Florida Case Law Update For Law Enforcement Legal Advisors

(State and Federal Cases of Interest to Police)

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.

Thanks to the Florida Attorney General Pamela Bondi and her "Criminal Law Alert" Editor Carolyn Snurkowski for their regular publication of "Criminal Law Alerts" (from which many of these summaries are derived) Thanks also to Tallahassee Police Legal Advisor Rick Courtemanche for sharing his periodic TPD case updates, and thanks to FDLE Regional Legal Advisor David Margolis for his "FDLE Case Updates."

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

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U.S. SUPREME COURT:

Trick or Treat! Halloween Oral Argument Set On Drug Dog Sniff Cases

Florida v. Jardines, 11-565, regarding the scope of the 4th Amendment's application to police use of a drug-sniffing dog on the exterior of a private home; and Florida v. Harris, 11-817, regarding a dog's "alert" as probable cause to search a vehicle, have been set for oral argument on Wednesday, October 31, 2012.

Here is a summary of the upcoming SCOTUS term by Ken Wallentine of "Xiphos":

The annual fall term of the high court traditionally begins with the cry of "oyez, oyez, oyez" on the first Monday of October. Several cases previously highlighted in Xiphos are on the Supreme Court docket. There are two drug detector dog cases that will be argued on Halloween.

In Florida v. Jardines, the Court will consider the question of whether a warrant is necessary when officers take a drug detector dog to the front door of a house. Detector dog sniffs are traditionally not considered to be "searches" under the Fourth Amendment because they reveal only the odor of contraband. Crashing against this logic is the Court view of thermal imaging and GPS/radio beepers that may reveal activities or contraband within a home.

Another Florida case, Florida v. Harris, presents the question of establishing a detector dog's reliability prior to a finding that the dog's sniff established probable cause to search. The Florida court required training and certification records, records of field deployment reliability, evidence of the handler's training and experience and other evidence relating to reliability that is known to the dog's handler. Compare this to established law in many courts that the prosecution need only show that the dog is trained and certified at the time of the sniff. For example, see United States v. Ludwig, 10 F.3d 1523 (10th Cir. 2011).

Just this past week, the Court agreed to consider whether the evanescent nature of alcohol in the blood justifies a warrantless blood draw in impaired driving cases. There is a split among many state and federal courts on this question. In Missouri v. McNeely, the Supreme Court will weigh in. Caution: some states that have disallowed warrantless blood draws based on the Fourth Amendment exigency evidence doctrine have done so under their state constitutions. The decision in Missouri v. McNeely may have no impact in those states.

TASER deployment converts detention into arrest

An officer received a tip from a reliable informant that a man was selling drugs out of a black Honda at a particular corner. Several officers wearing badges and guns saw Reid standing near a black Honda, parked at the reported location. They approached Reid to speak with him. When he saw the officers, Reid bladed away

from the officers as if to conceal his side. He turned and ran as one officer called out to him.

As he ran, the officers could see that one pocket was swinging as if it contained a gun or other heavy object. An officer fired a TASER at Reid. The two probes struck Reid in the back and officers were able to detain him. One officer asked Reid whether he was holding anything that was illegal. Reid said that he had a gun in his pocket.

Reid claimed that he was under arrest at the time that he made the statement about the gun. He asked that the court suppress his statement because he had not been given a Miranda warning and waived his rights. The appellate court agreed that Reid was under arrest and ordered suppression.

In two similar cases, United States v. Russ, 772 F.Supp.2d 880 (N.D. Ohio) and United States v. Colon, 654 F.Supp.2d 236 (E.D. Pa. 2011), federal judges reached the opposite conclusion. In the Colon case, the suspect experienced three energy cycles during the effort to detain him. Many other cases hold that tackling or knocking down a suspect does not necessarily convert a detention into an arrest. Officers must take care to report the reasons that force was necessary to detain the suspect and to explain each distinct application of force.

The court agreed that there was reasonable suspicion to detain and to frisk Reid. Unfortunately, the appellate court did not consider the question of whether the gun would have inevitably discovered. The court disallowed that application of the public safety exception to the Miranda rule. The court was divided, four to three, and the dissent would have found the use of the TASER to detain Reid a reasonable step. This case reminds officers to carefully report all factors justifying each distinct use of force. Remember, too, the possibility of injury from falls by elevated or fleeing suspects. Reid v. State, 2012 WL 3639058 (Md. 2012).

No expectation of privacy in cell phone location data

Melvin Skinner was known to federal agents by his drug courier code name, "Big Foot." Agents learned that Skinner and his co-conspirator were using a particular cell phone to communicate. The agents obtained a court order to require the cell phone service provider to release subscriber identification, cell site location information and real time GPS location information through pinging the phone.

Agents located Skinner at a truck stop in Texas. They approached Skinner and asked for consent to search his motor home. When he refused, a drug detector dog sniffed the exterior and gave a positive final response to the odor of controlled substances. A search yielded 1,100 pounds of marijuana and two guns.

Relying on the 2012 Supreme Court case, United States v. Jones (see Xiphos archives), Skinner argued that tracking his location constituted a search. Skinner also claimed that the cell location tracking was a search because there was no physical surveillance and the agents did not know his true identity. Thus, he claimed, the officers were not merely using technology to do that which they might have otherwise accomplished through physical surveillance.

The court of appeals held that there was no search because Skinner had no expectation of privacy in his cell phone GPS location data. Thus, no warrant was required. The court distinguished this case from the Jones decision by noting that there was no "trespassory interference" with Skinner's vehicle because no tracker was attached to it. United States v. Skinner, 690 F.3d 772 (6th Cir. 2012). For a more detailed discussion of cell site location information court rulings, see Wallentine, Cell Site Location Evidence: A New Frontier in Cyber-Investigation, 2011 (2) AELE Mo. L. J. 401.

Tips of child pornography on computers don't grow stale

Officers learned that Ronald Seiver downloaded a pornographic video of a 13 year-old girl, then uploaded still images extracted from the video to a child pornography sharing site. However, the officers learned that the download/upload activity happened seven months prior to the tip. The officers obtained a warrant, searched Seiver's computer and located child pornography. Seiver was convicted and sentenced to 35 years in federal prison.

Seiver claimed that the tip was stale and the affidavit for the warrant lacked probable cause. The court of appeals shifted focus from earlier cases that addressed staleness in the context of the likelihood for child pornography collectors to hang on to illicit images. Instead, the court joined a few other courts that examine current computer technology and the likely ability for computer forensic examiners to be able to retrieve deleted files up to the point that storage space utilization forces overwriting of the deleted images.

The Seiver case is a must-read for officers and prosecutors considering the freshness versus staleness of tips relating to evidence on a computer. The court's decision lists a number of resources and cites supports from other courts using analogous reasoning. United States v. Seiver, 2012 WL 3686387 (7th Cir. 2012).

Xiphos (pronounced zee-phose) is a biweekly summary of recent court decisions about criminal procedure and other subjects important to law enforcement officers and administrators. The xiphos is a short double-edged sword used essentially as a backup weapon by ancient Greek warriors. This service is provided at no cost. to subscribe, send a message to Xiphos-subscribe@KenWallentine.com to unsubscribe, send a message to Xiphos-unsubscribe@KenWallentine.com An excellent and free library of civil liability articles and case summaries may be found at www.aele.org

Rulings From 2011-2012:

Evidence Seized In Good Faith Reliance On Pre-Gant Law Need Not Be Excluded

By a 7-2 vote, the Court ruled affirmed an 11th Circuit decision holding that evidence seized prior to the Supreme Court's decision in Arizona v. Gant, 129 S.Ct. 1710 (2009) need not be excluded when officers were acting in good faith in reliance of pre-Gant law.

Davis v. United States, 131 S.Ct. 2419, (6/16/11).

Installation of GPS Tracking Device On Undercarriage of Car Is Search

The Court held that federal agents conducted a search when they installed a GPS tracking device under a car and then monitored it for 30 days. A five-justice majority held "(t)he Government physically occupied private property for the purpose of obtaining information" and "(w)e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted. The Katz "reasonable expectation of privacy" test is not the sole measure of Fourth Amendment violations. A four-justice concurring opinion disagreed with a "trespass-based rule," but concluded the length of monitoring in the case made it a search because it "involved a degree of intrusion that a reasonable person would not have anticipated."

United States v. Jones, 132 S.Ct. 935 (2012)

Officers Having A Concern About Imminent Violence Properly Entered Home Without Warrant

High School student Vincent Huff was rumored to have written a letter threatening to "shoot up" the school. The principal at the school called police and reported many parents were keeping their children home out of concern about the rumor. The principal was concerned about her school's students and requested the police investigate Huff. The officers confirmed Huff was frequently bullied at school. A classmate of Huff indicated he believed Huff was capable of carrying out the threat. Huff had been absent for two days. The officers, trained in targeted school violence knew these characteristics were common among school shooters. They decided to interview Huff.

Arriving at Huff's house, the officers announced who they were and knocked on the door several times with no response. One officer called the home telephone. They could hear the phone ringing but no one answered. The officer then called the cell phone of Huff's mother. The mother answered and confirmed she was inside the house. She also indicated Huff was in the house. The officer indicated they were outside and wanted to talk to her. She hung up the phone. About two minutes later the mother and Huff walked outside the door and stood on the front steps. The officers indicated they were there to inquire about the threats.

Huff responded, "I can't believe you're here for that" but the mother refused the officer's request to continue the discussion inside the house. At trial, one officer testified that in his experience it was "extremely unusual" for a parent to decline an

officer's request to interview a juvenile inside. He also found it odd that the mother never asked the officers the reason for the visit. When asked if there were any guns in the house, the mother immediately turned and ran into the house. "Scared because he did not know what was in that house" and because he had "seen too many officers killed," one of the officers entered the house behind the mother. Huff entered after the officer, and the second officer entered after Huff. The second officer was concerned about "officer safety," and did not want the first officer in the house alone. Two other officers, who had been out of earshot, entered under the assumption that the mother had given the officers permission to enter.

Huff's father entered the room and challenged the officers' authority to be in the house. The officers remained in the room for 5 to 10 minutes. No search was done of the premises or the occupants. They ultimately determined the rumor to be false and reported their findings to the school.

The Huffs sued under 42 USC § 1983, alleging a Fourth Amendment violation by entering the home without a warrant. After a 2-day bench trial, the court entered judgment in favor of the officers, finding they were entitled to qualified immunity because of the mother's odd behavior combined with the information the officers had obtained at school, which could lead a reasonable officer to believe there could be weapons in the house and that family members or the officers themselves were in danger. The 9th Court of Appeals affirmed the immunity for officers #3 and #4 who entered under the assumption there had been consent provided but reversed as to the first two officers, finding any belief that the officers or family members were in serious, imminent hard would have been objectively unreasonable. After "slapping the wrist" of the 9th CA for several reasons, including selective choice of the district court's factual finding, the Supreme Court in a Per Curiam opinion held reasonable officers in the position of the two officers could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence because a reasonable officer could have come to a conclusion that violence was imminent. The decision of the 9th CA regarding the first two officers was reversed, with the case remanded for entry of judgment in favor of the petitioners.

Ryburn v. Huff, 565 U.S. ---, 132 S.Ct. 987 (2012)

No Pre-Trial Screening of Eyewitness Reliability Required

By an 8-1 vote, the Supreme Court held that the Due Process Clause does not require a trial judge to screen eyewitness evidence for reliability pretrial when suggestive circumstances surrounding the identification were not arranged by law enforcement officers. The court distinguished these cases from earlier cases where police had orchestrated the suggestive circumstances by, for example, using an improper lineup.

Around 3 a.m. on August 15, 2008, the Nashua, New Hampshire Police Department received a call reporting that an African-American male was trying to break into cars parked in the lot of the caller's apartment building. When an officer asked eyewitness Nubia Blandon to describe the man, Blandon pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking

lot, next to a police officer. Petitioner Barion Perry's arrest followed this identification. Perry's state trial court denied his motion to suppress the identification. The New Hampshire Supreme Court affirmed his conviction. In affirming the New Hampshire court, the U.S. Supreme Court noted that due process requires a case-by-case assessment whether improper police conduct created "a substantial likelihood of misidentification." The Court required police misconduct as the basis for a potential suppression because the purpose of excluding evidence is "to deter law enforcement use of improper procedures in the first place. This deterrence rationale is inapposite in cases, like Perry's, where there is no improper police conduct."

Perry v. New Hampshire, 132 S.Ct. 716 (2012)

Prosecutors Violated Brady v. Maryland

Prosecutors violated Brady v Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)[1], by failing to provide defense counsel with statements by the single eyewitness who linked petitioner to the crime that called into question the reliability of that identification. Specifically, the lead detective's notes made the night of the murder and five days later contained statements by the eyewitness stating that he could not identify the perpetrators and did not see any faces. These statements were not disclosed to the defense.

Smith v. Cain, 132 S.Ct. 627 (2012)

Miranda Not Violated By Questioning of Prison Inmate

Fields, a Michigan state prisoner, was escorted from his prison cell by a corrections officer to a conference room where he was questioned by two sheriff's deputies about criminal activity he had allegedly engaged in before coming to prison. At no time was Fields given Miranda[2] warnings or advised that he did not have to speak with the deputies. Fields was questioned for between five and seven hours; Fields was told more than once that he was free to leave and return to his cell; the deputies were armed, but Fields remained free of restraints; the conference room door was sometimes open and sometimes shut; several times during the interview Fields stated that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell; after Fields confessed and the interview concluded, he had to wait an additional 20 minutes for an escort and returned to his cell well after the hour when he generally retired. At issue: Prisoners in custodial interrogation must be read their Miranda rights before questioning can begin. But what about prisoners who are being questioned for a crime unrelated to the one they are serving time for?

The Supreme Court unanimously held that the Sixth Circuit erred when it held that the Court's precedents established a categorical rule that a prisoner is always "in custody" for purposes of Miranda any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison. By a 7-2 vote, the Court held that respondent was not in custody when he was taken to a conference room by prison guards and questioned by law enforcement officers

[1] As used in this summary, "Brady" refers to this case unless otherwise noted.
[2] As used throughout this summary, "Miranda" refers to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

about a crime because he was told at the outset of the interrogation that he was free to go back to his cell at any time, and he was neither physically restrained nor threatened.

Howes v. Fields, 132 S.Ct. 1181 (2012)

Failure to Disclose "Ambiguous" and "Speculative" Police Activity Sheet Was Not Brady Violation

Almost 20 years after conviction for murders in connection with a Philadelphia Prince's Lounge robbery, Lambert brought a claim for post conviction relief in Pennsylvania state court, alleging that the Commonwealth had failed to disclose a "police activity sheet" in violation of *Brady*. The document, dated October 25, 1982, noted that a photo display containing a picture of an individual named Lawrence Woodlock was shown to two witnesses to the robbery, but that "[n]o identification was made." The document further noted that "Mr. WOODLOCK is named as co-defendant" by Jackson, who was in custody at the time on several charges and had admitted to involvement in at least 13 armed robberies of bars. The activity sheet did not indicate whether Jackson's reference was to the Prince's Lounge robbery or one of the others. The sheet bore the names of the law enforcement officers involved in the investigation of the Prince's Lounge robbery. It also bore the names of the robbery's murder victims, as well as the police case numbers for those murders. The Commonwealth has identified no evidence that Woodlock was ever investigated for any other robbery, or that his photo was shown to a witness in any other robbery.

Lambert claimed that the activity sheet was exculpatory, because it suggested that someone other than or in addition to him, Jackson, and Reese was involved in the Prince's Lounge crime. Lambert also argued that he could have used the activity sheet to impeach Jackson's testimony at trial, because the statement attributed to Jackson suggested that Jackson had identified Woodlock as a participant prior to identifying Lambert. The Commonwealth countered that the asserted "statement" by Jackson reflected in the activity sheet was in fact nothing more than an "ambiguously worded notation." The Commonwealth argued that this notation simply indicated that Jackson had named Woodlock as a "co-defendant" in some incident, without specifying whether Woodlock was said to be involved in the Prince's Lounge robbery or one of the dozen other robberies in which Jackson had admitted participating.

No *Brady* violation was found by the lower courts. However, the Third Circuit Court of Appeals deemed the non-disclosure to violate *Brady.* In its Per Curiam opinion, the USSC disagreed, noting the 3rd CA failed to address the state court ruling that the reference to Woodlock was ambiguous and any connection to the Prince's Lounge robbery speculative. The Court noted that ruling may well be reasonable, given that (1) the activity sheet did not explicitly link Woodlock to the Prince's Lounge robbery, (2) Jackson had committed a dozen other such robberies, (3) Jackson was being held on several charges when the activity sheet was prepared, (4) Woodlock's name appeared nowhere else in the Prince's Lounge files, and (5)

the two witnesses from the Prince's Lounge robbery who were shown Woodlock's photo did not identify him as involved in that crime. "The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (28 U.S.C. § 2254(d)(1)) precludes a federal court from granting a writ of habeas corpus to a state prisoner unless the state court's adjudication of his claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States…Any retrial here would take place three decades after the crime, posing the most daunting difficulties for the prosecution. That burden should not be imposed unless each ground supporting the state court decision is examined and found to be unreasonable under AEDPA."

Wetzel v. Lambert, 132 S.Ct. 1195(2012).

When Does "Clearly Established Case Law" Begin For AEDPA Purposes?

Following affirmance of state-court convictions for second-degree murder, robbery, and conspiracy, petitioner filed pro se petition for federal habeas corpus relief. The United States District Court for the Eastern District of Pennsylvania, denied petition. Petitioner appealed. The United States Court of Appeals for the Third Circuit. The Supreme Court held that clearly established federal law as determined by the Supreme Court, for temporal purposes under the provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) allowing federal habeas review of a state prisoner's claim adjudicated on the merits in state-court proceedings if the adjudication of that claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court, is the law at the time of the state-court adjudication on the merits.

Greene v. Fisher, 132 S.Ct. 38 (2011)

Failure of Defense Counsel to Recommend a Plea or Actions Causing a Plea Offer to Be Withdrawn May Violate Sixth Amendment Right to Counsel

The U.S. Supreme Court decided companion cases related to the right to effective counsel that addresses issues related to "lost opportunity" plea offers. In a 5-4 vote, the Court held the Sixth Amendment right to effective counsel is violated when defense counsel provides defective advice not to accept a plea offer, and defendant is convicted and sentenced to a sentence longer than what he would have received under the plea. (Lafler v. Cooper). In a 5-4 vote in a second case, the Court held the Sixth Amendment right to effective counsel is violated when counsel's deficient performance results in a loss of a plea offer and when after pleading guilty, the defendant is sentenced to a longer term than he would have gotten under the lost plea offer. (Missouri v. Frye).

In Lafler, the Court indicated a defendant can establish sufficient prejudice by showing "that but for the ineffective advice of counsel, there is a reasonable probability that the plea offer would have been presented to the court. (I.e., the defendant would have accepted and the government would not have withdrawn it.) In such cases, the proper remedy is to require the prosecution to reoffer the plea proposal and the court to determine which convictions if any were to be vacated and resentenced. In Missouri, the Court indicated the important of plea bargains requires counsel to provide adequate assistance during the plea bargain process,

including at the very least communicating any formal plea offers from the prosecution. Prejudice can be established by demonstrating a reasonable probability the defendant would have accepted the earlier plea offer, that the prosecution would not have withdrawn it, and that the court likely would have accepted it. The same remedy noted in Lafler was noted.

Lafler v. Cooper,132 S.Ct. 1376 (3/21/12)
Missouri v. Frye,132 S.Ct. 1399 (3/21/12)

Policy of Strip-Searching Every Detainee Placed In General Jail Population Regardless of Nature oof Offense Does Not Violate 4th or 14th Amendment

In a 5-4 opinion, the Court said absent substantial evidence to the contrary, the judgment of corrections officials to require strip searches of everyone, male or female, being placed in the general jail population does not form the basis of a 42 USC §1983 claim. The policy is reasonable to protect the safety of all concerned, including the detainee. The opinion did not address cases where the detainee may be held separately form the general jail population.

Florence v. Bd. of Chosen Freeholder of County of Burlington, 131 S.Ct. 1816 (mem.)(4/2/12)

Law Enforcement Witness Before Grand Jury Entitled to Same Absolute Immunity From 42 USC §1983 Lawsuit As A Witness Testifying At A Trial

The Court unanimously held that a law enforcement witness testifying in a grand jury proceeding has the same absolute immunity from a 1983 lawsuit as a witness who testifies at trial.

Rehberg v. Paulk, 131 Sup.Ct.1678 (mem.) (4/2/12)

Prisoners At Private Prison Cannot Assert 8th Amendment *Bivens* Claim

After tripping over a cart and breaking his elbow, a prisoner at a federal facility operated by a private company filed a *pro se* complaint against several employees of the facility, alleging the employees deprived him of adequate medical care, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment, and caused him injury. The United States District Court for the Eastern District of California dismissed the complaint. Prisoner appealed. The United States Court of Appeals for the Ninth Circuit reversed and remanded, and, subsequently, amended its opinion on denial of rehearing en banc. Certiorari was granted. Holding: The Supreme Court, Justice Breyer, held that prisoner could not assert an Eighth Amendment Bivens claim for damages against private prison employees.

Minneci v. Pollard, 132 S.Ct. 617 (2012)

Prior Violation of Miranda Did Not Poison Subsequent Mirandized Questioning

Murder suspect Archie Dixon claimed that his rights were violated because police ignored his request for counsel and failed to Mirandize him when he was detained for forgery in a murder investigation. In a later, but related investigation, Dixon was

read his rights and confessed. He was later sentenced to death. The Ohio Appellate and Supreme Courts affirmed, but the 6th Circuit Appeals Court reversed. On Nov. 17, in a per curium (unsigned) decision, SCOTUS reversed the 6th Circuit.

Bobby v. Dixon, 132 S.Ct. 26 (2012)

Double Jeopardy Does Not Bar Re-Prosecution of A Greater Offense When Jury Has Deadlocked On A Lesser Offense, Requiring Retrial

Alex Blueford was charged on multiple accounts with killing his girlfriend's 20-month-old son. The jury found Blueford did not commit capital murder, but deadlocked on first degree murder, manslaughter and negligent homicide. A mistrial was declared. At issue: If a jury deadlocks on a lesser offense, does the Double Jeopardy Clause bar re-prosecution of a greater offense? The USSC ruled 6-3 against Blueford and allowed retrial on the greater offense. It held that the jury did not finally resolve, for double jeopardy purposes, the question of defendant's guilt as to murder charges, and that the trial court was not required to issue partial verdict forms or give the jury new options for a verdict, in order to avoid declaration of mistrial based on juror deadlock.

Blueford v. Arkansas, 132 S.Ct.2044 (2012)

***Apprendi* Applies to Facts Supporting Enhanced Fines**

In a 6-3 ruling, the Court held the rule announced in Apprendi v. New Jersey, 530 U.S. 466 (2000) requires a jury to find beyond a reasonable doubt any fact that increases a defendant's maximum sentient of a criminal fine (as well as to incarceration time).

Southern Union Company v. U.S., 132 S.Ct. 2344 (6/21/12)

Public Sector Unions May Not Require Non-Members to Pay For Special Assessments That Are Used to Fund Political Or Ideological Activities

Nonunion members may not be assessed amounts to pay for political or ideological union activities. Fresh notice must be given to nonmembers when assessing such a special fee, and the fee cannot be collected unless the non-member provides affirmative consent. The issue was not rendered moot when the union offered to make a full refund of such assessments, because the conduct could immediately resume absent the ruling.

Knox v. Service Employees International Union, 132 S.Ct. 2277 (6/21/12)

Relaxed Mandatory Minimum For Crack Offenses Applies Retroactively And Is Applied to Any Offender Sentenced After 8/3/2010

Ruling 5-4, the Court held the new, more lenient mandatory minimum provisions in the Fair Sentencing Act of 2010 (reducing disparity in sentences in crack and powder cocaine from 100:1 to 18:1) applies retroactively to conduct occurring prior

to the 8/3/2010 effective date of the Act and should be used to anyone sentenced after that date.

Dorsey v. U.S., 132 S.Ct. 2321 (6/21/12)

Confrontation Clause Not Violated By DNA Expert Testifying There Was A DNA Match While Relying On Testing Done, And Report Authored By Another

By a 4-1-4 vote, the Court held that a defendant's Confrontation Clause rights were not violated when an expert witness, relying on the DNA testing performed ─ and lab report prepared ─ by another DNA analyst, gave her expert opinion that there was a DNA match. A four-Justice plurality (the Chief Justice and Justices Alito, Kennedy, and Breyer) reasoned that the expert could be cross-examined and that the out-of-court statements (the lab report) related by the expert to explain her assumptions "are not offered for their truth and thus fall outside the scope of the Confrontation Clause." An opinion by Justice Thomas concurring in the judgment rejected that reasoning but reached the same result based on his conclusion that the statements in the lab report "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." He specifically noted that the lab report was "neither a sworn nor a certified declaration of fact," and that although it was signed by two "reviewers," neither of them "purport[ed] to have performed the DNA testing nor certi(fied) the accuracy of those who did."

Williams v. Illinois, 132 S.Ct. 2221 (6/18/2012)

8th Amendment Bans Juveniles Being Sentenced to Life In Prison Without Parole For Homicide Offense

By a vote of 5-4, the Court held that the Eighth Amendment's ban against cruel and unusual punishment prohibits a sentencing scheme that mandates life in prison without the possibility of parole for juveniles who have committed homicide offenses. Instead, the Court held, "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." As stated by the Court, "While Graham 's *(Graham v. Florida, 560 U.S. –—, 130 S.Ct. 2011, (2010*)) flat ban on life without parole was for nonhomicide crimes, nothing that Graham said about children is crime-specific. Thus, its reasoning implicates any life-without-parole sentence for a juvenile, even as its categorical bar relates only to nonhomicide offenses. Most fundamentally, Graham insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. The mandatory penalty schemes at issue here, however, prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. This contravenes Graham 's (and also Roper 's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (*Roper v. Simmons, 543 U.S. 551 (2005))

Miller v. Alabama, 132 S.Ct. 2455 (6/25/12)
Jackson v. Hobbs, 10-9647 (6/25/12) (decided in tandem with Miller)

Most of Arizona's Immigration Law Preempted By Federal Law

By a vote of 5 to 3 (Kagan recused), the Court struck down three provisions of the Arizona immigration law as preempted by Federal law.

- Section 3 of Arizona's law, which imposed state fines and possible imprisonment on persons in the country illegally, was preempted by federal law that already makes it illegal for aliens to be in the country without authorization.
- Section 5(c) which made it a state crime for illegal immigrants to apply for or attain a job in Arizona, a practice that is not a crime under federal law was also struck down.
- Section 6, which authorized state officials to arrest without a warrant persons unlawfully in the country if officials believe they have committed a deportable offense was also struck down.

The Court left open the question of whether Section 2(b) (which requires law enforcement officers to check the immigration status of persons whom they have lawfully detained) was preempted. The Court indicated that this provision could survive preemption "—at least absent some showing that it has other consequences that are adverse to federal law and its objectives."

Arizona v. U.S., 132 S.Ct. 2492, (6/25/12)

Editor's note: For a quick summary of every 2012 U.S. Supreme Court opinion, categorized by topics including "Criminal Law," check out the Reuters summary site at: http://www.reuters.com/supreme-court/2011-2012
Individual opinions may be found at the USSC website:
http://www.supremecourtus.gov/

11th Court of Appeals:

Failure to Indicate At Trial That Key State Witness Had Received A $500 Reward Payment Was Brady and Giglio Error. Florida Supreme Court Erred In Concluding Non-Disclosure Wouldn't Have Affected Outcome. New trial Ordered.

Appellant's Giglio argument was "that (key witness) Cronin and the lead detective… both testified falsely at trial that Cronin received no benefit for her testimony against (Appellant) Guzman, other than being taken to a motel rather than to jail after she was arrested on unrelated charges."

Guzman's Brady violation argument was that "the State failed to disclose that Cronin was paid a $500 reward for her testimony." The 11th Circuit noted that a *Giglio* claim requires proof that: (1) prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material, i.e., that there is any reasonable likelihood that the false

testimony could have affected the judgment. A defendant is entitled to new trial for prosecution's use of false testimony, in violation of *Giglio*, if there is any reasonable likelihood that the false testimony could have affected judgment of the jury; this "could have" standard requires new trial unless prosecution persuades court that the false testimony was harmless beyond reasonable doubt. The 11th Circuit found "it was objectively unreasonable for the Florida Supreme Court to conclude that there was not any reasonable likelihood that the $500 reward and Cronin's and the detective's perjury could not have affected the outcome in this case."

The 11th Circuit also concluded "'there is no possibility that fair-minded jurists could disagree that the state court's decision' was an unreasonable application of United States Supreme Court's precedents regarding the knowing presentation of false evidence." See Harrington v. Richter, --- U.S. ---, 131 S. Ct. 770, 786 (2011). They also found Guzman's claim was meritorious. The 11th Circuit stated "there were significant weaknesses in the State's case against Guzman" and "the trial boiled down to a credibility contest between Guzman on the one side, and Cronin and (the detective) on the other side, but the State failed to correct materially false testimony of Cronin and (the detective)." ". . . we cannot say with fair assurance that the outcome of Guzman's trial was not swayed by the *Giglio* error." The 11th Circuit affirmed the district court's order granting Guzman a new trial on his *Giglio* claim.

Guzman v. Secretary, DOC, 663 F.3d 1336 (11th CA, 12/7/2011)

No Constitutional Right to Access Evidence For DNA Testing

Alvarez was convicted of first degree murder, sexual battery, and aggravated child abuse and he petitioned the postconviction court for some of the physical evidence for DNA testing and was denied. The 5th DCA affirmed the denial. (Alvarez v. State, 951 So.2d 852 (Fla. 5th DCA, 2007)(Table). In his federal complaint, Alavarez claims the denial of the evidence violated his rights under the 14th (due process and Access to courts), 8th (cruel and unusual punishment), 6th (confrontation and compulsory process) Amendments.

The 11th CA affirmed the state court. "The Supreme Court has recently made it abundantly clear that there is no freestanding constitutional right to Access evidence for DNA testing, and that the federal courts may only upset a state's postconviction DNA Access procedures if they are fundamentally inadequate to vindicate substantive rights." (Emphasis in original quote.)

Alvarez v. AG State of Florida, et. al., 679 F.3d 1257 (11th CA, 5/8/12)

FLORIDA SUPREME COURT CASES:

Theft of Truck Which Had Infant In Car Seat In Back Seat Was Not Proven to Be Kidnapping

Juan Gonzalez too his two door, extended-cab pickup truck with tinted windows to a Hialeah furniture store to pick up some furniture he had purchased. Gonzalez's

aunt, his girlfriend (Alvarado) and her two-year old daughter were with him. Gonzalez and his aunt went into the store, but Gonzalez asked Alvarado for some assistance. Alvarado exited the truck, leaving it running, with the keys in the ignition. Within minutes Delgado and another stole the pickup truck and drove away. All the events were captured on a storefront surveillance video. Seeing the truck was missing, Gonzalez immediately called 911. Within a half hour, the truck was located in a parking lot just outside of Hialeah, with the engine running, and doors unlocked. The child was still in the truck, in her car seat, and her eyes were puffy from crying, with mucous running down her face, and appearing "exhausted." She was otherwise unharmed. The front seat area of the truck was ransacked, and the radio ripped from the dash. Later that day, using the store surveillance video, police located and arrested Delgado and his accomplice near where the truck was recovered. He was charged with burglary of an occupied conveyance, grand theft, auto theft, and kidnapping with the intent to commit or facilitate a felony (F.S. 787.01(1)(a)2). At Delgado's trial, no direct evidence was introduced that he knew the child was in the truck. At the close of the state's case, Delgado moved for a judgment of acquittal on the kidnapping charge. The trial court denied the motion.

The 3rd DCA affirmed the conviction (Delgado v. State, 19 So.3d 1055 (Fla. 3rd DCA, 9/30/09) and the case moved to the Supreme Court. After finding the 3rd DCA failed to properly implement a three-part test set out in Faison v. State, 426 So.2d 963 (Fla. 1983) and ruled there was insufficient evidence of kidnapping. The Faison test is: [I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement must not be slight, inconsequential and merely incidental to the other crime; must not be of the kind inherent in the nature of the other crime; and must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection. The awareness of the victim must arise before or during the commission of the underlying felony (auto theft in this case) and not after the fact. The key factor in Delgado's guilt is whether he knew of the presence of the child before or during his theft of the truck. Evidence at trial indicated the child was asleep before the theft occurred. There was no evidence indicating she awoke before or during the auto theft. With this key element not proven, the kidnapping conviction was reversed.

The Court also noted that Delgado's act of abandoning the child following the auto theft, absent imposing an affirmative duty not present in the statute upon the defendant to alert other authorities to the child's presence, does not amount to the act of kidnapping as contemplated by the statute. The Third District's decision indicating otherwise was in error. The Court also commented that if Delgado had left the child in the vehicle unattended after transporting her away from her parents and harm to the child could reasonably have been expected to ensue, the State could have charged Delgado with child abuse pursuant to section 827.03(1)(b), Florida Statutes (2006), and the evidence may have been sufficient to sustain a conviction under that charge. See Ford v. State, 802 So.2d 1121, 1126, 1131 (Fla.2001) (concluding that defendant's act of leaving a 22–month–old child strapped into her car seat in an open pickup truck in an isolated, wooded area for over 18 hours after murdering the child's parents, thereby exposing the child to dehydration, heat, and numerous insect bites was sufficient to support a third-

degree felony child abuse conviction under section 827.03). However, Delgado was not charged with child abuse.

Delgado v. State, 71 So.3d 54 (Fla. 5/26/11, as revised on denial of rehearing 9/15/11)

A Parent Can Kidnap Own Child

Following affirmance of convictions for twenty-nine counts of aggravated child abuse, one count of child neglect, one count of child abuse, and three counts of kidnapping, (See: Davila v. State, 829 So.2d 995 (Fla. 3rd DCA, 2002)), the defendant filed a motion for postconviction relief. Judge Israel Reyes denied the motion. Defendant appealed. The 3rd District Court of Appeal, , affirmed and certified conflict (See: Davila v. State, 26 So.3d 5 (Fla. 3rd DCA, 2009)). The Florida Supreme Court held that a parent is not exempt from being held criminally liable for kidnapping his or her own child, disapproving Muniz v. State, 764 So.2d 729 (Fla. 2nd DCA, 2000).

The evidence presented at trial demonstrated that R.D. arrived from Nicaragua on February 5, 2000, and thereafter resided with his parents and two siblings in Sweetwater, Florida. Shortly after his arrival from Nicaragua, R.D. was struck by his parents several times for misbehaving and lying. Additionally, R.D. testified that his parents placed him in the storage room of their home for approximately two weeks and that, while he was free to roam about the room, he was not allowed out of the room during the two-week period. R.D. also testified that he had been placed in one of the bathrooms of his parents' home on two separate occasions—once in May for a period of three weeks and once in July for about one week. One of those occasions occurred after his mother complained that R.D. had not washed the dishes well and instructed Davila to lock R.D. in the bathroom, which he did. Davila then blindfolded R.D. with handkerchiefs, tied his hands and feet with rope, placed a bucket over his head and a handkerchief in his mouth, and locked the bathroom door. According to R.D., his father also hit him on his back, hands, and legs with a broomstick after discovering that R.D. managed to free himself from the rope, and kicked him once while R.D. was in the bathroom because he had removed the handkerchiefs from around his eyes. As a result of his father's kick, R.D. hit a bathroom wall and broke a tile. R.D. testified that he was required to lie down in the bathtub during his time in the bathroom, and if he did not do so, his father would hit him. R.D. eventually managed to escape from the bathroom and flee to a neighbor's home sometime in July 2000.

Davila's testimony conflicted to some extent with R.D.'s testimony as to the length of time and condition in which R.D. was *194 kept in the bathroom. Davila testified that the first time he put R.D. in the bathroom he only placed a bucket over his head and left R.D. in the bathroom for one day, releasing him at night. He further testified that he had placed his son in the bathroom one other time for about four or five hours because R.D. had lied and hit both of his parents. Davila denied that his son had been tied up for more than twenty-four hours, and then explained that he had not

really tied up his son when R.D. was placed in the bathroom, but rather that he had "rolled" R.D.'s hands a certain way.

The jury convicted Davila of twenty-nine counts of aggravated child abuse, one count of child neglect, one count of child abuse, and three counts of kidnapping. Subsequently, Davila was sentenced to thirty years in prison for the convictions of aggravated child abuse, five years in prison for the convictions of child abuse and child neglect, and life imprisonment for the convictions of kidnapping. The trial court ordered 198 days' credit for time served, and further ordered that the sentences run concurrently.

The Supreme Court upheld the conviction. It noted that F.S. 787.01(1)(a) defines the term "kidnapping" to mean forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to: 1. Hold for ransom or reward or as a shield or hostage; 2. Commit or facilitate commission of any felony; 3. Inflict bodily harm upon or to terrorize the victim or another person; or 4. Interfere with the performance of any governmental or political function. Subsection (1)(b) further provides: "Confinement of a child under the age of 13 is against her or his will within the meaning of this subsection if such confinement is without the consent of her or his parent or legal guardian." § 787.01(1)(b), Fla. Stat.

In this case, the jury was instructed in relevant part that to convict Davila of kidnapping a child under the age of thirteen, the State had to prove that the defendant "forcibly or by threat confined or imprisoned R.D. against his will ... with intent to inflict bodily harm upon or terrorize R.D." Davila argued that under section 787.01(1)(b), a parent of a child under the age of thirteen cannot be criminally liable for kidnapping that child where there was no court order depriving the parent of custody and where the alleged confinement of the child was with that parent's consent. The Court disagreed. The plain language of section 787.01(1)(a) requires the State to prove an overt act on the part of the defendant; namely, a forceful, secretive, or threatening act that confines, abducts, or imprisons another person against his will. Further, to prove the offense of kidnapping, it must be established that the defendant performed the overt act with one of the four specific intents delineated under subsection (1)(a) of the kidnapping statute. The plain language of subsection (1)(b) of the statute sets forth a method of proof which allows the State to establish that the overt act on the part of the defendant was against a person's will when that person is a child under the age of thirteen.

As stated by the Court, "The unambiguous language of section 787.01, Florida Statutes (2000), does not exempt a parent from criminal liability for kidnapping his or her own child. Thus, by its own terms, section 787.01 permits Davila to be legally convicted of kidnapping R.D." The Court said if the Legislature wanted to exempt parents it could have explicitly done so in the statute, which it did not do.

Davila v. State, 75 Fl.3d 192 (2011)

Numerous Acts of Aggravated Battery Do Not Merge With A Homicide

Caylor was convicted of first-degree murder, sexual battery involving great physical force, and aggravated child abuse. On direct appeal he alleged the trial court erred in denying his motion for judgment of acquittal on the offense of aggravated child abuse and on the offense of sexual battery involving great physical force. Caylor, relying on Brooks v. State, 918 So. 2d 181 (Fla. 2005), argued that "because the murder of Melinda Hinson was similarly accomplished by a 'single act'—in this case, strangulation—the act of aggravated child abuse, as in Brooks, merged with the homicide."

The Court discussed its reasoning in *Brooks*, along with its decision in Mills v. State, 476 So. 2d 172, (Fla. 1985), and the 4th DCA's decision in Mapps v. State, 520 So. 2d 92 (Fla. 4th DCA 1988). In *Brooks*, the Court stated that "[g]enerally, aggravated child abuse can be a separate charge and serve as the felony in a felony murder charge." Id. at 198 (emphasis added). However, in *Brooks*, the Court after comparing the facts of *Brooks* to *Mapps* explained "that the result in *Mapps* was correct precisely because 'there were separate acts of striking, shaking, or throwing which led to the killing of the child.'" *Brooks*, 918 So. 2d at 198 (emphasis added).

The record showed that Caylor admitted that he not only "strangled Melinda by hand," but also used a telephone cord as a ligature. The Court found that unlike Brooks, "Caylor's conduct was not entirely subsumed within the act that caused the victim's death; rather, there is competent, substantial evidence that Caylor committed numerous acts of aggravated battery that were separate from the homicide." The Court found "the trial court did not err in denying the appellant's motion for judgment of acquittal on the charge of aggravated child abuse, or in relying on that offense as an aggravating circumstance in its sentencing order." The Court found the death sentence proportionate and affirmed Caylor's convictions.

Caylor v. State, 78 So. 3d. 482, (Fla. 10/27/11)

Failure to Disclose Identity of Witness Who Could Impeach State's Eyewitness Warrants Evidentiary Hearing to Determine If Brady or Giglio Violation Occurred

Death row inmate Mungin appealed the summary denial of his 3.851 postconviction relief which "challenged his conviction on the basis that a newly discovered witness significantly impeaches the testimony of Ronald Kirkland, the only witness who identified Mungin as leaving the scene immediately after the murder." The newly discovered witness was George Brown who asserted he was the first person at the murder scene; no one else was present in the store; he told the police this information, and no one ever discussed it with him after that evening. He also asserted that Kirkland came to the scene later; told police he saw a man leaving the store (later identified as Mungin) and that the police relied on the information Kirkland gave instead of the information he gave.

The denial of Mungin's newly-discovered evidence claim was affirmed, because the information was not such that would "probably produce" an acquittal on retrial. (There was other significant incriminating evidence such as finding the gun used in the crime at Mungin's home.) However, the Court reversed and remanded the

Brady and *Giglio* claims for an evidentiary hearing. The Florida Supreme Court stated that "[w]e are troubled by the possibility that a false police report was submitted and then relied on by defense counsel. Without an evidentiary hearing to explore this issue, we are left with mere speculation as to what in fact occurred, what the police knew, what the prosecutor knew, and whether Kirkland, a witness with an extensive criminal history, was lying when he testified at trial."

Mungin v State, 79 So. 3d. 726, (Fla., 10/27/11)

Merger Doctrine Allows Felony-Murder Conviction Based On Single Act of Aggravated Child Abuse Resulting In Death

The Florida Supreme Court, in answering a question certified to it by the 1st DCA in Sturdivant v. State, --So.3d -- , (Fla. 1st DCA, 2010), held that merger doctrine does not preclude a felony-murder conviction based upon a single act of aggravated child abuse that caused the child's death. Aggravated child abuse is an enumerated underlying offense in the felony-murder statute. The Court receded from Brooks v. State, 918 So.2d 181 (Fla. 2005) to the extent it holds to the contrary and quashed the 1st DCA's decision below.

State v. Sturdivant, 2012 WL 572977 (Fla. 2/23/12)

"Fellow Officer Rule" Does Not Allow Use of A Non-Involved Officer to Testify In Order to Establish Probable Cause For A Traffic Stop

The Supreme Court resolved a conflict between two DCAs by indicating the "fellow officer rule" does not allow an officer who does not have firsthand knowledge of the traffic stop, and was not involved in the investigation at that time to testify as to hearsay as to what the officer who conducted the stop told him for the purpose of establishing probable cause for the stop. In Ferrer v. State, 785 So.2d 709 (Fla. 4th DCA 2001), such hearsay was allowed. The 2nd DCA disagreed in Bowers v. State, 23 SO.3d 767 (Fla. 2nd DCA 2009). The Court indicated Ferrer was wrongly decided, and departed from precedent set in State v. Peterson, 739 So. 2d 561 (Fla. 1999) which stressed the limits of the "fellow officer rule."

State v. Bowers, 87 So.3d 704 (Fla. 2/23/12)

F.S. 893.13 Is Constitutional – Shelton Analysis Rejected

Based on its conclusion that F.S. 893.13 is facially unconstitutional, the Twelfth Judicial Circuit issued an order granting motions to dismiss in forty-six criminal cases. The circuit court believed the elimination of the requirement to prove knowledge of the illicit nature of the substance as an element of the offense rendered the section unconstitutional. The 2nd DCA certified the matter to the Supreme Court as requiring immediate resolution as a matter of great public importance.

The Court noted that F.S. 893.13 as enacted in 2011 does not specify what mental state a defendant must possess to be convicted of selling, manufacturing, delivering, or possessing a controlled substance. It also noted that the statute now codified at F.S. 893.101 specifically deemed prior court opinions indicating a defendant must know of the illicit nature of the substance in his or her possession to be "contrary to legislative intent." The legislature also declared that lack of

knowledge of the illicit nature of a controlled substance "is an affirmative defense to the offenses of this chapter."

The Court also noted that since enactment of F.S. 893.101 each of the five DCAs had ruled the statute does not violate the requirements of due process. (See: *Harris v.* ***State****,* 932 So.2d 551 (Fla. 1st DCA 2006); *Burnette v.* ***State****,* 901 So.2d 925 (Fla. 2d DCA 2005); *Taylor v.* ***State****,* 929 So.2d 665 (Fla. 3d DCA 2006); *Wright v.* ***State****,* 920 So.2d 21 (Fla. 4th DCA 2005); *Lanier v.* ***State****,* 74 So.3d 1130 (Fla. 5th DCA 2011).)

However, the U.S. District Court for the Middle Court for the Middle District declared 893.13 unconstitutional in Shelton v. Secretary of Department of Corrections, 802 F.Supp.2d 1289 (M.D. Fla. 2011). It was Shelton that persuaded the Twelfth Circuit. However, the Supreme Court stated, "The problem with the district court's analysis is its failure to recognize that unless the law in question directly or indirectly impinges on the exercise of some constitutionally protected freedom, or exceeds or violates some constitutional prohibition on the power of the legislature, courts have no power to declare conduct innocent when the legislature has declared otherwise. *Ah Sin v. Wittman,* 198 U.S. 500, 25 S.Ct. 756, 49 L.Ed. 1142 (1905)… It is within the power of the legislature to declare conduct criminal without requiring specific criminal intent to achieve a certain result; that is, the legislature may punish conduct without regard to the mental attitude of the offender, so that the general intent of the accused to do the act is deemed to give rise to a presumption of intent to achieve the criminal result. The legislature may also dispense with a requirement that the actor be aware of the facts making his conduct criminal…The question of whether conviction of a crime should require proof of a specific, as opposed to a general, criminal intent is a matter for the legislature to determine in defining the crime. The elements of a crime are derived from the statutory definition…."

The Court reversed the circuit court's order, stating: "In enacting section 893.101, the Legislature eliminated from the definitions of the offenses in chapter 893 the element that the defendant has knowledge of the illicit nature of the controlled substance and created the affirmative defense of lack of such knowledge. The statutory provisions do not violate any requirement of due process articulated by this Court or the Supreme Court. In the unusual circumstance where a person possesses a controlled substance inadvertently, establishing the affirmative defense available under section 893.101 will preclude the conviction of the defendant. Based on the foregoing, we conclude that the circuit court erred in granting the motions to dismiss and we reverse the circuit court's order."

State v. Adkins, 2012 WL 2848903 (Fla. 7/12/12)

Defendant's Conversation With Another Was Not Custodial For Miranda Purposes

Police suspected Peterson was involved in the murder of his stepfather. Jackson, Peterson's friend, was arrested for a traffic offense a few days after the murder. While in custody Jackson agreed to call Peterson and ask about the murder. Peterson made some incriminating statements in the call and the two agreed to

meet. Jackson was wired for the meeting and Peterson admitted killing Andrews to Jackson, including revealing a great amount of detail about the murder.

On appeal, Peterson argued Jackson was an agent of police and that he should have received his rights per Miranda before engaging in conversations with Jackson. The Florida Supreme Court looked to Yarborough v. Alvarado, 541 U.S. 652 (2004) in evaluating whether Mirandas were required.

They were not required. Peterson was anxious to meet with Jackson to get his share of proceeds from a drug transaction they had worked on together. The two met in Jackson's car, in a public parking lot, in plain view. Even though Jackson did ask some questions, there is no indication of "pressuring" Peterson. "Peterson clearly wanted to share the details…." Jackson did not confront Peterson with evidence of his guilt. Peterson was free to leave at any time, and in fact stepped out of the car to smoke a cigarette without seeking Jackson's permission, and then returned to the car when he finished the cigarette. The Court affirmed Peterson's convictions and sentence of death.

Peterson v. State, 2012 WL 1722581, -- So.3d-- (Fla. 2012)

Court Adopts E-Filing Requirements

The Court adopted proposed amendments to the Florida rules of court to implement mandatory electronic filing procedures for all documents filed in Florida courts, with certain limited exceptions. An implementation schedule was established to provide that the electronic filing requirements will become effective in civil, probate, small claims, and family law divisions of the trial courts, as well as for appeals to the circuit courts in these categories of cases, on April 1, 2013. The electronic filings requirements will become effective in criminal, traffic, and juvenile divisions of the trial courts, as well as for appeals to the circuit courts in these categories of cases, on October 1, 2013. The requirements will become effective in the supreme court and district courts of appeal on October 1, 2012.

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, THE FLORIDA RULES OF JUDICIAL ADMINISTRATION, THE FLORIDA RULES OF CRIMINAL PROCEDURE, THE FLORIDA PROBATE RULES, THE FLORIDA SMALL CLAIMS RULES, THE FLORIDA RULES OF JUVENILE PROCEDURE, THE FLORIDA RULES OF APPELLATE PROCEDURE, AND THE FLORIDA FAMILY LAW RULES OF PROCEDURE--ELECTRONIC FILING. SC11-399. 2012 WL2865998, (6/21/12). {Rehearing Granted, 8/14/12}

The Court adopted changes to the Rules of Judicial Administration, Rules of Civil Procedure, Rules of Criminal Procedure, Probate Rules, Rules of Traffic Court, Small Claims Rules, Rules of Juvenile Procedure, Rules of Appellate Procedure, Family Law Rules of Procedure and Forms to implement mandatory e-mail service for all cases in Florida. E-mail service will be mandatory for attorneys practicing in civil, probate, small claims, and family law divisions of trial courts, as well as in all appellate cases, when rule amendments take effect on July 1, 2012. When the rules take effect on July 1, attorneys practicing in criminal, traffic, and juvenile divisions of trial court may voluntarily choose to serve documents by e-mail under new

procedures, or they may continue to operate under existing rules. E-mail service will be mandatory for attorneys practicing in these divisions on October 1, 2013. Self-represented parties involved in any type of case in any Florida court may, but are not required to, serve documents by e-mail. Attorneys excused from e-mail service are also not obligated to comply with new e-mail service requirements. Several limited exceptions to the e-mail requirement are permitted, and these were outlined in the Court's opinion.

IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUDICIAL ADMINISTRATION. SC10-2101. 2012 WL 2400760. (6/21/12)

Electronic Discovery Rules Adopted

The Court adopted various amendments to rules of civil procedure related to discovery of electronically stored information.

In Re Amendments to Florida Rules of Civil Procedure—Electronic Discovery, 2012 WL 2579681. –So.3d—(7/5/12)

Conviction For Burglary of A Conveyance With An Assault Qualifies Defendant For Sentencing As Prison Releasee Reoffender (PRR)

Reviewing State v. Hackley, 35 FLW D2436 (Fla. 1st DCA 10/29/10), which held such a conviction did NOT qualify for PRR sentencing, in direct conflict with Shaw v. State, 26 So.3d 51 (Fla. 5th DCA, 2009), the Florida Supreme Court sided with Shaw and quashed Hackley.

State v. Hackley, 2012 WL 2579673, -- So.3d-- , (7/5/12)

What Makes A Confession Coerced?

David Martin was indicted and convicted of First Degree Murder and sentenced to death for the killing of Jacey Williams. Key evidence in the trial was Martin's confession that he killed Jacey. The confession came after Martin first said he'd abandoned her on the side of the road. On appeal, Martin claimed his confession was not voluntary, was taken in violation of Miranda, and was the result of coercion. In particular, he named six tactics as coercive: (1) police threatened him with "death row" references; (2) police deluded him as to what the jury would do if he confessed and made it appear his legal position was not very serious; (3) police deceived him as to how much time he had to truly cooperate with law enforcement; (4) indicated they'd provide favorable testimony and use their influence at the trial if he would cooperate; (5) promised to arrange visits with his girlfriend if he cooperated; and (6) exploited his religious beliefs with a variation of the "Christian burial" interrogation technique. Martin testified at trial against advice of counsel and claimed a drug dealer killed Jacey in his presence. Martin's confession came in after the trial court rejected his motion to suppress it.

Ultimately the Florida Supreme Court found no Miranda violation and did not find the overall efforts of the police to be coercive. Key in the Court making its findings was the fact that the entire interrogation session was recorded and the Court could

hear it in its entirety. While the Court agreed that the confession was voluntary, it did note some concerns that can serve as guidance to homicide investigators.

Martin asserted that his response to the **Miranda warnings**, made two hours after the interview began ("I have nothing really to talk about") was an unequivocal assertion of his right to remain silent. The Court characterized this statement as "ambiguous" and restated that police do not have to ask clarifying questions when a defendant who has received proper Miranda rights makes only an ambiguous comment.

Regarding the confession and coercion issues, the Court indicated the test is whether the confession was the product of free will and rational choice. (Blake v. State, 972 So.2d 839 (Fla. 2007)). This is determined by the totality of the circumstances, taking into account any promises, threats, or misrepresentations by the interrogating officers.

The court found the **threat of the death penalty** was not done to incite fear in Martin but was part of a broader conversation about potential penalties he could face. Advising a suspect of potential penalties and consequences "does not amount to a threat." As to **misrepresenting his legal position**, the court noted the investigators continuously pressed Martin to provide information regarding the victim's location and welfare. "The exchanges…indicate that the detectives believed that Martin likely had not committed premeditated murder, but instead had fatally harmed (the victim) by accident." The Court also noted the detectives "…did not indicate that they could promise any specific result." The Court did note that law enforcement ought to "make clear to suspects charged with criminal activity that they could face a variety of charges and penalties, depending on their degree of involvement…." Given the very specific facts of this case, the Court held the detectives' statements did not result in an involuntary confession from Martin. As to the allegation that he had been **deceived as to the amount of time he had to cooperate**, the Court stated, "Detective Wolcott informed Martin that neither he nor Detective West would be available to speak with Martin after their current interview session. Detectives Wolcott and West were from counties other than that in which they conducted Martin's interview. Detective Wolcott was from the Jacksonville Sheriff's Office located in Duval County and Detective West was from the Clay County Sheriff's Office. Martin's interview was conducted in Pinellas County. The detectives may have been required to return to their home counties the next day, and thus spoke truthfully of their inability to continue the interview thereafter…(the) statements of the officers may be fairly interpreted as conveying that they themselves would return to their home counties and not be available to speak with Martin the following day. We do not agree that Detective Wolcott's comment suggested that Martin would be categorically barred from speaking with other members of law enforcement at a later time, and thus pressured him into confessing at that moment."

As to the **promise to advise the court of his cooperation,** the Court indicated the record was clear that the detectives explicitly told Martin that they could not make any promises. It also noted that a confession is not rendered involuntary simply because the police promise to convey to the State that a suspect was cooperative.

The Court also stated the detectives "clarified the limits of their authority to Martin…."

Regarding the **promise to let him visit with his girlfriend if he confessed**, the Court noted that a reading of the entire interrogation transcript made it obvious that the detective stated he could not make any promises. As to the **"religious beliefs"** issue, the Court rejected Martin's claim the detectives encouraged him to confess so they could bring Jacey back to her mother. The detectives also mentioned that the Bible teaches forgiveness and told Martin that regardless of whether God is "…number one in your book, it is for people like Jacey's mother." Recognizing that it had previously deemed the "Christian burial" technique as a "coercive and deceptive ploy" in Roman v. State, 475 So.2d 1228, (Fla. 1985), the Court cautioned that while under the totality of circumstances these statements were not coercive, "…well-trained investigators need to be cautioned to avoid violating the prohibitions against playing upon religious sympathies when interviewing a suspect."

The Court concluded, "Law enforcement must be afforded some leeway in how they conduct interrogations to ensure public safety and to further their objective of locating a missing person who might still be alive…Although some of the tactics and techniques used…may have been less than ideal, (the detectives) did not directly threaten, deceive, or delude Martin into confessing. Therefore, we affirm the trial court's denial of Martin's motion to suppress."

Martin v. State, 2012 WL 4125813, -- So.3d-- , (Fla. 9/20/2012)

FLORIDA DISTRICT COURT OF APPEALS CASES:

Mortgage Fraud Requires Proof That Untrue Statements Were Relied Upon

Barrios obtained a $325,000 mortgage to buy land and build a home. He used his girlfriend's cousin, a mortgage broker, to obtain financing. He listed his gross monthly income as $8900 per month on several loan documents. He was charged with attempting to obtain a mortgage by false representation, grand theft first degree, and providing false information to defraud a financial institution.

The state was able to prove Barrios had lower wages than he claimed. Barrios moved for judgment of acquittal at trial on all three counts. As to "mortgage by false representation" charge, he argued there was no direct evidence that the bank relied on the alleged false income declaration in issuing the mortgage. The trial court granted the motion and reduced the charge to attempt. It denied the motion on the other two counts, and Barrios appealed after being convicted of the three counts as amended.

The DCA noted there must be evidence of a victim's reliance on a defendant's misrepresentation to prove the crime of attempting to obtain a mortgage by false

representation. The state was unable to prove the bank relied on Barrios' (false) income statements. The DCA said the fatal error was not corrected by amending the charge to attempt since the issue was proof of reliance, not proof of completion of the crime. The 4th DCA reversed and ordered a judgment of acquittal on this charge, citing a failure of the state to prove Barrios intended to deprive the victim of its property at the time of the taking.

The state's theory was that Barrios never intended to pay the mortgage back, but that theory was based solely on Barrios' misstatement of his income. The DCA indicated this was insufficient to support grand theft.

Finally, with regard to furnishing false information to defraud a financial institution, the 4th DCA found that a judgment of acquittal should not have been granted. There was competent, substantial evidence for a jury to find that Barrios defrauded the bank by providing false income information three different times. The conviction for providing false information to defraud a financial institution was affirmed.

Barrios v. State, 75 So.3d 374 (Fla. 4th DCA, 11/30/11)

Defendant's Admissions Could Not Bolster State's Case Since It Had Failed to Establish Corpus Delecti of the Offense

An officer conducting surveillance for narcotics and prostitution violations saw a man in a white Ford Ranger drive by some men pacing near an ally and around the block. The truck returned and drove up to where one of the men was waving. The waving man directed the truck down the street a bit. The driver of the truck went down the street and parked his truck. The waving many looked up and down the street and approached the truck on the driver's side. About 10 seconds later, the truck drove away. The officer saw no exchange of cash or drugs but based on his training and experience, suspected the driver of the truck had purchased drugs.

Several blocks away, the truck was stopped for a traffic infraction. As the squad car driver activated his lights and siren, the driver made a left turn and was seen "making a throwing motion as he was popping something in his mouth." Later the officer clarified that the object "presumably" went into the driver's mouth. After making that left turn, the truck pulled into a convenience store parking lot. The driver got out of the truck and the officer took him into custody and read him his Miranda rights.

The defense objected to any discussion of what the driver stated based on the state's failure to establish the offense of tampering with physical evidence. The state countered that it had established that some sort of crime occurred and the fact that there was no contraband to support the crime was because the driver had impaired the investigation by ingesting the evidence. The prosecutor stated, "We don't even know what the object was that he swallowed, but that's the whole point of the charge, is that we don't know and we can't know because he ate the object." The defense objected saying the state was asserting the "thing" was crack cocaine, but it could have as easily been a mint or a Tic-Tac.

The trial court believed the elements of the crime had been established enough to allow the driver's admissions into evidence. On that basis the officer was allowed to

testify that the driver provided a statement, admitted he drove to the area to buy crack, had purchased $10 worth from the waving man and that he ingested the cocaine when pulled over. The driver did not testify. The jury found him guilty as charged with tampering with physical evidence.

However, the 2nd DCA noted that the State must establish an independent corpus delecti in order to offer an admission against interest into evidence. (See, e.g. J.B. v. State, 705 So.3d 1376 (Fla. 1998). The corpus must be proven by substantial evidence and may be proven by circumstantial evidence. The proof need not be uncontradicted or overwhelming but it must at least show the existence of each element in the crime. In the case under consideration, the DCA indicated the state could not prove the driver destroyed a thing in order to impair its availability for investigation without the driver's admission that what he swallowed was cocaine. Thus some further evidence was necessary than that which the state provided. The evidence available prior to admitting the driver's admissions was simply not strong enough to establish the corpus delecti. The admissions should not have been admitted, and the conviction was reversed.

Reinlein v. State, 75 So.3d 853 (Fla. 2nd DCA, 12/16/11)

Was That Pot Dry or Wet? Calculating Trafficking Weight.

The facts of this case are simple. Freshly cut marijuana from a hydroponics lab was seized and it weighed in at 26 pounds, providing the basis for a "trafficking" "in excess of 25 pounds of marijuana" charge (F.S. 893.135(1)(a)). Prior to trial a defense expert, Dr. Hall, examined the evidence, and found a pool of water had formed at the bottom of the container holding the cannabis and packaging. When he weighed the cannabis sans packaging and the pool of water, it weighed 24 pounds. At trial the defense moved to dismiss the trafficking charge. The state asserted the pool of water was not with the pot when it was seized, and that it had seeped from the plants over time.

The trial court ruled "nobody buys wet weed," and that wet weed cannot be smoked, and that cannabis could not be used while it still has water content. The court ruled the weight of the cannabis at issue was 24 pounds and granted the motion to dismiss the trafficking charge.

Seeing its theory of prosecution going up in smoke, the state appealed. The 3rd DCA returned to the statutory definition of cannabis for guidance. That definition included, "all parts of any plant of the genus Cannabis, whether growing or not…" The definition has been construed to exclude only wrapping materials, commingled soil, and excess water not inherent in the plant's vegetable matter." (emphasis supplied by the DCA). See: F.S. 893.02(3). Finding that the plants had been seized directly from a hydroponics lab, transported to storage and had not been dropped into a canal or other body of water so that there was no "excess water," the DCA reversed the trial court in favor of the state and reinstated the trafficking charge.

State v. Estrada and Cortina,76 So.3d 371 (Fla. 3rd DCA, 12/21/12)

Civil Ordinance Violation May Not Support Full Custodial Detention And Search

Palm Beach County deputies were keeping a beach front park under surveillance after sunset because drug paraphernalia had been found there. They confronted two juveniles who were in the park after dark. An ordinance allowed people in the park only from sunrise to sunset, and the restrictions were posted on signs at the park. One of the deputies recognized "C.D." as having been in the park after dark several weeks earlier and began explaining the ordinance to C.D. again. C.D. began to walk away. The deputy called him back, but C.D. continued to walk away. At the same time, C.D. made moves with his hand toward his pocket.

The deputy caught up with C.D., and arrested him for violation of the ordinance. Concerned for his safety and by reason of the arrest, the deputy searched C.D. and found a clear plastic baggie with marijuana in it in one of C.D.'s pockets. C.D. moved to suppress the marijuana, arguing the ordinance was noncriminal and could not support any arrest, and therefore would not support a search incident a lawful arrest. The trial court denied the motion on the basis of C.D.'s movements to his pocket and the deputy's concern for his safety.

The 4th DCA reviewed the ordinance and noted no penalty was included, and in fact made no indication that it was a violation to be in the park after hours of operation. The Court noted that Section 1-11 of the Code of Ordinances provided for a fine of up to $500 when an ordinance declared an act unlawful so that at most, a violation would have resulted in a fine. For this reason, the Court said one could be detained only long enough to be issued a summons or notice to appear and a full custodial detention and search violated the Fourth Amendment.

With regard to the "furtive movement" justification, the Court held that such a movement by an individual detained for a noncriminal infraction is insufficient to warrant a pat-down or any protective search. A pat-down is to be supported by reasonable suspicion that the suspect is armed, and simply appearing nervous or keeping one's hands near one's pockets in the context of a non-criminal stop does not give rise to such reasonable suspicion. The Court noted the Deputy did not pat C.D. down but engaged in a full search of him. Since the Court found the officer had no reasonable suspicion that C.D. was armed, the search was illegal and it found error in the trial court's denial of the motion to suppress.

C.D. v. State, 82 So.3d 1037 , (Fla. 4th DCA, 9/14/11)

Citizen's Reporting of Suspected Drug Use Provided Basis For Traffic Stop Leading to Seizure of Drugs

A clerk working at a Ft. Walton Beach convenience store was putting trash in the store's dumpster when he notice two people in a black Scion parked by the dumpster "dong something in their lap…they put their head down, came back up wiping their nose." The clerk did not see any drugs or an exchange between the two men. If was mid-afternoon and the men were plainly visible. One of the men exited the Scion and got into a red SUV parked by a gas pump. The clerk called the Sheriff's office and deputies arrived about 5 minutes later. The clerk pointed out the

SUV and indicated that one of the two in the Scion was in that truck. The deputies watched as the SUV drove out of the store's lot. They followed in their patrol car.

Other than seeing suspicious "furtive movements" as they followed the SUV, they observed no further suspicious behavior. Based on the clerk's information rather than the "furtive movements," they made a traffic stop and encountered Keller and Burns. Burns was driving. Permission to search the car was given and Keller was asked to step out of the car. Ultimately both men were arrested for possession of a controlled substance, manufacture or delivery of hydrocodone, possession of drug paraphernalia, and possession of less than 20 grams marijuana. Both men pled nolo, reserving the right to appeal.

The 1st DCA noted that information provided by a citizen informant was entitled to the "high end of the tip-reliability scale." (See: State v. Evans, 692 So.2d 216 (Fla. 4th DCA 1997). The trial court had concluded that the citizen informant relayed reliable information that Keller was engaged in drug use based on the citizen informant's "experience of witnessing people perform the same motions while ingesting cocaine, [thus] he associated this behavior with drug use and in fact told the Deputies that the [Scion's] occupants were involved in drug activity." Therefore the tip provided by [the citizen informant] was sufficient in content as well as credibility and provided [the deputies] the requisite reasonable suspicion to stop and temporarily detain the Defendant Keller as well as the Defendant Burns. The DCA held that under the totality of circumstances, the deputies' reliance on the store clerk's information was reasonable. The convictions were upheld.

Keller v. State, 71 So.3d 927 (Fla. 1st DCA, 2011)

Photos of Children's Heads Pasted Onto Photos of Adults Engaged In Sex Activity Does Not Create Child Pornography

Parker, a Sunday School teacher, compiled numerous photos of children in settings such as you would find in a yearbook or school photo. However, he cut the heads out of the children's photos and pasted them onto photos of nude or partially nude adult women, and photos of adult women engaged in sexual activity. None of the work was computer-generated. Parker was convicted of possession of child pornography (F.S. 775.0847 and 827,071(5) and appealed. The 2nd DCA first determined that pasting a child's photo head on a nude adult body photo portraying lewd exhibition of genitals was not child porn. It also determined that such photos on photos of adults engaged in masturbation or other sexual activity also were not child porn. In Stelmack v. State, 58 So.3d (Fla. 2nd DCA, 2010), the court determined the law required exhibition by a child. Even if the photos were considered in this case to be depicting "stimulated" sexual conduct, they depicted conduct of an adult. Without actual sexual conduct of a child, the photos were not child porn as defined by Florida law. The Court suggested that Florida could make activity such a Parker's illegal by enacting a statute similar to federal and other state laws which criminalize "visual depiction(s)…created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." However, the Court noted there was currently no such law, and reversed Parker's conviction.

Parker v. State, 81 So.3d 451 (Fla. 2nd DCA, 9/28/11)

Police Had Probable Cause to Search Car Without Warrant For Evidence of Shooting That Occurred Two Hours Earlier

Gardner and another man tried to shoot another person during an August afternoon. The victim tried to knock the gun away, and it discharged, with the bullet hitting the ground. Gardner and the shooter got into a red Chrysler Concorde and left the area, with Gardner driving. Detective Zagar met with the victim and interviewed him about the incident. After about two hours, when leaving the victim's home, Zagar saw the red Chrysler Condorde and followed it into a parking lot. When the car stopped, Gardner was the only occupant. The car was registered to Gardner. Zagar told Gardner he was going to be arrested for attempted murder, and Gardner resisted. After Gardner was arrested and removed from the car, a K-9 alerted to the presence of drugs in the trunk of the car. Officers searched the passenger area but could not get into the locked trunk. The car was removed to a secure area of the police department.

The next morning, Zagar searched the car and found cocaine in a cigar tube in the pocket of the driver's side door Gardner was charged with resisting and possession of cocaine. The trial court suppressed the coke finding the state had insufficient probable cause to conduct the search and the State appealed.

In Arizona v. Gant, 556 U.S. 332 (2009) the Supreme Court held that police could search a vehicle incident an occupant's recent arrest only if the arrestee was within reaching distance of the passenger compartment at the time of the search or there was reason to believe the vehicle contains evidence of the offense giving rise to the arrest. In the case at hand, there was no assertion that the first element existed. The 2nd DCA did find that Zagar had a reasonable belief that Gardner's car contained evidence of the arrest for attempted murder, however.

The DCA noted the trial court mistakenly required exigent circumstances to also exist even when probable cause to search a vehicle was present. The DCA correctly noted that when officer have probable cause to believe there is contraband inside an auto, the officers may conduct a warrantless search of the vehicle even after it has been impounded and is in police custody. Zagar had probable cause to believe that the car would contain evidence of the shooting that had occurred about two hours before the car was encountered. Even though the person who did the shooting was no longer in the car, Gardner was working with him and both left the scene in Gardner's car. The police were allowed to search the car under Gant because they had probable cause to believe evidence relating to the shooting (the offense for which Gardner was being arrested) would be found in the car.

Florida v. Gardner, 72 So.3d 218 (Fla. 2nd DCA, 10/5/11)

Defendant Not Detained When Officer Activated Emergency Lights And Exited Patrol Vehicle

The state challenged the trial court's order suppressing evidence in Seymour's case. Seymour and two other men were standing at 1 AM on the sidewalk. They flagged down an unmarked police car. The officer stopped, activated his emergency lights, got out of his vehicle and approached the three men. Seymour

was carrying a backpack and the other two men dropped items as they walked away. The officer testified that Seymour was carrying the pack in front of him "as it to shield it from (his) view," and that the two men "were attempting to conceal Seymour with his bag" from him. The officer drew his gun, ordered the men on the ground because of their suspicious behavior. After backup arrived they were questioned about their behavior and they were unable to explain their actions. All three were arrested for loitering and prowling. Incident to the arrest, the pack was searched and a .22 caliber gun, bandanas fashioned into masks, and bullets were found inside. Items dropped by the men were black gloves and another bandana mask.

Seymour argued that when the emergency lights were activated they were detained and at that time there was no reasonable suspicion to support the detention. The trial court agreed, and suppressed the evidence. The court relied upon Newkirk v. State, 964 So. 2d 861 (Fla. 2nd DCA 2007). ("…when an officer activates his emergency lights, that act initiates an investigatory stop….")

After the suppression order, the Florida Supreme Court issued G.M. v. State, 19 So.3d 973 (Fla. 2009) that held there was no per se rule that activation of police lights equates to a seizure. Instead, it is but one of several factors a court should evaluate. The 2nd DCA found that the officer had been flagged down, his vehicle was in the roadway, it was 1 AM and he activated his lights. However the encounter was consensual until the time the officer pulled his weapon and ordered the men to the ground. By that time the officer had reasonable suspicion to justify the detention. The court noted that "…the only reason he stopped in the first place was because the three had flagged him down and had been attempting to flag down other vehicles…." The order granting the motion to suppress was reversed and the case remanded.

State v. Seymour, 72 So.3d 320 (Fla. 2nd DCA 10/26/11)

Showing of Probable Cause That Bingo Regulations Were Violated Does Not Automatically Establish The Funds Obtained Are "Contraband" Subject to Forfeiture Under F.S. 932.703

The property seized in this case consisted of several bank accounts owned by various members of the Masino family and companies associated with the Masinos and their businesses, including Racetrack Bingo, Inc. Under the procedures set out in section 932.703, F.S., Leon County Sheriff Campbell obtained a Forfeiture Seizure Warrant for the subject accounts, and the owners of the accounts were notified of the action and their right to a hearing on the matter. The issue to be determined at the hearing was "whether there is probable cause to believe that the property was used, is being used, was attempted to be used, or was intended to be used, in violation of the Florida Contraband Forfeiture Act." Section 932.703(2)(c), F.S.

The sheriff presented evidence to the trial court to show that bingo operations were conducted in violation of several provisions of section 849.0931, F.S. The trial court surmised that the sheriff had shown probable cause to believe that there were

multiple violations of the statute regulating bingo, but correctly noted that the determination of whether the Masinos or any other persons were guilty of violating section 849.0931 (the bingo statute) was not before the court in the forfeiture proceedings under section 932.703. The trial court appropriately limited its ruling to whether there was probable cause to believe the bank accounts were "used, in violation of the Florida Contraband Forfeiture Act." The Sheriff's Office appealed the circuit court's order directing the sheriff to return seized property upon the circuit court's finding of no probable cause that the property was used or intended to be used in violation of the Florida Contraband Forfeiture Act, sections 932.701-932.706, Florida Statutes ("FCFA").

The DCA ruled that despite the sheriff's argument to the contrary, property connected to a violation of gambling laws, such as section 849.0931, is not per se "used, in violation of" the FCFA (sections 932.701-932.706, F.S.). Section 932.703(1)(a), F.S., provides for forfeiture only of property "used in violation of" the FCFA or "by means of which any violation of" the FCFA takes place. The FCFA is violated by any of the acts listed in section 932.702, F.S. Acquisition of property may be a violation of the FCFA if the property was acquired with proceeds from "a violation of the Florida Contraband Forfeiture Act." section 932.702(5), F.S. However, the Act does not prohibit acquisition of property from proceeds from violation of the gambling laws, nor does the act subject property so acquired to forfeiture.

The only other violation of the FCFA which could apply in this case was the possession of contraband, prohibited by section 932.702(2), F.S. Section 932.701(2)(a)2., F.S., defines contraband as any money "used . . . attempted, or intended to be used, in violation of the gambling laws of the state." In order for the bank accounts at issue to meet this statutory definition, some association with violations of the gambling law is not enough -- the accounts must have been "used" to carry out the violations of section 849.0931, F.S. Whether such "use" occurred is a fact question properly determined by the trial court, not a matter of law contained in the statutory language. Accordingly, a showing of probable cause that the owners of the bank accounts in question may have violated the bingo regulations in section 849.0931, F.S., does not automatically establish that the accounts are "contraband" as defined by the FCFA, subject to forfeiture under section 932.703, F.S. The 1st DCA affirmed the trial court's order directing the return of the seized funds. (The DCA also noted that a showing that the Sheriff had returned the moneys and they were now gone did not moot the Sheriff's appeal.)

Campbell v. Racetrack Bingo, Inc., 75 So.3d. 321 (Fla. 1st DCA 2011)

Possession of Several "Rocks" of Crack Alone Does Not Establish Intent to Sell

While on foot patrol at a park in Boynton Beach an officer in uniform saw Angelina Harris talking on a cell phone while holding a baggie containing numerous "off color whitish looking pebbles" in her other hand. By reason of training and experience, the officer believed the substance to be crack cocaine. As he approached Harris someone shouted "Police." Harris turned, saw the officer approach, crumpled the baggie in her fist and began to turn away from the officer while shoving the bag down the front of her waistband. A female officer responded, conducted a pat-

down, and a found a baggie with about 40-50 pieced of suspected rock cocaine. Subsequent lab analysis confirmed the rocks were cocaine.

At trial, the officer opined that the quantity of rock cocaine Harris possessed was indicative of someone trying to sell crack. Proof also indicated that Harris was NOT in possession of crack pipe at the time of her arrest. A jury found Harris guilty of possession of cocaine with intent to sell within 1000 feet of a park. She appealed.

The 4th DCA noted that packaging and quantity may indicate intent to sell, particularly if the quantity is substantial. But when quantities possessed are smaller, "courts generally require other proof of suspicious circumstances, drug paraphernalia available or other evidence which circumstantially would indicate intent to sell." (Citing: McCullough v. State, 541 So.2d 720 (Fla. 4th DCA 1989). The state's evidence must be inconsistent with a defendant's theory that the substance possessed was not for sale but exclusively for personal use.

In this case, the rock cocaine was not individually packaged. There was no evidence that Harris was carrying any money. The officer did not see other people buying from Harris or Harris trying to sell to others around her. The smaller quantity and absence of a crack pipe were the main elements supporting the state's theory. The 4th DCA indicated the trial court should have granted a judgment of acquittal on the issue of intent to sell, and reversed Harris's conviction of possession with intent to sell, remanding for entry of judgment on the lesser charge of possession of cocaine.

Harris v. State, 72 So.3d 804 (Fla. 4th DCA, 11/2/11)

State Is Not Required to Guarantee Eventual Freedom to Juvenile Offender Convicted of Crime Not Involving Homicide

Gridline was 14 years old when he shot someone. He was sentenced to a seventy-year prison sentence for attempted first degree murder and to a 25 year concurrent sentence for committing attempted armed robbery involving the use of a firearm. He appealed, arguing the U.S. Supreme Court's ruling in Graham v. Florida, 130 S.Ct. 2011 (2010) prohibits imposition of the functional equivalent of a natural life sentence upon juveniles.

The 1st DCA disagreed, and affirmed the sentence. The court noted that the Supreme Court specifically limited Graham to only "those juvenile offenders sentenced to life without parole solely for a nonhomicide offense."

Gridine v. State, 89 So.3d 909 (Fla. 1st DCA 12/30/11)

Note: The 1st DCA has considered other juvenile sentencing cases and has found at least one to violate Graham. In Thomas v. State, 78 So.3d 644, 646 (Fla. 1st DCA 2011), the court noted that the Graham holding was limited to those juveniles who were sentenced to life without parole for nonhomicide crimes. Although the court agreed that, at some point, a term-of-years sentence may become the functional equivalent of a life sentence, it rejected the appellant's argument that his fifty-year concurrent sentences met that

standard because, as found by the trial court, the appellant would be in his late sixties when he was released from prison, if he was required to serve the entirety of his sentence. In Floyd v. State, 87 So.3d 45 (Fla. 1st DCA, 4/12/12) the 1st DCA faced a situation where the juvenile Appellant, convicted of two counts of armed robbery, if he served the entirety of his sentence, would be ninety-seven when he was released. Even if Appellant received the maximum amount of gain time, the earliest he would be released was at age eighty-five. Both sentences exceeded the juvenile's expected life span. It remanded for resentencing, holding that this situation did not in any way provide Appellant with a meaningful or realistic opportunity to obtain release, as required by Graham.

Failure to Announce The Purpose of A Search Warrant Entry Did Not Meet "Knock And Announce" Requirements

Soto was convicted of trafficking in heroin. On appeal, Soto argued the trial court should have granted Soto's motion to suppress based on an argument that police failed to comply with the knock and announce statute, Section 901.19(1), Florida Statutes. The record revealed police knocked and announced their presence at the door to Soto's home, but did not indicate their purpose (to execute a search warrant.) The state argued that announcing the purpose was a "useless gesture" because the defendant and his girlfriend were asleep at the time of the entry and did not react to repeated shouts of "Police". The state argued the failure to announce their purpose made no difference in this case.

The 3rd DCA rejected the state's argument, finding the "useless gesture" doctrine applies only when police knew of the uselessness of the announcement of authority prior to breaking in. (See: State v. Brown, 36 So.3d 770 (Fla. 3rd DCA 2010).) "In this case, it is undisputed that the police became aware of the occupants' unconsciousness only after the unlawful entry." Soto's conviction was reversed with directions to discharge Soto.

Soto v. State, 75 So.3d 296 (Fla. 3rd DCA, 2011).

Defendant's Admission Coupled With Positive Field-Testing of Each Smaller Envelope Saves Cocaine Trafficking Charge

In the 2nd DCA and 3rd DCA areas, when multiple smaller packages of a suspected cocaine are being combined to determine the overall weight, case law requires each of the smaller packages to be lab tested to assure that the mixture contains "any mixture" of cocaine as utilized in F.S. 893.135(1)(b)1. This case arose in the 1st DCA, and because of the defendant's admission and the fact that each of the smaller packages was field-tested "positive" for cocaine, the DCA allowed a trafficking charge to survive notwithstanding the fact that each smaller pack was not lab-tested.

Jacksonville deputies executed a search warrant at Greenwade's residence. They found Greenwade sitting at a table in his garage, and took him into custody. He told the detectives, "What you're looking for is in the garage" and directed them to the table at which he had been sitting. On the table was a digital scale, and a green bag. Greenwade admitted the bag contained cocaine. Inside the bag were nine

power-filled one-ounce baggies. After Miranda's, Greenwade again said the cocaine was his. Each of the nine baggies field-tested positive for cocaine.

Ultimately, the nine bags were poured together to weigh. The total was 234.5 grams. The commingled mixture was lab tested and was confirmed to contain cocaine. Greenwade pled guilty to several charges but went to trial on his trafficking charge. The jury found him guilty of trafficking in more than 200 but less than 400 grams. He appealed this conviction, claiming the commingling of the baggies without testing each baggie individually was inappropriate. While recognizing the rationale and value of the "thou shalt not commingle before testing" rule applied in other parts of the state, the 1st DCA noted that in the instant case there was circumstantial evidence supporting a finding that all the baggies contained cocaine, that Greenwade had admitted the substance in the bag was his cocaine, and that there were positive field tests on each of the nine bags. It held the evidence was sufficient to support the jury's determination. It confirmed Greenwade's conviction, and certified conflict with the 2nd and 3rd DCA's on this issue, giving the Supreme Court a chance to take on the issue.

Greenwade v. State, 80 So.3d 372 (Fla. 1st DCA, 1/24/2012)

Note: For an example of when commingling was NOT approved, see Jackson v. State, 76 So.3d 1130, (Fla. 4th DCA, 1/12/2012) where only one of eight baggies was tested before commingled.

Gant Does Not Allow Search of Vehicle Solely Upon Fact That Driver Was Arrested on a Drug-Related Warrant Issued 4 to 5 Months Earlier

Sharon McCullough was arrested during a "warrant round-up" after pulling her car into her residential driveway. The arrest went without incident and she locked her car and tossed the keys to her son at the house. After cuffing and confining McCullough in a patrol car, the officer returned to the son and obtained the car keys. Viewing into the car, nothing of evidentiary value was visible. Upon unlocking the car, a search of McCullough's purse (that had been left in the car) produced cash, marijuana and cocaine. McCullough moved to suppress the evidence, arguing there was no basis under Arizona v. Gant, 556 U.S. 332 (2009) to search the car. The trial court granted the motion and the state appealed.

The state argued on appeal that since the arrest warrant was for a drug-related crime, Gant would allow officers to search the interior of the car for further evidence of drugs. It asserted the search was "per se appropriate" under Gant. In support, the State cited Brown v. State, 24 So.3d 671 (Fla. 5th DCA, 2009) where the court rejected appellant's argument that the search was not justified because there was no evidence apart from the offense giving rise to the arrest connecting the crime to the vehicle that was searched. The 2nd DCA did not agree. It noted that the arrest warrant on McCullough was issued four to five months prior and there was no evidence introduced at the hearing to suggest McCullough was contemporaneously breaking the law. It noted that if the officer had observed something making it reasonable to believe evidence of the arrest offense might be found in the vehicle, its finding would be different. The order granting suppression was affirmed.

State v. McCullough, 76 So.3d 399 (Fla. 2nd DCA, 12/30/2011)

Third-Party Consents Valid For The Most Part, But "Common Authority Over Premises" Has Limitations With Regard to Ability to Consent to Search

Raymond Kelly was identified by a victim and by reason of other evidence as being the perpetrator of a sexual assault. Evidence related to proving the case was found in an office desk drawer at a location where Kelly had worked, and in a red back-pack located at a residence shared by Kelly and his girlfriend. Kelly moved to suppress both sets of evidence.

With regard to the desk, the trial court found Kelly had no reasonable expectation of privacy in the desk itself, and that the employer had consented to the search. The trial court allowed the evidence in at trial. The trial court also admitted evidence from the back-pack. After being convicted on multiple counts of armed sexual battery, kidnapping, robbery and impersonating an officer, Kelly was sentenced to life as a habitual felony offender and dangerous sexual offender. He appealed.

Kelly had worked as a front desk manager at a local hotel. He shared the office with another employee where he had an assigned desk and desktop computer. Other employees would come into the office to use office equipment or obtain paperwork. Although other employees generally did not go into Kelly's desk, his desk had been searched by others on a few occasions, when he was not present, to locate missing paperwork or keys. The general manager of the hotel testified that around the time that the police called regarding Kelly, Kelly had been fired per company policy because he had failed to show up for work for three days without contacting the hotel. The manager gave his permission to police to search Kelly's desk. They found a Blackberry phone, which belonged to the victim, a camera, and material associated with the crime scene of two different incidents for which Kelly was being investigated. The 4th DCA agreed with the trial court that Kelly maintained no reasonable expectation of privacy in the desk and the officers' search did not violate the Fourth Amendment. In addition, it found the manager had consented to the search. With respect to employer/employee relationships, "even where a private employee retains an expectation that his private office will not be the subject of an unreasonable government search, such interest may be subject to the possibility of an employer's consent to a search of the premises which it owns." United States v. Ziegler, 474 F.3d 1184, 1191 (9th Cir. 2007). The general manager had ultimate control over all premises and consented to the search. The DCA affirmed the trial court on this matter.

However, the girlfriend's right to consent extended to the areas in which she shared joint control and custody. Noting that the girlfriend testified at the hearing that she was scared and felt she had to consent to search of the back-pack, and had told police the pack belonged to Kelly. If found that the girlfriend did NOT have "common authority" over the pack itself and the police search of that pack violated the Fourth Amendment. However, the DCA also found that admitting evidence from the pack was harmless beyond a reasonable doubt because the other overwhelming evidence of Kelly's guilt. This Fourth Amendment violation did not warrant reversal. The conviction was affirmed.

Kelly v. State, 77 So.3d 818, (Fla. 4th DCA, 1/11/2012)

Cannot Be Convicted of Carrying A Concealed Firearm In Own Home

During an undercover drug buy at Santiago's home, the undercover officer observed Santiago pull a firearm from his pocket and display it. The officer completed the transaction and left. Two weeks later, during the execution of a search warrant at the residence, the officer recognized Santiago. A gun was found at the residence and the officer recognized it as the one Santiago had pulled from his pocket.

During the trial for drug charges and for carrying a concealed firearm and possession of a firearm by a minor the jury sent the judge a question asking if "concealed" applied to a person in his own residence. The judge indicated the law precludes somebody from walking around in their home with a concealed weapon when there's other company in the home, concealed from the ordinary sight of another."

The jury subsequently returned a guilty verdict for carrying a concealed firearm. Santiago was sentenced to ten-year terms of imprisonment and appealed his conviction. The 4th DCA disagreed with the judge. F.S. 790.25 permits the lawful possession of a firearm in one's residence:

> **790.25 Lawful ownership, possession, and use of firearms and other weapons. --**
> (1) DECLARATION OF POLICY. -- The Legislature finds as a matter of public policy and fact that it is necessary to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons without prohibiting the lawful use in defense of life, *home,* and property . . .
>
> * * *
>
> (3) LAWFUL USES. -- The provisions of ss. 790.053 and 790.06 do not apply in the following instances, and, despite such sections, it is lawful for the following persons to own, possess, and lawfully use firearms and other weapons, ammunition, and supplies for lawful purposes:
>
> * * *
>
> (n) *A person possessing arms at his or her home* or place of business[.]

The 4th DCA noted the Supreme Court had previously rejected the argument that a person was not permitted to conceal his possession of a firearm in his own home: "Our supreme court addressed the issue in this case in Peoples v. State, 287 So.2d 63 (Fla.1973), where a defendant was tried and convicted for carrying a concealed firearm when police encountered him sitting on a bench in front of the business where he worked and resided. The defendant had chased two people whom he had seen removing property from the premises and was awaiting the arrival of police. The supreme court specifically rejected the argument that a person was not permitted to conceal his possession of a firearm in his own home…"

Confirming that the concealed weapons law does not apply to weapons in the home, Santiago was granted a new trial.

When Consent Become Trespass

Jose Ferrer 's home was believed to be the site of a marijuana grow operation. Access to Ferrer's property was barred by an electric gate at the end of the driveway and a fence around the perimeter of the land. Investigators conducted surveillance from the vacant lot next door and from the street. While they were conducting surveillance, Ferrer came to the gate to retrieve some trash cans from the street. The officers approached him and spoke to him from outside the gate. The officer who spoke to Ferrer testified that he "spoke with the subject at the gate, advised him we believed there was criminal activity occurring at the residence, and asked if we could enter the property to speak with him about it." He asked if he would "speak to him on the other side of the gate." Ferrer opened the gate with a remote control.

One of the officers asked Ferrer for identification and then followed him down the driveway that encircled the house so that Ferrer could get identification out of his car parked by the house. While Ferrer and the officer went to retrieve the identification, two other officers *went to the back of the house and up the stairs* to the second story porch where they smelled marijuana. One of those officers claimed to have smelled marijuana from the bottom of the stairs. Having smelled the pot, the officers detained Ferrer until they could obtain a warrant to search the house. The search yielded evidence that was the subject of the motion to suppress.

The trial judge admitted the evidence based on Ferrer's consent for the officers to enter his property. Ferrer argued he consented to enter the gated area but not the home or its curtilage. Ferrer was convicted of trafficking in marijuana, possession of a place used for trafficking, and renting a place use for trafficking. He appealed.

The 2nd DCA rejected the State's contention that once Ferrer opened the locked gate, general "knock-and-talk" principles authorized the deputies to proceed to the front door area. The State argued that because the officers were free to proceed to the front door of the house to knock and talk, the evidence of marijuana was legally obtained under the "plain smell" doctrine. However, the facts of this case did not demonstrate the implied general consent to enter the curtilage of the house that provides the basis for entry to conduct a knock-and-talk investigation.

As put by the Court,

> We reject the State's contention that once Ferrer open the locked gate, general "knock-and-talk" principles authorized the deputies to proceed to the front door area. See, e.g., State v. Navarro, 19 So.3d 370, 372–73 (Fla. 2d DCA 2009). The State argues that because the officers were free to proceed to the front door of the house to knock and talk, the evidence of marijuana was legally obtained under the "plain smell" doctrine. The flaw in this argument is that it does not recognize that the deputies' encounter with Ferrer at the gate was a knock and talk encounter. Rather than leaving his property open for any member of the public to enter, Ferrer had taken steps to keep out uninvited visitors by fencing it and erecting an

> electric gate across his driveway, thereby demonstrating an expectation of privacy. Cf. Nieminski v. State, 60 So.3d 521, 525–27 (Fla. 2d DCA 2011) (finding no violation of privacy where officers entered fenced property through a closed, but unlocked, gate). Thus, while officers were free to approach the gate to conduct a knock and talk—which they did—the area inside the fence fell under the same constitutional protections as the residence itself, and the officers were not at liberty, absent consent, to approach the residence. Compare Fernandez v. State, 63 So.3d 881, 883–84 (Fla. 3d DCA 2011) (holding that the defendant had a reasonable expectation of privacy in the fenced yard adjacent to his residence and that the momentary opening of the gate to allow the defendant to leave was not an invitation for police to enter); with State v. Triana, 979 So.2d 1039, 1045 (Fla. 3d DCA 2008) (finding no constitutional violation where the police had a consensual encounter with the defendant outside of the locked gate to the defendant's property and the defendant agreed to a search and opened the gate to allow the police to enter). It was undisputed that the only thing Ferrer consented to was to speak to the officers 'on the other side of the gate.'

Thus, the officers exceeded the scope of the consent given by Ferrer. The plain smell doctrine does not apply because the officers were not in a location where they had a legal right to be when they detected the odor. The officers were not in a lawful place when they smelled the marijuana that was the basis of the search warrant; thus, Ferrer's Fourth Amendment right to be free from an unreasonable search was violated. Accordingly, the Second DCA reversed the order denying Ferrer's motion to suppress and remanded the case to discharge Ferrer.

Ferrer v. State, 2012 WL 2052775, --So.3d—(Fla. 2nd DCA, 6/8/2012)

"Valid" Consent After Numerous Directions to "Get A Warrant"?

Due to the 4th DCA's characterization of the "inherent incredibility of this factual scenario" the facts as related by the DCA are reported in length:

> The inherent incredibility of this factual scenario causes us to write on this appeal from the defendant's conviction and sentence for Trafficking in Cannabis—Over 25 Pounds, Cultivation of Cannabis, and Use or Possession of Drug Paraphernalia….A detective received information from a concerned citizen that marijuana was possibly being grown at a particular location. The detective undertook day and night surveillance of the home for several months, visiting three to five times per week. Despite nearly one hundred visits, the detective did not have sufficient evidence to establish probable cause for a search warrant.
> The detective described the area as heavily wooded with little traffic. The property was approximately a half acre in size, surrounded by an outer fence with a metal gate at the entrance. An inner fence surrounded the immediate area of the residence.
>
> Unable to obtain a search warrant, several law enforcement officers, including the narcotics and K–9 units, assembled and proceeded to the

defendant's home. Everyone stayed out of view while the detective and another deputy, who spoke Spanish, approached the gate to the home.

The entrance gate was locked. The detective honked the horn multiple times to get the defendant's attention. When the defendant approached the gate, the detective advised they were conducting an investigation of indoor marijuana grows and asked for consent to search. The defendant refused and told them to obtain a search warrant.

The detective contacted her supervisor and advised she was unable to obtain the defendant's consent to search. Her supervisor directed the detective to return to the property to obtain the defendant's identity. The detective and the translating deputy returned to the home a few minutes later.

Once again, the detective honked the horn multiple times to get the defendant to respond. When he approached, the translating deputy asked the defendant to provide identification. The defendant returned to the home, retrieved his license, and gave it to the detective. The detective again asked to search the residence. The defendant again refused without a search warrant.

Having twice been denied consent to search, the detective did not leave the area, but stayed to contemplate the next move. The supervisor then approached the property and began to observe the residence with binoculars. At some point, the defendant jumped over the fence surrounding the property and made contact with the supervisor.

The detective returned to the house with the deputy. The defendant waved them in, motioning for them to jump the fence. The defendant told the deputy in Spanish, “come on in, you can look around.” The defendant then proceeded to the rear of the property to secure his dog. Once he returned, he entered the house followed by the detective and the deputy. The detective testified that she did not request consent to enter the home prior to entering and relied on the previous consent given outside of the defendant's property.

The detective took the lead, proceeding directly to where she believed the marijuana operation was located. Once in the room, the detective discovered a locked door. She asked the defendant for the keys, at which time the defendant kicked in the door. The detective observed evidence of the marijuana grow operation.

The detective then called in additional law enforcement officers to secure the residence so that she could obtain a search warrant. As a result of executing the search warrant, law enforcement secured several marijuana plants and various items used in the cultivation of marijuana.

The State charged the defendant with Trafficking in Cannabis—Over 25 Pounds, Cultivation of Cannabis, and Use or Possession of Drug

Paraphernalia. The defendant moved to suppress the evidence. Neither the defendant nor any witness testified for the defense at the hearing. The trial court did not enter a written order, but articulated specific findings of fact which tracked the testimony provided by law enforcement:

THE COURT: Okay. All right, I'm prepared to make my ruling. This is, uh, not even a close call. It's pretty, pretty clear.... Nothing that says you can't do a knock and talk. It's a time honored, valid investigative tool. Now the defendant clearly and obviously understood he had the right to refuse the search because he said, "No, go get a search warrant."... There were no force, threats, coercion. Uh, no physical contact. Uh, no unlawful or threatening display of weapons or acquiescence to mere authority. Uh, uh, other officers were in the area, but not visible from the property...This wasn't a situation though where they said you might as well consent because we're gonna get a search warrant and then consent was given without any break.

The trial court found no basis to suppress the evidence. Following the denial of the motion to suppress, the defendant entered a no contest plea as charged, reserving the right to appeal the order. The DCA affirmed the Defendant's conviction, but not without some reservation.

This case involved a "knock and talk," which "is a procedure ordinarily used by police officers to investigate a complaint where there is no probable cause for a search warrant." Id. at 598. Key to the legitimacy of the knock-and-talk technique . . . is the absence of coercive police conduct, including any express or implied assertion of authority to enter or authority to search." Id. at 598-99. Here, the trial court found the warrantless search was conducted pursuant to consent. The trial court did not have the benefit of conflicting testimony that the consent was not freely and voluntarily given; instead, the court had only the testimony of law enforcement to consider. There was no evidence of coercive conduct or the use of overbearing tactics by law enforcement. Under these circumstances, the 4th DCA could not say the trial court erred in denying the motion and affirmed the conviction.

(Editor's note: This leaves me—and perhaps some of the 4th DCA—wondering why, after twice telling detectives to pound salt, Mr. Hernandez had such a change of heart, prompting him to lock his dog away and kick down a door to a room he presumably locked and had the key to, so the officers could get a good look at the indoor grow operation and get the warrant he twice invited them to secure.)

Hernandez v. State, 80 So.3d 416 (Fla. 4th DCA, 2/15/2012)

Wife Can't Consent to Search of Husband's Safe.
Inevitable Discovery Cannot Obviate Need to Seek Search Warrant.

An officer responded to King's home after a domestic disturbance call. King had left, but the wife let the officer in. The officer knew King was a convicted felon. When asked, the wife reported that her husband had a gun in the home and took the officer to the master bedroom. She told the officer that the gun was in a safe on the floor of the closet, and she did not have a key. (Emphasis added.) The officer took the safe to his patrol car, pried the safe open, and located the gun. Only King's

belongings were found in the safe. King was subsequently arrested and charged with possession of a firearm by a convicted felon. At the suppression hearing, the officer testified he did not attempt to get a warrant. The trial court denied the suppression motion, finding the gun would have inevitably been discovered because probable cause existed to obtain a search warrant.

The 1st DCA first noted that the wife did not have authority to consent to the opening of the safe. She did not have a key to the safe, the safe had her husband's personal belongings in it, and she did not use the safe. "'[T]here is no right on the part of a third party to consent to a search of personal property belonging to another person unless there is evidence of both common authority over and mutual usage of the property.'" Kelly v. State, 374 Fla. L. Weekly D127, D129 (Fla. 4th DCA Jan. 11, 2012). Id. (quoting Marganet v. State, 927 So. 2d 52, 57-58 (Fla. 5th DCA 2006)). The Court also noted that the case's circumstances did not support a finding of "apparent authority" of the wife to consent even though the safe was in their commonly-shared bedroom.

Turning to the "inevitable discovery" basis for denial of the motion to suppress, the DCA reversed. The DCA found the trial court erred in denying the suppression motion by relying on the inevitable discovery doctrine because the facts do not support its application. "Specifically, the inevitable discovery doctrine may be employed to deem a search lawful if probable cause to obtain a warrant existed and officers are 'in the process of obtaining a warrant' when the search occurs." (Emphasis added.) The Court noted that to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment. See: U.S. v. Reilly, 224 F.3d 986, 995 (9th Cir. 2000) (quoting U.S. v. Echegoyen, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986)). The officer made no attempt to obtain a warrant, thus, the trial court's reliance on the doctrine to support the suppression motion was error. Case was reversed and remanded.

King v. State, 79 So.3d 236 (Fla. 1st DCA, 2/17/12)

Continued Interrogation by Detectives After Subject Asked For Attorney Rendered Statement Involuntary

The state challenged the suppression of a statement made to law enforcement officers by Gonzalo Rafael Venegas after he was taken into custody on suspicion of second-degree murder. Venegas cross-appealed the denial of his motion to suppress a knife that was located using information obtained during that same custodial interrogation.

Venegas was a part of the construction crew working on the Collier County courthouse. An incident occurred where a victim was stabbed and later died. Detectives at the scene determined that Venegas was involved in the incident. Venegas agreed to go with his wife to a police substation for questioning. It was understood he was being detained and not free to leave.

A detective read the Miranda warning to Venegas, and Venegas indicated he understood his rights. The interview was taped. The detectives explained what they were trying to accomplish and then asked Venegas, "Do you want to talk to us now

without a lawyer present?" Venegas responded: "No, because there is someone dead." The detective asked for the name of his lawyer and Venegas said "I want to talk with my wife. I have never had a lawyer because I've never committed any crimes or done anything." The detective asked again if he wanted to call his attorney and Venegas responded: "I want to see—talk for a moment with my wife."

The detective then stated, "Okay. We're going to have to either get—or going to ask you to consent to give us the knife, the tool that you used[d] . . . Or I'm going to have to go apply for a search warrant . . ." The other detective stated, "You can give us permission and you can give us the tool that was used or we are going to—." Venegas interrupted them and told them he knew where the knife was and told the detectives it was in the bathroom. The detectives located the knife.

The 2nd DCA affirmed the trial court's finding that "Venegas made an unequivocal request for an attorney" and "the detectives failed to immediately cease questioning" once he asserted that right. The DCA affirmed the ruling that "all statements made by Venegas subsequent to his invoking his right to counsel must be suppressed." The DCA then reversed the trial court's order denying Venegas' motion to suppress the actual knife. The trial court had concluded that there 'is no reason to apply . . . fruit of the poisonous tree doctrine' in this case." The trial court based its ruling on United States v. Patane, 542 U.S. 630 (2004), where "the Patane Court concluded that the facts of that case provided 'no reason to apply the 'fruit of the poisonous tree' doctrine' because simply excluding the unwarned statement was a sufficient deterrent to taking unwarned statements in future custodial interrogations."

The DCA determined "the facts in the instant case factually distinguishable from Patane." The officers continued to interrogate Venegas by telling him that he would have to consent to giving them the knife or that they would obtain a search warrant to search his house. Once Venegas invoked his right to an attorney, "the officers should have terminated their questioning until either Venegas consulted with his attorney or he initiated further conversation; any questioning after that point amounted to unlawful interrogation." Here, unlike in Patane, the exclusion of the physical evidence is necessary to deter future improper police conduct, namely continuing an interrogation after the suspect invokes his or her right to counsel. Patane involved a voluntary statement, but Venegas' statement regarding the location of the knife, cannot be considered voluntary. The statement regarding the location of the knife was "a direct response to the unlawful interrogation conducted in violation of his right to counsel." The DCA held the "fruit of the poisonous tree doctrine requires the exclusion of the knife that law enforcement located as a result of the involuntary statement made by Venegas in response to unlawful interrogation conducted after he invoked his right to counsel." The 2nd DCA reversed the order denying the motion to suppress the knife.

State v. Venegas, 79 So.3d 912, (2nd DCA, 2/17/12)

Possession of Large Quantity of Pills, When Also Having Rx For Them Will Not Support Trafficking Charge Absent Some Evidence of Intent or Actual Sale

Celeste was riding a bike at night without lights and was approached at a gas station where he was talking to someone. In response to the approach of the deputy, Celeste "turned around and appeared to put something in his front pocket." When confronted by the deputy, Celeste indicated he had put "his pills" in his pocket, and produced a pill bottle with 28 oxycodone pills. The label was not legible, but Celeste claimed to have an Rx for them. No prescription was produced by Celeste. A search found $260 in twenty dollar bills, and an additional 20 oxycodone pills separately packaged in a plastic wrapper and a list of names and numbers in Celeste's pocket. At trial, Celeste testified that he had a serious injury and had been prescribed the pain pills and introduced into evidence an Rx for 180 pills per month. The Rx was valid at the time Celeste had been arrested. The trial court denied a motion for acquittal and the jury found Celeste guilty of trafficking.

The 5th DCA reviewed the trafficking statute and noted it requires proof that a defendant "knowingly sold, purchased, delivered, brought into Florida or possessed four or more grams" of one of the specified controlled substances. The DCA also noted s. 893.13(6)(a), F.S. permits one to legally possess a controlled substance when obtained pursuant to a valid prescription. Celeste's conviction was reversed. "While the evidence presented may have been sufficient to prove that Mr. Celeste intended to sell some of his prescribed oxycodone, there is insufficient evidence that he actually did so."

Celeste v. State, 79 So.3d 898 (Fla. 5th DCA, 2/17/12)

Bond Cannot Be Revoked Unless Change of Circumstances Or Additional Evidence Subsequent to Pretrial Release

Soto was arrested and charged with various felonies, including some life felonies. He was transferred from juvenile to circuit court and was granted pretrial release after arraignment. He appeared at several "soundings" and at the end of the fifth "sounding" the prosecutor moved to have Soto held with no bond, based on the life felony charges. The trial court agreed.

In responding to Soto's petition for writ of habeas corpus, the 3rd DCA quashed the trial court's order and granted the habeas petition. Once a trial court grants bail, "it cannot revoke the decision if circumstances have not hanged or additional evidence emerged since the bond was originally set."

Soto v. State, 89 So.3d 263 (Fla. 3rd DCA, 3/7/12)

Use of Marijuana Is "Substantial Violation" of Youthful Offender Act

While on youthful offender probation, Christian violated the probation by using marijuana. He admitted the use. While he was not charged with a new crime, his probation was revoked and he was sentenced to concurrent terms of 10 years in prison. He appealed, arguing this violated the Youthful Offender Act. (F.S. 958.022-.15). He argued the concurrent split sentences on charges of aggravated assault (with a firearm) against a law enforcement officer and aggravated battery

with a weapon violated the Act which states that a youthful offender shall not be committed for a substantive violation (of probation) for a period longer than the maximum sentence for the offense for which he or she was found guilty or for a technical or non-substantive violation for a period longer than 6 years. He argued his violation was not "substantive" since he had not been charged with a new crime, so that a maximum of 6 years was all allowed.

The 5th DCA rejected the argument based on its precedent in Robinson v. State, 702 So.2d 1346 (Fla. 5th DCA 1997) which held that illicit drug use constitutes a substantive violation of youthful offender probation. "We have never imposed a requirement that the state independently prosecute new criminal charges in order to allege conduct as a violation of probation." (The Florida Supreme Court is reviewing two other cases with the same issue and clarification will be forthcoming.)

Christian v. State, 84 So.3d 437 (Fla. 5th DCA, 4/5/12)

City Properly Redacted Pre-Employment Questions Used On Polygraph

Rush was a candidate for reserve police officer in the City of High Springs. He sought the text of questions asked on a pre-employment polygraph, and the City claimed they were exempt from public records disclosure. The City relied on F.S. 119.071(1)(a) which states:

> *Examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure, certification, or employment are exempt from section 119.07(1) and section 24(a), Article I of the State Constitution. A person who has taken such an examination has the right to review his or her completed examination.*

Rush argued that this Public Records Act exemption is inapplicable to the redacted portions of the pre-employment polygraph examination report. However, the court found the instant case provided a clear example of the exemption's application. It was undisputed that the polygraph examination here was given by a governmental agency -- the City -- and was comprised of questions and answers. Moreover, deposition testimony indicated the polygraph examination was intended exclusively for employment purposes as the City required applicants for employment as reserve police officers to undergo such testing. Both the polygraph examiner and a representative from the City stated the polygraph tested the applicant's ability to be honest and accurate, which they claimed were essential traits of law enforcement officers. The redacted questions and answers contained in the pre-employment polygraph report, therefore, fit each of the criteria given in section 119.071(1)(a), F.S. The City's decision to redact the portions of the polygraph report containing examination questions and answers was reasonably based on section 119.071(1)(a). Accordingly, the 1st DCA held that the City appropriately found for the City on those counts of the complaint alleging it had improperly redacted the report.

Rush v. High Springs, 82 So.3d 1108 (Fla. 1st DCA, 2/23/2012)

Community Caretaker Function Did Not Justify Wandering Through House to Find Keys to Lock The Door

After he was arrested in his home by two detectives, the defendant agreed to let one detective remain in the house until the defendant's sister could arrive and take custody of the defendant's son. The defendant was taken to jail and shortly the sister arrived. However, she did not have keys to lock the house. The detectives were concerned about leaving the house unlocked, so they suggested they "Look around and see if we can find keys." Searching the house for keys along with the sister, a detective entered the defendant's bedroom and found the keys on top of his dresser. Beside the keys was a round of ammunition. The ammo was not visible without entering the bedroom. Defendant's motion to suppress was denied, and he pled nolo on the charge of possession of ammunition by a convicted felon, reserving a right to appeal.

The 4th DCA did not accept the state's theory that the search was within the "community caretaker" exception. The Court noted that once the defendant's sister arrived, no exigency existed which justified the detective's warrantless entry into the defendant's bedroom. The sister was capable of entering the bedroom to search for the keys. Even if the detectives wanted to assist the sister in finding the keys, they should have limited their search to the visible area of the house in which the defendant permitted them to enter, and directed the sister to search the non-visible areas of the house, including the bedroom. The facts here did not justify applying the community caretaking exception. The exigencies of the situation -- finding keys to lock the defendant's house -- are not compelling enough to find that the detective's warrantless entry into the bedroom was objectively reasonable. The detectives simply could have directed the defendant's sister to enter the bedroom to search for the keys. The detectives also could have requested the officer transporting the defendant to ask him where the keys were located and then relayed that information to his sister. The detective did not have to enter the defendant's bedroom.

Based on the foregoing, the 4th DCA found that the trial court erred by denying the defendant's motion to suppress. The court therefore reversed and remanded with directions for the trial court to vacate the defendant's conviction and sentence, grant the defendant's motion to suppress, and permit the defendant to withdraw his plea.

Aikens v. State, 80 So.3d 1121, (Fla. 4th DCA, 2/29/2012)

Juvenile Who Went to Jail With Mom to Be Questioned Was Not In Custody For Purposes of Miranda

A detective contacted E.W.'s mother and informed her that he was investigating a grand theft case against her son, who was 15 years old at the time. He asked her if E.W. would come in to speak with the police and told her that E.W. could possibly be arrested if he did not speak with him. Thereafter, E.W., accompanied by his mother, went to the police station. At the start of the interview, E.W. was advised that he was not under arrest or being detained and was free to leave. He was also informed that he did not have to speak with the detective and was assured that he was "not going to jail today or anything like that." E.W.'s mother was present with

E.W. the entire time and engaged in conversation during the interview. Although E.W. ultimately confessed to committing the crime, he was not placed under arrest that day, and he left with his mother. E.W. was charged with grand theft. He moved at trial to suppress his recorded statements made to the detective. The trial court found that E.W. was in custody for Miranda purposes during the questioning and therefore granted E.W.'s motion to suppress. The state then appealed to the 4th DCA.

Florida courts have applied the following four factors to determine whether one is in custody for purposes of Miranda: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning. Applying these factors, the 4th DCA concluded that E.W.'s encounter with the police was entirely consensual for purposes of Miranda.

State v. E.W., 82 So.3d 150, (Fla. 4th DCA, 2/29/2012)

Non-Controlled Synthetic Marijuana Possession
Does Not Support Possession of Paraphernalia Charge

During a search by a school police officer of C.M.'s back-pack at school, a plastic case containing a green, leafy substance and a glass ear dropper that had been converted into a makeshift pipe in which a residue was visible was seized. C.M. was charged with possession of marijuana and possession with intent to use drug paraphernalia.

No lab results were introduced at the juvenile hearing. The officer testified in the adjudicatory hearing that from his training and experience, the leafy substance and residue were marijuana in look and in smell. On cross, the officer admitted he understood that synthetic marijuana looks the same and has the same effect as marijuana. The state rested after calling the officer.

C.M. testified on his own behalf that the green leafy substance was not marijuana but was "Mr. Nice Guy" which he had legally purchased at a dollar store. He testified that "Mr. Nice Guy" looks and smells like "real" marijuana and that he used the ear dropper to smoke it. He said a friend gave him the dropper and could have very well used it to smoke real pot in the past.

The officer was recalled on rebuttal. He testified that real and synthetic marijuana smelled different from one another. However on cross, he admitted he had seen only one type of synthetic marijuana and had no training in identifying it. The trial court indicated there was reasonable doubt that the substance was marijuana and dismissed that charge. However the court found C.M. guilty of possession of drug paraphernalia, and the appeal followed.

In the appeal before the 3rd DCA, the State argued the evidence was sufficient to sustain the charge because the officer (deemed an expert by the court) testified he believed the residue in the ear dropper was marijuana. The DCA found that such an argument lacked merit under the facts of this case, however. Given the trial court's finding that the officer's testimony was insufficient to establish beyond a reasonable doubt that the green leafy substance possessed by C.M. was real, as opposed to synthetic, marijuana, the officer's testimony necessarily was insufficient to establish beyond a reasonable doubt that the residue found in the ear dropper was real, as opposed to synthetic, marijuana. Because the evidence failed to establish the substance in C.M.'s possession was a controlled substance, and the absence of any other evidence that C.M. used or intended to use the object to smoke marijuana, the finding of guilt for possession of drug paraphernalia could not stand and the 3rd DCA accordingly reversed the conviction of C.M. for possession of drug paraphernalia.

C.M. v. State, 83 So.3d 947(Fla. 3rd DCA, 3/14/2012)

Arrest Outside of Defendant's Apartment Did Not Justify "Protective Sweep" of The Apartment

Police were dispatched to an apartment on a "shots fired" call. They detained several people at the scene, including Rowell. After finding a shell casing in front of a first floor apartment, they established a perimeter around the entire complex. The alleged victim told police that Rowell has shot at him from the second floor balcony. Rowell's apartment was on the third floor of the complex. Rowell was taken into custody outside the apartment. Officers decided to search Rowell's apartment for the safety of everyone at the scene and to determine if there were other suspects in the apartment. His apartment door was "wide open." The officers entered the apartment, not knowing if anyone was in it, and conducted a "protective sweep." During the "sweep" a firearm was located on the kitchen counter. Finding no other people in the apartment, the officers left and sealed the apartment. They later obtained Rowell's co-occupant girlfriend's written consent to search the apartment.

At the motion to suppress hearing one of the officers indicated they had enough to get a search warrant to search Rowell's apartment, and on cross the officer acknowledged the apartment complex had been secured by the police perimeter, and that there would have been ample time to secure a warrant. The trial court denied the motion to suppress and Rowell was convicted of possession of a firearm by a convicted felon. He appealed to the 4th DCA, arguing the search of his apartment was illegal.

The court noted the Fourth Amendment permits a protective sweep incident to an arrest if the officer possesses a reasonable belief based on specific and articulable facts which warrant the officer in believing that the area harbors an individual posing a danger to the officer or others. Maryland v. Buie, 494 U.S. 325, 327 (1990). The Supreme Court has defined a protective sweep as "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." Id. The Court further opined that a protective sweep of a home, incident

to an arrest outside the home, cannot be justified routinely. See Mestral v. State, 16 So. 3d 1015, 1018 (Fla. 3d DCA 2009). Where a defendant is arrested outside his or her home, a warrantless protective sweep of the defendant's home is permissible only if the officers have a reasonable, articulable suspicion that the protective sweep is necessary due to a safety threat or the destruction of evidence. See Diaz v. State, 34 So. 3d 797, 802 (Fla. 4th DCA 2010). The arresting officer must have both: (1) a reasonable belief that third persons are inside, and; (2) a reasonable belief that the third persons were aware of the arrest outside the premises and might destroy evidence, escape or jeopardize the safety of the officers or the public. Where suspects are arrested outside a home and police officers have no reason to believe that other individuals dangerous to their safety are inside the home, entry into the dwelling cannot be justified merely because the police do not know, as an absolute certainty, whether more people could be in the home. In the case at bar, police acknowledged there was no indication of a second shooter or accomplice.

The Court concluded a warrantless entry could not be justified based on unfounded speculation that there could be someone inside the home who might pose a threat to officer safety. The Court therefore concluded that the officers did not have a reasonable belief that third persons were inside Rowell's apartment, much less a reasonable belief that any such persons were aware of the arrest and might destroy evidence or pose a threat to safety. A warrantless entry could not be justified based on unfounded speculation that there could be someone inside the home who might pose a threat to officer safety. The Court therefore concluded that the officers did not have a reasonable belief that third persons were inside Rowell's apartment, much less a reasonable belief that any such persons were aware of the arrest and might destroy evidence or pose a threat to safety.

Rowell v. State, 83 So.3d 990, (Fla. 4th DCA, 3/28/2012)

Use of Emergency Lights ("For Safety") In Conjunction With Checking Out An Occupied SUV Legally Parked At 2:30 AM At An Open Field Constituted "Stop" Requiring Reasonable Suspicion

A deputy on patrol at 2:30 AM noticed an occupied SUV legally parked in front of a vacant open field with all its lights off. He became suspicious because the SUV's lights were off and decided to investigate. He pulled his patrol car "almost catty corner" to the front of where the SUV was parked and activated his emergency lights so that he "would not be hit by oncoming traffic." He used a spotlight to illuminate the SUV. The deputy characterized the field as being in an area known for drug use and prostitution, but had no observation related to the SUV support any suspicion of either occurring.

The deputy indicated he went to the SUV to determine if the occupant was hurt or needed assistance. As he approached the SUV, he smelled the odor of marijuana. He asked the driver (Smith) for his license and then after seeing a partially smoked marijuana cigarette in the SUV ashtray, he arrested Smith for possession of marijuana. A search incident produced more marijuana and a bag of cocaine.

The trial court denied Smith's motion to suppress, indicating the patrol car did not block Smith's SUV and that the use of emergency lights was indicated to be for

safety, not to "stop" Smith. The 4th DCA reversed the trial court's denial of the suppression motion, indicating that under the totality of circumstances, once the patrol car emergency lights were activated, "no reasonable person would have…felt free to leave." The use of the emergency lights, coupled with shining the spotlight on the SUV further enhanced the "seizure." It noted that here the SUV occupant was aware of the emergency lights and spotlight.

Smith v. State, 87 So.3d 84 (Fla.4th DCA, 4/25/12)

Corpus Delecti – DUI

At 7:10 AM the defendant and his friend were in a truck traveling south on U.S. 1 in Jupiter when it crossed into the northbound lane, struck a car, causing serious injury to the car's two occupants, then flipped during which the defendant and friend were ejected. The truck then struck another car. Nobody saw who was driving the truck. Evidence at the scene did not suggest which of the two was driving. The two were taken to the hospital. At the hospital, the investigator spoke to the defendant's wife. She related that sometime between 2 and 2:30 AM the defendant received a call at their home in Jupiter, and advised her he was leaving to pick up a friend in Ft. Pierce (40 to 50 miles away) so they could play soccer in Jupiter later that day. The defendant left in his wife's truck (the one involved in the crash). He was alone when he left.

The investigator then spoke to the defendant. He appeared to be impaired and blood was drawn. Five hours after the crash, the defendant had a .13 blood alcohol level. No blood was drawn from the defendant's friend. The defendant was read his Miranda rights, waived them, and admitted he was the driver.

The defense at trial objected to introduction of the defendant's post-Miranda admission, claiming the state had not established the Corpus Delecti of the crime through evidence other than the defendant's admission. Before a confession is admitted, there must be substantial evidence that the crime was committed. State v. Allen, 335 So.2d 823 (Fla. 1976). The trial court overruled the defense objection and the defendant was convicted of two counts of DUI causing serious bodily injury.

The 4th DCA on appeal affirmed the convictions. The state provided substantial evidence circumstantially. First, they showed the defendant was driving the truck when he left Jupiter four to five hours before the crash. This provided enough time to drive to Ft. Pierce and return by the time of the crash. Second, the travel time was consistent with the defendant's comment to his wife that he intended to drive to Ft. Pierce to pick up a friend and return to Jupiter for a soccer game. Third, the truck in which the defendant was traveling was registered to the defendant's wife. The court noted that standing alone these three elements might not prove DUI beyond a reasonable doubt, but was sufficient evidence to allow the defendant's admission to be introduced as evidence.

Bribiesca-Fafolla v. State, 93 So.3d 364 (Fla. 4th DCA, 6/13/2012; reh. Denied 8/17/2012)

Prescription Defense Available to Any Person Authorized to Hold Drug For Prescription-Holder's Benefit

Williams testified at trial that she was "in temporary possession" of clonazepam at the request of the prescription holder. She indicated the prescription holder had memory problems that prevented her from taking her medication at the proper time. The trial judge refused to give the jury the "prescription defense" instruction. The 5th DCA reversed, indicating the defense (and corresponding jury instruction) is available to an individual authorized by the prescription holder to temporarily possess the medication on the holder's behalf.

Williams v. State, 85 So.3d 1185 (Fla. 5th DCA, 4/20/12)

Common Authority Over Premises Does Not Permit A Search of Any Personal Property Contained In The Premises

Ward pled no contest and reserved the right to appeal the denial of his motion to suppress drugs that formed the basis of his charges of trafficking in MDMA. (He had other convictions in addition to the trafficking one.) At the suppression hearing the evidence indicated that after Ward had been arrested for another drug-related charge, police went to his residence at his mother's home. The police told his mother that they suspected he had drugs in his room and the mother consented to a search of the premises. She told police she had "regular access" to her son's bedroom. Inside the bedroom closet, behind some jeans on the upper shelf, police found a box. Inside that box was a bag containing ecstasy pills. The closet had a door and contained only men's clothing.

The 4th DCA stated that even assuming the mother had "regular access" and that was sufficient to substantiate "the mother's apparent authority to consent to a search of the bedroom," the facts were insufficient for police to reasonably conclude the mother had actual or apparent authority to search the contents of the box. The DCA reversed Ward's drug trafficking conviction.

Ward v. State, 88 So.3d 419 (Fla. 4th DCA, 5/16/12)

More Than 12 Years After Sentence, Trial Court Has Jurisdiction to Designate Defendant As Sexual Predator

After being designated a sexual predator in a case resolved twelve years earlier, the defendant appealed the designation, arguing the court was barred by either the statute of limitations or laches. The defendant had been released from prison in 2009 but was still on probation when the trial court order was entered.

The 2nd DCA noted that there was no question that the underlying offense (sexual battery) qualified the defendant to be a sexual predator (F.S. 775.21(4)(c)(1)(a)). It also noted the trial court failed to make that designation when sentencing the defendant. However, the DCA noted there is a specified process for correcting overlooked designations (F.S. 775.21(5)(c)) and that as a matter of law, the defendant is a sexual predator. The official "designation" merely provides him with notice and an opportunity to be heard before registration requirements become

effective as to him. Since he was still on probation, the trial court continued to have jurisdiction to address the conditions of probation as necessary and to enter an order such as the sexual predator designation.

Almond v. State, 89 So.3d 1056 (Fla. 2nd DCA, 6/1/12)

Fellow Officer Rule Did Not Justify Stopping Defendant; But Since He Fled When The Stop Was Attempted, Conviction Survives

On June 24, 2010, a U.S. Marshal radioed for assistance from available patrol units to stop an armed homicide suspect who was driving in front of him on Interstate 95. Deputy Floyd caught up with them and the Marshal pointed to the gold Kia containing the suspect. Deputy Floyd activated his lights, as did Deputy Wilke, who was by then in front of Deputy Floyd. Deputy Wilke's SUV had Jacksonville Sheriff's Office insignia on it, "prominent and easily determined," as did Dep. Floyd's patrol vehicle. Henderson slowed, as if to pull off on the grass shoulder, but then continued to drive for one to two miles, although he could have pulled over on the shoulder during that time. Henderson did not speed or violate any traffic laws before he pulled over, but he did not stop until there were officers approaching from the opposite direction. A loaded .45-caliber handgun was found under the driver's seat.

Deputy Floyd testified that he initiated the stop based on the U.S. Marshal's request. The U.S. Marshal did not testify. The deputy said he was given a teletype at around 3:00 p.m. when he booked Henderson into jail stating that a warrant for Henderson's arrest had been issued in St. John's County. At trial, Henderson was convicted of possession of a firearm by a convicted felon, fleeing and eluding, and Driving While License Suspended or Revoked.

On appeal, the 1st DCA rejected the state's argument that the stop was justified by the "fellow-officer rule." The fellow-officer rule allows officers to act on information gained by other officers. However, the court held that the rule could not be applied under the facts of this case, because there was no record evidence of the U.S. Marshal's grounds for suspecting that Henderson had been involved in a homicide. The court also rejected the state's claim that the arrest warrant issued five hours later justified the stop, absent any record evidence of the information that was provided to the judge who issued the warrant and when the information was provided.

The court affirmed the order, however, because Henderson's act of fleeing or attempting to elude Deputy Floyd and the other officers avoided the necessity of determining whether there was reasonable suspicion or probable cause for the initial attempt to stop. When Henderson continued driving, however, long after the officers had activated their lights and sirens, in combination with the request from the Marshal to assist in stopping a homicide suspect and the Marshal's signal that the gold Kia contained the suspect, Deputy Floyd did have a reasonable suspicion that a crime had been or was being committed sufficient to warrant the stop.

Additionally, the court held that the trial court did not err by denying the Henderson's motion for judgment of acquittal on the charge of felon in possession of a firearm. Because Henderson was the sole occupant and driver of the car when

apprehended, he had exclusive possession of it, regardless of the vehicle's ownership, and thus his knowledge of the contraband and his ability to maintain control of it was inferred. The decision of the trial court was affirmed.

Henderson v. State, 88 So.3d 1060 (Fla. 1st DCA, 6/1/2012)

Aggregate 80 Year Sentence Does Not Violate Graham

Smith was convicted of two separate cases for events occurring on December 4 and 6 in 1985. The two separate cases resulted in convictions for eight offenses: two counts of sexual battery, two counts of burglary, one count of aggravated assault, one count of kidnapping, one count of possession of a weapon during commission of a felony and one count of possession of burglary tools. Smith was 17 when he committed the crimes. He pled nolo contendere and received multiple life sentences without parole. After Graham v. Florida, 130 S.Ct. 2011 (2010) was announced, the State moved in March, 2011, to correct Smith's illegal sentences since the sentences of life without parole for a juvenile was violating the Eighth Amendment. After conducting a hearing, the trial court granted the state's motion and entered an order resentencing Smith (only as to the five counts for which Smith received life sentences) to concurrent forty-year sentences on four of the counts, and another forty-year sentence on the remaining count, to be served consecutively to the other forty-year sentences. Thus, Smith was sentenced to an aggregate of eighty years in prison.

Smith asserts that his sentence is the functional equivalent of a sentence of life without the possibility of parole in that it does not provide him with a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, and therefore, the sentence violates the prohibition against cruel and unusual punishment under *Graham.* The 1st DCA disagreed. Having been sentenced in 1985, Smith was not required to serve 85% of his sentence. He is entitled to basic gain time (10 days per month) and incentive gain time (up to 20 days per month) for good behavior. Assuming he earns the gain time and does not forfeit any of it, he will serve a sentence "significantly less than the sixty-three years he would serve if only basic gain time were applied." The Court indicated he had been afforded the requisite "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation" mandated by Graham.

Smith v. State, 93 So.3d 371, (Fla. 1st DCA, 6/21/12)

Pre-Arrest Delay of Almost Three Years Was Due Process Violation

Hope was charged by information on 10/14/2010 in response to a sworn complaint filed 6/7/2010. The Defendant was charged with selling cocaine on November 20, 2007 (almost three years earlier) to undercover officers with his half-brother and co-defendant, Merrell Hudson.

Although the statute of limitations is the primary guarantee against bringing overly stale criminal charges, the statute of limitations does not fully define a defendant's rights regarding pre-indictment delay, and the due process clause plays a role in

protecting against delay. When reviewing a trial court's dismissal based on pre-arrest delay, the District Court of Appeal applies the de-novo standard of review to the trial court's interpretation of the due process test for pre-arrest delay, as this test involves a pure question of law. A defendant who seeks dismissal of criminal charges on basis of due process violation resulting from pre-arrest delay has the initial burden of showing actual prejudice. to warrant dismissal of criminal charges on basis of due process violation resulting from pre-arrest delay, prejudice must amount to a material impairment of defendant's capacity to prepare a defense. In opposing motion to dismiss for due process violation resulting from pre-arrest delay, state, after defendant has shown actual prejudice, has burden of showing why delay was necessary.

to demonstrate actual prejudice caused by the pre-arrest delay, the defense presented testimony from the Defendant, Hudson, and Brooke Williams, Defendant's former girlfriend:

- *The Defendant testified he was not with Hudson on the date of the alleged drug buy. He saw the video from the undercover buy and testified that the picture showing a portion of someone's head was not him. He believed he was with Williams, his girlfriend at the time, as he would have picked her up from college for the Thanksgiving break.*

- *Williams testified that she attended Bethune–Cookman College in Daytona in 2007. She testified that she would have been in Gainesville for Thanksgiving (November 22, 2007), but she did not remember if she left school early. According to Williams, there was a strong possibility she was in Gainesville on November 20, 2007 due to early dismissal from school, but she was not certain due to the passage *1135 of time. Williams did not have a 2007 school calendar to indicate the dates of the Thanksgiving break that year.*

- *Hudson testified that he made a plea deal, which required him to testify truthfully in all matters in relation to the drug buy. Hudson testified that he was not with the Defendant on the day in question, but that he was with K.B., his ex-girlfriend's brother. Hudson did not know K.B.'s last name and, due to the lapse in time, did not know how to locate or contact his ex-girlfriend or K.B.*

The State called three witnesses, Corporal Alade, Sergeant Hood, and Sergeant O'Quinn, to testify to the reasons for the pre-arrest delay:

- *Corporal Alade, of the Gainesville Police Department, testified that he was involved with three undercover drug buys from Hudson in 2007 and 2008, including the November 20, 2007 drug buy at issue. During the investigation, he learned that the cases might be federally prosecuted. Corporal Alade was not explicitly prohibited from discussing the cases with the State Attorney's Office, but he testified that common protocol was to not discuss cases when a federal prosecution might proceed. Alade was not aware of when the federal investigation ceased.*

- *Sergeant Hood, of the Alachua County Sheriff's Office, was the case agent on Hudson's cases. He testified that he was required to sign a document which prevented him from talking about the cases. Sergeant Hood did not recall whether*

the document prohibited him from discussing the Hudson cases with the State Attorney's Office. Hood testified that at the time he left Narcotics on December 21, 2008, the federal government was still investigating the cases and, around the summer of 2009, the federal government decided not to indict Hudson and the Defendant. He did not know why the case was not sent to the State Attorney's Office when the federal government decided not to prosecute.

- *Sergeant O'Quinn, with the Gainesville Alachua County Drug Task Force, testified about the delay in sending the case to the State Attorney's Office. She started working for the drug task force in March 2009, but she only became aware of this case when given a print-out of open cases around June 7, 2010. She sent this case to the State Attorney's Office after discovering it in the print-out.*

The 1st DCA found that the trial court did not abuse its discretion in finding "actual prejudice supported by articulable reasons, rather than just fuzzy memory" when it granted the motion to dismiss. It is the State's burden to show why the delay was necessary. The trial court found "that the first half of the delay was legitimate investigative delay and the second half was negligent delay." The 1st DCA found that "[i]n balancing the reasons for the delay against the prejudice, we cannot say the trial court abused its discretion." The 1st DCA affirmed the trial court's order granting Hope's Second Amended Motion to Dismiss.

State v. Hope, 89 So.3d 1132 (Fla. 1st DCA, 6/18/12)

No Double Jeopardy Violation When Convicting of Aggravated White Collar Crime As Well As The Predicate Offenses

In a case of apparent first impression, the 3rd DCA indicated dual convictions under Florida's aggravated white collar crime statute and its enumerated predicate offenses does not violate Double Jeopardy protections. The Court relied upon similar holdings and analysis applied to Continuing Criminal Enterprise (CCE) and Racketeering (RICO) cases in finding no violation occurred.

Headley appealed her conviction. Her case's scheme was complex and requires a detailed discussion:

- Headley and her co-defendant, Phillip Davis (former circuit court judge in Miami), were involved in the theft of grant money that was meant to fund the Miami–Dade Resident College (MDRC). Each was subsequently charged with one count of scheme to defraud $50,000 or more; one count of aggravated white collar crime, a violation of section 775.0844, Florida Statutes (2005);2 two counts of grand theft of more than $20,000 but less than $100,000; one count of grand theft of more than $300 but less than $5,000; and twenty-five counts of money laundering of more than $300 but less than $20,000. The aggravated white collar crime charges were based upon predicate acts consisting of scheming to defraud, grand theft, uttering a forged instrument, and money laundering.

- The evidence presented at trial showed that MDRC received three grants from the Miami–Dade Housing Agency for payroll and operating expenses. The grant contracts stated MDRC was to be reimbursed for expenses

already incurred. The contracts set forth MDRC employment positions, and these contracts were signed by Davis as the executive director of MDRC and Headley as the administrative assistant.

- The employees that were paid under the grants signed contracts with a company called Workforce Management, not with MDRC. The president of Workforce testified that he set up the company at Davis' request, Davis' post office box was used as Workforce's mailing address for bank correspondence, and Davis provided the name "Workforce Management" and paid its incorporation fee.

- Workforce submitted invoices to the grant administrator in order to receive reimbursement for payroll that MDRC claimed Workforce had already paid. Miami–Dade Housing Agency paid MDRC $100,557.18 to compensate nineteen employees, but only $36,845.78 was in fact paid. The evidence and testimony showed that invoices listed hours not worked by employees resulting in overpayment to MDRC; listed amounts paid to employees, which were greater than what the employees received; listed hourly rates greater than those paid to employees; and listed employees no one had heard of.

- MDRC also had a reimbursement grant from the State of Florida/ Department of Juvenile Justice. The grant was to fund two positions up to $50,000. Marie Boswell, the grant administrator, paid out $19,000. Davis wanted to increase the hourly rate of the employees in order to get the full $50,000 allowed by the grant. He told Boswell that he had a contract with Workforce, he owed Workforce $50,000, and Workforce might sue him.

- Records also reflected that employees (including Headley), who were reported as having been paid under the Miami–Dade Housing Agency grant, were documented as also having been paid for the same hours under the State grant.

The jury found Headley guilty of one count of scheme to defraud $50,000 or more, one count of aggravated white collar crime, two counts of grand theft of more than $20,000 but less than $100,000, and five counts of money laundering. The trial court entered convictions on all counts but only entered a sentence on the aggravated white collar crime count, suspending sentence on all other counts. The court sentenced Headley to ten years state prison followed by ten years' probation.

The 3rd DCA recognized that the Double Jeopardy Clause prohibits multiple convictions and punishments for the same offense. Without a clear statement to show legislative intent to authorize separate punishments for multiple offenses arising from the same criminal transaction, courts generally apply the "same elements" test. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); see also Cruller v. State, 808 So.2d 201, 203 n. 3 (Fla.2002) ("[C]ourts only employ the Blockburger test if there is no clear statement of legislative intent to authorize separate punishments for the two crimes in question."). In Florida, this test is codified as part of section 775.021, Florida Statutes (2005). However, the DCA also noted the White Collar Crime Victim Protection Act and the Florida RICO Act are similarly constructed, and both were enacted to allow for prosecution of the

major offense as well as the predicate offenses. "Both statutes establish an offense in which it is implicit that the defendant has committed a number of predicate offenses. Compare § 775.0844(3)-(4), with § 895.02. It has been previously held by Florida courts that being convicted of RICO as well as the necessarily lesser included offenses does not violate double jeopardy. See, e.g., Gross v. State, 728 So.2d 1206, 1208 (Fla. 4th DCA 1999); Haggerty v. State, 531 So.2d 364, 365 (Fla. 1st DCA 1988)." The Court continued, "The legislative intent in adopting the white collar crime statute was to 'enhance sanctions imputed for nonviolent frauds and swindles, protect the public's property, and assist in prosecuting white collar criminals.' § 775.0844(2)." As with RICO, the white collar crime statute was geared toward prosecuting those individuals who engage in a pattern of committing felony offenses involving fraud and deceit. See § 775.0844(4) (defining "aggravated white collar crime"); see also Carroll v. State, 459 So.2d 368, 370 (Fla. 5th DCA 1984) (recognizing that by establishing RICO, the legislature intended to punish those who engage in a pattern of criminal activity more severely than those who only commit the predicate offenses).

Additionally, the Court noted, "As with CCE, the legislative intent in establishing section 775.0844 was to create a separate and distinct offense, see State v. Traylor, 77 So.3d 224, 226 (Fla. 5th DCA 2011) (recognizing that charging a defendant with aggravated white collar crime is a "distinct" new count, separate from any predicate offenses previously charged); there is no reference in the statute to a multiplier of a penalty for some other offense; the punishment set forth in the statute does not reference its predicate offenses; and the definition of aggravated white collar crime is not drafted in the way that a recidivist provision would be drafted. See Garrett, 471 U.S. at 778, 781–82, 105 S.Ct. 2407." The Court held that the trial court did not err in convicting Headley of the offense of aggravated white collar crime and the underlying predicate offenses, and affirmed the circuit court conviction and sentence. (Note: There is still a pending appeal from the codefendant, Phil Davis.)

Headley v. State, 90 So.3d 912 (Fla. 3rd DCA, 6/20/12)

Warrantless Search By Police of Cell Phone On An Arrestee's Person At Time of Valid Arrest Approved. Question Certified.

The 5th DCA reversed a trial court order granting a motion to suppress text messages discovered by the arresting officer on a defendant's cell phone via a search incident the defendant's arrest. The Court cited several cases approving the search of containers found on persons after their arrest. Adopting the analysis of Smallwood v. State, 61 So.3d. 448 (Fla. 1st. DCA, 2011) and Fawdry v. State, 70 So.3d 626 (Fla 1st DCA 2011), and citing to United States v. Robinson, 414 U.S. 218 (1973) wherein the USSC held containers found upon a person incident to arrest may be searched without additional justification, the court remanded the case back to the trial court for further proceedings upon reversing the trial court's suppression order. It also certified to the Florida Supreme Court a question whether Robinson allows a police officer to search through information contained within a cell phone that is on an arrestee's person at the time of a valid arrest.

State v. Glasco, 90 So.3d 905 (Fla. 5th DCA, 6/15/12)

Traffic Stop Officer's Observation of Firearm In Pocket of Passenger Who Exited The Stopped Vehicle Provided Probable Cause For Arrest For Openly Carrying Weapon

Bethel was a passenger in a vehicle stopped in a residential area for a traffic violation. As the car came to a stop, Bethel exited and walked into the fenced front yard of the residence at which the car had stopped. (It was Bethel's residence.) As he was walking, one of the two officers saw "four inches of the butt of a handgun sticking out of the defendant's right pants pocket." He immediately recognized it as a handgun "based on this experience of having seen thousands of handguns." The officer told his partner he (Bethel) had a gun and at gunpoint entered the fenced front yard, ordering Bethel to put his hands up. Bethel complied, was arrested, and the gun retrieved from Bethel's pocket. Bethel was a convicted felon and was charged with being a felon in possession of a firearm. The search incident revealed marijuana and he was charged for that, too.

Bethel argued for suppression of the evidence. He asserted that when the officer saw the gun, he had no idea whether Bethel had a concealed weapons permit, and did not ask him if he did have one. He argued the officer lacked probable cause to believe he was committing any crime when he halted him and arrested him. Bethel also asserted that even if the officer had probable cause to arrest him for open carrying of a weapon, he had no authority to enter the curtilage of Bethel's house without a warrant. After finding the officer immediately sought to arrest the defendant out of concern for his and his partner's safety, the trial court denied Bethel's motion and he pled nolo reserving the right to appeal.

The misdemeanor crime of "open carrying of weapons" is committed when "any person . . . openly carr[ies] on or about his or her person any firearm or electric weapon or device" except as provided by law. §§ 790.53(1) & (3), Fla. Stat. (2008). The 4th DCA found that the officer had probable cause to arrest for this violation. Although the officer acknowledged that some pellet guns and BB guns look very similar to firearms until close inspection occurs, "such a theoretical possibility does not defeat a finding of probable cause in light of the officer's testimony that he immediately recognized the object was a gun based on his experience of having seen thousands of handguns." See Leighty v. State, 981 So.2d 484, 486 (Fla. 4th DCA 2008) ("In dealing with probable cause as the very name implies, the process does not deal with certainties but with probabilities. These are not technical niceties. They are factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians *414 act.") (emphasis and citation omitted).

Further, the 4th DCA concluded "the officer was able to arrest the defendant by entering into the curtilage of the defendant's property without a warrant."

As stated by the Court, "We further conclude that the officer was able to arrest the defendant by entering into the curtilage of the defendant's property without a warrant. We recognize that '[t]he zone of protection under the Fourth Amendment extends to the curtilage of a home, which includes a fenced or enclosed area encompassing the dwelling.' Tillman v. State, 934 So.2d 1263, 1272 (Fla.2006),

superseded by statute on other grounds, § 776.051(1), Fla. Stat. (2008). However, '[o]fficers are permitted to conduct a warrantless seizure of an item in 'plain view' if (1) the police see the item from a place they have a lawful right to be, (2) the incriminating nature of the item is 'immediately apparent,' and (3) the police have lawful access to the incriminating item.' Oliver v. State, 989 So.2d 16, 17 (Fla. 2d DCA 2008) (citing Horton v. California, 496 U.S. 128, 136–37, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)). The third criterion 'is simply a corollary of the familiar principle ... that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Horton, 496 U.S. at 137 n. 7, 110 S.Ct. 2301 (citation and quotations omitted)."

"Here, all three criteria were satisfied: (1) the officer saw the gun from a place he had a lawful right to be, that is, outside of the defendant's fenced-in yard; (2) the incriminating nature of the gun was immediately apparent to the officer based on his experience of having seen thousands of handguns; and (3) the officer had lawful access to the gun because exigent circumstances existed, that is, the need to seize the gun to protect the officers' safety. See Riggs v. State, 918 So.2d 274, 279 (Fla.2005) ('The kinds of exigencies or emergencies that may support a warrantless entry include those related to the safety of persons or property, as well as the safety of police.') (citation omitted). Florida law also was satisfied because the defendant committed the crime in the officer's presence and the officer made the arrest immediately or in fresh pursuit of the defendant. See § 901.15(1), Fla. Stat. (2008) ('A law enforcement officer may arrest a person without a warrant when ... [t]he person has committed a felony or misdemeanor ... in the presence of the officer. An arrest for the commission of a misdemeanor ... shall be made immediately or in fresh pursuit.')."

The officer "saw the gun from a place he had a lawful right to be," the officer knew immediately, based on his experience, it was a handgun, and "the officer had lawful access to the gun because exigent circumstances existed" (officer safety). The crime was committed in front of the officer and the officer was in fresh pursuit." As noted by the Court, "Florida law also was satisfied because the defendant committed the crime in the officer's presence and the officer made the arrest immediately or in fresh pursuit of the defendant. See § 901.15(1), Fla. Stat. (2008) ('A law enforcement officer may arrest a person without a warrant when . . . [t]he person has committed a felony or misdemeanor . . . in the presence of the officer. An arrest for the commission of a misdemeanor . . . shall be made immediately or in fresh pursuit.')." The trial court's suppression of the evidence was upheld.

Bethel v. State, 93 So.3d 410 (Fla. 4th DCA, 7/5/12)

Reliability Finding About "Sella" The Drug-Sniffing Dog's Survives Challenge

Blalock pled nolo to trafficking in marijuana, reserving his right to appeal, after the denial of his motion to suppress 28.6 pounds of marijuana discovered in a tool box in his truck. On appeal he argued the stop (failing to "Move Over") was pretextual, was extended beyond the time to issue the citation, and that the state failed to establish "Sella's" reliability as required by Harris v. State, 71 So.3d 756 (Fla. 2011), cert. granted, 132 S.Ct. 1796 (2012), (oral argument scheduled 10/31/12). The DCA affirmed in favor of the state on all three issues, but wrote about the Harris issue only.

"Sella" alerted to the seam between the cab and bed of the truck in the vicinity of the truck's tool box. A search of the box produced 28.6 pounds of marijuana wrapped in a vacuum sealed package with an overwhelming odor of ammonia. Blalock contended Harris had not been met because the State failed to introduce satisfactory evidence of Sella's field performance, including the number of times she had been deployed and her success and failure rate.

At the suppression hearing, Sella's handler/partner testified as to her field performance. She had been deployed 522 times; had alerted 258 times, with contraband discovered 122 times and no contraband discovered 136 times. of the 136 "false alerts," it was confirmed that drugs had been either recently used by an occupant of the vehicle or recently present in the vehicle in 22 of the cases. The State argued (and the trial court accepted) that based on this information Sella's success rate was between 74% and 78%, depending on whether her alerts in the 22 cases involving residual odors were considered failures.[3]

The DCA did not accept the trial court's calculations. "We agree with Appellant that the trial court erred in determining Sella's reliability by using the State's calculation based on the total number of deployments. Indeed, as the trial court pointed out in its order, the State's calculation gives Sella 'credit' for failing to alert when there is no way to assess whether she was correct because no search was performed. That said, we disagree with Appellant's contention that, in determining Sella's success rate, the trial court should only consider the number of verified alerts and the total number of alerts, as was done in Wiggs v. State, 72 So.3d 154 (Fla. 2d DCA 2011). The Florida Supreme Court recognized in Harris that "[a]n alert to a residual odor is different from a false alert," and in our view, an alert to a residual odor that the dog was trained to detect should not count either "for" or "against" the dog when determining its reliability. Here, taking into account the number of Sella's successful alerts and discounting the alerts where there was no contraband discovered but there were confirmed residual odors, Sella's success rate is approximately 52%[4]

The Court indicated that an even lower "success rate" would still support probable cause:
"Probable cause exists when 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.' Harris, 71 So.3d at 766 (quoting United States v. Grubbs, 547 U.S. 90, 95, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006)) (emphasis in original). Based on this low standard, Sella's 52% success rate is more than sufficient to establish probable cause for the search of Appellant's truck. Accord: United States v. Carroll, 537 F.Supp.2d 1290, 1297 (N.D.Ga.2008) ('Even if [the dog]'s accuracy rate is only 52%, that level of reliability is sufficient for his alert to establish probable cause. [The dog]'s alert indicates the presence of drugs by more than a preponderance of the evidence. [The dog]'s accuracy exceeds [the] 'fair probability' requirement of probable cause.'); see also United States v.

[3] As explained by the DCA, "The percentages correspond to a 26% failure rate calculated by dividing the total false alerts by the total deployments (136 ÷ 522 = 0.2605) and the 22% failure rate calculated by dividing the non-residual odor false alerts by the total deployments ([136–22] ÷ 522 = 0.2183)."
[4] As calculated by the DCA, 122 ÷ (258–22) = 0.5169.

Donnelly, 475 F.3d 946, 955 (8th Cir.2007) (a 54 percent success rating for the drug dog did not undermine the existence of probable cause, 'taking into account the totality of the circumstances present at the scene ..., [the defendant's] behavior and condition, [the dog's] history and pedigree, and [the dog's] positive indication of drugs within the vehicle'), cert. denied, 551 U.S. 1123 (2007).

"Moreover, even counting the alerts with no finds but confirmed residual odors 'against' Sella using Appellant's preferred method of calculation, her success rate is approximately 47%,[5] which itself does not undermine a finding of probable cause. See, e.g., State v. Nguyen, 726 N.W.2d 871 (S.D.2007) (holding that, given the totality of the circumstances, there was probable cause to search a vehicle after a drug-dog's alert when the dog's success rate was 46%)."

The Court also noted that no records were introduced into evidence, but that the records were available to both parties and defense counsel used them when cross-examining the handler. As a result the failure to introduce the records was harmless. "The training and certification evidence, along with the evidence of Sella's successful field performance, provided the trial court an adequate basis to evaluate Sella's reliability under the totality of the circumstances analysis required by Harris. The trial court's finding that Sella is reliable is supported by competent substantial evidence and, based on that finding, the trial court properly determined that Sella's alert provided the DOT officers probable cause to search Appellant's vehicle."

Blalock v. State, 2012 WL 2924071 --So.32d—(Fla. 1st DCA, 7/19/12)

Evidence Suppression Was Error –
Officer Had PC to Arrest and Was In "Hot Pursuit"

The Strategic Police Operations Response Team (SPORT) was patrolling a 4 block area in marked vehicles because of several recent threats that an officer was going to be shot and killed. A call came in that shots were being fired in the area. Officer Diaz exited his vehicle and heard shots being fired. He did not know who was firing them or how many people were involved. He walked to the area from where he heard the shots and saw three males in the backyard of a residence. One of the males placed something behind the dog house in the backyard. Even though he did not have binoculars, there was enough ambient lighting from streetlights for Diaz to believe the item was a firearm "based on the way the individual held the object and removed it from his waistband." The men appeared to Diaz to be hiding, but he could not identify who put the item behind the doghouse and he did not investigate what the object was. He watched the three men leave this yard and walk across the street to a second yard.

Diaz returned to his vehicle and issued a BOLO with a description of the individuals. Sergeant Rodriguez, a member of SPORT, heard the BOLO and saw the defendant Williams walking across the street, holding onto his waistband, but noted that he "did not see a bulge in the waistband." Rodriguez exited his vehicle with gun drawn, and ordered Williams to stop. Williams did not stop. He saw Williams head for the front porch of a house, jump over some bushes, toss a firearm into the bushes, and

[5] As calculated by the DCA: 122 ÷ 258 = 0.4728

continue into the house. Rodriguez ordered Williams to come out of the home, "because he had a firearm concealed away from my vision, and I saw him toss it. And if it's a legal gun, why did he toss it?"

Williams exited the house, was taken into custody. He was confirmed to be a convicted felon and charged. Williams moved to suppress the gun and the trial court granted his motion. While finding the officer's testimony credible, it did not establish a predicate sufficient to justify a warrantless entry into a home to arrest Williams." The trial court found Rodriguez's command for Williams to come out to be a constructive entry into the home.

The 3rd DCA disagreed with the trial court. It found Rodriguez had probable cause to arrest Williams for carrying a concealed firearm, noting that after being told to stop, Williams took the gun (previously not in Rodriguez's view) and tossing it into the bushes before entering the residence. While normally a warrant would be required for a non-consent entry into a residence, "hot pursuit" is a recognized exception to the warrant requirement. The fact that a "hot pursuit" is but a brief moment is of no import. See: United States v. Santana, 427 U.S. 38 (1976). The order for Williams to exit the house was the functional equivalent of a hot pursuit entry to extricate him. The trial court's suppression order was vacated and the DCA entered an order denying it.

State v. Williams, 2012 WL 2814083, --So.3d—(7/11/12)

Red Light Violation Law Does Not Violate "Equal Protection" Clause

Arrington challenged his officer-observed running a red light conviction (F.S. 316.075) which resulted in a $158 fine and four points added to his driving record on the basis that the red light camera law (F.S. 316.0083) which prohibits the same conduct but provides less-severe penalties violated the Equal Protection clause of the Constitution by treating citizens differently for the same conduct. The trial court agreed, and the state appealed.

The 4th DCA noted that the test to determine if a statute satisfies the Equal Protection Clause is "whether it rests on some difference bearing a reasonable relation to the object of the legislation." Soverino v. State, 356 So. 2d 269, 271 (Fla. 1978). The DCA also stated that the differing penalties are actually applied to differently situated individuals. The individuals cited for red light violations under section 316.075, F.S. (observed by an officer) are ticketed as the "driver" of the car. However, individuals cited for red light violations under section 316.0083, F.S. (observed by a red light camera) are sent a notice as the "owner" of the car. Because no one observes the driver, the "owner" of the car is sent a notice, and the statute then allows the "owner" to rebut that presumption. For this reason, no points are assessed against the "owner" because someone else may have been driving the car. The court stated that points on one's license are personal, because they apply to the licenses of people who violate traffic laws and they are not assessed against the vehicles involved in the violations. Due to section 316.0083, F.S.'s focus on a vehicle's "owner," rather than the actual "driver," it was rational for the legislature to exclude the imposition of additional points on the owner's license. Because points are "personal," the court argued that it would not be reasonable for

the legislature to impose them based on a red light violation captured by a camera as there is no law enforcement officer present to determine who actually operated the vehicle. There is therefore a rational basis for the differing penalties between the two statutory provisions, and the court reversed the trial court's order that section 316.075 was unconstitutional.

State v. Arrington, 2012 WL 3023203, -- So.3d -- (Fla. 4th DCA, 7/25/2012)

Defendant Cannot Be Convicted of Resisting Officer Without Violence Done In Same Episode As Resisting Officer With Violence

All of the conduct in this incident occurred at the same residence, to the same deputy, with no real temporal break. Law enforcement was called to a scene where paramedics were assisting the defendant's aunt. The defendant kept interfering and the deputy "had to physically remove Davilla from the home." The altercation continued between the deputy and Davilla until Davila was carried out and put into a police car. Davilla was convicted of both Resisting With and Resisting Without by reason of this incident. He appealed, contending the convictions constituted double jeopardy.

The 5th DCA reversed the conviction for Resisting Without after finding all actions occurred as a single episode. "If the offenses occurred as part of one criminal episode or transaction, then separate convictions for both resisting with and without violence are prohibited because the lesser offense of resisting without violence has elements which are subsumed by the greater offense of resisting with violence. Swilley v. State, 845 So. 2d 930, 933 (Fla. 5th DCA 2005); see § 775.021(4)(b)3., Fla. Stat. (2011). In making this fact-intensive determination, courts examine "whether there are multiple victims, whether the offenses occurred in multiple locations, and whether there has been a 'temporal break' between offenses." Staley v. State, 829 So. 2d 400, 401 (Fla. 2d DCA 2002)."

Davilla v. State, 2012 WL 2936072, --So.3d—(7/20/12)

"Stand Your Ground" – If Pretrial Motion For Immunity Is Denied, Party May Submit "Stand Your Ground" As Affirmative Defense In Criminal Trial

Mederos petitioned for a writ of prohibition following denial of his motion to dismiss an information charging him with aggravated battery with a deadly weapon, claiming immunity under Florida's "stand your ground" law. (§§ 776.012, 776.031-.032, Fla. Statutes (2009)).

Mederos, a senior special agent with Homeland Security (ICE), was with Javier Ribas (a special agent with the Bureau of Alcohol, Tobacco, and Firearms) when a pre-game[6] verbal altercation with Derek Smith (victim) became physical. As petitioner and his associates made their way to the stadium, Ribas and Derek Smith exchanged verbal insults. Words escalated to a physical confrontation. Mederos intervened, drawing his service-issued knife and stabbing Smith in the palm of the hand. Campus police arrived and Meeros was arrested and charged. Not

[6] FSU versus University of Miami football game in Tallahassee.

surprisingly, all parties admitted consuming alcoholic beverages prior to the altercation.

After a hearing the trial court denied the motion to dismiss. Even though Mederos maintained he was acting in self-defense and defense of Ribas in protecting him and Ribas against a forcible felony, the trial court found Mederos had not established facts by a preponderance of the evidence to support the immunity as a matter of law. The court found that Mederos had not proved by a preponderance of the evidence that his fear of great bodily harm was reasonable. As stated by the trial court:

> *Defendant, along with Mr. Ribas and Mr. Mesa, was walking toward the football game, after an afternoon of tailgating and drinking some beer, when they began engaging in banter with fans from the opposing team. This was initially friendly. At some point an altercation erupted between Mr. Ribas and Mr. Smith. Defendant subsequently became involved in the altercation with Mr. Smith.*
>
> *The testimony from the various witnesses describing what occurred on the day in question contradicts wildly. Mr. Ribas, Mr. Mesa, and Mr. Mederos testified that Mr. Smith strangled Mr. Ribas. However, Mr. Rogers, Ms. Rinehart, Mr. Honeysuckle, and Mr. Baar testified to only seeing a shoving match between Mr. Smith, Mr. Mederos and Mr. Ribas. Likewise, Mr. Smith denied choking Mr. Ribas. The photograph of Mr. Ribas' throat taken shortly after the incident showed red markings, consistent with trauma. Dr. Wright also testified that the redness on the throat was consistent with strangulation. However, he conceded on cross examination that the injury depicted could have come from repeated open-handed shoves to the throat.*
>
> *Based on all the testimony and the evidence, the Court finds that there was a physical altercation, which led to strangulation-type pressure being applied to Mr. Ribas' throat. However, given Mr. Ribas' testimony of his extensive training as a U.S. [Air] Marshall and then as an ATF agent, the fact that he was able to assist the victim with first aid, and the conflicting testimony of other witnesses, the Court does not fully credit Defendant's and Mr. Ribas' claim as to the severity of the attack or that Mr. Ribas was utterly unable to defend himself.*
>
> *Regardless of the extent of attack on Mr. Ribas, the testimony of the people who saw the "strangulation" established that Defendant thwarted the continued attack on Mr. Ribas and pulled him from the danger. It was subsequent to removing Mr. Ribas from imminent danger that Defendant continued his altercation with Mr. Smith, ultimately cutting Mr. Smith with his officer's knife. Neither Mr. Smith nor any of his companions had weapons: only Defendant was brandishing a knife.*
>
> *Once the attack on Mr. Ribas was over and he was removed from the zone of imminent danger, the putative forcible felony was over. At this point any right that Defendant had to use deadly force in defense of Mr. Ribas terminated as to the forcible felony. [Citation omitted.] Florida Statute sections 776.012, 776.013, and 776.031, when read together, allow for the use of deadly force only to prevent the commission of a forcible felony or for self-defense or defense of another, when the person reasonably believes it is necessary to prevent death or great bodily harm.*
>
> *Once the forcible felony was terminated, for immunity to attach, Defendant's use of deadly force must have been based on a reasonable fear of death or great bodily harm to himself or Mr. Ribas. The Court finds that Defendant has not proved by a preponderance of the evidence that his fear of great bodily harm was*

reasonable. Mr. Smith was intoxicated and unarmed and was throwing punches. Defendant, a Federal law enforcement officer, had been through Federal training on hand-to-hand defensive tactics. Defendant could have defended himself against further aggression without using a deadly weapon. Defendant's contention that he and his friends were outnumbered by the crowd does not change this finding. Defendant claims that the crowd was hostile and that he feared they would join Mr. Smith in the altercation. However, Defendant offers nothing more than his conclusory testimony that the crowd was egging Mr. Smith on, to establish that he felt the crowd would join in. Further, this claim is contradicted by the testimony of Ms. Rinehart, Mr. Honeysuckle, and Mr. Rogers, who testified that the crowd was not particularly hostile.

Moreover, Defendant contends that he did not use his weapon in aggression but merely had it in his hand as he was defending himself from Mr. Smith's punches. The physical evidence of Mr. Smith's injury indicates otherwise. The laceration that Defendant inflicted to Mr. Smith's hands was on the palm and was very deep. This is inconsistent with a defensive wound inflicted from a forceful jab with a knife. The physical evidence lends credence to Mr. Honeysuckle's testimony that Defendant was using the knife in an offensive manner rather than merely holding it up in a defensive posture.

The 1st DCA acknowledged the trial court's observation that the evidence related to the incident "contradicts wildly" and found competent substantial evidence to support the trial court's finding that immunity would not attach. However, Moderos may raise as an affirmative defense at trial the clam that he cannot be convicted, given the "Stand Your Ground" law. (Peterson v. State, 983 So.2d 27, 29–30 (Fla. 1st DCA 2008), approved in, Dennis v. State, 51 So.3d at 462–64; Darling v. State, 81 So.3d 574 (Fla. 3d DCA 2012).).

Mederos v. State, 2012 WL 3238759, --So.3d—(8/10/12)

60 Year Sentence For Juvenile Unconstitutional Under Graham

Adams, 16 years and 10 months old when he committed acts resulting in his conviction for attempted first-degree murder, armed burglary, and armed robbery, was sentenced to prison for a total of 60 years, with an aggregate minimum mandatory of 50 years. He appealed several issues, but the 1st DCA determined only his Graham[7] argument warranted discussion.

Defense counsel at sentencing argued Adams should be sentenced to no more than 30 years to have a chance to get his life back. He did not specifically argue a longer sentence would violate Graham, but it was raised in a rule 3.800(b)(2) motion. The trial court denied the motion on the basis that Adams had not been sentenced to life without parole or to such a lengthy sentence that is was a de facto life sentence.

The 1st DCA indicated it would like to affirm the sentence based on the reasoning in Henry v. State, 82 So.3d 1084 (Fla. 5th DCA, 2012) where an aggregate 90 year sentence was affirmed but acknowledged its own progeny of cases and found that

[7] Graham v. Florida, 130 S.Ct. 2011 (2010).

Graham applies not only to life without parole sentences but to lengthy sentences amounting to de facto life sentences, and that a "de facto life sentence" is one that exceeds the defendant's life expectancy. While recognizing the Florida Supreme Court has an opportunity to clarify the myriad of issues, the DCA is compelled to follow its own rulings. In the case at bar, the defendant will have to serve at least 58.5 years in prison, meaning he won't be released until he is nearly 76 years old. This exceeds his life expectancy. The sentence is a de facto life sentence and unconstitutional under the DCA's construction of Graham.

Since the 1st DCA's ruling directly conflicts with the 5th DCA's Henry case, it certified two questions to the Supreme Court: (1) Does Graham apply to de facto life sentences? (2) At what point does a term of years sentence become "de facto life"? Adams' case was affirmed in part, reversed in part and remanded for new sentencing.

Adams v. State, 2012 WL 3193932, -- So.3d—(8/8/12)

Constitutional "Abandonment" Not Always The Same As "Abandonment" Under Property Law; Resisting Officer Without Violence Not Chargeable When Encounter Is Consensual

An officer was doing a "drive-by" at a location where three young males were allegedly involved in narcotics sales. The officer witnessed J.W. walk into the front yard of a house and hand a black pouch to another individual who was later identified as Locke. Locke was seen placing the pouch underneath the platform-raised house. The officer exited his police vehicle and asked J.W. and Locke to "sit down on the porch." The two complied, however, J.W. soon got up and walked to the front door, opened it and attempted to go into the house. An occupant of the house was trying to deny J.W. access into the house, and the officer finally grabbed J.W. by the shirt, and "pulled him out of the house and handed him off to a second officer on the scene." The officer seized the pouch, searched it, and discovered cocaine. J.W.'s defense counsel moved for a dismissal of the charge of resisting an officer without violence, and to suppress the cocaine discovered in the pouch, arguing the warrantless search of the black pouch violated the Fourth Amendment. They contended the pouch was deliberately placed under the house and J.W. had a reasonable expectation of privacy in its contents. The State contended there was no such violation because the pouch was abandoned and the abandonment was not the product of police illegality. The court denied the suppression motion without providing a basis for its ruling.

The 3rd DCA reviewed abandonment under property law concepts versus abandonment for Fourth Amendment purposes. It stated the question as not whether J.W. abandoned the pouch under property law analysis, but whether by actions or words he abandoned his reasonable expectation of privacy in its contents. The DCA determined J.W. voluntarily gave to pouch to Locke and relinquished "possession, custody and control over the object and its contents." Further, the DCA noted there was no evidence to establish J.W.'s standing to contest the search and seizure, having failed to establish at the hearing that he had (or maintained) a reasonable expectation of privacy in the pouch after he voluntarily relinquished it to Locke. The trial court was found to have properly denied the suppression motion.

With regard to dismissing the resisting without violence charge, the DCA noted that the involved officer characterized the encounter with J.W. as a consensual encounter because he lacked reasonable suspicion to conduct an investigatory stop. The DCA found that since the officer did not have a well-founded suspicion of criminal activity, the State could not establish the elements for resisting an officer without violence. The trial court's order denying J.W.'s motion to dismiss this charge was reversed and remanded for dismissal of this count.[8]

J.W. v. State, 2012 WL 3101521, --So.3d--, (Fla. 3rd DCA, 8/1/12)

A Toy Gun Does Not Support 10-20-LIFE "Firearm" Enhancement

Testimony at trial indicated Cesar and another man robbed a Subway store. The Subway employee said both men "had guns." However, the testimony also suggested Cesar had a toy gun. The State introduced no evidence to contradict this observation. While affirming the conviction of Cesar on other challenges, and finding that the evidence presented was enough to support Cesar's conviction for robbery under a principal theory (see: Demps v. State, 649 So.2d 938 (Fla. 5th DCA 1995)), the evidence was not enough to support a 10-20-Life mandatory minimum sentence, citing Freeny v. State, 621 So. 2d 505 (Fla. 5th DCA 1993)). The conviction was affirmed but the sentencing enhancement was vacated. "A toy gun does not fit within the definition of a firearm under the 10-20-Life statute." (Citing Coley v. State, 801 So.2d 205 (Fla. 2nd DCA, 2001) which held a BB gun is not a "firearm" under the 10-20-Life statute.)

Cesar v. State, 2012 WL 3328387, --So.3d—(Fla. 4th DCA, 8/15/12)

OK to Detain Non-Resident During Consensual Search of Residence

After receiving an anonymous tip that drugs and firearms were being sold within an apartment, detectives conducted a "knock and talk" and received written consent from the apartment tenant to search the apartment. Wilburn, a visitor to the apartment was asked to step outside and was moved to the sidewalk, about five feet from the apartment door. The escorting detective asked Wilburn for identification, and he reached into his pocket, but then withdrew his hand quickly. In response to this "curious" action, the detective instructed Wilburn to face the building and again asked for identification. Wilburn reached in and removed his driver license from his right front pocket. Unfortunately for Wilburn, a clear "Ziploc" baggie with crack cocaine rocks came out of the pocket and fell to the ground. He was arrested and moved to suppress the cocaine. The trial court granted the motion, and the State appealed.

The Fourth DCA addressed whether police can legally temporarily detain a visitor to a premises that is being searched by reason of consent. It compared the current case to the facts of State v. Yule, 905 So.2d 251 (Fla. 2nd DCA, 2005) where a

[8] The State had cross-appealed, arguing the trial court improperly excluded the officer's testimony regarding conversations with informants that would have provided reasonable suspicion. However the state failed to preserve the issue at the trial court level, so the State was barred from raising it on appeal.

visitor in a premises being subjected to a "protective sweep" was asked to stay in the living room, and then was asked if he had any weapons on him. When Yule lifted his shirt, he exposed drug paraphernalia tucked in his pants. The 2nd DCA in Yule approved the detention for safety purposes.

The 4th DCA characterized the detention of Wilburn as also being for safety purposes while the warrantless search by consent was being conducted. The trial court's grant of the motion to suppress was reversed.

State v. Wilburn, 93 So.3d. 1115 (Fla. 4th DCA, 7/25/12)

Battery On Law Enforcement Officer Requires Officer to Have Been Engaged In "Lawful Performance of Duties"

As related by the court, here are the facts:

> At approximately 10:30 a.m. on June 24, 2009, Mr. Burney walked into a convenience store connected to a gasoline station. The store manager knew Mr. Burney as "Skip." When Mr. Burney entered the store, the manager was talking with a friend who happened to be an off-duty police officer. The officer was not in uniform. There may have been a customer or two in the store, but they did not testify, and there is no evidence that Mr. Burney had any significant conversations with any of them.
>
> It is apparent that Mr. Burney has some psychological issues. When he entered the store, he was ranting about a woman who was pumping gasoline. Inside the store, Mr. Burney continued his tirade, using profanity, but he did not direct his invectives to anyone in particular. Mr. Burney then approached the off-duty officer with apparent knowledge that the man was a law enforcement officer. He spoke profanely to the officer, who told Mr. Burney that there was no reason to speak in such a manner. The officer's comments seem only to have provoked Mr. Burney, who continued with his verbal barrage and then left the store.
>
> While continuing to yell at everyone within earshot, Mr. Burney got into his truck. He drove off of the property but returned almost immediately. When he returned, he reentered the store and confronted the off-duty officer, placing his own face nose-to-nose with the officer's face. When Mr. Burney's nose made contact with the officer, the officer pushed Mr. Burney back with his left hand just as Mr. Burney struck the coffee cup in the officer's right hand, spilling hot coffee all over the officer. At that point, the officer arrested Mr. Burney for disorderly conduct and battery.

Burney was convicted of battery on a law enforcement officer and he appealed. The Second DCA focused on whether the officer was engaged in the performance of a lawful duty." While noting that sometimes an off-duty officer can still be engaged in such duties (e.g. working as store security guard and apprehending a shoplifter), other times, an officer is simply a citizen. In this case, the officer was simply a customer at a convenience store. His engagement with Burney was deemed by the court to be as a private citizen as he tried to calm Burney down. There was no

evidence that Burney had engaged in criminal activity such as would support a conversion of the officer from private citizen to law enforcement officer. The DCA determined the battery was simple battery rather than battery on a law enforcement officer and reversed/remanded to the trial court.

Burney v. State, 93 So.3d 510 (Fla. 2nd DCA, 7/27/12)

Conspiracy Not Proven In Simple Buy-Sell Cocaine Deal Agreement

Robert Adams asked Major Moten to find out if Davis had cocaine for sale. After confirming that the he did have cocaine to sell, Moten gave Adams Davis' telephone number. Adams and Davis then planned, by phone, two one-kilogram cocaine transactions on consecutive days. They completed the second transaction. Adams later sold the cocaine to a third person. Davis was found guilty of one count of trafficking in cocaine and of conspiracy to traffic in cocaine. On appeal, he argued the evidence was insufficient to prove conspiracy. The 5th DCA agreed.

Conspiracy occurs when a person "agrees, conspires, combines, or confederates with another person to commit any act prohibited by" the applicable offense. (F.S. 893.135(5).) The conspiracy charge in this case did not show and agreement between Davis and any person to commit the same act of selling, purchasing, delivering, or possessing cocaine. In the 5th DCA's opinion, the evidence simply established the planning and execution of a buy-sell transaction between Davis and Adams. In such transactions, conspiracy usually does not exist because the buyer and seller each intend to commit a different criminal offense. As such, there is no conspiracy to pursue a common goal. The evidence at trial demonstrated that Davis intended to possess and then sell and deliver cocaine, and that Adams intended to purchase and then possess the cocaine. There was no proof that Davis agreed with Adams that Adams would resell the cocaine after their transaction. While there was sufficient proof to support the trafficking conviction, the DCA reversed the conspiracy conviction.

Note: The Court acknowledges that this ruling is incompatible with a previous case from the First District Court of Appeal (DCA). In Pallin v. State, 965 So.2d 1226 (Fla. 1st DCA 2007), the 1st DCA reasoned that the buyer and sellers shared a common objective to purchase or possess cocaine because the sellers had to purchase and possess the cocaine before the buyer could purchase or possess a smaller portion of it and that an agreement to buy and sell drugs would support a conspiracy conviction against the buyer or the seller. It certified conflict with the 1st DCA, meaning the Florida Supreme Court will now have an opportunity to resolve the conflict if it chooses to do so.

Until this conflict is resolved, investigators may face different prosecution determinations on this issue. Prosecutors operating in the counties making up the 5th DCA (Brevard, Citrus, Flagler, Hernando, Lake, Marion, Orange and Osceola, Putnam, St. Johns, Seminole, Sumter and Volusia) must follow the Davis opinion. Prosecutors operating in the counties making up the 1st DCA (Alachua, Baker, Bay, Bradford, Calhoun, Clay, Columbia, Dixie, Duval, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Okaloosa, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton and Washington) must follow the Pallin decision. Investigators working in counties falling within the other DCAs will have to

determine with their prosecutors whether they will follow Davis or Pallin approach to this type of conspiracy since they are not bound to follow one or the other. Please consult with your agency legal advisor to determine the impact of the impact of the Pallin and Davis cases on your region. For now, there are two conflicting standards applied to these conspiracies in the state, and your investigative outcome may depend on what part of the state you are in.

Davis v. State, 2012 WL 3044260, --So.3d--, (Fla. 5th DCA, 7/27/2012)

No "Resisting Without" If Officer Lacks Adequate Basis For Temporary Detention

An officer was dispatched to check out a suspicious vehicle. Upon arrival he saw three men standing around the parked car. Approaching the group, he smelled a strong odor of cannabis coming from the area where the men were standing. He asked the three for identification. Two produced ID's but A.T. did not. When advised he would be arrested if he failed to produce identification, A.T. turned to walk away saying, "I don't need to give you my ID." The officer grabbed him by the arm and he pulled away, continuing to struggle and pull away as the officer attempted to handcuff him.

At the end of the State's case the defense moved to dismiss the charge of resisting and officer on the basis that the officer had observed nothing to give him reason to detain the three men and that the encounter was consensual, so that A.T. was free to walk away. The judge did not dismiss the charge. A.T. was found delinquent for resisting an officer (in the execution of an investigatory detention), and the appeal followed.

The 4th DCA found that the State was required to prove that the officer had a reasonable suspicion of criminal activity to support an investigative detention. It found that the mere odor of marijuana emanating from the general area of the three men, which was the sole basis of the officer's belief he could detain them for investigation, was not enough to create a reasonable suspicion in this case. The officer did not see them involved in any crime. The men did not run away upon the officer's approach. The DCA referenced the holding in Robinson v. State, 976 So.2d 1229 (Fla. 2nd DCA 2008) wherein the 2nd DCA found that standing with a group of individuals surrounded by the odor of burned marijuana was insufficient to supply more than a "mere suspicion" that one was in possession of marijuana, and was not enough to justify a stop. The 4th DCA ruled that the mere odor of marijuana in the area in which A.T. and the other two were standing did not give rise to a reasonable suspicion to detain A.T. so his refusal to provide ID and subsequent actions did not constitute resisting an officer without violence.

A.T. v. State, 93 So.3d 1159, (Fla. 4th DCA, 8/1/2012)

End of DCA Summaries

(Compiled by David Margolis, FDLE Regional Legal Advisor, Orlando Regional Operations Center)

Update 12-01
Case: May v. State, 37 Fla. L. Weekly D122b (Fla. 4th DCA 2012).
Date: January 31, 2012
Subject: **The circumstances under which an officer can stop a vehicle based on a reasonable suspicion of doctor shopping**

FACTS: The DEA was investigating a "cash only" pain clinic for potential pharmaceutical crimes. A local narcotics detective with 3.5 years' experience observed the defendant exit the clinic. A vehicle was waiting for the defendant. She entered the rear passenger seat, and the car drove away. The detective followed the car, and ultimately observed a prescription bottle being passed from the front seat to the back. The detective stopped the vehicle because she believed she had just witnessed an illegal sharing of pills. However, the detective only saw the bottle – not the pills – and the defendant wasn't holding anything when she left the clinic. The defendant filed a motion to suppress, arguing that the vehicle was illegally stopped.

RULING: An officer has a reasonable suspicion of illegal pill sharing when (1) the officer observes a pill bottle change hands in a vehicle, (2) an occupant of the vehicle was just observed in a pain clinic that is under investigation, and (3) the officer explains how those observations are consistent with "pill sharing" or "sponsorship." Here, the detective met all three criteria. Therefore, the stop was valid.

DISCUSSION: The Court reiterates the principle that traffic stops are valid when supported by a reasonable suspicion of criminal activity. In this case, the Court found a reasonable suspicion of illegal pain sharing. This finding was based on a combination of factors. First, a prescription pill bottle was passed around inside a vehicle; the officer explained how this was consistent with "sharing of pills," an illegal activity. Second, a passenger in the vehicle had just exited a cash only pain clinic, creating a good possibility that she acquired controlled substances while inside. That was especially likely in this case, because the clinic was under investigation for pharmaceutical crimes. The Court distinguishes this case from its earlier holding in Benemerito v. State, 29 So.3d 367 (Fla. 4th DCA 2010).

In Benemerito, the Court found no reasonable suspicion of a hand to hand drug deal where the officer observed a hand to hand interaction between drivers in a Walgreens parking lot, but never observed a specific item (i.e. drugs or money) change hands. Unlike Benemerito, this case involved the sharing of pills, rather than a hand to hand sale. In pill sharing cases, no money changes hands; therefore, the officer's failure to observe money changing hands is irrelevant. The Court also found it significant that the defendant was seen at a suspicious cash only pain clinic, whereas Benemerito was seen at a reputable pharmacy.

Case Update 12-02

Case: Howes v. Fields, 132 S. Ct. 1181 (2012).
Date: February 21, 2012
Subject: **The circumstances under which an inmate must be given *Miranda* warnings prior to questioning**

FACTS: A corrections officer escorted a state prisoner from his cell to a conference room, where two armed deputies asked him about crimes that were unrelated to the inmate's incarceration. The deputies never threatened the inmate or restrained him in any way. The interview lasted approximately six hours, during which the conference room door remained open for part of the time. On multiple occasions, the prisoner was told he was free to leave and return to his cell. Although the prisoner indicated that he no longer wanted to talk to the deputies, he never asked to return to his cell.

RULING: It is unnecessary to read *Miranda* warnings to an inmate before asking him about events unrelated to his incarceration, as long as (1) the interview occurs in a well-lit, non-intimidating room, (2) the inmate is offered food or water, (3) he is not threatened or physically restrained, and (4) he is clearly advised that he can end the interview at any time.

DISCUSSION: *Miranda* warnings must be read prior to starting a "custodial interrogation." Although a prison may seem like a "custodial" environment, interviews are only custodial when a reasonable person would not feel free to end the interview. In other words, inmate interviews, just like all other interviews, are custodial only when a suspect reasonably feels compelled to remain with his interrogators. In this case, the inmate was taken to a conference area that was fairly open and well lit. There, the inmate was given food and water, and he was neither handcuffed nor shackled. Moreover, the suspect was told at least twice that he could end the interview and return to his cell if he so desired. In these circumstances, a reasonable person would feel that he could end the interview whenever he wanted. Therefore, the interrogation was non-custodial, and no *Miranda* warnings were needed.

Although the Court held that this interview was non-custodial, the Court emphasized that jailhouse interviews may still require *Miranda*, depending on how the interview is conducted. If the inmate is never advised that he can end the interview, then *Miranda* warnings will almost certainly be needed. Likewise, *Miranda* should also be read to an inmate who is handcuffed or otherwise restrained.

Case Update 12-03
Case: Ward v. State, 37 Fla. L. Weekly D1187 (Fla. 4th DCA, May 16, 2012).
Date: May 16, 2012
Subject: **Parent's Authority to Consent to Search An Adult Son's Bedroom**

FACTS: An adult named Ward lived with his mother at a house owned by her. When the police knocked on the door, the mother answered. She consented to a search of her home for drugs.

The police wanted to search Ward's bedroom, and his mother specifically gave them permission to do so. The mother told the police that she had "regular access" to Ward's bedroom, mostly for the purpose of making his bed and doing his laundry. Once in the bedroom, the officers found a box, hidden behind some clothes. Drugs were found inside the box. The drugs were seized, and Ward was charged with trafficking due to the quantity.

Ward moved to suppress the seizure of the drugs, arguing that his mother lacked the authority to consent to a search of his bedroom. The trial court disagreed, and ruled in favor of the State. However, Ward appealed his conviction, and the appellate court ruled in his favor.

RULING: No one can validly consent to a search of someone else's personal property, unless the person giving consent actually uses or exercises control over that particular property.

DISCUSSION: "Consent" is a well-established exception to the warrant requirement. Here, Ward's mother could certainly consent to a search of a home that she owns and in which she resides. Arguably, she may even have the authority to consent to a search of her adult son's bedroom, when she "regularly accesses" the room. However, she was not authorized to consent to a search of the box that was found in the room. The box belonged exclusively to Ward, and there is no evidence that his mother ever used it, opened it, or touched it. Because the box did not belong to the mother, and because she never interacted with it, she could not consent to a search of its contents. The police exceeded the scope of the mother's consent when the drugs were discovered and the drugs should have been suppressed.

Case Update 12-04
Case: State v. Glasco, 37 Fla. L. Weekly D1414 (Fla. 5th DCA 2012).
Date: June 15, 2012
Subject: **Search of a suspect's cellphone incident to arrest**

FACTS: The defendant was lawfully arrested at his home on felony drug charges. After the defendant was handcuffed, but before he arrived at the jail, police found a cellphone on the defendant's person. After the defendant arrived at the police station, the officers examined the phone and read the defendant's text messages.

The officers did not have a search warrant for the phone. In addition, the officers admitted that they had no probable cause to believe that any contraband would be found on the phone and indicated that at the time they searched the phone, they were not afraid that the defendant would erase or destroy its contents.

The defendant moved to suppress the cellphone evidence, arguing that the police could not search the phone without a search warrant, consent, or at least probable cause to believe that relevant evidence would be found on the phone. The trial court agreed with the defense and suppressed the evidence. However, the appellate court reversed.

RULING: When a suspect is lawfully arrested some place other than a vehicle, police are allowed to seize and search a cellphone found on the suspect during the arrest. In those circumstances, the officers do not need a search warrant, consent, or any other justification for the search as it is a type of "search incident to a lawful arrest."

DISCUSSION: For almost forty years, the Supreme Court has held that officers, when making any lawful arrest, have the right to search any containers found on the arrestee. ("Search incident to a lawful arrest") A cellphone is like a briefcase or a notebook, and the law is clear that those items can be examined without a warrant when they are found on a person who is lawfully arrested. Although the Supreme Court recently placed some restrictions on searches of vehicles, those issues do not apply in this case because the phone was found on the suspect's person while he was at home. Unfortunately, this case does not indicate whether officers can search a cellphone found on arrestees if the person arrested was the occupant of a car.

> *NOTE: The Florida Supreme Court is currently reviewing the issue of warrantless cellphone searches incident to a lawful arrest. Until the Florida Supreme Court reaches a ruling, the law in Glasco is valid and binding across the state. However, the law on this topic is in flux, and could be changed at any time.*

Case Update 12-05
Case: Davis v. State, 2012 WL 3044260 (Fla. 5th DCA 2012).
Date: July 27, 2012
Subject: **Conspiracy to Commit Drug Trafficking**

FACTS: The defendant, Davis, was charged with trafficking in cocaine and conspiracy to traffic in cocaine. The evidence showed that the defendant agreed, on the phone, to sell two kilograms of cocaine to someone named Adams. The two kilos were to be sold on separate days. Ultimately, the defendant completed one of the sales, but not the other. The State charged the defendant with trafficking in cocaine (based on the sale he completed) and conspiracy to traffic (based on the sale he agreed to but did not complete). The defendant was convicted on both counts, and he appealed the conspiracy conviction.

RULING: A defendant cannot be charged with conspiracy to traffic based on the defendant's agreement to sell drugs to (or buy drugs from) another person. A conspiracy charge requires the defendant and the co-conspirator to agree to participate in the same type of transaction, i.e. both of them agree to sell, or both of them agree to buy.

DISCUSSION: According to the 5th DCA, the crime of conspiracy requires an agreement between two or more persons. In a simple buy-sell transaction, one person "agrees" to sell, while the other "agrees" to buy. However, the conspiracy statute was designed to punish people who agree to commit the same type of activity. As a result, a defendant cannot be charged with conspiracy simply because he agrees to sell and someone else agrees to buy. If the defendant and

the co-conspirator agree to work together to sell (or deliver, or purchase) the drugs, *then* the defendant can be charged with conspiracy.

NOTE: The Court acknowledges that this ruling is incompatible with a previous case from the First District Court of Appeal (DCA). In Pallin v. State, 965 So.2d 1226 (Fla. 1st DCA 2007), the 1st DCA reasoned that the buyer and sellers shared a common objective to purchase or possess cocaine because the sellers had to purchase and possess the cocaine before the buyer could purchase or possess a smaller portion of it and that an agreement to buy and sell drugs would support a conspiracy conviction against the buyer or the seller. It certified conflict with the 1st DCA, meaning the Florida Supreme Court will now have an opportunity to resolve the conflict if it chooses to do so.

Until this conflict is resolved, investigators may face different prosecution determinations on this issue. Prosecutors operating in the counties making up the 5th DCA (Brevard, Citrus, Flagler, Hernando, Lake, Marion, Orange and Osceola, Putnam, St. Johns, Seminole, Sumter and Volusia) must follow the Davis opinion. Prosecutors operating in the counties making up the 1st DCA (Alachua, Baker, Bay, Bradford, Calhoun, Clay, Columbia, Dixie, Duval, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Okaloosa, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton and Washington) must follow the Pallin decision. Investigators working in counties falling within the other DCAs will have to determine with their prosecutors whether they will follow Davis or Pallin approach to this type of conspiracy since they are not bound to follow one or the other. Please consult with your agency legal advisor to determine the impact of the impact of the Pallin and Davis cases on your region. For now, there are two conflicting standards applied to these conspiracies in the state, and your investigative outcome may depend on what part of the state you are in.

Case Update 12-06
Case: Smith v. State, 37 Fla. L. Weekly D1980 (Fla. 1st DCA 2012).
Date: August 17, 2012
Subject: Probable cause to believe that pills are contraband

FACTS: A deputy was patrolling a residential neighborhood when he saw an unconscious man lying next to a truck. The deputy shined his flashlight at the man and asked for identification. The man stood up and identified himself as Smith, but he was acting strangely and, according to the deputy, "appeared to be under the influence of something." As Mr. Smith retrieved his driver's license from the truck, the deputy noticed a small, clear plastic bag containing several white pills on the driver's seat. It appeared that Smith was trying to hide the pills. The deputy told Mr. Smith to step aside, and then reached into the vehicle and picked up the bag. Smith later admitted that the pills were hydrocodone and that he lacked a valid prescription. Smith was charged with trafficking, and the trial court denied his motion to suppress the pills. However, the appellate court reversed, and held that the pills should have been suppressed.

RULING: Before an officer can use the "plain view" exception to seize a bag of pills, the officer must have sufficient reasons for believing that the pills contain a controlled substance.

DISCUSSION: The deputy's initial interaction with Mr. Smith began as a consensual encounter. However, when the deputy saw the pills in the truck and told Mr. Smith to step aside, the deputy's "show of authority" escalated the encounter into an investigatory detention. Like all investigatory detentions, this one required a reasonable suspicion that Smith had committed a crime.

In this case, the State tried to argue that the defendant's strange behavior, including his effort to hide the pills, created a reasonable suspicion that the pills consisted of controlled substances. Unfortunately, this evidence was not enough. The defendant made no admissions regarding the nature of the pills (before they were seized); the pills were not contained in a labeled bottle; the pills had no markings on them which would aid in their identification; and the deputy testified that people frequently use similar plastic bags to carry lawfully prescribed medications.

The State also argued that the deputy could seize the pills because he saw them in plain view. However, the Court held that even if the pills were seen in "plain view," the pills could not be seized unless the deputy had probable cause to believe the pills contained a controlled substance. The Court distinguishes this case from an earlier opinion: Keller v. State, 946 So.2d 1233 (Fla. 4th DCA 2007). In Keller, a "plain view" seizure was upheld where a pill bottle was seized from a pedestrian who publicly displayed the bottle. Unlike Mr. Smith, Keller was sitting outside a pharmacy known for distributing narcotics; she admitted that the bottle contained hydrocodone; and the bottle was labeled as a prescription issued to someone other than Keller. In this case, however, the deputy lacked an adequate basis for believing that the pills contained any controlled substances; therefore, the incriminating nature wasn't "immediately apparent," and the pills should have been suppressed as an unlawful seizure. Note: Most scheduled pills will have a manufacturer's imprint on them. Below is a sample photo of a hydrocodone pill showing an imprint. If a pill is seen in open view, and the imprint can be associated with a controlled substance, the officer may be able to seize the pill. In that scenario, the arrest report should carefully document why the officer believed the pill contained a controlled substance.

---End of Summary—

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.

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. The decision *may* be treated as controlling throughout the State if no other DCA has given its opinion on that particular issue of law. 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.

FDLE General Counsel Michael Ramage, October, 2012