Florida Case Law Update For Law Enforcement Legal Advisors 2013 Edition

(Cases of Interest To Florida Police Attorneys From The Past Year)

As Presented To
The Florida Association of Police Attorneys

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

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

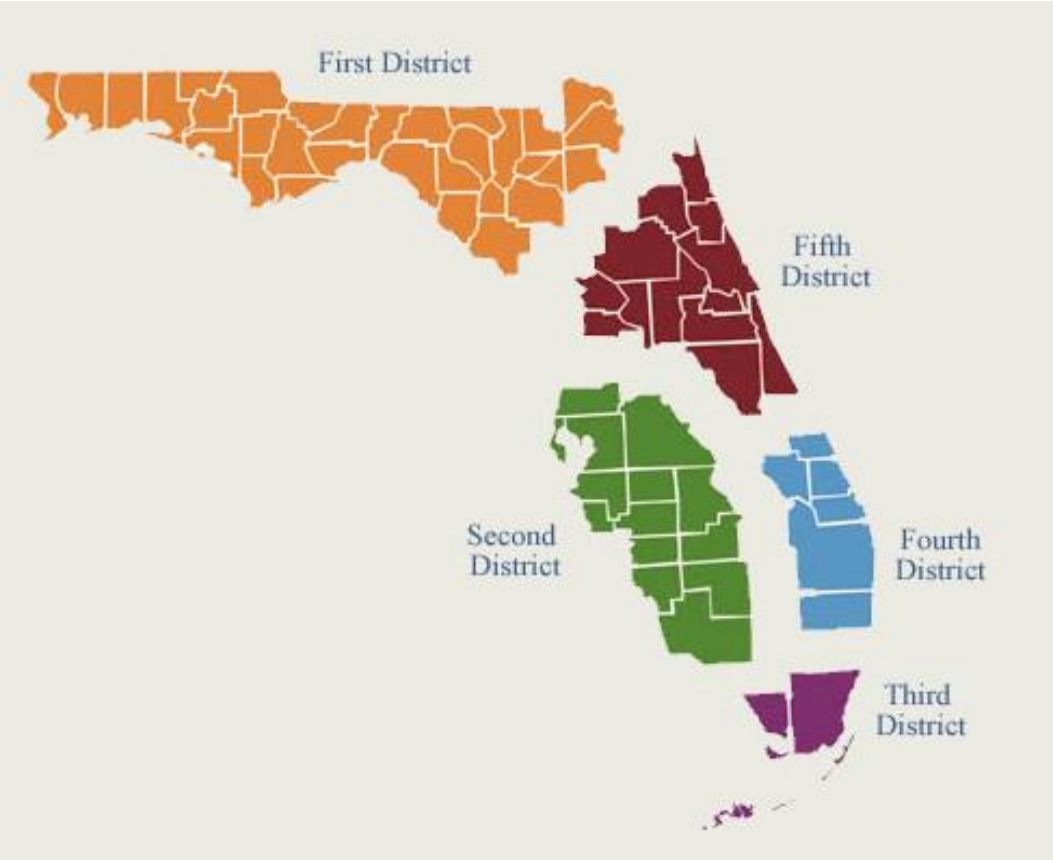
My sincere thanks to Tallahassee Police Legal Advisor Rick Courtemanche for sharing his monthly TPD case updates, to FDLE Regional Legal Advisor David Margolis for his "FDLE Case Updates" and to former FAPA member Craig Rockenstein for his proof-reading efforts.

A copy of this will be posted to the FDLE General Counsel's page at www.fdle.state.fl.us after presentation to FAPA.

Florida Cases Of Interest To Police Attorneys
Michael Ramage
October 3, 2013

Table Of Contents

Florida's District Courts Of Appeal Boundaries:



Selected Opinions Of The U.S. SUPREME COURT:

Alleyne v. United States, 570 U.S. __ (June 17, 2013). The Court overruled *Harris v. United States*, 536 U.S. 545 (2002), and held that **any fact that increases a mandatory minimum sentence must be submitted to the jury.**

Salinas v. Texas, 570 U.S. __ (June 17, 2013). **Use at trial of the defendant's silence during a non-custodial interview did not violate the Fifth Amendment.** Without being placed in custody or receiving Miranda warnings, the defendant voluntarily answered an officer's questions about a murder. But when asked whether his shotgun would match shells recovered at the murder scene, the defendant declined to answer. Instead, he looked at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, and began "to tighten up." After a few moments, the officer asked additional questions, which the defendant answered. The defendant was charged with murder and at trial prosecutors argued that his reaction to the officer's question suggested that he was guilty. The defendant was convicted and on appeal asserted that this argument violated the Fifth Amendment. The Court took the case to resolve a lower court split over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a non-custodial police interview as part of its case in chief. In a 5-to-4 decision, the Court held that the defendant's Fifth Amendment claim failed. Justice Alito, joined by the Chief Justice and Justice Kennedy found it unnecessary to reach the primary issue, concluding instead that the defendant's claim failed because he did not expressly invoke the privilege in response to the officer's question and no exception applied to excuse his failure to invoke the privilege. Justice Thomas filed an opinion concurring in the judgment, to which Justice Scalia joined. In Thomas's view the defendant's claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his pre-custodial silence did not compel him to give self-incriminating testimony.

Peugh v. United States, 569 U.S. __ (June 10, 2013). The Court held that **retroactive application of amended Federal Sentencing Guidelines to the defendant's convictions violated the Ex Post Facto Clause.**

Maryland v. King, 569 U.S. __ (June 3, 2013). **The defendant's Fourth Amendment rights were not violated by the taking of a DNA cheek swab as part of booking procedures.** When the defendant was arrested in April 2009 for menacing a group of people with a shotgun and charged in state court with assault, he was processed for detention in custody at a central booking facility. Booking personnel used a cheek swab to take the DNA sample from him pursuant to the Maryland DNA Collection Act (Maryland Act). His DNA record was uploaded into the Maryland DNA database and his profile matched a DNA sample from a 2003 unsolved rape case. He was subsequently charged and convicted in the rape case. He challenged the conviction arguing that the Maryland Act violated the Fourth Amendment. The Maryland appellate court agreed. The Supreme Court reversed. The Court began by noting that using a buccal swab on the inner tissues of a person's cheek to obtain a DNA sample was a search. The Court noted that a determination of the reasonableness of the search requires a weighing of "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy." It found that "[i]n the balance of reasonableness . . . , the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest." The Court noted in particular the superiority of DNA identification over fingerprint and photographic identification. Addressing privacy issues, the Court

found that "the intrusion of a cheek swab to obtain a DNA sample is a minimal one." It noted that a gentle rub along the inside of the cheek does not break the skin and involves virtually no risk, trauma, or pain. And, distinguishing special needs searches, the Court noted: "Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial . . . his or her expectations of privacy and freedom from police scrutiny are reduced. DNA identification like that at issue here thus does not require consideration of any unique needs that would be required to justify searching the average citizen." The Court further determined that the processing of the defendant's DNA was not unconstitutional. The information obtained does not reveal genetic traits or private medical information; testing is solely for the purpose of identification. Additionally, the Maryland Act protects against further invasions of privacy, by for example limiting use to identification. It concluded:

> In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

Missouri v. McNeely, 569 U.S. __ (April 17, 2013). **The Court held that in drunk driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.** After stopping the defendant's vehicle for speeding and crossing the centerline, the officer noticed several signs that the defendant was intoxicated and the defendant acknowledged that he had consumed "a couple of beers." When the defendant performed poorly on field sobriety tests and declined to use a portable breath-test device, the officer placed him under arrest and began driving to the stationhouse. But when the defendant said he would again refuse to provide a breath sample, the officer took him to a nearby hospital for blood testing where a blood sample was drawn. The officer did not attempt to secure a warrant. Tests results showed the defendant's BAC above the legal limit. The defendant was charged with impaired driving and he moved to suppress the blood test. The trial court granted the defendant's motion, concluding that the exigency exception to the warrant requirement did not apply because, apart from the fact that as in all intoxication cases, the defendant's blood alcohol was being metabolized by his liver, there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant. The state supreme court affirmed, reasoning that *Schmerber v. California*, 384 U. S. 757 (1966), required lower courts to consider the totality of the circumstances when determining whether exigency permits a nonconsensual, warrantless blood draw. The state court concluded that *Schmerber* "requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case." The U.S. Supreme Court granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk driving investigations. The Court affirmed. The Court began by noting that under *Schmerber* and the Court's case law, applying the exigent circumstances exception requires consideration of all of the facts and circumstances of the particular case. It went on to reject the State's request for a per se rule for blood testing in drunk

driving cases, declining to "depart from careful case-by-case assessment of exigency." It concluded: "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances."

Florida v. Jardines, 569 U.S. __ (Mar. 26, 2013). **Using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment.** The Court's reasoning was based on the theory that the officers engaged in a physical intrusion of a constitutionally protected area. Applying that principle, the Court held:

> The officers were gathering information in an area belonging to [the defendant] and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Slip Op. at pp. 3-4. In this way the majority did not decide the case on a reasonable expectation of privacy analysis; the concurring opinion came to the same conclusion on both property and reasonable expectation of privacy grounds.

Florida v. Harris, 568 U.S. __ (Feb. 19, 2013). **Concluding that a dog sniff "was up to snuff," the Court reversed the Florida Supreme Court and held that the dog sniff in this case provided probable cause to search a vehicle**. The Court rejected the holding of the Florida Supreme Court which would have required the prosecution to present, in every case, an exhaustive set of records, including a log of the dog's performance in the field, to establish the dog's reliability. The Court found this "demand inconsistent with the 'flexible, common-sense standard' of probable cause. It instructed:

> In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

Applying that test to the drug dog's sniff in the case at hand, the Court found it satisfied.

Smith v. United States, 568 U.S. __ (Jan. 9, 2013) In a case involving federal drug and RICO conspiracy charges the Court held that **allocating to the defendant the burden of proving withdrawal from the conspiracy does not violate the Due Process Clause.** This rule remains intact even when withdrawal is the basis of a statute of limitations defense.

Evans v. Michigan, 568 U.S. __ (Feb. 20, 2013.) **When the trial court enters a directed verdict of acquittal based on a mistake of law the erroneous acquittal constitutes an acquittal for double jeopardy purposes barring further prosecution.** After the State rested in an arson prosecution, the trial court entered a directed verdict of acquittal on grounds that the State had provided insufficient evidence of a particular element of the offense. However, the trial court erred; the unproven "element" was not actually a required element at all. The Court noted that it had previously held in *Arizona v. Rumsey*, 467 U. S. 203, 211 (1984), that a judicial acquittal premised upon a "misconstruction" of a criminal statute is an "acquittal on the merits . . . [that] bars retrial." It found "no meaningful constitutional distinction between a trial court's 'misconstruction' of a statute and its erroneous addition of a statutory element." It thus held that the midtrial acquittal in the case at hand was an acquittal for double jeopardy purposes.

Chaidez v. United States, 568 U.S. __ (Feb. 20, 2013) **The case of *Padilla v. Kentucky*, 559 U. S. ___ (2010) (criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas), does not apply retroactively to cases that became final before *Padilla* was decided.**

Bailey v. United States, 568 U.S. __ (Feb. 19, 2013) ***Michigan v. Summers*, 452 U.S. 692 (1981) (officers executing a search warrant may detain occupants on the premises while the search is conducted), does not justify the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant.** In this case, the defendant left the premises before the search began and officers waited to detain him until he had driven about one mile away. The Court reasoned that none of the rationales supporting the *Summers* decision—officer safety, facilitating the completion of the search, and preventing flight—apply with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises. It further concluded that "[a]ny of the individual interests is also insufficient, on its own, to justify an expansion of the rule in *Summers* to permit the detention of a former occupant, wherever he may be found away from the scene of the search." It stated: "The categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched." The Court continued, noting that *Summers* also relied on the limited intrusion on personal liberty involved with detaining occupants incident to the execution of a search warrant. It concluded that where officers arrest an individual away from his or her home, there is an additional level of intrusiveness. The Court declined to precisely define the term "immediate vicinity," leaving it to the lower courts to make this determination based on "the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors."

NOTE: These U.S. Supreme Court summaries were written by the University of North Carolina School of Government editors. For a summary of every U.S. Supreme Court opinion related to criminal law from 1991 to present, check out the UNC School of Government's summary site at: http://www.sog.unc.edu/node/489

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

FLORIDA SUPREME COURT CASES:

"Boom Box" Statute Unconstitutional

After being cited under F.S. 316.3045(1)(a) in separate incidents in Pinellas County, two individuals appealed a trial court's refusal to dismiss the citations on the basis that the "plainly audible" standard in the statute is vague, overbroad, promotes arbitrary enforcement and impinges on their First Amendment free speech rights.[1] The Florida Supreme Court ruled on their objections.

As to "Vagueness" the challengers argued that whether an officer can hear amplified sound "25 feet or more" from a vehicle depended on the officer's auditory ability and promoted arbitrary enforcement based on whether the officer liked or disliked the amplified sound. The Court noted that statutes do not have to have highly specific standards or mathematical certainty in the standards related. It held the "plainly audible" standard in the statute was not unconstitutionally vague.

However, the Court also noted that a statute that criminalizes constitutionally protected activities along with unprotected activities can unconstitutionally infringe protected rights. The Court noted the statute allowed commercial and political speech to be plainly audible at and beyond 25 feet but prohibited non-commercial and non-political speech at the same distance. Finding that the statute failed to narrowly tailored to meet the government's interest while at the same time protecting one's right of freedom of expression, the Court struck down the statute on the basis of being overbroad.

Note: Subsequent to Catalano being issued, the Minnesota Court of Appeals upheld an ordinance prohibiting loud audios heard from a distance of 50 feet. Minnesota v. McElroy, 828 NW 2d 741 (4/8/2013). The Minnesota court found that a standard of distance in the ordinance provided an objective guideline to avoid arbitrary enforcement. It also found its ordinance to be content-neutral in contrast to the Florida statute's content-based approach. The ordinance did not exempt political or commercial sound—but provided an option to seek a permit for sounds that exceeded the 50 foot limitation. The court specifically distinguished its holding from Catalano. The 2013 Florida Legislature proposed HB 1019 and SB 634 to attempt to remedy the Catalano opinion. HB 1019 died on the House floor and SB 634 failed to pass the Senate on a 19-19 vote on 3rd reading.

State v. Catalano, 104 So.3d 1069(Fla. 12/13/2012)

Circumstantial Evidence Supported Conviction For 1st Degree Murder And Sentence of Death

Kocaker appealed his first-degree murder conviction and death sentence arguing as one of his numerous grounds for appeal that the evidence presented at trial was insufficient to support the first-degree murder conviction.

Eric Stanton, a cab driver, was stabbed several times and was placed in the trunk of his cab while he was still alive. The cab was set on fire. Stanton was eventually able to free himself from the trunk through the backseat of the vehicle, but ultimately died from a combination of his stab wounds and carbon monoxide poisoning.

The Florida Supreme Court determined "the State's case was wholly circumstantial." The Court noted the jury was instructed "on both premeditated murder and felony-murder" and stated that

[1] F.S. 316.3045 provides in pertinent part: "(1) It is unlawful (to operate a sound making device from a motor vehicle on a street or highway)…so that the sound is: (a) Plainly audible at a distance of 25 feet or more from the motor vehicle…."

"[b]ecause the guilty verdict was rendered on a general form, the evidence must support either premeditated murder or felony-murder." (Citing Dessaure v. State, 891 So. 2d 455, (Fla. 2004)).

The Court determined that leaving a wounded, living victim trapped in a burning vehicle is sufficient evidence from which to infer premeditation. Also, the stab wound which would have been fatal without medical treatment also supported a finding of premeditation. Further, the evidence of the burning vehicle sufficiently demonstrated that the murder had occurred during a "felony murder" enumerated felony—arson." (See: F.S. 782.04(1)(a)2).

The Court found the circumstantial evidence was sufficient to establish premeditated and felony murder, and was inconsistent with defendant's "hypothesis of innocence." As to other appeal arguments made by Kocaker, the Court ruled the death penalty is proportionate, Florida's protocol for execution by lethal injection is not unconstitutional, and Florida's capital sentencing scheme is not unconstitutional. The Court affirmed Kocaker's conviction for first-degree murder and sentence of death.

Kocaker v. State, SC10-229. – So.3d --- (2013 WL 28243) (Fla. 1/3/2013).

Search Of Contents Of Cell Phone After Seizure Incident Arrest Requires Warrant

During a photo lineup after a robbery, Smallwood was identified by the victim as the robber. The victim knew Smallwood as "Dooley." Officer Ike Brown responded to the robbery scene and recognized the name "Dooley." He went to "Dooley's" home where "Dooley's" mother indicated her son's name was Smallwood. Arrest warrants were issued, and about a week later, Smallwood was arrested pursuant to the warrant by Officer Brown.

At the time of the arrest, Smallwood's cell phone was seized, but its seizure was not mentioned in the arrest report. A year later, just before trial Officer Brown told the prosecutor that upon seizing the phone he separated Smallwood from it and accessed and searched for data on the phone. That search produced five digital images that might be relevant to the robbery.

Before viewing the images, the prosecutor notified the defense counsel and sought to obtain a search warrant to view the images. The images showed a black and silver handgun, stacks of money, jewelry, and a photo of Smallwood's fiancée. Money stolen from the robbery (of a convenience store) was in bundled stacks, and a .38 caliber black and silver handgun was taken from the store.

A motion to suppress the cell phone evidence was denied, and the case was appealed to the 1st DCA, which affirmed the trial court. The case was then appealed to the Florida Supreme Court.

The Florida Supreme Court discussed whether United States v. Robinson, 414 U.S. 218 (1973) controlled and determined it did not. The search-incident-to-arrest doctrine announced in Robinson did not contemplate the complexity of information available on modern cell phones that are seized incident arrest. While Officer Brown was authorized to seize the cell phone, but once it was seized there was no possibility that Smallwood would use it as a weapon nor could he have destroyed evidence that may have existed on the phone. Accordingly, the Court ruled that a warrantless search of the contents of the phone was not justified. The DCA's decision was quashed, and the case remanded for proceedings consistent with the Court's opinion.

Smallwood v. State, 113 So.3d 724 (Fla. 5/2/2013)

Statements In Hospital While Recovering From Injuries Were NOT Involuntary

Wheeler was convicted and sentenced to death for the murder of a law enforcement officer and convicted of attempted first-degree murder and aggravated battery of two other law enforcement officers, all Lake County deputies. On 2/5/2005 deputies responded to a 911 call in a rural area of the county. They arrived and observed Sara Heckerman with facial bruises and a gash on her head. She lived in a travel trailer on the property with Wheeler. Deputies developed PC to arrest Wheeler.

Heckerman gave permission to look for him on the property. As the deputies were putting up crime scene tape near the travel trailer, Wheeler began shooting at the deputies. Several rounds were exchanged with Wheeler retreating into the woods and returning to begin the gun battle again. Wheeler was permanently paralyzed from his wounds. Deputy Wayne Koester died from a shotgun blast received from Wheeler. The murder weapon was found near where Wheeler was taken into custody. Wheeler was found guilty and sentenced to death. He raised several issues on appeal, but the one of significance to legal advisors was that his statements to detectives should have been suppressed.

The Florida Supreme Court noted that Wheeler detailed his actions against the deputies in a statement given almost immediately after he was moved from the intensive care unit to a regular hospital room on 2/17/2005. Wheeler spoke to a detention center deputy, Officer Brown. Among the things related to Brown, Wheeler indicated that he had been arguing with Heckerman on the day of the murder and his main intention was "to go after" Heckerman. He told Brown that he did not like people on his property and would have shot anyone he found there. Wheeler reported to Brown that when he came out of the woods with his shotgun, he saw deputies stringing crime scene tape, and that he "had a choice"—"I could either run or I could go out in a blaze of glory." Wheeler also described to Brown how he tried to escape on the dirt bike, jumped into the water, and later tried to retrieve his shotgun.

He alleged ineffective assistance of counsel because his trial attorney did not effectively establish grounds to suppress the statements, allegedly given while under heavy pain killing drugs, and while in a weakened physical condition caused by a substantial loss of blood. The Court noted medical records did not support his claims. A psychiatric exam made a few hours before the move to a regular hospital room indicated Wheeler had "stable" judgment, and "although…somewhat lethargic, is otherwise alert and oriented fully." The Court noted no temporal relationship between receiving large doses of narcotics or sedatives and the statements made to Brown. Medical records also indicated Wheeler had become hemodynamically stable on 2/12. Finally, the Court noted that various facts in statements made to Brown were "totally and completely consistent with other sources and established facts as to how the crimes occurred." This conclusively showed he had the ability to recall, recollect and recount his actions to Brown accurately. His testimony was determined by the lower court reviewing it to be "100%" credible. Wheeler's petition for a writ of habeas corpus was denied, and the post conviction court's denial of relief was affirmed.

Wheeler v. State, 2013 WL 3214434, --So.3d-- (Fla. 6/27/2013)

Editor's note: Many times officers will seek statements from defendants while they are still under hospital care. Officers should be careful to note all the circumstances of such questioning, knowing full well that defense attorneys will seek to suppress any incriminating statements provided on the basis of the statements being involuntary by reason of drugs or other circumstances related to the hospital stay. If a defendant is under guard and (s)he volunteers incriminating evidence to a guard, the guard should carefully note all circumstances, including the physical condition of the defendant, particularly any absence of factors suggesting the defendant was "out of it," "hallucinating," or some other condition that could be used to suggest the statement was not voluntary.

Driving After Suspension Plea Of Nolo Under Subsection Of Statute That States It Does Not Apply To Habitual Offenders Prevents Subsequent Charge Under Subsection That Applies To Habitual Offenders

Gil was stopped in Miami-Dade for speeding. He was determined to be driving with a suspended license and was also a habitual traffic offender. He was arrested and the arrest report indicated the arrest was for DWLS (F.S. 322.34(5), "Driving while license suspended, revoked, canceled, or disqualified.")

F.S. 322.34 provides in part:

(1) …any person whose driver's license or driving privilege has been canceled, suspended, or revoked, *except a 'habitual traffic offender' as defined in s. 322.264,* who drives…is guilty of a moving violation…."
(2) Any person whose driver's license…has been canceled, suspended, or revoked…who knowing of such cancellation, suspension, or revocation, drives…upon
(a) A first conviction is guilty of a misdemeanor of the second degree….
(b) A second conviction is guilty of a misdemeanor of the first degree….
(c) A third or subsequent conviction is guilty of a felony of the third degree….
* * * *
(5) Any person whose driver's license has been revoked pursuant to s. 322.264 (habitual offender) and who drives any motor vehicle…is guilty of a felony of the third degree…."

Gil pled nolo to the misdemeanor DWLS charge in country court, was adjudged guilty of the charge and sentenced to six months' probation and 200 hours community service, plus payment of $358. On the same day the State Attorney's office filed an Information charging Gil under the felony HTO statute. Gil moved to dismiss the charge on the basis of double jeopardy, in particular F.S. 775.021(4). That statute prohibits dual convictions when (among other factors) the offenses "are degrees of the same offense as provided by statute."

The trial court dismissed the charge. The 3rd DCA reversed the dismissal at State v. Gil, 68 So.3d 1003, determining that Subsection (5) was not a degree variant of subsection (2) of F.S. 322.34. The Florida Supreme Court granted review because the 3rd DCA opinion conflicted with other DCA opinions. The Court concluded that the 3rd DCA's decision below must be quashed. "Gil cannot be prosecuted under sections 322.34(2) and 322.34(5) for two reasons. First, the plain language of section 322.34 reflects that the crimes delineated in subsections (2) and (5) are mutually exclusive. Second, subsections (2) and (5) constitute variant offenses and, therefore, dual prosecutions of Gil under these provisions would violate the Double Jeopardy Clauses of both the United States and Florida Constitutions."

The Court held that dual prosecutions under subsections (2) and (5) of section 322.34 are both statutorily and constitutionally prohibited. The decision of the Third District in Gil was quashed, and the other DCA decisions were approved to the extent they are consistent with this opinion.

Gil v. State, 118 So.3d 787 (Fla. 7/11/2013)

Dwelling Being Renovated And Not Suitable For Lodging Can Still Be Subject of Burglary of Dwelling Conviction; Carjacking Occurs If Force Used In Robbery Of Keys Occurs Inside Building And Taking Of Vehicle Is Outside

Young entered a dwelling where the victim was located with the intent to commit an offense therein. He committed an assault or battery on the victim inside the dwelling while possessing and threatening the use of a firearm and took the victim's truck by force, violence, assault or putting in fear while in possession of a firearm. The victim owned a drywall texture business. At about 8 p.m. the victim was cutting drywall in a house he'd been hired to renovate. He had been working in the house for about a week and a half and was working alone. Young walked up to the victim holding a gun, and said "Where's it at? Give it to me. You know where it's at." Young reached into the victim's pockets and removed the victim's cell phone, car keys, and wallet. Young then joined up with an apparent accomplice outside and they left in the victim's truck.

Two days later, a patrol officer with the Orlando Police tried to stop the truck after the driver failed to stop at two stop signs. Young, the driver, engaged in a short high speed attempt to avoid the officer. He was apprehended and after running the tag the officer learned the truck had been stolen. The victim identified Young through a photo line-up. The truck was returned with apparently no damage and with most of the gas that was in the truck when it was stolen used up. All tools were still present

in the truck. The victim's wallet was in the truck and no blank checks had been attempted to be cashed and the victim's credit cards had not been utilized. The cell phone was never recovered.

Young appealed, arguing the trial court erred in finding him guilty of burglary of a dwelling where the structure was undergoing renovation and arguably was not suitable for lodging. The 5th DCA affirmed his conviction in Young v. State, 73 So.3d 825 (Fla. 5th DCA, 2011). The Florida Supreme Court acknowledged Young conflicted with Munoz v. State, 937 So.2d 686 (Fla. 2nd DCA, 2006). It sided with Young and held the structure under consideration was a dwelling as defined in F.S. 810.011(2), and disapproved Munoz.

Young also appealed his carjacking conviction, alleging the force used was during the robbery inside the house which was separate from the taking of the truck outside the house. The Supreme Court held Young's actions did constitute carjacking under F.S. 812.133. It specifically disapproved Flores v. State, 853 So.2d 566 (Fla. 3rd DCA, 2003) which held otherwise.

Young v. State, SC11-2151, 38 Fla.L.Weekly S657, --So.3d--, (Fla. 9/19/2013)

FLORIDA DISTRICT COURT OF APPEALS CASES:

"Private" Conversation Between Jailed Subject And His Mother Was Legally Surreptitiously Recorded

Jeremiah Cuomo was arrested for felonies and transported to the Bay County Jail, where he invoked his Miranda rights after receiving them. All investigator questioning stopped when he invoked his rights. Later, the investigator learned Cuomo's mother wanted to speak to Cuomo regarding his arrest. They were placed in an interrogation room. Prior to putting them in the room, the investigator hid a tape recorder in a desk drawer in the room and turned it on to record the conversation between Cuomo and his mother. Cuomo was brought to the room, handcuffed to the chair, and the room's door was closed and locked from the outside. At no time was Cuomo or his mother told that their conversation would be private, but they assumed they were speaking in private. Cuomo made admissions to his mother. Cuomo moved to suppress the recorded admissions as being recorded in violation of F.S. 943.03, Article I, Section 12 (Florida's equivalent to the 4th Amendment) and Article I, Section 23, Florida's "Right To Privacy[2]." The trial court did not suppress the recorded statements. Cuomo was convicted and appealed to the 1st DCA.

The DCA affirmed the trial court, and refused to suppress the statements. It noted that Cuomo's mother, not law enforcement, initiated the request for the conversation. The Court also noted that law enforcement did nothing to suggest the conversation was private, even though it appeared Cuomo subjectively assumed it was. Several deputies testified that the room was used for interviews on a regular basis and that neither Cuomo nor his mother was told the meeting would be private. Cuomo stated he was under the impression his discussion was private, but was never told it would be private. He also conceded that by reason of previous jail stays, he knew there was no expectation of privacy in the jail.

The Court found no violation of F.S. 943.03 (interception of an oral communication) because it ruled Cuomo's conversation occurred in a situation where there was no reasonable expectation of privacy. (Citing Smith v. State, 641 So.2d 849 (Fla. 1994) where recording of conversations in the backseat of a patrol car were admitted into evidence because the occupants had no reasonable expectation of privacy in what they said in that car.) Although Cuomo maintained a subjective expectation that what he said to his mother was private, that was not a reasonable expectation, particularly since the police did nothing to foster such an expectation. They did nothing to give rise to Cuomo's expectation,

[2] Article I, Section 23. Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

other than leaving Cuomo and his mother alone in the room. Relying on Allen v. State, 636 So.2d 494 (Fla. 1994), the DCA affirmed Cuomo's conviction.

Cuomo v. State, 98 So.3d 1275 (Fla.1st DCA, 10/24/12)

Statement Made To Girl Friend At Jail Room Was Not Illegally Monitored

Riley was taken into custody for a murder. During the interview at the jail house Riley admitted to shooting the victim but claimed it was accidental. Riley had asked police to notify his girlfriend Takita what had happened to him. At the end of the interview Riley was asked if he wanted Takita to come to the station with food and cigarettes and he agreed. Takita arrived and they were placed in a monitored interview room alone. During that interlude, Riley leaned in to Takita and whispered that he intentionally shot Mills. At no time had Takita been told by law enforcement what to do or say when she met Riley.

The inevitable motion to suppress was filed, arguing Riley was unaware of the fact that the conversation with Takita had been recorded. The trial court denied the suppression motion and Riley was convicted. He appealed to the 5th DCA.

The 5th DCA analyzed several cases and noted that Riley had asked that Takita be contacted, that law enforcement did not prompt Takita as to what to do or say, and that there had been nothing done by law enforcement to foster a reasonable expectation that their conversation would be private. The conduct of Riley and Takita (including him leaning to her and making his admission in a whisper) reflected that they did not have an expectation of privacy. The motion to suppress was affirmed.

Riley v. State, 114 So.3d 250 (Fla. 5th DCA, 1/25/2013)

Person Legally Stopped For Traffic Violation Is Not In Custody For Purposes of Miranda Warnings. Officer Safety Questions Were Not "Custodial Interrogation."

After stopping a vehicle committing a traffic violation and matching a BOLO related to a narcotics investigation, the officer approached the driver and said good morning, then asked if she had any weapons or drugs in the car. (The officer indicated to the court that these were questions he customarily asked in traffic stops out of a concern for officer safety.) When asked the question, the driver admitted she had a bag of pills on her. The officer asked her to step out of the car, and he retrieved a bag with over 28 grams of hydrocodone from her pocket. The driver moved to suppress the pills on the basis that the officer had engaged in a custodial interrogation without giving the driver her Miranda advisory. The trial court suppressed the evidence and the state appealed.

The 3rd DCA reversed the trial court. It stated that a person legally stopped for a traffic violation is not in custody for purposes of Miranda. (See: Berkemer v. McCarty, 468 U.S. 420 (1984)). The court then cited cases holding that preliminary questions whether a driver was in possession of drugs or weapons did not constitute custodial interrogation.

State v. Hinman, 100 So.3d 220 (Fla.3rd DCA, 10/31/12)

Subjects' Brief Entry Into Residence Did Not Support Burglary or Trespass

Two juveniles, TAW (female) and DBW (male), quietly approached an elderly woman's residence at around 9 PM. DBW turned his back to the front door, and kicked it open with his foot, leaving a footprint on the door consistent with such a kick. The elderly occupant had her back to the door, watching TV. She was startled by the kick and turned around. During somewhat confusing testimony, the woman indicated she believed one of the juveniles entered her residence a short distance. A neighbor to the victim called the police and TAW and DBW were taken into custody a short distance away.

The juveniles testified they were playing a "game" called "knock and run." DBW admitted kicking the door but said he did not intend to break it in. Both juveniles denied entering the residence. The trial judge found them delinquent and withheld adjudication on burglary of an occupied dwelling. An appeal followed.

The 2nd DCA reversed. Under F.S. 810.02 there must be proof that the juveniles entered the residence for the purpose of committing an offense therein. Despite the state's argument that the stealthy manner of approaching the door was prima facie evidence of intent to commit an offense in the house, the DCA disagreed. The Court pointed out the actual method of entering was quite noisy. The Court noted there was no evidence suggesting what offense was planned once in the dwelling. With regard to the argument that the juveniles were at least guilty of trespassing, the Court found that the evidence suggested at best that DBW entered the residence "mere inches for a matter of seconds" and this did not support a finding of "willful" entry into the residence. While agreeing the juveniles should be ashamed of their actions, the Court held they did not violate the law.

T.A.W. v. State; D.B.W. v. State, 113 So.3d 879 (Fla. 2nd DCA, 11/2/12)

Improper Reliance Upon "Protective Sweep"

Sheriff's deputies received a tip from another law enforcement agency that Idalia Roman's house was being used to grow marijuana. The source of the tip was a CI. The premises was placed under surveillance. Officers approached the residence and heard humming consistent with "grow" fans or ballast lights coming from the garage area. One deputy smelled the odor of cannabis coming from the roof above the garage and a PVC pipe coming from the garage that is consistent with a runoff pipe for a grow operation. The deputies went to the front door of the house and when Roman opened the door they smelled a strong smell of cannabis.

The deputies were declined consent to search the house. However, Roman was detained and one deputy entered the house to sweep it to see if anyone else was in the house (for "safety reasons") and Roman was advised that a search warrant was going to be sought. During the protective sweep, cannabis was viewed in the garage. The observation was included in the affidavit for the warrant.

The trial judge suppressed the evidence, finding there was no basis for the protective sweep and that absent the observations from that sweep no probable cause could be established. The State appealed. The 2nd DCA agreed the protective sweep was improper, noting no evidence to suggest someone else was in the house who could destroy evidence or constitute a threat to law enforcement. However, after referring to State v. Pereira, 967 So.2d 312 (Fla. 3rd DCA 2007), the Court found that after striking the portions of the affidavit including observations from the illegal sweep, probable cause could be found. It reversed the trial court's suppression of evidence seized by the warrant.

State v. Roman, 103 So.3d 922 (Fla. 2nd DCA, 11/7/12).

Evidence Supported "Loitering & Prowling"

At about 11:30 PM, a K-9 officer saw "M.R.", a juvenile, and two others in a commercial shopping center. All of the stores were closed. M.R. was trying door knobs and appeared to be looking for security cameras. When the officer approached in his vehicle (with his K-9 partner barking frequently) M.R. tried to hide behind a dumpster. As the officer exited his patrol vehicle, M.R. began to quickly walk away. After about 20 seconds of loud commands to stop, M.R. complied. After receiving his Miranda warnings, M.R. said nothing.

M.R. was found delinquent on the charge of loitering and prowling, and he appealed. The 3rd DCA reviewed the elements of L&P and found the first element, aberrant and suspicious criminal conduct that comes close to, but falls short of the actual commission of a crime was present in M.R.'s behavior that night. The second element, proof that the defendant's behavior was alarming in nature and created an imminent threat to public safety was also present. Presence in a closed shopping

center at 11:30 PM, testing door knobs, looking for surveillance cameras, hiding from police when they initially arrived and then quickly walking away when actually approached by an officer added up to behavior that a law abiding person does not engage in. Adjudication of delinquency was upheld.

M.R. v. State, 101 So.3d 389 (Fla. 3rd DCA, 11/14/2012)

Developing Basis For Pat-Down After "Citizen's Encounter"

An Escambia County deputy observed June riding his bike on Gulf Coast Highway. He approached June from behind and pulled his patrol car onto the shoulder behind June. He did not activate his patrol car's lights. June turned around and observed the deputy exiting his patrol car. The deputy never ordered June to stop, but June engaged the deputy in a conversation. Although the deputy had never seen June in the area, he had no reason to believe June was engaged in criminal activity. He asked June for identification and June gave the deputy his identification card. The deputy radioed pertinent information to dispatch for a warrants check and continued to chat with June and returned the identification to June as they talked and the deputy waited for a response from dispatch.

The conversation began "agreeable" but the deputy noted June repeatedly reached into his pockets while speaking to him. This caused the deputy to ask for consent to search June, but June refused. When questioned, June said he had no contraband on him, but volunteered he had a pocketknife in his front right pants pocket. The deputy noted that June then began to "fidget" and exhibit "nervous energy." Even after being asked by the deputy to stop reaching into his pocket, June continued to do so. The deputy then informed June he was going to pat him down for safety reasons to secure the knife and assure there were no other possible weapons on June.

After removing the knife, the officer continued to pat down June "to make sure there were no other weapons that could harm me at that time." He felt a plastic baggy with a "rock-like substance in it" that by reason of his training and experience he knew immediately that it was going to be cocaine. He retrieved the substance and a field test was positive for cocaine.

The trial court denied June's suppression motion and the case moved to the 1st DCA on appeal. The DCA affirmed that an officer may conduct a pat-down during what started as a consensual "citizen's encounter" without any reasonable suspicion when during the encounter the officer develops a reasonable belief that the person may be armed or is potentially dangerous. While recognizing differences between the DCA's in Florida, the 1st DCA indicated its case law resulted in a finding that June was seized from the moment the deputy asked him to keep his hands out of his pockets. Since June had volunteered he had a knife, and since he continuously reached for the pocket carrying the pocketknife, the deputy had a reasonable belief that June was armed and potentially dangerous. Therefore the pat down was reasonable. The discovery of the cocaine was justified under the "plain feel" doctrine. The DCA affirmed the trial court's denial of the motion to suppress and affirmed the judgment and sentence.

June v. State, 2012 WL 5897616, (Fla. 1st DCA, 11/26/12)

Grabbing Sweatshirt While Owner Still Held It Resulted In Illegal "Seizure" Of Subject

After seeing three people in a park that was closed after dark, two officers in a patrol car shined a spotlight on them and one officer approached them. Recognizing them as juveniles, the officer told them he needed to speak to them for a minute. The juvenile "B.L." passed a sweatshirt to a female companion and the officer immediately questioned what they were doing and grabbed the sweatshirt. As he grabbed it, he felt what he thought was a firearm but turned out to be a knife. Prior to grabbing the sweatshirt, the officer had no basis to believe any of the three was armed. B.L. was charged with trespassing and carrying a concealed weapon. His motion to suppress was denied and he pled no contest, reserving right to appeal.

The 4th DCA found that B.L. was in the process of abandoning the sweatshirt, and that implicit in abandonment is a renunciation of a reasonable expectation of privacy in that being abandoned.

However, the DCA said since B.L. had not let go of the sweatshirt at the time the officer grabbed it, the shirt was not "abandoned" and B.L. had standing to challenge the seizure. The issue then became whether the seizure was lawful.

According to the DCA, the use of the spotlight was a factor, but not dispositive of the issue whether the three juveniles were "seized." The officer's statement that he needed to speak to them did not convert the encounter to a seizure. However, the physical touching of B.L.'s sweatshirt did indicate a seizure (citing U.S. v Mendenhall, 446 U.S. 544 (1980) and Copeland v. State, 717 So.2d 83 (Fla. 1st DCA, 1998). At the time the shirt was grabbed, there was no reasonable suspicion to detain the juveniles. B.L.'s conviction was reversed.

B.L.v. State, -- So.3d--, WL 55000339 (4th DCA, 11/14/2012)

Detectives Did Not Honor Subject's Invocation Of Miranda Rights

After being provided his Miranda rights, Gilbert responded, "I'd rather have somebody to represent me." Despite this invocation of right to counsel, detectives continued to talk with Gilbert. One detective told Gilbert that they did not want him to say later that no one asked for his "side of the story." The detective assured Gilbert that they were trying to protect him. The second detective indicated they planned to talk to all involved in the case (attempted murder). The detective told him "I wouldn't be doing my job if I didn't come, at least to try to get your side of the story."

Gilbert responded, "I need to give a side, 'cause, I don't have no part in this." The detective assured Gilbert they'd "respect whatever you decide" and indicated they were not there to force him to do anything. They again said all they wanted to do was get his side of the story. Gilbert ultimately admitted he fired one shot "in the air." The trial court denied the motion to suppress. The denial was appealed to the 4th DCA.

Citing Traylor v. State, 596 So.2d 957 (Fla. 1992) the DCA said once Gilbert had requested a lawyer, the government could not reinitiate interrogation on any offense throughout the period of custody unless a lawyer is present. While recognizing a subject could reinitiate contact, the court noted interrogation refers to any words or actions that the police should know are reasonable likely to elicit an incriminating response. (Rhode Island v. Innis, 446 U.S. 291 (1980). The court found that the record demonstrated that Gilbert had not reinitiated contact. It found the detectives' continued contact with Gilbert was "interrogation" after he had invoked his right to an attorney. Gilbert's comments should have been suppressed and the court reversed the trial court and remanded.

Gilbert v. State, 104 So.3d 1123 (Fla. 4th DCA, 11/21/12)

Guidance Counselor's Hunch Did Not Support Search

T.S. arrived with her mother before school began for a meeting with Barbara Meshna, the school's guidance counselor. T.S. brought a book bag with her to the meeting. At the meeting's end, Meshna reminded T.S. that school rules did not allow students to carry book bags in the halls during the school day. Meshna let T.S. leave the book bag in her office and T.S. did so "without any issue at all." Four times during the day T.S. came to the office asking to access the book bag. Citing school policy Meshna denied each request.

Considering how many times T.S. sought to access the book bag, Meshna became suspicious and started wondering why it was so important to T.S. Without any further information or suspicion, Meshna searched the book bag which revealed marijuana and paraphernalia. T.S. was charged with possession of marijuana and drug paraphernalia. T.S. sought to suppress the evidence on the basis that Meshna had insufficient justification to search the book bag.

The trial court found that the act of T.S. bringing the bag to school in violation of policy subjected the bag to search absent any additional suspicions. It refused to suppress the evidence and T.S. was found guilty. T.S. appealed the ruling to the 2nd DCA. The 2nd DCA noted that under New Jersey v.

T.L.O., 469 U.S. 325 (1985) school administrators must have " reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or rules of the school." The DCA indicated Meshna simply had an unsupported hunch that something was not right with T.S.'s book bag. There were no facts supporting a reasonable ground to believe T.S. was violating school rules or that something in the bag would demonstrate a violation of law. The fact that T.S. sought access to the bag four times alone was unremarkable in that she could have been seeking something she could lawfully possess. T.S.'s anxiety to get to the bag standing alone did not provide support for the search. The evidence should have been suppressed and the DCA reversed the trial court's decision not to suppress the evidence.

T.S. v. State, 100 So.3d 1289 (Fla. 2nd DCA, 11/28/12)

Officer Must Observe Altering License Tag To Make Arrest W/O Warrant

Jenkins' car was stopped because he was playing loud music and had a tinted plastic cover over his license tag, and because he failed to make a complete stop at a red light. Jenkins was arrested for the second degree misdemeanor of altering a license tag. (F.S. 320.061). Search incident to arrest produced cocaine, baggies with coke residue and a digital scale. Jenkins stated he was selling drugs because he kept getting laid off and he was "broke."

A few weeks later Jenkins was stopped again because of the tinting over the license tag. He was again arrested, this time for obscuring a license tag. An inventory search produced over 700 counterfeit CDs and DVDs. Jenkins admitted he knew they were counterfeit but said he was selling them to "try to make ends meet." Arguing that altering a tag is a misdemeanor offense that must be committed in the officer presence to support arrest, Jenkins sought to suppress the evidence from the two arrests. The trial court denied the motion and Jenkins was convicted. He appealed to the 2nd DCA.

The DCA agreed with Jenkins, finding that a violation of F.S. 320.061—the altering of the tag—must occur in officer's presence. While Jenkins could have been cited for a violation of F.S. 316.605 (improper display), arrest of Jenkins was still not justified because that violation is a noncriminal traffic infraction. With both arrests determined to be unlawful, the DCA indicated the evidence discovered after arrest should have been suppressed. Jenkins' convictions were reversed.

Jenkins v. State, 102 So.3d 739(Fla. 2nd DCA, 12/14/12)

Various Interviews Of Casey Anthony Analyzed For Miranda Violations

The 5th DCA reviewed a series of investigative related interviews of Casey Anthony after the trial court refused to suppress the evidence obtained by reason of those interviews and Anthony was found guilty of several counts of providing false information. Rather than provide a lengthy summary of each situation, the following chart summarizes the essence of each issue. Review the actual case for supplemental details. In general, Anthony falsely related to police that she had last seen her daughter Caylee when she dropped her off at the nanny's apartment which was located in the Sawgrass Apartments in Orlando, that she was employed at Universal Studios during 2008, and that she had received a call from Caylee on July 15, 2008.

Incident	Circumstances
7/15/08	Initial investigation. Casey made **oral statements in patrol car** while being voluntarily driven to where nanny's apartment was supposed to have been; follow up statement at Casey's home. False statements: Universal Studios employment; leaving Caylee with nanny Zenaida Fernandez Gonzalez at Sawgrass Apartments on 6/9/08; receiving call from Caylee on 7/15/08. Information provided orally in car and **in writing at her home**.
7/15/08 & 7/16/08	**After being handcuffed** when Cindy Anthony alleged Casey had fraudulently used her credit cards, a Sergeant ordered **cuffs removed** because their focus was on possible kidnapping of Caylee, not credit card allegations. **About 1.5 hours after cuffs removed, at 4:10 am at residence bedroom with door open,** Casey provided recorded statement duplicating earlier information and adding that she had disclosed Caylee's disappearance to two Universal Studios employees.

7/16/08	Asked to come to Universal Studios. **Voluntarily driven there in patrol car**. In presence of investigating detective Casey confronted with fact that Universal had no indication she worked there. She offered to take them to where she worked, started down hall in employee area then admitted she had lied about Universal employment and nanny's address.
7/16/08	**At conference room at Universal Studios,** confronted with lies, and Casey confirmed she was there voluntarily to assist efforts in locating Caylee. Again confirmed she'd lied about Universal and the nanny's address, but maintained she'd left Caylee with nanny on 6/9 and had gotten the 7/15 call from Caylee.
7/16/08	**Arrested for child neglect and providing false information to law enforcement. Taken to Sheriff's office. Provided Miranda rights for first time.**

Despite Anthony's allegations that all the above statements were given while she was "in custody" and were obtained in violation of her Miranda rights, the 5th DCA disagreed. The initial statements were taken in response to a 911 call for assistance, and were obtained while was voluntarily assisting the investigation into a possible kidnapping of Caylee. Even after being cuffed and uncuffed, the statements were provided at Anthony's home, in a non-coercive environment of her spare bedroom. She was not "confronted" during that time. Even though she was not specifically advised she was free to leave, evidence indicated to door to the spare bedroom was open the entire time and Anthony was not restrained or restricted in moving about her own residence. The court dismissed the argument that because she had been cuffed, she was "in custody" from that time forward notwithstanding the cuffs had been removed. She remained available for further law enforcement interviews after the cuffs were removed. The interviews at Universal did not constitute a custodial interrogation. Even though she was confronted with her numerous lies in a conference room with the door closed, the overall tone of the encounter was not accusatorial nor did the officers speak to her in an intimidating manner. Several times Casey acknowledged she was participating voluntarily in an attempt to locate her missing daughter. Miranda warnings were not required for any of these encounters. Ultimately, two of the four counts of the Information were dismissed by the 5th DCA because they were based on statements rather than false information, but the remaining counts were affirmed.

Anthony v. State, 108 So.3rd 1111, (Fla. 5th DCA, 1/25/13)

Inconsistent Vehicle Color Alone Not Sufficient For Stop Of Vehicle

An Escambia County deputy "ran" the tag on a bright green Chevy that came back registered to a blue Chevy. Based on this inconsistency, the deputy stopped the car. When he approached the car he smelled cannabis. Ultimately cannabis and crack cocaine were discovered. The defendant moved to suppress the evidence on the basis that the deputy had no reason to stop his car.

The deputy testified at the motion to suppress that it was the color change that piqued his interest and he could not resolve the issue until he stopped the car to check the V.I.N. number. He admitted he saw no independent traffic violations or other basis to stop the car. The trial court did not suppress the evidence and the defendant appealed.

The 1st DCA indicated that a color change could be a factor giving a basis for a traffic stop, but the color change alone would not provide that basis. "…(I)f we accept the State's argument, every person who changes the color of their (sic) vehicle is continually subject to an investigatory stop so long as the color inconsistency persists, regardless of any other circumstances." Judgment and sentence were reversed.

Van Teamer v. State, 108 So.3d 664 (Fla. 1st DCA, 2/13/13)

Fleeing and Abandoning Bag Of Dope = Well Founded Suspicion

A dispatcher reported to a detective that anonymous calls were reporting that "Odie," wearing dark clothing, was selling drugs at a specified street location. The detective knew "Odie" was the street name for Leonard. He responded to the location which was a high-crime drug sales location, and saw "Odie." "Odie" was Leonard. The detective and his partner approached "Odie" asking him to stop and talk to them. "Odie" ran and the officers pursued him on foot. Leonard ran into a residence and the detective followed after getting permission from a resident. While inside the detective saw

Leonard drop a bag. The detective caught up with Leonard, who resisted arrest. The second officer arrived and Leonard was taken into custody. The bag was retrieved. Inside was cocaine.

The 3rd DCA considered the case after the trial court suppressed the evidence and the state appealed. The court said there was no need to determine whether the officers had a well-founded suspicion when they initially approached "Odie" because Leonard did not submit to their authority. They had not physically restrained him prior to his abandonment of the cocaine. The actual seizure of "Odie" was based on a well-founded suspicion of criminal activity because he had fled in a high crime area and discarded the bag while fleeing. The order suppressing the cocaine was reversed and the case remanded.

State v. Leonard, 103 So.3d 998 (Fla. 3rd DCA, 12/19/12)

"Place of Business" Construed To Affirm Dismissal Of Carrying Concealed Charge

Little was viewed by officers carrying a firearm in a "union hall" parking lot. It was in his waistband, under his shirt. He did not have a permit to carry a concealed firearm. Little moved to dismiss the charge on the basis that the parking lot was not open to the public and that he qualified for the "place of business" exception found at F.S. 790.25(3)(n), making it lawful to carry a firearm at one's home or place of business. The trial court dismissed the charge and the state appealed.

The 4th DCA noted that Little was an elected financial secretary for his union, who was responsible for providing security in the union hall and its parking lot, dispatching labor, patrolling the docks, safekeeping union money and serving as the union's business agent. Applying factors found in Peoples v. State, 287 So.2d 63 (Fla. 1973), the court found that Little's place of business was the union hall, which included the non-public union hall parking lot. The exception applied and the trial court's dismissal of the charge was affirmed.

State v. Little, 104 So.3d 1263 (Fla. 4th DCA, 1/9/13)

Officer's Statements During Questioning Did Not Make Confession Involuntary

Carroll accompanied a detective to the sheriff's office for questioning regarding being engaged in lewd and lascivious conduct with a 13-year-old boy. During the questioning, Carroll confessed. The trial court suppressed the confession based on statements of the detective during the questioning. The statements in question included:

> *So it's probably a good time for you to help yourself out right now, you know, and just see what it is that we can do to help you out, you know, because, um-. Like I said, it's not the end of the world, you know. It's not the worst thing anybody ever did. Like I said, it's not like you're abusing your little girl. That would be a whole different story with us right now, man.*
> *. . . .*
> *You used a thirteen-year-old kid who was willing to do it, you know. I mean, that's a whole lot different than a guy that's, you know, forcing little kids to do something to him.*
> *. . . .*
> *Well, I don't know if it's really taking advantage of it if it's something that he was consenting to do, you know? I mean, he consented to it. It's not like you're this seedy little - And you've never been in trouble before. I've done a criminal history on you. You've never gotten in trouble.*

The trial court suppressed based on a finding that the detective's offering of an inducement, downplaying the event's seriousness and suggestion that the boy consented to the behavior, coupled with the defendant's lack of a prior record and lack of education made the confession

involuntary. The 2nd DCA disagreed. Carroll had a 9th grade education and his lack of prior contact with the criminal justice system did not mean he did not perceive his situation. The interrogation (which was recorded) demonstrated that Carroll could converse intelligently in an interview that lasted only 22 minutes. Suggesting that the victim might have consented did not convert the confession into an involuntary one. (Citing, Wyche v. State, 906 So.2d 1142 (Fla. 1st DCA 2005).

State v. Carroll, 103 So.3d 929 (Fla. 2nd DCA 11/9/12)

Civilian Investigative Panel's Subpoena Of Officer And Its Investigation Into His Conduct Not Preempted By Law Enforcement Officer Bill of Rights

The City of Miami has instituted a "Civilian Investigative Panel" (CIP) that can review complaints of officer misconduct. Lieutenant D'Agastino was subpoenaed to testify before the CIP as it reviewed allegations of a traffic stop he had conducted. He sought a protective order, arguing F.S. 112.533(1) granted the police department the exclusive procedure to investigate a complaint against a law enforcement officer. The 3rd DCA found that the LEO Bill of Rights did not expressly preempt other investigative bodies or oversight and that there was no incompatibility between the CIP and LEO Bill of Rights. The CIP authority extended to an independent, external entity; while the LEO Bill of Rights applied to the Miami Police Department as D'Agastino's employing department. The court affirmed the trial court's order in favor of the City, finding the CIP was acting within legitimate authority.

D'Agastino v. City of Miami, --So.3d --, WL 238217 (Fla. 3rd DCA, 1/23/13)

Seeing School-Aged Youth Near School During School Hours Is Basis To Determine If He or She Is A Truant

An officer observed L.C. not far from a high school during school hours, carrying a book bag and appearing to be the age of a high school student. He conducted a stop, which was not challenged, to inquire whether L.C. was in fact a truant. The story provided by L.C. to explain why he was out of school did not "sit right" with the officer, and he determined to put L.C. in his patrol vehicle. Prior to putting him in the car, he patted L.C. down and made a plain feel seizure of marijuana from L.C.'s pocket. The trial court denied L.C.'s motion to suppress, which was based on an argument that at the time he was patted down, the officer had not confirmed he was, in fact, a truant. The argument continued that the officer had no authority at that time to place L.C. into custody.

The 3rd DCA reviewed the statute involved[3] and found the officer had the requisite ground to take L.C. into custody, which was "reasonable grounds" not a "confirmation" of his truancy status. The court affirmed the trial court's sentence of probation and denied the motion to suppress.

L.C. v. State, 105 So.3d 635 (Fla. 3rd DCA, 1/23/13)

BOLO Was Sufficient To Justify Stop Of Vehicle

At age sixteen Partlow was involved in a murder/robbery. Two brothers were walking in a parking lot when they observed the victim in an altercation with two other males. There was a vehicle in the parking lot with someone sitting on the driver's side. The two males got in the vehicle and drove off. The two brothers rendered assistance to the dying victim, who said he'd been robbed and stabbed. The brothers provided a description of the get-away vehicle and a BOLO was issued seeking two maybe three young black males in a white four-door Chevy Malibu or Monte Carlo sedan with "bondo" covering damage to the right front bumper of the car. A few days later an officer observed a vehicle matching the BOLO. It was less than 3 miles from the scene of the crime. He followed the car to a residence, called for back-up and when the driver exited the vehicle the officer approached

[3] F.S. 984.13(1)(b): (A child may be taken into custody) "…(b) By a law enforcement officer when the officer has reasonable ground to believe that the child is (truant)…for the purpose of delivering the child without unreasonable delay to the appropriate school system site…"

him and detained him and other occupants of the vehicle, including Partlow. Partlow admitted his active participation in the robbery and admitted stabbing the victim as he tried to run away. The victim's autopsy determined the stab wound to be cause of death.

After discussing Hunter v. State, 660 So. 2d 244 (Fla. 2009), the 1st DCA found the facts supporting the BOLO to be sufficient to support the stop of the vehicle and detention of the driver and occupants. Among the compelling factors were two eyewitness sources of information, the specificity of the description of the persons involved and the vehicle, and the fact that the officer had seen no other car matching the BOLO in the geographic vicinity of the crime. All these factors mitigated any concern about the 2 ½ day lapse between the BOLO and the stop of the car.

Partlow v. State, 2013 WL 45743, (Fla. 1st DCA, 1/4/13)

F.S. 938.06(1)'s 2010 Amendment Made The $20 Assessment For Crime Stoppers Trust Fund A Mandatory Cost Regardless Whether Any Fine Is Imposed

In reconsidering this matter *en banc,* the 1st DCA receded from an earlier decision and ruled that the only prerequisite to the imposition of the $20 cost after the 2010 amendment is that a person be convicted of any criminal offense. It is no longer to be considered a surcharge on any fine, if a fine is imposed, as was the law prior to the 2010 amendment.

Spear v. State, 109 So.3d 232, (1st DCA, 1/16/13)

Manipulating Off-Duty Assignments To Get More Than Other Eligible Officers Is Not Criminal Scheme To Defraud

The Palm Beach County Sheriff's Office maintained a computerized method of assigning deputies opportunities to guard inmates or arrestees at a hospital after their regular shifts, as an overtime assignment. The system allowed deputies to sign up for shifts in the upcoming week on midnight on Sundays. There had to be a 48 hours "break" once a deputy performed an overtime shift before he or she could serve a new one.

Deputies noticed that Deputy Dent was receiving a huge number of assignments. She was assigned OT shifts 388 times, with 100 assignments in a one-year period. Even though she did not work all the assigned shifts (for example a shift was cancelled if the inmate or arrestee was released from the hospital and services were no longer needed), she earned over $18,000 working the OT shifts. There was evidence that when the list was opened at midnight on Sunday, Dent had already secured shifts to the maximum amount allowed. A supervisor had control over shift assignments and the assumption was that Dent's name was populating the calendar before it was opened to others.

The state charged her with engaging in a scheme of a systematic, ongoing course of conduct, with intent to defraud or to obtain property from one or more persons by false or fraudulent representations or promises and obtaining property from one or more such persons. The theory was that the systematic manipulation of the computerized OT assignment system denied other deputies of an opportunity to work OT because Dent was getting preferred opportunities to sign up before the other deputies could. Dent was convicted of a third degree felony and appealed.

The 4th DCA reviewed what constituted "property" as used in the criminal charge and found that ultimately the state was alleging there was a loss of "opportunity" to work OT, but also found that no particular deputy "owned" any particular "opportunity." While the behavior might violate department policies or be grounds for discipline or termination, Dent's manipulation of the program and obtaining a huge chunk of available OT opportunities did not constitute obtaining "property" for criminal fraud purposes under the statute. She did not commit criminal fraud. The conviction was reversed and sentence was vacated.

Dent v. State, --So.3d--, 2013 WL 440117, (Fla. 4th DCA,2/6/13)

"Medical Emergency" Search Exception Grounds Had Dissipated By Time Search Was Conducted

Police were dispatched to Fields' home after his mother called and reported she found him in his room nude, with a mixture of pills and paraphernalia and that he was "agitated" and appeared to have been "beaten up." The responding officers intended to evaluate Fields for commitment under the Baker Act[4] or Marchman Act[5].

However, when they arrived, Fields was standing in the yard, clothed and was not "agitated." The officers approached Fields and began talking to him. He showed no aggression or agitation. He answered the officers' questions and was coherent. One officer noticed the top of a pill bottle sticking up from Fields' pocket, and asked what was in the bottle. Fields indicated it was "Lisinopril," his blood pressure medicine. The conversation continued, with the officers inquiring whether Fields had been taking drugs or whether he was "hearing voices." Fields volunteered he had participated in several drug treatment programs. Fields responded to further questioning by indicating he had been in trouble with law enforcement in the past for "drug trafficking." Upon making this statement, the officer said, "Let me see the pill bottle in your cargo pocket." Fields handed the bottle to the officer who found it contained controlled substances. Fields was arrested for possession. The trial court denied Fields' motion to suppress and the issue was appealed to the 2nd DCA.

The basis of the seizure was argued by the state to be the "feared medical emergency" exception and doctrine. The 2nd DCA rejected this argument. While the officers responded to a feared medical emergency, their arrival demonstrated no such emergency existed. Fields was cooperative, non-agitated, coherent and showed no concern when first asked what was in the pill bottle. It was only after he volunteered he had a prior conviction for drug trafficking that the officer moved to view the bottle's contents. Since there was no medical emergency, the officer had no basis to show him the pill bottle's content. The denial of the motion to suppress was reversed and case was remanded for discharge.

Fields v. State, 105 So.3d 1280 (Fla. 2nd DCA, 2/8/13)

"Performance Of Duty" As Basis Of "Resisting" Discussed

Deputies responded to a call from a mother indicating her 12 year old daughter was involved sexually with another juvenile. With the mother's consent, the deputies attempted to speak to the daughter. The daughter became very upset with her mom and the deputies. She began screaming and exhibiting agitated behavior. The daughter's behavior caused the lead deputy to believe leaving her at the house would promote a physical altercation with the mother. The deputies tried to calm the daughter but when a deputy tried to guide her to a chair, the daughter kicked him. After being handcuffed, the daughter was arrested. It took three deputies to get her into a patrol car, during which the daughter bit and kicked the deputies.

The daughter was charged with one count of resisting a law enforcement officer with violence and three counts of battery on a law enforcement officer. The trial court granted the defense motion to dismiss all charges on the basis that the officers were not engaged in the performance of lawful duties when they encountered the daughter. The State appealed.

To convict a defendant for battery of a law enforcement officer and resisting an officer with violence, the State must prove that the officer was engaged in the lawful performance or the execution of a legal duty. The 5th DCA stated that the deputies were within their authority in responding to the mother's call that alleged sexual activity by the twelve-year-old child. Once inside the home, the situation evolved, requiring the deputy to grab the girl's arm in order to prevent her from assaulting her mother. The court cited F.J.R. v. State, 922 So. 2d 308, 310 (Fla. 5th DCA 2006), which held that for reasons of public and personal safety, police officers need to be able to keep reasonable control over certain situations. The deputies were performing lawful duties when the daughter resisted their

[4] F.S. 394.451
[5] F.S. 397.305

efforts. Further, one is not entitled to resist an arrest with physical force. The DCA reversed the order of dismissal and remanded the case for further juvenile proceedings.

State v. A.R.R., 113 So.3d 942 (Fla. 5th DCA, 2/8/13)

Search Warrant Affidavit Fell Short Of Crucial Factor: Timeliness Of Information

Police obtained a search warrant to search Barrentine's residence and surrounding property for evidence of animal cruelty and fighting. The affidavit related the following:

→Two concerned neighbors provided information to the Sheriff's Office in September 2003 regarding suspected dog and rooster fighting and cruelty.
→A land surveyor notified the Sheriff's Office on September 11, 2006, that he had seen emaciated pit bulls on the property with scars on their faces and necks. He said those dogs were chained with oversized chains and had dirty water bowls. He also observed several roosters that had missing feathers and appeared to be animal aggressive. The legs of these roosters were tied to the ground by rope.
→Aerial photographs obtained from the Property Appraiser's website showed a large number of dogs confined individually on the property.
→There was a large privacy fence surrounding the property, preventing anyone outside the property from looking therein..
→The Affiant's training and experience with animal fighting and cruelty investigations suggested these factors were indicative of such behavior.

Barrentine filed a motion to suppress, and the trial court denied the motion. The 2nd DCA found a fatal deficiency in the affidavit in that none of the supporting facts were relatively recent. As noted by the court, the affidavit must establish such a time frame so that one is able to discern the relevant time period from the entirety of the affidavit. "Stale" facts do not support a conclusion that the behavior is occurring or has recently occurred. The court stated that the neighbors' reports from three years previous were too remote in time to establish probable cause. Additionally while the land surveyor's report was made the day before the warrant was signed, there was no indication of when the land surveyor made the actual observations that were in his report. There were no indications of the date of the photographs that were obtained from the Property Appraiser's website. Because the warrant omitted any indication that the suspected crimes were currently occurring or had occurred at some point in the not-too-distant past, there was insufficient probable cause to issue a search warrant.

The DCA returned the case to the trial court for a determination of whether, despite the lack of probable cause, the "good faith" rule would apply to salvage the evidence seized when the warrant was executed, including whether there was additional facts known to the affiant that were not included in the affidavit itself.

Barrentine v. State, 107 So.3d 483 (Fla. 2nd DCA, 2/13/13)

Posting Threat On Facebook Page Is "Sending" Threatening Communications

O'Leary threatened death or serious injury to another in a posting he placed on his Facebook page. A Facebook "friend" saw the post and showed it to a relative, who then informed one of the persons to whom the threat was directed of the posted threat. Ultimately O'Leary was charged with two counts of making written threats to kill or do great bodily harm in violation of F.S. 836.10.[6]

O'Leary moved to dismiss the charges, claiming he had not "sent" a threat. The state argued that posting on Facebook was "sending" the threat. The trial court agreed with the state and O'Leary appealed.

[6] F.S. 836.10 provides in part: "Any person who writes…and also sends…any letter, inscribed communication, or electronic communication…containing a threat to kill or do bodily injury to the person to whom such letter or communication is sent…commits a felony of the second degree…."

The 1st DCA held that by posting his threats (directed to family member and her partner) it was reasonable to assume O'Leary intended his Facebook friends (those having access to his Facebook page) would read the communication. Indeed, the court noted there is no other reason to post things to Facebook other than upon the assumption the postings would be seen and read by others. In contrast, had O'Leary made the threats in his personal diary or journal, not viewable by others normally, there would be no such "communication." The action of O'Leary was "sending" as contemplated by the statute. The trial court was affirmed.

O'Leary v. State, 109 So.3d. 874 (Fla. 1st DCA, 3/18/2013)

Placing Of Child Porn On One's "LimeWire" Shared Folder Is Not "Transmitting" Child Pornography

Biller downloaded child porn onto his home computer via the peer-to-peer file sharing network known as LimeWire. He obtained the porn from LimeWire subscribers who permitted access to their files on their own computers. Using an undercover subscription to LimeWire, deputies accessed and retrieved child porn images from Biller's shared LimeWire-accessible folders via the internet.

Based on the successful retrieval of the porn images, Biller was charged with one count of "transmitting" child pornography using an electronic device, a violation of F.S. 847.0137(2).[7] F.S. 847.0137(1) defines "transmitting" as: "…the act of sending and causing to be delivered any image, information, or data from one or more persons or places to one or more other persons or places over or through any medium, including the Internet, by use of any electronic equipment or device."

On appeal to the 5th DCA, Biller argued he did not "transmit" child pornography by simply making what was on his home computer's files accessible to co-users of LimeWire. The state conceded that Biller did not affirmatively dispatch the images to the deputies using a function of his computer. Biller did not know the deputies had obtained the images. However, the state argued by maintaining them in a known "shared" file, Biller has "sent" the images to any LimeWire subscriber who chose to access them. Biller counter-argued that "send" should be construed in the common use and sense, meaning "to cause to go or be carried" (Webster's New World College Dictionary, 4th Edition, 2001).

While acknowledging the state's approach was not unreasonable, the DCA indicated ambiguities in a criminal statute or multiple interpretations as to what is prohibited must be resolved in favor of the defendant. Biller's conviction for transmitting child pornography was reversed and the case remanded for resentencing.

Biller v. State, 109 So.3d 1240 (Fla. 5th DCA, 3/28/2013)

Officer Can Detain Someone Who Is Walking From Just-Illegally-Parked Car

After receiving complaints of illegally parked vehicles, a deputy was patrolling the area when he saw Arevalo park his car on a grassy area signed "Do Not Park." By the time the deputy turned his patrol car around, Arevalo had exited his car and was walking away, crossing the street. The deputy "kind of motioned him to return to his car" and Arevalo did so. He told Arevalo he had illegally parked his car and asked for Arevalo's driver's license. Arevalo stated he did not have one and handed the deputy his Florida identification card instead. A check of Arevalo's records indicated his license was suspended for the sixth time. Arevalo confirmed he knew his license was suspended, and the deputy arrested him.

The trial court granted Arevalo's motion to suppress, finding that the stop of Arevalo (by the deputy gesturing him to return) was not based on any suspicion of commission of a crime. The state appealed.

[7] F.S. 847.0137(2) provides in part: "…(A)ny person in this state who knew or reasonably should have known that he or she was transmitting child pornography, as defined in s. 847.001, to another person in this state or in another jurisdiction commits a felony of the third degree…."

The 4th DCA noted that an officer may issue a parking citation to the individual driver, or place the citation in a conspicuous place on an "unattended" vehicle. The court refused to find the deputy's calling of Arevalo back to the car as an impermissible "seizure" of him. The fact that Aravelo had left the car did not mean the deputy lacked the authority to call him back to the car. An observed traffic violation is a basis for a stop and the court found that it was reasonable to call Aravelo back for the purpose of issuing the citation. Conducting the customary driver's license and active warrants check while issuing the citation was not problematic. The motion to suppress was reversed and the case remanded for further proceedings.

State v. Arevalo, 112 So.3d 529 (Fla. 4th DCA, 3/6/2013)

Proximity To Drugs Alone Did Not Establish Constructive Possession

Over course of an investigation involving a confidential informant, a Detective observed a drug purchase of crack cocaine from a Jaguar driven by Rangel. There were three others in the car with Rangel. The CI delivered the purchased crack to the detective, who then asked that the car be stopped for a traffic violation. A short time later the car was stopped for a window tinting violation. At this time Rangel was no longer driving, but was in the front passenger seat and one of the three other occupants was no longer in the car. As the officer approached the car, he noted Rangel rummaging around in the floor of the front passenger seat, but he did not actually see Rangel touch anything. The officer asked the car's occupants to exit the vehicle and performed consensual searches of each of them No contraband was located on them.

A K-9 unit responded and alerted on the vehicle. A search of the interior of the car produced a pint-sized plastic container in a caddy containing car cleaning products, found on the passenger front seat floor. The officer asked Rangel to identify the liquid contents in the container, and Rangel told him to drink it to find out. A deputy opened the container which emitted a fine, white powder. Ultimately the container liquid was found to contain ecgonine, a cocaine derivative. After being convicted of drug related charged, Rangel appealed the trial court's failure to dismiss the cocaine charge on the basis that constructive possession had not been established.

The 2nd DCA noted that since this was a "constructive possession" case, the state had to prove that Rangel (1) knew of the presence of the contraband and (2) that Rangel had the ability to maintain dominion and control over the controlled substance. Since the cocaine was in joint possession of others in the car, the mere proximity to the contraband is insufficient to prove constructive possession. In fact, the court said the proximity of Rangel did not demonstrate he had dominion or control over the car cleaning caddy and the pint bottle. There was no corroborating evidence such as Rangel's prints on the bottle and no admission made by Rangel. The officer could not say he saw Rangel touching the bottle. Without such additional evidence, the state failed to establish constructive possession. The trial court erred by denying Rangel's motion for judgment of acquittal on the possession charge.

Rangel v. State, 110 So.3d 41 (Fla. 2nd DCA, 3/8/2013)

Are Miranda Warnings To Be Given To A Subject Barricaded In His Apartment?

Atac was to be arrested for the murder of his father. The detective and an arrest team arrived at Atac's apartment complex to arrest him. The detective called Atac to try to secure a peaceful arrest. However Atac had noticed the police taking up various positions and refused to exit his apartment. He told the detective he was holding two firearms and would shoot anyone coming into the apartment, saving the last bullet for himself. A stand-off developed, with officers talking to Atac by phone for about 2 ½ hours. Many times Atac abruptly ended the calls but twice reestablished contact by calling the detective. During one of the calls, Atac admitted he had killed his father. Ultimately, the detective convinced Atac to peacefully leave his apartment.
Atac moved to suppress his confession on the phone, claiming he should have been given Miranda rights before the detective engaged in the "interrogation" by phone. The trial court deemed Atac not to be "in custody" and refused to suppress the confession.

The 4th DCA found that the police did not "summon the suspect for questioning" but instead were attempting to arrest him when he departed the apartment. The court found that Atac's reaction to seeing police outside is why police could only communicate with him by phone in an effort to prevent him from shooting others and himself. The purpose of the phone calls was to prevent Atac from doing violence to himself or to others. The questioning that occurred was controlled by Atac, who could (and did) terminate calls at will. While it is true Atac was confronted with evidence of his guilt, the court said that was a natural gravitation of the conversation since the police were there to arrest Atac for murder. Another key factor in Miranda analysis is whether Atac was free to leave the place of questioning. The court noted there was no discrete "place" of interrogation of Atac and he was under no compulsion to speak with law enforcement as they surrounded his apartment. While he was going to be arrested if he did so, Atac was free to leave his apartment. The DCA agreed with the trial court that Atac was not in "custody" for purposes of Miranda. The motion to suppress was properly denied.

Atac v. State, 2013 WL 950052, (Fla. 4th DCA, 3/13/2013)

Opening Car Door (& Discovery of Drugs) Within "Emergency Aid" Exception

At about 3:30 AM, a deputy came across Dermio's car, parked in the parking log of a local bar, with the motor running and lights on. The deputy pulled behind Dermio's car and turned on her emergency lights. As the deputy approached Dermio's car, she noticed Dermio in the driver's seat with his head cocked to the left, cradling a cell phone. His eyes were closed and he appeared to be asleep. The deputy shined a flashlight into Dermio's face with no response, then tapped on the window with her flashlight, to which Dermio made an incoherent response. The deputy testified Dermio seemed "really out of it." She asked him to roll down his window three times, but Dermio did not respond and continued to seem incoherent. The deputy opened Dermio's door because she was concerned for his safety. She was greeted with the odor of burnt marijuana and she viewed a metal pipe on the center console. A further search of the car produced a firearm, marijuana and various other drugs. After being transported to the sheriff's office and given Miranda rights, Dermio made incriminating statements.

At the suppression hearing, the deputy admitted she had suspicion that Dermio had been driving under the influence, and acknowledged she had observed no traffic infractions and that Dermio's car was legally parked. She said her original purpose was to check out Dermio's safety but that she also suspected a possible DUI. She confirmed that prior to opening Dermio's door she had not smelled alcohol or marijuana.

Evidence was introduced showing the deputy who interviewed Dermio at the sheriff's office had told Dermio that if he provided truthful statements, the deputy could "help him." The deputy did not define to Dermio what "help" meant but suggested that she might be able to talk to the judge if anything came out of the information Dermio provided. It was clarified at the hearing that Dermio was specifically told there were "no promises."

The 2nd DCA ruled that the initial encounter was supported by the "emergency aid" or "welfare check" exceptions to a need for a warrant. Thus the interaction began as a consensual encounter. The court distinguished this request to roll down the window from a similar request in Greider v. State, 977 So.2d 789 (Fla. 2d DCA 2008). Greider held that requesting a driver to roll down his window converted a consensual encounter to a detention. In that case, the officer's concern for the driver's safety had subsided. This was not the case in Dermio's encounter. The requests to roll the window down and the opening of Dermio's door were acts taken in continuation of the welfare check. The evidence was then in plain view and no unreasonable search or seizure occurred. The court also ruled the comments made to Dermio at the station with regard to the interview did not mean Dermio's statements were not voluntary or freely given. The clear message that the deputy could not make any promises made it clear that offers of potential help were simply an offer to let Dermio's cooperation known the trial judge. It did not render Dermio's confession involuntary. The denial of the motion to suppress was affirmed.

Dermio v. State, 112 So.3d 551 (Fla. 2nd DCA, 4/5/2013)

"I Want To Go Home" Is NOT An Unequivocal Assertion Of Miranda Right

Sepanik was arrested regarding a firearm offense and taken to the police station for questioning. She was read her Miranda rights and she agreed to talk to police. Over the course of her interview she volunteered a number of times that she did not want to go to jail and wanted to go home. She occasionally added that she needed to care for her grandparents or her son. After these volunteered statements, she provided incriminating statements in the interview. The interview was videotaped.

After viewing the tape, the trial court suppressed her confession. The trial court faulted the officers for not clarifying what she meant when she said she wanted to go home. The court determined that a reasonable officer would have understood Sepanik's statements to be an assertion of her right to remain silent.

The 2nd DCA disagreed. The court noted that Davis v. U.S., 512 U.S. 452 (1994) indicated that post-Miranda ambiguous or equivocal references to an attorney did not require officers to stop and clarify the subject's intent. The Florida Supreme Court ruled in State v. Owen, 696 So.2d 715 (Fla. 1997) that police are not required to ask clarifying questions in response to an ambiguous or equivocal request to terminate questioning. The DCA characterized Sepanik's "I want to go home" as an expression of the stream of consciousness any defendant in custody would think. The suppression was reversed and case remanded.

State v. Sepanik, 110 So.3d 977, (Fla. 2nd DCA, 4/10/2013)

Questioning Of Inmate At Prison Required Miranda Warnings

MacKendrick was incarcerated in the Okaloosa Correctional Institution for an offense unrelated to the questioning he was to receive. Deputies from Liberty County came to the prison and asked to interview MacKendrick regarding allegations that he had committed sexual acts against a female minor.

MacKendrick was summoned to the central office. He testified in court that he heeded the order to report because in prison you obey verbal orders. Disobeying would result in discipline. He was taken through two secure doors, and frisked for contraband. A prison officer asked MacKendrick why he was going to be questioned, and MacKendrick said he did not know. The prison officer suggested he must have done "something wrong." MacKendrick was escorted to a small 8 foot by 8 foot room, accompanied to the room by the warden and a prison inspector.

MacKendrick denied initiating the interview and maintained he did not go to the room voluntarily. He encountered the two detectives, in plain clothes in the room when he was placed in the room. The detectives confronted MacKendrick with the minor's recorded complaint, detailing alleged sexual conduct between the two. MacKendrick was told they were there to get his side of the story. One of the detectives was a key factor in the case that resulted in MacKendrick being in prison. Initially MacKendrick said he doubted that the victim made sex abuse allegations, and consistently denied the truth of any such allegations. No Miranda warning were provided before the interview began. The interview was not recorded. The detectives made MacKendrick listen to the victim's recorded statement detailing sexual abuse, then indicated to him that somebody was not telling the truth since she said the sex occurred and MacKendrick denied it. In response, MacKendrick allegedly said "If she said it, it must be true."

At this point, Miranda warnings were administered. MacKendrick was told the detectives wanted to obtain a formal taped statement. MacKendrick initially agreed, then told the deputies, "I can't do it. You know I'm not waiving my rights." The interview ended and MacKendrick was returned to his cell.

MacKendrick testified that he thought he had to answer questions and that since the room door was locked, he was not free to leave. MacKendrick said after his Miranda rights were read, he was asked to sign a paper and he told the detectives, "No, I need an attorney." He denied saying "If she said it,

it must be true." He claimed what he really said was, "Everything that these people say about me down there, you think is true."

After being arrested and going to trial on the sex charge, MacKendrick's motion to suppress statements to the detectives was denied. A jury found him guilty of capital sexual batter and lewd or lascivious molestation. He was sentenced to concurrent terms of life in prison. The case was appealed to the 1st DCA. The DCA found the questioning of MacKendrick to be a custodial interrogation for which Miranda rights should have been provided before questioning began. MacKendrick was summoned to the questioning room with no explanation and no indication that his appearance was voluntary. MacKendrick thought he had no choice but to comply to the order to report for the interview. Failure to do so would result in prison discipline, in MacKendrick's mind. The small room where the interview occurred, with a closed and locked door supported a perception that MacKendrick was not free to leave. MacKendrick was never told he could leave if he wished. His statements should be suppressed and the case was remanded for a new trial.

MacKendrick v. State, 112 So.3d 131 (Fla. 1st DCA, 5/9/2013)

Flight And Reasonable Suspicion

Law was observed engaging in actions with a group of men doing drug transactions at an apartment parking lot. He came from the apartments, engage in a short conversation with men in the lot, patted his pockets and put his finger up in the air, then returned to the apartments. Some of the men in the parking lot left and the detective viewing the transactions ordered them "taken down." Law came back out from the apartment with cash in his hand and approached the remaining men in the parking lot. When he saw the takedown, he grabbed his shorts' waistband and started speed walking back to the apartments. The detective called for an officer to take Law down, too.

Two detectives responded and, seeing Law, exited their vehicle. No guns were drawn. One detective said, "Hey! Police! Come here man, what are you doing?" Law responded, "I'm straight" or "I'm good, I'm good" but walked backwards away from the detective. As the detective advanced toward Law, he grabbed his waistband and started running. The detective gave chase, yelling loudly, "Stop, police, stop running!" The detective caught up with Law at an apartment doorway. As Law tried to enter the apartment, he found the doorway was partially blocked and as he tried to pull himself into the apartment a silver object hit the door frame and bounced outside the apartment. It was a firearm. After a struggle, Law was arrested and the firearm retrieved.

The trial court granted Law's motion to suppress on the basis that his flight was "provoked." The 3rd DCA disagreed. The DCA said Law was not seized until he was caught after fleeing not when the detective first approached him. All facts leading up to the seizure including his initial flight can be used to support reasonable suspicion for a detention. There was no unreasonable show of force by the police or provocation for Law's flight. His continued running after being told to stop was sufficient reasonable suspicion of wrongdoing to support his detention. The suppression order was reversed.

State v. Law, 112 So.3d 611 (Fla. 3rd DCA, 4/24/2013)

Arrest Just Inside Residence Doorway On A Ten-Day Old Charge Deemed Illegal

This published case resolved two separate marijuana-grow related cases against Ojeda. The first case resulted in the 3rd DCA determining that Ojeda's consent for officers to search his house, his cars and his garage (where an indoor grow operation was located) was freely and voluntarily given.

The second case (Case No. 07-10526A as noted in the opinion) reached a different conclusion about the legality of Ojeda's arrest in regard to an unrelated marijuana case. 18 months after the search mentioned in the first case, the same investigating detective travelled to a nearby residence where he and his team believed Ojeda might be found. Their purpose was to arrest him on ten-day-old charges in another marijuana grow case should Ojeda answer the door. Although the detective thought the house where they thought Ojeda might be might also be an indoor grow operation, they

had made no effort to secure a search warrant. Their "sole purpose" was to arrest Ojeda if he answered the door.

He did. As the door was opened by Ojeda, a strong odor of marijuana "wafted across the threshold." Without permission, the detective entered the house, handcuffed Ojeda and then because he heard "suspicious sounds" he left Ojeda in the custody of an assisting officer while a protective sweep of the house was done. An additional person was arrested. About five or ten minutes later, after backup had arrived, a second protective sweep was conducted, and the grow operation was discovered during this sweep.

Citing Riddick v. New York, 445 U.S. 573 (1980), the 3rd DCA noted police may not enter houses without consent or without a warrant (or exigency) in order to make a routine felony arrest. The arrest of Ojeda was for a ten-day-old charge. No exigent circumstance existed. There was no indication that evidence was in the process of destruction. There was no evidence that Ojeda was trying to flee upon opening the door. The DCA noted that another detective was actually enroute to the State Attorney's office to obtain an arrest warrant for Ojeda on that ten-day-old case, and that the detective admitted there was nothing preventing them from securing the house until that warrant was obtained, by saying "I didn't even think about it." "The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" (citing U.S. v. [U.S. Dist. Ct.], 407 U.S. 297 (1972). The Court rejected "inevitable discovery" because there was no assurance that once the warrant was obtained, Ojeda would have been arrested in his house. The trial court's motion to suppress (in the second case) was reversed and the case remanded.

State v. Ojeda, 2013 WL 181063, --So.3d.—(Fla. 3rd DCA, 5/1/2013)

Parking Lot Attempted Robbery Report Provided Basis For Investigatory Stop

An off-duty, out of uniform officer, driving his marked patrol car was waved down and forced to stop as he drove into a McDonald's parking lot. The individual was talking on his cell phone and appeared to the officer as "agitated and excited." He told the officer that someone had pulled a gun on him in the bathroom at the McDonald's. The officer confirmed that the victim was talking to 911 at the time he waved the officer down. The victim described the gunman as a black man, wearing a black hoodie and red shorts, accompanied by another black man wearing a white t-shirt and blue jeans. The officer's encounter with the victim lasted about two minutes. He asked the victim to stay there while he scoped the area for the two persons described. The officer failed to get the victim's name or contact information.

After driving only a few minutes, the officer found two people walking matching the description. Since at least one of the two was reported to be armed, the officer exited his car, gun drawn He told the two he was not sure if they were the actual people or not, but that they matched a description of someone who had just pulled a gun. He told them for his safety he wanted to see their hands. T.S. did not respond to numerous requests to show his hands. Finally, after the officer told T.S. "I'm going to tell you one more time and if you do not comply I'm going to blow your head off!" T.S. removed his hands from his pocket and told the officer he had a handgun in his pocket. The officer retrieved a .38 snub nose pistol with hammer cocked, and called for backup. A return to McDonald's revealed the victim had left.

T.S. was charged with carrying a concealed firearm and possession of a firearm by a minor. A motion to suppress was filed on the basis that the stop of the two people was based on an unreliable anonymous tip. The trial judge suppressed the evidence based on a finding that the victim was an unreliable "anonymous informant." The 3rd DCA characterized the situation as reliance upon a citizen informant, not an anonymous one, even though the officer failed to get the citizen's name. At no point did the victim indicate a desire to remain anonymous so as to remain unaccountable for any false information he might have provided. His report to both 911 and the officer indicated his willingness to be held accountable for two reports of the incident. The officer observed the victim's demeanor during their two minute encounter and could assess his apparent credibility. The quick location of persons matching the assailant's descriptions nearby confirmed the informant's credibility and reliability. The informant should be considered a citizen informant. The stop was based on

reasonable suspicion and the search of T.S. was legal. The suppression order was reversed and case was remanded.

State v. T.S, 114 So.3d 343 (Fla. 3rd DCA, 3/15/2013)

Stepping Off Entranceway To Peer Into Mobile Home Window Was Privacy Violation

Around 9 p.m. a deputy sheriff received an anonymous call indicating the caller had been at a party and had observed marijuana plants being grown in the home. The caller gave specific descriptions of how to get to the premises, and indicated the plants were "directly to the right when you enter through the front door of the mobile home." The caller said he had recently left the home and the plants were still there.

The deputy met with a back-up, and the two went to the residence, arriving about 75 or 80 minutes after receiving the phone tip. The mobile home was in a rural area, in a "pasture" setting, accessible by a dirt driveway. While the driveway was gated, the gate was open. The deputies entered, planning to "see what they had to say." (Essentially a "knock and talk" encounter.) There was a small bonfire burning in the back yard, with "drinks and stuff" around it. Nobody was in sight. The deputies followed a rough path to the front door, accessible by a single step. They knocked, identifying themselves as police, but nobody answered. They went to the back yard, knocked on the back door, again announcing themselves, and no one answered.

Returning to the front, the deputy who received the anonymous call left the front door area to look into a window two feet to the left of the door. He saw marijuana plants inside. The backup deputy went to the window and looked in, seeing the plants. She agreed at the suppression hearing that she could "not observe anything through that window if actually on the step knocking on the door."

By looking sharply to the right of the left window they were peering through, the deputies could see a number of small marijuana plants under a grow light, in the area the anonymous tipster said plants were located. A narcotics investigator was called to the scene, and he peered into the window, confirming the plants were marijuana. An assistant state attorney was called, who advised the deputies to enter and secure the home. The front door was locked, but the deputies entered through the unlocked back door, without a warrant. Defendant Powell was awake and on the bed in the back bedroom. A second occupant was in the bathroom. Both were arrested and cuffed. They expressed their displeasure with the "trespassing" deputies.

Two deputies went to secure a warrant, leaving the third deputy on the scene to secure the premises. A search warrant was obtained and marijuana plants and growing or smoking paraphernalia were seized. The search produced nothing not already seen by the deputies through their window-peeking and warrantless entry other than some marijuana pipes. The two occupants were charged with possession and manufacture-related charges. They moved to suppress the evidence seized as being by reason of an unconstitutional search of the home. The trial court denied the motion. The defendants pled to their charges, retaining the right to appeal the non-suppression.

The 1st DCA determined that when the deputies left the front door and moved to peer inside the window, they infringed upon an area in which there was a reasonable expectation of privacy. The implied permission to enter the property applied to the driveway, the rough path to the door and the steps leading to the door. The deputies went "off-path" and moved to an area to which a reasonable expectation of privacy applied. That action constituted both an intrusion into a potentially protected zone and violated the expectation of privacy, since there was no evidence that the occupants had willingly exposed the interior of the mobile home to the public. The deputies' search leading to the discovery of marijuana plants in the trailer was illegal and the denials of the motions to suppress were reversed.

Powell v. State,2013 WL 2232319, -- So.3d --- , (Fla. 1st DCA, 5/22/2013. On reh'g 8/1/2013)

Delay In Arresting And Bringing Subject To Trial. Due Process Violation?

In 2008, a confidential informant introduced undercover detectives to a dealer known as "Scooney." He sold crack cocaine to one of the detectives. The detective thought "Scooney" was "Eric Long" and submitted the crack for analysis in a container labeled "Eric Long." After sending it in, the detective viewed a photo of "Eric Long" and determined he was not "Scooney." That evening, "Scooney" made a second sell to the detective. Not knowing "Scooney's" real name, the detective submitted the second vial of crack under the name "Eric Long." Shortly thereafter, upon reviewing a business log that requires identification before permitting entry, detectives determined "Scooney" was likely Vincent Stuart. They viewed Stuart's DL photo and confirmed him to be "Scooney." A month later, "Scooney" (Stuart) sold more cocaine and it was submitted for analysis under the name "Vincent Stuart."

Fourteen months later (2009) the state charged Stuart by information with possession and sale of cocaine. The charges were delayed in being filed in order to protect the confidential informant's identity. The state delayed arresting Stuart for about 14 more months, with Stuart being arrested in 2011. Stuart moved to dismiss the charges, claiming the failure to timely charge and arrest him denied him due process. The trial court dismissed the cases after an evidence hearing. The state appealed.

The 2nd DCA analyzed the delays applying Due Process Clause and Sixth Amendment analysis factors. The delay in charging Stuart was analyzed under the Due Process Clause, while the delay in arresting him after the Information was filed was analyzed as a Sixth Amendment (speedy trial) issue.

With regard to the pre-arrest delays, the court noted there were three categories of delays that must be considered in determining a Due Process violation: (1) deliberate delays; (2) negligent delays; and (3) justified delays. A justified delay occurs when the State undergoes "considerable legitimate difficulty" in bringing a case to trial. The need to protect the Confidential Informant's identity constituted a legitimate reason for what was considered a "justified delay."

The delay between the filing of the charges and the start of the trial (including the delay in the arrest) required a balancing of four factors: (1) whether the length of the delay is presumptively prejudicial; (2) the reason for the delay; (3) whether the appellant has timely asserted his rights; and (4) whether actual prejudice has resulted from the delay. The Court determined the post arrest delay was "somewhat presumptively prejudicial and, since the state asserted no valid reason for the length of the delay it was negligent. Accordingly, the delay resulted in actual prejudice to Stuart. However, the Court also ruled that Stuart failed to demonstrate how the delays encountered actually harmed his defense. It reversed the trial court's dismissal of the charges and remanded for trial.

State v. Stuart, 115 So.3d 420 (Fla. 2nd DCA, 5/22/2013)

Retaining DL During Consensual Encounter May Convert Session To A Detention

A deputy observed Horne after midnight walking on the grassy side of a roadway. There was no sidewalk. She was about 10 to 15 feet from the road. The deputy pulled his marked patrol car onto the grassy area at an angle, in front of her path. Horne told the deputy that she was walking that far off the road to remain safe from "crazy drivers." She gave the deputy her DL and a computer search revealed no active warrants. At some point after obtaining the DL but before he returned it to her, the deputy asked for, and received, consent to search Horne's pockets. The deputy could not remember precisely when the request to search was made, but admitted he had not told her she was free to go.

The search produced two carisoprodol pills (Schedule IV controlled substance) in the bottom of Horne's jacket pocket. Horne claimed they belonged to a friend who had an Rx for the drugs. Horne was arrested and charged with possession. She moved to suppress the pills on the basis that the officer was holding on to her DL when he sought permission to search her pockets, converting the

consensual encounter into an illegal detention. The trial court disagreed and did not suppress the drugs. Horne pled nolo and appealed. The 2nd DCA decided the encounter was initially consensual, including providing the DL to the deputy. However, the records check was completed and the deputy did not return Horne's license to her. The fact that he had not returned the DL at the time he sought permission to search her pockets constituted circumstances in which a reasonable person would not feel he or she was free to leave. The deputy had no reasonable suspicion to detain Horne, so the "consent" was not legally obtained. The conviction and sentence were reversed and the case remanded.

Horne v. State, 113 So.3d 158 (Fla. 2nd DCA, 5/24/2013)

Working "Up The Food Chain" In Street Narcotics Sale Investigation Approved

Arrestee #1 was arrested after police had set up the purchase of cocaine from her via a confidential informant. Upon arrest, she agreed to lead them to her supplier. She called her supplier to indicate she was on the way to meet him to secure more drugs. Officers accompanied her to the supplier's location and he was arrested. Arrestee #2 agreed to cooperate to lead officers to his supplier. He called his supplier, with the lead detective listening to the call. He asked her if she has "the stuff" and she said she did. This supplier was inside a restaurant and agreed to come and provide drugs to Arrestee #2. Arrestee #2 identified Schwartz as his supplier as she exited the restaurant. Schwartz reached into her car and retrieved a manila envelope. She stood at the rear of her car, waiting for Arrestee #2.

Instead, police, including a K-9 unit approached her. The first officer to reach her identified himself as a narcotics investigator to which Schwartz responded, "This is what you're looking for" and handed over the envelope. The K-9 alerted on the envelope (cocaine found inside) and Schwartz's purse (containing cocaine and oxycontin pills). Schwartz was arrested and sought to suppress the found drugs arguing the detectives were without reasonable suspicion to approach and detain her, and also moving to dismiss charges bases on objective entrapment. The court denied both grounds and Schwartz was convicted. She appealed to the 4th DCA.

The 4th DCA found that officers had developed reasonable suspicion that Schwartz was dealing in drugs even though the two informants (Arrestees #1 and #2) were unknown as far as their credibility at the time. The subsequent handing over of the envelope with drugs in it and the K-9 alert provided probable cause for the arrest.

Schwartz also argued she was objectively entrapped because her husband and brother were known drug traffickers. The 4th DCA agreed with the trial court that there was no egregious police conduct in this case. The use of confidential informants and "flipping" suspects to go up the supply chain to find the major suppliers was noted by the Court to be common police work. The court affirmed the conviction and sentence of Schwartz.

Schwartz v. State,2013 WL 2320829, --So.3d -- (Fla. 4th DCA, 5/29/2013)

Ability Of Police Officer To Investigate Acts Believed To Occur Within Officer's City-- What Happens If Acts Turn Out To Have Happened Outside City's Limits?

Nunn was charged with numerous sex-related charges involving a child under twelve. The victim was B.N. After B.N. and her mother moved to New Mexico, B.N. reported to her that Nunn had committed sex acts on her while in Florida. The mother called New Mexico authorities who in turn called the Coral Springs Police Department because that is where the New Mexico authorities believed the sex acts had occurred. A CSPD officer flew to New Mexico to interview B.N. There, B.N. indicated acts had occurred in an apartment in Coral Springs and at a house in Margate.

The officer conducted a controlled phone call of B.N. talking to Nunn. The call was recorded. At the time of the call, the officer believed she was investigating crimes that occurred in Coral Springs as well as Margate. After the call, B.N. indicated all the acts occurred in the house at Margate. Nunn

was arrested by Margate authorities based on his statements given in the controlled call placed by the CSPD officer.

Nunn moved to suppress the call's evidence. He argued "all party consent" was required since the CSPD officer was not acting within her jurisdiction when she made the controlled call as it turned out all actions occurred in Margate. The 4th DCA noted a municipal officer can exercise law enforcement powers within the territorial limits of the municipality, but that an exception allows an officer to conduct investigative actions outside his/her jurisdiction if the subject matter of the investigation originates inside the city limits.

The DCA agreed with the state that the CSPD officer was acting in good faith at the time the controlled call was made. She believed criminal acts occurred in both Coral Springs and Margate and was conducting in good faith an investigation into those alleged acts occurring within Coral Springs. Even though it turned out all the acts were in Margate, the officer believed in good faith otherwise at the time the recording was made. The denial of Nunn's motion to dismiss was affirmed.

Nunn v. State, 2013 WL 2494161, -- So.3d-- , (Fla. 4th DCA, 6/12/2013)

Reasonably Believed Need For Medical Assistance Justified Entry

C.L.L. engaged in a fight with Curtis Pearce inside C.L.L.'s home. Someone made a 911 call during which the fight could be heard in the background but hung up before details could be obtained. The 911 operator discerned the location from which the call had originated and dispatched deputies to the location. Upon arrival the deputies encountered Pearce outside the house. They saw blood on his hands, but Pearce had no injury. He was uncooperative and belligerent. He eventually said he'd been in a fight in the residence but that the other participants had already left. Concerned for the condition and safety of anyone inside the house, deputies announced their presence and entered through an unlocked garage door to check inside. They found C.L.L. and his friend asleep on two couches. Near the couch, a small baggie of marijuana and a bong were located. An odor of burnt marijuana was in the air. Looking at the sleeping juveniles, the deputies saw that C.L.L. had a laceration on his head and his buddy had a black eye. Waking them up, deputies quickly confirmed they were both intoxicated. C.L.L. was read his Miranda rights and he confirmed the marijuana was his. C.L.L. moved to suppress the marijuana and paraphernalia on the basis that the deputies had no legitimate basis to enter the house. The trial court disagreed, and admitted the evidence. C.L.L. appealed to the 1st DCA.

The emergency exception requires a demonstration of an objectively reasonable basis to believe there is a need for police assistance for the protection of life. It is irrelevant whether upon entry it turn out there was no actual emergency. The courts apply a two-prong approach: (1) Did officers reasonably believe someone was in danger in the premises? And (2) Was entry into the premises necessary to provide aid to anyone believed to be endangered? After reviewing the evidence (911 reporting call when fight was overheard, the hang-up, finding someone on scene with blood on his hands who admitted a fight had occurred in the premises) the court found the officers' belief to be reasonable. Pearce's indication that the others involved had left the premises did not require the officers to accept it on face value. They were reasonable in wanting to check whether someone needed aid inside the house because the actual location of the others remained uncertain. The marijuana and paraphernalia were observed immediately upon entry into the premises, and were not part of a post-emergency "search." Both C.L.L. and his friend had injuries, so the emergency continued and was going on as the marijuana and paraphernalia were discovered. The DCA affirmed the decision to admit the evidence.

C.L.L. v. State, 115 So.3d 1114 (Fla. 1st DCA, 7/5/2013)

Search Of Car To Find Gun Used In Assault Based On Probable Cause Giving Rise To Assault Arrest, Not As Search Incident Arrest

McIntosh's girlfriend called 911 claiming McIntosh threatened her with a firearm. Officers arrived and found the two calmly talking to one another. One officer cuffed McIntosh for safety because a firearm was alleged to be involved, but he was not announced to be under arrest. The girlfriend provided a sworn statement that McIntosh pulled a firearm from a shelf and made a threatening statement that put her in fear. Based on that sworn statement, the officers believed they had probable cause to arrest McIntosh and arrested him for aggravated assault with a firearm. He was secured in a police car.

The girlfriend advised the police that she saw McIntosh put the gun in either the backseat or trunk of his car. An officer obtained McIntosh's car keys, searched the car, and found the gun and ammo in the trunk. McIntosh was a convicted felon, and additional charges were added. He moved to suppress the gun and ammo. After hearing testimony of witnesses, the trial court granted the motion to suppress, indicating the officers did not have probable cause to arrest McIntosh or search the car.

The 5th DCA reversed the suppression. Contrary to what the trial court had held, there was evidence to support the conclusion the girlfriend saw what McIntosh did with his gun. (He had argued the evidence suggested she did not see anything about what he did with the gun.) The court noted that she testified numerous times she saw him put it in the car, but that she could not tell whether he put it in the back seat or the trunk. The only uncertainty was its specific location, not whether the gun was in the car.

The DCA found that officers had probable cause for the aggravated assault arrest. Further, that same probable cause supported a belief that evidence related to the crime was located in the car itself. It was this specific probable cause that supported a search of McIntosh's car in any place that might contain the sought after evidence: the gun. The court noted this was not a search incident an arrest, but rather a search based on probable cause to believe evidence pertaining to a crime was in the car. The 5th reversed the trial court's suppression of the evidence and remanded.

State v. McIntosh, 116 So.3d 582 (Fla. 5th DCA, 6/25/2013)

School Bus Fracas: Stand Your Ground Applies, But Who's Standing Whose Ground?

T.P. was allegedly battered in a school bus fight. T.P. and A.F. (the complainant) were both on a middle school bus. When the bus stopped, T.P. (a boy) started to get off and A.F. (a girl) pulled his jacket. They started fighting. A.F., the larger of the two, pulled T.P. down to a seat. The bus driver testified that A.F. first grabbed T.P. and then punched him. After A.F. pulled his jacket, T.P. fought back.

Meanwhile, T.P.'s mother and grandmother got on the bus to try to stop the fight. Grannie hit A.F. and then T.P. got off the bus. However, a deputy arrested T.P. after arriving and trying to sort things out.

In contrast to the bus driver's version, A.F. testified that T.P. was in the back of the bus and she heard that some boys were going to fight T.P. after school. When the bus stopped she and T.P. got off, with T.P. being in front. She said T.P. bumped her on the shoulder and she tapped him, pulled his jacket and said, "You just pushed me." She says T.P. saw his mother and grandmother approaching the bus and punched her in the cheek. T.P.'s mother and grandmother boarded the bus and started hitting A.F. She was somewhat inconsistent on cross exam by saying she did not pull T.P.'s jacket when T.P. bumped her. Instead, she alleged he turned around and started hitting her, provoking the fight.

The defense argued F.S. 776,032 (Stand Your Ground[8]) applied and T.P. was lawfully entitled to defend himself because A.F. had used force against him. The trial court denied the motion on the

[8] F.S. 776.032 reads in part: (1) A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, …..

basis that SYG applied only to the defense of a home or vehicle, not a school bus. After the trial, during which the school bus driver did not testify, T.P. renewed his SYG motion to dismiss and was denied by the trial court. Upon conviction, T.P. appealed.

The 4th DCA held that the SYG law applies in places like a school bus. "It is extremely broad in its grant of the right of a person to protect himself or herself in any situation where the person is not engaged in an unlawful activity and is a place where the person is entitled to be."

However, the Court was unable to resolve whether the SYG defense applied in this case. It was unable to conclude from the record whether A.F. was the aggressor, whether she used actual force rather than simply touching or tugging T.P.'s jacket. The court suggested that might be a "battery" but might not be force as contemplated by SYG. Further the court said the record was not sufficient to determine whether T.P. was reasonable in his belief that the force he used against A.F. was necessary to protect himself from "great bodily harm." The case was remanded for the trial court to resolve these issues and to determine whether SYG did in fact apply. "Should the trial court find in favor of T.P. on both of the foregoing issues, T.P. is entitled to dismissal of the delinquency petition. If, on the other hand, the trial court determines that T.P. has not proved both issues in his favor, then the court may reimpose its adjudication and disposition."

T.P. v. State, 117 So.3d 864 (Fla. 4th DCA, 7/17/2013)

Anonymous Tip Describing Person Supposedly Brandishing Firearm Did Not Give Officers Reasonable Suspicion To Detain Subject

A deputy was dispatched to investigate a disturbance where one of the participants allegedly brandished a handgun and fled. He was described as a black make wearing a white shirt and black or dark shorts and carrying a black square handgun. Several anonymous witnesses, including a postal carrier, called 911 to report the incident. A helicopter was sent to search for someone matching the description.

The helicopter pilot reported seeing a black male wearing a white shirt, black shorts and a black jacket about 150 feet from the disturbance, talking to some men. Deputies responded to the location of the black male. When they arrived, the subject (Stinson) walked away from the group of men. The deputy directed Stinson to come to him. He was concerned he might be carrying a weapon in the jacket because it was March and too warm to be wearing a jacket. Stinson did not obey, and continued to walk away. He walked through a gate and up a driveway, with the deputy following him. Stinson walked into the home and handed the jacket to a woman inside, along with a large quantity of cash. The deputy came to the doorway and demanded both Stinson and the woman step outside. He instructed the woman to bring the jacket. After several commands she gave him the jacket.

Stinson started walking away while the deputy spoke to the woman. Another officer approached Stinson and walked him over to a police cruiser and questioned him. One of the officers tossed the jacket into the patrol car, which caused a pill bottle to "kind of pop up" out of the jacket. Hydrocodone and cocaine were found in the bottle. Stinson was charged with possession of cocaine with intent to sell and trafficking of Hydrocodone.

Stinson moved to suppress the evidence, arguing the officers had no reasonable suspicion to detain him. The trial court disagreed and refused to suppress the evidence. The 4th DCA found there was no reasonable suspicion. The stop was based on an anonymous tip and there was no evidence suggesting other witnesses, including a mail carrier, had confirmed the description of the alleged assailant. The DCA concluded the tip was indeed "anonymous." Since that was the case, additional suspicious circumstances as a result of investigation were necessary. The court concluded there

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(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony

were no additional suspicious circumstances. Talking with other men is not suspicious. Stinson matched a vague description that omitted any mention of a jacket. Even if the jacket was inappropriate for the warm weather, it was not indicative that Stinson had just committed a crime or was about to commit one. The sole basis of the detention was the anonymous tip, that was not corroborated. The officers lacked reasonable suspicion to detain Stinson and the evidence should have been suppressed. The DCA reversed the case.

Stinson v. State, 117 So.3d 859 (Fla. 4th DCA, 7/17/2013)

Waving Penis In Front Of 13 Year Old From Across Street Is A Felony

A thirteen-year-old reported that Usry would regularly stand across from her school bus stop and would cough or clap to get her attention, and expose his genitals to her. The victim further testified that Usry would wave his "private part" at her and without labeling his actions as masturbation, she demonstrated at trial that Usry would move his hands back and forth on his "private part."

Usry moved for a judgment of acquittal, arguing that the State failed to prove lewd or lascivious exhibition, in that the crime required some "real obvious masturbatory act or something awfully close to it," and that what the victim described was at most a violation of F.S. 800.03, which addresses the exposure of sexual organs. Usry testified (in a bench trial) that he only urinated in front of the victim. At close of evidence and arguments, the trial court stated in part that the difference between F.S. 800.03 and F.S. 800.04(7), in a "non legal way of looking at it," was the sexual intent versus an "obnoxious intent." Finding this "sexual intent" was present, the trial court found Usry guilty of lewd or lascivious exhibition and aggravated stalking. Usry appealed to the 1st DCA.

On appeal, the 1st DCA agreed with the trial court, noting that the statute for lewd or lascivious exhibition merely requires that a person "Intentionally exposes the genitals in a lewd or lascivious manner" in the presence of a victim less than 16 years of age. The words "lewd" and "lascivious" meant that the acts must have "a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act," which the court found had occurred in this case. The court held that even without the victim's trial testimony indicating that Usry masturbated in her presence, the evidence that Usry exposed himself and waved his "private part" in front of her along with the other circumstances of this case, clearly established the crime. The DCA noted that while committing such an act in front of an adult may only warrant treatment as a first-degree misdemeanor, the Legislature determined that committing the act in front of a child less than sixteen years of age constitutes a felony and deserves a harsher penalty. Accordingly, the 1st DCA affirmed Usry's conviction and sentence.

Usry v. State, 38 Fla.L.Weekly D1749c, --So.3d-- (Fla. 1st DCA,8/15/2013)

"Saleability" Of Firearms Means One Who Possesses A Gun That Was Stolen Five Months Earlier Cannot Be Considered Proof Of Theft

An officer had his off-duty firearm stolen when his house was burglarized. About five months later, the gun was recovered in the possession of 16 year old L.S. L.S. was charged under F.S. 812.022(2), which provides that possession of recently stolen property gives rise to the presumption that the possessor stole the property. There was no other evidence tying L.S. to the burglary and theft of the firearm. The court adjudicated L.S. on all the charges against him, including grand theft of the firearm. L.S. appealed, arguing that there was insufficient proof to support the grand theft conviction, because the state failed to prove that he was in possession of "recently stolen" property.

The 4th DCA noted that there is no specific time frame that defines whether something is recently stolen, and it can be a different time for different types of items. Relying on other courts' rulings, the DCA concluded that the time frame in this case (five months after the theft) was too long for the gun to be "recently stolen." The court stressed that guns are highly saleable and are in fact transferred with relative ease, and what constitutes "recently stolen" sufficient to apply the legislative presumption must be construed with that transferability in mind. Because of this, the court reversed the adjudication for grand theft and directed the court to dismiss that charge.

Weapon In Driver's Door Pocket Was Not "Concealed"

O.S. was stopped for a malfunctioning tag light. He was "fidgeting" and was asked to step out of his. When the door opened, the officer saw a set of "brass knuckles" in the driver's door pocket. They were immediately identified by the officer and were not covered in any manner. O.S. admitted having them when asked if he had anything in the car the officer should know about. O.S. was charged with carrying a concealed weapon. The defense moved to dismiss the charge, arguing the knuckles were not concealed. The trial judge denied the dismissal on the basis that the knuckles were not visible to someone outside the car unless the door was opened, and O.S. appealed.

The 3rd DCA agreed with the defense. On appeal, the court noted the definition of concealed weapon, required the weapon to be "carried on or about a person in such a manner as to conceal the weapon from the ordinary sight of another person." The court cited a number of "variables" courts have created to be considered in evaluating whether a weapon inside a vehicle is concealed under the statute, including: (1) "the location of the weapon within the vehicle;" (2) "whether, and to what extent, the weapon was covered by another object;" and (3) "testimony that the defendant utilized his body in such a way as to conceal a weapon." The Court also noted that "although the observations of the police officer will not necessarily be dispositive, a statement by the observing officer that he or she was able to 'immediately recognize' the questioned object as a weapon may conclusively demonstrate that the weapon was not concealed as a matter of law because it was not hidden from ordinary observation."

The DCA stated that none of these factors supported the trial court's conclusion that the weapon was concealed. The weapon was located in an open side pocket within the vehicle. It was not obscured by any other object. O.S. made no attempt to conceal the weapon with his body in any way. He immediately admitted to possessing the weapon upon questioning by the officer. The officer testified that he identified the weapon "right away." The DCA held that the weapon was not "concealed" as a matter of law, and reversed the trial court's decision.

O.S. v. State, 38 Fla.L. Weekly D1727a , --So.3d—(Fla. 3rd DCA 8/14/2013)

Shopping Bag Lined With Multiple Layers Of Aluminum Foil Is An Anti-Shoplifting Device As Contemplated By Law

Cenatis was observed carrying an old, heavy looking Victoria's Secret shopping bag. Based on experience, a store security officer suspected it to be a "booster bag" designed to shield anti-shoplifting tags from the sensors at the door, allowing shoplifters to exit stores with stolen merchandize without setting off the door alarms. The store's security personnel saw Cenatis and her companion place items in the bag, which they handed back and forth. They exited the store without paying for the items. They were arrested and found to have many items in the bag that had not been purchased.

Cenatis was charged with using an antishoplifting countermeasure device (F.S. 812.015(7))[9] and petit theft. F.S. 812.015 also defines antishoplifting devices and countermeasures.[10] At trial, a police

[9] "It is unlawful to possess, or use or attempt to use, any antishoplifting or inventory control device countermeasure within any premises used for the retail purchase or sale of any merchandise. Any person who possesses any antishoplifting or inventory control device countermeasure within any premises used for retail purchase or sale of any merchandise commits a felony of the third degree . . . . Any person who uses or attempts to use any antishoplifting or inventory control device countermeasure within any premises used for the retail purchase or sale of any merchandise commits a felony of the third degree…."

[10] (h) "Antishoplifting or inventory control device" means a mechanism or other device designed and operated for the purpose of detecting the removal from a mercantile establishment or similar enclosure, or from a protected area within such an enclosure, of specially marked or tagged merchandise. The term includes any

officer described the booster bag as several identical Victoria's Secret bags stacked within each other, with several sheets of aluminum foil layered within the bag. The bag was held together with adhesive. On first inspection, the bag appeared to be an ordinary shopping bag and the aluminum foil was not visible from the outside. The bag was much heavier than an ordinary shopping bag.

Cenatis moved for judgment of acquittal on the grounds that a shopping bag layered with aluminum foil was not an antishoplifting device countermeasure device under the statute. The trial court denied Cenatis's motions. The jury returned a verdict finding Cenatis guilty of using an antishoplifting device countermeasure and petit theft. Cenatis appealed her judgment and sentence to the 4th DCA.

The 4th DCA held that the bag used by Cenatis was created by altering or modifying ordinary shopping bags and aluminum foil in order to create a device capable of avoiding detection by the door sensors. Therefore, the "booster bag" was clearly an antishoplifting device countermeasure under the statute. The court affirmed Cenatis' conviction and sentence for theft.

Cenatis v. State, 38 Fla. L. Weekly D1580a, --So.3d--. (Fla. 4th DCA, 7/24/2013)

Preponderance of Evidence In E-mail Message String Shows Law Enforcement Entrapped The Subject

Gennette appealed his conviction of "unlawful use of a two-way communications device to facilitate a felony" (F.S. 934.215) after he pled nolo, reserving his right to appeal. He challenged the charge on the basis of entrapment (F.S. 777.201), which was not accepted by the trial court. The 1st DCA agreed that entrapment occurred and remanded the case for dismissal.

A defendant must prove entrapment by a preponderance of the evidence to succeed on this basis. Normally a jury, as finder of fact, determines whether entrapment occurred. In this case, there was no dispute of the facts and the trial judge was authorized to rule whether there was entrapment as matter of law. Gennette responded to a government created advertisement on Craigslist, and an ensuing email chain where he and "Amber" (a fictitious 19 year old) discussed a sexual liaison. The ad read: "Sisters looking for a hot night—w4m—19 (Pcola/Destin/PC)." Testimony established that "w4m" meant a female looking for a male, and the "19" was a reference to the age of the woman. There was no suggestion of illegal activity. The "19 year old" mentioned expanding the behavior to include her 14 year old sister.

Gennette responded to the initial ad on Thursday night at 11:24 p.m. ("For real. Nah, I don't believe it, LOL can U prove me wrong? Cute guy here, Trey") and "Amber" responded at 11:42 p.m. ("Hi Trey! Let see how cute!!! My lil sis is in town visiting me for the summer. She is 14. You ok with that?")

Gennette continued the email conversation at 10:21 a.m. the next morning: "well I think she is a bit young, lol but depends on what you have in mind before i send my pic, are there any age requirements? lmao well the hell with it, ill send a pic anyway me and my pet possum."

At 3:34 p.m. "Amber" replied: Nice pic! Why in the world would you have a pet possum? There are no age requirements here". Gennette replied at 3:59 p.m. "Well thank you…I found my lil-bear in my backyard when she was just a baby and ive raised her…she's so spoiled and thinks shes a people, lol….now its your turn, lol"

The state argued Gennette's response in the third email message in the chain ("well I think she is a bit young, lol but depends on what you have in mind….are there any age requirements?...") showed Gennette readily accepted "Amber's" offer for sexual activity with a minor.

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electronic or digital imaging or any video recording or other film used for security purposes and the cash register tape or other record made of the register receipt.
(i) "Antishoplifting or inventory control device countermeasure" means any item or device which is designed, manufactured, modified, or altered to defeat any antishoplifting or inventory control device.

The 1st. DCA disagreed. If found that the email showed only that he understood a minor sister was visiting 19 year old "Amber" for the summer and that the rest of his comments were equivocal. None of the emails at this point, said the court, contained any reference to sexual activity or performance with either "Amber" or the minor. The court characterized the messages as too vague to constitute an offer and acceptance for criminal conduct.

Emails continued with the agent sending Gennette a photo of two women posing as "Amber" and her "sister." Communications continued with "Amber" talking about having a "fun" weekend and plans to "get into some fun." Gennette indicated his plans to watch a movie at home and care for his pet possum who was recovering from veterinary surgery. In the 17th message, Gennette invited "Amber" to his home where "we could figure out something to do if you like." "Amber" replied, "We host only."

Gennette lamented he could not leave his recuperating possum but asked, "if I was invited over, what would u have in mind?" The agent, a/k/a "Amber" wrote back "fun" and asked "what do you have in mind for us?" The court noted the agent used "we" and "us" in the responsive emails, but Gennette only referred to "u" and "you" in chatting back to "Amber." The court characterized these communications as reflecting ambiguous intentions about whether he was still contemplating contact only with "Amber."

Emails continued. In the 32nd email "Amber" wrote, "do u realize that its me and my lil sis." Gennette responded, "im trying to keep things clean so to speak, lol until told otherwise…" Emails continued and the agent pressed Gennette for specifics and details because she had to prep her little sister. Gennette wrote back, "Prep her? What does that consist of?" The court indicates this message indicates the offer includes the minor is beginning to sink in. Finally in the 41st message, Gennette acknowledges the under aged sister and asks "is that all consensual?" to which "Amber" replied it was all consensual.

Communications continued and the agent's and Gennette's messages increased in suggestiveness, including suggestions of sexual activity including the minor.

In a lengthy treatise on "entrapment" the court noted that "inducement" has been defined as "persuasion, fraudulent representations, threats, coercive tactics, harassment, promise of reward, or pleas based on need, sympathy or friendship." (Citing State v. Henderson, 955 So.2d 1193, 1195 (Fla. 4th DCA, 2007). The DCA held that in the case at bar, the emails established by a preponderance of the evidence that the government induced or encouraged Gennette, and due to his lack of predisposition, caused him by methods of persuasion to commit the charged offenses. Throughout the email chain, the agent took the lead. The agent initially suggested the presence of a minor. When the conversation wandered into innocuous matters, the agent returned them to sexual activity involving a minor. The agent accused Gennette of being "scared." The effect of the emails was to overcome Gennette's obvious reluctance to commit or even describe illegal activity in his emails. The Court reversed the conviction and sentence, noting, "The law does not tolerate government action to provoke a law-abiding citizen to commit a crime in order to prosecute him or her with that crime."

Gennette v. State, 38 Fla. L. Weekly D1949, --So.3d—(Fla. 1st DCA, 9/13/2013)

Agency Cannot Avoid Public Records Request By Transferring Records To Another Agency (After Request Was Received)

Robert Chandler made an electronic public records request to the City of Sanford Police Department's Volunteer Program Coordinator requesting a copy of an 8/31/2011 email sent by the Coordinator to George Zimmerman, a former neighborhood watch volunteer. At the time, Zimmerman was defendant in an active criminal investigation and prosecution related to the shooting and death of Trayvon Martin on 2/16/2012. At the direction of the Governor, the prosecution of Zimmerman was transferred from the 18th Circuit to the 4th Circuit's State Attorney.

Despite several follow-up emails and communications, Chandler was not advised until 6/6/12 – eleven days from his original request –that the City was "reviewing his request for processing." He filed for a writ of mandamus on 6/14/12 and on 6/15/12 the trial court issued an Order directing him to file proof that the City had been served, and for the City to show cause or file a responsive

pleading. Each party subsequently responded to this order. The City produced a number of 8/31/11 emails between Zimmerman and the Coordinator, in .pdf format, editing out Zimmerman's personal email address. Chandler objected, asserting the City had no right to edit out Zimmerman's email and arguing the City should have produced the emails in the manner they were normally maintained, not as PDF's that could not be modified or edited.
The City defended that it was unable to produce in a format other than the redacted PDF because it had been directed to do so by the State Attorney as part of the criminal investigation and prosecution of Zimmerman. It claimed the State Attorney had reviewed the original records and made the redactions which it gave to the city as PDFs for use in responding to public records requests. In response to a trial court question, the city attorney indicated he or she was unaware if the city still possessed original records and reminded the court it was nevertheless under a State Attorney directive not to disclose the originals. The judge ruled that the State Attorney should be the proper party to the Petition for Mandamus and dismissed the petition against the city. It advised Chandler he was free to pursue action against the State Attorney as the party that redacted the records. Chandler appealed this ruling.

The 5th DCA held as a matter of law that the City of Sanford remained the government entity responsible for the public records. The city could not be relieved of its legal responsibilities under Chapter 119 by transferring the records to another agency, citing Tober v. Sanchez, 417 So.2d 1053 (Fla. 3rd DCA, 1982). The DCA held the trial court erred when it dismissed Chandler's petition against the city. It declined to rule on the other issues such as validity of the asserted exemption and the delay in production, and remanded to the trial court for further proceedings.

Chandler v. City of Sanford, et. al. 38 Fla.L. Weekly D1945, (Fla. 5th DCA, 9/13/2013)

Observing Group Of Young Men Late At Night In Area Known For Gun Crimes, Smelling Burned Marijuana In Air And Seeing Cloud Of Smoke Above The Group Justified Investigatory Stop—But Not A Frisk

After several gang-related shootings in the "high crime" Cloverleaf area of Miami Gardens, Miami Gardens P.D. began covertly monitoring the area to prevent crime. At about 11 p.m. an officer in an unmarked car observed three or four juvenile males in a parking lot, just a few feet from the officer. When he exited his car, the officer smelled the odor of burnt marijuana coming from the area of the group. He did not see anyone smoking marijuana, but did notice "a puff of smoke" hanging in the air near the juveniles. As he got closer to them, the smell of burnt marijuana was stronger. The officer asked for backup and patted down the individuals for weapons due to his safety concerns based on the area's reputation for gun-related violence. Finding a bulge in D.H.'s pocket he thought it to be a firearm and forced D.H. to the ground and detained him and the other two juveniles at gun point until his backup arrived. When the backup arrived, the officer handcuffed D.H. and retrieved a .38 caliber revolver from D.H.'s jacket pocket. A small baggie of marijuana was also retrieved.

In response to a motion to suppress and hearing, the trial court ruled that the pat down of D.H. for a weapon was not supported by a reasonable suspicion that he was armed, but the search was lawful because the officer had probable cause to arrest D.H. for possession of marijuana. D.H. pled nolo and appealed. The 3rd DCA agreed there was no basis for the weapon pat-down, but disagreed with the trial court that there was probable cause to believe D.H. was in possession of marijuana.

The court noted the initial stop was based on a reasonable suspicion to investigate the use of marijuana. However, to justify a weapons pat-down, an officer must have a reasonable belief that the subject is armed. Being in a "high crime area" alone is not enough to justify a pat-down. (Citing Robinson v. State, 976 So.2d 1229 (Fla. 2nd DCA 2008). The totality of the circumstances in this case was it was late, in a high crime area known for gun-related crimes, the area of encounter was dark, and the officer was outnumbered three to one. The record demonstrated no behavior by D.H. to give rise to a reasonable belief that he was armed. Although the officer had reasonable suspicion to conduct a stop based on the odor of marijuana, the pat-down exceeded the allowed scope of that stop. The court reversed the denial of D.H.'s motion to suppress the gun and marijuana and remanded with instructions to discharge D.H.

Detention Of Occupant Of Premises While Search Warrant Being Executed

A gun fell from Jenkins' waistband as police detained him on public property in front of a private residence at which a search warrant was being executed. Jenkins' car was parked at the residence. The trial court found that Jenkins was on the city's property in front of the premises and was illegally detained, relying on Michigan v. Summers, 452 U.S. 692 (1981) and granted a motion to suppress the gun. The state appealed.

The 5th DCA noted that a search warrant for a premises permits the detention of the occupants of that premises so long as they are located inside the premises or within its immediate vicinity. (Bailey v. U.S., 133 S.Ct. 1031 (2013). Factors mentioned in Bailey help reviewers discern whether one is within the "immediate vicinity."[11] The factors listed in Bailey to determine whether an occupant was within the immediate vicinity include the "lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors." The court found that Jenkins' presence on a public street, without more, is insufficient to determine whether the detention was or was not an unreasonable seizure. The trial court's decision was reversed, and the case was remanded for the trial court to make further factual determinations in accord with the Bailey factors.

State v. Jenkins, 2013 WL 4764747, (Fla. 5th DCA, 9/6/2013)

LATE BREAKING SEPTEMBER OPINIONS "MINI SUMMARIES"

Mere Presence At Scene, Knowledge of Robbery Attempt, and Flight From Scene Are Insufficient To Support Defendant's Felony Murder Conviction Based on Codefendant's Conduct. *Rocker v. State, 38 FLW D1853 (Fla. 2nd DCA, 8/30/2013).*

Murder Committed By Juvenile. Only Sentence Now Available Is Life With Possibility of Parole After 25 Years, As Per Miller v. Alabama, 132 S.Ct. 2455 (2012). *Horsley, Jr. v. State, 38FLW D1862, (Fla. 5th DCA, 8/30/2013).*

26 Year Delay In Charging Sex Battery On Child Not Violation Of Due Process Unless Specific Prejudice From The Delay Is Established. *Taylor v. State, 38 FLW D1835 (Fla. 4th DCA, 8/28/2013).*

State Has Discretion To Prosecute Medical Doctor Under 2nd or 3rd Degree Felony Under F.S. 893.13(8) Or More Severe Penalties under F.S. 893.135(1)(c). (Two cases: *State v. Gonzalez, JR., 38 FLW D1831 (Fla. 4th DCA, 8/28/2013)* and *State v, Schultz, 38 FLW D1828 (Fla. 4th DCA, 8/28/2013).*

Act of Tying Victim's Hands While Committing A Robbery And Not Untying Them Until Conclusion Of The Crime Is Kidnapping. *Castro v. State, 38 FLW D1879(Fla. 4th DCA, 9/4/2013)*

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

[11] "Limiting the rule in Summers to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification. Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe...In closer cases courts can consider a number of factors to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors…" Bailey, at 1042.

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

The internet makes court rulings and opinions from around the state and country known almost as soon as they are issued. Opinions issued by courts *other than* the DCA in which your agency resides, the Florida Supreme Court, or the U.S. Supreme Court are considered "persuasive authority" and are NOT binding. Such "persuasive" authority may, or may not, be given weight by the court considering the issue. Unless the opinion involves the United States Supreme Court addressing a Fourth Amendment issue (which Florida's courts must, as required by Florida's Constitution, follow) or interpreting a Florida Supreme Court opinion, Florida courts are not bound to follow federal opinions. Nevertheless, Federal opinions are often given great "persuasive" weight by Florida appellate courts when dealing with new issues. A ruling on a statute's constitutionality by a trial court judge binds only that judge, but may (or may not) be voluntarily accepted by other trial court judges. Such a ruling may prompt an appeal to a DCA or the Supreme Court which would ultimately provide "binding" law.

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

If there is a case in this summary that concerns you, locate and read the entire case. Do not rely solely on the summary for a full understanding of the case itself. Discuss it with your legal advisor or supervisors. Remember, just because a court "somewhere" has issued an opinion does not necessarily mean it applies to your agency. Let your agency legal advisor assist you in determining whether, and to what extent, a new opinion affects you and your agency.

FLORIDA CASE LAW UPDATE 13-01

Case: **Riley v. State, 2013 WL 275272 (Fla. 5th DCA 2013)**

Date: **January 25, 2013**

Subject: **Recording a suspect's conversation with his girlfriend in a police station**

FACTS: The defendant, Riley, was arrested for murder. Prior to being interviewed, Riley asked the detective to inform his girlfriend, Takita Thomas, that he had just been arrested. The detective agreed, and proceeded to record his interview with Riley. During the interview, Riley made some incriminating statements. Toward the end of the interview, the detective asked Riley if he wanted his girlfriend to come to the station. Riley said yes. The detective then allowed the girlfriend to bring food and cigarettes for Riley.

The detective left Riley alone with his girlfriend in the interview room. Riley then confessed the murder to his girlfriend. Unbeknownst to Riley or his girlfriend, the police had secretly recorded the conversation. Riley argued that his statements were inadmissible because he was never Mirandized. Riley also argued that the recording violated his reasonable expectation of privacy. The trial judge rejected both arguments, and Riley was convicted. The appellate court affirmed the conviction.

RULING: (1) Suspects have no reasonable expectation of privacy at a police station, unless the suspect is conferring with counsel.
(2) Suspects are not entitled to Miranda warnings prior to questioning by friends or other private citizens, unless the friend is acting at the direction of law enforcement.

DISCUSSION: At a police station, a suspect has no expectation of privacy unless law enforcement "deliberately fosters an expectation of privacy" or the suspect is meeting with his attorney. In this case, the police never told Riley that he was not being recorded, and the recording occurred in the same room where Riley already gave a recorded statement to a detective. Furthermore, Riley's girlfriend was not his attorney. Therefore, Riley could not reasonably expect any privacy in his conversation.

The Court also held that the girlfriend's conversation with Riley did not obligate the police to give Miranda warnings. Miranda is required prior to a custodial interrogation. In general, questions asked by private citizens do not qualify as "interrogation." However, private citizens can become interrogators if law enforcement directs the citizen or guides the citizen regarding what questions to ask. In this case, Riley's girlfriend was a private citizen acting on her own behalf. Law enforcement never asked the girlfriend to speak with Riley, and they certainly never instructed or guided her regarding what questions to ask. Under those circumstances, no "interrogation" occurred. Therefore, Miranda was unnecessary.

NOTE: The opinion does not explicitly say whether Miranda was read prior to the detective's interview with Riley. Instead, the opinion focuses entirely on Riley's conversation with his girlfriend.

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FLORIDA CASE LAW UPDATE 13-02

Case: **Bailey v. United States, 2013 WL 598438 (2013).**

Date: **February 19, 2013**

Subject: **Detaining persons leaving premises prior to execution of a search warrant**

FACTS: The police lawfully obtained a search warrant for an apartment. The officers were on scene preparing to execute the warrant when they noticed two unidentified men leave the apartment, get in a car, and drive away. The officers followed the car for approximately one mile and then stopped the vehicle. During the stop, the officers frisked the driver (Bailey), and found a set of keys that matched the apartment. Ultimately, the officers executed the warrant and found weapons and drugs in the apartment. Bailey was arrested and charged with possessing a variety of illegal weapons and drugs. He then filed a motion to suppress the apartment keys that were found on his person. Bailey argued that the officers engaged in an illegal seizure by stopping his car without a reasonable suspicion that Bailey had committed any illegal act. The trial court denied the motion to suppress, and the circuit court of appeals agreed with the trial court. However, the United States Supreme Court reversed the ruling of the circuit court by holding that the motion to suppress should have been granted.

RULING: Officers executing a search warrant can temporarily detain anyone on the premises; however, officers *cannot* detain occupants who have already left, unless the officer has a reasonable suspicion that the occupant has committed a crime.

DISCUSSION: In the case of *Michigan v. Summers*, the Supreme Court held that officers, while executing a search warrant, can temporarily detain the occupants of the premises while the search is being conducted. Under the *Summers* rule, officers can detain an occupant even without a reasonable suspicion that the occupant has committed a crime. Subsequent cases have held that "occupants" include people who are standing outside the home or on the curtilage.

However, the primary justification for this rule is officer safety. When a suspect has left the scene, the officers are not in danger of harm or interference with the search. Therefore, an occupant who has left the scene before the warrant is executed cannot be detained *unless* the officer has a reasonable suspicion that the occupant has committed or is committing a criminal act or traffic infraction.

The Court did not decide whether the officers had a reasonable suspicion that Bailey had committed a crime. Instead, it simply held that officers cannot detain people who leave the scene of a warrant prior to its execution, unless the officer has a reason to believe that person has committed a crime.

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FLORIDA CASE LAW UPDATE 13-03

Case: **O'Leary v. State, 2013 WL 1091690 (Fla. 1st DCA 2013).**

Date: **March 18, 2013**

Subject: **Written threats to do bodily harm**

FACTS: **The defendant, Timothy O'Leary, posted a comment or status update on his personal Facebook page. In the comment, the defendant threatened one of his female relatives with death or serious injury. The comment was seen by a male relative named Michael O'Leary. Michael was able to see the comment because he was friends with the defendant on Facebook. Michael showed the threatening comment to the victim's uncle, who then showed the comment to the victim. The defendant was charged with making a written threat to kill or do bodily harm.**

The defendant filed a motion to dismiss, arguing that he never "sent" the message; therefore, the comment failed to meet the elements of Fla. Stat. 836.10. However, the trial court found that the defendant's Facebook comment properly qualified as a "sending," and refused to dismiss the case. The defendant eventually pled no contest to the charge, and then appealed the trial court's ruling that he had "sent" the threatening message. The appellate court agreed with the trial judge and affirmed the conviction.

RULING: **If a suspect posts a message on Facebook threatening to kill or seriously harm another, the message has been "sent" to anyone who is allowed or authorized to view the message.**

DISCUSSION: **A violation of Fla. Stat. 836.10 occurs when (1) a person writes or composes a threat to kill or do bodily injury, (2) the person sends or procures the sending of that communication to another person, and (3) the threat is to the recipient of the communication or a member of his family. In this case, the defendant did not dispute that his message threatened death or serious bodily injury. He also acknowledged that the message was received by Michael O'Leary, who was a member of the victim's family.**

Instead, the defendant's sole argument was that he merely "published" the message on his personal Facebook profile. According to the defendant, he never "sent" the message to the victim or to Michael. However, the Court ruled that the defendant's posting was directly communicated to anyone who was authorized to view the comment. In this case, the defendant had previously added Michael as a Facebook "friend," and the defendant's comment was expressly shown to all of the defendant's friends. Therefore, the trial court correctly concluded that the threatening message was "sent" to Michael, even if Michael was not the sole or intended recipient.

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Case: **Smallwood v. State, 2013 WL 1830961 (Fla. 2013)**

Date: **May 2, 2013**

Subject: **Search Of A Cellphone During A Lawful Arrest**

FACTS: The defendant, Cedric Smallwood, was suspected of robbing a convenience store. The investigating officer obtained a valid warrant for Smallwood's arrest. The officers arrested Smallwood, and found a cellphone on or near his person. The officers seized the cellphone incident to the lawful arrest. The investigating officer then examined the phone without a search warrant. While searching the phone, the officer found pictures of cash and firearms that tended to link Smallwood to the robbery. The officer did not inform the prosecutor of the search or the pictures until a year later, when Smallwood was preparing for trial. When the prosecutor learned of the search, he immediately obtained a search warrant for the phone.

Smallwood asked the trial court to suppress the photos, arguing that the officer improperly searched his phone without a warrant. The trial judge denied the motion, and Smallwood proceeded to trial. At trial, the investigating officer testified that it is common for suspects to have incriminating pictures on their phone, and that he searched the phone to determine if any such images would be found in this case. Ultimately, Smallwood was convicted of robbery with a firearm, and the First District Court of Appeals affirmed his conviction. However, the Florida Supreme Court overturned the conviction by ruling that Smallwood's phone was illegally searched without a warrant.

RULING: **During a lawful arrest, an officer can seize a cellphone from the person being arrested; however, the officer cannot examine the phone without a search warrant, unless the officer obtains the suspect's consent or a genuine exigency exists.**

DISCUSSION: As a general rule, searches should not occur without a warrant. The rule contains several exceptions, one of which is a "search incident to arrest." During a lawful arrest, an officer can search the arrestee for weapons, contraband, or evidence that may be concealed. This rule enhances officer safety, and it prevents the suspect from destroying evidence. In this case, the suspect was lawfully arrested pursuant to an arrest warrant. Therefore, the officers could lawfully *seize* the suspect's phone to prevent him from erasing the data. However, a lawful arrest does not, by itself, entitle the officer to *search* or examine the phone. In most cases, a search warrant is needed before the phone can be searched.

NOTE: This opinion does not discuss or overrule the exceptions for consent or exigent circumstances. Officers can still examine a suspect's phone if the suspect voluntarily consents, or if the officer can articulate a serious exigency that prevents the officer from obtaining a warrant in time.

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FLORIDA CASE LAW UPDATE 13-05

Case: **Powell v. State, 2013 WL 2232319 (Fla. 1st DCA 2013)**

Date: **May 22, 2013/August 1, 2013 (upon rehearing)**

Subject: **Looking inside the window of a home while conducting a knock and talk**

FACTS: Law enforcement received an anonymous call indicating that marijuana would be found at a particular home. In the middle of the night, two deputies went to the home, without a warrant, to perform a knock and talk. The home was located in a rural area, and a gate was found at the front of the property. The gate was open and there were no signs posting saying "No Trespassing." A rough path lead to the front door. When no one answered the door, the deputies noticed a window a few feet to the left of the door. The deputies stepped away from the doorstep in order to see through the window. While standing only inches from the window, the deputies observed marijuana plants in the kitchen. Ultimately, the deputies entered the home without a warrant and arrested the occupants for Possession. The defendants asked the trial court to dismiss the case, arguing that the officers violated the Fourth Amendment by looking through the window. The trial court denied the motion, but the appellate court reversed.

RULING: When conducting a knock and talk, officers cannot trespass on the curtilage of someone's home for the purpose of looking inside a window.

DISCUSSION: In general, officers are not allowed to enter the curtilage of someone's home without a warrant, an emergency exception to the need for a warrant, or the person's consent. Although the word "curtilage" is ambiguous, it includes any area that is physically and mentally connected to the home, such as porches, patios, backyards, and side windows. An exception to this rule allows the police to approach the front door of a home for the purpose of attempting a voluntary interview with a resident. During a "knock and talk," the officer is required to follow the walking path (if one exists) and remain at the front door. The officer cannot begin searching elsewhere on the property. In this case, the officers could not see through the window from their position at the front door; instead, they stepped onto the yard, which is part of the curtilage, to look through it. The officers had no lawful right to enter the yard or go anywhere on the curtilage (other than the walking path to the front door). Therefore, the officers observed the marijuana from a place they had no lawful right to be, and the observation was an unconstitutional search. That which was observed (the marijuana) was suppressed as was the fruit of the illegal search (the warrantless seizure of the plants). This resulted in dismissal of the Possession charge.

The Court mentioned, however, that some homes have a window built into the front door. In that scenario, the officer can look through the window because the officer has a lawful right to stand at the door. The Court also noted that officers are allowed to stand on public roadways and sidewalks and look into an open window. In that scenario, the officer is standing in a place where he or she has a lawful right to be.

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FLORIDA CASE LAW UPDATE 13-06

Case: **Tallman v. State, 38 Fla. L. Weekly D1444 (Fla. 1st DCA 2013)**

Date: **July 1, 2013**

Subject: **Step-Parent's Consent to Search of Juvenile's Bedroom**

FACTS: A juvenile suspect lived in a home with his father and stepmother. The officers conducted a "knock and talk." The stepmother answered the door, and voluntarily consented to a search of the house, including her stepson's bedroom. The juvenile's father was not home at the time.

During the subsequent search of the bedroom, the officers found a box inside a dresser drawer. The officers then found contraband inside the box. The juvenile was charged accordingly, and he filed a motion to suppress, arguing that his stepmother lacked the authority to consent to a search of his bedroom drawer and the box contained therein.

RULING: Parents and step-parents can lawfully consent to a search of a juvenile's bedroom, including any containers found within the room.

DISCUSSION: As a general rule, a person who resides at a home cannot consent to the search of a bedroom, box, or other area, when that area is used exclusively by someone else. In other words, a person who resides at a house can only consent to a search of the person's own bedroom, or a common area, or other area over which the person normally exercises dominion and control.

However, this rule does not apply to a search of a juvenile's bedroom or other belongings. Unlike adults, juveniles do not have the right to exclude a parent from access or control over items located within their parents' home. Parents always have the authority to search a juvenile's belongings that are located within the parent's house. By this ruling, the Court has now extended that rule to step-parents. Thus, a parent or step-parent can lawfully consent to a search of their child or step-child's bedroom or other personal effects.

NOTE: The opinion does not indicate whether the juvenile affirmatively objected to the search of his room. Cases involving a present-and-objecting juvenile will be evaluated on the unique facts of each case, such as the age of the juvenile, and whether the juvenile's room was "off limits" to his or her parents/step-parents. This opinion does not provide a "bright line rule" as to whether a present-and-objecting juvenile can overrule a parent or step-parent's consent.

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FLORIDA CASE LAW UPDATE 13-07

Case: **Calloway v. State, 38 Fla. L. Weekly D1609 (Fla. 5th DCA 2013)**

Date: **July 26, 2013**

Subject: **Commanding a suspect to exit his home during a knock and talk**

FACTS: Officers received an anonymous tip indicating that Calloway was conducting various drug activities at his house. The house was located in a high crime area. However, the officers were unable to corroborate the tip or otherwise establish probable cause for a warrant. Instead, the officers performed a knock and talk at Calloway's home. Nobody answered when the officers knocked on the front door. The officers then observed Calloway exiting a side door. As Calloway exited the door, he noticed the officers. Calloway exclaimed "oh, shit," and quickly retreated into his house. The officers then began knocking loudly on the side door. After two minutes of continuous knocking and police announcements, Calloway's mother opened the side door. The officers ordered her out of the house, and also commanded Calloway to exit with his hands up. Calloway complied. The officers handcuffed Calloway. While handcuffed, Calloway volunteered that he had marijuana in the house. His mother consented to a search of the house. During the search, the officers found marijuana and other contraband in Calloway's bedroom. Calloway was charged with possession of cannabis and other contraband. Calloway filed a motion to suppress, arguing that the police had no legal authority to order him to exit his house during the knock and talk. The trial court denied the motion, but the appellate court reversed.

RULING: During a knock and talk, the police cannot command or compel a suspect to exit his home unless the officers could lawfully enter the home.

DISCUSSION: The officers were not violating the law in conducting a knock and talk at Calloway's house, but a knock and talk is a consensual encounter. During a knock and talk, a resident is free to answer the door, not answer the door, talk to the police, or not talk to the police. However, an officer cannot issue commands such as "stay here" or "come here" during a consensual encounter; therefore, under the Court's holding, the officers elevated the encounter to a detention (requiring at least reasonable suspicion) when they commanded Calloway to exit the house. (Their actions might have been approved if they merely asked him if he was willing to step outside, instead of commanding him to exit.) However, an earlier appellate decision, *Davis v. State*, 744 So.2d 586 (Fla. 2d DCA 1999), ruled that an officer's "request" may be perceived as a command or a seizure. For that reason, officers engaging in knock and talks should either refrain from asking the suspect to step outside, or ensure that such a request is phrased as a neutral and non-coercive question.

The State argued that the officers had a reasonable suspicion to detain Calloway, because of Calloway's unprovoked "flight" into his home at the sight of the officers. Calloway's home was located in a high crime area – and unprovoked flight in a high crime area normally entitles the officer to detain a suspect. However, the Court was mindful that the Fourth Amendment places special restrictions on the government's ability to invade the privacy of a person's home. When a person retreats inside his home, the government can neither enter the home nor force a person to exit, unless the officers are armed with probable cause and a recognized exception to the warrant requirement (such as "hot pursuit").

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