Florida Case Law Update For Law Enforcement Legal Advisors

2015 Edition

(Selected Cases of Interest To Florida Police Attorneys From November, 2014 through September, 2015)

Plus Selected 2015 Legislation Affecting Florida Law Enforcement

As Presented To
The Florida Association of Police Attorneys
Thursday, October 1, 2015
by

Michael Ramage, Esq.

ramagelaw@yahoo.com

PERMISSION HAS BEEN GRANTED TO THE FLORIDA POLICE CHIEFS ASSOCIATION TO MAKE THIS SUMMARY AVAILABLE TO ITS MEMBERSHIP. PERMISSION IS GRANTED TO FLORIDA LAW ENFORCEMENT AND CRIMINAL JUSTICE AGENCIES TO DUPLICATE AND DISTRIBUTE WITHOUT CHARGE, WITH ATTRIBUTION.

All cases that might affect Florida law enforcement that were announced in the past year were not included in this summary. The cases that have been included were selected to sample of ongoing issues and developments in Florida criminal law. This summary is not a complete review of every opinion of interest to Florida law enforcement issued in the last 10 months.

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

Florida Cases Of Interest To Police Attorneys
Michael Ramage
October 1, 2015

Table Of Contents

U.S. 11th Circuit Court of Appeals Cases:…….. 3

Florida Supreme Court Cases..... 6

Florida DCA Cases:

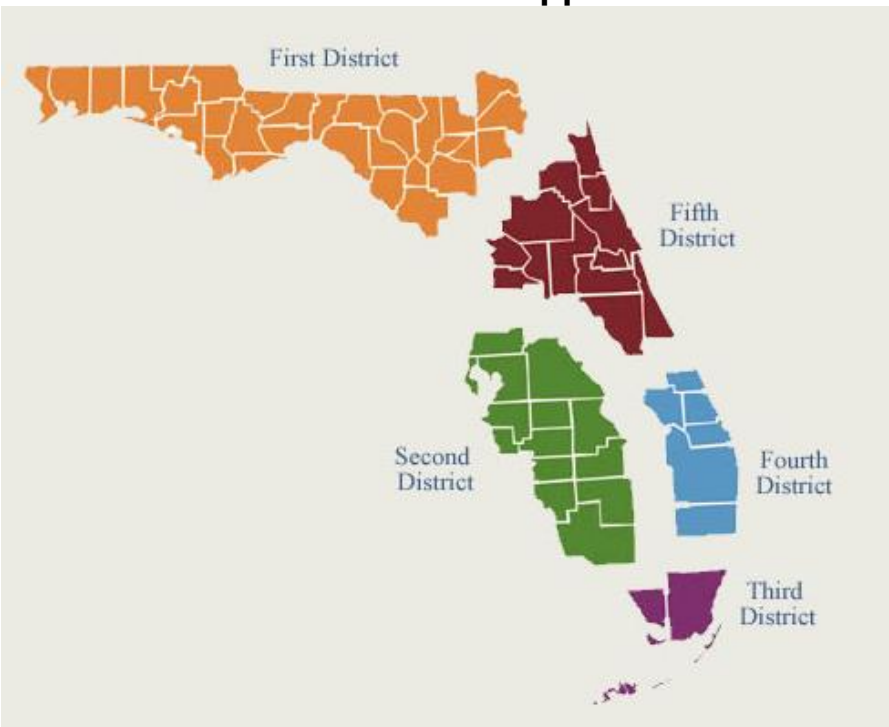
1st DCA: …….. 11
2nd DCA: ……. 23
3rd DCA: ……. 32
4th DCA: ……. 39
5th DCA: ……. 52
Late Announced Cases Of Interest…….. 70

Records-Related Cases…… 63

Legislation Of Special Interest…… 73

A Note To Law Enforcement…… 77

Florida's District Courts Of Appeal Boundaries:



U.S. 11th Court Of Appeals:

Failure To Issue Seemingly Feasible Warning Of Use Of Deadly Force Does Not Render Automatically Unreasonable The Use Of Deadly Force

F.S. 776.05 relating to law enforcement officers using force to make an arrest provides a defense in a civil action for damages alleging wrongful use of deadly force when the officer's use of deadly force was necessary to prevent the arrest from being defeated by the subject's flight and, when feasible, some warning had been given. The 11th Court of Appeals considered a situation where a warning of the use of deadly force was seemingly feasible but was not provided. It answered the question whether an officer must provide a verbal warning when feasible with a "No."

Officer Cain stopped Pedro Quiles for reckless driving. Quiles presented a driver's license with the name "Alex Perez". Perez' license was suspended. Cain determined to arrest Quiles, whom he believed to be Perez. Officer Savitt arrived as a backup. Officers Cain and Savitt asked Quiles to step from his car. Quiles attempted to run away and they grabbed him, pulling him back toward the car. The physical struggle continued and Cain and Quiles fell to the ground with Quiles on top of Cain. During the struggle, Savitt began yelling to Quiles, "Watch your gun, watch you gun!" It appeared Savitt was trying to protect Cain's gun. Quiles freed himself from Cain's grasp by backing out of his shirt, and again started to run away. Officer Savitt fired two shots at Quiles, who was hit and died as a result. A witness testified that neither officer warned Quiles before he was shot.

The plaintiff did not challenge the trial court's finding that Savitt reasonably believed Quiles had taken Officer Cain's gun during the struggle. However the trial court denied qualified immunity on the basis that the two officers failed to warn Quiles about the possible use of deadly force, and that such a warning was feasible in this incident.

The 11th CA reviewed the Supreme Court's guidance on use of deadly force, including Graham v. Connor (1989) and Scott v. Harris (2007), applying the standard that the reasonableness of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

It ruled that Officer Savitt violated no constitutional right when he shot Quiles since his action was objectively reasonable. Quiles was resisting physically, actively and aggressively to the officers' efforts to arrest him by twice attempting to run and by fighting with Officer Cain. When Quiles pulled away from Cain's grip and began to run away for a second time, Savitt believed reasonably (although mistakenly) that Quiles was in possession of Cain's gun. A reasonable officer in Savitt's situation could have believed reasonably that Quiles—armed with a gun—posted a threat of serious injury to the officers and to others. There was no indication that Quiles had stopped resisting the officers' efforts to seize him. Officer Savitt made a split-second decision to shoot Quiles to avoid the risk of serious injury to Cain and himself or to bystanders.

As to the requirement for a verbal warning prior to the use of deadly force, the 11th CA stressed that Garner did not establish a magical on/off switch that triggered rigid preconditions whenever an officer's actions constitute deadly force. Instead, reasonableness is to be determined based on all facts and circumstances of each individual case. Based on clarification of Garner by Scott, "…(W)e now know…that an officer's failure to issue a seemingly feasible warning—at least, to a person appearing to be armed—does not, in and of itself, render automatically unreasonable the use of deadly force…." The Court continued by stating it had indicated in Penley v. Weippert 605 F.3d 843 11th Cir. 2010) that it "declined to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing—particularly where such a warning might easily have cost the officer his life." The court ruled that Savitt's actions did not violate the Constitution. The denial of qualified immunity was reversed.

Quiles v. City of Tampa, et. al, 596 Fed. Appx. 816, No. 14-12875 (11th Cir. Unpublished. 1/5/15).

Editor's Note: Florida law imposes by F.S. 776.05 a requirement of providing a warning "when feasible." This language mirrors the U.S. Supreme Court's articulated standard in Graham. Focusing on the reasons why providing a warning might easily cost the officer his or her life (or could expose others to threat of serious injury) can help establish that providing the warning was NOT feasible. The same considerations should come into play in the agency review of the officer's use of deadly force since most policies include the "when feasible" requirement. While each shooting is evaluated on its unique facts, the fact-finding investigators should pay particular attention to what the officer who used the deadly force relates as to his or her belief at the time regarding the dangerousness of the subject.

Driver Having Apparent Authority Over Bag At Feet Of Passenger Can Consent To Search Of That Bag

Tyrone Barber was a passenger in a car driven by Geofrey Robinson when the car was stopped by Miami-Dade Police. Robinson was arrested for driving while his license was suspended. Robinson consented to a search of the car. MDPD Detective Anthony Rodriguez directed Barber, who was sitting in the passenger seat to exit the car. During the search, Rodriguez saw a purple bag on the passenger-side floorboard. In direct examination at trial Rodriguez said he did not know to whom the bag belonged, but on cross exam he indicated he believed it was Barber's bag at the time he searched it. A handgun was found inside, along with Barber's business cards and a photo of Barber and his children. Barber had been previously convicted of a felony and he was arrested for possession of a firearm by a convicted felon. After receiving his rights per Miranda[1], Barber admitted the gun was his.

Barber was indicted under 18 USC § 922(g) (possession of firearm by a convicted felon) and moved to suppress the evidence. The district judge denied the motion, finding that Robinson had actual and apparent authority to consent to the search of the bag. The 11th CA affirmed because he had apparent authority to consent. The CA noted its previous opinions indicating a passenger had no standing to object to a car's interior search (see, e.g. U.S. v Lee, 586 F.3d 859 (11th Cir. 2009)) addressed only a passenger's expectation of privacy in the car, not to a passenger's expectation of privacy in a bag within a car. Barber had standing to object to the bag search.

The CA then turned to the issue of authority of Robinson to consent to a search of the bag. The district court gave three reasons why it was reasonable to believe Robinson had common authority over the bag: (1) the ownership of the bag "was not established until after the search occurred"; (2) the bag "was in easy reach" of Robinson; and (3) "the bag was not secured in any way." The CA noted the district court did not err when it determined that Robinson had apparent authority to consent to the search of the bag. The bag's placement on the passenger-side floorboard, within easy reach of Robinson, coupled with Barber's silence during the search, made it reasonable to believe Robinson had common authority over the bag. Drivers do not ordinarily place their bags on the driver-side floorboard, but drivers sometimes use the passenger-side floorboard to store their belongings. The officers could have reasonably believed Robinson had common authority over the bag. And because Robinson had apparent authority to consent to the search, we need not decide whether he had actual authority to do so. The evidence was properly suppressed and Barber's conviction was affirmed.

U.S. v. Barber, 777 F.3d 1303, (11 Cir 2/3/15).

Theory Of Inevitable Discovery After Post-Impoundment Inventory Search Of Vehicle Saves Illegal Search That Discovered Sawed-Off Shotgun

When a Miami Gardens police officer stopped a truck driven by Shawnton Johnson, the officer checked the license plate for the truck and determined that it was registered to a deceased person. Johnson admitted that he was driving the truck with a suspended driver's license. The officer then conducted an illegal search of the truck and discovered a sawed-off shotgun. The officer arrested Johnson, performed an inventory search of the truck, and had the truck impounded.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). All references to "Miranda rights" or "Miranda warnings" in this summary relate to the rights required to be provided to suspects in custodial interrogations by the U.S. Supreme Court in this case.

After being charged under 18 USC § 922(g) (possession of firearm by a convicted felon) Johnson moved to suppress the shotgun. The government argued the gun was admissible under the exception to the exclusionary rule for inevitable discovery. The government argued that, because there was no registered owner to whom the officer could have returned the truck, the officer would have discovered the shotgun when he impounded the truck and conducted an inventory search. The district court denied the motion to suppress. The 11th CA agreed and affirmed Johnson's conviction.

Johnson v. U.S., 777 F.3d 1270 (11 Ci777 2/2/15)

Known Felon Riding Bike With Weapon Strapped To Handlebar Was Justifiably Stopped and Detained

Marco Heath was lawfully detained, pursuant to the Fourth Amendment, because the initial stop was justified by reasonable articulable suspicion where (1) an officer observed him riding his bicycle with weapons strapped to the handlebar in a high crime area, and (2) the officer recognized him from prior encounters and knew that he was a convicted felon. Heath's detention while the officers searched the area where he had been stopped and seen earlier was reasonably related in scope to the purpose behind the detention, that was, to investigate whether he had been in possession of firearms. The stop was not overly intrusive, as Heath was not handcuffed.

U.S. v. Heath, 2015 U.S. App. LEXIS 13666, 8/5/15

From The 8th Circuit: Officers' Perception Need Only To Be Reasonable; Not Correct

Ransom was driving home from work on a dark, raining night. When his van began to backfire, Ransom pulled over to the side of the road. Someone who heard the sounds from Ransom's van called 911 and reported that gunshots had been fired from or near the van. Two patrol officers responded and pulled up behind Ransom's van. Seconds later, the van backfired again, and the driver's-side door opened. One of the officers yelled at Ransom to get back into the van, but Ransom, appearing not to hear the command, stepped out. At that time, both officers fired a total of eight shots at Ransom. Ransom did not react as if he had been shot, nor did he appear to notice the officers had fired at him. The officers ordered Ransom to lie on the ground and he complied. When the officers asked Ransom about the gunshots, Ransom told them his van was backfiring. The officers told Ransom his van could not be backfiring because one of the windows on their patrol car had been shot out. When other officers arrived on the scene, a sergeant directed two detectives to transport Ransom to the police station to be interviewed. The detectives transported Ransom to the station where they spoke to him for approximately thirty-five minutes before releasing him. The investigation revealed that Ransom's van had been backfiring, and that ricocheting bullets fired from the officers' guns had caused the damage to their patrol car.

Ransom sued the patrol officers, claiming the officers seized him in violation of the *Fourth Amendment* by shooting at him and then by ordering him to lie and the ground and handcuffing him. The court disagreed. First, it was undisputed that none of the officers' rounds hit Ransom. However, assuming Ransom was grazed by bullet or piece of broken glass, the court held that any seizure that resulted was reasonable. First, the officers responded to a 911 call of shots fired from a van. Second, when the officers arrived, Ransom's van backfired; a sound that both sides agreed could have been mistaken for a gunshot. Third, Ransom then got out of the van and appeared to disregard the officer's commands to get back inside. As a result, the officers were justified in firing their guns at Ransom to neutralize what they reasonably believed to be a threat to themselves.

The court further held it was reasonable for the officers to order Ransom to the ground and handcuff him while they determined if there might be another person firing a gun at them. After detaining Ransom, the officers saw that one of their windows was shot out. Although it was later determined that a ricochet from one of the officers' bullets caused the damage to the patrol car, at the time, it was reasonable for the officers to believe there might be another person firing at them. Consequently, the court held the patrol officers were entitled to qualified immunity.

Ransom alleged his 4th Amendment rights were violated by being taken to the police station for questioning. The court held it was objectively reasonable for the detectives to detain Ransom and drive him to the police station for an interview to determine if he had fired a gun at the patrol officers.

Ransom also sued the sergeant, claiming the sergeant violated the *Fourth Amendment* rights by directing the detectives to obtain a statement from him at the police station. The court held that even if the detectives had violated Ransom's *Fourth Amendment* rights by detaining him, the sergeant could not be held liable for a seizure effected by other officers.

Ransom v. Grisafe, 790 F.3d 804 (8th Cir.,. June 22, 2015)

FLORIDA SUPREME COURT CASES:

State Must Prove Defendant Had Actual Knowledge Of The Crash Forming Basis Of A "Leaving Scene Of An Accident" Charge

In Dorsett v. State, 147 So.3d 532 (Fla. 4th DCA), *review granted,* 122 So.3d 869 (Fla. 2013), the 4th DCA certified the question:

"In a prosecution for a violation of section 316.027, Florida Statutes (2006), should the standard jury instruction require actual knowledge of the crash?"

After a review of the record and a lengthy analysis, the Supreme Court answered, "Yes":
"We agree…that…the State must prove beyond a reasonable doubt that the driver had actual knowledge of the crash, an essential element of the crime of leaving the scene of a crash."

State v. Dorsett, 158 So.3d 557 (Fla. 2/26/2015)

Circumstantial Murder Case Where Main Evidence Was Defendant's DNA Under Victim's Fingernails Did Not Dispel Reasonable Hypothesis Of Innocence

Derral Hodgkins appealed his conviction of First Degree Murder of Teresa Lodge. Lodge was a cook, manager, and dishwasher at a breakfast café near her apartment. Lodge's body was discovered in her apartment on Thursday, September 28, 2006, after she failed to report to work, failed to answer her door, and a friend opened the apartment using a spare key. The last time she communicated with the restaurant was about 2:23 p.m. on Wednesday, September 27. The evidence at trial was totally circumstantial. A friend testified that she and Lodge were in Lodge's apartment on Monday the 25th when Hodgkins came to the door. He conversed with Lodge at the front door four about five minutes and the friend said Lodge's voice became "uneasy" as she talked with Hodgkins.

Lodge's body had a large, gaping wound on her neck. There was a pool of dried blood around her head, blood on her face, shirt and mouth and under her body were multiple $20 bills under her body and on the nearby bed. In addition, there was a large sum of cash in her purse on the bed. There were no signs of forced entry. Scrapings were taken from Lodge's fingernails. A beer bottle in the kitchen was found to have Lodge's blood upon it. Twenty-one sets of fingerprints were lifted from the crime scene, three of which were Lodge's and the rest were unidentified. The Medical Examiner testified that Lodge had 32 bodily injuries and that she suffered seven stab wounds to the torso and abdomen and three incised wounds to the neck, which severed her external jugular vein. Manual strangulation was indicated as a contributing factor to her death. No injuries were found on her hands or arms, indicating a lack of defensive wounds.

After FDLE found that DNA from the fingernail scrapings was consistent with Hodgkins' DNA, detectives questioned him. During the course of several voluntary interviews, Hodgkins offered varying explanations of how Lodge would scratch his back (thereby explaining how his DNA was found under her fingernails). After being confronted by the detectives, he admitted he had lied, and that

they had engaged in intercourse three days before she was killed. He stated she scratched his back during the encounter. He told the detectives he lied because he did not want his then-wife to learn of his infidelity and because he did not want to be accused of murder because he had seen her so close to her death. Throughout all the interviews, Hodgkins consistently denied killing Lodge.

The first trial resulted in a mistrial. The second trial occurred in August 2011. At the close of the state's evidence, Hodgkins moved for a judgment of acquittal because the state failed to present evidence inconsistent with Hodgkins' explanation that his DNA under Lodge's nails was from their sexual encounter a few days before her death. Motion was denied and the appeals occurred.

Noting that suspicions alone, no matter how strong, will not meet the state's burden to prove its case beyond a reasonable doubt, the Florida Supreme Court summarized the state's circumstantial case to be: (1) Hodgkins lied to detectives about having sex with Lodge; (2) medical testimony regarding Lodge's wounds and cause of death; (3) evidence that Lodge frequently washed her hands thoroughly at work and at home; (4) observations by coworkers that Lodge handled raw meat frequently at the café on the Monday, Tuesday, and Wednesday before her death; (5) DNA found under her nails matched Hodgkins'; and (6) testimony that the DNA was robust when collected and that had it been the result of intercourse the Monday before her death, it would have been degraded. The Court noted this last element of proof may have served to establish that Hodgkins had contact with Lodge some point closer to her death, but that it failed to prove Hodgkins killed Lodge. The Court also noted that of the fingerprints lifted from the scene, none were identified as Hodgkins, and that proof at trial indicated a spare key to Lodge's apartment which was normally hidden outside was missing on the day of the murder and was never found. There was also evidence that Lodge's ex-husband, her drug dealer, regularly beat her when they were married. In short, the Court felt there was ample possibility that someone other than Hodgkins could have killed Lodge. The Court indicated the state failed to meet its burden to establish its case beyond a reasonable doubt, and failed to introduce competent evidence inconsistent with the defendant's theory of events and innocence. Hodgkins' conviction was reversed and the case remanded with instructions to enter a verdict of acquittal.

Hodgkins v. State, --So.3d—, SC13-1004 (Fla. 2015)

Defendant Has Burden To, By Preponderance of Evidence, Demonstrate At Pretrial Evidentiary Hearing Entitlement To "Stand Your Ground" Immunity

In reviewing the 5th DCA's refusal to issue a writ of prohibition that would have prevented a criminal trial from proceeding from beyond the pretrial hearing stage, the Supreme Court reviewed F.S. 776.032 (2011) which provides immunity from prosecution when a defendant has used force in accordance with specified statutory circumstances, specifically the burden of proof in a pretrial evidentiary hearing where the defendant has filed a motion to dismiss, relying on the statutory immunity.[2]

The Court concluded that the 5th DCA correctly determined that the defendant bears the burden of proof, by a preponderance of evidence, to demonstrate his or her entitlement to the "Stand Your Ground" immunity at a pretrial evidentiary hearing. The Court answered, "No" to the 5th DCA's certified question:

> *Once the defense satisfies the initial burden of raising the issue, does the state have the burden of disproving a defendant's entitlement to self-defense immunity at a pretrial hearing as it does at trial?*[3]

In so doing the Court indicated is was now making "explicit what was implicit" in Dennis v. State, 51 So.3d 456 (Fla. 2010): the defendant bears the burden of proving by a preponderance of the evidence his or her entitlement to the defense. The Court noted its opinion was consistent with every Florida appellate court to consider the issue both before and after Dennis and was consistent with "a legislative intent to provide immunity to a limited class of defendants who can satisfy the statutory requirements."

[2] In a footnote, the Court noted the legislature in 2014 amended the statute adding immunity for "threatened use of force" but found that the amendment has no effect on the Court's holding or analysis "which would remain the same if we applied the current statute."
[3] See: Bretherick v. State, 135 So.3d 337 (Fla. 5th DCA 2013).

The Supreme Court also noted that while the trial court and the 5th DCA agreed that Bretherick had not sustained his burden of proof at the pretrial stage, neither court held that Bretherick was foreclosed from raising self-defense as an affirmative defense to be considered by the jury at trial. The Court approved the 5th DCA's decision, answered the certified question in the negative, and remanded the case for proceedings consistent with the opinion. (i.e. To set the case for trial.) Justice Canady dissented, joined by Justice Polston, indicating they would place the burden on the State, not the defendant.

Bretherick v. State, -170 So.3d.776, SC 13-2312 (Fla. 7/9/15)

Murder Suspect's Declaration "Don't Want To Talk To Nobody Then" After Jailer Refused To Loosen Shackles Wasn't Invoking Right To Remain Silent

This case was a review of the first-degree murder conviction of the defendant (Timothy Fletcher). Numerous issues were discussed by the Supreme Court, including a claim that an in-custody interview of the defendant was in violation of his prior invocation of a right to remain silent. The situation, as detailed by the Court was as follows:

Prior to the post-arrest interrogation, the following exchange occurred between Fletcher and the deputies who escorted him into the interrogation room:

FLETCHER: Will you do me a favor and loosen the (inaudible) around the shackle?
UNIDENTIFIED MALE DEPUTY: What's that?
FLETCHER: Will you loosen the shackle a little bit, please?
UNIDENTIFIED MALE DEPUTY: Have a seat.
UNIDENTIFIED FEMALE DEPUTY: No. No.
FLETCHER: No? It's too tight. I don't want to talk to nobody then.
UNIDENTIFIED FEMALE DEPUTY: Sit down. (Inaudible) waist chains first and then we can do the shackles.

Shortly after this exchange, the detective who interrogated Fletcher and an investigator from the State Attorney's Office entered the room, and the deputies left. The detective read the *Miranda* rights to Fletcher, and asked Fletcher if he understood those rights. Fletcher responded affirmatively. The detective then inquired whether, with those rights in mind, Fletcher was willing to speak with the detective and the investigator. Again, Fletcher responded affirmatively, and he signed a waiver. He made incriminating statements.

Fletcher filed a motion to suppress his post-arrest statement on the basis that he invoked his right to remain silent during the exchange with the deputies. The trial court denied the motion and noted in its order that Fletcher's statement "I don't want to talk to nobody then" was not given in response to a question or during the interrogation; that the interrogating detective was not in the room at the time of the statement; and that the deputies to whom the statement was directed left the room before the interrogation commenced. The trial court found that the statement was conditional on the deputies loosening the shackle. The trial court also found that Fletcher made a voluntary, knowing, and intelligent waiver of his *Miranda* rights.

The Supreme Court held that the statement by Fletcher, "I don't want to talk to nobody then," was neither an equivocal nor an unequivocal invocation of his right to remain silent. The purpose of the statement was to persuade the guards to loosen the shackles. No questioning, discussion, or even casual conversation occurred prior to this statement. Fletcher was simply being secured in the interrogation room, and during this process he made a conditional statement to bargain with the deputies to have his shackles loosened.

The Court indicated that even if it were to conclude that the statement was an equivocal invocation of the right to remain silent, any uncertainty as to whether Fletcher sought to invoke this right was clarified by the subsequent reading of the *Miranda* warnings prior to the interrogation. The Court found this case similar to *Henry v. State*, 574 So. 2d 66, (Fla. 1991), in which the defendant stated to one officer while the second officer was outside the room, "I'm not saying nothing to you. Besides, you ain't read me nothing yet." When the second officer entered the room, he read the defendant the *Miranda* rights. The first officer never informed the second officer of the defendant's statement. The Florida Supreme Court held in Henry that the statement was not an equivocal request to remain silent, and even if it had been, the second officer effectively, if unintentionally, clarified the defendant's intent when he read

the *Miranda* rights. Similarly in the current case, the Supreme Court found that even if it were to conclude that Fletcher made an equivocal statement as to his right to remain silent, the subsequent reading of the *Miranda* rights clarified his intent. It held that the trial court properly denied the motion to suppress and denied Fletcher relief. Other claims by Fletcher were also denied, and his conviction and death sentence were affirmed.

Fletcher v. State, --So.3d.-- SC12-2468 (Fla., 6/25/2015)

Misstatement Of Department's Handcuff Policy Not A *Giglio* or *Brady* Violation

The Florida Supreme Court handled numerous challenges to Steven Hayward's conviction of murder and sentence of death.

Hayward was convicted of robbing, shooting and killing a newspaper delivery person (Destefano) at a newspaper stand in a Fort Pierce convenience store around 4 in the morning. Hayward shot Destefano twice with a .22 caliber pistol and Destefano, who had a concealed weapons permit for his .357 caliber revolver, shot Hayward once in the hand. Not long after he was shot, Destefano was found about a block away. When paramedics and police responded, an officer asked him, "What happened?" to which Destefano responded that a black male with a stocking cap over his face had shot him. Soon thereafter Destefano died.

Hayward's girlfriend testified that Hayward came to their rooming house near the convenience store just before dawn on the day of the shooting with an injury to his hand. Two days after the shooting, police responded to the rooming house after receiving a report that someone there had a possible gunshot wound to his hand and had asked a resident to sew it up. The police were allowed by other residents to enter and found Hayward coming out of a communal bathroom. They asked to see his wound, which was wrapped, and he showed it to them, claiming it was a knife wound inflicted by his girlfriend.

Hayward was subsequently asked to come to the police station to discuss the injury to his hand, to which he agreed, and was handcuffed for the ride in the back seat of the police car. The officer told Hayward he was not under arrest, and that it was "policy" to handcuff anyone being transported in the police car. Hayward suddenly stated that he "wasn't going to lie" and that he had been robbed and shot several days earlier. Hayward's girlfriend also informed the officers that she had stabbed Hayward in the hand, but that he had reported to her that he had been shot when two black men were robbing him. She said he was shot in the same hand where she had earlier stabbed him.

Once at the police station, Hayward was uncuffed but secured by an ankle bracelet, and was advised of his *Miranda* rights. During the interview, he told police he had not been stabbed in the hand, but had been shot in the robbery attempt by two men, one black and one Mexican, when he attempted to take their gun away. He later changed the story to say he was not robbed, but had witnessed Destefano being robbed and shot by a lone man, and that when he, Hayward, attempted to pick up a gun at the scene, he was accidentally shot. He also admitted going through Destefano's car looking for anything of value. Several months later, the murder weapon, a .22 caliber revolver, was found behind a wall board in the rooming house where Hayward's girlfriend lived. Hayward's blood was found inside the gun's firing chamber.

On cross-examination at the pretrial suppression hearing, Officer Mace testified, "It's policy that any time we transport anybody in our police cars, that they're secured or handcuffed" for officer safety. Mace also said that it was "written in our POP, our policy from [the] police department. Anybody that travels in our vehicle in the back seat will be secured." Officer Mace said, "I advised him, I said, sir, you're not under arrest but for the purpose of and policy of my department I have to secure you." When asked, "If one reviewed that, that would be in there?" Officer Mace answered, "Yes, sir."

Fort Pierce Police Captain Greg Kirk testified at the hearing that the police department had a written policy for prisoner transport but did not have a written policy for transport of non-prisoners. That decision is left to the discretion of the officer, but he agreed there is an unwritten policy regarding transport of non-prisoners in the back seat of patrol cars.

Hayward characterized as "a lie" the testimony of Officer Mace that the policy calling for handcuffing anyone transported in a patrol car was a written policy. Hayward argued that the State failed to correct

this false testimony, a violation under Giglio v. United States, 405 U.S. 150 (1972), and failed to supply trial counsel with the written policy at trial in order for defense counsel to use it to impeach Officer Mace, a violation under Brady v. Maryland, 373 U.S. 83 (1963).

The Supreme Court disagreed. It indicated that in order to demonstrate a *Brady* violation, the defendant has the burden to show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. Strickler v. Greene, 527 U.S. 263 (1999); *see also* Way v. State, 760 So. 2d 903 (Fla. 2000). As stated in *Strickler,* in order to meet the materiality prong of *Brady*, the defendant must demonstrate a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. "[R]eversal of a conviction is required upon a 'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Youngblood v. West Virginia*, 547 U.S. 867 (2006).

Regarding the *Giglio issue, the Court indicated a* claim under *Giglio* alleges that a prosecutor knowingly presented false testimony against the defendant. In order to demonstrate a *Giglio* violation, "a defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." *Tompkins v. State*, 994 So. 2d 1072, 1091 (Fla. 2008) (citing *Guzman v. State*, 941 So. 2d 1045, 1050 (Fla. 2006)). Once the first two prongs are established by the defendant, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. The State then "has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt." *Tompkins* at 1092. The harmless error standard requires the State to prove "that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986)).

The Court found that simply because Officer Mace erroneously stated that the policy on transporting persons in the patrol car was written does not prove that the falsity was purposeful, or that the State knew that it was false or knew that there was a written policy that contradicted Officer Mace's testimony. Thus, no *Giglio* violation was shown. With regard to the *Brady* violation, the State did not disclose that the written policy did not expressly extend to handcuffing non-prisoner passengers in the patrol car. Even so, Hayward failed to demonstrate that had trial counsel been provided the written policy, and had it been used to impeach Officer Mace, there is a reasonable probability—defined as one sufficient to undermine this Court's confidence in the outcome—that the statements would have been suppressed after the hearing or that the jury at trial would have found the statements involuntary. It cannot be said that if Officer Mace had been confronted with, and impeached by, a copy of the written policy, the whole case would have been viewed in such a different light that confidence in the verdict would be undermined. The Court stated it is likely that Office Mace would have simply responded that he was in error concerning the terms of the written policy, but that there was clearly an unwritten policy that he had been taught concerning handcuffing of persons traveling in the back of a patrol car. As evidenced by the testimony of Captain Kirk at the evidentiary hearing, the officers were taught to use their discretion and to err on the side of safety whenever transporting persons in the back of a patrol car.

The Court held that that no *Giglio* or *Brady* violations have been established in regard to Officer Mace's testimony at the suppression hearing or trial. After reviewing several other grounds for appeal, the Court held that the order of the circuit court denying post-conviction relief to Hayward was affirmed and his petition for writ of habeas corpus was denied.

Hayward v. State, --So.3d— SC12-1386 (Fla., 6/25/2015)

FLORIDA DISTRICT COURT OF APPEALS CASES:

First District Court Of Appeals:

Attempt To End Questioning By "I am through with this interview" And Asking To Leave Interrogation Room Were Invocations Of Right To Remain Silent

Amato Scott was convicted of second degree murder and appealed claiming the trial court erred in denying his motions to suppress two separate statements made to the police. Scott made statements to officers on 4/27/2012 which he characterized as a result of continued and persistent questioning and threat after he invoked his right to remain silent and his right to counsel. The interview was conducted in Adele, Georgia, where Scott lived, regarding a shooting that occurred in Jacksonville, Florida during a drug deal. Detectives confronted Scott with evidence of his guilt, including the co-defendant identifying Scott as the shooter. Scott initially denied being in Jacksonville or involved in the drug deal or shooting. Then the following exchange took place:

> Detective: You wasn't there?
> Scott: No and I am through with this interview because I am not—
> Detective: You don't want to talk to me?
> Scott: No I am through with the interview because I am not fixing to sit here and—
> Detective: Do you want to talk to me?
> Scott: I am not fixing to sit here and let you manipulate me to say something—
> Detective: The truth, I can't manipulate the truth man. Either I've got evidence or I don't. Christina, Christina is lying to me?
> Scott: Man, I am not fixing to sit here and—
> Detective: Do you want Christina to come back here and tell you—
> Scott: I am not fixing to sit here and let you, let you fellows make me say that I did something that I ain't do?
> Detective: Were you in Jacksonville on April 7th?
> Scott: I am through with this interview.
> Detective: What are you saying? Do you not want to talk with us anymore? Because I will tell you what happens when you don't want to talk with us anymore. You sit here. I go get, I call Jacksonville, get a warrant and I serve you with a murder warrant. Are you saying you don't want to talk to me now anymore.
> Scott: I am saying, I ain't saying I am not, I don't want to talk to you. What are we talking about?
> * * * *
> Detective: If you want to talk to me knock on the door. I am going to go type up your warrant. You are under arrest. You have already been read your rights for murder and we will probably get a grand jury indictment for first degree murder once you are back in Jacksonville…knock on the door if you want to talk to me.
> Scott: I am trying to talk to you now….
> * * * *

The encounter included both Scott's indication of desire to end the interview coupled with the detectives threatening an arrest or arrest warrant. During the subsequent discussion, Scott agreed to speak without a lawyer but asked that his mother be brought in. The detective agreed, but only if Scott admitted involvement in the incident. Scott continued to deny involvement. Detectives exited and re-entered the room several times. After again denying involvement and asking for his mother, Scott was handcuffed and advised he was "under arrest." The cuffing detective left the room, and Scott began yelling repeatedly through the door the he would talk. After a few minutes, detectives returned to the room and uncuffed Scott. Scott admitted he had been in Jacksonville, but claimed he had remained in a motel room while the co-defendant left and came back a few minutes later. The detectives told him he was not telling the truth. Scott began vomiting. The detectives asked if he was going to tell the truth, and Scott vomited again. His mother was then brought in. He ultimately provided incriminating details and admissions.

The trial court granted Scott's motion to suppress in part. It held that when Scott said "I am through with this interview" he had invoked his right to remain silent and that questioning should have ceased. The court found the detective threatened Scott when he said if he didn't talk he'd go get a murder warrant, meaning further statements were not freely and voluntarily made. However, the trial court

found that when the detective advised Scott he was under arrest and had been read his rights for murder, the threat of arrest was no longer active and was no longer a threat used coerce Scott's statements. The court found that Scott's knocking on the door to summons the return of the detectives and his statements such as "I am trying to talk to you now" was a voluntary re-initiation of the conversation. As a result, only the comments made during the brief periods between the time arrest was threatened and the advisement that he was "under arrest" were suppressed.

A second interview that occurred on 4/29/2012 involved similar statements by Scott such as "I ain't talking to you," "I want to go back to my cell," and "May I leave, man?" Questioning continued until Scott invoked his right to counsel in their presence. Scott alleged that the co-defendant, who was previously in the interview room alone with Scott was an agent of the State and that he had told the co-defendant he wanted an attorney, so that anything he said to the detectives or the co-defendant after that point should be suppressed. The trial court denied Scott's motion to suppress comments made on the 29th, finding that his comments were not an unequivocal invocation of a right to remain silent.

The 1st DCA made a lengthy discussion of cases related to whether one has voluntarily reinitiated contact with police after invoking a right to remain silent. It found that the substance of the entire transaction confirmed that Scott did not voluntarily make such initiation. The interview of the 27th produced admissions that were not voluntary, and the DCA did not accept the trial court's distinction that all that occurred after Scott was told he was under arrest was admissible. The DCA noted that Scott was never reminded of his right to remain silent any of the times he was told he was under arrest and concluded his re-initiation of the conversation was involuntary. Regarding the interview on the 27th, the DCA agreed Scott had again invoked his right to remain silent. It disagreed with the trial court's characterization of Scott's statements as being expressions of wanting to be somewhere else. The DCA indicated that Scott's repeated requests to return to his cells was an unequivocal invocation of his right to remain silent. It did not agree that Scott's comments to the co-defendant was an unequivocal invocation of his right to an attorney. However, since both sets of admissions were erroneously admitted and were not harmless error, the judgment and sentence were reversed and the case remanded for a new trial.

Scott v. State, 151 So.3d 567 (Fla. 1st DCA, 12/22/2014)

Child Porn Placed In Shared File Accessed Via The Internet Supported Initial Investigation By Municipal Officer Who Accessed Photo Even Though Actual Computer Containing Porn Is Sited In Another Municipality

John Knight pled no contest to two counts of possession of child porn, reserving his right to appeal the denial of his motions to suppress. The first motion claimed a Neptune Beach police officer engaged in an extra-jurisdictional investigation and search of his home computer that was physically located in Atlantic Beach. The second motion claimed the warrant to search the home computer was overbroad because it did not state with particularity the areas of the computer to be searched. The third motion claimed the execution of the warrant was not reasonable because forensic exam of the computer was not completed until over six months after the computer's seizure. The 1st DCA affirmed the trial court's denial of the second and third motions without discussion. It denied the first motion but explained the rationale behind its decision.

Detective Burban of the Neptune Beach Police Department was conducting investigations into possession of child pornography using a program called the Wyoming Took Kit to search for people sharing known child porn on peer-to-peer networks (software programs allowing users to share files with other people connected to the same network regardless of their physical locations). The program Detective Burban used identifies known images of child porn and then logs the IP address of the computer containing the porn, the name of the file containing the known child porn, and the date the file was shared. Using the information provided, Burban subpoenaed information from the IP address provided and determined the IP was registered to a residence in Atlantic Beach.

Burban then enlisted the assistance of Atlantic Beach Police Department detective Chris Pegram. Pegram wanted to handle the case but asked for Burban's assistance because the Atlantic Beach Police did not have the necessary training or experience. There was a mutual aid agreement between both police departments. Ultimately a search warrant was obtained, which was executed on 9/9/2009.

John Knight was at the home with his 17 year old stepson. Knight was cooperative and confessed he had downloaded child porn onto the desktop computer in the bedroom. The computer was seized and a copy of the warrant was left at the residence.

The 1st DCA noted that generally municipal officers can exercise their law enforcement powers only within the territorial limits of the municipality. However, one exception allows a municipal officer to act outside of his or her jurisdiction if the subject matter of the investigation originates inside city limits. (E.g. Nunn v. State, 121 So.3d 566 (Fla. 4th DCA, 2013). Accordingly, the investigatory acts of an officer outside her jurisdiction are not deemed unlawful if the officer has a good faith belief that the crime occurred within her jurisdiction. Another exception is when the officer is empowered by a mutual aid agreement (i.e., voluntary cooperation agreement pursuant to F.S. 23.121 or interlocal agreement pursuant to F.S. 166.0495).

Since Knight had placed the child porn photos in a peer-to-peer network that could be accessed over the Internet by Detective Burban within her city limits of Neptune Beach, her actions were not outside her jurisdiction. Burban did not know whether the shared porn was or was not inside her territorial jurisdiction. Once Burban determined the physical IP address was in Atlantic Beach, she was now on notice that any further investigation was outside her jurisdiction unless an exception applied. Since there was a mutual aid agreement between Neptune and Atlantic Beach police departments, the warrant was legally mutually obtained, and the investigation lawfully conducted by the two detectives. The trial court properly denied Knight's motion to suppress.

Knight v. State, 154 So. 3d 1157 (Fla. 1st DCA, 12/22/2014)

Forgery Of Court Document Requires Proof Of Intent To Injure Or Defraud

Tabitha Lewis was convicted of forgery under F.S. 831.01 for creating an "Order To Pick Up Minor Child(ren)" following the form of Florida Family Law Form 12.941(e). The name of the presiding judge in the captioned dissolution proceeding was typed in a script font at the signature block and was dated July 5, 2012. The "order" purported to grant temporary custody of the party's son to Ms. Lewis. Lewis was in the course of divorce proceedings between herself and James Lewis. James had been granted temporary sole custody of the parties' son. Ms. Lewis had asked James to give her custody of the child and James had refused. Later that night Ms. Lewis broke into James' house and assaulted him. She was arrested and the car she had driven to the scene was impounded. The car was owned by James. One or two days later, James went to the impound lot to retrieve the car. In a satchel he found the subject "order." James gave the document to his attorney, who brought it to the attention of the judge at the next scheduled dissolution hearing. Ms. Lewis admitted during questioning by the judge that she had created the order on a computer form she had found on the internet. She maintained she was "just playing around with it" and never intended to use the document.

Ms. Lewis was subsequently charged with forgery. Ms. Lewis testified on her own behalf, and indicated she hoped the judge would grant custody to her, and that she had seen her attorney prepare orders ahead of time, and had prepared the order in an attempt to be prepared if the court were to grant her custody. She said she assumed the typed signature would not be considered the judge's signature. She said drafting the order made her feel a little better about not having custody of her son and that she never showed the document to anyone or used it in any way. The jury found her guilty and she was sentenced to 5 years prison.

The First DCA characterized the trial judge's reasons for denying the JOA as "inferences (that) were no more than speculation on the part of the trial court, which cannot substitute for actual proof of intent." The state failed to introduce any evidence that Ms. James attempted to pass the document off as a court order or even mentioned the document to her husband. It noted that a finding of intent must be based not on mere speculation but on actual evidence. Not only creating, but doing something to further the intent to injure or defraud a person with a bogus court order is a necessary part of proving forgery of an official public record. Since the state failed to present direct or circumstantial evidence of intent to defraud or injure or of some action amounting to passing off the "order" as genuine, the conviction failed. Case reversed with remand for entry of judgment of acquittal.

Lewis v. State, 152 So.3d 845 (Fla. 1st DCA, 12/16/2014)

State Failed To Rebut Defendant's Evidence That "Others" Had Recently Driven Car In Which Gun Was Found

Joe Lee Kemp, IV was convicted of possession of a firearm by a convicted felon. The trial court denied his motion for judgment of acquittal. The facts were that police were executing a search warrant in which Kemp and four other males were located. Adjacent to the residence was a fenced-in area where a newer Chrysler was located, with other cars. A detective searched the Chrysler and found a car rental agreement in Kemp's name in the glove box. The rental period was from August 29, 2013 until 6PM on September 5, 2013, the day of the search.

In the front seat center console, the detective found a handgun and a receipt for a cell phone bill payment made in cash two days earlier. The receipt was in Kemp's name. No DNA or fingerprint testing was done on the firearm. No one in the residence claimed ownership of the gun. The detective could not say with certainty whether the car was locked or unlocked when he began his search. None of the officers could testify how the keys to the car were obtained by police, or from whom they were obtained. None of the testifying officers could indicate who drove the car to the house, or when the men in the house had arrived there. None had any information regarding who was driving the car during the rental period.

Kemp moved for JOA, arguing the car was located at a residence that contained several people; there was no evidence that Kemp was the sole driver of the car; that there was no DNA or fingerprint evidence tying him to the firearm, and that none of the officers testified that the keys to the car were obtained from Kemp. The trial court denied the motion for JOA. The court felt the phone bill receipt being in the console with the gun was enough evidence to deny a JOA.

The defense produced one witness who said he drove the rental car all day on August 31, and that others were in the car with him. He turned the car over to Kemp's girlfriend. He also indicated he did not observe the rental car when he arrived at the residence and that when he arrived, Kemp was there alone. He indicated he did not know how Kemp or the other men got to the residence the day of the search. He indicated the gun found in the Chrysler was not his. The defense rested and renewed its motion for a JOA, adding to the argument that the evidence now showed others had been in the car during the week prior to the search. The trial court again denied the motion, noting it thought the State had "some evidence to rebut that reasonable hypothesis of innocence."

The 1st DCA noted that Kemp's status as a felon alone was not proof of guilt. Applying the rule of constructive possession that when contraband is in joint rather than exclusive possession, knowledge of its presence and ability to control it will not be inferred by ownership but must be established by independent proof. (Citing Julian v. State, 545 So.2d 347 (Fla. 1st DCA 1989)). Noting the trial court placed great weight on the fact that the cell bill receipt was dated just two days prior to the gun's discovery, the DCA noted the State had presented no evidence to rebut Kemp's evidence that others had been driving or occupied the car in the intervening two day period. The DCA also noted the police could not indicate from whom they obtained the car keys or say who drove the rental car to the residence. Florida law requires appellate courts reviewing circumstantial evidence cases to determine, viewing the evidence in a light most favorable to the State, whether every reasonable hypothesis of innocence has been excluded. In circumstantial evidence cases the appellate court has a special standard that requires a finding that the evidence excludes the defendant's reasonable hypothesis of innocence. There was no evidence as to the time the gun came to reside in the car's console. Accordingly the DCA held the evidence was insufficient to support a prima facie case that Kemp was in constructive possession of the firearm. Kemp's conviction was reversed.

Kemp v. State, - So.3d ---- (Fla. 1st DCA, 1D14-2738, 6/15/15)

"Hot Pursuit" Entry Into Defendant's Garage To Arrest Him For Misdemeanor Marijuana Possession Violated Fourth Amendment

A police officer on foot patrol noticed Christopher Markus smoking a cigarette. As the officer approached, he smelled the odor of burning marijuana and asked Markus to "step toward me" so he could be detained for investigation of the offense of possession of marijuana. Markus turned and ran into his nearby residence's garage. The officer pursued him into the garage, and after a brief struggle,

secured him. A firearm was found in Markus' waistband. Markus was charged with possession of a firearm by a felon and moved to suppress the evidence. The trial court did not suppress the evidence, holding that the officer was engaged in a legal "hot pursuit" that justified the officer's warrantless entry into Markus' garage. The First DCA held that the officer violated the Fourth Amendment when he entered Markus' garage, meaning the gun should have been suppressed, and reversed Markus' conviction.

The DCA noted that as a general rule, "hot pursuit" is not available an exception to the warrant requirement when the pursuit is by reason of a misdemeanor crime. The DCA cited both the U.S. and Florida Supreme Courts in support of the proposition. In *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984), the U.S. Supreme Court explained: "Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. . . When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate."

The Florida Supreme Court expanded on the principle in *Riggs v. State*, 918 So. 2d 274 (Fla. 2005): "When the government invokes this exception to support the warrantless entry of a home, it must rebut the presumption that such entries are unreasonable. *See* *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984). To do so, it must demonstrate a "grave emergency" that "makes a warrantless search imperative to the safety of the police and of the community." *Illinois v. Rodriguez*, 497 U.S. 177, 191, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). An entry is considered "imperative" when the government can show a "compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978). As is often the case under the Fourth Amendment, "[t]he reasonableness of an entry by the police upon private property is measured by the totality of existing circumstances." *Zeigler v. State*, 402 So. 2d 365, 371 (Fla. 1981)."

The DCA noted a couple of cases where hot pursuit arrests for misdemeanor offenses were approved:

> In *Gasset v. State*, 490 So. 2d 97 (Fla. 3d DCA 1986), after Metro-Dade police officers observed the defendant's reckless driving, the defendant led officers on a high-speed chase through a residential area. The chase ended in the defendant's garage, where officers entered and arrested him. The offenses observed (reckless driving and attempting to elude a police officer) were non-felony offenses punishable by less than one year of imprisonment, but the trial court upheld the warrantless arrest of the defendant in his garage because "the propriety of the arrest does not turn on the charges upon which the arrest was effected." *Id*. at 98. Relying on the ruling in *United States v. Santana* that "a suspect may not defeat" a valid arrest beginning in a public place by fleeing to a private place, the Third District Court of Appeal ruled that "enforcement of our criminal laws, including serious traffic violations, is not a game where law enforcement officers are 'it' and one is 'safe' if one reaches 'home' before being tagged." *Id*. at 99. The court concluded that by committing a dangerous traffic violation and fleeing at high speed, Mr. Gasset "cast aside any fourth amendment shield which might have served to protect him." *Id*.

The DCA stated that although the majority in *Gasset* did not use the phrase "exigent circumstance," the high-speed chase on the public roadways clearly presented a danger to the public, the defendant, and police officers, thus qualifying for the exigent circumstance exception to the Fourth Amendment warrant requirement.

The DCA also discussed a warrantless arrest in *State v. Williams*, 128 So. 3d 30 (Fla. 3d DCA 2012) where officers were investigating audible gunshots in an area where threats had been made to shoot and kill police officers patrolling in the area. Seeing Williams holding his waistband as he walked away from the officers, they ordered him to stop. He fled, jumping over some bushes and was seen to have tossed a firearm into the bushes before entering his home. As noted by the 1st DCA, the 3rd DCA reversed the trial court's suppression of the evidence, finding that the officers were in "hot pursuit" and attempting to make a valid warrantless arrest prior to Williams' entry into the home. ("Williams could not thwart this effort, or convert a proper warrantless arrest into one requiring a warrant, simply by reaching his house before the officer reached him." *Id*. at 34. Similar to the dangerous high-speed

chase in *Gasset*, the pursuit of Williams for a firearms offense could certainly present the exigent circumstance of a hot pursuit for an offense, not necessarily a felony, which under the circumstances endangered the public and police.

The offense Markus was suspected of committing was simple possession of marijuana, an offense that did not justify the threshold required to support entry into Markus' garage under a theory of "hot pursuit." The court indicated the trial court should have granted the motion to suppress, and reversed Markus' conviction.

Markus v. State, 160 So.3d 488 (Fla. 1st DCA, 2/27/15)

Note: The DCA is not saying police cannot chase fleeing misdemeanants. It is saying they cannot be chased into areas protected by the 4th Amendment unless the state can justify a compelling need due to public safety and no time to secure a warrant. Entries into 4th Amendment-protected areas in hot pursuit of misdemeanants are presumed illegal, and the state has a high burden to rebut that presumption.

F.S. 790.25(3)(n) Protects Store Employee's Possession Of Firearm In Vehicle Parked In Employer's Parking Lot As It Is Part Of Employee's "Place of Business"

Curry-Pennamon, a Walmart employee on duty, was arrested for a shooting incident which occurred in the Walmart parking lot where he was found to be in possession of a firearm, which he kept in a holster in the glove compartment of his vehicle. Curry-Pennamon was charged with attempted first-degree murder (count 1) and carrying a concealed firearm (count 2). At trial, the defense argued for a judgment of acquittal on count 2 based on an argument that under section 790.25(3)(n), Florida Statutes (2011), Curry-Pennamon could lawfully possess a firearm at his place of business, and the evidence supported that Curry-Pennamon was at his place of business at the time he possessed the firearm. The trial court denied the motion for judgment of acquittal, and the jury found Curry-Pennamon guilty as charged.

The First DCA reversed the concealed firearm conviction. It noted that F.S. 790.25(3)(n) provides an exception for persons "possessing arms at his or her home or place of business." The DCA agreed this exception applied to employees working at their place of employment. It noted that the Florida Supreme Court has held that the "place of business" exception under section 790.25(3)(n) applies not only to owners of a business, but also to its employees. *Peoples v. State*, 287 So. 2d 63, 67 (Fla. 1973) (holding the exception applied to allow a grocery store employee to lawfully possess a concealed firearm while on the store premises).

The DCA also noted that courts have interpreted the "place of business" exception to encompass property surrounding the business, including parking lots. *State v. Anton*, 700 So. 2d 743, 749 (Fla. 2d DCA 1997); *see also State v. Little*, 104 So. 3d 1263, 1265 (Fla. 4th DCA 2013) (holding that parking lot of defendant's place of business was "surrounding property" included within exception of section 790.25(3)(n)).

Finally, the DCA acknowledged that courts are directed to liberally construe the provisions of section 790.25 "in favor of the constitutional right to keep and bear arms for lawful purposes." *Florida Carry, Inc. v. University of North Florida*, 133 So. 3d 966, 970 (Fla. 1st DCA 2013). Because Curry-Pennamon's possession of a firearm in the parking lot at his place of business fell within the statutory "place of business" exemption from the prohibition on carrying a concealed firearm, the DCA held that the trial court erred by denying his motion for judgment of acquittal on that charge. The attempted murder charge was affirmed but the concealed firearm charge was reversed.

Curry-Pennamon v. State, 159 So.3d 158 (Fla. 1st DCA, 1/2/15)

Detective's Response To Interrogated Subject's Prefatory Question Was Not Attempt To "Steamroll" The Subject Into Waiving Miranda Rights

Detective Richard Tiburzio, who was investigating an allegation that Hineline unlawfully touched a twelve-year old, called Hineline to set up a date and time he could meet with him and discuss the allegations. After he called Tiburzio, the detective told Hineline he wanted to speak with him about the incident giving rise to the charge, and that the reason he wanted to do it at the police station was "out of respect, which I do for everybody, is that I might get you to come up to the police department so I

didn't have to come to the house and everybody knows what's going on." Ultimately, Hineline voluntarily went to the police station to discuss the matter. He was not under arrest at this point. While at the police station, Detective Tiburzio recorded his conversation with Hineline. During the recording, the following exchange occurred:

> *[TIBURZIO]: Ok. Well, there's been a referral made to me to investigate, but in order for me to talk to you, I have to read you a rights waiver.*
> *[HINELINE]: Rights? Why? Am I being arrested or...*
> *[TIBURZIO]: No, you're not being arrested.*
> *[HINELINE]: Okay.*
> *[TIBURZIO]: You're going to be released.*
> *[HINELINE]: All right.*
> *[TIBURZIO]: But the bottom line is that in order for me to talk to you, I have to read you your rights because you have rights.*
> *[HINELINE]: Okay.*
> *[TIBURZIO]: And I will be more than glad to discuss what's going on at that point in time, but I have to read you a rights waiver. And I figured rather than go to your house...*
> *[HINELINE]: Yeah, I appreciate this...*
> *[TIBURZIO]: You know what I mean?*
> *[HINELINE]: ... because, yeah.*
> *[TIBURZIO]: I'm one of these guys, I've been here 33 years...*
> *[HINELINE]: Right, right.*
> *[TIBURZIO]: ... so I know how this thing works, and I just want to make sure that, you know, mano-a-mano, man-to-man, you and I are just talking and stuff like that, but...*
> *[HINELINE]: Okay.*
> *[TIBURZIO]: ... in order to talk to you, I need to read you your rights. Would you be willing to talk to me?*
> *[HINELINE]: Yeah.*
> *[TIBURZIO]: Okay.*
> *[HINELINE]: Yeah. I don't have anything to hide.*
> *[TIBURZIO]: I didn't figure you did. Okay. Can you read English?*
> *[HINELINE]: Yes.*
> *[TIBURZIO]: Okay. This is a rights waiver. It says, before we ask questions, you must understand your rights. You have the right to remain silent. And anything you say can be used against you in court. You have the right to talk to a lawyer before we ask any questions, and to have a lawyer with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish. And if you decide to answer any questions now without a lawyer present, you still have the right to stop answering at any time until you talk to a lawyer. Does that make sense?*
> *[HINELINE]:* ***Okay, do you think I'm going to need a lawyer? I mean...***
> *[TIBURZIO]:* ***Well, we'll discuss that here in just a second.***
> *[HINELINE]:* ***Okay.***
> *[TIBURZIO]:* ***That's up to you. Do you understand those rights?***
> *[HINELINE]:* ***Yeah.***
> *[TIBURZIO]:* ***Okay. Do you wish to talk to me at this time?***
> *[HINELINE]:* ***Yeah.***
> *(Emphasis supplied by DCA).*

Hineline moved to suppress his statements made during the interrogation, arguing that Detective Tiburzio's response to Hineline's prefatory question of, "Okay, do you think I'm going to need a lawyer? I mean…" by saying "Well, we'll discuss that here in a second. That's up to you…" was improper and allowed the detective to "steamroll" him. The parties stipulated that the narrow issue to be decided at the suppression hearing was whether the officer made a good-faith effort to give a simple and straightforward answer, the third prong in the test announced in *Almeida v. State*, 737 So. 2d 520 (Fla. 1999), namely, whether the officer made a good-faith effort to give a simple and straightforward answer. The trial court suppressed Hineline's statement, finding the Detective's "We'll discuss that here in just a second" as an improper, non-straightforward response, intending to "steamroll" Hineline into waiving Miranda rights.

The DCA viewed the video as well as the transcript. As stated by the DCA, "(W)hat occurred was a fluid conversation between Hineline and the officer (in which Hineline was cooperative), and there was no pause between the officer's response of '[w]ell, we'll discuss that here in just a second,' and '[t]hat's up to you. Do you understand those rights?' In fact, immediately following this latter question, Hineline indicated he understood his rights, and, when the officer again asked whether—in lieu of

understanding his rights, and hearing '[t]hat's up to you'—if he wished to speak to him, Hineline responded affirmatively." The DCA noted that only after answering Hineline's question, and after Hineline indicated his continued willingness to speak to the detective after being fully advised of his rights, did Detective Tiburzio resume the interrogation. Accordingly it held the trial court erred in suppressing Hineline's statement. Reversed and remanded.

State v. Hineline, 159 So.3d 293 (Fla. 1st DCA, 3/5/15)

Failure To Elicit Testimony From Church Trustee That Church Met *At The Time Of The Charged Conduct* Means State Failed To Prove Key Element

Jamarol Fletcher appealed his convicted of possession of cocaine within 1,000 feet of a church and possession of cocaine with intent to sell and being within 1,000 feet of a church. He argued the trial court erred in denying his motion for acquittal. The First DCA agreed that the trial court erred because even though the state elicited testimony that the church conducted regular religious services at the trial that occurred six months after Fletcher was arrested, it failed to establish that the church has such religious services at the time of his arrest. The only evidence as to the church's services was as follows:

> *Q: And does the church conduct regular religious services?*
> *A: (By trustee of the church) Yes, it does.*
> *Q: How often would you say you conduct those services?*
> *A: We have Sunday School, church school every Sunday, and then we have religious services of church services every Sunday.*

The questions were not asked in the context of activity of the church at the time Fletcher was arrested. The DCA held that testimony about the church holding services at the time of trial was not evidence of regularly conducted religious services at the time of the offense. Fletcher's convictions were reversed and the case remanded for the trial court to enter convictions for sale of cocaine[4] and possession of cocaine with intent to sell and to impose a corrected judgement and sentence scoresheet. Otherwise the trial court's rulings were affirmed.

Fletcher v. State, --So.3d—(Fla. 1st DCA, 1D14-3874, 7/8/15)

Failure To Establish Why Warrant Could Not Have Been Sought During 2 ½ Hours Dooms Evidence From Real-Time Cellular Phone Obtained Under "Exigency" Theory

Kendrick Herring appealed the trial court's denial of his motion to suppress any evidence obtained as a result of the search and seizure of his real-time cellphone location data. The First DCA reversed the trial court after reviewing the facts of the case.

On March 18, 2011, Timmy Andrew and Herring made contact via cellphone to arrange a drug deal. Andrew and his friend, Terry Eubanks, met Herring around 10:30 p.m. As Herring and Andrew discussed the sale, and the Herring opened fire on the vehicle Andrew and Eubanks were occupying. Andrew and Eubanks managed to escape from the scene, fled to Eubanks' home, and contacted law enforcement. Andrew died of his injuries, and Eubanks suffered a gunshot wound to his arm.

Around 11:15 p.m., Eubanks told law enforcement that Andrews and the Herring had been communicating via cellphone. At 1:52 a.m., law enforcement contacted the cellphone provider using an exigent circumstances form and asked for the Herring's real-time cellphone location data. Around 2:50 a.m., the cellphone provider began sending the real-time cellphone location data. Herring was located using this data and was arrested around 4:00 a.m. During Herring's arrest, law enforcement recovered a .45 caliber handgun, which matched the projectiles recovered from Andrew as well as the casings found at the scene of the shooting. Law enforcement also recovered the cellphone that was

[4] Editor's note: Fletcher's original conviction was for *possession* of cocaine within 1000 feet of a church, not *sale* of cocaine. The opinion does not discuss this discrepancy between the original conviction (possession) and the remand and order to enter a conviction for "sale of cocaine."

used to communicate with Andrew earlier in the evening.

Herring was charged with numerous felonies. He filed a motion to suppress arguing that his real-time cellphone location data was illegally seized because law enforcement did not seek a warrant and none of the warrantless search and seizure exceptions applied. He sought to suppress the cellphone, firearm, and all other physical evidence recovered during his arrest. Following a suppression hearing, the trial court entered an order finding that there were exigent circumstances in this case that abrogated law enforcement's requirement to obtain a warrant.

The DCA first dismissed the State's proffered "good faith" justification. The Florida Supreme Court in *Tracey v. State* recently held that "regardless of Tracey's location on public roads, the use of his cell site location information emanating from his cell phone in order to track him in real time was a search within the purview of the Fourth Amendment for which probable cause was required." 152 So. 3d 504, 525-26 (Fla. 2014). As such, the Appellant is correct that he has a reasonable expectation of privacy in his real-time cellphone location data.

The circumstances at issue here occurred prior to the *Tracey* ruling, and the State argues that the good faith exception applies. However, in *Tracey*, the court held that because there was "no warrant, court order, or binding appellate precedent authorizing real time cell site location tracking," the good faith exception was not applicable. *Id.* at 526. As such, here, because there is no warrant, court order, or binding appellate precedent providing that one does not have a reasonable expectation of privacy in real-time cellphone location data, the good faith exception does not apply.

The DCA then discussed whether the warrantless seizure was justified on a theory of exigency. Relying on its opinion in *Lee v. State*, 856 So. 2d 1133, 1136 (Fla. 1st DCA 2003), the Court identified the following factors as indicators of exigency: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) a reasonable belief that the suspect is armed; (3) probable cause to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; and (5) a likelihood that delay could cause the escape of the suspect or the destruction of essential evidence, or jeopardize the safety of officers or the public.

While some of the factors were present, the failure of the State to justify why no attempt to obtain a warrant destroyed its reliance on exigency. The DCA noted that the suspect was to be charged with murder and attempted murder. Law enforcement officers had a reasonable belief that the suspect was armed because they did not recover a firearm from the scene of the shooting. The officers also feared that a delay in the capture of the suspect could jeopardize the safety of law enforcement or the public. As such, there were various factors here that indicated exigent circumstances. However, when determining whether sufficient exigent circumstances exist, courts examine the totality of the circumstances. One such circumstance that courts look to is whether law enforcement had the time to secure a warrant. The Court noted that "[I]f time to get a warrant exists, the enforcement agency must use that time to obtain the warrant." (See: *Hornblower v. State*, 351 So. 2d 716, 718 (Fla. 1977).)

The record under review was devoid of any explanation why the officers could not have obtained a warrant during the 2.5 hour period at issue. Further, there was no testimony that the officers made an attempt to obtain a warrant or that they considered making such an attempt. Accordingly, under the facts presented, the totality of the circumstances does not demonstrate exigent circumstances to overcome the warrant requirement. The denial of the motion to suppress was reversed.

Herring v. State, 168 So.3d 240 (Fla. 1st DCA, 1D13-5304, 5/22/15)

An Officer's "Acting In The Performance Of Official Duties" As Used In "Stand Your Ground" Is Broader Than Examples In F.S. 776.032 And Differs From "Lawful Execution Of Official Duty" As Used In Other Statutes

Keenan Finkelstein petitioned the First DCA a writ of prohibition to prevent the circuit court from continuing the State's prosecution of him for battery on a law enforcement officer with a deadly weapon, claiming immunity under Florida's "Stand Your Ground" law. (A petition for writ of prohibition is the proper method to challenge a trial court's denial of a pre-trial motion to dismiss charges based on a claim of statutory immunity under F.S. 776.032. *Mederos v. State*, 102 So. 3d 7, 11 (Fla. 1st DCA 2012).)

The criminal charge was based on an incident which occurred outside a residence on the night of March 20, 2013. Escambia County Sheriff's deputies received a report of a robbery near a convenience store. Kanelius Wells, the victim of the robbery, knew the alleged robber and led deputies to the neighborhood to point out the particular residence of the robber. Several deputies, including Sergeant Johnson, reported to the neighborhood, parked their vehicles out of sight of the home, and approached the home on foot. Sergeant Johnson positioned himself so that he could watch persons and vehicles leaving the home. He and the other deputies had a general plan to contact the suspected robber if he exited the residence and possibly arrest him. The garage door at the residence was open.

When Finkelstein went into his garage and approached a vehicle similar to the one described by wells, Sergeant Johnson stepped out of the darkness to address Finkelstein. Sergeant Johnson testified that he shined his flashlight on Finkelstein's face and announced, "Sheriff's office, show me your hands." Another deputy also testified at the hearing that Sergeant Johnson identified himself as a Sheriff's deputy immediately upon encountering Finkelstein, while Finkelstein denied hearing such identification. Sergeant Johnson testified that upon his calling out to Finkelstein, Finkelstein immediately responded by shooting him. The testimony of various witnesses conflicted about what happened next, but there was no question that gunfire was exchanged and Sergeant Johnson was seriously injured.

Finkelstein was charged with battery on a law enforcement officer with a deadly weapon. He then asserted that he was immune from prosecution under F.S. 776.032, Florida Statutes, because the deadly force he used was justified to defend himself. The statute provides that if a defendant establishes that the force used was justified under any of the applicable situations, the defendant qualifies for immunity from prosecution.

However, the statute also provides that the immunity is **not** available if the person against whom the force is used is a law enforcement officer acting in the performance of his or her official duties and who has identified himself or herself in accordance with any applicable law (or the person using force knew or should have known the person was a law enforcement officer).

After a hearing, the circuit court ruled that Finkelstein failed to carry his burden to establish his entitlement to immunity from prosecution, based on the "credible substantial evidence" that Sergeant Johnson was a law enforcement officer who was involved in the performance of his official duties, and who identified himself as an officer. Finkelstein on appeal argued that at the time Finkelstein defended himself by shooting Sergeant Johnson, Sergeant Johnson was **not** performing his official duties and had **not** identified himself as a police officer.

Finkelstein asserted on appeal that "official duties," for purposes of F.S. 776.032 immunity, are limited to execution of warrants for search or arrest, execution of lawful warrantless arrests, legally detaining or stopping a citizen, and service of process. However, the DCA noted the statutory definitions of "law enforcement officer" uniformly describe the "primary responsibility" of law enforcement officers as "the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state." (F.S.S. 112.531(1); 316.1906(1)(d)(1); 943.10(1)). The DCA noted this broad description of responsibilities or duties is not limited to execution of warrants, service of process, or actual arrests.

Finkelstein further argued that Sergeant Johnson violated his constitutional rights by pointing his service weapon at Finkelstein and illegally detaining him, and thus Sergeant Johnson could not have been performing any official duties. The DCA noted that any challenge to the legality of the search and seizure of Finkelstein is separate from the determination of immunity under F.S.776.032, Florida Statutes. The question of whether the law enforcement exception to the statutory immunity applies does not involve the admissibility of evidence obtained from Finkelstein by any search by Sergeant Johnson, or a civil action against the Sheriff's Office for a violation of Finkelstein's civil rights. Even if Sergeant Johnson's actions were illegal, which the DCA did not find, Finkelstein's emphasis on the "lawful execution" of legal duties was misplaced. The Court observed, “As pointed out in the State's Response, the phrase ‘performance of . . . official duties’ in F.S. 776.032 differs from the phrase ‘lawful execution of a legal duty,’ in statutes defining resisting arrest and other obstruction crimes. *See, e.g.*, F.S. 843.02, Fla. Stat. (‘whoever shall obstruct . . . any officer . . . in the lawful execution of any legal duty’).” Because the evidence supported the trial court's findings of fact, and because the trial court correctly applied F.S. 776.032(1) to those facts, the DCA denied the writ of prohibition. This denial

pertaining to the exception to statutory immunity from prosecution was without prejudice to Finkelstein's ability to raise the affirmative defense of self-defense at trial.

Finkelstein v. State, 157 So.3d 1085 (Fla. 1st DCA, 2/26/15)

Resident's Assertion That Police Did Not Comply With "Knock And Announce" Statute Was Too Speculative

Quincy police officers executed a search pursuant to an unchallenged warrant and, as a result, found five pornographic photographs of a minor on James Carter's laptop. He challenged the validity of the search's execution, claiming that the officers had failed to properly knock and announce pursuant to F.S. 933.09.

Carter, who was asleep until officers entered his home, testified during the hearing on the motion to suppress that he, as a light sleeper, would have woken had the officers properly knocked and announced their presence and purpose. He also testified that his dog, a German Shepherd, would have barked had the officers properly complied with the knock-and-announce statute.

An officer who had participated in the search warrant's execution testified that although she could not remember this specific search, it is the routine of those in the Quincy Police Department to knock and announce their presence prior to entering a home. The trial court determined that appellant had the burden of proving a violation of the knock-and-announce statute, but he failed to meet that burden with his speculative testimony that although he was asleep, he *would* have woken had officers knocked.

The First DCA noted that the burden of proof on an allegation of failure to comply with the "Knock and Announce" statute had not been previously directly addressed in Florida. It determined that the burden initially falls on the defendant to prove a prima facie case of officer noncompliance with the knock-and-announce requirements. After the defendant makes that prima facie case, the burden then shifts to the State to prove compliance. The DCA noted that the testimony of Carter, who was asleep when the police would have knocked and announced, was speculative. His testimony that his dog *would have* barked upon hearing a knock at the door was likewise speculative, since he was not awake to determine whether the dog barked or not. Therefore, the DCA held that Carter failed to meet the burden of proving a prima facie case of officer noncompliance with the knock-and-announce statute. The trial court was affirmed.

Carter v. State, --So.3d – (Fla. 1st DCA, 1D13-4950, 7/21/15)

Motion For Return Of Property Must Be Countered With Specific Evidence To Refute Assertions Made In Motion. Summary Rejection Of Motion Improper. Trial Court Must Either Hold Hearing Or Attach Portions Of The Record Conclusively Refuting The Motion.

Robert Nofsinger sought return of his "Droid Motorola Cellphone" after pleading no contest to lewd or lascivious battery on a person less than sixteen years of age. The phone had been seized by the Bay County Sheriff's Office when other items were seized during the investigation. The BCSO opposed Nofsinger's motion arguing in part that the item had been removed from the indexed storage area and co-mingled with other evidence to be subject of a Motion for Destruction. ("It is effectively in a large trash can which will require extensive effort to recover/identify this specific phone.") The BCSO also argued that Nofsinger had been charged with sexual offenses against his granddaughter and the phone had photos that were suggestive of more than a traditional grandfather-granddaughter relationship. The trial court denied Nofsinger's motion and he appealed. The 1st DCA, primarily because the trial court record was devoid of evidence to defeat Nofsinger's recovery attempt and the assertions made therein, reversed the trial court's summary denial of that motion, with directions to either hold an evidentiary hearing or attach portions of the record that conclusively refute the motion.

Nofsinger v. State, --So.3d—(Fla. 1st DCA, 1D15-721, 824/15)

Methamphetamine Investigation Provides Search & Seizure "Primer"

Four days after arresting someone—not Joseph Lee Smith—at Smith's residence for manufacturing methamphetamine, a Dixie County Sheriff's Office investigator, Lt. Michael Brannin, returned to the home to conduct a follow-up investigation. As he approached the front door, he observed a controlled fire burning on the side of the house. He knocked on the door and, when Smith answered, explained why he was there and said he needed to talk to Smith. Smith stepped out the door and accompanied Lt. Brannin into the yard toward the fire. Their path took them past a truck parked in a carport attached to the house. Investigator Brannon asked to see what was in the fire, and Smith went with him, though saying nothing. The only notable item in the fire was an empty lighter fluid container. All the while, Lt. Brannon could smell lighter fluid in the vicinity. From training and experience, he knew the odor of lighter fluid is associated with methamphetamine manufacture. He eventually determined the odor was coming not from the fire, but from the truck parked about ten feet away. So, he took a nearby lawn chair, positioned it roughly two feet away from the truck and sat down. At about the same time, he summoned Officer Jaime King, who was on standby offsite. Smith, meanwhile, pulled up another lawn chair and sat with Investigator Brannin. The two men conversed; Brannin asked Smith what he was burning in the fire, and Smith responded that it was yard debris.

Brannin then asked Smith about a small light attached to the truck's grille. Smith became visibly nervous. Brannin then pretended to be interested in buying the truck and asked Smith if he could look under the hood. Smith agreed, and opened the hood himself, which allowed Brannin to see that a bottle appearing to be a Gatorade bottle was inside the engine compartment, located near the radiator, toward the driver's side of the truck. He could not see the whole bottle or its contents, and Smith shifted position to keep the bottle obscured. Officer King arrived at that point, and Smith announced he had to leave to pick up his children from school. Knowing from training and experience that plastic bottles like the one in the truck's engine compartment are commonly used in the making of methamphetamine, Brannin asked Smith to hand him the bottle before leaving. Smith obliged, placing the bottle on the ground in front of the truck at the investigator's direction and walking away. Brannin then seized the bottle, opened it, discovered it contained ingredients for making methamphetamine, and arrested Smith.

The trial court suppressed the evidence inside the bottle. It found Smith impliedly consented to Brannin's entry on the property and search of his yard, and the truck's engine compartment. However it ruled that when Officer King arrived, Smith's further actions were acquiescence to authority. Finding no exigent circumstances supporting the warrantless search of the bottle's contents, and finding that Smith allowing Brannin to open the bottle was the product of the acquiescence, the bottle contents were inadmissible.

The state appealed. The First DCA first considered the issue of consent. If found that Smith did not expressly consent to the search of his yard and truck but his conduct allowed a reasonable conclusion of implied consent. Smith walked with Brannin, sat down next to him and engaged in a consensual conversation. Brannin using deception by feigning interest in buying the truck did not render Smith's implied consent involuntary.

When King arrived, the dynamics changed. The DCA indicated, "(A) reasonable person in Smith's position would have believed his ability to leave was, indeed, conditioned on his removing the bottle from the truck and handing it over, even if the request was not specifically phrased that way. Moreover, Lt. Brannin directed Smith to place the bottle on the ground in front of the truck. Again, under the circumstances, a reasonable person would think he should comply with the directive, which Smith did. We also find it significant that Smith did not, in fact, leave after handing over the bottle, but stayed around while Inspector (sic) Brannin opened the bottle and discovered its contents. These circumstances show Smith's submission to the show of authority of the two officers present."

Having found that the seizure of the bottle and its search was not by reason of consent, the DCA then turned to whether there was probable cause to support the seizure and search based upon exigent circumstances. The DCA noted exigent circumstance include likelihood of delay causing destruction of essential evidence or jeopardizing safety of the public or officers. The DCA concluded there was probable cause to search the truck and remove the bottle. An arrest for methamphetamine manufacturing had occurred at the residence just four days earlier. An empty lighter fluid can was seen by Brannin. Lighter fluid is used in meth manufacturing, as are bottles such as the one Brannin

saw in the truck. Smith became "visibly nervous" when Brannin turned attention to the truck. When the hood was opened, Smith tried to position himself between Brannin and the bottle in an attempt to obscure it from Brannin's sight. All these factors gave Brannin probable cause to believe Smith was in the process of manufacturing meth. Brannin expressed his concern that Smith could easily destroy the bottle and its contents in the nearby fire. Safety concerns were raised because the contents could very well be explosive. Fumes of lighter fluid were smelled by Brannin. Smith had indicated he had to leave, meaning the potentially explosive bottle would still be in the truck's engine compartment. Any such explosion would destroy evidence and endanger safety. The DCA concluded, "There being probable cause to search the truck and seize the bottle, together with exigent circumstances preventing any delay to obtain a warrant, the warrantless search was lawful. Smith's motion to suppress should have been denied." The trial court's suppression order was reversed.

State v. Smith, --So.3d—(Fla. 1st DCA, 1D14-1279, 8/31/15)

Other 1st DCA Cases Of Potential Interest-- "Quick Summaries"—

→ **Abandonment** is an affirmative defense that assumes that an attempt (or other specified offense) has been proven. *See* F.S. 777.04(5)(a). Because F.S. 777.04(5) left undisturbed "the traditional burden of proof" applicable to affirmative defenses, *Smith v. United States*, 133 S. Ct. 714, at 720, the trial court properly instructed the jury that appellant had to prove he abandoned his attempt to commit theft by a preponderance of the evidence.

Harriman v. State, --So.3d—(Fla. 1st DCA, 1D14-2147, 8/24/15)

→ During an altercation, Addison attempted to use her cell phones, but McCray broke them in half. She testified that she never told McCray that she was going to call law enforcement or 911. Defense counsel sought a judgment of acquittal because the State failed to show that Addison was attempting to contact law enforcement during her physical altercation with McCray. The trial court denied the motion, and McCray was found guilty of **tampering with a victim or witness**. Because there was no evidence that Addison was attempting to contact law enforcement, the trial court should have granted the motion for judgment of acquittal. *See Longwell v. State*, 123 So. 3d 1197, 1198 (Fla. 1st DCA 2013). The conviction for tampering with a victim or witness was reversed.

McCray v. State, --So.3d—(Fla. 1st DCA, 1D14-5950, 824/15)

→ The First DCA conflicts with the Second DCA's decision in Harris v. State, 11 So.3d 462 (Fla. 2nd DCA, 2009) and holds that the **partial obstruction of a license tag** by the vehicle's trailer hitch forms the basis for a valid vehicle stop since **F.S. 316.605(1)** forbids obstruction of the alpha-numeric designation by any matter. It certified that its interpretation is in conflict with Harris. (In Harris, a trailer obscured a license plate so that it could not be read within 30-50 feet of the vehicle. Upon stopping the vehicle for the plate violation, the officer smelled the odor of fresh marijuana and found marijuana in the defendant's pocket and cocaine. The 2nd DCA found that trailer hitches, bike racks, handicap chairs, u-hauls and the like are not covered by F.S. 316.605(1).)
→ Conflict with the 2nd DCA was certified.

Baker v. State, --So.3d—(Fla. 1st DCA, 1D14-4110)

Second District Court of Appeals:

Posting Of "No Trespassing" Sign At Residence Surrounded By Fence With Closed Gate and Mailbox Outside Of Fence = Reasonable Expectation Of Privacy

On July 24, 2012, three detectives were investigating an anonymous tip that Robinson's house was used to grow marijuana. The detectives did not have a warrant and had not performed an investigation to establish probable cause for such an offense. When they arrived, they discovered that the property, a small acreage, was completely surrounded by a chain-link fence. The only entrance gate was closed but not locked. Although the detectives did not recall any signs on the property, the trial court found that both a "no trespassing" sign and a "beware of dog" sign were posted at the entrance. The mailbox was on a post at the fenced line outside the gate so that the mailman did not need to enter the property.

After entering the property through this gate, the officers located Robinson and convinced him to allow

them to search the property. They found the two marijuana plants behind Robinson's house. This resulted in the State's prosecution of Robinson for manufacturing marijuana. Robinson filed a motion to suppress arguing that the detectives' entry onto his property was an illegal search and that the State had failed to prove that his subsequent consent to search was voluntary. The trial court denied the motion based on the 2nd DCA's decision in Nieminski v. State, 60 So.3d 521 (Fla. 2nd DCA 2011). However, the 2nd DCA reversed the trial court.

The DCA emphasized that the Nieminski "property was not posted with 'no trespassing' signs" and "did not have any other signs that might discourage a person from entering." It also noted there was no evidence to establish the location of the mailbox. It determined Nieminski failed to establish that he had a reasonable expectation of privacy that included the right to assume ordinary citizens would not open his gate and knock on his front door.

In contrast, Robinson did establish that he had a reasonable expectation of privacy in this property because ordinary citizens would not disregard his threat of prosecution and the risk of a bad dog to enter through his closed but unlocked gate. His mailbox was outside the fence to the property. The property was surrounded by a chain-link fence; had a closed gate; the warning signage and had excluded mail delivery from within the gated perimeter. The trial court should have granted the motion to suppress. Reversed, remanded, with an order to the trial court to dismiss the proceeding since both parties had stipulated the suppression motion was dispositive.

Robinson v. State, --So.3d-- (Fla. 2nd DCA, 5/22/15, 2D13-4412)

Handcuffing Subject While Waiting For Show-Up Witness To Arrive Isn't Illegal Arrest

On April 5, 2013, at approximately 10:30 p.m., a citizen saw a man break into a work truck parked at a business. Upon witnessing the man break into the truck, the citizen called 911, reported the break-in while it was still in progress, and informed the 911 operator that the perpetrator was carrying a white bucket and was leaving the scene in a newer-model, "fancy," white automobile. The citizen informant also described the perpetrator as a white male, fifty to sixty years old, and slightly overweight. A BOLO with the pertinent information was broadcast.

Officer Alec Gregoire of the Venice Police Department was patrolling the area with Officer Walker Hearing the BOLO, the two immediately went to the location of the business where the break-in had been reported. Finding no one, the officers circled the block. A few minutes after the initial report, about one-quarter of a mile from the scene of the break-in, the officers saw a 2005 white Chrysler 300 at an auto repair business located in an industrial area. (The opinion notes in a footnote that the car was well-maintained and appeared to be relatively new.) The Chrysler was parked "on the easement" and "in the driveway," perpendicular to the other cars parked at the business. The auto repair business and other nearby businesses were closed for the evening; there were no people around, and there was very little traffic. The officers' attention was drawn to the Chrysler because of the odd manner in which it was parked and its resemblance to the car described in the BOLO.

The officers stopped to investigate. Immediately, they saw Leach crouching behind the Chrysler. Both officers drew their pistols; Officer Gregoire repeatedly commanded Mr. Leach to stand up and show his hands. Mr. Leach did not move from his crouching position until after Officer Gregoire had warned him approximately seven times. Finally, Mr. Leach stood up, and the officers could see that he—like his automobile—matched the description given in the BOLO. The officers handcuffed Mr. Leach for their safety and detained him while waiting for the man who had witnessed the break-in at the remodeling business to be transported to the scene for a show-up identification. In the interim, the officers read Mr. Leach his *Miranda* rights and asked him what he was doing at the auto repair business. Mr. Leach explained that he was driving from his mother's home in Venice to his home in Sarasota and that he had stopped at the auto repair shop to urinate. However, the area where Mr. Leach claimed to have urinated showed no evidence of moisture.

A few minutes after Leach had been detained, the witness arrived and immediately identified Leach as the man he had seen breaking into the truck at the business. The officers arrested Leach at 10:59 p.m. The entire sequence of events from the initial report of the incident until the officers placed Mr. Leach under arrest took approximately thirty minutes. The State charged Mr. Leach with the burglary of an unoccupied conveyance, a third-degree felony.

In granting the motion to suppress, the trial court indicated the officers had a basis to approach Leach, but did not have enough suspicion to draw their guns, cuff him and hold him while the investigation proceeded.

The Second DCA agreed that the citizen informant's report and the BOLO provided enough basis for the officers' initial stop. It disagreed with the trial court that there was no basis for subsequent actions of the officers. The officers were facing a felony suspect who was hiding behind a car at night in the parking lot of a closed business. They could not determine whether he was, or was not, armed. Leaving their weapons holstered would have put the officers at an unnecessary risk. (*See Saturnino-Boudet v. State*, 682 So. 2d 188, 191 (Fla. 3d DCA 1996) "[T]he officer may detain the individual even at gunpoint and/or by handcuffs for the officer's safety without converting the *Terry* stop into a formal arrest."). Under the circumstances of this case, holding Leach for a few minutes to allow an eyewitness to come to the scene and confirm whether or not Mr. Leach was the perpetrator of the vehicle break-in was reasonable The court also noted that had the eyewitness not identified Leach, it could have resulted in a faster resolution to Leach's favor.

Addressing the handcuffing, the DCA noted cuffing not convert a valid investigatory detention into a custodial arrest. (*See Reynolds v. State*, 592 So. 2d 1082, 1084 (Fla. 1992)) Here, Leach's attempt to conceal himself, his initial refusal to obey the officers' commands while they were pointing pistols at him, and his proximity to a car into which he might reach for a weapon or that he might use as a means of escape raised reasonable concerns for the officers' safety and the possibility that Leach might attempt to flee. Under the circumstances, it was reasonable for the officers to handcuff Leach during the brief, investigative detention while they waited for the witness to arrive.

The DCA held that the officers' initial detention of Leach was supported by reasonable suspicion. The circuit court erred in granting Mr. Leach's motion to suppress. Reversed. Remanded.

State v. Leach, --So.3d—(Fla. 2nd DCA, 2D14-1569, 5/8/15)

Pro Se Forfeiture Respondent's Actions Raised Issues Of Fact. Grant Of Summary Judgment In Favor Of City Reversed.

Ira Bull Moreland appealed a final summary judgment awarding to the City of Fort Myers $2470 in currency that was seized from Moreland during a search of his apartment. The Second DCA reversed because there were disputed issues of material fact that precluded summary judgment.

Officers from the Fort Myers Police Department searched Moreland's apartment pursuant to a warrant that was based, in part, on allegations that drugs were being sold from the premises. Moreland refused to comply with the search. He tried to barricade himself in a bedroom, but the police were able to secure and arrest him. Following the arrest, the police found the disputed cash in Moreland's pockets. The police also found a plastic candy container containing nineteen pieces of crack cocaine on the bed. Moreland admitted that the drugs were his. In another bedroom, the police found a small piece of burned steel wool and a razor blade, both bearing cocaine residue.

The City filed a forfeiture action, alleging that Moreland was a drug dealer and that the cash was contraband. The circuit court found probable cause for the forfeiture. In response, Moreland asserted that the drugs found at the scene were for his personal use and that he was never caught selling drugs. He further asserted that the cash came from his Social Security/SSI checks and that he was planning to purchase a car with the money on the day of his arrest. The City denied these allegations.

Thereafter, Moreland filed two verified motions that repeated these claims. The City later filed a motion for summary judgment. It attached the affidavits that had been submitted for the search warrant and the arrest affidavit filed after Moreland's arrest. The City also attached a request for admissions, which Moreland had never answered. In the request for admissions, Moreland was asked to admit that he sold illegal drugs and that the seized money was connected to his drug-selling activities, assertions that were directly contrary to what Moreland had claimed in his court filings.

The arrest affidavit showed that Moreland was arrested for selling cocaine within 1000 feet of a specified location and for resisting without violence. The affidavit in support of the search warrant

recited that there had been citizens' complaints about drug dealing and that there were two drug purchases in Moreland's apartment by a confidential informant. Notably, however, the affidavit recited that the drugs were sold by a female. Although the events occurred at his apartment, Moreland was not mentioned in connection with these transactions.

In a verified motion to dismiss, Moreland repeated his assertions that the money came from his Social Security checks and said that he had produced documentation to support this claim. Throughout the proceedings, Moreland repeatedly asked for the appointment of counsel, which was (properly) denied. After a hearing at which Moreland appeared by telephone, the circuit court granted the City's motion for summary judgment and entered an unelaborated final judgment.

On appeal, Moreland argued, and the DCA agreed, that the circuit court erred by granting summary judgment despite Moreland's defense that the money came from his Social Security benefits rather than from illicit drug dealing. Summary judgment may not be granted unless there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The DCA found that in this case, there were disputed issues of material fact regarding the source of the money. Although a court normally has discretion to rely on a technically deemed admission to support a summary judgment, it is error to do so if the record contains evidence contradicting the admission. However, summary judgment is not proper based on a failure to respond to requests for admissions when the record otherwise reveals disputed issues of material fact. In this case, the pro se litigant continually contradicted the City's assertions about the source of the money. The remaining circumstances relied upon by the City did not, by themselves, conclusively resolve the dispute. The City claimed that the crack was packaged for sale, but it appears from the record that the packaging was not inconsistent with personal use. The City asserted that the denominations of the currency were consistent with drug dealing. But Moreland did not have only smaller denominations. While the total amount of cash might have been sufficient to create a question for the trier of fact, it did not suffice for summary judgment. Further, the affidavit in support of the search warrant reported that a female, not Moreland, was selling drugs from the apartment. And, there was smoking paraphernalia in the apartment. This was consistent with Moreland's claim that the drugs found at the scene were for personal use.

The DCA reversed, and remanded for further proceeding. It also "anticipated" that the trial court would give Moreland an opportunity to respond to the City's request for admissions As put by the DCA, "Given Moreland's repeated and consistent explanation about the source of the money, the City would be hard pressed to claim prejudice."

Moreland v. City of Ft. Myers (In re $2470 in U.S. Currency), 164 So.3d 111 (Fla. 2nd DCA, 5/8/15)

Search Of Intoxicated Defendant Taken Into Custody Under The Marchman Act Not Justified As "Incident To Arrest" If Not Booked Through Jail

The Marchman Act (F.S. 397.6772(1)) allows a law enforcement officer to take an individual involuntarily into protective custody when the officer has a good faith belief that the individual is "substance abuse impaired" and has lost the power of self-control and is likely to inflict physical harm on himself or herself or another. Anthony White was taken into custody under the Act. A concerned citizen called police and reported he was lying on a county road. The responding deputy found him lying partially on the road with his backpack beside him. He did not initially respond to the Deputy, but eventually the deputy helped him sit up. White appeared very confused, and had a heavy odor of alcohol about his person. He eventually told the Deputy his name was "Crunch" and had been "living in the woods" and had "a lot" to drink that day. Eventually the Deputy decided White should be taken into protective custody under the Act.

In Collier County adults processed under the Marchman Act are taken to the county jail. At that detainment, White confirmed the backpack was his and that he wanted to take it with him. The 2nd DCA noted that even if the drunken White had indicated he did not want the backpack, the Deputy had a duty, once White was detained, to care for his property. As a matter of standard procedure, an inventory search of all persons entering the county jail and all personal effects is conducted to prevent weapons and other contraband from entering the facility. Because of this procedure, the Deputy searched White's backpack before he transported White to the jail. He had no consent or warrant.

During that search, the Deputy discovered ammunition, which formed the basis of White's criminal charge of possession of ammunition by a convicted felon.

White entered a plea after the trial court denied the dispositive motion to suppress. He appealed his sentence of four years' imprisonment and 6 years' probation, arguing the search during a civil detainment was illegal. The DCA affirmed that the Deputy had a legitimate basis to take White into custody under the Marchman Act. It agreed with White that such detention was not an "arrest", so the search of the backpack was not justified as a search incident arrest. The DCA noted that the statute (F.S. 397.6772) does not make it improper for a county to process detainees under the Act at the local jail, and in fact authorizes it. By reason of standard booking procedures and inventory search of White's backpack would have occurred. Thus the contraband's discovery was inevitable. The trial court properly denied White's motion to suppress. The DCA noted some other states have limited inventory searches for those taken into detention; while other states have allowed it. The DCA noted that some counties do not process detainees under the Act through their jails and expressly left open the issue of whether contraband discovered in a warrantless search of a backpack or other bag should be suppressed when the detained person has not been transported to a jail and the officer has no other reason to believe the item could not be safely transported. The trial court's refusal to suppress the evidence was affirmed, as was the judgment and sentence. The DCA noted that the public policy question is whether prosecutions in these cases should be prevented or limited in order to promote the full and unfettered ability of law enforcement to "protect and serve." the community in cases involving the mentally ill or impaired. It concluded that was "…a public issue for the legislature or for independent prosecutors" and not for the DCA.

White v. State, 179 So.3d 77 (Fla. 2nd DCA, 6/10/15, 2D14-1201)

Slow Driving Did Not Provide Suspicion To Conduct Traffic Stop

A Highlands County detective testified that on the day in question he was conducting an "interdiction" on U.S. Highway 27. The road was a divided highway with two lanes in each direction, and the speed limit was 65 miles per hour. The detective was parked in the median in an unmarked car. Around noon, he saw a car traveling under the speed limit. The car was in the curb lane, and there were several vehicles behind it. After all the vehicles passed by his location, the officer pulled onto the road and proceeded in the same direction. He passed the vehicles in the left lane and pulled into the curb lane behind the lead car. The detective paced the car for half a mile and determined that it was traveling 45 miles per hour. He did not see the car drift or weave in its lane, nor did he notice anything to indicate that there was a mechanical problem with the car or a medical problem with the driver. The traffic was light, and nothing prevented vehicles from passing in the left lane. Nonetheless, the detective testified that the car's low rate of speed was impeding the flow of traffic, so he conducted a traffic stop. After the stop, the detective learned that the driver had a suspended license. Alexander Agreda, who was a passenger in the car, admitted that his license was also suspended. He then spontaneously told the detective that he had a gun, which the detective retrieved without incident. In a subsequent search of the car, crack cocaine and a pipe were discovered on the passenger side.

Agreda argued in a motion to suppress that there was no legal basis for the traffic stop and, therefore, that the contraband should be suppressed. The circuit court disagreed, ruling that it was "objectively reasonable" for the detective to stop the car to determine whether something was wrong with the driver. After this ruling, Agreda entered a no contest plea and reserved the right to appeal the denial of his dispositive motion to suppress. Pursuant to the plea, he was convicted and sentenced to prison for felon in possession of a firearm, unlawful carrying of a concealed weapon, possession of cocaine, and possession of paraphernalia.

The Second DCA indicated there was no basis for the detective's traffic stop. The minimum speed allowed on the highway was 40 miles per hour. The vehicle was traveling 45 mph. The car was not causing congestion. Traffic was light and the left lane was open, allowing cars to pass the subject vehicle. The detective admitted on cross examination that there was nothing giving rise to a suspicion the driver was ill, tired, or driving under the influence. The DCA indicated the trial court should not have based its decision on a stop to see if there was something wrong with the driver. The facts failed to support a reasonable basis to conduct a stop under the community caretaking theory since there was no articulation of facts showing the stop was necessary for the protection of the public. (See: Majors v. State, 70 So.3d 655 (Fla. 1st DCA 2011). The only facts established were that the vehicle

was driving more slowly than most motorists, and that alone did not justify a stop. Agreda's convictions were reversed and case was remanded for discharge of the defendant.

Agreda v. State, 152 So.3d 114 (Fla. 2nd DCA, 12/3/14)

State Evidence That Value Was "Around" An Amount Failed To Prove Felony Value

Timothy Wayne Wiechert was charged with grand theft under F.S. 812.014(2)(c)(1), which requires the State to prove through competent, substantial evidence that the value of the property stolen was "$300 or more, but less than $5,000." (In a footnote, the DCA noted the State could have chosen to charge Wiechert with third-degree grand theft under F.S. 812.014(2)(d), which makes it a third-degree felony to steal property valued at $100 or more, but less than $300, from a dwelling. However, the State did not charge Wiechert under this statute; therefore, it was obligated to prove that the value of the items stolen was $300 or more.)

At trial, the victim testified that a safe was stolen from his residence, for which he had paid "around a hundred dollars or so, a hundred-fifty at Home Depot." He believed that he had purchased the safe about two years before the theft. Inside the safe were "birth certificates, Social Security cards, titles to vehicles — you know, important paperwork, stuff like that." He said that if he had to replace the items, it would be "whatever the Tax Collector's Office would charge you which is about a hundred, hundred-and-a-half or so." He testified that he had replaced one of the titles and that he recalled having to pay "a hundred dollars or so," but he also testified that "[a]t the time I was transferring the title over to my son, so I don't know exactly how much" was for the transfer rather than the replacement of the title. In addition to the safe and its contents, the victim testified that the thief took one pair of "work" Levi's jeans, two jackets, one t-shirt, and a grey duffle bag from his house. The victim had paid $200 each for the jackets, one of which was purchased in 2008 and the other in 2007. He paid about $20 for the t-shirt the same year it was stolen. He did not recall when he purchased the jeans or for how much, and he believed that the duffle bag had been a promotional gift from one of his suppliers. The State did not elicit any testimony concerning the condition of any of the clothing *or* its replacement cost *or* current value.

The 2nd DCA found that the State's evidence was legally insufficient to establish a felony value of at least $300. The victim offered no evidence as to the market value of the safe or the clothing at the time of the offense. Instead, he testified only to purchase prices that were from two to seven years ago. The State also did not offer any evidence of the replacement cost of the safe or the clothing, nor did it offer any evidence of the manner in which the items were used, their general condition or quality, or any applicable depreciation. Arguably, the State presented some evidence of the replacement cost of the vehicle titles; however, that evidence was limited to the victim's "guesstimate" that some portion of approximately $100 he paid to transfer the vehicle title to his son was for the replacement of the title. This evidence, standing alone, was insufficient to constitute proof beyond a reasonable doubt that the cumulative value of the stolen items exceeded $100, much less that it exceeded the $300 necessary to obtain a conviction under F.S. 812.014(2)(c)(1). The DCA affirmed his burglary conviction, but reversed the grand theft conviction, and remanded for resentencing for second degree petit theft. The overall sentence imposed was to be recalculated on a new Criminal Punishment Code scoresheet.

Wiechert v. State, --So.3d--- (Fla. 2nd DCA, 2D14-1937, 7/1/2015)

"Gestures" From Occupant Were Reasonably Construed By Officers As An Invitation To Enter. Spontaneous Statement That There Were Needles And Drugs In Bedroom Were Properly Including In Affidavit For Search Warrant

In response to a burglary, officers traced a phone found at the victim's residence to a codefendant at the address of defendant Scotty Thompson's sister. Officers testified that Thompson's sister invited them into the house. Thompson's sister, however, testified that the police asked if Thompson was there and she said, "yes" while gesturing toward Thompson who was sitting on the couch.

She maintained that she did not invite them in, instead testifying that she was pushed out of the way by the police officers. Thompson himself offered testimony stating, "[W]ell, I noticed that somebody knocked on the door and my sister answered the door, and I heard them ask for me and she said,

'Yeah' and she pointed at me. Like I was on the couch. And then they walked right by her and asked me to get up and asked me if I could talk to them."

The officers spoke with Thompson and asked for permission to search his bedroom. He refused, stating that he did not want his bedroom searched because there were needles with methamphetamine in the bedroom. The officers obtained a search warrant, with probable cause in the affidavit being based on this and other statements. They discovered stolen items as well as illegal drugs in the residence. Thompson was charged with burglary while armed; two counts of grand theft; manufacture of methamphetamine; possession of a listed chemical; actual or constructive possession of a structure used for trafficking, sale, or manufacture of controlled substances; possession of methamphetamine; possession of drug paraphernalia; and possession of cannabis.

The defense moved to suppress evidence resulting from the search on the grounds that the officers did not have Thompson's sister's consent to enter the home and that the officers had omitted this information in bad faith in the application for a warrant. The court denied the motion to suppress, finding that Thompson's sister's testimony was not credible. The court also found no merit in the allegations concerning the application for a search warrant. Thompson was found guilty at jury trial and sentenced to seven years. He appealed the Court's refusal to suppress the evidence.

The 2nd DCA noted that "consent" is evaluated by the totality of the circumstances. Although there was conflicting evidence as to whether Thompson's sister had invited the officers into the residence, sufficient evidence existed to support a finding that the officers reasonably perceived Thompson's sister's response (in the form of a gesture) as an invitation to enter the residence and she in fact had the authority to invite them inside. Regarding Thompson's assertion that his incriminating admission was the result of an illegal interrogation, the DCA noted that evidence was presented showing he volunteered the information. Incriminating statements that are made voluntarily and spontaneously and are not the product of interrogation are admissible. The officers testified that they asked Thompson for consent to search the bedroom and he refused, answering that there were needles with methamphetamine in the room. The DCA found that Thompson did not provide the information in response to an inquiry about the contents of the room; instead, it that his statement was volunteered pursuant to a consensual encounter between Thompson and the officers. Thompson was free to simply reply "no" to the search request or ignore the officers rather than volunteering information about the contents of the bedroom. Accordingly, the court did not err in denying Thompson's motion to suppress, and his statement was appropriately included in the affidavit for the search warrant.

The DCA also affirmed the trial court's denial of a motion of acquittal. Thompson's conviction was affirmed.

Thompson v. State, --So.3d – (Fla. 2nd DCA, 2D13-5874, 7/15/15)

Consent To Enter Residence To Search For Wanted Person Did Not Authorize Search Of Back Yard For Evidence Of Drugs After Resident Admitted Smoking Marijuana. Repeated Refusal To Place Purse In Sight On Hood Of Patrol Car Justified Arrest For "Resisting."

On July 26, 2013, police went to Rori Bultman's house to search for a suspect in an unrelated case. Upon arriving at Bultman's house, the police asked if they could look inside for the suspect. Bultman agreed, and immediately upon entering the house, the officers smelled marijuana. The officers then asked Bultman about the odor, and Bultman responded that she had been smoking marijuana earlier that day. One officer stayed with Bultman and they exited to the front yard while the other officer proceeded to the backyard, where he found a "boat" made of aluminum foil that was caked with methamphetamine. Back in the front yard, the officers asked Bultman for consent to search the premises for narcotics, but she refused. The officers then asked Bultman for her identification, which she indicated was in her purse located in her car. Bultman retrieved her purse and handed the officers her identification. However, Bultman then attempted to hide her purse from the officers, and when they asked to search the purse, she refused. The officers repeatedly asked Bultman to place the purse on the hood of their police car for officer safety and twice had to remove it from her person.

The officers arrested Bultman for resisting their commands to leave the purse on the hood of the car and conducted a search of her purse incident to arrest, wherein they found drugs and paraphernalia. Bultman was charged with resisting an officer without violence for impeding the officers' lawful

investigation, possession of methamphetamine, possession of cannabis, and possession of drug paraphernalia. Bultman filed a motion to suppress the methamphetamine boat, the drugs and paraphernalia retrieved from her purse, and any statements she made to the officers. The motion to suppress the physical evidence was granted completely, on the basis that the officers did not have consent to search Bultman's backyard, where the methamphetamine boat was found, and that the smell of marijuana was an insufficient reason by itself to justify detaining Bultman. The State appealed the trial judge's ruling. The Second DCA affirmed in part, and reversed in part, remanding for further consideration.

Regarding the aluminum foil "boat" obtained from Bultman's backyard, the trial court in this case explicitly found that it was "unknown whether the Defendant's consent extended to the search of her backyard nor whether Deputy Ranze could observe the [boat] in plain view from the inside of the home or is [sic] open to public view." At the hearing, Deputy Ranze testified that he had searched the home for the missing suspect with Bultman's consent and that he then went immediately to the backyard *before* seeking Bultman's consent to search the premises for narcotics. The other officer, Deputy Lockard, testified that Deputy Ranze had exited the home out the front door with Bultman after conducting the initial search and then got permission from Bultman to search the backyard. The DCA found that given this conflict in facts, the trial court did not err in finding the search of the yard to be without consent and in granting the motion to suppress the methamphetamine boat found in the backyard on this basis.

The DCA did not agree with the trial court regarding the search of Bultman's purse. First, the officers lawfully detained Bultman after smelling marijuana inside the house, a place they were lawfully allowed to be after Bultman gave consent to search for the missing suspect. Second, because Bultman was being lawfully detained due to the smell of marijuana at the time she refused to follow the officers' orders to leave the purse on the hood of the car, Bultman could have been and in fact was arrested for resisting an officer without violence. Because Bultman had the purse on her person at the time of her arrest for resisting an officer without violence, the officers could lawfully conduct a search of the purse incident to arrest. *(*Citing: United States v. Robinson, 414 U.S. 218 (1973); and Chimel v. California, 395 U.S. 752 (1969).) The DCA held that without a definitive showing that the officers had Bultman's consent to search her backyard, the evidence obtained from Bultman's backyard was properly suppressed. However, given the legality of her detention and arrest, the evidence gathered from Bultman's purse should not have been suppressed. Accordingly, it reversed this portion of the trial court's order. Partially reversed. Remanded.

State v. Bultman, 164 So.3d 144 (Fla. 2nd DCA, 5/13/15)

Suspicion That Subject Had Run From A Reported Burglary Did Not Support Arrest For Loitering And Prowling 30 Minutes Later Because There Was No Contemporaneous "Imminent Threat" To Persons Or Property

At 11:08 p.m. on September 24, 2012, a 911 caller reported a burglary by two black males. At 11:15 p.m., a deputy observed two black men in black clothing running from the scene. The men climbed a wall and headed in the direction of a wooded area near an apartment complex. Corporal Schmick responded to the burglary call as part of a perimeter unit and first observed Tressie Demont Ellis in the gated apartment complex at 11:36 p.m. Ellis was walking back and forth in front of a closed gate for vehicular traffic. Ellis saw the officer and then walked to an adjacent building. Corporal Schmick lost sight of Ellis, but after twenty to thirty seconds, Ellis walked back to the gate. A vehicle entered through the gate, but Ellis remained there. Then a couple of minutes later, Ellis walked out of the complex through a nearby pedestrian gate. He walked straight towards Corporal Schmick who then initiated a consensual encounter. Ellis was cooperative and gave his name to Corporal Schmick. He acknowledged that he did not live in the complex. He said he was cutting through the complex and had walked through the gate to get into the complex. Corporal Schmick stated that Ellis "appeared to fit the description of one of the suspects." Also, Ellis was sweating profusely and out of breath, his pants and feet were muddy, and he had a small laceration on his wrist. Corporal Schmick felt that Ellis's story did not make sense because the complex was fully fenced and gated. One could not cut through the gated community because of the wall around it and the adjacent woods and swampy area. Ellis was eventually arrested, and a search incident to arrest revealed two cell phones and a bracelet stolen in the burglary that had occurred just half an hour earlier.

The 2nd DCA found that there was insufficient evidence to support a Loitering and Prowling conviction. Here, the circumstances reflect Ellis's effort to leave the vicinity of the earlier burglary rather than an immediate concern that a crime was likely to occur in the very near future. Ellis was walking out in the open, briefly entered an adjacent building, and then walked back to the closed vehicular gate. After a short time he exited the complex and walked towards Corporal Schmick. Nothing indicated that Ellis was about to burgle an apartment, break into a car, or otherwise threaten the safety of persons or property in the area. Rather, Ellis's actions were those of a person who was trying to find his way out of the gated complex.

While Corporal Schmick testified that he believed Ellis was an imminent threat to the residents at the time of his arrest because he was walking around in an apartment complex and did not live there, this stated reason falls short of a reasonable belief that Ellis "was intending to commit harm to person or property in the very near future." (See: *McClamma v. State*, 138 So. 3d 578, 587 (Fla. 2nd DCA), *rev. denied,* 151 So.3d 1228 (9/5/14).) The evidence does not otherwise establish that reasonable alarm existed for an imminent threat to person or property in the vicinity. Because the State had failed to prove a prima facie case of loitering or prowling, Ellis's conviction and sentence for that crime was reversed. (Ellis's conviction for burglary of an unoccupied dwelling was affirmed, but his conviction for grand theft was reversed and remanded for sentencing as petit theft because the State failed to establish felony value of the stolen property found on Ellis.)

Ellis v. State, 157 So.3d 467 (2/11/15)

Other 2nd DCA Cases Of Potential Interest-- "Quick Summaries"—

→ **Failure to disclose inculpatory comment** of defendant causes reversal. When the State inadvertently failed to disclose defendant's pre-Miranda affirmative response to a detective's question whether a laptop (containing child pornography) was the one the defendant normally used, the trial court erred in finding that defendant was not prejudiced, as suppression of the earlier statement might have led to suppression of his recorded statement, and there was a reasonable possibility that defense counsel's trial preparation and strategy would have been materially different because counsel could have pursued the suppression of all statements made by defendant. New trial ordered.

Guevera-Vilca v. State, --So.3d—(Fla. 2nd DCA, 2D11-5805, 4/10/15)

→ Defendant was convicted of the first degree felony of **witness tampering and third degree felony of being a principal to perjury based on procuring a witness to testify falsely in a deposition** in another criminal proceeding and making a payment to the witness to falsely testify. The DCA found that the principal-to-perjury crime contains all the elements of the tampering crime, and in addition it requires that the induced person actually make the false statement in the official proceeding. Therefore, the elements of the latter were subsumed by the former, and Mays's conviction of both crimes based on the same incident violated double jeopardy. Because the elements of the tampering crime are subsumed by the principal-to-perjury crime, the tampering crime is the lesser offense, regardless of which of them carries the greater penalty.

Mays v. State, --So.3d—(Fla.2nd DCA, 2D13-1273, 8/21/15)

→ A Clearwater patrol officer stopped Joseph Conyers for riding his bicycle without lights. The officer told Conyers he was not going to issue him a citation but asked if he could search him for weapons. Conyers agreed to submit to a pat-down. When the officer touched Conyers' right pants pocket with this open palm, he felt a hard, cylindrical object that he "immediately recognized to be a crack pipe." The officer reached into the pocket and retrieved the object, confirming his suspicions. It was a crack pipe-a cylindrical, glass tube with steel wool in one end and with white residue inside. Conyers was arrested for possession of drug paraphernalia and the search incident to the arrest found crack cocaine in a sweatband underneath Conyers' hat. He challenged the **"plain feel"** seizure.

In Walker v. State, 514 So. 2d 1149 (Fla. 2d DCA 1987) the DCA had held that seeing the "stem" of a pipe in plain view did not provide probable cause for arrest for possession of drug paraphernalia since "pipes are used to smoke materials other than drugs" and are not contraband per se. The DCA distinguished Walker and another case (T.W.C. v. State, 666 So.2d 217 (Fla. 2d DCA 1995)) because the pipe seized from Conyers was not a traditional tobacco pipe. The DCA held that "an experienced officer who identifies such a glass tube by plain feel can conclude, based on his or her prior experience and the totality of circumstances…" that the tube is drug

paraphernalia. It noted that the pipe retrieved fit within the statutory definition of drug paraphernalia (F.S. 893.145(12) even if it had not contained residue. Conyers' judgments and sentences were affirmed.

Conyers v. State, 164 So.3d 73 (Fla. 2nd DCA, 5/6/2015)

Third District Court of Appeals:

Suspicions Did Not Add Up To Probable Cause To Arrest Juvenile Linkage To Initial Illegal Arrest Sufficiently Broken With Regard To Subsequent Confession To Additional Offense Provided Weeks After Arrest

There were three robberies with assaults in Key West over a week's time. The first victim could only generally describe his assailants as two juvenile males on bicycles. A week later, two others were similarly attacked, minutes apart, by what they both described as a group of four or five black juveniles on bicycles. All three victims were beaten and their wallets stolen while they were incapacitated on the ground.

A bystander recovered a cell phone from the site where one of the victims was assaulted. Police detectives used information on the phone to track down 17-year old Cornelius Jones. The officers went to Jones's apartment and spoke to his mother. Although Jones was not there and she could not contact him (he had lost his cell phone the previous night), Jones's brother took them to an area where he said Jones could be found. In a small open area among mangrove trees the officers found Jones with another person. When the police officer asked Jones where he was the previous night, he declined to answer and declined to voluntarily come in for questioning. Officer Leahy handcuffed Jones.

The officer turned to the other person who was with Jones, Tomas Reza, a 16-year-old Hispanic male. Neither officer knew him, or had any instructions regarding him. They nevertheless questioned Reza about who he was and where he had been the night before. Officer Calvert testified that Reza appeared very nervous, refused to answer questions about where he had been the previous night, and also refused to voluntarily come with them to the police station for questioning. Reza was then handcuffed and both juveniles were placed in separate squad cars and taken to the local police station. Neither Jones nor Reza resisted, and neither were read their *Miranda* rights.

The police contacted Reza's mother and she met them at the station. In the interview room and with his mother present, Reza was read his *Miranda* rights and he signed the *Miranda* waiver form. He was not handcuffed at that time. Upon questioning by Detective Haley, he made statements that indicated he participated in two of the attacks. He implicated Jones as well. Immediately after the interrogation, Reza was booked on charges based on two of the three muggings. The time between Reza's arrest and the beginning of the interview was approximately forty-five minutes.

Two weeks later, while incarcerated in the juvenile detention facility, Reza was interviewed by the detectives regarding the first robbery. During this interview, Reza was read his *Miranda* rights and admitted that he and Jones had assaulted and robbed the first victim, too. Based on these statements, Reza was additionally charged with that robbery as well. The two cases were transferred to adult court, as Reza had turned 17. Reza sought to suppress his statements in both cases; the record indicates that both parties agreed the motion was dispositive. After a suppression hearing the trial court summarily denied the motion to suppress.

Upon review the 3rd DCA stated that even if Reza's initial detention could be considered a consensual encounter, it did not meet the criteria for an investigatory stop because "[w]hether an officer's suspicion is reasonable is determined by the totality of the circumstances which existed at the time of the stop and is based solely on facts known to the officer *before* the stop." (See: *Fuentes v. State*, 24 So. 3d 1231, 1234 (Fla. 4th DCA 2009)). In Reza's case, the officer had no prior information about Reza, did not know who Reza was when he was found with Jones, and admitted at the suppression hearing that Reza did not match the description of the perpetrators. Further, the officer could not articulate reasons for handcuffing and bringing Reza to the station other than that Reza did not look him in the eyes when he questioned him, was anxious, and refused to answer his questions. As a result of the lack of

probable cause at the time of the initial detention, the trial court should have granted Reza's motion to suppress those statements arising out of the first interrogation.

The state argued that subsequent admissions were sufficiently detached from the causal connection to the initial illegal arrest of Reza that they should be admitted. The State argued that those intervening circumstances included, for example, the police encountering Reza with Jones in the mangrove cut-through area (characterizing it as a "hideout"); the police officer's conclusion that Reza was being evasive; Reza's mother's presence during the interview; the fact that Reza was not handcuffed while in the interview room; that Reza never asked to leave and was not prevented from doing so, and that Reza knowingly waived his *Miranda* rights. Examining the totality of the circumstances, the 3rd DCA concluded that the trial court erred by denying the motion to suppress Reza's initial confession. The State admitted that there was no probable cause to detain or arrest Reza. There was minimal passage of time between the illegal arrest and confession; there were no intervening circumstances sufficient to disconnect the illegality of the detention from Reza's inculpatory statements during the initial interrogation. Reza was handcuffed and transported to the police station, placed un-handcuffed in an interview room, and was not told he was free to leave. Although he was Mirandized and his mother was present during the interview, this is not enough to overcome the coercive nature of the police encounter. The DCA reversed the trial court's refusal to suppress as related to the case based on the second and third robberies.

Reza's second confession admitting his participation in the first mugging was made about two weeks later while he was incarcerated at the Department of Juvenile Justice. Reza was brought to speak with the detectives at the detention facility. The detective turned on a digital recorder, read Reza his *Miranda* rights, and Reza agreed to speak with the detectives. The DCA noted that where a confession is obtained after the administration of the *Miranda* warnings, the State must demonstrate by a preponderance of the evidence that the defendant knowingly and intelligently waived his or her privilege against self-incrimination and the right to counsel, especially where the suspect is a juvenile. (See: *Ramirez v. State*, 739 So. 2d 568, 575 (Fla. 1999)) . In *Ramirez*, the Florida Supreme Court set out certain factors that may be included in deciding whether a waiver of *Miranda* warnings is valid: [1] the manner in which the Miranda rights were administered, including any cajoling or trickery; [2] the suspect's age, experience, background and intelligence; [3] the fact that the suspect's parents were not contacted and the juvenile was not given an opportunity to consult with his parents before questioning; [4] the fact that the questioning took place in the station house; and [5] the fact that the interrogators did not secure a written waiver of the Miranda rights at the outset.

Applying the *Ramirez* factors, the DCA noted the record indicates the *Miranda* warnings were properly administered. Although the detectives did not secure a written *Miranda* waiver prior to the second interrogation, this is not fatal to the waiver analysis. Even though the failure to notify Reza's parent prior to the second interrogation does not, by itself, dispose of the *Miranda* waiver question, it is a factor relevant to the voluntariness of the waiver of rights. Although lack of notification of a child's parents is a factor the court may consider in determining the voluntariness of any child's confession, it is not a statutory prerequisite for an appropriate interrogation.

Early into the second interrogation, Reza asked for his mother and became emotional about not being able to speak with her. The officers did not ask why he wanted to see his mother, and repeatedly told Reza that they could not arrange for him to see her. The State asserts that, similar to the right to remain silent, police must cease questioning only if the juvenile expressly conditions his participation on the presence of a parent. On this record, the DCA found that Reza's statements that he wanted to see his mother were equivocal and not an invocation of his right to remain silent.

Reza also argued that his second confession should have been suppressed because his counsel was not notified prior to the interrogation. He asserted that the officers interrogating Reza about the first mugging knew or should have known that Reza had been appointed counsel for the charges lodged against him in the second and third robbery cases, but made no effort to notify counsel so that he or she could be present at Reza's second interrogation regarding the first matter. The DCA noted the U.S. Supreme Court held in *McNeil v. Wisconsin*, 501 U.S. 171, (1991), that an accused's request for counsel at his initial appearance on a charged offense, while effective to invoke his Sixth Amendment right to counsel, did not constitute an invocation of his *Miranda* right to counsel that would preclude police **i**nterrogation on unrelated, uncharged offenses. In so holding, the Court refused to merge the Sixth Amendment right to counsel, which is offense-specific, with the non-offense-specific *Miranda*

right to counsel during interrogation. The DCA concluded that no Sixth Amendment violation occurred here.

Considering the remaining *Ramirez* factors, the DCA found that the record demonstrated that Reza's age, experience, education, background, and intelligence were such that he could read and write English, he was aware of the penalties he faced, he understood his situation and chose to voluntarily speak with the detectives about the first mugging. Although the juvenile detention facility is an inherently coercive environment, there is no compelling evidence of police misconduct or coercive interrogation tactics. Reza was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit. The trial court's refusal to suppress evidence related to the first robbery was affirmed. The case related to the second or third robberies was remanded for reconsideration in view of the DCA's determination that the evidence should have been suppressed.

Reza v. State, 163 So.3d 572 (Fla. 3rd DCA, 4/8/2015)

Murder Suspect's Statements Suppressed Because Detectives Deliberately Delayed Providing Him Miranda Rights

This case involves a murder that formed the basis for one of the "The First 48 Hours" television show segments.[5] The efforts of investigators, including response to the crime scene were videotaped by the "48" TV production crew. The Defendant, Andrew Cummings moved to suppress "all oral statements, confessions and admissions made by the Defendant to the police or other agents of the State of Florida."

The basic facts were that the Defendant was found covered in blood near the site of a murder in the man's apartment, a place where the Defendant regularly was found. As grounds for the motion, the Defendant argued he was "[A]pprehended by numerous police officers when he was found outside near a house, bleeding and going into convulsions. ..(that)… (t)he police guarded the Defendant while he was receiving treatment. ...(and) (i)mmediately upon discharge, he was met by two detectives and transported by yet another officer to the station for interrogation."

The Motion continued: "Any statement made from the time he was detained and subsequently arrested prior to *Miranda* warnings was obtained in violation of the Defendant's right to counsel. Moreover, any such statement was also obtained in violation of the Defendant's right to remain silent because he was in custody and being interrogated at the time by the police about a murder investigation. Furthermore, the statements were also the product of a statement obtained earlier without the benefit of *Miranda* rights. ... The statements were not made knowingly, intelligently or voluntarily in violation of *Miranda*…."

After the hearing on the motion to suppress, the trial court made oral rulings which included a statement that the Defendant "was in custody when he was transported to the hospital and while he was at the hospital he was not free to leave." The trial court also ruled that the Defendant's statements made when he was first found were not voluntary because "he was in no condition to voluntarily make statements to that." In a later written order the trial court ruled that the Defendant was illegally detained during his pre-*Miranda* statements and that a reasonable person in Defendant's position would not have felt free to leave, or disengage from, the police contact existing in this case. As such, defendant was in 'custody' when his statements were taken. The trial court suppressed Defendant's pre-*Miranda* statements, noting the Defendant was consistently in custody for several hours (i.e. from the time he was transported to the hospital to the moment he was escorted to the interview room.). After later proceedings on a motion for rehearing, the State filed this appeal.

The 3rd DCA agreed with the trial court. It affirmed suppression of all statements made by the Defendant because the trial court was correct to conclude that the Defendant was in custody at the time all statements were made (S*ee Ramirez v. State*, 739 So. 2d 568, 573 (Fla. 1999)), and in finding that his post-*Miranda* statements were the result of a deliberate decision to delay issuing *Miranda* warnings to the Defendant. (See: *Ross v State*, 45 So. 3d 403 (Fla. 2010)). In addition, the DCA concluded that the trial court was also correct to initially find that the Defendant was in no condition to

[5] "Loved To Death." The First 48, Season 4, Episode 1 (2006). (One of two cases in episode.)

make voluntary statements. *Reddish v. State*, 167 So. 2d 858, 863 (Fla. 1964). The trial court's suppression of the statements was affirmed. The DCA also agreed that the "48" video could not be shown at trial since it had been so heavily redacted and edited that it had no evidence value.

State v. Cummings, 159 So.3d 865 (Fla. 3rd DCA, 2/4/2015)

To What Extent Can A Physician's Report of "Doctor Shopping" Result In Admissible Evidence And Testimony?

In November of 2011 Key West Police responded to a call from Dr. Shapiro, a physician at the Truman Medical Center regarding "doctor shopping." Dr. Shapiro told the officers that Samuel Strickling, who was in the waiting room, had secured a prescription for a controlled substance from Dr. McKnight (another doctor at the medical center) the day before and was now seeking another prescription from Dr. Shapiro. Shapiro provided police with a copy of both physicians' records relating to Strickling. Dr. McKnight was interviewed and completed a sworn statement regarding the incident. Strickling was arrested and charged with violating F.S. 893.13(7)(a)8 because Strickling had not revealed he had obtained a prescription for a controlled substance from another provider within the last thirty days.

After trying unsuccessfully over four months to notify Strickling of its intent to request a subpoena to secure his medical records, the state finally notified Strickling of its intent to seek the subpoena (as required by F.S. 456.057(7)(a)3.) The subpoena was issued. Strickling thereafter moved to "suppress" not only the medical records provided by the doctors but also those obtained pursuant to the subpoena. He also sought to preclude the two doctors from testifying. He argued the doctors had no authority to provide his medical records to police and that the state had failed to act in good faith in securing the information. Relying on Mullis v. State, 79 So.3d 747 (Fla. 2nd DCA, 2011) and State v. Sun, 82 So.3d 866 (Fla. 4th DCA, 2011), the trial court agreed and suppressed all statements and the medical records secured by the State and precluded the calling of either physician as a witness. The 3rd DCA agreed with the trial court on all matters other than the ability of the state to call Dr. Shapiro.

The DCA noted that F.S. 456.057 defines how medical records may be obtained, and created a broad physician-patient privilege of confidentiality in medical records and a patient's medical condition. There are narrowly defined situations in which the information may be disclosed, including by the patient's consent, when a compulsory medical exam has been ordered in a civil case, in any civil or criminal action upon issuance of a subpoena with proper notice to the patient or his/her legal representative; for statistical and scientific research if the identity of the patient is redacted or unless the patient consents to identity disclosure and to a regional poison control center for purposes of treating a poison episode. Sun stated that the state constitutional right to privacy protects medical records and any attempt by the government to obtain such records must meet constitutional muster. In Mullis the 2nd DCA suppressed oral statements made to a police officer over the phone because F.S. 456.057 does not bar members of the public from seeking medical information about patients but does bar healthcare providers from providing such information and that officers are not free to use their indicia of authority to pressure or cajole staff to violate the statute.

The court noted that the situation in Sun and Mullis was different than what had occurred with Dr. Shapiro. The oral representations of Dr. Shapiro did not derived from inquiries initiated by law enforcement officers, nor did police cajole Dr. Shapiro or his staff in order to secure information. It was Shapiro who initiated contact with police. Unlike the investigating officers in Sun and Mullis, the officers in the current case had no information that would have allowed them to seek consent, a search warrant or a subpoena when they approach Shapiro. There was no basis to warrant excluding Dr. Shapiro as a witness.

The DCA also found no 4th Amendment basis to suppress his testimony. Shapiro's actions did not include any form of state action so as to implicate the Fourth Amendment. Dr. Shapiro just picked up the phone and called police. The Fourth Amendment protections are not triggered by the actions of private persons however egregious they may be. (State v. Pailon, 590 A.2d 858 (R.I. 1991) citing U.S. v. Jacobsen, 466 U.S. 109 (1984) and other cases.) At footnote 5, the course observed that suppression of records is not provided for regarding evidence disclosed by a covered entity in violation of HIPAA (the federal Health Insurance Portability and Accountability Act of 1966). Fines and imprisonment, not suppression of evidence, are the HIPAA remedies. The DCA did not extend its analysis to Dr. McKnight. Once Dr. Shapiro identified Dr. McKnight as having information about

Strickling's treatment and prescription drug use, police should have conformed with the statute. Likewise, the medical records provided by Dr. Shapiro should have been obtained by Strickling's consent or by subpoena, and accordingly they remained suppressed. The DCA noted there is no "exigent circumstance" exception such as "crime in progress" to relieve police of the requirements of F.S. 456.057. The DCA refused to find that the state was acting in good faith. It affirmed the suppression of the medical records turned over to police by Dr. Shapiro, and the exclusion of Dr. McKnight's testimony. The portion of the trial court's order excluding all testimony from Dr. Shapiro was reversed.

State v. Strickling, --So.3d—(Fla. 3rd DCA, 5/13/2015, 3D14-1668)

Pre-Arrest Handcuffed Transport To Police Station Did Not Taint Confession

Transporting a person to the station for questioning can taint a subsequently obtained confession if the officers did not have probable cause for arrest at the time of the transport. In 1985 the U.S. Supreme Court reversed a Florida conviction, stating that an illegal detention occurs when police, without probable cause or warrant, forcibly remove a person from a place where he or she has a right to be and transport that person to the police station for investigation, no matter how brief that stay at the station may be. (Hayes v. Florida, transported to be fingerprinted.) This case, issued by the Third DCA, demonstrates the importance of having the probable cause to arrest even if the arrest has not been communicated at the time the person is transported.

Harvey Abraham hit an 11 year old girl with his Ford F-150 pickup truck and left the scene. A week later a detective was called by a body shop regarding a truck with front-end grill and other body damage. Parts of the broken grill left at the accident scene matched the missing pieces of the truck's grill, and fibers matching the injured girl's clothing were embedded in the truck grill. The shop owner agreed to call the truck owner to his shop and soon thereafter Abraham arrived. The detective asked Abraham if he could speak with him about a hit and run, and Abraham agreed to go with the detective to the station.

Having no "cage" in his car, the detective handcuffed Abraham for security purposes before transporting him to the station in his car's back seat. Abraham was taken to a small interrogation room, shackled to the floor, and given his *Miranda* rights. Abraham signed a written waiver form. He admitted driving the truck, knowing he had some sort of accident after he returned to the scene, but denied knowing he had hit a person until the detective told him. The detective then announced he was under arrest for leaving the scene.

Abraham moved to suppress his confession, claiming he was effectively arrested when he was handcuffed prior to being transported, continuing through being shackled in the interrogation room. He asserted that the detective had no probable cause to believe that he (Abraham) was the truck driver at the time of the accident prior to his admission and that because of this the detective had no probable cause to arrest him for the offense. The trial court denied the motion and the 3rd DCA agreed.

The DCA agreed that Abraham *was* seized for Fourth Amendment purposes prior to his arrest. However it found the detective *had adequate probable cause to support that arrest prior to his admission of being the driver.* "Prior to the seizure of the defendant, Detective Hernandez had determined that someone driving a white or gray F-150 pickup truck had struck and killed A.V. and that the driver had fled the scene of the accident without stopping. He had also determined the F-150 pickup truck in front of the garage had been the vehicle involved in the accident…." The DCA further noted that the defendant had told the body shop owner the truck was damaged after he had left it on the street and that it had been struck by another vehicle, thereby admitting he was in physical control of the vehicle on the day of the accident. Under the totality of the evidence known to the detective, he had probable cause to arrest Abraham prior to his initial transport to the police station. The conviction was affirmed. (Note: Had the DCA not found the detective had such probable cause before he transported Abraham in cuffs to the police station, the situation would have likely resulted in suppression of Abraham's confession, as per the guidance issued in Hayes.)

Abraham v. State, 155 So.3d 451 (Fla. 3d DCA 1/21/15)

Court Should Have Found Probable Cause That Funds Seized From Safety Deposit Box For Forfeiture Were From Narcotics Trafficking

Miami-Dade County appealed the trial court's finding of no probable cause with respect to a portion of its in rem forfeiture Complaint, which was filed after the required time for requesting an Adversarial Preliminary Hearing by any other party. The Complaint involved $26,474.00 in currency and the contents of a safe deposit box ($20,012.00). The trial court found no probable cause as to the contents of the safe deposit box. The Third DCA reversed the trial court.

The forfeiture proceedings arose out of a long-term narcotics investigation. As part of the investigation, an individual sold methamphetamines to undercover officers and was later arrested. After the arrest, the individual waived his *Miranda* rights and stated that he had additional narcotics at his home. The individual also gave consent to search his residence. During the search of his residence, the individual provided police with the key to a safe in his closet, which contained, among other things, three "quick count" bundles of currency, two of $10,000 — all in $100 bills — and the other of $6,000, and the key to a safe deposit box. The individual was provided with a Notice of Seizure advising of the intent to institute forfeiture proceedings against the currency found in the residence and on his person.

A search warrant was later issued for the safe deposit box. It was found to contain $20,012.00 in cash in two "quick count" bundles of $10,000 — all in $100 bills, a $10 bill and a $2 bill. Another Notice of Seizure was provided to the individual advising him of intent to institute forfeiture proceedings as to those funds. The individual was charged with trafficking and possession, but did not respond to the County's notices.

Because there was no response to the Complaint, the County's sworn allegations to those facts were the evidence before the trial court that the currency was used, attempted to be used or intended to be used in felony narcotics transactions. The County eventually filed an ex-parte motion for determination of probable cause/petition for judgment of forfeiture. The trial court issued an order finding probable cause as to the currency found in the home, but finding that the County did not have probable cause as to the contents of the safe deposit box.

The 3rd DCA noted, “As stated in *City of Coral Springs v. Forfeiture of 1997 Ford Ranger Pickup Truck*, 803 So. 2d 847 (Fla. 4th DCA 2002): The determination of probable cause involves the question of whether the information relied upon by the state is adequate and sufficiently reliable to warrant the belief by a reasonable person that a violation has occurred. This belief must be more than a mere suspicion, but can be created by less than prima facie proof. Probable cause for forfeiture may be established by circumstantial evidence, and even by hearsay evidence.”

The DCA continued in its analysis: “Section 932.701(2)(a) 1. specifically directs courts to consider the totality of the circumstances when determining probable cause in that it defines a "Contraband article" as "Any . . . currency . . . that was used, was attempted to be used, or was intended to be used in violation of any provision of chapter 893, *if the totality of the facts presented* by the state is clearly sufficient to meet the state's burden of establishing probable cause to believe that a nexus exists between the article seized and the narcotics activity, whether or not the use of the contraband article can be traced to a specific narcotics transaction." (e.s.) *Miami-Dade Police Dept. v. Forfeiture of $15,875.51*, 54 So. 3d 595, 598 (Fla. 3d DCA 2011) ("One factor alone did not rise to the level of probable cause, but the totality of the circumstances clearly established probable cause to proceed with forfeiture."), *citing State Dep't of Highway Safety & Motor Vehicles v. Holguin*, 909 So. 2d 956, 957-59 (Fla. 3d DCA 2005). *See also U.S. v. 57,500 in U.S. Currency*, No. 03-60598, 2004 U.S. Dist. LEXIS 29498, 2004 WL 3751472 (S. D. Fla. April 27, 2004) ("Proceeds of illegal activity for which the government has probable cause to seek forfeiture and that are contained in a safe deposit box, are subject to forfeiture.").”

The 3rd DCA held that the totality of the circumstances in the evidence presented to the trial court was sufficient, as a matter of law, to satisfy the requirement that there was probable cause to warrant a reasonable belief that the currency in the safe deposit box was connected to criminal activity. The Order finding no probable cause as to the contents of the safe deposit box was reversed, and the case was remanded for further proceedings consistent with the DCA’s opinion.

Miami-Dade County v. $26,474.00 in U.S. Currency, --So. 3d—(Fla. 3rd DCA, 3D15-88, 5/13/15)

Polite Police Were Still Coercive In Their Presence

In response to a BOLO stemming from a house burglary, police found a car and two persons matching the general description of the suspects and the suspects' vehicle. The car was parked about a mile from the burglary in a residential driveway. The owner of the house was on his porch talking to the defendant, Freddie Hall. Three police cars pulled up, one blocking the driveway, and several officers got out. All were wearing clothing identifying themselves as "police" and all were armed, although their guns were holstered. One officer conversed with the home owner and the other officer patted down Hall, took the car keys, and asked to search the car. Hall agreed and was cooperative throughout, although testimony indicated he was visibly upset that the police frisked him and searched the car. After two officers searched the car and found nothing, a third officer searched it again and found a small personal Taser in the console and a baggie of rock cocaine under the front seat. No evidence from the burglary was found, Hall was not charged with possession of the cocaine since there was no proof he knew of its existence. Hall was charged with possession of a weapon by a convicted felon.

The police testified at the suppression hearing that they were responding to the BOLO and looking for three jewelry boxes reported stolen in the burglary. All parties agreed it was a legitimate investigatory stop. The homeowner testified that Hall and he acquiesced to the search because the police took their IDs and car keys, had blocked the driveway, and there were at least four police cars and as many officers present. He said the officers were not rude or aggressive but that he did not feel he could leave the property, or go into his house, or refuse police requests because he did not want to aggravate the police.. The trial judge granted the motion to suppress the fruits of the search, believing that under the totality of the circumstances, a reasonable person would not have felt able to leave or refuse police requests.

The 3rd DCA agreed with the trial court. "Despite the fact that, in this instance, the police were polite and did not draw their weapons, there was nevertheless the appearance of police authority and the circumstances were coercive in nature: the police arrived in three to four vehicles, blocked the driveway, frisked both parties, took their ID and car keys, and searched the vehicle three times before finding the small Taser. Under these circumstances, the trial court made a determination that did not clearly violate any of the tests for voluntary/involuntary consent." Affirmed.

State v. Hall, --So.3d—(Fla. 3rd DCA, 3D13-1449. 8/12/15)

Other 3rd DCA Cases Of Potential Interest – "Quick Summaries"--

→ The trial court did not err in denying defendant's motion to suppress because even if a police officer did not have probable cause to arrest defendant for violation of a domestic violence injunction under F.S. 901.15(6), the arrest was nevertheless valid as it was supported by probable cause to believe defendant committed the offense of criminal mischief under F.S. 901.15(9)(b).

Hawxhurst v. State, 159 So.3d 1012 (Fla. 3rd DCA, 3/15/15)

→ The court upheld a trial court's finding of probable cause for a county to maintain a **forfeiture** action against appellants' property because the evidence presented at the adversarial preliminary hearing established probable cause that the $197,016 found in appellants' safe in their home represented proceeds from a pattern of racketeering activity; that is, the organized and ongoing scheme to purchase and sell stolen goods, and that the currency was intended for use in the course, was derived from, or was realized through that **racketeering** conduct, in violation of the Florida Contraband Forfeiture Act, F.S.S. 895.01-895.05, and was, therefore, subject to further civil forfeiture proceedings.

Marolf v. Miami-Dade County, --So.3d—(Fla. 3rd DCA, 3D14-1462, 2/11/15)

Fourth District Court of Appeals:

Vague BOLO Leads To Unsupported Stop And Evidence Suppression

Jonavon Gaines appealed his conviction for robbery with a firearm. He argued the trial court should have suppressed evidence because police lacked reasonable suspicion to support stopping and detaining him. He also challenged allowing the jury to hear an unredacted taped statement in which the detective expressed his opinion that Gaines was guilty and made references of a collateral offense. He also challenged the denial of a new trial because the bailiff had improper communications with the jury during its deliberations. The Fourth DCA reversed and remanded for a new trial based on the first two points.

After closing a convenience store in Vero Beach the victim was approached in his car by a man with a gun who demanded the store's money bag. The bag and personal items were turned over to the man who led towards the back of the store. The victim then called 911. The victim told the dispatcher that he was robbed by a "tall black guy." He reported the robber to be sixteen or seventeen years old, wearing a dark colored garment with a hood. He also indicated he had seen the robber's face and had seen the robber before when he came into the store.

Vero Beach Police Officer DeAcetis responded to the crime scene. He testified that the first BOLO merely identified the perpetrator as a black male. A short time later, based on information provided by the victim, DeAcetis relayed it to other officers by radio. This second BOLO described the perpetrator as a black male, 16 to 17 years old, short cropped hair, wearing a long-sleeved dark T-shirt. The BOLO related no information about a vehicle.

Corporal Dominguez and other officers set up a perimeter around the crime scene. About 10 minutes after setting up the perimeter, but a half hour or more after the robbery occurred, Dominguez stopped Gaines' gray van about two blocks from the store. No traffic infractions or otherwise suspicious behavior were observed by Dominguez. Gaines was stopped because he was a young black male with short cropped hair. Although Gaines was wearing a white T-shirt instead of a long-sleeved dark shirt, officer DeAcetis had explained people who have committed crimes often change clothes before they are caught.

After stopping the van, Dominguez held him until the victim could arrive for a show-up identification. The victim had already been taken to a show up involving a black man, about 30 years of age, with curly hair and a beard. He was not identified as the robber. When brought to where Gaines was being held, the victim identified him as the person who robbed him. Gaines was arrested. A backpack on the passenger's seat was searched and a handgun, dark colored clothes, and a wallet with the victim's identification and money cards were located.

A Detective interviewed Gaines after advising him of his Miranda rights. The interview was played to the jury. It included the detective confronting Gaines by telling him he had been caught with everything at a crime scene, and insisting Gaines was lying when he denied being involved. The jury found Gaines guilty. He was sentenced to 15 years, including mandatory minimum of ten years.

The 4th DCA found the BOLO description of the robbery suspect as a teenaged black male with short cropped hair was too vague and general to warrant stopping and detaining Gaines. It noted that mere suspicion is not enough to support a stop, citing Popple v. State, 626 So.2d 185 (Fla. 1993). In analyzing the insufficient basis for the stop, the Court noted Gaines was stopped ½ hour or so after the robbery, but the BOLOs had no mention of vehicle. In fact, the information was that the perpetrator fled on foot. It noted the description (young black man with short cropped hair wearing a long-sleeved dark shirt) could have fit many young black men. The Court provided several case examples where vague and overly broad descriptions were found not to support stopping or detaining subjects. The 4th DCA held the trial court erred in denying Gaines' motion to suppress as a result of the stop.

Regarding the statement provided to the detective, the Court noted that a witness's opinion to the credibility, guilt or innocence of the accused is generally inadmissible, particularly the opinion of an interrogating officer. In the case at hand, the 4th DCA found that the limited probative value of the appellant's statements was outweighed by the prejudicial effect of the detective's opinion as to Gaines'

guilt, and invaded the province of the jury to determine if what Gaines said was an admission of guilt. Since the case was reversed and remanded for a new trial with instructions to grant Gaines' motion to suppress, the Court declined to address the third appellate issue of the bailiff's communication to the jury during its deliberations.

Gaines v. State, 155 So.3d 1264 (Fla. 4th DCA, 2/11/15)

Trial Court Cannot *Sua Sponte* Dismiss State's Criminal Case (But State Must Preserve Objection To Prevail On Appeal)

The State appealed the trial court's *sua sponte* dismissal of its delinquency action because the court felt the state had not be diligent in attempting to serve C.W. with the action. The DCA was forced to affirm the trial court in this case because the state failed to preserve the correct appropriate arguments on appeal. Nevertheless, the court in "directive" dictum reminded trial judges that they cannot, without having a motion to dismiss presented to them by the defendant, dismiss the state's case.

As stated by the DCA: "… where, as here, no motion to dismiss has been filed, the trial court is without authority to dismiss a criminal prosecution *sua sponte*. State v. D.W., 821 So. 2d 1179, 1180 (Fla. 3d DCA 2002) ("The trial court may adjudicate only those issues or questions which are properly placed before the court, such as occurs when the defendant files a sworn motion to dismiss."); State v. Leon, 967 So. 2d 437 (Fla. 4th DCA 2007). Additionally, the trial court's *sua sponte* dismissal of the case encroached upon the State's discretion to prosecute. Leon, 967 So. 2d at 437. We have previously instructed that "it is the state attorney, not the trial court, who 'has complete discretion in making the decision to charge and prosecute.'" State v. W.D., 112 So. 3d 702, 704-05 (Fla. 4th DCA 2013) (quoting Cleveland v. State, 417 So.2d 653, 654 (Fla. 1982))."

Furthermore, the dismissal of criminal charges is "an action of such magnitude that resort to such a sanction *should only be had when no viable alternative exists*." Dawson v. State, 951 So. 2d 931, 933 (Fla 4th DCA 2007) (emphasis added) (quoting State v. Lowe, 398 So. 2d 962, 963 (Fla. 4th DCA 1981)). Here, because the State requested additional time to locate and serve C.W., this provided a viable alternative to dismissal, and as such, the sanction of dismissal was not the trial court's last resort in this case. Nonetheless, while the DCA agreed with the State that the trial court erred in *sua sponte* dismissing the case, because the State failed to make the appropriate arguments below, it was forced to affirm.

State v. C.W., ---So.3d --- (Fla. 4th DCA, 4D14-1320, 6/17/15)

No Legitimate Expectation Of Privacy In Photos Posted On Facebook

The 4th DCA discussed whether there is a privacy interest in photos posted on one's Facebook page in this non-criminal case. Maria Nucci sought to quash an order obtained in a civil "slip and fall" lawsuit by defendant Target Stores. The DCA denied cert, but engaged in a discourse about the lack of privacy in photos posted on social media sites (i.e. Facebook) that might be of value when seeking photos as part of a disciplinary investigation or in otherwise dealing with allegations that such photos are "private." The DCA also noted the Stored Communications Act had not impact on this matter. As stated by the 4th DCA:

> We agree with those cases concluding that, generally, the photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established. *See* Davenport v. State Farm Mutual Auto. Ins. Co., No. 3:11-cv-632-J-JBT, 2012 U.S. Dist. LEXIS 20944, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012); *see also* Patterson v. Turner Constr. Co., 88 A.D.3d 617, 931 N.Y.S.2d 311, 312 (N.Y. App. 2011) (holding that the 'postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access'). Such posted photographs are unlike medical records or communications with one's attorney, where disclosure is confined to narrow, confidential relationships. Facebook itself does not guarantee privacy. Romano v. Steelcase, Inc., 30 Misc. 3d 426, 907 N.Y.S.2d 650, 656 (N.Y. Sup. Ct. 2010). By creating a Facebook account, a user acknowledges that her personal information would be shared with others. *Id*. at 657. 'Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist.' *Id*.

> Because "information that an individual shares through social networking web-sites like Facebook may be copied and disseminated by another," the expectation that such information is private, in the traditional sense of the word, is not a reasonable one. *Beswick v. N.W. Med. Ctr., Inc*., No. 07-020592 CACE(03), 2011 WL 7005038 (Fla. 17th Cir. Ct. Nov. 3, 2011). As one federal judge has observed, 'Even had plaintiff used privacy settings that allowed only her "friends" on Facebook to see postings, she "had no justifiable expectation that h[er] 'friends' would keep h[er] profile private. . . . " *U.S. v. Meregildo*, 883 F. Supp. 2d 523, 2012 WL 3264501, at *2 (S.D.N.Y. 2012). In fact, "the wider h[er] circle of 'friends,' the more likely [her] posts would be viewed by someone [s]he never expected to see them." *Id*. Thus, as the Second Circuit has recognized, legitimate expectations of privacy may be lower in e-mails or other Internet transmissions. *U.S. v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (contrasting privacy expectation of e-mail with greater expectation of privacy of materials located on a person's computer). *Reid v. Ingerman Smith LLP*, No. CV2012-0307(ILG)(MDG), 2012 U.S. Dist. LEXIS 182439, 2012 WL 6720752, at *2 (E.D.N.Y. Dec. 27, 2012); *see also Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012) (holding that "material posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy"); *Mailhoit v. Home Depot U.S.A., Inc*., 285 F.R.D. 566, 570 (C.D. Cal. 2012) (indicating that social networking site content is neither privileged nor protected, but recognizing that party requesting discovery must make a threshold showing that such discovery is reasonably calculated to lead to admissible evidence).

The DCA continued:

> We distinguish this case from *Root v. Balfour Beatty Construction, LLC*, 132 So. 3d 867 (Fla. 2d DCA 2014). That case involved a claim filed by a mother on behalf of her three-year-old son who was struck by a vehicle. Unlike this case, where the trial court ordered the production of photographs from the plaintiff's Facebook account, the court in *Balfour* ordered the production of a much broader swath of Facebook material without any temporal limitation—postings, statuses, photos, "likes," or videos—that relate to the mother's relationships with all of her children, not just the three year old, and with "other family members, boyfriends, husbands, and/or significant others, both prior to, and following the accident." *Id*. at 869. The second district determined that "social media evidence is discoverable," but held that the ordered discovery was "overbroad" and compelled "the production of personal information . . . not relevant to" the mother's claims. *Id*. at 868, 870. The court found that this was the type of "carte blanche" irrelevant discovery the Florida Supreme Court has sought to guard against. *Id*. at 870; *Langston*, 655 So. 2d at 95 ("[W]e do not believe that a litigant is entitled *carte blanche* to irrelevant discovery.") The discovery ordered in this case is narrower in scope and, as set forth above, is calculated to lead to evidence that is admissible in court.

The DCA also rejected Nucci's claim that the Stored Communications Act, 18 U.S.C. §§ 2701-2712, has any application to the case:

> Generally, the "SCA prevents 'providers' of communication services from divulging private communications to certain entities and/or individuals." *Quon v. Arch Wireless Operating Co., Inc*., 529 F.3d 892, 900 (9th Cir. 2008), *rev'd on other grounds by City of Ontario, Cal. v. Quon*, 560 U.S. 746, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010) (citation omitted). The act does not apply to individuals who use the communications services provided. *See, e.g., Flagg v. City of Detroit*, 252 F.R.D. 346, 349 (E.D. Mich. 2008) (ruling that the SCA does not preclude civil discovery of a party's electronically stored communications which remain within the party's control even if they are maintained by a non-party service provider).

Nucci & Leon v. Target Corp., 162 So.3d 146 (Fla. 4th DCA, 4D14-138) (1/7/15)

Stopping Man Walking Out Of Residence Where Person Named In Arrest Warrant Is Thought To Reside Was Not Supported By Reasonable Suspicion

Officers were in the process of surveilling a residence in preparation of executing an arrest warrant at the residence for a man by the name of "R.Q." During the course of their surveillance, the officers saw a man exit the house wearing a full-face motorcycle helmet. The officers approached him to determine whether he was the man they were looking for, at which point the man took off his helmet and gave the officers his name, Richard Scott. The officers were unable to confirm Scott's identity in their system so Scott invited them inside the residence while he looked for his driver's license. Scott could not find his license, so he and the officers went back outside. The officers then asked him to have a seat on the porch while they tried to confirm his identity. A few minutes later, Scott walked back into the house and locked the door. Circling to the back of the house, the officers saw Scott as he exited the house, jumped a fence and fled. Fearing he was the arrest subject who was fleeing, they pursued and arrested Scott for resisting arrest without violence. The officers later determined Scott's identity could not be verified because Scott gave them a date of birth that was off by one year.

Scott argued at trial for a judgment of acquittal, claiming the encounter was consensual and that he had the right to terminate the encounter any way he wanted. The trial court denied his motion and Scott appealed. The issue reviewed by the 4th DCA was whether their stop of Scott as he fled the yard was legal. Noting that the arrest warrant provided the officers with authority to arrest the person named in it., the court said it is not a license to duck the reasonable suspicion requirement to stop someone they only have a "hunch" might be the person. The mere fact that a person is at the residence associated with a suspect with a pending arrest warrant does not in itself justify an investigative stop. The DCA reversed Scott's conviction.

Scott v. State, 150 So3d 1273 (Fla. 4th DCA, 11/26/14)

Miranda Violations Occurred But Harmless Error In Murder Trial

Lamont Davis was convicted of felony murder and sentenced to life imprisonment for his role in the 2010 killing of a young mother in Port St. Lucie, Florida. At the same trial, he also was convicted of armed burglary with a firearm causing bodily harm or death, possession of a firearm by a felon, possession of ammunition by a felon, and high-speed or wanton fleeing. The victim was shot and killed during a robbery of her home in March 2010. Investigators found two bullet casings at the scene, including one from a 10 mm round. Investigators tracked the purchase of the 10 mm ammunition to a gun shop in Port St. Lucie, Florida. Using security footage from the shop, they identified Davis and his co-defendant as the purchasers of the ammunition.

Eight days later, Davis was arrested for high speed or wanton fleeing after he sped away from a routine traffic stop and crashed his car into an apartment building, following which he fled on foot before being apprehended. Items taken from the victim's home were found in Appellant's car.

While in pretrial custody, Davis was interviewed by officers from the Port St. Lucie Police Department and an agent from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). At the beginning of the interview, the ATF agent advised Davis that the agent could not speak to him unless Davis waived his rights. Davis replied, "Well could I — Could I call my mother? I got a lawyer. Could I call them?" The agent spoke with Davis for several more minutes before an officer from the Port St. Lucie Police administered Davis *Miranda*[1] rights. Davis agreed to speak with the officers and signed a waiver form. Davis continued talking to the investigators before again asking, "Can't I call my lawyer?" Questioning nonetheless continued, and Davis eventually told officers he was involved in the robbery and murder.

Following the interrogation, detectives obtained a search warrant and executed a search of the residence of Davis's girlfriend. Additional items removed from the victim's home were found in the girlfriend's residence. Davis filed a pretrial motion to suppress his statements made during the course of the police interview. The trial court granted the motion in part and denied it in part, suppressing everything Davis said before he was read his *Miranda* rights and everything after he stated, "Can't I call my lawyer?" The motion was denied for everything between those points. Davis also moved to suppress evidence obtained from search warrants for his automobile and his girlfriend's residence and to sever his high speed fleeing charge from the other counts. The trial court denied these motions and ruled that the fleeing charge was "episodically related to the burglary because [Davis's] automobile

contained many of the items reportedly stolen during the burglary when the murder occurred."

At trial, the portion of Davis's statement that was not suppressed was entered into evidence. Among other testimony, Davis's girlfriend stated that he had planned the robbery in her presence, brought stolen goods to her home, and asked his co-conspirator why he had shot the victim. The jury also heard tapes of phone calls between Davis and his girlfriend in which he asked her to find a gun he had hidden. Davis was convicted on all counts, and appealed.

The 4th DCA held that the question "Could I call my (lawyer)?" was a clear expression of his desire for an attorney. Davis's Miranda rights were violated. However, such violations are subjected to the "harmless error" test to see if the error complained of did not contribute to a verdict otherwise. The DCA found ample evidence of Davis's guilt notwithstanding the evidence obtained by reason of the Miranda violation. Detectives already knew Davis had purchased the ammunition. The gun store clerk identified Davis in a lineup. Davis admitted he was a convicted felon and that he had fled the police. Items stolen during the robbery/killing were found in Davis's car. Other items stolen were found at Davis's girlfriend's house. Davis told detectives he heard the mother had been killed in front of her child—a fact police had not revealed to the media. Davis's girlfriend testified she observed him planning the robbery and that Davis had discussed the shooting of the victim in front of her. Police had recorded a conversation where Davis asked his girlfriend to hid the gun used in the shooting. While excluding the information illegally obtained from the search warrant affidavit left insufficient probable cause to support the warrant, the DCA found that independent evidence known to police would have inevitably provided probable cause to obtain a warrant totally independent of the Miranda violation information, so the evidence obtained in the house was allowed under the "inevitable discovery" analysis. The DCA held that any error in the admission of Davis's statements and their use in applying for a search warrant was not reversible error. No other reversible error exists to allow his convictions to be reversed.

Davis v. State, 153 So.3d 360 (Fla. 4th DCA, 12/17/14)

RICO Case Survives Challenges Related To "Interrelatedness", Use of Juvenile Offense As A Predicate Offense, and Failure To Sever Defendant From Co-Defendants In Trial

Victor Castillo appealed his convictions for racketeering and conspiracy to commit racketeering. First, he asserted that the state failed to prove interrelatedness between the predicate incidents and the criminal street gang, of which he was a member, for purposes of proving a pattern of racketeering activity and as to the conspiracy to commit racketeering. Second, as one of the predicate incidents occurred when he was a juvenile, he contended that it could not serve as a predicate incident because it was not "chargeable by indictment or information." Finally, he claimed that the court erred in failing to grant a severance of his trial from his co-defendants, because, of the more than sixty predicate incidents only three involved him, thus making the evidence of the other incidents unduly prejudicial.

Castillo was charged, along with thirteen other defendants, with racketeering and conspiracy to engage in racketeering, in violation of the Florida RICO statutes. The information alleged that appellant was part of a criminal street gang called SUR 13. Although the information listed over eighty predicate acts to form a pattern of racketeering activity, only five involved appellant. Several of his co-defendants pled guilty and agreed to testify against other members of the gang. Two of the remaining defendants were tried with him, although he moved unsuccessfully to sever his trial from theirs because of the volume of predicate acts involving the other co-defendants.

The trial lasted for a month with over 100 witnesses testifying for the state. The state showed through the testimony of its members that SUR 13 was a criminal street gang comprised of Mexicans, and that the gang had existed at least from the time that appellant joined it sometime between 1998 and 2000. Castillo, along with Ernest Campos and Jose Sanchez, were the leaders of the gang, although Campos was the primary leader and Sanchez merely approved his orders. The gang existed to commit violence and crimes, and engage in drug activity. The gang had a membership ritual of a "beat-down" of new members by other members. Once a person became a member, he was expected to commit crimes to grow the gang's reputation for violence and thus gain respect. Gang members were expected to protect other members of the gang and to stand up to the police. SUR 13 members committed acts of violence against members of several rival gangs. Members would be disciplined with violence for violating orders. When a member wanted to leave the gang, he was required to commit acts of violence

first. Some members testified that they had convictions related to drugs, acts of violence, and resisting arrest. They said that these acts were gang-related, as they were trying to develop the reputation of the gang.

Multiple members of the gang testified to Castillo's leadership role in the gang. He wore the gang's tattoos and would direct the commission of crimes. He also committed crimes, including drug crimes. Several witnesses testified to his possession of guns and his use of them in shootings, although those were not the RICO predicate acts charged against him. Much of the evidence presented was directed at predicate acts of the other defendants. These consisted of murders, attempted murders and other shootings, drug trade, arson, and other crimes which Castillo claimed had nothing to do with him. Nevertheless, there was testimony that some of those crimes were done at his direction or with his knowledge. Further, there was substantial evidence that these predicate acts, or at least many of them, were committed in order to increase the gang's reputation, particularly with other gangs.

The specific predicate acts charged against Castillo, which the jury found that he committed, were: (1) resisting arrest without violence on July 9, 2000; (2) possession of cocaine; and (3) battery. He was also charged with petit theft and conspiracy to commit first degree murder, but the jury did not find that he committed these predicate acts.[6] The jury found appellant guilty of racketeering, concluding that the state had proved three predicate acts: resisting arrest, possession of cocaine, and battery. The judge convicted him and sentenced him to thirty years imprisonment for racketeering and fifteen years for conspiracy, to be served consecutively. He appealed his conviction.

The 4th DCA noted the purpose of the RICO statute was to punish those who engaged in a pattern of criminal activity, it also noted that a "criminal street gang" was within the definition of a criminal "enterprise" under the Florida RICO statute (see: F.S. 895.02(3) and F.S. 874.03). It noted that "racketeering activity" included obstruction of justice pursuant to Chapter 843, battery under Chapter 784, and drug offenses under Chapter 893.

The DCA noted that a "[p]attern of racketeering activity" is defined in F.S. 895.02(4) as:

> …engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incident occurred within 5 years after a prior incident of racketeering conduct.

The DCA referred to the Florida Supreme Court's Gross v. State, 765 So.2d 39 (Fla. 2000) in determining what is an "enterprise": "In order to prove an enterprise, the State need only establish two elements: (1) an ongoing organization, formal or informal, with a common purpose of engaging in a course of conduct, which (2) functions as a continuing unit." Moreover, the DCA noted the Legislature included a "criminal gang" within the definition of enterprise. Such an enterprise, by statutory definition, is simply a group which has as its primary purpose the commission of criminal or delinquent acts—like SUR 13. The evidence presented showed that SUR 13 was indeed a criminal gang, with identifying symbols and rituals, whose purpose was to increase its reputation by committing crimes and violent acts, protecting its members, and standing up to the police.

Interrelatedness Argument: Castillo argued his criminal behavior actions were isolated incidents and lacked any interrelatedness to the gang or its RICO criminality. The DCA disagreed. One of the predicate acts that the jury found that Castillo committed was resisting an officer without violence. This

[6] The first predicate act, of resisting arrest, occurred after an officer spotted appellant in a bar from which appellant had previously been issued a trespass warning. He began making a disturbance and was asked to leave. He took a fighting stance toward the officer at the bar and started to come at the officer, who then pepper sprayed him. He was arrested for resisting arrest without violence. After the arrest, the officer identified him as being a member of a gang and observed a gang tattoo on his neck. The other two predicate acts occurred during an incident at a night club. The appellant was at a bar with another one of the leaders of SUR 13. The victim was in the bathroom when appellant attacked him with a bottle, as did two other individuals with appellant. The victim was taken to the hospital, and when an officer arrested appellant, cocaine was found on him.

occurred in 2000 at a bar from which he had previously been ordered to leave. Castillo disobeyed the officer's order to leave by taking an aggressive stance toward the officer. The officer did not testify that there were any other gang members around, nor did he say that appellant voiced his resistance by reference to his gang. The officer noticed that appellant belonged to a gang after the arrest when he observed appellant's tattoo.

The DCA noted that two views can be taken of this act. It could have been an isolated incident and was not in furtherance of any gang activity, because there was no connection to the gang, other than appellant's tattoo. On the other hand, gang members were supposed to stand up to the police, and others testified that they too had been charged with resisting arrest and considered it gang-related activity. Because of the broad definition of "criminal gang" in the statute, the gang's purpose to commit criminal acts, and in light of the testimony of the other gang members regarding resisting arrest, the DCA concluded that the resisting arrest charge could be considered a predicate act for a RICO conviction.

Juvenile Offenses Argument: Castillo argued it was improper to use juvenile offenses as "predicate acts." The DCA disagreed. The RICO statute focuses on the conduct proscribed, not the individual. Castillo was not being charged with the crimes committed while he was a juvenile; these were simply the predicate acts. In 2007 when the indictment was filed, the crime of resisting arrest was "chargeable" by information or indictment. Therefore, it would qualify as a predicate act. Moreover, the Legislature clearly intended to include within the ambit of F.S. 895.02, juvenile delinquent acts committed by criminal gang members, as in 2007 it defined a "criminal street gang" as group whose primary activities were "the commission of criminal or **delinquent** acts[.]" F.S.874.03, (emphasis supplied).

Failure To Sever Trial From Co-Defendants' Trial: The DCA also found this argument without merit. In essence, Castillo was claiming "spillover" prejudice from the numerous predicate acts in which he had no direct involvement. In *U.S. v DiNome*, 954 F.2d 839, 843 (2d Cir. 1992), the court said of such a claim:

> [T]he government must prove an enterprise and a pattern of racketeering activity as elements of a RICO violation. 18 U.S.C. § 1962(c). Proof of these elements may well entail evidence of numerous criminal acts by a variety of persons, and each defendant in a RICO case may reasonably claim no direct participation in some of those acts. Nevertheless, evidence of those acts is relevant to the RICO charges against each defendant, and the claim that separate trials would eliminate the so-called spillover prejudice is at least overstated if not entirely meritless.

The DCA noted, that, just as in the RICO trial in *DiNome*, evidence of the various criminal activities was relevant to the RICO charges against each appellant because it tended to prove both the existence and nature of the RICO enterprise and a pattern of racketeering activity on the part of each defendant by providing the requisite relationship and continuity of illegal activities. Applying that reasoning to the current case, the DCA found that the predicate acts against other members were necessary to explain the nature of the gang and its purpose as well as the continuity of the illegal activities. Castillo's convictions and sentences were affirmed.

Castillo v. State, 170 So.3d 112 (Fla. 4th DCA, 4D12-1584, 7/1/2015)

Editor's note: The Castillo case provides an excellent analysis of key aspects of Florida's RICO law. Those dealing with RICO investigations will benefit from reviewing the court's discussion.

Loud and Abusive Language Is Not Disorderly Conduct And Is Not A Predicate To Support Resisting Without Violence Charge

Two officers were dispatched to a disturbance. Arriving, they found 20-30 juveniles who as a group according to one officer were "exhibiting hand gestures, aggressive behavior" and were screaming obscenities and "cursing across the street." Most of the juveniles fled when the officers arrived but the remaining juveniles were directed by one of the officers to sit on the ground while he conducted an investigation. S.S. refused to sit and started to walk away. An officer grabbed her by her left bicep and attended to direct her to the ground. She pulled away and continued to walk away. The officer grabbed her again, and she shoved the officer and attempted to punch him. The officer gained control over

S.S. and placed her on the ground where she continued to resist. S.S. was charged with resisting arrest without violence.

At trial, the arresting officer admitted he did not see S.S. do anything criminal other than yelling, screaming and cursing that made up the general disturbance. Finding that the officers were investigating conduct that could affect the peace and quiet of persons of who may witness them (quoting part of F.S. 877.03, Disorderly Conduct) the trial judge found S.S. guilty.

On appeal, the 4th DCA disagreed. It held that the officer was not engaged in the execution of a lawful duty when S.S. pulled away from him, shoved and attempted to punch him. Normally mere words do not form the basis of a disorderly conduct charge, as they are protected under the First Amendment. The defendant "may have been loud and profane, but the record was devoid that her words incited or were inclined to incite others to breach the peace, or posed an imminent danger to others." The DCA continued by noting that "although the defendant told the officer to 'go to hell'" the language did not justify detention of S.S.

Note: In considering disorderly conduct charges, officers should remember that speech alone generally will not support the charge. For words alone to support a charge of disorderly conduct those words must result in or present a substantial likelihood of actionable conduct. Words causing others to take illegal actions or words coupled by the defendant's own illegal actions will justify a disorderly conduct charge. Evidence that the defendant somehow physically interfered with an officer's attempt to conduct a lawful duty is a basis for a potential "resisting" charge. In short, both "disorderly" and "resisting" offenses must involve some sort of conduct and more than simply words alone.

S.S., a child v. State, 154 So.3d 1217 (Fla. 4th DCA, 1/21/15)

Evidence Not Sufficient To Sustain "Principal" Elderly Exploitation Conviction

Tyrone Javellana appealed his conviction for financial exploitation of an elderly person or disabled adult, arguing that his motion for judgment of acquittal should have been granted. The 4th DCA agreed and reversed his conviction.

The evidence at trial showed that the defendant and his wife, who was a co-defendant, were well acquainted with Mary Teris, an elderly woman with a vast financial estate. The defendant's wife worked at an investment firm and she began assisting with Teris' account in the early 1980s. In 1996, Teris executed a will, a special needs trust, and a revocable trust. The estate plan focused on the long-term care of Teris' adult sons, who were not capable of independent living. Beginning in 2008, Teris made multiple amendments to the estate documents, under the advice of a different attorney than the one who had drafted the original documents. The successor attorney testified he considered himself a "good friend" of the defendant's wife, who referred him business and also referred Teris to him "to review her trust and make some changes." The documents were amended. Ultimately, the defendant and his wife were residual beneficiaries of the estate. The defendant and his wife served as witnesses to Teris' execution of some of the amendments, and at some point in time, his wife became aware of the substance of the amendments. However, there was no evidence that the defendant, who also chauffeured Teris on errands, had any knowledge of a plan to exploit the victim. As for Teris' mental capacity at the time she executed the amendments to her estate documents, there was conflicting evidence before the jury.

To convict under a principals theory, the State is required to prove that the defendant had a conscious intent that the criminal act be done and . . . the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually commit or attempt to commit the crime. (See: *Hall v. State*, 100 So. 3d 288, 289 (Fla. 4th DCA 2012). The DCA noted that guilt as a principal may be established by circumstantial evidence, "but such evidence must be both consistent with guilt and inconsistent with any reasonable hypothesis of innocence; evidence which establishes nothing more than a suspicion, or even probability, of guilt is not sufficient." (Citing *K.O. v. State*, 673 So. 2d 47, 48 (Fla. 4th DCA 1995)).

The state points to the following evidence of its allegations that the defendant aided and abetted his wife's exploitation of Teris: 1) that the defendant had a long-standing relationship with Teris and should have known she was incapacitated, 2) that he drove Teris to the attorney's office, where she executed

the estate document amendments that were favorable to him, 3) that he and his wife waited until Teris had severe dementia to have the attorney draft the amendments, and 4) that two weeks after they were given power of attorney, they used the health care surrogate document to arrange for a mental health physician to conduct a "court-ordered" mental competency evaluation of Teris when in fact there was no such court order. The 4th DCA found the evidence was insufficient to allow the jury to infer that Tyrone aided and abetted or otherwise willingly participated in any such exploitation. The state pointed to no evidence establishing that the defendant was ever aware that Teris was amending her estate documents to benefit the defendant and his wife. There was no evidence that the defendant was involved in arranging the appointment for a court-ordered mental competency evaluation or that the defendant even spoke to his wife about Teris' estate. There was simply no evidence that the defendant knew anything about Teris' estate or of any plan by his wife to exploit Teris; thus, there was no evidence of his conscious intent that the crime be committed. The web of circumstantial evidence introduced against the defendant did not refute the obvious hypothesis of innocence—that the defendant was simply helping Teris, someone he knew for many years, by serving as her occasional driver and witnessing the execution of document revisions at the office of Teris' attorney. Tyrone's conviction was reversed, and case was remanded to the trial court with an order to discharge Tyrone.

Javellana v. State, --So.3d—(Fla. 4th DCA, 4D13-1952, 6/24/15)

Officer Did Not Have Reasonable Basis To Stop and Question Juvenile For Truancy. Subsequently Discovered Marijuana Should Have Been Suppressed.

A West Palm Beach police officer testified that while patrolling in his vehicle on a school day around 8:15 in the morning, he observed J.R. at 47th Street and Broadway walking away from his bus stop with another juvenile. The officer knew J.R. because of previous encounters with him. He knew that J.R., a fifteen-year old, attended school and that his bus stop was at 50th Street and Manning, five blocks away. The officer watched J.R. with his binoculars and saw him walk up to a residence that he knew was not J.R.'s. Because the officer's view was obstructed, he could not see whether J.R. entered the residence, but he saw his companion wait on the street until J.R. joined him a few moments later. The two then continued walking east. The officer stopped J.R. at 47th and Spruce. J.R., a minor, was holding a package of cigars. The officer asked him "why he had left the bus stop prior to the bus arriving." J.R. told him that he was walking towards the bus stop, but the officer stated that this was inconsistent with what he observed. The officer took the cigars from J.R. and patted him down for protection. The officer felt in J.R.'s pocket what he believed to be a closed buck knife. As he pulled it from his pocket he also grabbed felt to him to be a "nickel bag" amount of marijuana (about a half gram) in a zip lock bag. The officer took J.R. into custody and placed him in the back of his patrol car. J.R. asked the officer if he was under arrest, whether the officer was taking him home or to the Juvenile Assessment Center, and why he stopped him. The officer explained that he saw him walking up to a house away from the bus stop and he did not know what he was doing. J.R. responded that he bought weed at the house. He added that he and his friend were going to smoke the marijuana instead of going to school.

On cross-examination, the officer testified that although the officer was not sure of the exact time when school started, he conceded that school could have started at 9:30 a.m. J.R .argued that the evidence and his statements should be suppressed because there was no reasonable basis to stop him for truancy when he was not yet "absent" from school. In addition, he argued that there was no justification for the pat down that led to discovery of the marijuana. The trial court denied J.R.'s motion to suppress. After trial, the court found J.R. guilty of possession of marijuana, less than twenty grams, withheld adjudication of delinquency, and placed him on probation. J.R. appealed.

The 4th DCA determined that the officer initiated a stop of a juvenile for truancy without reasonable grounds to believe that the child was absent from school. Although the officer may have believed that J.R. was planning to miss school based on his observations of J.R.'s movements and location before school started, F.S. 984.13 does not authorize an officer to preemptively detain a child who may be plotting to skip school later. [7] Here, the officer detained the juvenile for truancy well over an hour

[7] F.S. 984.13(1)(a), Florida Statutes (2013), states in relevant part: (1) A child may be taken into custody:
. . . .
(b) By a law enforcement officer when the officer has reasonable grounds to believe that *the child is absent* from school without authorization or is suspended or expelled and is not in the presence of his or her parent or legal guardian, for the purpose of delivering the child without unreasonable delay to the appropriate school system site. (Emphasis added.)

before school was scheduled to start. J.R. could not have been "absent" from school before it began or was scheduled to begin. Moreover, merely missing the bus could not be considered truancy where, as in this case, the officer did not know whether J.R. had already missed the bus, or whether he could have taken a bus at one of the multiple bus stops in the area or relied on some other means of getting to school that day.

The state relied on *K.A.C. v. State*, 707 So. 2d 1175 (Fla. 3d DCA 1998) to argue that a law enforcement officer may take custody of a child if the officer has reasonable suspicion that the child is simply planning on being truant. However, the 4th DCA found the state's reliance on *K.A.C*. was misplaced. There, the Third District concluded that police officers had a well-founded suspicion that K.A.C. was truant when they observed him walking away from the school while all of the other children were walking toward school. Although the state argues an inference can be drawn that school had not yet started because children were walking towards school at the time, the opinion does not specify the time of day when K.A.C. was stopped or reveal whether school was already in session.

Because the officer in this case did not possess the requisite reasonable grounds to believe that J.R. was truant when he stopped and detained him, and did not describe any circumstances or behavior on the part of J.R. to justify the pat down, the trial court should have suppressed the marijuana and incriminating statements resulting from the unlawful search and seizure as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

J.R. v. State, 149 So.3d 1196 (Fla. 4th DCA 11/5/2014)

Service Under F.S. 48.031(6) At A "Virtual Business" Location Was Not Valid

Tamas Krisztian the defendant in a subrogation action, appealed a default final judgment and an order denying his motion to quash service of process. The Fourth DCA agreed and quashed the service. State Farm Mutual Insurance, as subrogee of its insured, filed suit against the defendant, regarding an auto accident. The defendant admits that State Farm repeatedly attempted, but failed, to personally serve him with process from September 11, 2008, until August 18, 2011, at multiple locations.

On August 18, 2011, State Farm effectuated substitute service on the defendant by delivering the third pluries summons and complaint at a Hollywood address to Elena Kaira as co-resident. The return of service stated that the Hollywood address was the defendant's usual place of abode. On September 22, 2011, State Farm moved for a clerk's default against the defendant, which the clerk's office entered. Upon State Farm's motion, the court granted a final judgment against the defendant. On December 21, 2011, the defendant moved to quash service of process and set aside the default final judgment. He argued the Hollywood address was not his usual place of abode. On July 23, 2012, the court granted the defendant's motions and set aside the judgment.

On October 24, 2012, State Farm served the defendant through a process server at a different Hollywood business address. The process server effectuated "designated" service by giving a copy of the summons and complaint to a person "who stated that he/she was the designated person to accept service on the within named subject's behalf in their absence, and informed said person of the contents therein in compliance with state statutes." The return of service also stated that she "said she has been authorized by [the defendant] to accept—she also called him." On June 11, 2013, State Farm again moved for a default and final judgment. On January 28, 2014, the defendant again moved to quash service of process. He alleged that the new Hollywood address was a "virtual business office for numerous companies that use the workplace on a flexible contract basis." He also alleged that it was not his usual place of abode F.S. 48.031[8].

State Farm filed an affidavit attesting that it made a diligent search and inquiry to discover the defendant's residence. The affidavit described the history of State Farm's search for the defendant,

[8] F.S. 48.031(6) provides:" If the *only address for a person to be served, which is discoverable through public records, is a private mailbox*, substitute service may be made by leaving a copy of the process with the person in charge of the private mailbox, but only if the process server determines that the person to be served maintains a mailbox at that location." (Emphasis added). "Private mailbox" is not defined in the Section.

alleging that the defendant had concealed himself to avoid service of process. The court ordered a special set hearing on the defendant's motion to quash and State Farm's motion for default and final judgment. The court's order indicated that copies were furnished by e-service to attorneys, including defendant's counsel. Neither the defendant nor his counsel appeared at the hearing.

The court denied the defendant's motion to quash service, finding the October 24, 2012 service was proper under F.S. 48.031(6). The court found that the address served constituted a private mailbox and that State Farm had complied with the statutory requirements by showing that the only address discoverable for the defendant through the public records is the private mailbox address. The Court also found upon the entirety of the record that the Motion to Quash should be denied.
The court entered a default and final judgment against the defendant for $166,724. The defendant appealed to the DCA.

The defendant argued State Farm had failed to meet its burden to strictly comply with the statutory requirements for substitute service. He asserted that substitute service was not properly made on him at a private mailbox pursuant to F.S. 48.031(6), because the Hollywood office was not the only address discoverable and the process server failed to determine that the person who received service was in charge of his mailbox.

The 4th DCA relied on a previous case: Here, private mailbox service pursuant to section 48.031(6), Florida Statutes (2008) was not an appropriate method of substitute service on the Defendants because the Plaintiff did not prove that the only address for the Defendants, which was discoverable through public records, was a private mailbox. The record reflects that the Plaintiff discovered at least one address through public records at which to serve the Defendants, and unsuccessfully attempted to serve them at that address. (Beckley v. Best Restorations, Inc., 13 So. 3d 125 (Fla. 4th DCA 2009)).

It found that State Farm also had not met the requirements of F.S. 48.031(6): "The trial court found that the Hollywood address was the only address discoverable through public records, but the evidence is contrary to this finding. State Farm's affidavit of diligent search listed multiple addresses where the process server attempted service. Although State Farm unsuccessfully attempted to serve the defendant at the other addresses, that is insufficient to invoke service under section 48.031(6)." The DCA indicated the trial court erred in denying defendant's motion to quash. Reversed and remanded.

Krisztian v. State Farm Mutual, --So.3d.-- (Fla. 4th DCA, 4D14-892, 7/22/15)

Patrol Officer's Illegal Search Of Suspected Residential Grow House Was Sufficiently Separated From Detective's Own Investigation And Basis For Warrant

Carlos Luna's neighbor —characterized by the Fourth DCA as a "citizen informant"-- called the police to inform them that she suspected that drugs were being grown in Luna's house. A road patrol officer was dispatched to the location. After speaking with the neighbor, the officer approached the home. He went around the side of the home and peeked in a window. He observed no furniture, and it appeared that the house was empty. He also looked at the electric meter which was turning "fast." He provided this information to his superiors in an email. As a result, a detective in the narcotics unit was assigned to investigate.

Four days later, the detective went to the house. Upon approaching the front door, he experienced an overwhelming smell of marijuana, along with the sound of oscillating fans and water pumps inside the house, which he believed from his experience to be evidence of a "grow operation." The detective then applied for a search warrant for the home. His affidavit omitted the facts of the first encounter by the road patrol officer, although the affidavit did include the information regarding the neighbor's report. The magistrate issued the warrant.

Two days later, officers continued their surveillance of the home and saw Luna leaving the house. He was stopped, and the officers smelled marijuana, leading to his arrest. The officers then executed the search warrant, finding marijuana plants and cultivation equipment, as well as documents tying appellant to the operation.

Luna moved to suppress the seized property, contending that the detective's affidavit used to obtain the search warrant omitted material information of the original illegal search of the property. The trial

court held a hearing at which the narcotics detective testified that he had based his investigation on the neighbor's tip and did not consider the information from the road patrol officer. The trial court found that the omissions in the affidavit were not material. Even though the road patrol officer's activities were an illegal search because of the entry onto the property without any exigent circumstances, there was a clear and unequivocal break between the illegal activity and the issuance of the search warrant due to the narcotics detective's separate and independent investigation. After the denial of the motion, appellant pled to the charges, reserving his right to appeal this dispositive issue.

The 4th DCA agreed with the trial court. The DCA found that the illegal conduct of the road patrol officer was not the "but for" cause of the discovery of the evidence. The tip by the neighbor is what drew law enforcement's attention to the house. Therefore, even had the information from the road patrol officer been included in the affidavit, the illegality of the officer's entry onto the land would not have prevented the issuance of the search warrant. The DCA held that the omission did not compromise the remainder of the information which led the court to issue the warrant. Conviction and sentence affirmed.

Luna v. State, 154 So.3d 1181 (Fla. 4th DCA, 1/7/15)

Officer's Seizure of Baggie Of Marijuana Was Improperly Based On An Educated Hunch Rather Than Tactile-Based "Plain Feel" Exception

Law enforcement received a call regarding a stolen vehicle. When that vehicle ultimately was located in a parking lot, defendant "G.M." was seated in the passenger seat. Officers approached the vehicle, and both G.M. and the driver were ordered out of the car. Because he was in a stolen vehicle, the officers handcuffed G.M. and performed a weapons pat-down for officer safety before placing him in the back of a patrol car.

The officer performing the pat down felt a baggie in G.M.'s pocket, with a plant-like material in it. The officer testified he believed the contents to be plant material, but indicated he "had no clue what type of plant" it might be. He also indicated he did not squeeze the baggie nor did he manipulate it in any way. He stated that based on his training and experience, he believed it was marijuana and pulled the baggie out of G.M.'s pocket.

On cross exam the officer admitted he saw no bulges in G.M.'s clothes. He indicated G.M. said nothing suggesting he might be armed. He admitted that G.M. was just sitting in the passenger's seat when he ordered G.M. out of the car. He indicated that when G.M. exited, he saw no bulges in his clothes or other indication he might be armed other than the fact "that he was sitting—sitting in a stolen vehicle." The trial court denied G.M.'s motion to suppress and G.M. was convicted of possession of marijuana. He appealed.

The 4th DCA found that the officer had justification to handcuff G.M., pat him down for a weapon, and to place him in the patrol car. However, the baggie was not a weapon so justification for its seizure absent probable cause to believe G.M. was possessing drugs was the "plain feel" doctrine. In this case the DCA noted the officer admitted that he had "no clue what type of plant it was at the time," and, only claimed that he thought it was marijuana based on his "training and experience." There was no testimony that by plain feel the officer was able to develop anything more than an inkling that the bag he felt in appellant's pocket, which did not create a bulge in the clothing, would contain contraband. In other words, the officer's perception that the material in the plastic bag was contraband did not come as a result of his tactile perception, but from an educated hunch based upon the plain feel of the object. Thus the pat-down itself was justified, but the seizure of the baggie, based only on the officer's educated hunch was not. The decision not to suppress the marijuana was reversed as was G.M.'s conviction. Remanded.

G.M. v. State, --So.3d—(Fla. 4th DCA, 4D14-969, 8/12/15)

BOLO Description Of Car And Tag Number Still Valid Basis For Investigative Stop 40 Days Later

An intruder entered the victim's home and fled in a getaway vehicle parked across the street after encountering the victim. The victim described the vehicle to the police as a metallic gold older model Buick or Oldsmobile with Florida license plate AUK509. A BOLO was issued on the day of the incident. Forty days later, the detective assigned to the case stopped a vehicle driven by Tucker, believing the

vehicle matched the description given by the victim. The vehicle was a gold 1993 Chevy Lumina with Florida license plate AUKQ59. Tucker was ultimately charged with burglary and driving while license suspended or revoked. He challenged the basis of the stop, arguing the passage of 40 days made the BOLO information "stale." The trial court denied his motion. He pled nolo and appealed.

The 4th DCA agreed with the trial court that the detective had a reasonable suspicion to stop appellant's vehicle based on the license plate together with the distinctive color and older age of the vehicle. Although the vehicle description was forty days old, it was not stale. "The mere lapse of substantial amounts of time is not controlling of a question of staleness. Staleness is to be evaluated in light of the particular facts of the case and the nature of the criminal activity and property sought." *Brachlow v. State*, 907 So. 2d 626, 629 (Fla. 4th DCA 2005) (citation omitted). Items which are consumable, such as drugs, are more likely to become stale sooner than non-consumable items, which do not have the same staleness concerns. *State v. Felix*, 942 So. 2d 5, 9-10 (Fla. 5th DCA 2006); Wayne R. LaFave, 2 Search & Seizure § 3.7(a) (5th ed. 2014). As the present case involves a non-consumable item, staleness concerns were not present. *See Brachlow*, 907 So. 2d at 629 (finding information gained four years earlier that defendant possessed videotapes of pornography was not stale because "videotapes, unlike drugs, are non-consumable items" and "it is more reasonable to assume that such an item will still be present in a defendant's house even after a substantial passage of time"); *State v. Leyva*, 599 So. 2d 691 (Fla. 3d DCA 1992) (holding four- to five-week-old knowledge that a defendant's driver's license was suspended was not stale and provided the officer with the reasonable suspicion to make a valid stop); *see also United States v. Marxen*, 410 F.3d 326 (6th Cir. 2005).

Tucker v. State, --So.3d—(Fla. 4th DCA, 4D13-4508, 8/19/15)

Other 4th DCA Cases Of Potential Interest – "Quick Summaries"--

→RICO charge falls because only one predicate act proven. The trial evidence demonstrated defendant's and his group's involvement in just one predicate act, mail or wire fraud. Since the State's evidence failed to prove defendant's involvement in two or more predicate acts, the trial court should have granted a motion for judgment of acquittal on the racketeering charge, under F.S. 895.03(3) (2003), of the **RICO** (Racketeer Influenced and Corrupt Organization) Act, F.S.S. 895.01-895.06, (2003). However, **Conspiracy to RICO** and Scheme To Defraud charges survive. Defendant was engaged in the scheme to defraud because he must have known that selling illegally obtained drugs to a drug wholesale business would eventually result in the sale of the drugs to consumers. Thus, there was evidence from which the jury could have concluded that he intended that mail and wire fraud would be committed during the course of the enterprise to further its goals for conspiracy. The RICO conviction was reversed, but the convictions for conspiracy to commit RICO and organized scheme to defraud were affirmed.

De La Osa v. State, 158 So.3d 712 (Fla. 4th DCA, 2/18/15)

→ **Inevitable discovery.** The DCA affirmed defendant's conviction for sexual battery, and the trial court did not err in denying his motion to suppress DNA evidence obtained pursuant to a search warrant because while the affidavit contained several misleading statements, the DNA evidence recovered from the crime scene was matched to defendant from the nationwide registry and would have eventually been discovered, even if he had not otherwise been a suspect. The court further held that given the totality of information contained in the affidavit, the established inconsistencies, even if excised, were not sufficient to negate the magistrate's probable cause finding.

Murray v. State, 155 So.3d 1210 (Fla. 4th DCA, 1/14/15)

The DCA engaged in a lengthy analysis for each of the below issues and ultimately found:

- → F.S. 790.053, which generally **prohibits the open carrying of firearms, is constitutional**.
- → The exceptions to the prohibition against open carry constitute affirmative defenses to a prosecution for a charge of open carry.
- → There is no need to address whether the "brief and open display" exception unconstitutionally infects the open carry law by its vagueness because under the facts of the case this exception did not apply to the Defendant.

Norman v. State, 159 So.3d. 205 (Fla. 4th DCA, 2/18/15)

→ Police had reasonable suspicion to stop defendant's vehicle because, within six minutes of receiving a "be on the lookout" **(BOLO) alert,** an officer saw defendant's vehicle, which matched the BOLO description, traveling on the only road of escape from the location of the burglary, the source of the BOLO information was the burglary victim, and the officer observed additional suspicious activity, including defendant circling a neighborhood, cutting in front of a vehicle to make a turn, and then driving evasively; thus, evidence seized during the stop did not warrant suppression.

State v. Jemison, --So.3d—(Fla. 4th DCA, 4D14-2497, 8/12/15)

→ After receiving a "BOLO" call from another officer related to a female riding a scooter, a Palm Beach County Sheriff's Office Deputy observed Baden riding a scooter, at approximately 2:00 a.m., on a designated roadside parking area alongside a sidewalk. Ultimately Baden was **arrested for DUI**. The Deputy testified that as Baden rode the scooter, the front tire of the scooter kept hitting and bouncing off the curb. The Deputy also noticed that there was a pedestrian walking on the sidewalk next to Baden to whom the latter was talking as she was riding the scooter. Each time Baden hit the curb, the pedestrian would flinch and step further away. The Deputy became concerned about Baden's ability to drive due to the number of times that the scooter was hitting the sidewalk and her failure to look where she was going as she continued to talk to the pedestrian next to her. The Deputy further testified to being afraid she was either going to enter the sidewalk and strike the pedestrian or run into the rear of a vehicle parked approximately twenty-five to thirty feet ahead in her lane of travel. The Deputy effected a stop with his patrol car lights, and Baden stopped her scooter. Deputy observed Baden "still wobbling back and forth on the scooter." The Deputy inquired whether she was all right, but received no response. A fellow officer who arrived on the scene after Baden had been stopped detected a "strong smell of an unknown alcoholic substance emitting from" her and that she had bloodshot glassy eyes and her speech was slurred, prompting the officer to call a third officer to conduct a DUI investigation. The trial court denied her motion to suppress and after pleading nolo, Baden appealed. The DCA upheld the trial court's determination that the **Deputy had a basis to stop** Baden, after seeing numerous traffic violations, and behavior consistent with driving under the influence.

Baden v. State, --So.3d—(Fla.4th DCA, 4D14-1893, 8/19/15)

→ **Tossing evidence onto a road in the daytime in full view of police officers does not support the charge of "Tampering With Evidence"** under F.S. 918.13(1)(a). In contrast, discarding items so that they could not be retrieved (e.g. swallowing evidence) could support the charge. (See: Obas v. State, 935 So.2d 38 (Fla. 4th DCA 2006)).

Hataway v. State, --So.3d—(Fla. 4th DCA, 4D-13-4622, 7/22/15)

Fifth District Court of Appeals:

Information From Face-To-Face Anonymous Tipster Whose Identity Was Ascertainable Supported Detention, Which Led To Search And Discovery Of Drugs Forming Basis For Arrest

After receiving a tip that Paul Jenkins had traveled from North Carolina to the Roadway Inn in Apopka to purchase and distribute pills and confirming from the motel manager that Jenkins was staying there, police contacted Jenkins. He agreed to cooperate with police, consented to a search of his room that resulted in the discovery of illegal pills. During the search, Jenkins informed the Orange County deputies that he had just received a text from someone whom Jenkins had previously paid $200 for 30 Oxymorphone pills. He explained that a white male named "Gary" would be delivering the pills in about 10 minutes and that he would be driving an older model, white 4 x 4 Dodge pickup truck with an Alabama license plate.

The deputies set up surveillance and about 10 minutes later an older model white 4 x 4 Dodge pickup with an Alabama license plate, driven by a white male, pulled into the motel's lot. The surveillance team made contact with the truck's driver and secured him ("for the deputies' safety to make sure he did not have any weapons"). The driver was identified as Gary Bullock. He was told he was stopped because they suspected he was possessing illegal narcotics. Bullock immediately admitted he was delivering pills to the motel and indicated where they were in his truck. The truck was searched and 31 Oxymorphone pills, drug paraphernalia and a misdemeanor amount of marijuana was seized.

The trial court suppressed the evidence, ruling that Jenkins was an untested confidential informant who was previously unknown to the deputies, had no agreement to cooperate, gave a description of the vehicle but no specific description of Bullock, and since simply driving into a motel parking lot did not distinguish Bullock for any other patron.

The Fifth DCA disagreed with the trial court. It noted there are three types of police encounters with citizens: (1) consensual; (2) investigatory stop; and (3) an arrest. An investigatory stop requires a well-founded, articulable suspicion of criminal activity. Terry v. Ohio, 392 U.S. 1 (1968). The DCA quoted a First DCA opinion, Berry v. State, 86 So. 3d 595 (Fla. 1st DCA 2012) in describing the spectrum of reliability of tips. As noted in Berry, that spectrum ranges from the "anonymous, unknown tipsters whose assertions of criminal activity typically cannot be verified and thus require independent corroboration" to the relatively high reliability of a tip from the "citizen-informer crime victim whose motivation in reporting illegality is the promotion of justice and public safety rather than financial gain, and who can be held accountable for the accuracy of the information given." (Citations omitted.) It noted that between these types of tips are the face-to-face anonymous tipster whose identity cannot be ascertained; the face-to-face anonymous tipster whose identity is ascertainable, and the paid informant, among others. The Fifth DCA deemed Jenkins to be essentially a face-to-face anonymous tipster whose identity was ascertainable.

Law enforcement was required to corroborate Jenkins' information to have a basis for an investigatory stop and the DCA found there was sufficient corroboration. Jenkins informed law enforcement of the basis of his knowledge. He showed the deputies the text message. He provided a detailed description of the truck and was accurate in estimating the time of the driver's arrival. The information Jenkins provided was verified when Bullock arrived in the vehicle as described at the time as estimated. While admitting Jenkins may have been "at the lower end of the spectrum of reliability," the court found that the deputies sufficiently corroborated Jenkins' information, and had the requisite reasonable suspicion to justify the stop of Bullock.

Once stopped, Bullock confirmed the presence of pills in his truck, which provided probable cause for the warrantless search. Once the pills were discovered, probable cause for Bullock's arrest was established. The DCA reversed the trial court's suppression of the evidence and remanded for further proceedings.

State v. Bullock, --So.3d -- (Fla. 5th DCA 5/1/2015) 5D14-2164; 40 FLW D 1024.

Forfeiture Of Property Valued Between $238,000 And $295,000 Was Excessive When Maximum Fine For Marijuana-Related Offenses Giving Rise To Forfeiture Is $11,000

Lena G. Agresta, the Personal Representative of the Estate of Joseph Farley, challenged the forfeiture of a parcel of real property on constitutional grounds. Agresta argues that the forfeiture violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. Farley was convicted of cultivating cannabis, stealing electricity, and misdemeanor possession of cannabis, all of which occurred in his home. The City of Maitland brought this civil forfeiture proceeding against the home implicated in the underlying marijuana operation pursuant to the Florida Contraband Forfeiture Act. The court granted final summary judgment in favor of the City, finding that the property was both an instrumentality of the crime and that forfeiture was proportional to the offenses for which the owner was convicted. Agresta did not challenge the trial court's findings on the instrumentality test. Agresta's sole challenge is on the issue of proportionality.

The 5th DCA agreed with Agresta. The DCA noted the U.S. Supreme Court has held that the Excessive Fines Clause of the Eighth Amendment applies to forfeitures under 21 U.S.C. § 881(a)(4). (*Austin v. United States*, 509 U.S. 602 (1993).) Because provisions of the CFA are similar to the provision of 21 U.S.C. § 881(a)(4), the *Austin* analysis was applied by the DCA. To determine if a forfeiture is proportional, the Eleventh Circuit Court of Appeals, like most federal courts, has noted that courts must ask: "Given the offense for which the owner is being punished, is the fine (imposed by civil forfeiture) excessive?" *United States v. 427 & 429 Hall Street*, 74 F.3d 1165, 1172 (11th Cir. 1996). In answering this question, the Eleventh Circuit identified three factors in evaluating whether the forfeiture is excessive. The factors are "(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature . . .; and (3) the harm caused by the defendant." *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007).

Applying those factors to the instant facts, the DCA concluded that the forfeiture was excessive. Farley clearly fell within the class of persons at whom the CFA was principally directed. Based on the charges of which he was convicted, Farley faced an eleven-year maximum penalty and an $11,000 maximum fine. The value of the home sought to be forfeited was between $238,000 and $295,000. There was no evidence that Farley caused harm beyond his commission of the offenses underlying his convictions. The Eleventh Circuit has recognized the difficulty of putting a monetary value on the gravity of the offense and has suggested that a consideration of the fines approved by the legislature indicates the monetary value society places on the harmful conduct. (*See United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1309-10 (11th Cir. 1999) -holding if value of forfeited property is within range of fines prescribed by Congress, strong presumption arises that forfeiture is constitutional, and not excessive).)

The case was remanded for setting a forfeiture amount in line with the criminal case's fine limits that would not constitute an "excessive fines" violation. The majority acknowledged the dissent, and in dicta noted elements that might have supported a larger forfeiture amount:

Note: In her dissent, Judge Berger correctly observes that Farley's grow operation occurred within 1,000 feet of a school. However, he pled to cultivation, a third-degree felony, grand theft of electricity, and misdemeanor possession of cannabis. If Farley had been convicted of manufacturing cannabis within 1,000 feet of a school (or trafficking), as originally charged, the harm caused might have been exacerbated. Likewise, if the operation went on for some time, the harm caused might have been correspondingly greater because the profits from the crime would have been greater. But there was no such evidence in this case, as it was decided on summary judgment.

Agresta v. Case No. 5D13-3577 City of Maitland, 159 So. 3d 876 (Fla. 5th DCA, 2/20/15)

Protective Vehicle Search Before Allowing Driver Back Into Car Was Justified

Paul Hopkins, of the Orange County Sheriff's Office, testified that he performed a traffic stop of Jason Toussaint's car at 11:00 at night in a high crime area, after observing the car making a right turn at a red light without stopping. Upon entering the car's license plate information into his computer, Hopkins discovered that the owner of the vehicle was a "career offender." Hopkins also testified that he saw the defendant make three movements in the car, which he described as follows: "The first one was a lean just to the center area of the vehicle. Secondary one was a very large movement within the car. That's where, based on what I saw him do, I believed that's when he, I believe, he put the contraband into his groin area. And then the last one was a very far lean to the right."

Hopkins testified that, in his experience, this type of behavior indicates that the person may be reaching for a weapon. After the defendant stopped his vehicle, he was ordered out of the car and directed to the front of the police vehicle. He consented to a pat-down search, and no weapons were found on his person.

Hopkins testified that he requested permission to search the defendant's vehicle:

Q. Okay. Now, did he give you consent to search his vehicle?
A. He did in a roundabout way.
Q. Okay. Explain that to the Court.
A. His words were -- when I asked if I could search his vehicle, he said, no, but you can if you want to.
Q. Okay.
A. Which is not uncommon for people to say to us.

While Hopkins was using the electronic citation writing program in his car, a back-up officer (Deputy Cliborne) arrived. Once back-up arrived, Hopkins began a search of the defendant's car. Upon opening the console compartment located in between the front seats, Hopkins discovered a plastic baggie containing cocaine. Hopkins then placed the defendant under arrest, handcuffed him, and conducted a search of his person. The search uncovered cannabis. Toussaint filed a motion to suppress the evidence and the trial judge granted the motion. The trial judge did not believe Toussaint's consent for a search of the car to be unequivocal. It also did not believe the officer's observations warranted a protective search:

> Second, the Court does not believe a "protective cursory search" of the vehicle was permissible. . . . The Court must look at the totality of the circumstances which the officer had facing him at the time of the decision to search the interior of the vehicle. In the case at bar, Hopkins had already removed [the defendant] from the vehicle, had [the defendant] fifteen to twenty feet from [the defendant's] vehicle standing in front of Hopkins' patrol car, and Hopkins further had Deputy Sheriff Cliborne standing next to [the defendant], Cliborne being in full uniform with a firearm, Taser, and other law enforcement equipment. Furtive movements . . . are insufficient to create reasonable suspicion that a defendant poses a threat without other objective facts. *F.J.R. v. State*, 922 So. 2d 308, 311 (Fla. 5th DCA 2006). Leaning twice to the right and lifting up his buttocks along with [the defendant] having a criminal record and being in a high crime area is insufficient to give law enforcement officers authority to conduct a search of an automobile where the driver, [the defendant], is out of the car and being guarded by another law enforcement officer. The State has failed to show that the officer had a reasonable suspicion to search the vehicle. In *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the Supreme Court made it clear that the law enforcement cannot search a recent occupant's vehicle unless the occupant ([the defendant]) was within reaching distance of the passenger compartment or it is reasonable to believe that the vehicle contained evidence of the arrest, neither of those exceptions apply herein.

The State appealed. Addressing the consent issue, the 5th DCA held, "Here, the trial court concluded that no consent to search was given by the defendant since his response was equivocal. We find no error in this ruling." However, it agreed with the State that the trial court erred by granting the suppression motion because the search of the defendant's vehicle was an authorized protective search, based on Hopkins' reasonable belief that the defendant may have hidden a weapon in his car.

"Here, the trial court erred when it concluded that the totality of the circumstances did not provide Hopkins with reasonable suspicion to justify a protective search of the defendant's vehicle because Hopkins knew the defendant was a career criminal and the stop was conducted in a high crime area at 11:00 at night. Additionally, Hopkins testified that he searched the defendant's car because he was concerned the defendant might have had a weapon hidden inside and he did not want the defendant to be able to run to the car and arm himself. Further, Hopkins intended to have the defendant sit in his car while Hopkins wrote the traffic citation. These specific, articulable facts justified Hopkins' protective search of the vehicle."

The DCA found the trial court's reliance on *Arizona v. Gant*, 556 U.S. 332 (2009), was misplaced. In *Gant*, the defendant was arrested for driving with a suspended license. He was handcuffed and placed in the back of a locked patrol car. While he was in the locked patrol car, police searched his vehicle as a search incident to arrest. The Supreme Court held that police could "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 343. In the case at hand, the search of the defendant's car was not a search incident to arrest. Although the trial court found that the defendant was "being guarded by another law enforcement officer," the United States Supreme Court in Michigan v. Long, 463 U.S. 1032 (1983) rejected the argument that the removal of an occupant from a car removed any danger to the safety of the officers because the occupants no longer had access to weapons. While the defendant may have been guarded by another officer, he was not under arrest and, therefore, would have been able to return to his vehicle, giving him access to a potential weapon.

Since the need for a protective search justified search of Toussaint's vehicle, the trial judge's suppression of the evidence was reversed and the case remanded for further proceedings.

State v. Toussaint, ---So.3d--- (Fla. 5th DCA, 5D14-1945)

Totality of Circumstances Did Not Suggest Defendant Was "In Custody" During Jailhouse Interviews

The defendant was indicted on one count of first-degree murder and one count of armed burglary of a dwelling. The murder victim was the defendant's husband, and the persons who allegedly committed the murder were the defendant's son and one of the son's friends. The defendant was charged as

being a principal to the murder. She moved to suppress statements she made to law enforcement during two station-house interviews. The first interview took place in the early morning of the day after the murder and the second interview occurred a day or two after the first interview. The motion alleged that suppression of the defendant's statements was warranted because the defendant was in custody at the time the statements were made, but she had not been issued her *Miranda* warnings prior to being interviewed. The trial court granted her motion, indicating she was in custody and had not been given her *Miranda* warnings. The state appealed to the 5th DCA.

The DCA noted that a review of the defendant's interrogation interviews, as well as the testimony submitted during the suppression hearing, establishes that, with regard to the defendant's initial interview, an officer went to where the defendant was staying in the early hours of the morning following the murder and told her that he needed to interview her at the station, and she volunteered to go to the station with him. He drove the defendant to the station in an unmarked patrol car; she sat in the front passenger seat of the car and she was not handcuffed. The officer told the defendant, before taking her to the station, that she was not under arrest and that she was free to leave at any point.

The video of the interrogation demonstrated that the door to the interview room was not locked, but it was closed for privacy. The interview was one hour and fifty-two minutes long, and it was undertaken around midnight, about nine hours after the murder. The interview was accusatory at times and involved several different interviewers. At one point, one interviewer told the defendant to "stay right here," and he then exited the room. The defendant remained sitting in her chair. After the interview, an officer drove the defendant back to where she was staying.

The next day, law enforcement discovered hundreds of letters which were written by the defendant to her son (the alleged murderer) prior to the murder, while he was in prison on unrelated charges. The content of the letters suggested that the defendant was involved in planning the murder; therefore, the officer contacted the defendant again and requested that she come back to the station to answer some more questions. She agreed. He then picked the defendant up from her home in his unmarked patrol car and took her to the station. She again rode in the front seat of the car with no restraints.

The second interview was two hours and forty minutes long. One deputy advised the defendant at the beginning of the interview that he appreciated her coming to talk to them and that she was not under arrest for anything. The other deputy told her that the door was shut for privacy and she was free to leave at any time. The interview was more accusatory in nature than the first interview and included questioning about the incriminating letters.

At the end of the second interview, the initial interviewer asked the defendant if she remembered that he had told her, when she first came in, that she was not under arrest and she responded "uh huh". He told her that she was free to leave and that she had been free to leave the whole time. He stated that he was going to release her so she could go home if she wanted to. One of the officers then drove the defendant home. The defendant was not arrested until three years later.

The 5th DCA then analyzed the facts using the factors identified in Snead v. State, 913 So.2d 724 (Fla. 5th DCA, 2005) and other cases. In order for a court to determine that a suspect is in custody, it must be evident under the totality of the circumstances that a reasonable person in the suspect's position would feel a restraint on his or her freedom of movement. In other words, a reasonable person in the position of the person being interviewed would not feel free to leave or to terminate an encounter with the police. A trial court should consider four factors in determining whether an interrogation is custodial: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; and (4) whether the suspect is informed that he or she is free to leave the place of questioning. Thus, the court must use an objective test to determine whether an individual is in custody. The proper inquiry is not the unarticulated plan of the law enforcement officers, but rather how a reasonable person in the suspect's position would have perceived the situation.

In the case at hand, the DCA noted that as for both interviews, an officer asked the defendant to come down to the station to answer some questions and, once she agreed, the officer drove the defendant to the station in an unmarked police car. During the ride, the defendant sat in the front seat of the car without any restraint. She was advised before each interview that she was free to go at any time. After

the interviews were completed, an officer drove the defendant home. Thus, as for prongs one and four, the manner in which law enforcement summoned the defendant for questioning did not suggest that she was in custody, and the defendant was told, prior to both interviews, that she was not under arrest and she was free to leave at any time. (A key element was the defendant being told prior to the interview that she was free to leave at any time.) As for prongs two and three, although one purpose of the interview was to get the defendant to tell the officers her motive for participating in her husband's murder, and the officers spent most of the time during both interviews confronting the defendant with evidence they said they had against her, under the totality of the circumstances, a reasonable person in the defendant's position would have felt free to terminate the interviews. The trial court's suppression order was reversed and the case remanded for further proceedings.

State v. Myers, -- So.3d – (Fla. 5th DCA, 5D14-3037, 7/17/2005).

Ordering Passenger Three Times To "Keep His Hands On The F***ing Dashboard" Before K-9 = Restraint. "Consent" Was Submission To Authority

Ernest Oliver was the passenger in a car that a police officer stopped for an inoperable tag light. After the stop, another officer and his K-9 came to the scene so that the K-9 could conduct an exterior search of the vehicle.[9] Before conducting that search, the K-9 officer ordered Oliver and the driver to keep their hands on the dashboard. As noted by the trial judge, who had the benefit of a videotape of the encounter, the officer told Oliver three times to "keep his hands on the f***ing dashboard."

The 5th DCA stated it could "easily discern that this directive was not conversational in tone. After the K-9 alerted the officers to the presence of drugs in the car, Oliver was searched and marijuana and a firearm were discovered on his person.[10]

An noted by the DCA, "The seminal case on this issue is *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), in which Mendenhall was charged with possession of drugs following a search by DEA agents at an airport. The Supreme Court reasoned that a person is seized "only when, by means of physical force or a show of authority, his freedom of movement is restrained." *Id*. at 553. It elaborated that "[o]nly when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." *Id*. This determination is based upon the totality of the circumstances. *See id*. at 554".

The DCA found that in denying the motion to suppress, the trial court focused on the fact that Oliver made no attempt to leave. However, the issue was not whether Oliver actually made such an effort. Rather, the focus should have been on whether, under the circumstances, a reasonable person would have believed he was free to leave. *See, e.g., Williams v. State*, 694 So. 2d 878, 880 (Fla. 2d DCA 1997). The language and tone of voice used are among the factors specifically noted in *Mendenhall* as being relevant in determining whether compliance with an officer's request was compelled. *See Mendenhall*, 446 U.S. at 554.

The DCA found that a reasonable person would believe, after having been aggressively ordered three times to keep his hands secured on the "f***ing dashboard," that his freedom of movement was restrained. This converted the incident to a seizure and eliminated any basis to believe Oliver consented to the subsequent police actions.

The DCA pointed out that a number of courts have addressed analogous circumstances. For example, in *Davis v. State*, 946 So. 2d 575, 577 (Fla. 1st DCA 2006), a sheriff's deputy "asked" Davis to exit the car in which he was a passenger and put his hands on the car's roof. The court found that, while the initial encounter was valid, ordering Davis to place his hands on the car converted the encounter into a seizure, and that Davis's ensuing "consent" to a search of his person was merely a submission to authority. *Id*. at 578; *accord McNeil v. State*, 746 So. 2d 547, 548 (Fla. 5th DCA 1999) (holding that McNeil was seized when an officer ordered him to place his hands on the back of the patrol car);

[9] The appeal did not raise the basis of the stop or the time the stop was extended for the K-9 search as issues.

[10] The subsequent basis for the search of Oliver was not an issue in the appeal which focused solely on whether the motion to suppress should have been granted.

Wooden v. State, 724 So. 2d 658, 659 (Fla. 2d DCA 1999) (finding that officers effected a stop when they ordered Wooden to the ground); *Smith v. State*, 592 So. 2d 1239, 1240 (Fla. 2d DCA 1992) (holding that consensual encounter became a stop when subject was ordered to place his hands on the hood of the patrol car in the "frisk" position).

Similarly, here, Oliver was seized when the officer ordered him to put his hands on the dashboard, and therefore, the trial court erred in denying Oliver's motion to suppress. The DCA reversed, indicating the evidence should have been suppressed.

Oliver v. State, 157 So.3d 495 (Fla. 5th DCA, 2/13/15)

Validity Of Traffic Stop For Violating F.S. 316.125 Requires Determination Of The Status Of The "Sidewalk" Between A Business Lot And The Roadway

The issue on appeal involving three consolidated cases was whether the trial court properly granted the motions filed by three defendants to suppress the illegal drugs and paraphernalia (and in one case, a concealed firearm) that were seized after deputies with the Citrus County Sheriff's Department stopped the three vehicles for violating F.S. 316.125. The deputies concluded the statute was violated because the vehicles in each case failed to stop before crossing over a sidewalk or sidewalk area situated over the driveways adjacent to the highway. The trial court granted each motion after concluding that there was no statutory requirement to stop before entering the highway because there was no vehicular or pedestrian traffic present in the area at the time. The State urged reversal, contending that the deputies legally stopped each vehicle because the statute requires vehicles to stop before crossing over driveways containing sidewalks or sidewalk areas regardless of pedestrian or vehicular traffic in the area.

As to the facts, two of the cases involve incidents that occurred at the same location, but on different dates. Sean Nelson parked his car on the North side parking lot of a Chevron gas station located in the business district of Crystal River. A sidewalk borders both sides of the driveway, and pictures introduced into evidence show that the sidewalk or sidewalk area appears to extend over the driveway. A deputy observed Nelson get into his vehicle and drive directly from his parked position in the parking lot onto the highway without stopping. The deputy initiated a traffic stop of the vehicle based on Nelson's failure to stop before crossing over the sidewalk or sidewalk area onto the highway in violation of F.S. 316.125. A subsequent consensual search of the vehicle uncovered drugs and paraphernalia. A concealed firearm was also found. Nelson was arrested and transported to jail. He filed a motion to suppress, arguing that the statute did not require a stop before crossing over the driveway because there was no vehicular or pedestrian traffic present in the area at the time.

Coryon Nelson (who may be related to Sean Nelson) was parked at a gas pump located at the same Chevron gas station. He got into his vehicle and drove over the same driveway onto Highway 19 without stopping. He was stopped and a canine unit was summoned. The dog alerted to the car, and the subsequent search of the vehicle uncovered drugs and paraphernalia. Coryon was arrested and transported to jail. His motion to suppress essentially parrots the arguments made in Sean Nelson's motion. The third case involved Ben Padgett at a different date and location, the Liquid Lagoon bar located adjacent to Highway 19 in the business district of Crystal River. Padgett was a passenger in a vehicle that exited the parking lot and entered the highway without stopping. The driveway at this location is similar to the driveway located at the Chevron gas station. Photographs in the record show a sidewalk leading up to both sides of the driveway, and it appears that the sidewalk or sidewalk area extends over the driveway. The vehicle was stopped and a canine unit was summoned. The dog alerted to the car, and a subsequent search of the vehicle uncovered illegal drugs under the passenger's seat. Padgett was arrested and transported to jail. His motion to suppress presents arguments that are very similar to the arguments in the motions filed by the other two defendants.

The trial court granted the motions to suppress, stating that "[I]n its entirety it's a failure-to-yield statute, and in its particulars it's a failure-to-yield statute." The trial court further explained that "[T]here has to be something that has to be failed to yield to, a pedestrian or traffic." The Fifth DCA noted that if this is the proper interpretation of the statute, the trial court correctly granted the motions. But if not, it must reverse.

F.S. 316/125 reads:

> (1) The driver of a vehicle about to enter or cross a highway from an alley, building, private road or driveway shall yield the right-of-way to all vehicles approaching on the highway to be entered which are so close thereto as to constitute an immediate hazard.
> (2) The driver of a vehicle emerging from an alley, building, private road or driveway within a business or residence district shall stop the vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across the alley, building entrance, road or driveway, or in the event there is no sidewalk area, shall stop at the point nearest the street to be entered where the driver has a view of approaching traffic thereon and shall yield to all vehicles and pedestrians which are so close thereto as to constitute an immediate hazard.
>
> (3) A violation of this section is a noncriminal traffic infraction, punishable as a moving violation as provided in chapter 318.

After noting the trial court relied upon subsection (1) to support its decision, the DCA found that subsection (1) was not the section to consider. Instead, subsection (2) was the relevant section to consider since the premises from which the drivers departed in all three cases were businesses. Looking to the provisions of that subsection, the DCA found a requirement that the driver stop before "driving onto a sidewalk or onto a sidewalk area extending across the . . . driveway." The DCA found that proper consideration of this statutory provision and the plain and ordinary meaning of the words used reveal with clarity that drivers must stop before traversing a sidewalk or sidewalk area to enter an adjacent highway.

The DCA noted the State contended that proof of a sidewalk extending over the driveways at each location is contained in the record, referring to numerous photographs (both ground and aerial) and argues that they reveal a sidewalk located between the parking lot and highway that connects to and is intended to extend over the driveways so pedestrians can walk from one end of the street to the other. The DCA noted that the trial court never addressed the factual issue of whether a sidewalk or sidewalk area extends over the driveways at each location. That issue must be resolved by the trial court in order to properly determine whether the traffic stops were appropriate or not. If there are sidewalks extending over the driveway, the defendants' arguments will fail. If the sidewalks do not extend over the driveway, then the trial court must consider whether the drivers stopped "at the point nearest the street to be entered where the driver has a view of approaching traffic…" before entering the highway. The orders to suppress the evidence were reversed with the trial court being directed to reconsider the facts and the issues presented.

State v. Nelson, --So.3d—(Fla. 5th DCA, 5D14-1802, 5/8/15)

Accidental Destruction Of Digital Recording Of Noncustodial Interview Of Defendant Was Not In Bad Faith And Did Not Warrant Trial Court's Suppression Of Evidence

The State appealed the trial court's order suppressing evidence of certain statements allegedly made by Jaron Miller to law enforcement officers during a noncustodial interview. The trial court had suppressed the evidence as a sanction, based on its determination that the law enforcement personnel had acted in bad faith as demonstrated by their "gross negligence" in losing or destroying the recording of the subject interview. The Fifth DCA found that the record did not support a finding of bad faith, and reversed.

On July 4, 2013, Sergeant Mankewich and Detective Voyles of the Orange County Sheriff's Office contacted Miller to discuss an allegation that Appellee had sexually battered a minor. The interview was conducted at Miller's residence. Approximately seven months later, Miller was charged by information with two counts of lewd or lascivious battery, and was arrested shortly thereafter.

Detective Voyles' written report set forth the alleged incriminating statements made by Miller during the July 4, 2013 interview and also referenced that the interview had been digitally recorded. The written report further provided that Miller's recorded interview had been "placed on compact discs and submitted to the transcription unit and evidence for later use in trial."

During the discovery process, Miller sought production of the interview recording. When the State failed to produce the requested item, he filed a motion to compel. After the State ultimately advised Miller that it was unable to produce a recording of the interview because it had been lost or destroyed, Miller filed a motion for sanctions. An evidentiary hearing on Miller's motion for sanctions was held on

July 30, 2014. Sergeant Mankewich was the only witness to testify at the hearing, and his testimony was largely unchallenged. (Voyles was working as a law enforcement officer in another state.)

According to Sergeant Mankewich, Detective Voyles had surreptitiously recorded the interview with Miller through the use of a small digital recorder. Upon their return to the office, the recording was to be "downloaded" onto a computer. Sergeant Mankewich did not know if the computer had "crashed," but for whatever reason, the recording of the interview could not be located. He further emphasized that he had "rechecked everything" and was still unsuccessful in his search for the missing recording. Sergeant Mankewich was unaware of any effort to intentionally lose or destroy this potential evidence. Finally, Sergeant Mankewich averred that he could testify as to the statements Miller made during the interview and that those statements were accurately reflected in the written report.

The trial court found that the Sheriff's Office's actions constituted gross negligence, which it equated to bad faith: "[T]he Court's going to find that the duty of care required for a defendant's admission is above and beyond the duty of care that one would ordinarily expect for other types of evidence; thus, losing this particular evidence rises to the level of gross negligence rather than just negligence. As far as the Court is concerned, that means that there is bad faith."

The trial court ruled that any evidence regarding the statements given by Miller to law enforcement officers on July 4, 2013, would be excluded. The State appealed that ruling.

The 5th DCA noted that when determining whether a defendant's due process rights have been violated by the State's loss or destruction of evidence, the court must first consider whether the missing evidence was "materially exculpatory" or only "potentially useful." (Citing: *State v. Bennett*, 111 So. 3d 943, 944 (Fla. 2d DCA 2013).) "Materially exculpatory" evidence is evidence that might be expected to play a significant role in the suspect's defense. See: *California v. Trombetta*, 467 U.S. 479 (1984). "Potentially useful" evidence, by contrast, is evidence that merely poses some likelihood of helping to exonerate a defendant. See: *Arizona v. Youngblood*, 488 U.S. 51 (1988).

The DCA noted that In the instant case, there was no contention by Miller that the lost evidence was "materially exculpatory." The DCA also found that the loss or destruction of evidence that is potentially useful to the defense violates due process only if the defendant can show bad faith on the part of law enforcement. Under *Youngblood*, bad faith exists only when law enforcement personnel intentionally destroy evidence they believe would exonerate a defendant. (See also: *Guzman v. State*, 868 So. 2d 498, 509 (Fla. 2003).

The DCA found that the record was devoid of evidence supporting the trial court's finding of bad faith. There was no evidence suggesting law enforcement personnel intentionally lost or destroyed the recording of Appellee's July 4, 2013 interview. Accordingly, it was error for the trial court to grant Miller's motion for sanctions. The DCA did note, however, that its decision did not preclude Miller from inquiring about the loss or destruction of the recording at trial. The trial court's suppression order was reversed.

State v. Miller, 159 So.3d 992 (Fla. 5th DCA, 3/20/2015)

Probable Cause To Search Vehicle Justified Seizure Of Vehicle For Purpose Of Securing It While (Unnecessary?) Search Warrant Obtained

Susana Rondon, was attempting to enter the gated apartment complex where she lived. Rondon drove up behind a red Jeep Cherokee vehicle that was stopped at the entrance gate. Rondon honked her horn, opened the gate, and thereafter both vehicles entered the apartment complex. Rondon then parked her car and, at this point, Joes Carlos Diaz-Ortiz, who was driving the Jeep, blocked Rondon's car, exited, and confronted Rondon as she was exiting her car. Diaz-Ortiz pulled out a handgun, chambered a round, and pointed the gun at Rondon. Rondon immediately got back into her car, and Diaz-Ortiz returned to the Jeep with the gun and left. Rondon observed the direction in which the Jeep traveled, and after attempting to call 911, drove her car in that direction to determine the tag of the Jeep.

Rondon came upon Orange County Sheriff Lieutenant Jose Campina, who was working as a courtesy officer for the apartment complex. She advised Campina what had occurred. Campina began driving around the apartment complex parking lot to look for the Jeep, with Rondon following in her car.

Between five and ten minutes after the incident, Rondon saw the red Jeep Cherokee parked in front of one of the apartment buildings and identified the vehicle to Campina as the one her assailant was driving.

Through the window of the vehicle, Campina saw a driver's license, a cell phone, some money, and a clear plastic bag containing a white substance. Campina called for backup, and while waiting for assistance, Campina put crime-scene tape on all of the doors and windows of the Jeep. He then had the vehicle towed to the sheriff's department to be processed and held until a search warrant was issued.

After obtaining the search warrant, law enforcement searched the Jeep and collected a driver's license that had been issued to Diaz-Ortiz. Thereafter, using the driver's license photo, law enforcement prepared a photo lineup, and Rondon positively identified Diaz-Ortiz as the person who pointed the gun at her in the apartment complex parking lot. A few days later, he was arrested and charged with aggravated assault with a firearm.

Diaz-Ortiz moved to suppress any and all evidence seized from the Jeep Cherokee, essentially arguing at the hearing that the seizure of the vehicle was without probable cause. After hearing testimony from Rondon and Campina, the court orally announced that there was insufficient probable cause for the seizure of the Jeep because: (1) there was no evidence as to how many vehicles were in the parking lot; (2) there was no evidence of how recently Rondon had "strolled" the parking lot by herself or with her family identifying cars; (3) there was no evidence of whether Nicole Dean, the owner of the vehicle, or Diaz-Ortiz lived at the residence or were just visiting; (4) a Jeep Cherokee is a very common car; and (5) Rondon did not recall if the Jeep had a trailer hitch or "appeared to have been in a crash." The trial court then concluded that since the search warrant was the product of the illegal seizure of the Jeep, any evidence found in the vehicle must be suppressed as "fruit of the poisonous tree."

The 5th DCA disagreed with the trial judge. It noted that probable cause is a practical, common-sense question. It is the probability of criminal activity, and not a prima facie showing of such activity, which is the standard of probable cause. The determination of probable cause involves factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *See: Polk v. Williams*, 565 So. 2d 1387, 1390 (Fla. 5th DCA 1990). It found probable cause did exist.

The seizure of the vehicle was based on Rondon's statements to law enforcement, made almost immediately after the incident, that she was a victim of an aggravated assault and that the individual who committed the aggravated assault with the firearm returned to the Jeep with the firearm. When located nearby, the vehicle was in open view in the parking lot, and Diaz-Ortiz had no reasonable expectation of privacy in the area from which it was seized. *See Ruiz v. State*, 743 So. 2d 581, 582 (Fla. 4th DCA 1999). (The Jeep was owned by Diaz-Ortiz's fiancée' who gave him permission to use the Jeep, and the trial court's finding of "standing" was not an appellate issue.)

The 5th DCA found that under the totality of the circumstances, Campina had probable cause to believe that the vehicle contained contraband or evidence of a crime—specifically, the firearm. Based on the automobile exception, he had probable cause to search the vehicle without a warrant. Since Campina had probable cause to search the vehicle, he also had probable cause to seize the vehicle. (*See: Chambers v. Maroney*, 399 U.S. 42, 52 (1970): "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."). As a result, it was not a violation of Diaz-Ortiz's constitutional rights for Campina to seize the Jeep until a search warrant was issued, and the trial court's conclusion that the search of the vehicle was fruit of the poisonous tree was erroneous. Reversed and remanded.

State v. Diaz-Ortiz, --So.3d—(Fla. 5th DCA, 5D15-211, 7/24/25)

Defendant's Mention He "Should" Talk To An Attorney Was Not An Unambiguous Or Unequivocal Request For Counsel

Corey Carter had been arrested shortly after a reported armed robbery. Detective April Brunner had been advised by another officer that Carter "wanted to talk. The interview was recorded. The interview

was characterized by the 5th DCA as a "casual, non-confrontational discussion." Carter was uncertain initially whether he should talk to Brunner without a public defender. The detective tried several times to determine if Carter wanted to give a statement without counsel present, but Carter equivocated saying things such as, "I think I should wait to talk to my public defender, and then have a ---'cause I wanna tell the truth, you now—the whole truth, you know, but um…." Brunner told Carter she would end the interview any time he wanted, but Carter continued to express interest in talking, saying "I mean I do (want to talk) but I don't think I should. I want to, but…." Shortly after saying this Carter spontaneously asked whether police had found "the other guy." When Brunner said, "Yes" Carter started discussing the incident. Brunner interrupted him to confirm he wanted to proceed. She read him his Miranda rights, and Carter agreed to waive the rights and give a statement.

The trial court suppressed Carter's statement but the 5th DCA concluded Carter's statement that he "should" wait to talk to his attorney immediately after asserting he wanted to tell the "whole truth" was not an unambiguous or unequivocal request for counsel. The DCA also rejected Carter's argument that he had indicated a desire to remain silent. "Indeed, the record reflects that when Carter began to spontaneously discuss the circumstances surrounding the alleged crime, Detective Brunner interrupted to ensure that he was voluntarily waiving his right to remain silent." Case was reversed and remanded.

State v. Carter, ---So.3d—(Fla. 5th DCA, 5D14-2892, 8/14/15)

Other 5th DCA Cases Of Potential Interest – "Quick Summaries"--

→ After a lengthy analysis, the 5th DCA holds that it is **not unconstitutional to punish someone for refusing to submit to a breath test.**

Williams v. State, --So.3d—(Fla. 5th DCA, 5D14-3543, 6/5/15)

→ Because the offense of **unlawful use of a two-way communications device**, F.S. 934.215, did not contain any elements that were distinct from the offense of **traveling to meet a minor**, F.S. 847.0135(4), the offenses did not satisfy the Blockburger[11] test codified in F.S. 775.021(4), and because F.S. 847.0135(8) did not express a clear legislative intent either on its face or in its legislative history to authorize dual convictions under F.S. 847.0135 and any other statute, defendant's dual convictions violated **double jeopardy** and required that the conviction and sentence for use of a two-way communications device be vacated.

Holt v. State, --So.3d—(Fla. 5th DCA, 5D14-3269, 8/14/15)

→ Kleiber was the driver of a vehicle involved in a two-car collision in which an occupant of the other vehicle was killed, and another occupant suffered serious bodily injuries. The FHP accident investigator who arrived on the scene shortly after the crash observed the damage on Kleiber's car and, smelling alcohol on his breath, read Kleiber his *Miranda* rights and asked if he would submit to a blood test pursuant to Florida's implied consent law. Kleiber consented to the **blood draw**. The rules related to such a draw requires cleaning the puncture point with an antiseptic that does not contain alcohol. Kleiber was allergic to iodine so the paramedic wiped the spot with a dry, sterilized gauze from a sealed packet. The trial court suppressed the blood test results, holding the state to strict **compliance with the wording of the rule 11D-8.012(1)**. The DCA reversed the trial court, noting minor deviations from the rules will not prohibit admission of test results. The trial court was directed to hold a hearing to determine whether there was substantial compliance with the rule.

State v Kleiber, --So.3d—(Fla. 5th DCA, 5D14-2921, 8/21/15)

→ In determining whether an autopsy report prepared pursuant to chapter 406, Florida Statutes (2001), is testimonial hearsay under the **Confrontation Clause of the Sixth Amendment** to the United States Constitution, the DCA agreed with Appellant. Luis Rosario had been convicted of aggravated child abuse and first-degree murder of a four-year-old boy, and argued that his Sixth Amendment right to confront witnesses against him was violated at trial for two reasons. First, the trial court allowed the admission of the autopsy report of A.S. into evidence without requiring the testimony of the medical examiner who prepared the autopsy report. Second, the trial court allowed a surrogate medical examiner, who did not perform or participate during the autopsy, and who had replaced the ME who authored the report, to testify as to the cause of death listed within the report.

[11] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

While the DCA agreed there had been a violation of the Sixth Amendment, under the specific factual circumstances of this case, it held that these errors were harmless beyond a reasonable doubt and affirmed Rosario's conviction.

Rosario v. State, --So.3d-- (Fla. 5th DCA, 5D13-1740, 8/28/15)

Records-Related Opinions From The DCA's

A Convicted Defendant Has Burden To Demonstrate Records Sought Under Fla. R. Crim. P. 3.852 and F.S. 119.19 Relate To Colorable Claim. Production Of Public Records Not Intended To Be A Procedure Authorizing A Fishing Expedition Unrelated To Colorable Claim For Post-Conviction Relief

In a per curiam opinion, the Supreme Court rejected a convicted defendant's appeal from an order denying a motion to vacate a judgment of conviction of first-degree murder and a death sentence. Twilegar alleged ineffective assistance of counsel. This claim was rejected by the Court. He also alleged that F.S. 119.19 and Florida Rule of Criminal Procedure 3.852 are unconstitutional because the prevent his access to public records to which he is otherwise entitled. He alleged the statute and rule are so stringent that they prevent any similarly situated inmate from ever being able to access constitutionally obtainable public records. The trial court rejected this argument, as did the Supreme Court.

The Supreme Court pointed out that it has consistently held that a defendant bears the burden of demonstrating that records sought relate to a colorable claim and that production of public records is not intended to be a "procedure authorizing a fishing expedition for records unrelated to a colorable claim for post-conviction relief." (Quoting Dennis v. State, 109 So.3d 680 (Fla. 2012) which quoted Diaz v. State, 945 So. 2d 1136 (Fla. 2006). Twilegar's claim fails "because the purpose of the rule and statute is not to grant access to unrelated or protected documents." The circuit court's denial of Twilegar's motion for post-conviction relief was affirmed.

Twilegar v. State, --So.3d.—, SC13-2169, (Fla. 2015,, 5/28/15).

Does Custodian Of Criminal Discovery Have Legal Obligation To Combine Its Discovery Review For Trial Purposes With A Review By Reason of A Public Records Request If Doing So Will Be More Economical And Result In Less Delay?

The short answer to the above question based on this case is "No, at least not yet." Ultimately the 1st DCA certified the question to the Supreme Court for an ultimate resolution.

This case involved what the DCA termed "overly contentious" public records litigation between various media and the State Attorney's Office of the 4th Judicial Circuit. In a case that resulted in extreme media attention the media sought copies of phone calls made from the jail by criminal defendant Michael Dunn while awaiting trial in Jacksonville. Previous disclosures had shown Dunn to have made "potential racially inflammatory references to fellow inmates" in letters he had written, which brought focus upon what he might have said in his calls from jail.

After reading about the letters in the media, the trial judge issued an order forbidding disclosure of any discovery before the court reviewed that which was to be disclosed. After a series of emergency petitions and orders of the 1st DCA, over a span of three months, the trial court's restrictive orders were lifted. The DCA summarized that the effect of its orders "was to require immediate release of all such public records" absent an immediate evidentiary hearing and "written order for possible appellate review." The DCA deemed it necessary to compel "disclosure of all criminal discovery produced in this case, *including but not limited to the defendant's recorded conversations*, provided pursuant to discovery. (Emphasis added). The DCA noted, however, that its order did "not modify [the Media's] requirement to comply with necessary payment and other administrative requirements provided in Chapter 119."

The trial court promptly held a hearing after which is it denied Mr. Dunn's request to keep the discovery confidential. The result was that the trial court's actions compelled the immediate release of all public records at issue, including the recorded conversations, subject to whatever "necessary payment" requirements Chapter 119 imposed.

As to the phone recordings, the SAO required advance payment from the Media for its anticipated efforts to complete its public records review process. It estimated that the cost of reviewing and redacting the recorded jail calls for confidential and exempt information would be over $6,000, and approximately half that amount was required as a deposit to begin the review process. The Media refused to pay the deposit, contending that the SAO's policy of requiring full payment to review every phone recording including those the SAO had already reviewed for trial purposes, violated Florida's public records laws. The Media sought an emergency hearing to determine whether the SAO was violating Chapter 119, and obtained an order of the DCA to expedite the matter. Because the first day of trial—set for February 3, 2014—was just a few days away, the DCA permitted the circuit's chief judge to consider the appointment of a special master or magistrate to hold a hearing and make recommendations to the trial court. As jury selection began, the chief judge did just that, appointing a magistrate to determine whether the SAO's response to the Media's requests for the recorded jail calls was reasonable or amounted to an unlawful refusal of access.

The testimony before the magistrate established that there are two ways the SAO reviews recordings of jail calls. For its trial review process, a non-attorney support specialist listens to jail calls while performing other tasks, essentially keeping an ear out for any potentially relevant or helpful information to the prosecution's case. The specialist maintains a summary of the calls for purposes of this review. In contrast to this type of review, public records review is handled differently. The SAO maintains a two-person public records unit, comprised of one attorney and one administrative assistant. Upon receipt of a public records request for criminal discovery involving audio recordings, the administrative assistant first listens to the recordings in their entirety, stopping to redact exempt material. The redaction process consists of stopping and rewinding the recording, creating a marker showing where the exempt material is contained, and removing the audio from that portion of the recording. Once that process is completed, the attorney conducts an abbreviated review of the recordings, checking the redactions and listening to the recordings at double their normal speed for items the assistant may have missed.

To estimate the cost of its review, the SAO multiplied the hours of calls by 1.5 for the administrative assistant's initial, lengthier review, and then by the administrative assistant's hourly rate of pay, which in this case was $10.94. The SAO then multiplied the hours of calls by 0.5 for the attorney's double-speed review, and then multiplied that number by the attorney's hourly rate of pay, which in this case was $35.61. For the 186 hours of calls at issue, the SAO estimated that the public records review would cost $6,357.14, and it required a $3,000 deposit before it would begin its review. If the actual cost of producing the redacted records is lower than the estimate, a refund would be issued; the Media was notified of this refund policy. The SAO would also split payment among multiple requesters. Though the Media could choose calls from a list the SAO prepared, only the time and date of each call was listed.

Following the evidentiary hearing, the magistrate entered a report and recommendation, concluding that the SAO's failure to produce the calls without the requested financial deposit was not an unlawful refusal of access. The magistrate, however, recommended that the SAO immediately release eight hours of jail calls by 5:00 p.m. on each business day, and that the Media pay a rolling deposit of $273.60 at the end of each business day or $1,374.50 for each 40-hour workweek of labor. With 186 hours of calls to be reviewed, and an estimated 360 hours to review them, the entire process would require nine weeks to be completed. On March 12, 2014, the trial judge adopted the magistrate's report and recommendations, except that he ordered only six (rather than eight) hours of calls to be produced each work day. Three days later, a jury verdict was rendered.

As stated by the DCA: “No one disputes that the phone recordings are public records or that they must be made available in as immediate a manner as is practicable. And, as a general matter, the Media does not disagree that advance payment of some amount may be required. Instead, the crux of the legal issue is to what extent, if any, was the SAO as a records custodian legally required to coordinate its review of phone recordings for discovery purposes and for use at trial, with its public records request review under Chapter 119.” The DCA indicated it found “no clear answer.”

The DCA noted, “The narrow focus of the challenge before us is whether the *application* of the SAO's public records review policy to the facts of this case amounts to an unlawful delay and denial of access.” The DCA observed that the Media's primary point is that the SAO's public records review policy was combative, inefficient, unduly expensive, and prolonged, which made it virtually impossible to get access to Mr. Dunn's phone recordings prior to trial. The Media further contend that the SAO overstated its estimated special service charges and increased delays by failing to disclose summaries of the phone calls and failing to take any steps to coordinate or combine its ongoing review of Mr. Dunn's phone recordings.

The Media points out the antipathy between it and the SAO, which the magistrate observed was "palpable," along with the SAO's public statements criticizing the public records laws. All of this, according to the Media, reflected an intent to make the process of getting the requested public records as onerous as possible for them.

The SAO’s position was that it has two independent review processes, both facially reasonable, and that the Media requests for the phone recordings vacillated, making it unclear whether they desired the calls and would pay the deposit. Further, due to the extensive review needed to complete the calls—360 hours—requiring a deposit was not unlawful. The SAO also notes that the Media did not claim the magistrate's findings lack competent substantial evidence as to the SAO's estimated costs and methodology and the estimated time for review and production.

Ultimately the DCA concluded:

“All that said, the ultimate question here is whether the application of the SAO's public records policy is unreasonable because it failed to take steps to avoid repetition and duplication with its review of the recordings for use at trial. Coordinating trial review efforts with pending public records requests (and perhaps even anticipated requests in the highest profile cases) makes sense, but in the absence of clear legislative intent requiring it, we are unable to conclude that the SAO is legally required to do so.”

The DCA denied the Media petition, holding, “…because we find no legal duty exists to require a custodian of criminal discovery to combine its ongoing discovery review for trial with public records requests, we deny the Media's request for relief, but certify the following question of great public importance:

DOES A CUSTODIAN OF CRIMINAL DISCOVERY HAVE A LEGAL OBLIGATION TO, WHERE POSSIBLE, COMBINE ITS REVIEW OF DISCOVERY FOR TRIAL PURPOSES WITH A PUBLIC RECORDS REQUEST IF DOING SO WILL BE ECONOMICALLY EFFICIENT AND RESULT IN LESS DELAY?

Morris Publishing Group, LLC, d/b/a, The Florida Times-Union, Grannett Rivers States Publishing Corporation, d/b/a/, WTLV/WJXX First Coast News, and Post-Newsweek Stations Florida, Inc., d/b/a, WJXT-TV4, Petitioners v. State Of Florida and Michael Dunn, Respondents, 154 So.3d 528 (Fla. 1st DCA, 1/20/2105)

Too Many Restrictions Imposed Upon Public Records Requestor By Custodian Of Records. Cannot Require Electronic Access When Requestor Seeks Paper Copies. Cannot Grant Access For Only One Hour Per Day, With 24-Hour Advance Notice.

The appellants in this case appealed the trial court’s grant of summary judgment to the appellee and the First DCA concluded the summary judgment was properly granted. In this case, appellants claim the trial court erred in concluding that appellants placed unreasonable restrictions on appellee's access to public records in appellants' custody by only referring appellee to a website in response to his public records request.

The DCA noted that while there is authority supporting appellants' position that their duty under the Act can be met in this way if the request is solely for electronic access, appellee's request—which initially was for electronic access—was ultimately for actual paper copies (due to appellee's alleged difficulties with the website). The DCA stated access to public records by remote electronic means is merely "an *additional* means of inspecting or copying public records." F.S. 119.07(2)(a), (emphasis added). This additional means of access, however, is insufficient where the person requesting the

records specifies the traditional method of access via paper copies.

In addition, appellants claimed the trial court erred in finding that they violated the Public Records Act by restricting appellee's right to inspect and copy public records in appellants' possession between the hours of 8:30 a.m. and 9:30 a.m., Monday through Friday, with twenty-four-hour notice. The Act authorizes inspection and copying of public records at "any reasonable time." The DCA noted that while the custodian may reasonably restrict inspection to those hours during which his or her office is open to the public, appellants have gone much further by limiting appellee's access to a single hour on weekday mornings. "Clearly, this hampered appellee's right to inspect the records in appellants' custody 'at any reasonable time.'"

The Court also noted that there is no authority allowing appellants to automatically delay production of records for inspection by imposing a twenty-four-hour notice requirement. *See* *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1079 (Fla. 1984) (holding that "an automatic delay, no matter how short, impermissibly interferes with the public's right, restrained only by the physical problems involved in retrieving the records and protecting them, to examine the records"). The 1st DCA concluded the trial court properly granted summary judgment in favor of appellee.

Lakeshore Hospital Authority, and Jackson Berry (individually and as custodian of records), Appellants v. Stewart Lilker, Appellee, --So.3d—(Fla. 1st DCA, 1D14-4579, 7/8/2015)

Government Not Required To Transcribe A DVD Provided To Indigent Defendant

Arick Burkett, an indigent defendant, sought to compel a clerk of court to transcribe and provide a paper copy of a DVD that contained a recorded police interview with his co-defendant. The materials were needed to assist Burkett in preparing his pro se motion for post-conviction relief.

The First DCA disagreed with Burkett's assertion that the transcription was compelled by Lewis v. State, 142 So.3d 879 (Fla. 1st DCA, 2014). It noted Wilcox v. State, 143 So.3d 359 (Fla. 2014) held that a trial court did not abuse its discretion by refusing to order the State to transcribe a recorded statement it had provided to an inmate in DVD format, even though the inmate had no technology to access the DVD. As noted by the DCA, citing language in Woodfaulk v. State, 935 So.2d 1225 (Fla. 5th DCA, 2006): "Indigent prisoners may obtain free copies and services for a plenary appeal, but there is no provision to obtain them thereafter. There is no right to free transcripts for use in preparation of a post-conviction motion. Rather, a prisoner seeking post-conviction relief must first prepare and file his motion before he may secure those portions of the record relevant to the motion." The trial court's denial of Burkett's motion was affirmed.

Burkett v. State, 152 So.3d 787 (Fla. 1st DCA, 12/9/2014)

Vague Public Records Request For County Employees' Work Email Addresses Which County Suspected As Being a "Phishing" Attempt Did Not Justify Award Of Attorney's Fees Based Upon County's Non-Response

A public records request was made to Union County on October 30, 2013, from an email account bearing the address ask4records@gmail.com and it was sent to the county at UCBOCC@windstream.net, an email address posted on the county's website and not associated with a particular county employee. The request was made on behalf of an unidentified "Florida company" and it was submitted by an unnamed agent of the company. Other than the email address, ask4records@gmail.com, the request did not contain any information as to how the county might contact the agent or the corporation. The complete text of the request:

To: The county of Union County, Florida
PUBLIC RECORDS REQUEST: I am making the following public records request on behalf of a Florida company: I don't know what records you keep, or how you keep them, but I would like to get a complete list of all the work email addresses of all the employees that work for your county that have email addresses. If you already have such a list put together then that list is what I want. If you don't already have such a list put together, I am not asking you to create the list per se. I am simply requesting that you produce to me all of the individual public records (email addresses) you have that, when put together, would make up a list of all the work email addresses of all the employees of your county that have work email addresses. I am describing the list I desire

so you will know what group of individual public records (email addresses) I want. I don't want duplicates. I want these records emailed to me at ask4records@gmail.com electronically please. I don't want any paper records of these email addresses. I want electronic copies of these records. If you feel that I am not entitled to these records for some reason, please email me and let me know every reason why you feel this way. If you take longer than the law allows you to produce these requested records, the utility of the records to the requestor (the Florida company I am writing on behalf of) will have substantially diminished and the requestor will be damaged as a result of such delay. If you conclude that any portions of the records requested by this request are exempt or confidential, please state in writing and with particularity the reasons for your conclusion that those portions of the records requested are exempt or confidential. If you contend that any of the public records I have requested are exempt, confidential, or otherwise not subject to disclosure, please email me every reason why you feel that way in writing and with particularity. Thank You.

On March 4, 2014, four months after sending the email request, the plaintiff filed a lawsuit against the county. The complaint sought injunctive relief, a writ of mandamus and an award of attorney fees under F.S. 119.12, Florida Statutes. The county subsequently provided all of the records at issue, and the controversy between the parties was then effectively limited to the plaintiff's claims for injunctive relief and attorney fees. The trial court held an evidentiary hearing on these claims and ruled in favor of the county. The court reasoned that plaintiff's request was "intentionally designed to appear to be deceptive." This finding was based on the testimony of a county official who explained that he did not respond to the records request immediately because it appeared to constitute "phishing," a term that refers to a scam to dupe an email recipient into revealing personal or confidential information that can later be used illicitly. Ultimately, the trial court concluded that the delay in providing the records was not tantamount to an unlawful refusal and that the plaintiff was not therefore entitled to an award of attorney fees.

Since the County had provided the requested records by the time the DCA review occurred, its decision on this issue was to determine only the entitlement to attorney fees. The DCA noted that F.S. 119.12 addresses the issue of fees: "If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award, against the agency responsible, the reasonable costs of the enforcement including reasonable attorney fees."

The Court observed that by its terms, the statute places several conditions on the right to an award of fees. The court must determine that the agency has "refused" to provide the records and the refusal must be "unlawful." It noted that delay does not in and of itself create liability under F.S. 119.12. As the court stated in *Office of the State Attorney for the Thirteenth Judicial Circuit v. Gonzalez*, 953 So. 2d 759 (Fla. 2d DCA 2007), an award of fees under the statute is proper only if the delay is "unjustifiable" and thus amounts to an "unlawful refusal" to provide the records.

The DCA noted the record of the hearing amply supports the trial court's conclusion that the county was justified in declining to immediately respond to the plaintiff's request. The request was made by an unnamed agent for an undisclosed company and it was sent to the county from an email address that did not appear to be the address of a person. This would lead anyone familiar with the perils of email communication to exercise caution, if not to disregard the communication entirely. The email from the sender could have contained a virus. It might have been a computer-generated message sent out from a computer-created email account. The sender might have intended to initiate a series of electronic communications that would have caused the disclosure of exempt materials or created difficulties for the county's information technology officers.

During the oral argument, counsel for the plaintiff was asked if his position would be the same if his email had been diverted from view by a spam filter and he said that it would. This possibility helps to illustrate the special problems presented here. A suspicious email like the one in this case might not reach the intended recipient and even if it did, it might be regarded as computer junk mail. The plaintiff was not required to identify himself in the request or to reveal his reason for requesting the records. But the delay in this case could have been avoided altogether if the plaintiff had just given the county a phone number or some other contact information that could be associated with a person. In that event, the county could have simply contacted the plaintiff to verify that the email was authentic.

The plaintiff counters this suggestion by pointing out that the county could have written to him at

ask4records@gmail.com, but that argument plainly reads too much into the obligations created by the public records law. The right created by Article I, section 24 and F.S. 119.07 is a right that can only be exercised by a "person." That much is clear from the text of the constitution and the statute. The DCA indicated it knew of no law that requires a governmental entity to provide public records to a generic email address, at least not until such time as it is made clear that the address belongs to a person. If a generic email address were treated as the equivalent of a "person" within the meaning of the constitution and the statute, the DCA noted an unscrupulous computer hacker could bring the work of a government agency to a halt by randomly generating a multiplicity of requests, all of which would require a response, and in the process expose the agency to multiple attorney fee awards for no good reason.

The DCA concluded the county provided the records to the plaintiff soon after it learned that the request had been made by person on behalf of a Florida corporation that did, in fact, exist. There was no reason to believe that the county would not have provided the records much sooner had it been able to verify the authenticity of the plaintiff's email and the DCA had no reason to question to trial court's conclusion that the county acted in good faith. The DCA held that under these circumstances, the delay in responding to the email was not tantamount to a refusal and that the trial court correctly denied the plaintiff's request for attorney fees.

Consumer Rights, LLC v. Union County, 259 So.3d 882 (Fla. 1st DCA, 4/16/2015)

Email With Attached Facebook Post Sent To Police Department Describing Offense Was Partly Exempt Under "Active Criminal Investigation" Exemption But Time, Date, Location and Nature Of Reported Crime Should Have Been Provided

Michael Barfield appealed an order denying his petition to obtain Tallahassee Police Department records. The trial court concluded that an email and an attachment forwarded to the police alleging an incident of domestic violence were exempt from disclosure as they related to an active and ongoing criminal investigation. (F.S. 110.071(2)(c)1). The 1st DCA reversed because some of the information regarded "time, date, location and nature of a reported crime" and was not exempt. (F.S. 119.011(3)(c)1).

On October 25, 2014 the Florida State University general counsel sent an email and attachment of a screenshot of a Facebook post to Tallahassee Police Chief Michael DeLeo requesting an investigation of an incident of domestic violence. The Facebook post included information giving the date and time of the alleged domestic violence and photos of bruised body parts. The incident involved an FSU football player. TPD issued a press release on 10/27/2014 acknowledging that it was investigating "an alleged domestic battery involving Karlos Williams" and that details could not be released because it was "an active on-going investigation." Later that day Barfield sent a public records request via email seeking "(a)ny record involving Karlos Williams that was generated as a result of an incident that occurred on or about Wednesday, October 22, 2014." The request included the typical reminder to detail the statute and reasons behind any claimed exemption. On October 28, Barfield followed up threatening legal action if the records were not provided by the morning of the 29th. On the 29th he filed an emergency petition for a writ of mandamus and an emergency motion requesting an immediate hearing (F.S. 119.11(1)). A trial court hearing was conducted on November 3, after which the court denied Barfield's petition.

The 1st DCA, citing Florida Freedom Newspapers v. Dempsey, 478 So.2d 1128 (Fla. 1st DCA 1985), which held that "information disclosing the time, date, location , and nature of the crime is discoverable to the extent it was included in the…document referring the matter…and which served as the basis for initiating this investigation." (at 1132), reversed the denial of Barfield's petition. Since the Facebook post sent to TPD as an attachment to the FSU General Counsel's email reported the date, time, and nature of a crime to TPD, it should have been disclosed. Case was remanded.

Barfield v. City of Tallahassee, --So.3d—(Fla. 1st DCA, 1D14-5530, 8/14/15).

Criminal Prosecution Subpoena Of Medical Records Requires Clear Connection Between Illegal Activity And Person Whose Privacy Is At Stake

Jorge Barahona petitioned for a Writ of Prohibition or Certiorari to preclude the review of his medical records *in camera.* His co-defendant (his wife) Carmen Barahona requested the records in pretrial discovery. The Barahonas were indicted for the first-degree murder of one of their adoptive children, and other charges. The State seeks the death penalty against both defendants.

Carmen filed a pretrial motion for the issuance of a subpoena *duces tecum* seeking medical (including psychological and psychiatric records) from a local hospital related to Jorge. She maintained the records were necessary and relevant to her defense, and asked the trial court to review them *in camera.* Carmen's justification was that the medical records would help establish the veracity of Jorge's statement to police that he thought his children were trying to poison him. The trial court found the need for the *in camera* review was sufficient since the records might contain information that Carmen might use in nudging forward their defense or mitigation. The order was stayed to allow Jorge to seek relief in the 3rd DCA. Jorge sought to prevent the disclosure, arguing Carmen offered no specific nexus between his own medical records and Carmen's defense; that if she obtains the records she'll be obligated to provide them to the State under reciprocal discovery, that the trial judge's review of the records would prejudice the judge-particularly in the sentencing stage, and that disclosure is prevented by the Health Insurance Portability and Accountability Act (HIPAA) and its privacy rule. (45 C.F.R. §§ 164.102- 164.106). Carmen's justification focused on Jorge's bizarre behavior toward the children and his belief they were trying to poison him, and explaining why she assisted Jorge by taping the children's hands and placing them in a bathtub "to sleep." The State responded by indicating it was taking no position other than asking the court not to prejudice the State's rights under discovery.

The DCA noted that Carmen's argument that a subpoena would trump the HIPAA and Florida laws (F.S. 396.3025(4) and F.S. 456.057) privacy provisions. The DCA noted, however that Article I, section 23 of the Florida Constitution and the physician-patient privilege in F.S. 456.057 require that a subpoena be issued only "when there is a clear connection between illegal activity and the person whose privacy has allegedly been invaded." (Citing State v. Johnson, 814 So.2d 390 (Fla. 2002)). It indicated Carmen had failed to establish this requisite clear connection since her justification failed to show how the records sought related to the separate case against her and her defenses (as opposed to the case against Jorge and his defenses). She did not indicate any personal knowledge that Jorge was claiming the children were poisoning him, at any time before or during the incidents detailed in the indictment. The DCA granted Jorge's Petition and quashed the trial court's order.

Barahona v. State, et. al., -- So.3d—(Fla. 3rd DCA, 6/10/15, 3D15-9130)

Video Footage Captured By Surveillance Security System Cameras Cannot Be Disclosed Since It is Both Confidential And Exempt Under F.S. 119.071(3)(a) and F.S. 281.301

An Orlando television station sought videos from the Central Florida Regional Transportation Authority, d/b/a LYNX and LYNX resisted. A declaratory judgment was sought, and obtained at the trial court level by the TV station, with the trial court finding that the "security system" public records act exemptions did not apply to LYNX buses' camera footage. LYNX appealed to the 5th DCA, arguing the video footage did fall under the exemptions. The 5th DCA held that the provisions of F.S. 119.071(3)(a) and F.S. 281.301 were broadly worded and that the video footage captured by the bus camera directly "relates to and reveals information about a security system." The DCA noted the videos, which are records, "reveal the capabilities—and as a corollary, the vulnerabilities—of the current system." Finding the wording of the statutes reflected clearly the Legislature's intent, the DCA found no need to analyze legislative history. It held that the footage fell within the exemptions and was confidential and exempt from public inspection under the Public Records Act.

Editor's Note: This opinion in effect means departments have no specific basis to release segments or still shots from such videos for legitimate investigative purposes. The opinion could have far-reaching impact. Are convenience store videos or bank surveillance videos provided to law enforcement after a robbery also under the confidential and exempt status since they "reveal information about a security system"? In contrast to several other provisions in the public records

laws, there is no express indication that the custodian of the video can release the video (or portion thereof) for specified purposes. Likely a statutory remedy will need to be crafted to clearly assure "security system" videos (including "stills" from those videos) can legally be shared with the public for legitimate investigative purposes.

Central Florida Regional Transportation Authority, d/b/a/ Lynx v. Post-Newsweek Stations, Orlando, Inc. d/b/a WKMG-TV Local 6, 157 So.3d 401 (Fla. 5th DCA, 1/30/15, reh. denied 2/26/15)

Supplement: Late-announced opinions of potential interest

1st DCA--Too Darkly Tinted Windows Provided Reasonable Suspicion For Traffic Stop and Information Developed During Stop Supported Frisk Which Revealed Knife With Cocaine Residue.

In the early morning hours of August 14, 2013, Vaughn's vehicle was stopped by Gainesville police officer for a window tint violation. Upon approaching the vehicle, the Officer Futrell saw a television illegally mounted to the dashboard. Futrell asked for Vaughn's license and registration and questioned him regarding his home address. The addresses on the license and the registration, as well as the one orally provided by Vaughn, were all different. Futrell then asked Vaughn a series of questions regarding whether he had any weapons or contraband on his person or in the vehicle, and he replied that he had a knife on him. Futrell requested Vaughn step out of the vehicle for officer safety purposes because he had admitted to having a knife on him and she did not know if any other weapons were in the vehicle. A backup arrived. Futrell then informed Vaughn that they needed to remove the knife from him for safety reasons. The backup officer patted down the pocket indicated by Vaughn, removed a box cutter or utility knife, and handed it to Futrell. Without opening the knife, Futrell was able to see a white powdery residue she suspected to be cocaine. A field test conducted on-site confirmed her suspicion. Vaughn was then searched and narcotics were found on his person.

The 1st DCA agreed with the trial court that the chain of events provided legal basis for the stop, search, and seizure. Vaughn was legally stopped because of the dark window tint (F.S. 316.2953) and the TV mounted on the dashboard (F.S. 316.303) both non-criminal traffic infractions. The multiple addresses allowed Vaughn's detention to determine whether he had committed a criminal offense of failing to maintain an up-to-date registration. (F.S. 320.02(4)). Under F.S. 320.57(1), this would be a 2nd degree misdemeanor. The removal of the knife was justified under F.S. 901.151(5), and the cocaine was in plain view when the knife was retrieved. The trial court's non-suppression of the evidence was affirmed.

Vaughn v. State, --SO.3d—(Fla. 1st DCA, 1D14-2241 9/11/15).

2nd DCA--State Not Diligent In Searching For Defendant After Information Filed

The State alleged that Ms. Norton committed the offense of "Doctor-Shopping" in Pasco County on or between June 9, 2009, and March 25, 2010. The information was filed on July 27, 2010, and a capias issued the same day. Ms. Norton was arrested in St. Lucie County on July 30, 2014. Norton sought dismissal based upon passage of the statute of limitations and the state argued it had made diligent efforts and a diligent search for Ms. Norton. The trial court denied her petition to dismiss and the appeal resulted. The 2nd DCA determined:

> [1]-A § 893.13(7)(a)(8), Fla. Stat. charge against defendant was dismissed for failure to commence prosecution within the limitations period under § 775.15(4)(b), Fla. Stat. (2009); [2]-The State attempted to serve defendant at her mother's address, but she had not lived there for six years, and the State posted the warrant on law enforcement websites;
> [3]-Eleven months later, the State made an unsuccessful attempt to locate defendant at an address obtained through the driver's license and vehicle registration databases, and attempted service twice in 24 hours;
> [4]-The State did not search the telephone book, property tax records, voter registration records, probation office records or utility records and did not attempt to search an online telephone directory or use an Internet search engine;

[5]-The State did not show that Norton was out of the state during the time between the filing of the Information and her arrest, nor did it show that use of the sources identified in *State v. Mack*, 637 So.2d 18 (Fla 4th DCA 1994) would have been futile.

Petition for writ of prohibition to the Pasco County Circuit Court granted; discharge ordered.

Norton v. State, ---So.3d.--, (Fla. 2nd DCA, 2D15-2231, 9/4/15)

5th DCA--Computer Records Reflecting Owner Of Vehicle Has Suspended License Provides Reasonable Suspicion To Stop The Vehicle And Check License Status Of Driver

On December 28, 2013, a little after midnight, Officer Daniel Bruns of the Orlando Police Department was driving behind a black Hyundai SUV. Bruns ran a check on the license plate, which revealed that the registered owner of the vehicle had a suspended license. Based on this information, Officer Bruns conducted a traffic stop. He then approached the vehicle and requested the driver to hand over his registration and driver's license. The driver, Manuel Laina provided Officer Bruns with a Florida ID card, advising that his license was suspended. After confirming that Laina's license had been suspended for sixty months as a habitual traffic offender on April 25, 2011, and that no hardship license had been issued, Officer Bruns arrested Laina for driving with a suspended license as a habitual traffic offender in violation of F.S. 322.34(5).

The trial court ruled the stop was without reasonable suspicion, relying on State v. Teamer, 151 So.3d 421 (Fla. 2004) in which the Florida Supreme Court held an officer did not have reasonable suspicion to stop a vehicle solely because it did not match the color indicated on the registration. The 5th DCA reversed the trial court's suppression. "Significant to this analysis, "[r]easonable suspicion . . . [is] based on probabilities, not absolute certainty." *State v. Burgos*, 994 So. 2d 1212, 1214 (Fla. 5th DCA 2008) (citing *State v. Jones*, 417 So. 2d 788, 793 (Fla. 5th DCA 1982) (explaining that "[t]he word probable means it is 'more likely than not' that a particular categorical statement or proposition is, or will be, true or that a particular event has, or will, occur.")). The relevant probability here is that most vehicles are driven by their owners, most of the time. As such, once Officer Bruns discovered that the owner of the vehicle he was following had a suspended driver's license, this "articulated fact" gave him a "founded suspicion" that the driver might be driving illegally."

State v. Laina, ---So.3d—(Fla. 5th DCA, 5D14-4469, 9/11/15).

2nd DCA--Exigent Circumstances Justified Seizure Of Personal iPhone

In late October 2011 North Port Police Department investigators received an alert from a Massachusetts state trooper that an individual named Anthony Hanifan had transmitted child pornography to a criminal defendant in Massachusetts. After interviewing Hanifan's wife, North Port police officers learned Hanifan's physical description, his car's description, and that Mr. Hanifan possessed a smartphone that he kept in a black protective case. By reason of additional investigative efforts, Hanifan's smartphone was directly implicated in Mr. Hanifan's alleged criminal activities.

Two North Port police detectives then went to Hanifan's house in an attempt to contact him. Finding no one home, they waited in their vehicle in a neighbor's driveway until they observed Hanifan driving his vehicle toward his house. He came almost to a complete stop in front of his driveway then suddenly sped away. In pursuit, the detectives saw Hanifan's vehicle drive through two intersections, each time passing a stop sign without making a complete stop. The detectives relayed this observation to their supervisor and were ordered to execute a stop of the vehicle and take custody of a smartphone in a black case if they observed one. They stopped Hanifan, identified him, and seized his iPhone, which was lying in its black case in the officers' plain view on the passenger-side front floorboard. The iPhone was secured, but not accessed or searched, until the detectives obtained and executed a search warrant.

As discussed by the 2nd DCA, when a seizure like this occurs without a warrant, the State bears the burden of showing that an exigent circumstance, such as the potential destruction of evidence, existed at the time of the seizure; it must also rebut the presumption that a warrantless search is unreasonable. The State met its burden. Having been informed of Hanifan's alleged criminal activity and the likelihood

that a smartphone on his person could contain direct evidence of that criminal activity, and then observing what, by all appearances, was an attempt to elude law enforcement officers by driving through two stop signs, there was reasonable justification for the seizure of the iPhone. The detectives' concerns that Hanifan could destroy or conceal the iPhone or delete the electronic data and digital images stored on it were reasonable and authorized them to temporarily retain custody of the phone while they obtained a warrant.

Hanifan argued this was a "police-created exigency" exception to this rule. He argues that any probable cause or exigent circumstances that might have justified seizing his iPhone were of the detectives' own machination. The DCA did not find his argument persuasive, particularly in light of *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011), which recognized that in some sense the police always create the exigent circumstances, as there is an inherent degree of police involvement whenever they undertake a search or seizure to prevent the potential destruction of evidence. In effect, Hanifan's argument would liken the mere presence of detectives in his neighborhood to a threat against his constitutional rights. The DCD dismissed this argument. The detectives made no contact with Hanifan whatsoever before they observed his traffic infractions and stopped him. Accordingly, the police-created exigency doctrine does not apply here, and the trial court properly denied the motion to suppress.

Hanifan v. State, --So.3d—(Fla. 2nd DCA, 2D13-4480, 9/18/15)

Remember:

The cases discussed is this summary are a <u>sampling</u> of cases issued over the last 10 months. This is not an exhaustive discussion of every case issued in the last year that may be of interest to law enforcement agency legal advisers and officers. Some cases of interest to you may not be included in this summary.

→ Do not rely solely upon the summary of any case provided herein. Read the full opinion.

<u>Law enforcement officers</u>: Discuss any case of interest or concern with your agency's legal counsel prior to relying upon it.

2015 Legislation Of Interest:

Ch. 2015-26 (CS/CS/SB 766): "Freedom From Unwarranted Surveillance Act" (Regulating Use of Drones)

This law became effective July 1, 2015. It amends F.S. 934.50, the "Freedom From Unwarranted Surveillance Act." It prohibits a person, a state agency, or a political subdivision from using a drone to capture an image of privately owned real property or of the owner, tenant, occupant, invitee or licensee of such property with the intent to conduct surveillance without his or her written consent if a reasonable expectation of privacy exists. The law defines "image" to include thermal, infrared, ultraviolet, visible light, or other electromagnetic waves; sound waves; odors; or other physical phenomena "which captures conditions existing on or about real property or an individual located on that property." It retains the definition of "drone" as was in the law previously. It adds a definition of "imaging device" to mean a mechanical, digital, or electronic viewing device; still camera; camcorder; motion picture camera; or any other instrument, equipment, or format capable of recording, storing or transmitting an image. It defines "surveillance" for purposes of F.S. 934.50 to be "…the observation of…persons with sufficient visual clarity to be able to obtain information about their identity, habits, conduct, movements, or whereabouts" and with regard to privately owned real property "the observation of such property's physical improvements with sufficient visual clarity to be able to determine unique identifying features or its occupancy by one or more persons."

The law expands the list of prohibited uses of drones. In addition to previously-existing prohibition of the use of a drone by law enforcement to gather evidence or other information, the prohibition has been expanded to apply to a person, state agency or political subdivision to "record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance…in violation of such person's reasonable expectation of privacy without his or her written consent." It includes a presumption of reasonable expectation of privacy on privately owned real property "if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone."

The law retains its previous three exceptions to its prohibitions: (1) To counter a high risk of a terrorist attack; (2) If use of the drone is authorized by a search warrant; and (3) Exigencies related to preventing imminent danger to life or serious damage to property, or to forestall an imminent escape of a suspect, the destruction of evidence or facilitating the search for a missing person. In addition, six additional exceptions are added:

1. Using a drone to perform reasonable tasks within the scope of practice or activities of a person or entity engaged in a business or profession licensed by the state (including agents, employees or contractors thereof) if the drone is operated to perform reasonable tasks related to the person or entity's license. This exception excludes "private investigation" activities, however.

2. Use of drones by an appraiser or contractors/employees for assessing property for ad valorem taxation.

3. Capturing images for electric, water or gas utilities for operations and maintenance of utility facilities, including inspections, assessing vegetation growth on utility rights-of-way; utility routing, siting and permitting; and for conducting environmental monitoring.

4. For aerial mapping, if use complies with FAA regulations.

5. For delivery of cargo, if use complies with FAA regulations; and

6. To capture images necessary for the safe operation or navigation of a drone being used for a purpose allowed under federal or Florida law.

The law adds a right to initiate a civil action for compensatory damages for violations of the section and to seek injunctive relief. The prevailing party is entitled to reasonable attorney fees from the non-prevailing party based on actual and reasonable time expended by the attorney at an appropriate rate and (with regard to contingent fees) without a multiplier unless the case is tried to verdict (in which case a multiplier of 2x the actual value of time expended may be awarded by the court). Punitive damages are also authorized. The remedies provided in the section are cumulative to other existing remedies.

The current prohibition on the use of evidence obtained in violation of the law is retained.

The FAA has issued a notice of proposed rulemaking related to drones. See: http://www.faa.gov/regulations_policies/rulemaking/recently_published/media/2120-AJ60_NPRM_2-15-2015_joint_signature.pdf

A copy of the amended Florida law can be accessed at: http://laws.flrules.org/2015/26

<><><>

One Person Consent Exception Created For Minors Intercepting Oral Communications Expected To Capture Admission Related To Unlawful Sexual Act or Unlawful Physical Force Against The Minor

Chapter 2015-82 (HB 7001) became effective July 1, 2015. It authorizes interception of oral communications by a minor for the purposes of obtaining admissions related to sex crimes or crimes of violence against the minor by adding subparagraph (k) to F.S. 943.03(2):

> (k) It is lawful under ss. 934.03-934.09 for a child under 18 years of age to intercept and record an oral communication if the child is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child.

A copy of the Florida law can be accessed at: http://laws.flrules.org/2015/82

<><><>

Public Records Exemption: Active Duty Service Members and Families

Chapter 2015-86 (HB 185), effective 6/2/2015. Previous public records laws did not provide a public records exemption for active duty service members of the United States Armed Forces, Reserve Forces, or National Guard. This bill creates a public records exemption for the identification and location information of current or former active duty service members of the U.S. Armed Forces, Reserve Forces, or National Guard who served after September 11, 2001, and their spouses and dependents. In order for the exemption to apply, the current or former service member must submit to the custodial agency a written request and a written statement that reasonable efforts had been made to protect the identification and location information from being accessible through other means available to the public. The law defines the term "identification and location information" to mean the: -home address, telephone number, and date of birth of a service member, and the telephone number associated with a service member's personal communication device; -home address, telephone number, date of birth, and place of employment of the spouse or dependent of such service member, and the telephone number associated with such spouse's or dependent's personal communication device; and -name and location of the school attended by the spouse, or the school or day care facility attended by the dependent of such service member. The bill is retroactive and was signed into law and was effective on 6/2/15.

<><><>

Public Records Exemption: Body Camera Recording Made by a Law Enforcement Officer

Ch. 2015-41 (SB 248), effective 7/1/2015, creates F.S. 119.071(2)(l), which defines a public records exemption for a body camera recording made by a law enforcement officer. As defined in the bill a "body camera" is a portable electronic recording device that is worn on a law enforcement officer's

body and that records audio and video data in the course of the officer performing his or her official duties and responsibilities. The bill makes a body camera recording, or a portion thereof, confidential and exempt from public disclosure if the recording is taken:

• Within the interior of a private residence;
• Within the interior of a facility that offers health care, mental health care, or social services;
• At the scene of a medical emergency involving a death or involving an injury that requires transport to a medical facility; or
• In a place that a reasonable person would expect to be private.

A law enforcement agency may disclose a body camera recording in furtherance of its official duties and responsibilities and may also disclose the recording to another governmental agency in the furtherance of its official duties and responsibilities.

A law enforcement agency must disclose a body camera recording, or a portion of it, to:

• A person recorded by a body camera (the person receives those portions of the recording relevant to the person's presence in the recording);
• The personal representative of a person recorded by a body camera (the person receives those portions of the recording relevant to the recorded person's presence in the recording);
• A person not depicted in a body camera recording if the recording depicts a place in which the person lawfully resided, dwelled, or lodged at the time of the recording (the person receives those portions of the recording that record the interior of such a place); and
• Pursuant to a court order.

The bill provides that, in addition to any other grounds the court may consider in determining whether to order that a body camera recording be disclosed, the court must consider whether disclosure is necessary to advance a compelling interest; whether the recording contains information that is otherwise exempt or confidential and exempt under the law; whether the person requesting disclosure is seeking to obtain evidence to determine legal issues in a case in which the person is a party; whether disclosure would reveal information regarding a person that is of a highly sensitive personal nature; whether disclosure may cause reputational harm or jeopardize the safety of a person depicted in the recording; whether confidentiality is necessary to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice; whether the recording could be redacted to protect privacy interests; and whether there is good cause to disclose all or portions of a recording.

In any proceeding regarding the disclosure of a body camera recording, the law enforcement agency that made the recording must be given reasonable notice of hearings and an opportunity to participate.

A law enforcement agency must retain a body camera recording for at least 90 days. The language will require law enforcement to retain these recordings for the stated minimum amount of time but does not otherwise supersede the retention and destruction schedule established by the Division of Library Services. Effective 7/1/2015.

<><><>

Public Records Exemption: Florida RICO Act

Ch. 2015-99 (HB 7061). The bill creates a public records exemption that provides that information held by an investigative agency pursuant to an investigation of a violation of the RICO Act is confidential and exempt from F.S. 119.07(1) and s. 24(a), Art. I of the State Constitution. However, information that is confidential and exempt may be disclosed by the investigative agency to a government entity in the performance of its official duties and a court or tribunal. The information will no longer be confidential and exempt once all investigations to which the information pertains are completed, unless the information is otherwise protected by law. An investigation is considered complete once the investigative agency either files an action or closes its investigation without filing an action. Effective 7/1/15.

<><><>

Public Records Exemption: Human Trafficking Victims

Ch. 2015-146 (HB 467) Currently, Florida law exempts active criminal intelligence and active criminal investigative information from public disclosure. In addition F.S. 943.0583, F.S., provides a public records exemption for criminal history records of a human trafficking victim that have been ordered expunged. This bill, which was linked to the passage of CS/CS/HB 465 (Ch. 2015-145), amends F.S. 119.071(2)(h), F.S., to expand the types of criminal intelligence and criminal investigative information that are confidential and exempt from public records requirements to include:

• Any information that reveals the identity of a person under the age of 18 who is the victim of a crime of human trafficking for labor or services proscribed in F.S. 787.06(3)(a);
• Any information that may reveal the identity of a person who is the victim of a crime of human trafficking for commercial sexual activity proscribed in F.S. 787.06(3)(b), (d), (f), or (g); and
• A photograph, videotape, or image of any part of the body of a victim of a crime of human trafficking involving commercial sexual activity proscribed in F.S. 787.06(3)(b), (d), (f), or (g).

The bill also amends F.S. 943.0583, making the above-described criminal intelligence and criminal investigative information confidential and exempt from public records requirements under the section providing expunction for human trafficking victims. The bill authorizes release of the confidential and exempt information by a law enforcement agency in certain instances. It is retroactive. Effective 7/1/15.

<><><>

Public Records Exemption: Residential Facilities Serving Victims of Sexual Exploitation

Ch. 2015-147 (HB 469) This bill, which was linked to the passage of CS/CS/HB 465 (Ch. 2015-145), creates a public record exemption for information about the location of safe houses, safe foster homes, other residential facilities serving child victims of sexual exploitation, and residential facilities serving adult victims of human trafficking involving commercial sexual activity. The information regarding the location of these facilities that is held by an agency is confidential and exempt from public record requirements. However, the bill allows this information to be provided to any agency in order to maintain health and safety standards and to address emergency situations. Effective 7/1/2015.

<><><>

Public Records Exemption: E-mail Addresses/Department of Highway Safety and Motor Vehicles

Ch. 2015-32 (CS/CS/SB 7040) creates a new exemption for e-mail addresses collected by the DHSMV for conducting driver license and motor vehicle record transactions. Effective 7/1/2015.

About the compiler of this summary:

Michael Ramage retired in February, 2014 from the position of General Counsel with the Florida Department of Law Enforcement, a position he had held since 1992. He currently does a limited amount of consulting and training presentations. He is employed part-time as the Associate General Counsel for the Institute of Intergovernmental Research in Tallahassee, Florida. He has been a member of FAPA since 1986. A 1978 graduate of the University of Kentucky College of Law, he is a member of the Florida and Kentucky Bars. You can contact him at Ramagelaw@yahoo.com.

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

Unless overturned or modified by the U.S. Supreme Court, all decisions rendered by the Florida Supreme Court are mandatory or "binding authority" on all state courts in Florida. A decision of a District Court of Appeal (DCA) is binding only on all trial courts within the geographic boundaries of the DCA's jurisdiction. In general, that decision will be treated by trial courts throughout the state as controlling or "highly persuasive" if no other DCA has given a conflicting opinion on that particular issue of law. See: Pardo v. State, 596 So. 2d 665, (Fla.,1992) and Walters v. State, 905 So. 2d 974, Fla. 1st DCA 2005). In developing its opinion, a DCA first looks to see whether it has issued an opinion on the issue, or a very similar issue. A decision within the same DCA is given great weight. If the DCA has not ruled on an issue, the DCA will look to the other Florida DCAs to see if there is an opinion that will assist it in reaching its decision. However, a DCA is not required to accept another DCA's opinion on an issue, and if two DCAs disagree, the matter may be certified to the Florida Supreme Court as a "conflict" (between the DCAs) for final resolution.

The internet makes court opinions from around the country known almost as soon as they are issued. Rulings from other states do not bind Florida courts. Unless the opinion is from your circuit court, the District Court of Appeal district in which your agency resides, the Florida Supreme Court, or the U.S. Supreme Court it is not binding. Opinions from other Florida courts may "persuasive authority" which may or may not be followed by a court considering the issue.

Generally, Florida courts are not bound to follow Federal Court opinions unless it a case from the United States Supreme Court impacting Florida, or a case coming from the 11th U.S. Court of Appeals or a Florida Federal District Court addressing Florida state law or procedure, or actions applying to persons within Florida. Nevertheless, Federal opinions from other Federal Courts of Appeal often have "persuasive" weight for Florida courts when dealing with issues for which there is no previously-issued binding Florida case law (precedent).

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

If there is a case in this summary that concerns you, read the full case. Do not rely solely on this summary for a full understanding of the case. Discuss it with your legal advisor or supervisors.
Just because a court "somewhere" has issued an opinion on an issue of interest does not necessarily mean it applies to your agency.

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