Florida Case Law Update For Law Enforcement Legal Advisors And Their Agencies

(75 Or So Florida Cases of Interest From The Past Year)

(As Presented To
The Florida Association of Police Attorneys--Thursday, October 7, 2010_

Michael Ramage, General Counsel
Florida Department of Law Enforcement

(850) 410-7676
michaelramage@fdle.state.fl.us

There are many cases of interest to Florida law enforcement announced in the past year that were not included in this summary. The cases included herein were selected to highlight ongoing issues and developments in Florida criminal law, and this summary should not be considered a complete review of all law enforcement cases of interest.

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

Special Thanks to the Office of Florida Attorney General Bill McCollum and "Criminal Law Alert" Editor Carolyn Snurkowski for their regular publication of "Criminal Law Alerts" from which many of these summaries are derived. A special thanks to Tallahassee Police Legal Advisor Rick Courtemanche for sharing his periodic TPD case updates, too.

U.S. SUPREME COURT:

USSC endorses warrantless entry into house under "emergency aid" exception.

Michigan v. Fisher, 09-91. Decided December 7, 2009. By a 7-2 vote, the Court summarily reversed a Michigan Court of Appeals decision that upheld the suppression of evidence on Fourth Amendment grounds. Officers were called to the residence because the subject was acting crazy. Upon their arrival, the officers found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fence posts along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. (It is disputed whether they noticed this immediately upon reaching the house, but undisputed that they noticed it before the allegedly unconstitutional entry.) Through a window, the officers could see respondent, Jeremy Fisher, inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.

The officers knocked, but Fisher refused to answer. They saw that Fisher had a cut on his hand, and they asked him whether he needed medical attention. Fisher ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant. Officer Goolsby then pushed the front door partway open and ventured into the house. Through the window of the open door he saw Fisher pointing a long gun at him. Officer Goolsby withdrew.

Fisher was charged under Michigan law with assault with a dangerous weapon and possession of a firearm during the commission of a felony. The trial court concluded that Officer Goolsby violated the Fourth Amendment when he entered Fisher's house, and granted Fisher's motion to suppress Officer Goolsby's statement that Fisher pointed a rifle at him.

Relying on *Brigham City v. Stuart*, 547 U.S. 398 (2006), the Court held that the search was proper under the "emergency aid" exception, under which officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."

Michigan v. Fisher, 09-91, 130 S.Ct. 546; 12/7/09

Miranda Warnings Sufficiently Advised Defendant

By a 7-2 vote, the Court held that the *Miranda* warnings officers gave to respondent were adequate, even though they did not explicitly state that he had the right to consult with a lawyer during questioning. The Court concluded that the warnings — which informed respondent that he had "the right to talk to a lawyer before answering any of the [officers'] questions," and that he can invoke this right "at any time . . . during the interview" — reasonably conveyed that right.

Florida v. Powell, 130 S.Ct. 1195 , ---U.S.---, 2/23/2010

"Break In Custody" Clarified For Purposes Of *Miranda* Questioning

The Court held that the *Edwards v. Arizona*, 451 U.S. 477 (1981), prohibition against interrogating a suspect who has invoked his Fifth Amendment right to counsel terminates when the suspect has been released from custody and 14 days have elapsed since the release. Releasing a suspect back into the general prison population, where he is serving a sentence on an unrelated crime, constitutes such a break in custody. *Edwards* did not mandate suppression of a statement taken from respondent, who had invoked his right to counsel during an interrogation more than two years earlier and had then been released back into the general prison population.

Maryland v. Shatzer, 130 S.Ct. 1213, --- U.S. ---, 2/24/2010

Nature Of The Force Used Rather Than The Extent Of Injury Is Relevant In Reviewing Excessive Force Cases

In a summary ruling, the Court reiterated that claims that police used excessive force on a suspect are to be evaluated on the basis of the nature of the force used, not on whether the individual suffered any injury during the incident. The ruling overturned a lower federal court ruling that dismissed an excessive force claim because the suspect's injuries were minimal. The new ruling was based on the Court's 1992 decision in Hudson v. McMillian. Justice Clarence Thomas, joined by Justice Antonin Scalia, supported the result, but repeated his earlier argument that the *Hudson* decision was decided wrongly.

Wilkins v. Gaddy, 130 S.Ct. 1175 , --- U.S.---, 2/22/2010

Deportation Consequences Of Plea Must Be Explained To Defendant

The Court held that counsel provides constitutionally deficient representation under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), if she fails to advise her non-citizen client whether a plea of guilty carries the risk of deportation. Where deportation is the clear consequence of pleading guilty, counsel has a duty to advise the defendant of that fact. Where the deportation consequences of a plea are unclear, counsel must advise the defendant that pleading guilty may carry adverse immigration consequences.

The Court did not extend its holding to other collateral consequences of pleading guilty, finding that deportation has unique consequences and is intimately related to the criminal process. Further, the Court did not address whether petitioner is entitled to relief, which depends on whether he can show prejudice, as this is an issue the lower courts must address on remand.

Padilla v. Kentucky, -- U.S. ----, 130 S.Ct. 1473, 3/31/2010

8th Amendment Bans Sentencing Of Juvenile To Life Sentence Without Parole For Commission Of A Non-Homicide

The State of Florida filed a probation violation report against defendant, who was on probation for crimes he had committed while a juvenile. The Circuit Court Judge in Duval County determined that a probation violation occurred and sentenced defendant to life imprisonment without the possibility of parole. Defendant appealed.

The Supreme Court held that the Eighth Amendment's ban on cruel and unusual punishments categorically prohibits the government from sentencing a juvenile to life without the possibility of parole as punishment for the juvenile's commission of a non-homicide. The 5-Justice majority emphasized that only 12 jurisdictions nationwide impose life without parole sentences on juvenile non-homicide offenders, that "juveniles have lessened culpability" and therefore are "less deserving of the most severe punishments," and that such a punishment "improperly denies the juvenile offender a chance to demonstrate growth and maturity."

The Court ruled that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

Graham v. Florida, 130 S.Ct. 2011, 5/17/10

After Properly Being Advised Of *Miranda* Rights, Subject Must Unambiguously Invoke Right To Remain Silent; A One-Word "Yes" To An Incriminating Question Can Constitute Waiver Of Right To Remain Silent

Two detectives questioned Thompkins for close to three hours after he was captured in a neighboring state more than a year after a January 2000 drive-by shooting in Michigan. At the start of questioning, they provided Miranda rights and asked Thompkins to read part of the list out loud, to make sure he understood English. Thompkins refused to sign the form that indicated he understood his rights. Even though the written waiver was not executed, the detectives began questioning Thompkins. It appears that the officers did almost all of the talking. A few of Thompkins' answers were single words.

Not much was gained by the interview until near the end of questioning, when one officer asked whether Thompkins believed in God. Tears welled up in Thompkins' eyes as he said "Yes." He was then asked: "Do you pray to God?" Again, he said "Yes." The detective then asked: "Do you pray to God to forgive you for shooting that boy down?" and Thompkins said "Yes," and then looked away.

Thompkins refused to make any written confession, and the questioning stopped after about three full hours. That one-word "Yes" was introduced as a confession at Thompkins' trial, and he was convicted. The Federal Sixth Circuit Court ruled that Thompkins had not waived his right to silence, finding his persistent silence through the prolonged interview indicated he did not want to waive his rights. The U.S. Supreme Court disagreed.

First, citing its 1994 ruling in *Davis v. U.S.*, where the Court had said that a suspect must make clear without ambiguity when he wants to claim the right to counsel after getting Miranda warnings, the Court laid down the same rule for claiming the right to silence under *Miranda*. There is no reason to treat those two rights differently, Justice Kennedy wrote. If a suspect could invoke the right to silence by simply staying silent, or by some other "ambiguous act, omission, or statement," that could complicate the dealings with police and require the officers to make difficult decisions about what the suspect actually intended, and run the risk of guessing wrong. In this case, "Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police."

Second, regarding the question of how a suspect gives up the right to silence by "waiving" it, the Court majority concluded that police need only give the warnings and then satisfy themselves that the suspect understood his rights; they are not required, at any point in the interview, to obtain an explicit waiver from the suspect.

Thus, the questioning can proceed unless the suspect, at some point, explicitly and without ambiguity invokes the right to silence. If the suspect continues to remain silent or uncooperative, police may then use a strategy to try to get the suspect, at last, to confess. In this case, the Court found that once Thompkins had said "Yes" to the question about praying to God for forgiveness for the shooting, he engaged in "a course of conduct" that indicated he was surrendering the right to silence with that confession. "If Thompkins wanted to remain silent, he could have said nothing in response to [the detective's] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation," Justice Kennedy wrote. In this case, the rights were provided, the Detectives determined the subject understood his rights (even though he refused to reflect that in writing), and from that point on, whether questioning stopped depended on the subject's choices and actions. Since he failed to explicitly invoke a right to silence and then he gave up any silence he was maintaining by briefly confessing, Thompkins opted to give, in a constitutionally permissible manner, evidence against himself.

Berghuis v. Thompkins, ---- U.S. ----, 130 S.Ct. 2250, 6/1/2010

Editor's Note: Some policies and procedures may require more documentation of a waiver of one's rights than is constitutionally required by reason of this recent case.
Review your policy. Time to revise?

Second Amendment Incorporated To Apply To The States

By a 5-4 vote, the Court held that the Second Amendment right to keep and bear arms is incorporated as against the states. Four Justices found that it is incorporated through the Due Process Clause; one Justice (Thomas) found that it is incorporated through the Privileges or Immunities Clause.

McDonald v. City of Chicago,--U.S.--, 130 S.Ct. 3020, 6/28/10

Honest Services Statute Must Be Restricted To Bribery and Kickback Situations. Prejudice To Fair Trial By Reason of Pretrial Publicity and Community Prejudice Applies Only To Extreme Cases.

In the *Skilling* case, the Court issued two important rulings arising from the conviction of Jeffrey Skilling for his conduct as President of Enron.
--The Court held that to avoid being unconstitutionally vague, the federal "honest services" fraud statute, 18 U.S.C. §1346, must be construed to cover only bribery and kickback schemes. The Court found that Skilling did not violate §1346 because the government did not allege bribery or kickbacks, and the matter was remanded for a harmless-error analysis.
--The Court rejected Skilling's contention that pretrial publicity and community prejudice prevented him from having a fair trial. The Court held that a presumption of prejudice applies in only extreme cases, and that Skilling failed to show that actual prejudice contaminated his jury.

Skilling v. United States, 08-1394, --U.S.--, 130 S.Ct. 2896, 6/24/10.

- Based on its *Skilling* ruling, the Court held that the honest-services instructions given in this case — in which Conrad Black and other executives of Hollinger International were convicted — were incorrect.

  Black v. United States, 08-876, --U.S.--, 130 S.Ct. 2963, 6/24/10.

- Through a one-sentence *per curiam* opinion, the Court vacated the judgment and remanded to the Ninth Circuit for further consideration in light of the Court's decision in *Skilling.* The case involved an Alaska state official had been convicted under the honest-services statute for not disclosing a conflict of interest, even though state law did not require such disclosure.

  Weyrauch v. United States, 08-1196, –U.S.--, 130 S.Ct. 22 (Mem), 6/24/10.

Fourth Amendment Not Violated When Police Department Reads Officer's Personal Text Messages Sent While On Duty On Department-Issued Device

The city provided officers with text-capable pagers. It had an e-mail policy in effect that provided in part, that the city "…reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." On its face, the policy did not apply to texting but the city had indicated it would apply the same standards to text messages.

The city had a text message contract with a limit, with extra costs for monthly texting totals beyond the contract maximum. After Quon and many other officers were found to have exceeded the contracted for monthly maximum, the city began to review their text messages to determine if they were done off duty, or if on duty whether they were personal or business related. The purpose of the review was both to determine if the contract maximum was too low, and to require the officers to reimburse for personal use of texting. As Quon's texts were reviewed, they were found to involve messages of a sexual nature and that "very few" of Quon's texting while on duty was work related. Quon was disciplined. He and other officers sued, claiming the 4th Amendment and the federal Stored Communications Act (SCA) were violated by the city's actions.

The SCA claim was dismissed on summary judgment, leaving the 4th Amendment claim for Supreme Court review. The Court indicated the search was reasonable in its purpose and reasonable in its execution as a workplace search. It was motivated by a legitimate work-related purpose and was not excessive in its scope. It would have been regarded as reasonable and normal in the private-employer context. The Court criticized the 9th Circuit's "least intrusive means" test as inconsistent with controlling precedents.

City of Ontario v. Quon, 08-1332, --U.S.--, 130 S.Ct. 2619 (6/17/10)

Editor's note: A fairly extensive overview of all U.S. Supreme Court 2009 Term cases of interest to law enforcement appears in the Florida Attorney General's July 13, 2010 Criminal Law Alert, found on the web at:
http://myfloridalegal.com/alerts.nsf/d1b346d5ba583c0585256642005da52a/d8dc930e5cceb1e18525775f00432565!OpenDocument

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

11th Court of Appeals & U.S. District Court:

Use Of Taser: Denial of qualified immunity for officers. Even in absence of case law, laser force employed ("Taser" used 8 to 12 times) was such that immunity would not apply.

Orlando police officers Lori Fiorino and David Burk appealed the district court's denial of their motion for summary judgment on the basis of qualified immunity. The 11th Circuit, "after thorough review," concluded "that the officers are not entitled to qualified immunity on the claim of excessive force," and affirmed the district court's order denying qualified immunity to the officers. After noting that "Quite simply, though the initial use of force (a single Taser shock) may have been justified, the repeated tasering of Oliver into and beyond his complete physical capitulation was grossly disproportionate to any threat posed and unreasonable under the circumstances…" and agreeing with the district court "that the force employed was so utterly disproportionate to the level of force reasonably necessary that any reasonable officer would have recognized that his actions were unlawful" the 11th Circuit stated:

> The facts, when viewed in a light most favorable to Oliver, show that Oliver was neither accused nor suspected of a crime at the time of the incident, that Officer Fiorino tasered Oliver at least eight and as many as eleven or twelve times with each shock lasting at least five seconds, that the officers made no attempt to handcuff or arrest Oliver at any time during or after any Taser shock cycle, that the officer continued to administer Taser shocks to Oliver while he was lying on the hot pavement, immobilized and clenched up, and, finally, that these Taser shocks resulted in extreme pain and ultimately caused Oliver's death.

Oliver, et al., v. Fiorino, et al., 586 F.3d 898. (11th CA,10/26/09)

Failure To Disclose Payment of $500 "Reward" To Key State Witness And General Failure To Fully Disclose Information Constituted *Brady/Giglio* Violations. Habeas Petition Granted.

Guzman, convicted of first-degree murder and armed robbery, was adjudicated guilty and received a sentence of death. His sentence was affirmed by the Florida Supreme Court. In his federal habeas petition, Guzman alleged (among other claims) that "there was both a *Giglio* violation and a *Brady* violation." *Giglio v. United States*, 405 U.S. 150 (1972) and *Brady v. Maryland*, U.S. 83 (1963).

As to the *Giglio* violation, Guzman contends “Ms. Cronin and the lead detective in this case both testified falsely at trial that Ms. Cronin received no benefit for her testimony against Petitioner, other than being taken to a motel rather than to a jail when she was arrested.” With regard to the *Brady* violation, Guzman contends “that the State failed to disclose that Ms. Cronin received a $500 reward for her testimony.”

The case involved a Daytona Beach Detective. Ms. Cronin testified before the grand jury against Guzman on January 11, 1992. At the trial, the Detective denied that she, law enforcement, or the State Attorney's office had offered Ms. Cronin any deals in exchange for her testimony. Ms. Cronin also denied ever receiving a deal from law enforcement, although she acknowledged being placed in a hotel room for protection.

At the Rule 3.850 evidentiary hearing, however, after defense investigation had revealed a payment had been made to Ms. Cronin, the Detective conceded that, on January 3, 1992, just eight days before Ms. Cronin testified before the grand jury she delivered a money order to the Volusia County Jail in the sum of $500 made payable to Ms. Cronin. The money was placed in Ms. Cronin's prison account where she was incarcerated and was provided to her because she had provided information leading to the arrest of Guzman.

The Detective denied that Ms. Cronin was paid for her testimony and could not recall when the reward money had first been offered to Ms. Cronin. However, the reward was originally offered on August 16, 1991, for information “about a man stabbed to death in his motel room” and was published in the *Daytona Beach News-Journal* and the *Orlando Sentinel*. Detective Sylvester recalled that Ms. Cronin's mother contacted her on January 2, 1992, “asking if it were possible for [Detective] to obtain the reward money to get it to [Ms. Cronin] in case she got out when she went to court that day.” The Detective testified that she had not disclosed to the prosecuting attorney the $500 reward paid to Ms. Cronin. The prosecutor denied any knowledge of the $500 reward.

The U.S. District Court noted, “It is this false testimony, unwittingly presented by the prosecution due to the false statements of its lead detective whose knowledge and statements are imputed to the prosecution that compel the reversal of this conviction.” Regarding the *Giglio* claim, the District Court determined that “the false testimony was material, and there was a reasonable likelihood that the false testimony could have affected the trial court’s judgment as the fact-finder in this case.” Further, Guzman “has shown that the false testimony was not harmless beyond a reasonable doubt and that it had a substantial and injurious effect or influence in determining the trial court’s verdict.” Based on the facts of this case, the Court determined that “Petitioner has shown that the decision of the Supreme Court of Florida was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” and held that “this issue is meritorious, and Petitioner is entitled to habeas relief on this claim.”

The Court explained its concerns:

> Nevertheless, it is clear that the State provided Ms. Cronin with a payment of $500, which is a significant sum to an admitted crack cocaine addict and prostitute. Ms. Cronin was the key witness in this case, and the credibility of her testimony was critical to the State's case against Petitioner. The $500 payment would have provided substantial and specific evidence of Ms. Cronin's motivation to lie against Petitioner. The $500 payment was more than just another avenue of impeachment against an already discredited witness. The fact that the lead detective and the lead witness twice denied the existence of the payment is at least a tacit admission that it was perceived to have relevance to a reasonable fact finder viewing the credibility of this witness.
>
> More importantly though, neither the trial court on remand nor, therefore, the Supreme Court of Florida on review, addressed the impact of the inability to impeach [the Detective] concerning her denial that any payment had been provided to Ms. Cronin. Petitioner's counsel was never given the opportunity to impeach the detective concerning her false testimony with regard to the payment, or to impeach her regarding her having permitted the key witness to give false testimony under

> oath before the court in the trial proceeding. Certainly a reasonable, objective fact-finder would have considered such testimony relevant to the evaluation of the evidence.

Regarding the *Brady* claim, the Court determined that "[c]ertainly, a rational and objective fact-finder would have considered the fact that 1) Ms. Cronin, the most important witness for the State, received a payment of $500, and 2) both Ms. Cronin and the lead detective in this case falsely testified that any compensation had been paid to Ms. Cronin." Further, "the false testimony and the withholding of the evidence pertaining to the reward was material, and there was a reasonable probability that the false testimony and evidence would have affected the trial court's judgment as the fact-finder in this case."

The Middle District concluded that Guzman "has demonstrated that the false testimony and the withholding of the evidence was not harmless beyond a reasonable doubt and that it had a substantial and injurious effect or influence in determining the trial court's verdict." Guzman "has shown that the decision of the Supreme Court of Florida was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," and held that "this issue is meritorious, and Petitioner is entitled to habeas relief on this claim."

Guzman v. Secretary, DOC, 698 F.Supp. 2d 1317 (USDC MD, Florida,, 3/17/2010)

Hearing Shots Fired In Housing Project In Early Morning And Seeing A Car Quickly Exiting Project Justifies Investigative Stop

In an 11th CA case out of Georgia, an officer was parked outside a public housing project in Savannah, working on paperwork, when he heard a gunshot. It was 1:30 A.M., and the streets were quiet. The officer worked the area and knew the project to have "its fair share of crime." Within a few seconds of the shots, a car quickly pulled out of one of the project's two exits. The officer called for backup and pulled the car over. The backup officer arrived a few minutes later and saw Williams, a passenger in the car, remove a handgun from his waistband and try to hide it under the center console. Williams was immediately arrested and the handgun seized. Williams was charged with unlawful possession of a firearm under 18 USC § 922(g)(1).

After his motion to suppress was denied, he entered a conditional plea reserving the right to appeal the denial of the suppression. The 11th CA rejected Williams' contention that since the project had two exits, the shot-firing person might have used the other exit. The court observed that officers need not be absolutely certain, or even have probable cause before stopping a car. Instead, the officer must have only reasonable suspicion. In this case, the officer saw a lone car drive out of a high-crime housing project in the middle of the night within seconds of hearing gunshots. The court found it "eminently reasonable" of the officer to suspect the occupants of the car to have been involved in a crime. Williams' conviction was affirmed.

U.S. v. Williams, 2010 WL 3528542, ---F.3d ---(11th CA, 9/13/10)

FLORIDA SUPREME COURT:

Activation of Police Emergency Lights Normally Equates To A Seizure But Defendant Did Not Notice Them So He Was Not "Seized"

Because the defendant was unaware that the police emergency lights had been activated until after the officer already had probable cause to arrest the defendant, his seizure was legal. Members of the Miami-Dade Police Department undercover narcotics unit were in an unmarked police vehicle parked on a public roadway across the street from a public park. There had been past complaints of narcotics dealing in the park, which is adjacent to an elementary school. The defendant, GM, and others were standing near a Lexus and a second vehicle parked side by side. Over a period of about 15 minutes the officers did not observe any criminal behavior, but noted GM exiting then re-entering the Lexis after speaking to some individuals outside the car. Concerned that the group's actions were not what the officers considered "traditional" park activities, the officers activated their unmarked car's emergency lights, crossed the street, entered the park and stopped their car about three feet behind the two parked cars. They were in plain clothes, but had badge lanyards and firearms that remained holstered.

Some of the windows of the Lexus were open. One of the officers smelled marijuana and saw smoke emanating from the car. Looking in the window, the officer observed GM in the back seat with what appeared to be marijuana and a "blunt" (a hollowed out cigar that has been filled with marijuana) on his lap. When the officers identified themselves as police, GM placed the marijuana in his mouth. The officer ordered him to "surrender" the marijuana, and GM complied. The marijuana was seized for evidence. GM was arrested.

At the suppression hearing, the first officer testified that GM did not see him approach as he had his head down and "he didn't seem me coming from the back." The officer also indicated that at the time he first made contact with the individuals in and around the cars, they were not free to leave even though he had not seen the commission of a crime prior to that contact.

The second officer confirmed the smell of marijuana and the smoke coming from the car, and indicated he positioned himself to provide security and to watch the individuals there who were not in the car. He also said he would have not allowed the individuals to leave while their inquiries proceeded. GM testified that he was unaware of the officers' approach and that a second occupant of the car warned him. "I had marijuana in my lap and I was rolling. I put it in my mouth."

The trial court ruled the initial encounter was a consensual encounter for which no reasonable articulable suspicion of criminal activity need be stated. GM pled no contest to the charge of possession of marijuana and sought appeal. The 3rd DCA affirmed the trial court's denial of the motion to suppress in G.M. v. State, 981 So.2d 529 (Fla. 3rd DCA 2008). The 3rd DCA concluded that there was no reasonable suspicion that GM or the others had committed or were committing a crime. However, the 3rd DCA ruled that no seizure of GM occurred until the officers smelled the marijuana, and that the seizure from that point was based on reasonable suspicion. Upon observing the marijuana in GM's lap, probable cause for GM's arrest existed. In particular, the 3rd DCA found that GM was unaware of the activation of the emergency lights, and was not even aware of the officers' presence until they were outside the Lexus' windows (at a point where reasonable suspicion had already developed).

The Supreme Court affirmed the trial court's suppression but distinguished and disapproved part of the 3rd DCA's holding. The 3rd DCA had indicated that activation of emergency lights would not necessarily constitute a seizure of GM even if GM had been aware the lights had been activated. The Supreme Court specifically rejected this reasoning and held that under the circumstances of this case, had GM been aware of the lights, he would have been seized. Justice Pariente, concurring, noted that common sense suggests one is not free to leave when a police vehicle with activated emergency lights pulls up behind him or her, and to suggest that one is free to leave notwithstanding those lights is unwise and dangerous.

G.M. v. State, 34 FLW S568 (Fla. – So. 2d. ---, 10/8/09)

Fleeing Officers In High-Crime Area Constitutes Basis To Conduct Stop. Failing To Stop Is Resisting An Officer Without Violence (F.S. 843.02)

The Florida Supreme Court resolved conflicting interpretations between the 2nd and 3rd District Courts of Appeal and applied *Illinois v. Wardlow*, 528 U.S. 119 (2000) to approve the 2nd DCA's construction. At issue was whether a juvenile's continued flight, within a high-crime area, despite a police officer's verbal order to stop, constitutes the offense of resisting, obstructing, or opposing an officer without violence under F.S. 843.02. The Court agreed it was such a violation:

> The plain language of section 843.02 makes it an offense for any person to resist, without violence, a law enforcement officer when the officer is engaged in a lawfully executed legal duty. Under Wardlow, the moment C.E.L. took flight in a high-crime area, the officers were provided with reasonable suspicion to warrant an investigatory stop. Therefore, the officers were engaged in the lawful execution of a legal duty. Thus, C.E.L.'s continued flight in defiance of the officers' lawful command constituted the offense of resisting an officer without violence under section 843.02. Based on the foregoing reasoning, we approve the Second District's holding in C.E.L. and disapprove of the Third District's opinion in D.T.B. Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

In an observation that should encourage those who believe a court should follow the law, the Court noted that it was "obligated to apply the law as written by the Legislature and to follow the Fourth Amendment precedent laid out by the United States Supreme Court, even if we question the wisdom of that precedent or the public policy behind the law."

C.E.L., v. State, 995 So.2d 558 (Fla., 12/17/09)

Use Of Recorded Jailhouse Phone Calls Not A Confrontation Clause Violation.

On direct appeal from a death sentence, among the issues appealed, Twilegar argued that the trial court erred in admitting tapes of Twilegar's jailhouse phone calls and that "the use of the tapes constituted a Confrontation Clause violation."

In rejecting Twilegar's claim, the Court relied on its decision in Globe v. State, 877 So. 2d 663 (Fla. 2004), where the Court addressed a Confrontation Clause issue and held that the clause was not implicated where Globe and his codefendant gave a joint taped statement in which they admitted killing a fellow inmate and where the tape was played at trial. The Globe decision, along with the adoptive admissions exclusion to the hearsay rule are discussed at length in the opinion.

The Court noted that Twilegar, like Globe, "was a knowing and active participant in the recorded conversations that he too, as did Globe, had ample opportunity to refute or contradict any of the statements that were adverse to his interests; instead, he acquiesced in the statements."

> To claim now that he is entitled to cross-examine the other participants in the conversations is disingenuous in light of the fact that he had previously acquiesced in their statements. As in Globe, the statements were properly admitted as adoptive admissions under section 90.803(18)(b), Florida Statutes (2007). As to whether the trial court erred in admitting the tapes in light of fact that use of the tapes could compel Twilegar to disclose his alleged drug dealing in order to explain certain statements in the tapes, the court did not err in this respect, for the court reasonably may have concluded that the probative value of the evidence was not substantially outweighed by the danger of prejudicing the jury. See § 90.403, Fla. Stat. (2007). Accordingly, Twilegar has failed to show that the trial court erred with respect to this claim.

Twilegar v. State, 2010 WL 26512, -- So.3d. -- , (Fla. 1/7/2010)

30 Minute Delay Between Giving Of *Miranda* Rights And Starting Interrogation Was Not An Illegal "Warn, Delay, Interrogate" Strategy

McWatters, sentenced to death for murder, contends that the thirty-minute delay between receiving his *Miranda* warnings from the arresting officer, Sergeant Humphrey, and the actual interrogation by Detective Dougherty was a "warn-delay-interrogate strategy that rendered the warning constitutionally inadequate under the United States Supreme Court's holding in Missouri v. Seibert, 542 U.S. 600, 604 (2004). He claims the delay "diluted the effectiveness" of his waiver.

The trial court denied the motion finding that McWatters was given a "thorough and accurate reading of his Miranda rights," and that McWatters "understood the rights read to him and repeatedly asked to be able to speak to Detective Dougherty." The Miranda warning was not re-read before McWatter was interviewed by Detective Dougherty. The Court determined that unlike *Seibert*, McWatters received his Miranda warning "as soon as he was taken into custody, and he has conceded that he was accurately informed of his rights and that he understood his rights before any questioning began." The interlude between the warning and the interview was "comparatively brief." In addition, McWatters undermined his own claim when he waived his rights by requesting to speak with Detective Dougherty, "who did in fact conduct the interview about the homicides."

The Court found each death sentence was proportionate and affirmed McWatters' convictions and his sentences of death.

McWatters v. State, 36 So.3d 613, (Fla. 3/18/2010)

The Crime of "Manslaughter By Act" Does Not Require Proof That The Defendant Intended To Kill The Victim

The Court was reviewing Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), which was certified as a question of great public importance. Question presented: IS THE STATE REQUIRED TO PROVE THAT THE DEFENDANT INTENDED TO KILL THE VICTIM IN ORDER TO ESTABLISH THE CRIME OF MANSLAUGHTER BY ACT? The 1st DCA also certified "its decision is in direct conflict with the decision of the 5th DCA in Barton v. State, 507 So. 2d 638 (Fla. 5th DCA 1987), quashed in part on other grounds, 523 So. 2d 152 (Fla. 1988)."

The Supreme Court indicated proof of intent to kill was not required. "…(T)he crime of manslaughter by act does not require the State to prove that the defendant intended to kill the victim." "We further hold that the intent which the State must prove for the purpose of manslaughter by act is the intent to commit an act that was not justified or excusable, which caused the death of the victim." The Court mandated that Montgomery receive a new trial. Given its resolution of the certified question, it found it did not reach the certified conflict.

State v. Montgomery, 2010 WL 1372701, -- So.3d -- , (Fla. 4/8/2010)

Alleged Affair Between Witness And Investigator Not Proven; No *Brady* Violation

Lambrix, convicted of two counts of first-degree murder and sentenced to death, claimed the "State withheld material exculpatory or impeachment evidence involving a sexual relationship between a witness and a State Attorney Investigator in violation of Brady v. Maryland, 373 U.S. 83 (1963). The trial court had reviewed the allegation and found that no sexual encounter had occurred.

The Supreme Court concluded "there is no basis in the record to reject the trial court's factual finding that no sexual encounter occurred between [the two]." The trial court evaluated the substance of both persons' testimony and found the investigator's testimony to be more credible.

Further, Lambrix could not show prejudice – "that this suppressed evidence was sufficient to undermine confidence in the outcome." The Court determined that even if an affair had occurred, the

"record established that the affair could have only occurred at one time—during the second trial, when they both had hotel rooms in the same hotel." Further, the Court noted that "[e]ven if the subject of the alleged one-time affair could be the subject of cross-examination in an attempt to

impeach [the witness], there is no basis to conclude that the jury would have disregarded or not found credible the substantial testimony [the witness] provided as to the facts of the murders."

Lambrix. v. State, 2010 WL 1488028, -- So.3d -- (Fla. 4/15/10)

Prosecutor Should Have Disclosed Letters To Defendant That Alleged Co-Defendant "Would lie." However, No Prejudice Demonstrated.

Manuel Rodriguez alleged a violation of Brady v. Maryland, 373 U.S. 83 (1963) in that the State withheld favorable evidence that would have impeached Luis Rodriguez (co-defendant and friend of defendant; not related). The evidence in question was two letters Willy Sirvas wrote to the prosecutor before trial, alleging that (co-defendant) Luis Rodriguez would lie. These letters were not turned over to the Manuel's defense team.

Luis Rodriguez pled guilty to second-degree murder and testified against Manuel. The Court noted that "[a]ny potential impeachment of Luis could have been significant because he was a main witness against Manuel Rodriguez and Rodriguez's defense has been that, although he was involved, Luis was the main actor in the murder."

Strongly condemning the conduct of the prosecutor, the Court determined that both letters met the first prong of Brady [of potential value to defense] and should have been disclosed to defense counsel. However, the Court concluded that Manuel Rodriguez failed to demonstrate how he was prejudiced. The credibility of Sirvas is questionable because his "actual testimony contradicted his letters." His letters "alleged Luis told him 'everything.'" However, his testimony was that "Luis did not tell him any of the specifics about the case itself and that he did not even know the codefendant's name." Because "Sirvas did not know the underlying facts of the case and who participated in the crime," Manuel Rodriguez was not able to "show how Luis would lie about Rodriguez's involvement."

The jury was aware that Luis pled guilty in order to avoid the death penalty. The Court found that "defense cannot show how (Manuel) Rodriguez was prejudiced by the failure to turn over the letters" and denied relief on this claim. The Court affirmed the circuit court's denial of postconviction relief.

Rodriguez v. State, 2010 WL 1791139, -- So.3d -- (5/6/10)

Editor's Note:

The U.S. Supreme Court heard oral argument 0n October 6 regarding whether a prosecuting office was negligent in its training of prosecutors regarding their *Brady* obligations. Connick v. Thompson (09-571). In the case, John Thompson was wrongfully imprisoned for 18 years following a trial during which the prosecutor withheld exculpatory evidence, in violation of *Brady v. Maryland*. Thompson brought suit pursuant to 42 U.S.C. § 1983 alleging that the district attorney's office is liable for failing to properly train its employees on the requirements of *Brady.* The U.S. Court of Appeals for the Fifth Circuit found in favor of assigning liability to the district attorney's office. Petitioners, including District Attorney Harry Connick, appealed to the Supreme Court. Connick claims that there was no obvious need to train prosecutors regarding *Brady* standards and that liability should not attach to the office when there was no notice that the training program needed reform. Respondent Thompson contends that the prosecutors' lack of training amounted to a deliberate indifference to preserving constitutional rights and that liability may properly attach to the district attorney's office without a past history of violations. This decision will determine the extent to which a municipality may be liable for a single action by one of its employees, and may provide guidance as to the extent of training police and prosecuting agencies should provide regarding *Brady*.

Death Penalty Defendant Properly Advised Of Miranda Warnings. No Requirement To Advise Has A Right To Request An Attorney Any Time During Questioning

Once a suspect is properly advised of his right to the presence of counsel before and during the interrogation, there is no requirement that the suspect again be additionally advised that he has the right to have counsel appointed during questioning. The Court held the Defendant Miller's suppression motion was properly denied because "Miller was fully informed of his right to have counsel appointed," and the warnings Miller received "were sufficient and adequate under the Florida and United States constitutions." The Court found Miller's death sentence "proportionate when compared with other capital cases" and affirmed Miller's convictions and sentences.

Miller v. State, ----So.3d--- 2010 WL 2195709 (Fla. 6/3/10)

No Expectation Of Privacy In Apartment From Which You Have Been Evicted. Passage of Time Does Not Vitiate Miranda Warning. Police Agreeing To Report Cooperation To Trial Court Does Not Make Confession Involuntary.

On Saturday, April 27, 2002, Caraballo and four other men abducted a young couple (Angel and Portobanco) as they were walking from the beach to their car. The group robbed the victims, raped one of them, and then tried to kill both of the victims. Portobanco survived and based on his account of the attack, police were able to locate a suspect at an apartment complex. Police learned that a person named Victor Caraballo was recently a tenant in the complex, but he had been evicted. The apartment staff escorted the police to the apartment from which Victor had been evicted. There they discovered that someone had placed a new noncompliant lock on the apartment door and the apartment was occupied. The officers were not able to get the attention of the person inside the apartment so they kicked down the door. Inside they found Victor Caraballo. In Spanish, Victor identified himself as Victor Caraballo and indicated that Hector Caraballo was his brother.

Agent Hidalgo, a Spanish-speaking FDLE agent, was brought to the apartment to speak to Victor Caraballo. Around 4:10 p.m. on April 28, Caraballo was advised in Spanish of his *Miranda* rights, and signed a waiver form printed in Spanish.

Victor acknowledged that he and four others traveled to Miami Beach the evening before and robbed a young couple; that Portobanco was beaten and left at some point during the trip back to Orlando, but he denied Angel was murdered. He then showed Agent Hidalgo where various items were located in the apartment, including Portobanco's wallet and Angel's purse, cell phone, and ATM card. Hidalgo also obtained consent from Caraballo to search the apartment and seize the items. That evening, Caraballo was taken to the Orlando FDLE office. Around 10 p.m. that same evening, Caraballo was questioned in the presence of Miami Beach Police Detective Larry Marrero and FDLE Agent Hidalgo. Caraballo admitted certain facts but still did not admit that Angel was killed. Throughout the evening additional information was gathered and FDLE agents recovered Angel's body.

Months after the murder, Caraballo wrote a letter that contained a "voluntary confession" and sent it to the State Attorney's Office. In the letter, Caraballo described the crimes and claimed that he participated in the attacks only because the other men had threatened him. He claimed that he did not harm either of the victims. Caraballo said that no one manipulated him to write the letter and that the confession was voluntary. Caraballo offered to become a witness for the State. Caraballo and the four others were each indicted on seven counts including Angel's murder. Caraballo was tried in a trial separate from his codefendants and his confession letter was introduced as evidence. Caraballo was convicted as charged and he was sentenced to death.

On appeal, Caraballo argued that his constitutional protections against unlawful search and seizure were violated when law enforcement conducted a warrantless entry into and search of the apartment where he was found. The Supreme Court disagreed, finding that Caraballo did not have an expectation of privacy at the time when law enforcement officers entered and searched the

apartment. Caraballo had been served with an eviction notice and had told the apartment complex that he had already removed all of his belongings out of the apartment. The apartment maintenance supervisor conducted a walk-through of the apartment and determined that it had been abandoned. A vendor's lock had been placed on the door in order to allow various vendors access to the apartment for cleaning and painting. That lock was replaced and Caraballo was in the apartment without authority when police found him. The Supreme Court found that by conceding to the eviction notice, Caraballo abandoned the apartment and was not protected by the Fourth Amendment.

Caraballo also argued that law enforcement lacked probable cause to arrest him for trespassing. The Court disagreed. At the time that law enforcement entered the apartment, they knew that the

person last associated with the apartment (Victor Caraballo) shared the same last name as Hector Caraballo, the individual to whom a call from the cell phone of one of the victims was linked. They also knew that the approved vendor's lock to that apartment had been removed from the front door and was replaced with one that the apartment complex did not have access to. Moreover, when Agent Hidalgo arrived, Caraballo volunteered that he was trespassing in the apartment. Under the totality of the circumstances, law enforcement had probable cause to arrest Caraballo for trespassing or to detain him and question him further.

Caraballo also argued that the taped interview that took place at the FDLE office on the evening of April 28 was conducted in violation of his Fifth Amendment privilege against self-incrimination. The Supreme Court disagreed. The length of time between Caraballo's *Miranda* warning and the time of the taped statement does not, without more, render his statement involuntary. In this case, Caraballo signed his waiver at 4:10 p.m. on April 28, and the taped interview began about 10 p.m. that evening. Caraballo was not given his *Miranda* warning again before the interview began because he was informed of his rights earlier. Both Agent Hidalgo and Agent Koteen of FDLE also testified that Caraballo was advised of his rights in Spanish. Caraballo said that he understood each right, and he was provided a rights form in Spanish, which he signed. Both agents witnessed these events. Consequently, the Court concluded that Caraballo knowingly and voluntarily waived his *Miranda* rights, and that waiver extended to his interview at the FDLE office some six hours later that evening.

The Court also found that comments made by the officers during the interview, which suggested that Caraballo's cooperation with law enforcement would be disclosed to the trial court, did not vitiate the voluntariness of Caraballo's statement. The Court said that the fact that a police officer agrees to make one's cooperation known to prosecuting authorities and to the court does not render a confession involuntary. (Citing: Maqueira v. State, 588 So. 2d 221, 223 (Fla. 1991)).

Caraballo’s conviction was affirmed. Because of an error in the penalty phase, the case was returned to the trial court for a new penalty phase.

Caraballo v. State, 39 So.3d.1234 (Fla. 6/24/10)

Reading Of Miranda Warnings Alone Does Not Make Encounter Into Stop

The Supreme Court reviewed *Caldwell v. State*, 985 So.2d 602 (Fla. 2nd DCA, 2008) which was certified in conflict with *Raysor v. State*, 795 So.2d 1071 (Fla. 4th DCA, 2001) where the 4th DCA concluded that the reading of *Miranda* warnings always converts a consensual encounter into a Fourth Amendment “seizure.” (Raysor involved an officer who always read Miranda warnings to persons he questioned on the street “out of an abundance of caution.” The officer had waved in a friendly manner to Raysor, who approached the officer voluntarily. After noticing calluses on Raysor’s fingers—an indicator of crack cocaine use—the officer read Raysor his rights and Raysor waived them. He asked Raysor if he had any cocaine or drug paraphernalia and Raysor produced a crack pipe. The officer indicated at the suppression hearing that until the pipe was produced, Raysor was free to leave. The trial court deemed the encounter consensual, but the 4th DCA found that once *Mirandas* were read, as a matter of law, the encounter was a seizure, which under the facts of the Raysor case was illegal since the officer had no suspicion or probable cause.

After discussing *U.S. v. Mendenhall*, 446 U.S. 544 (1980) and its standard that a reasonable person must believe he or she is not free to leave to make an encounter “custodial,” the Florida Supreme

Court disagreed with the 4th DCA's characterization that administering *Miranda* warnings made any encounter as a matter of law "custodial."

In *Caldwell,* based on Caldwell's similarity to a person seen in a security videotape at the scene of some burglaries, the officers believed Caldwell might have committed them and approached him in a public area during the daytime in the presence of others. He was "directed away from the others" towards the officer's police cruiser, and confronted about the burglaries. The officer expressed his belief that Caldwell committed the burglaries, asked him about the video (to which Caldwell denied any involvement) and then read him his Miranda rights. Caldwell asked if he was being arrested and the officer told him he was not under arrest, but wanted Caldwell to be sure of his rights.

Caldwell then asked if he could see the videotape and the officer told him he'd have to go to the scene of the burglary to view them. The officer offered Caldwell a ride in his cruiser. Caldwell agreed. A frisk of Caldwell that preceded him being given the ride in the officer's vehicle did not convert the encounter into a seizure because Caldwell had been told the frisk was a condition of accepting the ride. Caldwell did not object. He was not cuffed or otherwise constrained. Caldwell and the officer continued to talk during the drive. Prior to arrival at the burglary scene, the officer again expressed his belief that Caldwell committed the crimes. Upon arriving at the scene of the burglaries and before seeing the videotape, Caldwell confessed. His motion to suppress his confession as the fruit of an illegal detention was denied. He pled nolo and filed the appeal.

The Supreme Court concluded that "Miranda warnings do not result in a seizure as a matter of law" while also noting that advising one of his or her Miranda rights "may increase the coercive atmosphere of a police-citizen encounter" and could be a factor in determining the encounter was in fact a seizure. The Court approved *Caldwell* to the extent consistent with its holding and disapproved *Raysor* to the extent it was inconsistent with its holding.

Caldwell v. State, 2010 WL 2680254, *--So.3d--, (Fla. 7/8/10)*

FLORIDA DISTRICT COURT OF APPEALS CASES:

Use of Two Cases Under Appeal As RICO Predicates Resulted In RICO Conviction Being Tossed When Defendant Won Appeal On The Two Cases

In putting together predicate acts to build a RICO case, care should be taken to use strong predicates and avoid using predicate acts that could be found to be unproven, or otherwise infirm. In this case, the state utilized two drug trafficking related convictions as two of several predicates related to the defendant's street gang RICO. Both convictions were pending further appeal. The defendant was convicted of RICO. After his conviction, the two drug trafficking cases were reduced on appeal to lesser included charges. The 2nd DCA reversed the defendant's conviction for RICO and Conspiracy to RICO, on the basis that use of the now-vacated convictions deprived the defendant of a fair trial. (This was done even though it appears more than two predicate acts still supported the underlying RICO and RICO Conspiracy charges notwithstanding the two vacated convictions. The court deemed the defendant's characterization as a drug trafficker as being essential to the jury's determination of RICO.)

Santiago v. State, 23 So. 3d 1206 (Fla. 2nd DCA , 10/21/09)

Enforcement Action Outside Municipal Officers' City Limits Approved Because They Were Under A Mutual Aid Agreement

Detectives from the City of Coconut Creek were in Margate, investigating a robbery of a Publix grocery about 5 minutes' drive away in Coconut Creek, when they made a traffic stop of the defendant that ultimately resulted in his arrest and being charged with the robbery. The cities had entered into a Mutual Aid Agreement allowing investigations outside their normal city limits of incidents occurring within their city. The Agreement also required notice to the city in which out-of-jurisdiction enforcement action was being taken. In the case at hand, the detectives were investigating a robbery that occurred in their city, and notified Margate Police that they were making the traffic stop. They were in strict compliance with the conditions and obligations of the Mutual Aid Agreement and the 4th DCA agreed that the defendant's motion to suppress based on an "illegal stop and arrest" was properly denied by the trial court.

Daniel v. State, 20 So.3d 1008 (Fla. 4th DCA, 11/4/09)

Modified Nail Clipper Used As Knife Is Not "Common Pocket Knife"

The defendant in this case attempted to argue his modified nail clipper fell within the statutory exception as a "common pocket knife" and was not a "weapon" for purposes of supporting a conviction for aggravated battery with a weapon and carrying a concealed weapon. The 3rd DCA noted that the record reflects "the instrument in question was a nail clipper, which the defendant had modified and he was carrying in an open position. By the defendant's own admissions, he had modified the blade by sharpening the smooth side 'for [his] protection,' giving it a distinctive weapon-like characteristic." Thus, the DCA determined that "the instrument that the defendant carried in an open position and used to stab the victim—the police officer who was attempting to arrest the defendant" was such that the question of whether it was or was not a "common pocket knife" was properly a jury question and the convictions would be affirmed.

Johnson v. State, 21 So.3d 911, (Fla. 3rd DCA, 11/12/09)

Not Wanting Answers To Be Recorded Is Not Invocation Of Right To Be Silent

Bailey was questioned in his hospital room after being shot during an attempted home invasion robbery. He was provided his rights per *Miranda*, waived them, and gave a statement with several incriminating elements. The next day, investigators returned. The subject again acknowledged his

rights. Detective Gupton testified that Bailey "'appeared to understand the form, did not have any questions about it, and did not ask for a lawyer." When Bailey was questioned about the incident on Phillips Highway, Bailey responded one time with "Man, I don't really want to talk about that (inaudible)." Upon further questioning Bailey indicated he did not want his statement on tape, so the recorder was turned off, but questioning continued:

> DET GUPTON: Okay. I know it's hard but it helps me understand things clearer. What can you tell me about that incident?
> MR. BAILEY: Man, I don't really want to talk about that (inaudible).
> DET PADGETT: Why is that?
> MR. BAILEY: Huh?
> DET PADGETT: Why is that?
> MR. BAILEY: Cause I don't want no record of it on tape[.]
> DET PADGETT: Cause what?
> MR. BAILEY: Cause I don't want to record on tape or nothing like that.
> DET GUPTON: Okay, well, I'll tell you what. I'll turn mine off, okay? I'll turn it off. How about that?
> MR. BAILEY: You sure you (inaudible)?
> DET GUPTON: What?
> MR. BAILEY: (Inaudible)
> DET GUPTON: Yeah.
> ....
> MR. BAILEY: Let me see it. Is it turned off? Let me see it. Is it turned off?
> DET PADGETT: Yep. Ain't no tape in it is there?
> DET MEACHAM: Naw, it's just a little digital thing. It's shut off.
> DET PADGETT: Digital recorder, that's all.
> MR. BAILEY: Okay.

After the tape was turned off, the interview continued and Bailey "repeated the information he had given to Detective Padgett the day before, named the other perpetrators, and described the home where the November 9, 2004, robbery and murder occurred." The recording was played at trial and the jury convicted Bailey "of several crimes based on the incident that occurred on Phillips Highway on November 9, 2004." The 1st DCA stated that "like the trial court, we were able to listen to the interview," and "we were able to consider the manner in which the words at issue were expressed and determine whether the officers responded reasonably." After listening to the "words in their audible context," the 1st DCA concluded that the "words on the recording simply do not come across as a clear assertion of a right." Therefore, the 1st DCA stated "we cannot say that the trial court erred in concluding that Appellant's words were insufficient to trump his prior waiver of his right to remain silent" and affirmed Bailey's judgments and sentences.

Bailey v. State, 31 So.3d 809 (Fla. 1DCA, 12/22/09)

Murder Defendant's Assertion Of Right To Remain Silent Not Honored

Pierre, convicted of first-degree felony murder and robbery and sentenced to life in prison, appealed arguing his confession should have been suppressed because "he unequivocally invoked his right to stop questioning, which was not honored by the police." The 4th DCA, in its lengthy analysis, devoted five pages to the detailed findings of fact provided by the trial court in its order denying suppression, which was based on the trial court's viewing of the recorded interrogation of Pierre.

Pierre was questioned by Detective Campbell and Detective Coleman. Pierre stated to Detective Campbell, "I'm not saying anymore." The 4th DCA determined that Pierre was properly *Mirandized* and "Detective Campbell immediately ceased questioning Pierre." Pierre's invocation was apparently not related to Detective Coleman, who re-entered the room and continued to interrogate Pierre. The state relied on State v. Owen, 696 So. 2d 715 (Fla. 1997), *reaffirmed in Owen v. State*, 862 So. 2d 687, 696-98 (Fla. 2003), saying that Pierre's statement ("I'm not saying anymore") is "virtually indistinguishable" from those in *Owen*. The 4th DCA, however, found *Owen* distinguishable. After viewing the tape, the 4th DCA stated it did not agree with the trial judge's conclusions.

When Detective Coleman re-entered the room and continued with his interrogation of Pierre, the 4th DCA concluded that this amounted to interrogation under the analysis of *Origi v. State*, 912 So. 2d 69 (Fla. 4th DCA 2005). Thus, the officers did not cease questioning after Pierre's unequivocal invocation of his right to silence. Detective Coleman's not knowing Pierre invoked his right of silence while he was out of the interrogation room was of no significance.

The 4th DCA concluded that Pierre's invocation of the right to remain silent was not scrupulously honored. See: Michigan v. Mosley, 423 U.S. 96, 104 (1975), where the Supreme Court found that the police honored the right by ceasing questioning once the suspect invoked his right. "While Detective Campbell ceased questioning, Detective Coleman did not. Only about a minute passed between Pierre's termination of questioning and Detective Coleman's continuation of the interrogation, hardly a significant lapse of time. Pierre was never reread his *Miranda* rights, and the questioning continued in the same location before the same detectives." The case was reversed and remanded for new trial with the subject portions of the confession excluded.

Pierre v. State, 22 So.3d 759 , (Fla. 4th DCA, 11/18/09)

"Fellow Officer Rule" Wrongly Used To Admit Hearsay

At a county court hearing on a motion to suppress all evidence derived from an illegal traffic stop, the officer who made the original traffic stop did not appear. A second officer, Tracy, who had been called to the scene after the stop to conduct a DUI investigation, was allowed to testify about what the first officer (Suskovich) told was the basis for the stop of the driver (Bowers). The county court suppressed the evidence, holding that the state failed to establish the basis for the stop since Suskovich did not testify. The circuit court reversed the granting of the motion to suppress, and indicated the "fellow officer rule" allowed Tracy to relate Suskovich's reason for the stop notwithstanding that it was hearsay. The circuit court relied upon Ferrer v. State, 785 So. 2d 709 (Fla. 4th DCA 2001) in making its decision.

The 2nd DCA reversed the circuit court, and discussed the "fellow officer rule" in great detail. It concluded that "Ferrer was wrongly decided because it misapplies the fellow officer rule to circumvent the hearsay rule of evidence."

The court noted:

> At that point of the traffic stop, there was no "investigative chain" during which collective knowledge was imputed to Officer Suskovich to provide probable cause for the traffic stop. Officer Suskovich was the sole officer with any knowledge leading up to and culminating in the traffic stop. Officer Suskovich did not rely on any knowledge or information possessed by Officer Tracy or any other officer to establish probable cause to stop Bowers. The fact that Officer Tracy was called to the scene after the stop was completed for the purpose of performing a separate DUI investigation does not make him a fellow officer for purposes of determining whether there was probable cause to support the traffic stop.

The 2nd DCA stated that "[t]he issue raised in Bowers' motion to suppress was not whether there was probable cause for Officer Tracy to conduct a DUI investigation and make an arrest but rather whether there was probable cause for Officer Suskovich to stop Bowers." Conflict with Ferrer was certified and the case remanded to circuit court, with an order to affirm the county court's suppression order.

Bowers v. State, 23 So.3d 767 , (Fla. 2nd DCA, 11/18/09)

Failure To Produce Federal Agents' Reports In State Discovery The Reports Are Not "In Possession of the state."

With the increasing use of federal and state/local task forces, cases in which a substantial amount of the investigative work has been done by federal officers will often be filed in state court. Federal agencies do not routinely release their agents' case reports. Is there a discovery violation when federal reports are not provided to the state or local agency for provision to the state attorney for

inclusion in discovery but the federal agents who authored the reports are called to testify at trial? This case discusses the issue.

Caplan was convicted of trafficking in marijuana after a co-defendant and a DEA Agent testified at trial. Caplan's attorney had filed a motion to compel production of all federal agent reports prior to trial but the trial court noted it could not force federal agencies to produce them, and denied the motion. Caplan's attorney then tried to exclude the federal agent from testifying at trial.

The trial court dealt with this as a discovery violation and held a Richardson hearing. It concluded that any violation was not willful and gave the defense the opportunity to depose the federal agent. At deposition, the agent did not refer to any of his reports. The reports were not produced as part of discovery. The trial court denied the defense motion to exclude the agent from testifying.

On appeal to the 4th DCA, the defense claimed a discovery violation and sought a new trial. The 4th DCA held there was no discovery violation. While "Florida Rule of Criminal Procedure 3.220(b)(1)(B) requires the state to produce during discovery 'all police and investigative reports of any kind prepared for or in connection with the case' that are 'within the state's possession or control,'" the 4th DCA said that "[f]ederal agents are precluded from providing reports of investigations without authorization." *See* 28 CFR § 16.22. The reports were not in the State's possession. Caplan knew about the reports and neither the State nor Caplan was able to obtain copies of the reports from the U.S. Attorney. Thus, the State did not commit a discovery violation by failing to produce records it did not have. The 4th DCA held the "trial court did not err in refusing to exclude the DEA agent's testimony" and affirmed Caplan's conviction and sentence.

Caplan v. State, 23 So.3d 1230 , (Fla. 4th DCA, 11/25/09)

En Banc 5th DCA Reverses Earlier Ortiz decision

Last year, the 5th DCA allowed suppression of drugs found in open view when it ruled that an officer had no basis to enter a child's home after the school reported that the child's parents failed to pick up the six year old child after a school event, and the officer received no response when knocking at the child's residence door. The child led the officer to a garage door and they entered the house. It was 7:30 PM, 1 ½ hours after the child was to have been picked up, and a light was on in the house. No one responded to the officer's announcements. Making it to the parents' bedroom, he found the door locked, with no one responding. Believing there very well might be an medical emergency "or worse" going on, he unlocked the door to search for a body. The officer discovered drugs in open view in the parents' bathroom. The case was viewed as a radical and unwarranted restriction on police public caretaker functions. The 5th DCA En Banc has reversed the earlier opinion and common sense again prevails.

The 5th DCA determined that the "identical principles obtained in the present case are demonstrated by a consideration here of the same two inquires suggested by *Riggs*." (*Riggs v. State*, 918 So. 2d 274 (Fla. 2005)). The first inquiry is: "(A) Whether the officer had reasonable grounds to believe that the child's parents might be in need of medical attention." The 5th DCA determined "[t]he officer was fulfilling a laudable police function in attempting to reunite the child with his missing parents. He was not, it should be noted, acting to investigate and uncover a crime." The 5th DCA concluded that viewing the facts objectively, the officer reasonably concluded that something was wrong. The 5th DCA concluded "[t]here was nothing unreasonable about the officer's behavior or his apprehensions that he was dealing with an emergent situation that demanded prompt action."

The second *Riggs* inquiry is: "(B) Whether the officer had reasonable grounds to connect the feared emergency to the house that was entered." The 5th DCA concluded that "[a]ll of the evidence pointed to the Ortiz residence as the site of the feared medical emergency."

The 5th DCA noted, "a proper function of the officer in these circumstances was to attempt to reunite the child with his parents," much the same function as the supreme court implicitly approved in *Riggs*. The DCA affirmed Ortiz's convictions and the trial court's denial of his motion to suppress. ". . . this case requires us to balance two values that are important to all of us: our desire to have police officers perform the community caretaking function particularly in perceived emergent circumstances,

and the warrant requirement to underpin a search." The court continued, "Here, the benefit obtained by allowing officers to act without a warrant in perceived emergency situations must trump the marginal curtailment of the warrant requirement. This case does not present a new exception, nor does it diminish the respect for the sanctity of the home. Rather, it simply adheres to the holding of our supreme court in *Riggs*, and applies a recognized exception to the warrant requirement."

Ortiz v. State, 24 So.3d 596 (Fla. 5th DCA,11/13/09)

Prior Notification To Patient Not Required When Seeking Pharmacy Records Under Florida Statutes

During an investigation into a suspected "doctor shopping" violation, the investigator requested and received from the pharmacy, pursuant to section 893.07(4), Florida Statutes, the records at issue in this matter. (See also F.S. 893.13(7)(a)8.) The trial court granted Carter's suppression motion which asserted "the warrantless seizure of her prescription records violated her constitutional rights to privacy and to due process," and that "her pharmacy records could not legally be transmitted to law enforcement officers unless she was provided prior notice and the opportunity to consent or be heard." The State appealed.

The 1st DCA held that the trial court's ruling that the warrantless seizure of the pharmacy records without prior notice was unlawful was erroneous, and reversed the order suppressing the prescription records and remanded for further proceedings.

> *. . . section 893.07(4), Florida Statutes, requires pharmacies to maintain the records at issue here for a period of 2 years "for inspection and copying by law enforcement officers whose duty it is to enforce the laws of this state relating to controlled substances." The statute does not require a subpoena, warrant, or prior notice to the patient. The enactment of section 893.07 was an extension of warrantless search and seizure power by the Legislature "as part of a major legislative revision of the Florida drug abuse laws." Gettel v. State, 287 So. 2d 413, 414 (Fla. 2d DCA 1984).*

The 1st DCA further noted that "[i]f the Legislature intended to require pharmacies to notify patients in connection with section 893.07, the Legislature would have included this requirement in the statute, as it did in statutes governing disclosure by other health care entities."

State v. Carter, 23 So.3d 798 , (Fla. 1stDCA, 11/30/09)

5th DCA Applies U.S. Supreme Court's GANT Case To Approve Search Of Vehicle Incident Arrest Of Driver On Outstanding Warrants For Theft

Brown, while in his vehicle, was stopped because of outstanding warrants for theft. After the officer identified Brown and confirmed the outstanding warrants, Brown was taken into custody, handcuffed and placed in the officer's patrol vehicle. The officer then looked into Brown's car, noticed a lady's wallet on the front seat of the driver's side, opened the wallet, and discovered it belonged to an elderly woman. A search of the vehicle was conducted and three other wallets were found belonging to three other elderly women.

Brown filed a motion to suppress claiming the "police had no cause to search his vehicle because the vehicle had no connection to the crimes for which he was arrested." The motion was dismissed by the trial court, "applying the then-prevailing interpretation of New York v. Belton, 453 U.S. 454 (1981)," which held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Id. at 460.

After *Arizona v. Gant*, 129 S. Ct. 1710 (2009) was announced, Brown challenged the trial court's reliance upon Belton in light of Gant, which was decided after Appellant's conviction. Brown specifically challenged "the applicability of the search incident to arrest exception because he was already shackled and locked in a police car at the time of the search, a fact not in dispute."

The 5th DCA provided an in-depth analysis of the "trilogy of Supreme Court cases preceding *Gant*." Following its analysis, the 5th DCA held the search was lawful under *Gant*, even though Appellant was not within reach of the vehicle at the time of the search. The Court also noted the police were acting under good faith of the law as it existed at the time of the police actions. Brown's conviction was affirmed. The Court noted:

> **In conclusion, we hold that when the offense of arrest of an occupant of a vehicle is, by its nature, for a crime that might yield physical evidence, then as an incident to that arrest, police may search the passenger compartment of the vehicle, including containers, to gather evidence, irrespective of whether the arrestee has access to the vehicle at the time of the search.** If the offense of arrest is for a crime for which there is no physical evidence, then the search of the vehicle is not authorized as an incident to arrest, unless the arrestee has access to the passenger compartment of the vehicle at the time of the search, as was the case in *Belton*. For searches conducted before *Gant* was decided, in reliance on the widely accepted interpretation of *Belton*, the exclusionary rule is not available as a remedy.

EDITOR'S NOTE: *Gant* has produced two main interpretations. The first is that as articulated in *Brown*, above, that *Gant* means that except in driving and traffic types of offenses, when a person is arrested in a vehicle and removed from the vehicle, the police have reasonable cause to search the vehicle for further evidence of the crime for which he was arrested. (See also: *People v. Osborne,* 175 Cal.App. 4th 1052, 1065 (2009).)
The second, more restrictive, interpretation refuses to read *Gant* as providing a per se test for reasonable basis to search the vehicle depending solely on the nature of the offense for which the defendant was arrested. E.g., *United States v. Reagan,* No. 3:10-22, 2010 WL 201089 (E.D.Tenn. May 19, 2010). The approach in *Reagan* is that "reasonable belief" is the same as "reason to believe" and requires a court to determine, based on common sense and the totality of the circumstances whether the police had cause to believe there would be evidence of the offense of the arrest in the vehicle. (See also: *Arizona v. Gamboa*, Arizona Court of Appeals, 2010 WL 2773359, July 13, 2010.)

Brown v. State, 24 So.3d 671 (Fla. 5th DCC, 12/18/09)

Subsequent Placement Of Trashcan At Street For Pickup Does Not Cure Earlier Illegal Viewing Of Contents While Next To Residence

The evidence at issue was bloodied items (shoes and article of clothing) seen inside a trashcan. Detectives went to Edward's home to interview him, as he was a person of interest in a homicide investigation. No one was home and the detectives were "uncertain if the home was occupied," so one detective lifted the lid of the trashcan to see if there was any trash. They saw the bloodied items but did not seize them. After the trashcan was taken to the curb "the bloodied items and a black carry-on-bag were seized from the trash."
The record revealed that "the evidence which was retrieved was cited in the applications for the search warrant and arrest warrant which were subsequently issued." The State conceded the initial search was illegal, however, the State argued that once "the trashcan was placed on the street for collection, the contents therein were abandoned and Edward had no reasonable expectation of privacy in the trash."

The 1st DCA concluded the State's argument "ignores the fact that the police acquired knowledge of the contents of the trash illegally, and the State never introduced evidence that, without this knowledge, officers would have nonetheless searched the trashcan."

> The exclusionary rule provides that evidence obtained directly or indirectly from a violation of the fourth amendment is not admissible against an accused at trial. Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The harsh consequences of the "fruit of the poisonous tree" doctrine are ameliorated by three crucial exceptions. A court may admit such evidence if the state can show that (1) an independent source existed for the discovery of the evidence, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920); (2) the evidence would have inevitably been discovered in the course of a legitimate investigation, Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 77 (1984); or (3) sufficient attenuation existed between the challenged evidence and the illegal conduct, Wong Sun. . . .

Noting the state failed to establish any of the above exceptions, the 1st DCA allowed the trial court's suppression order of the evidence to continue.

State v. Edward, 25 So.3d. 610 (Fla. 1st DCA, 12/22/09)

Historical Cell Site Information Is Not "Content-Based" And Does Not Implicate 4th Amendment Protections. Obtaining Such Information Does Not Have To Be Done By The Content-Based Process In Chapter 934, F.S

As stated by the court, "Technology confronts Florida's statutory scheme for discovery of cellular telephone records in this appeal from the defendant's conviction and sentence for burglary of a dwelling, robbery, and two counts of battery, all while armed with a deadly weapon. The defendant makes several arguments, none of which merit a reversal. We write to address the trial court's admission of historical cell phone site evidence."

Among other evidence, the State obtained the defendant's historical cell site information by requesting an Order Authorizing Disclosure of Cellular Telephone Billing Records and Cell Site Number and Location. Initially, law enforcement obtained the records through an investigative subpoena. The defendant moved in limine or to suppress the evidence because the State had not complied with F.S. 934.23. The court suppressed the information, but allowed the State to obtain a proper court order.

Mitchell, convicted and sentenced for burglary of a dwelling, robbery, and two counts of battery, all while armed with a deadly weapon, appealed arguing the trial court erred in permitting the State to obtain and introduce the defendant's historical cell site records because it originally failed to obtain the records, pursuant to F.S. 934.23, (Required Disclosure of Customer Communications and Records). Mitchell further argued that "the evidence should be excluded because the State essentially conducted a warrantless search and seizure of his phone records to find his historical physical location, in violation of his Fourth Amendment rights."

The 4th DCA first observed:

> Chapter 934 protects against unauthorized interception of oral, wire, or electronic communications" and is "strictly construed and narrowly limited." *State v. Jackson,* 650 So.2d 24, 26 (Fla.1995). Section 934.23 requires an officer to obtain a warrant or seek a court order when obtaining customer or subscriber records from an electronic communication provider. § 934.23(4)(a) 1., 2., Fla. Stat. A court may issue the order under subsection (5), only if the "officer offers specific and articulable facts showing that there are reasonable grounds to believe the contents of a wire or electronic communication or the records of other information sought are relevant and material to an ongoing criminal investigation." § 934.23(5), Fla. Stat. "[C]ontents of a communication," however, are not obtainable under subsection (4)(a). § 934.23(4)(a), Fla. Stat. This section mimics subsections 2703(c) and (d) of the Stored Communications Act (SCA). 18 U.S.C. § 2703.

The 4th DCA noted that case law concerning historical cell site information is relatively new and unsettled, and that the 5th DCA held in Figueroa v. State, 870 2d 897 (Fla. 5th DCA 2004), that obtaining phone numbers from cell phone service providers is not a Fourth Amendment violation.

However, the 4th DCA stated that "no Florida court has addressed the prerequisite for obtaining historical cell site information." It then looked to a case of first impression, where the U.S. District

Court for Massachusetts held that historical cell site information was obtainable through a court order issued pursuant to subsections 2703(c)(1)(B) and (d) of Title 18 of the United States Code. (See: *In re Applications of the U.S. for Orders Pursuant to Title 18 U.S.C. § 2703(d)*, 509 F. Supp. 2d 76 (D. Mass. 2007) (reversing a decision by the Magistrate Judge which required a warrant to obtain historical cell site information).

The DCA detailed the Massachusetts U.S. District Court's application of a "three-part test to determine if section 2703 provided a proper means to obtain the information"—

> The district court applied a three-part test to determine if section 2703 provided a proper means to obtain the information. First, the court determined that a cell phone service provider fits within the statutory definition of a "provider of electronic communication service[s]," as defined by the SCA. *Id.* at 79 (quoting 18 U.S.C. § 2510(15)). Second, the court determined that historical cell site information was "a record or other information pertaining to a subscriber to or customer of" an electronic communications service because it contained "data specific to the handling of a customer's call." *Id.* at 79-80 (quoting 18 U.S.C. § 2703(c)(1)). Third, the court determined that the information was not "content" information because the location of a cell tower disclosed nothing about the "substance, purport, or meaning" of the call. *Id.* at 80 (quoting 18 U.S.C. § 2510(8)). Lastly, the court found that because historical cell site information disclosed only information in the past and not the current location of the defendant, it did not implicate the Fourth Amendment. *Id.* at 80-81.

The 4th DCA adopted the reasoning of the U.S. District Court of Massachusetts "because our statutory scheme is so similar to the federal statute." The 4th DCA held that "historical cell site information is not content-based."

The user of a cell phone has no expectation of privacy in those records. *See Smith v. Maryland*, 442 U.S. 735 (1979). And, because historical cell site information discloses only the defendant's past location and does not pinpoint his current location in a private area, it does not implicate Fourth Amendment protections. *See United States v. Knotts*, 460 U.S. 276 (1983). In short, law enforcement need only comply with the provisions of section 934 to obtain historical cell site information.

The 4th DCA found no error in the trial court's reliance on Hunter v. State, 639 So. 2d 72 (Fla. 5th DCA 1994) when it allowed "the State a second opportunity to obtain the historical cell site records." The 4th DCA also found that the "affidavit presented in this case . . . clearly provided the court with sufficient 'specific and articulable' facts to allow the trial court to decide whether to order production of the records." Mitchell made cell phone calls during the night and morning of the crime. "The cell site information was relevant to place the defendant in the area near the crime at the time of the crime." The 4th DCA concluded that "given the eyewitness testimony, defendant's admission, and physical evidence, any error would have been harmless." *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The 4th DCA found "there was no error in the admission of the historical cell site information."

Mitchell v. State, 25 So.3d 632, (Fla. 4th DCA, 12/30/09)

Editor's Note: On 9/7/2010 the 3rd CA issued an opinion, *In Re: APPLICATION OF the UNITED STATES of America FOR AN ORDER DIRECTING A PROVIDER OF ELECTRONIC COMMUNICATION SERVICE TO DISCLOSE RECORDS TO the GOVERNMENT,* --- F.3d ----, 2010 WL 3465170 (C.A.3 (Pa.)) that also discussed access to information under 18 USC Section 2703 that would reveal a cell phone owner's historical locations as (s)he used the cell phone.

The CA3 noted: "Because the statute as presently written gives the MJ (magistrate) the option to require a warrant showing probable cause, we are unwilling to remove that option although it is an option to be used sparingly because Congress also included the option of a § 2703(d) order. However, should the MJ conclude that a warrant is required rather than a § 2703(d) order, on remand it is imperative that the MJ make fact findings and give a full explanation that balances the Government's need (not merely desire) for the information with the privacy interests of cell phone users."

It appears the court assumed there was an expectation of privacy in such historical information in reaching its less-than-clear conclusion. Otherwise why would a warrant be necessary? On the other hand, if the information can be obtained by a Court order, what is the expectation of privacy, if any?

Fleeing Police Statute's Elements Regarding Agency Insignia Must Be Proven At Trial

F.S. 326.1935(2), Florida Statutes (2006), provides:

> Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated commits a felony of the third degree . . . (emphasis added)

At trial, the deputy testified he passed a car with non-working taillights and attempted to effect a traffic stop. According to the deputy, "he turned around and decided to initiate a traffic stop." The deputy testified he was driving a "marked patrol car, lights on top" and was wearing a uniform. He further testified "in order to stop the Mercury, he engaged his exterior lights and activated his siren." The defense moved for acquittal, noting that no evidence that the car had the "agency insignia" or other similar markings was introduced by the state. The trial court denied the motion but the 1st DCA reversed. The 1st DCA concluded that "[b]y neglecting to bring forth any evidence that Deputy Stone's vehicle contained agency insignia or other jurisdictional markings, the state failed to make out a prima facie case of fleeing or attempting to elude a law enforcement officer in violation of section 326.1935(2)."

The rest of the story: However, the DCA noted that the jury, in finding the defendant guilty of F.S. 326.1935(2) had to have found all the elements of F.S. 326.1935(1), which it construed to be a lesser included of F.S. 326.1935(2). It remanded the case back to the trial court to render judgment and sentence for violation of F.S. 326.1935(1) which is also a third degree felony:

> (1) It is unlawful for the operator of any vehicle, having knowledge that he or she has been ordered to stop such vehicle by a duly authorized law enforcement officer, willfully to refuse or fail to stop the vehicle in compliance with such order or, having stopped in knowing compliance with such order, willfully to flee in an attempt to elude the officer, and a person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Slack v. State, 30 So.3d 684 (Fla. 1st DCA, 3/25/10)

Editor's Note: Contrast Slack with **Dumais v. State,** 49So. 3d 850 (Fla. 4th DCA, 7/14/10**)** where Ft. Lauderdale officers testified they were chasing in "marked units" and where the defendant after being extracted from his vehicle said he was sorry and should have stopped when he saw the officers' lights. The 4th DCA distinguished Slack and said that the defendant's admission that the officers were police supports a finding to sustain a conviction under F.S. 326.1935(2).

Regardless, officers should be trained to describe their vehicle to include "agency insignia" and other police type "jurisdictional markings" as being prominently displayed. Consider photographing the chase vehicle when arrests for fleeing have been made and providing the photo to the prosecutor for use at trial.

"Zone of Uncertainty" To Be Taken Into Account In Determining Whether Defensive Use of Deadly Force Is Appropriate.

Montanez, owner of a tow truck company, got into an altercation with Glen Rich, whose car had been towed to the tow truck company's lot. Sometime during the altercation, Rich entered his vehicle and drove it towards Montanez and one of Montanez's employees. Montanez claimed that he fired his weapon as he dove out of the way to avoid being hit by the vehicle.

The physical evidence revealed that the bullet entered the front side passenger window and then stuck Rich, suggesting that Montanez fired the weapon as the vehicle was passing him. Montanez,

charged with second-degree murder and shooting at or into a vehicle, filed a motion to dismiss and a motion for immunity, under F.S. 776.032, the "Stand your Ground" law.

Following an evidentiary hearing the trial court denied the motions noting "that when a vehicle is proceeding forward, there is a zone of uncertainty as to the possible direction of that vehicle." However, the trial court found that Montanez discharged his firearm after the zone of uncertainty had passed; thus, ". . . the threat of imminent death or great bodily harm had also passed." While the parties agreed that the "preponderance of the evidence standard" was correctly utilized in deciding the issue of immunity, Montanez argued that the "trial court departed from the essential requirements of the law when the trial court commented in its order that '[t]he events in this case did not occur in a house or a vehicle which is where this Court believes immunity is intended to apply.'"

The 2nd DCA determined that the record was clear that Montanez fired the shot after the vehicle passed him. The trial court determined that Montanez "knew or should have known that he and [the relevant employee] were no longer in the 'zone of uncertainty' when he fired his weapon." The implication from that finding is that before a person is justified in discharging a weapon in defense of others, that person must be reasonably certain that the person whom they are defending is in immediate danger of death or great bodily harm. Such a determination is in accord with the objective, reasonable person standard by which claims of justifiable use of deadly force are measured. "We find no error in such a determination."

Montanez v. State, 24 So.3d 799 , (Fla. 2nd DCA, 1/6/10)

Officers Following Subject Back Into House With Permission So He Could Put On Shirt Entered With Consent and Plain View Seizure Of Drugs Was Legal

Police officers received an anonymous tip regarding a homicide in the apartment building that Woods resided in. Three officers knocked on Wood's apartment door and when all the individuals appeared at the door, the police informed them they were investigating a homicide and asked the individuals to step outside to talk. Everyone complied without resistance.

However, after Woods exited the apartment without a shirt on, he asked if he could go back inside to get a shirt. Officer Nubin replied that he could, but that she would have to accompany him for officer safety reasons. Officer Harris asked, "Are you sure it's all right if we follow you back to your room?" and Woods said "Yes."

When the officers accompanied Woods back to his room, they saw in plain sight a bag of marijuana and a bag of what appeared to be crack cocaine. A search warrant was executed and marijuana, cocaine and firearms were recovered. Woods was free to leave up to the point when the officers saw the marijuana in his room. The trial court found the officers' account of what transpired more credible than the witnesses and found the encounter consensual.

The 4th DCA cited to State v. Triana, 979 So. 2d 1039 (Fla. 3d DCA 2008), because of its similarity to the instant case and because it "properly considers the factors considered in *Mendenhall,*" which was the "totality of the circumstances" approach. United States v. Mendenhall, 446 U.S. 544 (1980). Based on the totality of the circumstances, the 4th DCA concluded there was no Fourth Amendment violation in the instant case and affirmed the denial of the suppression motion. "The officers never acted in a threatening manner, never drew their weapons, and never raised their voices or ordered the residents to do anything against their will."

Woods v. State, 25 So.3d 669 (Fla. 4th DCA, 1/13/10)

Attempted Burglary Instruction Improper Where Only Issue Was Defendant's Intent in Entering Abandoned Duplex

Jackson was convicted of Attempted Burglary and Possession of Burglary Tools. He appealed arguing the trial court erred in charging the jury on attempted burglary when there was no evidence to support the attempt.

Jackson was in an uninhabited duplex that had been boarded up and scheduled for demolition. He was found by police to be wearing a "tool belt containing pliers, screw drivers, and a hammer." There was copper wire on the ground around his feet and the walls had been ripped open. Jackson was arrested, read his *Miranda* warnings, and waived his rights.

He told the officers he stripped the copper wire but did not know it was illegal to do so. The state requested the jury be instructed on attempted burglary as a lesser included. Jackson objected and requested that only trespass be charged as a lesser included offense. In closing, Jackson, who represented himself, argued he committed a trespass, but not a burglary. The jury was instructed on attempted burglary and Jackson objected to the trial court's instruction.

The 4th DCA noted that the Florida Rule of Criminal Procedure requires an instruction on "attempt" if supported by the evidence and specifically says the attempt instruction shall not be given if there is no evidence to support the attempt and the only evidence proves a completed offense. Because of the rule's express prohibition, the trial court does not have the discretion to instruct on an attempt where the only evidence proves a complete offense. See Wilson v. State, 635 So. 2d 16, 17 (Fla. 1994).

In this case, the single contested issue was whether Jackson entered the house with the intent to steal something. If his intent was to steal, then a burglary was committed. If his intent was to look around, then he committed a trespass. The 4th DCA concluded there was no evidence that Jackson attempted a burglary but did not complete it. The 4th DCA referred to Pepitone v. State, 846 So. 2d 640 (Fla. 2d DCA 2003), a similar case where the 2nd DCA held the trial court erred by instructing the jury on attempted burglary because the evidence established that Pepitone entered the house but nothing was taken. As the 2nd DCA did in Pepitone, the 4th DCA reversed the attempted burglary conviction and remanded with directions to enter a judgment and sentence for trespass.

Jackson v. State, 26 So.3d 642 (Fla. 4th DCA) 1/20/10

"Probable Cause" To Support Warrant Involves Practical, Common-Sense Decision That There Is A Fair Probability That Evidence Will Be Found In A Place

The Broward County Sheriff's Office was investigating an accident where Joseph Hatton died as a result of the injuries he sustained after defendant's vehicle collided with Hatton's vehicle. The Detective filed a "General Affidavit and Application for Search Warrant for the sensing and diagnostic module (SDM) (also known as a 'black box') from the defendant's vehicle."

The facts supporting probable cause as stated in the Affidavit included an indication that the investigation suggested defendant's vehicle was traveling "well in excess" of the posted (40 mph) speed limit; that the post-impact distance traveled by both vehicles was greater than one hundred twenty five feet; that there were no pre-impact tire marks, suggesting that no braking took place before impact; that post-impact tire marks along with physical evidence on scene suggest that the defendant's vehicle was traveling in excess of 70 mph; and that an eyewitness "stated that she heard the tires on the vehicle that [the defendant] was driving 'chirp' as the vehicle was changing into a faster gear."

The officer further stated in his affidavit that the "black box" located in the defendant's vehicle "may contain electronically stored data including, but not limited to, data pertaining to the pre impact speed of the vehicle, airbag system deployment time and status, engine RPM's, brake circuit status, seat belt circuit status, Delta 'V' readings, and ignition cycles."

The warrant was issued, and the black box seized. The defense filed a motion to suppress evidence from the black box, which was granted by the trial court. The trial court noted that "the general affidavit and application for search warrant did not contain specific and sufficient facts to establish probable cause that a crime had been committed and that the evidence of that crime would be found in the defendant's vehicle. Speed alone was insufficient."

In its lengthy analysis, the 4th DCA discussed the "task of the issuing magistrate" and also noted that where the issuance of a search warrant based on a probable cause affidavit is at issue, the standard of review is not de novo, but rather a standard of 'great deference.'" The issuing magistrate's duty "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him,…there is a fair probability that…evidence of a crime will be found in a particular place."

The DCA noted that there are two elements that must be proven in the affidavit for the magistrate to determine that probable cause exists when issuing a search warrant: (1) the commission element—that a particular person has committed a crime—and (2) the nexus element—that evidence relevant to the probable criminality is likely to be located at the place searched.

The DCA determined the detective's affidavit presented enough facts for the magistrate to make a practical, common-sense decision, based on the circumstances set forth in the affidavit, that the defendant committed the alleged crime (the commission element) and that evidence relevant to the probable criminality [of vehicular homicide was] likely to be located at the place searched – the Corvette's black box (the nexus element).

Thus, the 4th DCA held that the magistrate properly issued the search warrant and reversed the trial court's order suppressing the evidence.

State v. Abbey, 28 So.3d 208, (Fla. 4th DCA, 2/24/2010)

Seizure of Firearm And Defendant's Ownership Statement Suppressed Because Search Violated GANT Guidelines

K.S. was stopped after a fleeing and eluding incident. When the officer pulled his patrol vehicle up behind K.S.'s vehicle, he "observed K.S. reaching towards the dashboard on the passenger side and ordered K.S. to show his hands and step out of the car."

K.S. exited his car; he was handcuffed, and arrested for fleeing and eluding. Backup officers arrived and no weapons were found on K.S. The officer took K.S.'s car keys; unlocked and opened the glove box in K.S.'s vehicle; and found a semiautomatic firearm. K.S. testified at the hearing that he had not agreed to or consented to a search of the vehicle.

The trial court, relying on Arizona v. Gant, 129 S. Ct. 1710 (2009), granted the motion to suppress the firearm and the defendant's admission of ownership and use of the gun made after the gun's discovery. The State appealed.

The 2nd DCA noted that the Gant court held that the search of Gant's vehicle was unreasonable where Gant "clearly was not within reaching distance of his car," because he was handcuffed in a patrol car at the time of the search. The Gant court also held that "the police could not reasonably have believed they would find evidence relevant to Gant's crime of driving with a suspended license."

In the instant case, while the State argued that K.S.'s furtive movements towards the glove compartment justified the search based on officer safety concerns, the 2nd DCA rejected that argument. Similar to Gant, K.S. was in handcuffs, separated from his car, and "under the supervision of additional backup officers," at the time of the search. The DCA determined that the officer could not reasonably have believed he would find evidence of K.S.'s crime of fleeing and eluding by opening the glove box. Thus, the 2nd DCA affirmed the trial court's order granting K.S.'s motion to suppress.

State v. K.S., 28 So.3d 985, (Fla. 2nd DCA,3/5/2010)

Stop Justified By "A Founded or Reasonable Suspicion"

The record revealed that undercover Detective Valdez arranged to purchase two kilograms of powder cocaine from Marcos Lopez (Marcos). During surveillance of Marcos, defendant Elvis Lopez

(Lopez) was seen leaving a residence with Marcos and then followed Marcos, in his own vehicle, to the prearranged drug buy.

Lopez parked in a different location from where Marcos and Detective Valdez met. Following the transaction between Marcos and Detective Valdez, a takedown unit moved in and arrested Marcos. Lopez immediately tried to leave, but Detective Oliva used his car to block and detain Lopez. Lopez told the officer he was there "to collect the debt from the proceeds of the sale he knew was going to take place." Lopez agreed to go to the police station, he waived his *Miranda* rights, and then gave a recorded interview in which he specifically admitted his involvement in the unlawful transaction.

Lopez filed a motion to suppress challenging the validity of the initial investigatory stop. At the suppression hearing Detective Valdez testified that, based on his broad experience, a second vehicle follows a vehicle involved in a drug transaction to insure that there are no law enforcement officials at the transaction site. Detective Oliva testified that "the defendant's behavior gave rise to the suspicion that he was in communication with Lopez during the drug sale."

The lower court determined the stop was not justified, and all derived from it was to be suppressed. The 3rd DCA ruled that the trial court's conclusion was "unacceptable." "The contrary conclusion, which seems to have been indulged by the trial judge, amounts to a finding not only that the defendant's actions in accompanying, following, and waiting for Marcos and then attempting to flee when he was apprehended were completely innocent and the connections to the drug deal completely coincidental, but that the police were unreasonable as a matter of law in thinking otherwise. The 3rd DCA concluded that "we think it clear that the circumstances apparent before the stop gave rise to a founded or reasonable suspicion, as required by the Constitution, that the defendant was a principal or accomplice in the ongoing drug transaction." See Terry v. Ohio, 392 U.S. 1 (1968).

The DCA noted that as stated in State v. Maya, 529 So. 2d 1282, 1287 n.7 (Fla. 3d DCA 1988), determinations of reasonable suspicion do not "turn on whether an innocent explanation can possibly be conjured up from what are obviously incriminating circumstances. Rather, [they are] dependent on what a realistic view of the facts justifies or requires." The DCA concluded, "Not only can we not fault the police for stopping Elvis, but, as Terry itself says, '[i]t would have been poor police work indeed for [the] officer . . . to have failed to investigate[] [his] behavior.'" Terry, 392 U.S. at 23. The 3rd DCA reversed and remanded. "(T)he stop was justified, Terry; § 901.151(2)."

State v. Lopez, 29 So.3d 399, (Fla. 3rd DCA, 3/3/2010)

Facts Provided Probable Cause To Arrest Passenger As Well As Driver

A local business in Hialeah was burglarized; two firearms, and $300 in cash were removed from the business. The business had a surveillance video which captured the burglary. The business owner recognized a former employee, who used a key to open the door of the business after it had closed, allowing the burglars entry into the business.

Detectives interviewed the former employee. She identified Armin Dominguez as one of the men and provided his address, along with a description of the vehicle he drove. She told the detectives she only knew the other man by the name of "Yoander."

The detectives set up surveillance at the address of Dominguez. When a vehicle, with two males, arrived at the residence; Dominguez was identified by one of the detectives as the driver. Upon the occupants spotting an unmarked police car the vehicle sped away. Additional police units were called and the vehicle was blocked in a "felony stop" maneuver." Both men were directed to exit the car, at which point the police saw, through the clear windows of the vehicle, a shotgun on the back seat and a ski mask and cash box on the floor of the vehicle.

Dominguez was read his rights and the passenger (defendant) in the vehicle identified himself as "Yoander." The detective administered a verbal Miranda warning to "Yoander." He was transported to the police station; executed a written Miranda form and he then provided a comprehensive oral and written statement admitting his involvement (with Dominguez) as one of the burglars.

The trial court found "this sequence of facts did not provide a reasonable suspicion to detain and question Zaldivar" and concluded that "Zaldivar's detention with Dominguez was an arrest without probable cause." The 3rd DCA reversed after concluding that "the police had ample cause to stop Dominguez and the car he was driving. Such a stop includes the legal right to order other occupants to step out of the vehicle." See: Prestley v. State, 896 So. 2d 862, 864 (Fla. 5th DCA 2005). As noted by the Court, the observation of the stolen weapon and other evidence of the burglary in plain view in the car along with the passenger's self-identification as "Yoander" provided adequate probable cause for arrest. The motion to suppress his post-arrest statements should have been denied.

State v. Zaldivar, 34 So.3d 76, (Fla. 3rd DCA, 3/31/2010)

Traffic Stop "Unreasonably Prolonged" To Promote Dog Sniff

Whitfield pled nolo contendere to the charge of trafficking cocaine and reserved his right to appeal the denial of his motion to suppress the cocaine evidence found during the search of his vehicle. Whitfield asserted "the charges against him stemmed from an unreasonably prolonged traffic stop."

The entire stop, approximately thirty minutes, was recorded and admitted into evidence at the suppression hearing. Whitfield was initially stopped for speeding on the Florida Turnpike. The Trooper told Whitfield he would receive a warning. Within the first fifteen minutes of the traffic stop, the trooper had completed his driver's license and warrants checks; received confirmation the rental car was not stolen; and saw that the rental agreement listed Whitfield as an authorized driver of the rental vehicle.

When Whitfield declined permission for the Trooper to search the vehicle, the Trooper called for a K-9 unit. Almost twenty-five minutes into the stop, the trooper asked dispatch to get verification from Avis that Whitfield was listed as an authorized driver. Whitfield received his "completed written warning at about 27 ½ minutes into the stop. However, he was told he was not free to leave because verification from Avis had not come back. At 28:36, dispatch informed the Trooper Barley that Whitfield was an authorized driver. The K-9 unit arrived at 28:57 to begin the sniff search.

By reason of the sniff, the dog alerted, and drugs were found following a search of the car. The trial court denied the suppression motion "because the K-9 unit arrived within a minute of the verification that Whitfield was an authorized driver." The trial court "found the delay in conducting the canine search was not unreasonable.

However, the 5th DCA concluded that the Trooper had completed all routine investigation within 12 minutes of the traffic stop, and that but for the extended interrogation of Whitfield, there was no reason why the warning should not have been issued within a short time thereafter. The search did not begin until after the citation was issued and the purpose of the traffic stop completed. The DCA found that the facts fell short of establishing reasonable suspicion of criminal activity to justify holding Whitfield past the reasonable time to issue a citation for speeding. "…this traffic stop should have been concluded by the issuance of the written warning long before it was…The fact that the dog sniff began a short period of time…after the traffic stop was concluded, does not save the search."

Whitfield v. State, 33 So.3d 787, (Fla. 5th DCA, 4/23/10)

"Hot Pursuit" Allows Entry Into Home While In Pursuit Of Misdemeanant If Crime Punishable By Jail

Two officers noticed Brown and another man outside an apartment complex during an unrelated investigation. Brown had an assault-type rifle. After the men were ordered to stop, they did not comply and they ran into the defendant's apartment. The door was open, and one officer followed and found the rifle as well as over twenty grams of marijuana. Brown admitted the gun and pot belonged to him. The trial court granted the suppression motion concluding in part that since Brown's weapons offense would have been a misdemeanor, the officer could follow him into the

home in pursuit of Brown for that purpose.

The 3rd DCA discussed what is a lawful hot pursuit. While the trial court was correct in finding that "the offenses observed by the officers, possession of an assault-type rifle, and fleeing from an officer were 'only' misdemeanors," the 3rd DCA cited to its decision in Ulysse v. State, 899 So. 2d 1233, 1234 (Fla. 3d DCA 2005), where it "squarely held that the hot pursuit exception to the warrant requirement is nonetheless fully applicable." The court rejected the suggestion that a hot pursuit exception does not apply to pursue a misdemeanant, citing Gasset v. State, 490 So. 2d 97 (Fla. 3d DCA 1986) which held that hot pursuit of a fleeing misdemeanant is permissible where the misdemeanor is punishable by a jail sentence.

The Court noted that section 901.15, Florida Statutes (2008) specifically provides:

> A law enforcement officer may arrest a person without a warrant when: (1) The person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer. An arrest for the commission of a misdemeanor or the violation of a municipal or county ordinance shall be made immediately *or* ***in fresh pursuit***. [e.s.]

The 3rd DCA found that the time of day, the presence of an assault-type rifle, the disregarded commands to stop, and the possible threat of an uncooperative suspect with a weapon, were overwhelming reasons to follow Brown into the home. The DCA also found that "the knock and announce rule is not applicable in hot pursuit situations." The order under review was reversed and the cause was remanded for denial of the motion to suppress.

State v. Brown, 36 So.3d 770, (Fla. 3rd DCA, 5/12/10)

No Reasonable Suspicion To Detain Juvenile Who Ran When Patrol Car Arrived And Officer Approached With Gun Drawn

OB, a 15-year-old juvenile, and his friends were walking to an elementary school to play basketball when it began to rain and they took shelter under a neighbor's carport. As the rain ended, a police car—responding to a BOLO--pulled up and an officer with gun drawn approached the youths. The youths ran because they were "scared." OB was found hiding in someone else's backyard by another officer, was ordered to lie face down in the mud, and then was handcuffed. When OB's father arrived, OB's eye was swelling shut and his shirt was torn. OB maintains the officer kicked him in the face and threw him over a fence. OB was charged with resisting an officer without violence.

The opinion does not relate what the BOLO was. Presumably it involved the teens being on the residence's premises (the carport). Regardless of what the BOLO details were, the trial court determined that responding to the BOLO was a lawful execution of a legal duty and upheld the detention and charging of OB, relying on Billips v. State, 777 So.2d 1094 (Fla. 3rd DCA 2001) and E.A.B. v. State, 851 So.2d 308 (Fla. 2nd DCA 2003).

The 3rd DCA disagreed with the trial court, noting that Billips and E.A.B. stand for the proposition that officers are NOT engaged in the lawful execution of a legal duty when responding to a BOLO unless they also have the requisite reasonable suspicion. The facts of the OB case were that the officers observed three African-American males in the backyard, and did not indicate any observation of criminal or suspicious conduct. Further, the circumstances found in C.E.L. v. State, 24 So.3d 1181 (Fla. 2009) (citing and applying Illinois v. Wardlow, 528 U.S. 119 (2000) were not present. The unprovoked flight of OB and his companions upon noticing the police did not occur in a "high crime area." The trial court record did not establish any independent reasonable suspicion on the part of the officer. The teens' flight alone did not constitute reasonable suspicion. Further there was no proof that OB heard any order by the police to stop. The DCA noted that OB testified "he took off running" and did not hear any command of the officers and was actually unaware whether an officer was after him in particular. The DCA found that the trial court erred in finding OB guilty of resisting an officer without violence.

O.B. v. State, 36 So.3d 784 , (Fla. 3rd DCA, 5/12/10)

Corpus Delicti Of Murder Established. Circumstantial Evidence Allows Reasonable Inference That Victim Could Be Dead Due To Crime

Michael Wolfe, convicted of first-degree murder and sentenced to life, contended on appeal that the trial court "erred in admitting, over objection, his statements because the State failed to establish the corpus delicti of murder." He specifically contested whether there was sufficient evidence proving that the criminal agency of another person caused David Jackson's death.

Barbara Wolfe, Wolfe's second wife, had a child from her first marriage to victim David Jackson. Jackson and Barbara divorced, she married Wolfe and they moved to Arizona. Jackson visited his son in Arizona in 1987. Barbara and the son were scheduled to visit Jackson in Florida in July 1988. Before the scheduled visit, Jackson was reported missing and the case went cold.

Wolfe adopted Barbara's son after Jackson never was found. Barbara and Wolfe later divorced. The case was later reopened and the investigation led investigators to Wolfe's third wife, Nancy Graham. Graham told the investigators that Wolfe had confessed to the murder of Jackson and told her how it happened. It was her statement to police that lead to an arrest warrant being issued for Wolfe. When

Wolfe was arrested and the story made the news, Wolfe's first wife, Carol Larson, contacted the police and told them that Wolfe also confessed to her about the murder of David Jackson.

At trial, Wolfe "denied confessing to Jackson's murder to either Graham or Larson, but admitted to alcoholism." Both Larson and Graham testified at trial.

The 4th DCA noted that "[i]n order to establish that the criminal agency of another person was the cause of death for purposes of proving the corpus delicti in a homicide case, all that is necessary is that the evidence 'tends' to show that a homicide was committed or allows a reasonable inference that the alleged victim *could* be dead due to a criminal agency." *Davis v. State*, 582 So. 2d 695, 700 (Fla. 1st DCA 1991).

In this case, the circumstantial evidence established that David Jackson was a responsible person, who paid his bills the day before he went missing; he was close to family and friends and spoke with them regularly; he left his home with only a couple of dollars; and later, his car was found at the airport but his dismantled skeletal remains were found in a once-deserted field two miles from his ex-wife's parents' home. The 4th DCA found that "the State presented sufficient circumstantial evidence to allow the reasonable inference that Jackson could be dead due to someone's criminal agency, thereby establishing the corpus delicti of murder." The 4th DCA affirmed his judgment of conviction and sentence of life in prison.

Wolfe v. State, 34 So.3d 227, (Fla. 4th DCA, 5/12/10)

Physical Actions Of Subject Constituted Consent To Search Of His Person

Detective Ogg stopped Jose Gamez's car after it failed to stop at two stop signs. There were other passengers in the vehicle. Because Gamez appeared "very nervous and was physically shaking" during his encounter with the Ogg, the detective requested Gamez talk to him near the police vehicle and away from the other passengers.

Gamez consented to a search of his vehicle and when asked, he told the detective he had nothing illegal on him. When the detective requested a search his person, Gamez "raised his hands above his head and spread out his feet, indicating that he was giving consent to search his person." The detective "felt a 'squishy' material wrapped in plastic on Gamez's waistline." Based on his experience, the detective believed the substance was "methamphetamine, marijuana or cocaine." The detective asked Gamez to empty his pockets and "Gamez took out a couple of cell phones and a roll of money." The detective asked Gamez if he could check his pockets again and "Gamez again raised his hands." The detective found another roll of money and some drugs in a bag.

The trial court granted the motion to suppress the evidence found in Gamez's pants, finding specifically "there was not clear and convincing evidence that Gamez gave Detective Ogg consent to search his person when he lifted his hands and spread his feet." However, the 2nd DCA disagreed with the trial court. It noted that consent to search may be in the form of conduct, gestures, or words. In both instances where Gamez was asked by the detective for permission to search his person, Gamez responded by raising his hands and spreading out his feet. The 2nd DCA concluded these actions conveyed Gamez's consent to search his person. Further, "as in Griffin, Gamez's behavior after Detective Ogg began to search him also supports the conclusion that Gamez consented to a search of his person, because Gamez never pulled away or otherwise indicated that he did not want to be searched." The 2nd DCA also found Gamez's consent to search was voluntary and reversed the trial court's order granting the suppression motion and remanded for further proceedings.

State v. Gamez, 34 So.3d 245, (Fla. 2nd DCA, 5/14/10)

Entry Into Home For "Protective Sweep" After Outside Arrest of Occupant 5 Feet From Door Not Justified

Luis Diaz pled no contest and reserved the right to appealed the court's failure to suppress evidence leading to his conviction for possession of heroin and drug paraphernalia. He was a subject of an ongoing drug investigation based on complaints that he was selling drugs from his house, and had been arrested for heroin possession approximately six months prior.

During this investigation, Russell was seen outside Diaz's home with a male and observed her depositing something believed to be narcotics into Steadham's pocket. After Russell went back into defendant's house the police made contact with Steadham and he admitted Russell had delivered narcotics to him. The police continued surveillance of the home and arrested Russell when she later came back out of the house.

Detective Eglund testified that when he arrested Russell about 5 feet from the door to the house, the front door to the house was open and he could see people moving around inside the back of house. Five officers entered the home with guns drawn and performed "a protective sweep." The Detective testified that the sweep was done "for our well being, making sure nobody was armed."

The defendant and his girlfriend were located in the bedroom with what appeared to be containers of heroin lying on the bed. They were taken outside, "handcuffed, read their *Miranda* rights, given BSO consent forms, and advised of their right to refuse consent." Neither Diaz nor his girlfriend had tried to destroy evidence. Both the girlfriend and the defendant signed the consent to search the house forms and heroin was found when the officers reentered the home. The girlfriend signed her consent under a false name. She said she had no idea the police were in the house until they entered the bedroom and she used a false name out of a concern for "having responsibility to sign anything."

A second detective testified that "[t]ypically, with narcotics investigations, there's an unknown. You don't know if there's going to be weapons inside." However, on cross examination he acknowledged that, although he knew there were occupants inside the residence, he did not know whether or not they were armed. He further acknowledged that he did not remember any weapons being recovered during the previous sweep of the defendant's home in conjunction with the previous arrest. He also said consent to search the house then was obtained in the same manner as it was in this case.

The court denied the motion to suppress, reasoning that because the officers could see from the front door that there were other individuals inside the home, they were authorized to conduct a protective sweep for their safety and to protect them 'from the possibility of any type of harm coming to them.

The 4th DCA disagreed. The DCA agreed that the officers had a reasonable belief that other people were inside the home. However, there was no proof at the hearing to establish the required "reasonable, articulable suspicion" that these individuals posed a danger and might jeopardize the officers' safety or that they were attempting to destroy evidence.

The court determined that exigent circumstances did not exist to support a warrantless entry to search the defendant's house. Based on the detective's observations of the hand-to-hand transaction, Steadham's statements and admissions, and the defendant's arrest for heroin possession six months earlier, the 4th DCA concluded there was sufficient time to apply for a search warrant. Yet, rather than obtain a warrant, "…the police continued surveillance, waited for Russell to re-emerge from the house, and then arrested her just a few feet from the front door." The DCA concluded that if time to get a warrant exists, [then] the enforcement agency must use that time to obtain the warrant. Hornblower v. State, 351 So. 2d 716, 718 (Fla. 1977).

The 4th DCA held the consents to search the house by defendant and his girlfriend were invalid "[b]ecause the police were not justified in entering the defendant's house without a warrant and conducting a protective sweep" so they were the product of illegal police activity. (Citing *Gonzalez v. State*, 578 So. 2d 729, 734 (Fla. 3d DCA 1991) (quoting *Norman v. State*, 379 So. 2d 643, 646–47 (Fla. 1980)). The 4th DCA held the "state failed to prove that the taint of illegal entry was dissipated by subsequent events." The denial of the suppression motion was reversed and the case was reversed and remanded for further proceedings.

Diaz v. State, 34 So.3d 797, (Fla. 4th DCA, 5/19/10)

Detention To Issue "Trespass" Warning Illegal So Evidence Illegally Seized And No Basis To Charge Defendant With "Escape"

Police were called to a bar in Sebastian, Florida on the eve of the 2007 Super Bowl after the bartender had argued with Gestewitz. When the police arrived, Gestewitz was outside the bar and the manager of the bar asked the officers to issue Gestewitz a trespass warning, so that he "could not re-enter the bar." One officer went inside the bar to write up the warning while the other officer remained outside with Gestewitz. When a friend offered to give him a ride, Gestewitz asked the officer if he could leave, and the officer told Gestewitz he was being detained "until they processed his trespass warning."

Gestewitz put his hands in his pockets, and the officer ordered him to remove his hands from his pockets; he did so and (according to the officer) began to "voluntarily" remove the items in his pockets. A plastic baggie was "poking out" of one of his pockets and when asked what was in the bag, Gestewitz said it was a "Xanax bar." Gestewitz was placed under arrest and before he was handcuffed, Gestewitz tried to flee. He was captured after he fell. Gestewitz's suppression motion was denied and he pled guilty to possession of Xanax, reserving his right to appeal. He went to trial on the escape charge and was found guilty.

The 4th DCA noted that the sole basis for detaining Gestewitz was to give him a written warning stating that he could not re-enter the bar in question and, if he did re-enter, he would face arrest for trespass. The 4th DCA noted that there is nothing in the statute defining how an authorized person is to convey a trespass warning. The 4th DCA found that the officers had no statutory or other lawful authority permitting them to detain Gestewitz for the purpose of issuing him a trespass warning since they had no reasonable suspicion that Gestewitz committed the crime of trespass, because a trespass warning is a prerequisite to that crime.

Based on these circumstances, along with a finding that the officers had no fear for officer safety or reasonable suspicion that Gestewitz had committed a crime or was about to commit a crime, the 4th DCA held Gestewitz's detention to be unlawful. This made discovery of the Xanax unlawful. Further, the court noted, "It necessarily follows that because the discovery of the Xanax bar led to the arrest, which was unlawful, there could be no escape, as it stemmed from that unlawful arrest." The court also noted there was no authority for the officer to order Gestewitz to take his hands out of his pocket. The 4th DCA reversed the convictions and ordered Gestewitz to be discharged.

Gestewitz v. State, 34 So.3d 832, (Fla. 4th DCA, 5/26/10)

Tossing What One Later Admits Is Cocaine Prior To Stopping Vehicle During Police Traffic Stop Is Tampering With Evidence, Not Just Simple Abandonment

Sergeant Devlin observed Chapman drive a truck to an intersection and then observed a black male make contact with Chapman through the driver's side window of the truck. Devlin watched the black male reach into the driver's side window, but did not see whether any items were exchanged. The contact lasted about fifteen seconds, after which Chapman drove the truck away heading westbound. Seeing that a brake light was out on the truck, Sergeant Devlin activated the lights of his unmarked patrol vehicle. Chapman did not immediately pull over. Instead, Devlin saw Chapman toss something from the truck to the ground. Chapman then traveled approximately “another half a mile” before he pulled over.

Sergeant Devlin made contact with Chapman, explained the reason for the stop, and told him he saw him throw something out of the truck. According to Devlin, Chapman stated that he had just purchased some cocaine and that he had discarded it out of the truck because he didn't want to go to jail. Delvin tried to find the discarded item but was unsuccessful. At trial, Chapman contradicted Devlin’s account of the incident. He said that he did not make contact with a black male and did not tell Devlin he threw anything out the window of his vehicle. Chapman was convicted of tampering with evidence.

On appeal he argued that the State failed to establish a prima facie case because the evidence was insufficient to prove the second element of the charged offense, that he had the intent to destroy, conceal, or remove the alleged contraband so as to impair its verity or availability. Chapman asserted that while the act of throwing the alleged contraband out of the truck window amounted to abandonment, it did not amount to tampering with physical evidence because the substance was not altered and was not concealed.

The 5th DCA held that the purpose of the statute was to punish the damage, destruction or concealment of physical evidence in an effort to prevent its use in a criminal case. The DCA found that throwing the cocaine from the moving car was almost certain to make its recovery impossible, and it was made more certain by the failure to stop for half a mile. Chapman's own words established he was attempting to get rid of cocaine. The DCA differentiated Chapman’s actions from cases in which there was abandonment in a location proximate to law enforcement and nothing to suggest an attempt to damage, destroy or cause the evidence to be lost. The conviction was affirmed.

Chapman v. State, 36 So.3d 822 , (Fla. 5th DCA, 5/28/10)

Walking Into Apartment Without Occupant’s Objection Is Not “Consent”

An officer responded to a call about a home invasion robbery. When he spoke with one of the robbery victims who had already left the location where the crime had occurred, the victims reported that the robbery occurred at Dixon's apartment and that the robbers had fled. The officer then walked to Dixon's apartment and knocked on the door.

Dixon answered the door accompanied by his girlfriend. During the questioning, the officer walked into Dixon's apartment. He did not ask for permission to enter, but Dixon did not object. Dixon and his girlfriend continued to speak about the robbery. They confirmed that the robbers had already fled the apartment. The officer observed evidence consistent with the events described to him by the victims. While the officer was speaking with Dixon's girlfriend, Dixon walked into his bedroom, closed the door for a minute or two, and then came back out. He appeared to be nervous and agitated and asked the officer to leave the apartment.

The officer became concerned that there might still be a suspect in the apartment, although he did not hear any noises coming from other rooms. He asked Dixon and his girlfriend to step outside, and then conducted a sweep of the apartment, during which he found several bags containing drugs. All of these items were in plain view during the search of the apartment. No robbery suspects were in the apartment. The officer then called a canine unit to search the apartment. However, Dixon told the officers that he did not want them to enter into his apartment. Eventually, a search warrant for

the apartment was obtained based on information provided by the officer and the results of field tests done on the narcotics found by the officer in Dixon's apartment. A subsequent search revealed additional drugs and paraphernalia.

The trial court denied Dixon's motion to suppress because it found that the warrantless search of Dixon's apartment was justified by exigency. Dixon pled no contest and reserved his right to appeal the court's ruling on the motion. On appeal, Dixon argued that the trial court erred in denying his motion to suppress because he did not consent to the search of his apartment and there were no exigent circumstances justifying the warrantless search. The State responded that Dixon did not protest the officer's entry into his apartment, and once inside, exigent circumstances developed which justified the officer's search for a robbery suspect in the apartment.

The 4th DCA reversed. A warrantless search of a home is per se unreasonable and in violation of the Fourth Amendment. However, a warrantless search may be legal if the State proves consent or exigent circumstances. The DCA held that Dixon's failure to protest the first officer's entry into his apartment did not constitute consent to enter. The DCA also held that there was not exigency when that officer entered the apartment. The court reasoned that the officer had a duty to investigate the 911 call, but in order to justify a warrantless entry and search of Dixon's apartment, the State was required to prove that exigent circumstances existed which required entry into the apartment immediately without a warrant. Based on the testimony at the suppression hearing, such exigent circumstances did not exist. The officer did not observe evidence of an ongoing burglary when he

arrived at the apartment. He did not testify that he was concerned there could be other victims of the robbery inside the apartment who needed immediate assistance. The officer did not testify that he suspected the robbery suspects were in the apartment as soon as he reached the apartment door. The officer became suspicious only after he entered the apartment without consent, saw evidence of the robbery, and observed Dixon nervous and agitated after disappearing to another room. These observations do not support the warrantless entry into the apartment *prior* to making these observations.

Dixon v. State, 37 So.3d 858 (Fla. 4th DCA, 6/9/10)

Mere Questioning Of An Individual, Including Requesting Identification, Does Not Amount To 4th Amendment Detention

A uniformed police officer was patrolling an apartment complex pursuant to an approved security detail through her department. The complex was in a high-narcotics area and was being closed down. The officer's responsibility was to check the names of every person who entered the complex and make sure that no vehicles entered.

At approximately 10:45 p.m., Goodwin drove an SUV into the complex. The officer thought Goodwin was lost and would do a u-turn to exit. Goodwin did not return and, the officer drove her car to the back of the complex. She saw the SUV parked at an angle. For safety, though, she turned on her spotlight to see inside the vehicle. The officer then walked up to the driver's side of the SUV. She saw Goodwin moving around in the driver's seat. She asked Goodwin what he was doing in the complex. Goodwin responded that he was looking for his friend. The officer was skeptical and asked Goodwin for his driver's license, registration, and proof of insurance. Goodwin opened the center console, exposing a small amount of cannabis wrapped in plastic. She asked Goodwin to step out of the SUV, and took him into custody. A pat-down search revealed various controlled substances in Goodwin's pocket.

The state charged Goodwin with possession of the cannabis and controlled substances. The trial court granted the defendant's motion to suppress. The trial court reasoned that asking for a person's driver's license amounts to only a consensual encounter, but asking also for a person's registration and proof of insurance converts the consensual encounter into an investigatory stop. Based on those legal conclusions, the trial court found there was no reasonable suspicion to justify the stop.

On appeal, the 4th DCA reversed. It held that the mere questioning of an individual, *including a police request for identification*, does not amount to a Fourth Amendment detention. (Citing State v.

Dixon, 976 So. 2d 1206, 1208 (Fla. 4th DCA 2008).) The DCA reasoned that requesting three types of identification is a reasonable way to verify a person's identity. Goodwin also argued that the officer's use of the flashlight constituted a show of authority. The DCA rejected this argument based on the totality of the circumstances. It cited State v. Wimbush, 668 So. 2d 280, 281-82 (Fla. 2d DCA 1996) (encounter was consensual where officer illuminated car's interior with spotlight and asked driver for identification); State v. Hughes, 562 So. 2d 795, 797-98 (Fla. 1st DCA 1990) (officers approaching defendant's parked vehicle and shining flashlight inside was not functional equivalent of a stop) in support of its conclusion.

State v. Goodwin, 36 So.3d 925, (Fla. 4th DCA, 6/9/10)

Lab Report Alone Is Insufficient Evidence To Support Probation Violation

Forbes' strong-arm robbery probation was revoked based on his arrest for purchase and possession of cocaine for sale and he appealed. At the revocation hearing a City of Miami Police officer with the Crime Suppression Unit testified that while on surveillance duty, he observed Forbes ride up on his bike to another person and "engage in conversation and exchange currency for an unknown item." Another officer from the tactical unit stopped and searched Forbes and found in his pocket two plastic baggies containing what the officer suspected was powder cocaine.

No field tests were conducted on the suspect cocaine and it was impounded and submitted to the lab. The officer could not offer an opinion as to whether the substance in the baggies was cocaine. Over Defense objection, a lab report with a positive indication of cocaine was entered into evidence. Forbes testified he did not have any cocaine in his possession; that the officers found scratch-off tickets in his pockets; and he admitted to smoking crack cocaine on the night before his arrest. Based on the defendant's admission, the officer's testimony and the lab report, the trial court revoked Forbes' probation.

The 3rd DCA found that the lab report was not admissible into evidence as an exception to the hearsay rule because no one from the lab testified as to knowledge of testing and reporting procedure. After noting that the lab report is nevertheless admissible as hearsay at a probation violation hearing, the court also noted that hearsay alone is an insufficient basis upon which to revoke probation. Because no further evidence, such as testimony from an officer experienced in the handling of and arrests for cocaine, or the positive results of a field test, reliably identified the substance in the defendant's possession as cocaine, the hearsay evidence contained in the lab report could not solely support the order revoking the defendant's probation. The revocation was reversed.

Forbes v. State, 38 So.3d. 232 ,(Fla. 3rd DCA, 6/23/10)

Reality That Possession of Child Pornography Is A Solitary and Secretive Crime Allows Inference That Porn Collection Will Be At Offender's Home

On December 11, the parents of a seven year old girl contacted the Jacksonville Sheriff's Office to report Sabourin had taken pornographic photos of their daughter. The girl indicated the photos had been taken while riding in Sabourin's car on November 23, in the company of his six year old niece. During the session, the niece said it was okay and that he took picture of her like that "all the time." After the interview, detectives obtained a search warrant. The affidavit for the warrant did not include the date the car ride had occurred. The warrant was executed on December 19. Several electronic storage devices and photography equipment was seized. Child pornography was found. During a subsequent interview with detectives, Sabourin admitted taking the photos of the seven year old, and committing sexual battery over 100 times upon his niece since she turned four.

The trial court ruled the probable cause was "stale" and failed to establish a nexus between the evidence sought and the Defendant's home. It suppressed the evidence obtained by the warrant and the confession. The state sought review of the suppression order.

The 1st DCA disagreed with the trial court and analyzed the nature of the crime of possession of child pornography. It stated that "[v]arious courts have recognized the reality that the act of possessing child pornography is a 'solitary and secretive crime.' As such, it is widely recognized that collectors of child pornography tend to retain their materials in secure places, including their homes." (See State v. Felix, 942 So. 2d 5, 10-11 (Fla. 5th DCA 2006).)

The Court continued by citing U.S. v. Lamb, 945 F.Supp. 441, 460 (N.D.N.Y.1996):

> Since [child pornography] materials are illegal to distribute and possess, initial collection is difficult. Having succeeded in obtaining images, collectors are unlikely to quickly destroy them. ***Because of their illegality and the imprimatur of severe social stigma such images carry, collectors will want to secret them in secure places, like a private residence.*** This proposition is not novel in either state or federal court: pedophiles, preferential child molesters, and child pornography collectors maintain their materials for significant periods of time. (emphasis added by court)

The DCA found the trial court erred finding the county judge lacked a substantial basis for authorizing a search of the Defendant's residence. The DCA also concluded the search warrant was not based on stale information. "While Detective Soehlig neglected to include the specific date of the car ride in the affidavit, a 'practical, common sense' evaluation of the circumstances set forth in the affidavit, . . . it was reasonable for the county judge, the issuing magistrate, to conclude the Defendant presently possessed child pornography on electronic storage devices in his residence."

The DCA reversed the order granting suppression of both the evidence and confession and remanded for further proceedings. As a parting shot, the court also observed that even if the warrant was technically flawed, the good faith exception to the exclusionary rule would apply.

State v. Sabourin, 39 So.3d 376, (Fla. 1st DCA, 6/21/10)

Police Failed To Adequately Corroborate Anonymous Email Tips And Delay Of Three Months From Last-Received Email To Start Of Surveillance Found To Have Made Tip Information "Stale"

Beginning in October 2006 an unidentified citizen began sending emails to the City of Tampa message center concerning drug activity at two local strip club bars. The emails described three people actively involved. Police began surveillance and made an arrest of one of the people. The arrest resulted in a guilty plea. All the information provided by the emailer proved accurate. The emails stopped for awhile, but resumed in March 2007.

The new emails named Lila Gonzalez, described her car including tag number, and provided her phone number. The emails described Gonzalez's place of employment. The emails said Gonzalez and her boyfriend, Francis Garcia, were growing marijuana in their home and selling cocaine from the residence. Police located Gonzalez's residence address from property records, and confirmed she was the electric service billing party. Three months after the last-received email, on July 10, 2007, Gonzalez's residence was under surveillance. She exited and drove off. After observed making a moving violation, a traffic stop was initiated. During the stop the officer asked Gonzalez if she had anything illegal in her truck, and she replied she did.

The officer asked Gonzalez if he could move her truck out of the roadway to alleviate the rush hour backup. Gonzalez agreed, and exited her truck. She then stated to the officer she had cocaine in her bra and asked what he wanted her to do. The officer read her the *Miranda* rights and asked her is she would remove the coke and hand it to him. She did so. A field test was positive. The officer then asked if there was more cocaine at Gonzalez's residence, and she replied she wanted an attorney because she could "see where this was going." The house was secured while a warrant was obtained. A search of the residence pursuant to the warrant produced nine marijuana plants, marijuana, a digital scale, a wooden grinder, guns, ammunition, a blower, a generator/power supply unit, a lamp, and florescent fixtures. No cocaine was seized.

The inevitable motion to suppress was filed. At the hearing on the motion, the officer testified as to the information received by the emails, but also admitted they had not performed any trash pulls, had not attempted any controlled buys, and had not spoken to neighbors to confirm whether there was unusual coming and going from the residence. The officers confirmed that the couples' power bill was not higher than normal, and that they had not done any surveillance of the house prior to July 10. They also admitted no contraband was found in Gonzalez's truck by reason of the traffic stop. The officer admitted that he would not assume a person in possession of one gram of cocaine was dealing in cocaine.

The trial court denied the motion to suppress, but the 2nd DCA disagreed. It found the email information stale because it was three months old when Gonzalez was put under surveillance. No indication of contraband being viewed in the house was contained in the emails. The officers admitted no steps to corroborate the tips in the emails. During the brief surveillance on July 10, no unusual activity at the residence was observed. Possession of one gram of cocaine on one's person does not suggest a fair probability that one is selling cocaine from her house. The DCA held that the motion to suppress should have been granted and remanded for action consistent with its holding.

Gonzalez and Garcia v. State, 38 So.3d 226 , (Fla. 2nd DCA, 6/23/10)

Failure To Independently Corroborate "Tip" Poisoned Encounter Which Resulted In Discovery Of Cocaine

A Key West officer responded to an anonymous call reporting that a black male wearing a shirt, jeans and "nice sneakers" was sitting next to a nicely-dressed while female, selling narcotics. The officer arrived but did not observe anything suggesting a crime had occurred, was occurring or was about to occur. The officer called for backup. A patrol car came the wrong way down a one-way street and directed its spotlight on the two people. Two other officers arrived on the scene. Hill provided his DL upon demand and an officer took it to run through the system. A second officer asked Hill for permission to search him while the DL check occurred. Hill indicated to the court he did not believe the officer had the right to search him but nevertheless he proceeded to empty his pockets. Among the pocket contents was a baggie with a white powdery substance, which the officer recognized as cocaine. It later tested positive for coke.

At the suppression hearing the officer indicated Hill was free to decline the search and leave at any time. Hill's attorney argued Hill was "boxed in by four uniformed officers who approached him from multiple directions" and that no reasonable person would have felt free to leave.

The 3rd DCA agreed that no reasonable person in Hill's position would have felt free to leave or to decline the officer's request. It noted that the requested consent to search was made while Hill's license was in the possession of another officer. It noted *Golphin v. State*, 945 So.2d 1174 (Fla. 2006) where retention of ID during the course of further interrogation or search "certainly factors into whether a seizure has occurred."

The DCA characterized the event as an investigatory stop, requiring reasonable suspicion. Finding that the police possessed no well-founded, articulable suspicion that Hill was engaging in criminal activity, the consent to search was tainted and not voluntary. The Court reversed the order denying motion to suppress and remanded.

Editor's Note: This case follows the reasoning of *Florida v. J.L., 529 U.S. 266 (1999).* This is the case where the Court was concerned that acting on non-corroborated anonymous tips to involuntarily detain persons would promote mischief-making by persons calling in "tips" just to have others harassed by police. Independent corroboration of anonymous tips is required.

Hill v. State 39 So.3d 437 (Fla. 3rd DCA, 6/3010)

Lewd and Lascivious Exhibition (F.S. 800.04(7)(a)3) Does Not Address Simulation Of Oral Sex Using An Object

Lowe was charged with a violation of F.S. 800.04(7)(a) for placing an anatomically-correct dildo into his mouth in the presence of a seven-year-old child. After the court denied his motion to dismiss, Lowe pled no contest and reserved his right to appeal. The 5th DCA reversed the trial court's denial of the motion to dismiss and remanded the case for dismissal after it found the specific language of F.S. 800.04(7)(a)3 prohibits only simulation of acts of "sexual activity" and the definition of "sexual activity" does not include simulation of oral sex with an object.

Lowe v. State, 40 So.3d 789. (Fla. 5th DCA, 7/2/10)

Re-Initiation Of Interrogation After Defendant Invoked Right To An Attorney Dooms Inculpatory Statements Obtained During The Session

Wilder was incarcerated in the Duval County Jail on other charges and was interviewed by officers on five different occasions on November 4, 5, and 7, 2005. After being interviewed at 6:35 p.m. and 8:10 p.m. on the 4th, Wilder was being fingerprinted and the conversation "turned to the events surrounding the murder." Wilder indicated he did not want to talk to police without counsel. ("Okay. See, I don't feel comfortable…in this type of environment and…I would rather not even talk unless I had an attorney present…my thing is where I'm from in my neck of the woods people don't talk to the police, man.") After Wilder asked for a lawyer during the course of custodial interrogation, his interrogator stopped the questioning, just as *Miranda* required. However, rather than facilitating or a least awaiting the opportunity to consult with counsel the police shortly thereafter re-initiated interrogation.

Later on the night of the 4th or early hours of the 5th, Wilder was brought back to the interview room because his brother, Malcom, (who had been initially charged with the murder) wanted to talk to him. Wilder was again read his *Miranda* rights, characterized by the officer as "just a formality" since they did not intend to question him at that time. Later on, sometime on the 5th, officers again questioned Wilder on their own initiative. *Miranda* rights were not read this time. During this session Wilder made inculpatory statements.

Without explanation, the trial court did not suppress the statements, but the 1st DCA found the second session to be violative of Wilder's rights to an attorney as per *Miranda*. It characterized Wilder's invocation as unambiguous. It noted that Wilder had not re-initiated contact. Since the state had not established that the admission of the statements did not contribute to the guilty verdict for first-degree murder, attempted second degree murder with a firearm and petit theft, the case was reversed for a new trial.

Wilder v. State, 40 So.3d 804, (Fla. 1st DCA, 7/7/10)

Obtaining Patient Profiles And Prescription Records From Pharmacy Does Not Require Search Warrant or Subpoena

Tamulonis was charged with three counts of obtaining or attempting to obtain a controlled substance by fraud (F.S. 893.13(7)(a)(9)). She argued the evidence should be suppressed because F.S. 456.057(7)(a)(3) and F.S. 395.3025(4)(d) require officers to obtain pharmacy records by reason of either a warrant or subpoena. The trial court granted her suppression motion.

The 2nd DCA noted that F.S. 465.017(2) provides that "Except as permitted by this chapter, and chapters 406, 409, 456, 499 and 893, records maintained in a pharmacy relating to the filling of prescriptions and the dispensing of medicinal drugs shall not be furnished to any person…(except) upon the issuance of a subpoena…and proper notice to the patient…." Finding Tamulonis's records were obtained pursuant to Chapter 893, and citing *State v. Carter,* 23 So.3d 798 (Fla. 1st DCA 2009), the 2nd DCA indicated "pharmacy records are not medical records and that section 893.07(4), Florida Statutes (2007 & 2008), authorizes law enforcement officers to obtain…without a subpoena or warrant." The court adopted the 1st DCA's holding in *Carter* and reversed the order granting the motion to suppress and remanded for further proceedings.

State v. Tamulonis, 39 So.3d 524 (Fla. 2nd DCA, 7/9/10)

Physical Evidence Obtained Is Admissible Despite *Miranda* Violation. Comments Were Not Product Of Intentional Behavior To Elicit Them And Were Not Product Of Custodial Interrogation.

Noto was convicted of trafficking in cocaine. He argued on appeal that the trial court erred in not suppressing some of his statements and seized cocaine. The State cross appealed, arguing the trial court erred in suppressing an admission. The 4th DCA ultimately found no merit in the claims raised and affirmed Noto's conviction.

Sunrise Police received a report that drugs were being purchased from a residence, which was put under surveillance. They observed Ms. Perez drive to the house, remain in the residence for 15 minutes, then drive away. She was followed to a restaurant parking lot where, instead of parking in open spots near the restaurant, she parked next to a vehicle occupied by Noto. Perez moved and sat in the passenger side of Noto's car. After 30 seconds, she returned to her car, and both vehicles drove away.

Soto was followed, and stopped after he failed to come to a complete stop at a red light. The detective obtained Soto's license and registration, and went back to his vehicle. He then returned, identified himself as a trained narcotics investigator, related what he had observed at the restaurant and indicated it was consistent with a drug transaction. He asked Noto if he had anything illegal. Noto said, "No," but then said tomorrow was his birthday and he wanted to "get a little something." When asked what he meant, Soto indicated he had picked up a gram of cocaine from Perez but had swallowed it. The detective told Soto his stomach was going to be pumped and he called for a K-9 unit.

About 15 or so minutes later, the K-9 arrived and alerted to the presence of drugs from the exterior of the vehicle. A subsequent search revealed over 30 grams in the backside of the passenger seat. Noto was transported to the police station. It was at the station where Noto was first advised of his *Miranda* rights. Noto demanded an attorney and was placed in a holding cell.

Six feet away from the cell the detective and other officers were talking. Noto overheard "trafficking" mentioned. Noto interjected and asked what "trafficking" meant. The detective responded that in meant cocaine greater than one ounce. Noto then responded he was supposed to be picking up only an "8-ball" (1/8 ounce) and two grams. Later, Noto was in an interview room with Ms. Perez. The room was wired and Noto reiterated to Perez that he was supposed to pick up an "8-ball" and two grams.

On appeal Noto contended the traffic stop was illegal as a pretext for a drug investigation. The court denied this based on *Whren v. U.S.*, 517 U.S. 806 (1996). Having observed the roll through on a red light, the detective had valid grounds to conduct a traffic stop. Regarding whether Noto was "in custody" during the stop, the court noted the detective had Noto's license and registration and was contronting Noto with evidence of guilt of being involved in an observed drug transaction. The court noted this "weighs heavily in the balances" citing *State v. Pitts*, 936 So.2d 1111 (Fla. 2nd DCA, 2006). The DCA found Noto's admissions to be a product of a custodial interrogation.

However, regarding the seizure of the cocaine in the car, the DCA cited *U.S. v. Patane*, 542 U.S. 630 (2004) which held "the 'fruit of the poisonous tree' doctrine does not extend to physical evidence derived from unwarned but voluntary statements." Since the cocaine was derived from an unwarned but voluntary statement during a lawful traffic stop, suppression of the cocaine was not required.

Noto also argued the cocaine should be suppressed because the continued detention of Noto at the traffic stop (to allow the K-9 to arrive) was unlawful. The DCA noted it took 15 to 20 minutes for the K-9 to arrive after Noto admitted he picked up a gram of cocaine. While noting this time was beyond the time necessary to issue the traffic citation, the court agreed with the trial court that based on the observations leading up to the encounter and Noto's admission of picking up a gram of cocaine, there was justification for the continued detention of Noto. The DCA distinguished this case from

Whitfield v. State, 33 So.3d 787 (Fla. 5th DCA 2010) where a 29 minute wait for a K-9 was too long. Whitfield had not admitted he had picked up cocaine, in contrast to Noto's admission.

Regarding Noto's interjection after hearing "trafficking" at the holding cell, the DCA agreed with the trial court that the officers should not have known their conversation was reasonably likely to elicit an incriminating response from Noto. This was not like *Rhode Island v. Innis*, 446 U.S. 291 (1980) (the "Christian burial" case) where officers intentionally engaged in behavior to elicit an incriminating response from the suspect. Here, Noto spontaneously interjected himself into the conversation of the officers.

Noto finally argued that placing Ms. Perez in the same interview was done to circumvent his invocation of *Miranda* rights. The DCA found the recorded statement of Noto regarding the 8-ball and two grams was not a product of custodial interrogation. Ms. Perez was not a state agent or acting at the direction of any state agent. The trial court did not err in allowing the statements in as evidence. The DCA also found that the state is not required to prove the defendant had knowledge of the weight of the cocaine possessed, Noto's last issue on appeal. Noto's conviction was affirmed.

Noto v. State, 2010 WL 2675310, --So.3d--, (Fla. 4th DCA, 7/7/10)

BOLO Issued On Basis Of Detailed 911 Call Provided Basis To Detain

"Cecil Brown" called 911 and stated that two white men pulled a black 9mm handgun on him. Brown described the two men, the location where the incident happened, a detailed description of the SUV driven by the men (including license plate number, the location of an FSU decal, and the direction the vehicle was heading. Brown provided his cell number, the street where he could be located and a detailed description of what he was wearing. The Tallahassee Police Department issued a BOLO, and within minutes the SUV was located, and DeLuca and the other occupant were detained. Drugs were found in the SUV. DeLuca was charged with drug offenses and resisting without violence. However after the arrest, Brown's call disconnected and TPD determined it could not verify the call, could not locate Brown, nor did they find a handgun in the SUV.

The trial court equated Brown's call to an anonymous call, and found the "tip" to be unreliable. Since the detention of the occupants of the SUV was illegal the trial court deemed that the evidence seized must be suppressed pursuant to *Baptiste v. State*, 995 So.2d 285 (Fla. 2008).

The 1st DCA quoted *Adams v. Williams,* 407 U.S. 143 (at 147) (1972) where the USSC stated, "…in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible information warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response." Relying on *Adams*, the DCA found the totality of the circumstances indicate the police reasonably believed the incident report was verifiable and reliable when the detention (based on the BOLO) began. It noted the trial court improperly classified the source of the tip as "anonymous" based on information discovered after the lawful detention and that the trial court failed to note the appropriate nuance to the informant rule where the informant is the victim of the crime reported. The suppression order was reversed and the case remanded.

State v. DeLuca, 40 So.3d 120. (Fla. 1st DCA, 7/16/10)

Search Of Car Not Justified Under *Gant*, But Was Justified As Inventory Search

A deputy made a traffic stop of Townsend because of an obstruction on the vehicle's license tag. Townsend produced a driver license and registration. The registration was for a Kia, but Townsend was driving a Chrysler. When asked where he was going, he said he was going to a bar to get a drink. When the license was "run" it was determined Townsend had a business purposes only license. Townsend was arrested, handcuffed, and placed in the back of the patrol car. His car was obstructing the bicycle lane on the shoulder of the highway. There was nobody at the scene to take possession of the vehicle. Because the vehicle was obstructing the highway, the deputy began the impoundment process, following standard policy and procedure. In conducting the impoundment inventory, the deputy discovered a crack cocaine rock on the driver's seat and a glass crack cocaine

pipe under the driver's seat. Townsend was then also charged with possession of cocaine and paraphernalia. In his police report, the deputy characterized his search as "incident to arrest" not as an inventory search.

At the suppression hearing the deputy said his search was both incident arrest and inventory. Townsend argued the search was illegal under *Arizona v. Gant*. The state countered that it was a valid inventory search. The trial court granted the motion to suppress, relying on the deputy's characterization in his police report as the search being a search incident arrest. The 2nd DCA determined that under *Gant* the search would not have been allowed. However, it found the trial court erred in suppressing the evidence because the inventory search was legitimate. It was done in conjunction with impoundment of the vehicle, according to standardized procedures. Such a search is a recognized exception to the warrant requirement. Townsend had also argued the officer should have called his wife, the vehicle's co-owner and given her a chance to respond and take the car home. The DCA indicated an officer is not required to make such an offer if acting in good faith, as was the officer in this case, citing *Robinson v. State,* 537 So.2d 95 (Fla. 1989). The DCA noted it is the nature of the search, not the label placed upon it, that controls.

State v. Townsend, 40 So.3d 103 , (Fla. 2nd DCA, 7/16/10)

Factors Did Not Provide Reasonable Suspicion To Support Stop

After the trial court denied her suppression motion, Ray pled nolo and appealed the denial. At the suppression hearing the arresting officer testified she was monitoring this particular neighborhood where Ray was arrested "in response to resident complaints of drug dealing." She observed Ray stop her vehicle in the middle of the road; an unknown male approached the vehicle; and the officer "observed some sort of hand-to-hand exchange" between the two. While the officer could not identify what was exchanged, "she perceived the exchange to be a drug transaction."

The officer followed Ray when she drove away and then attempted to effectuate a traffic stop using her lights. When Ray drove through a stop sign without stopping, the officer pulled Ray over. Ray dropped a white substance out of her vehicle's window as the officer approached. The officer recovered the substance and it later tested positive for cocaine.

The State argued that "based on the totality of the circumstances, including the nature of the exchange, the officer's narcotics training, and the location's reputation as a drug area, there was reasonable suspicion that a drug transaction occurred. The State also argued in the alternative that Ray was detained and investigated because of a traffic law violation.

The 4th DCA discussed *Burnette v. State*, 658 So. 2d 1170, 1171 (Fla. 2d DCA 2003), where the 2nd DCA decided that even though the officer could not identify the objects exchanged in the transaction, "the police could form a reasonable suspicion that a drug transaction took place because (a) the officer had extensive drug training; (b) the defendant was making an exchange with an identified known drug dealer; and (c) the transaction took place at a location where the police had previously made thirty to forty drug arrests." However, the 4th DCA found that there were not enough factors to support the stop in the present case: "The officer could not identify the objects exchanged, the participant involved in the exchange with Ray was not a known drug dealer, and the officer was monitoring the area in response to reported drug deals rather than prior drug arrests." Since the officer was not justified in making the investigatory stop, the evidence was to be suppressed. The fact that Ray committed a traffic infraction AFTER the officer's lights were turned on to effect a stop cannot justify the basis for the stop itself.

Ray v. State, 40 So.3d 95 (Fla.4th DCA, 7/14/10)

State Allowed To Have Witness Living In China Testify At Trial Via Satellite Feed. Sixth Amendment Confrontation Right and Requirement Of Testimony Under Oath Satisfied.

Rogers, convicted of burglary of a structure, grand theft, criminal mischief causing greater than two hundred dollars' damage, and resisting an officer without violence, appealed his convictions contending the trial court erred by allowing a state witness to testify by satellite from China at Rogers' trial. The witness in question who was allowed to testify at trial via a satellite feed from China, over the objection of the defense, was a former officer of the Leesburg Police Department, who was the arresting officer and a material witness to the crimes charged. At the time of trial, the witness, a United States citizen, was living in China and had indicated he "intended to return to live in the United States once his wife, a Chinese national, got her visa."

The Confrontation Clause provides ". . . the accused shall enjoy the right . . . to be confronted with the witnesses against him," but the 5th DCA noted that "[t]he Confrontation Clause, however, is not absolute in terms of a requirement for *physical confrontation*, and is subject to exceptions where 'considerations of public policy and the necessities of the case' require it." *Maryland v. Craig*, 497 U.S. 836, 849 (1990); *see also Harrell v. State*, 709 So. 2d 1364 (Fla.), *cert. denied*, 525 U.S. 903 (Fla. 1998). The *Harrell* court concluded that "the satellite procedure can only be approved as an exception to the Confrontation Clause if it is justified on a case-specific finding based on important state interests, public policies, or necessities of the case, and provided that the three purposes of confrontation – oath, cross-examination and observation of witness demeanor – are satisfied." *Harrell*, 709 So. 2d 1369. The 5th DCA agreed with the trial court's finding that the prosecution of Rogers could not have gone forward without some acceptable procedure being adopted other than a face-to-face confrontation, thus, "the State interest and necessities of the case warranted the use of the satellite procedure." The 5th DCA further found that the "oath element is satisfied." When affirming the judgment and sentence the 5th DCA noted: "…the State established that the law enforcement officer would (upon his intended and likely return to the USA) be subject to prosecution for perjury upon his making of a knowingly false statement."

Rogers v. State, 40 So.3d 888, (Fla. 5th DCA, 7/23/10)

When State Refuses To Proceed After Jury Sworn, Court's Granting Of Defense Motion For Judgment of Acquittal Is Not Subject To Review.

Stone was charged with first-degree murder and attempted first-degree murder. A jury was sworn on February 1, 2010. The next morning, the State—for reasons not reflected in the record—requested a continuance and refused to give an opening statement. During the day a "protracted dialogue between the court and the prosecutor ensued" in which the prosecutor adamantly refused to begin the state's case. The court made a final demand that the state begin its case, and the state refused to do so. The trial court then announced the state had "rested its case." Stone moved for a judgment of acquittal, arguing the state had failed to prove any elements of the crime. The court granted the motion.

On appeal, the 4th DCA noted that F.S. 924.07(1)(j) authorizes a state appeal of a JOA "after a jury verdict." It is crafted to avoid violation of the constitutional protections against double jeopardy. The court's ruling on the defense motion was an "acquittal" within the meaning of subsection 924.07(j). consistent with double jeopardy jurisprudence. It was the ruling of a judge that actually represent[ed] a resolution, correct or not, of some or all of the factual elements of the offense charged. Because it was not a ruling granting a motion for judgment of acquittal after a jury verdict, the ruling was not appealable under section 924.07. The state cannot appeal the court's order.

State v. Stone, 2010 WL 2925691, -- So.3d-- (Fla. 4th DCA 7/28/10)

Facts Related To Traffic Stop Do Not Support Defense of "Necessity"

After being stopped for following too closely, Mickell initially told the trooper he had left his license at home. On three separate occasions he provided the trooper with a false name and date of birth. Twenty minutes into the stop, Mickell finally provided his true identity. In truth, Mickell was a habitual

traffic offender with a suspended license. Mickell was arrested. He then indicated he was trying to get one of the passengers to the hospital for medical assistance. (The "necessity" defense.) At trial, Gloria Joseph testified for the defense, indicating she was initially driving the car but had an asthma attack and could not find her inhaler. She had Mickell drive the car because of the other two passengers, one had been drinking and the other also had a suspended license. She said they were on their way to the hospital when the trooper stopped them. She also indicated that subsequent to the stop, she found her inhaler and did not need to continue to the hospital.

Perhaps sensing the wool being pulled over its eyes, the 4th DCA noted that the defense of necessity requires a reasonable belief of danger or emergency that the defendant did not cause and the "threatened harm" must be real, imminent, and impending. Noting that Mickell provided a false name three times, extending the stop by at least 20 minutes, it was "unlikely" that there was a real medical emergency or that Mickell believed one existed. The relevance of the evidence to disprove the tendered defense of "necessity" was not substantially outweighed by the danger of unfair prejudice to the defendant. The conviction of Mickell for driving while license revoked as a habitual offender was upheld.

Mickell v. State, 2010 WL 2925351, -- So.3d-- , (Fla. 4th DCA, 7/28/10)

Seeing An Illegal U-Turn Alone Did Not Warrant Stop For Suspected DUI

Beahan was stopped by a Santa Rosa County Sheriff Sergeant in Milton, Florida, after making an "illegal U-turn." The deputy was on patrol in an area known for drug transactions, and had observed Beahan driving slowly down the street, stopping in front of some housing units, and driving again. The Sergeant said Beahan could have turned around using a three-point turn, but instead made a U-turn that cause him to drive his vehicle up over the curb on the opposite side of the street, with the wheels extending about two feet onto the grass. There were no other vehicles on the street at the time. "Fearing that the defendant was driving under the influence or alcohol or drugs," the Sergeant made a traffic stop. No citation for the U-turn was issued.

While a computer check was being processed on Beahan's license, another K-9 officer and his drug sniffing dog were called in for assistance. The dog alerted on the car and the officers found in the vehicle "a smoking pipe and a baggie with a crushed up white substance in it." Beahan was arrested and moved to suppress the evidence. At the suppression hearing, Sergeant Haines testified that Beahan appeared nervous "but he did not smell of alcohol and that he did not appear to be under the influence of drugs or alcohol." The trial court "concluded that the improper turn could give rise to a suspicion that the defendant was impaired" and denied the suppression motion. Beahan entered a plea of nolo contendere and reserved his right to appeal the dispositive order denying the motion.

The 1st DCA determined that "Sergeant Haines did not have a reasonable suspicion that the defendant was impaired at the time of the stop." Beahan was driving slowly down a residential street which is not unusual and he was not driving erratically. "The fact that he stopped a few times along the side of the street is more likely to indicate that he was looking for an address or speaking with friends than it does to suggest that he was impaired."

The Court noted that the stop might have been justified on the basis of the observed illegal U-turn, citing *Whren v. U.S.*¸517 U.S. 806 (1996), regardless of the officer's motivation. However, the state did not seek to justify the stop and search on that basis. The 1st DCA concluded that there "was no reasonable suspicion to believe that the defendant was driving his car while impaired." The 1st DCA reversed, finding the search was unlawful and the evidence seized from the vehicle should have been suppressed.

Beahan v. State, 2010 WL 3034883, --So.3d— (Fla. 1st DCA, 8/5/10)

14 Year Old Passenger Who, After Seeing Driver Of Car Exit The Car, "Spread Eagle" and Being Frisked Prior To Arrest, Mimicked Same Behavior When Asked Out Of Car Did Not "Consent" To A Frisk.

E.J. was a passenger in a car that was pulled over for an illegal turn. The driver smelled of alcohol and failed roadside sobriety tests. He was arrested. The vehicle was to be towed and the deputy asked E.J. (who was 14 years old) to get out of the vehicle. The deputy asked her if she had anything on her person which would concern the deputy. She said, "No," but then "spontaneously" turned and placed her hands on top of the car, spreading her legs.

Believing E.J. was consenting to a frisk, the deputy patted her down and found a large bulge on her right side that turned out to be marijuana. At the suppression hearing, E.J. indicated this was her first, and only, encounter with police officers and that she was simply doing what she had seen the driver do a moment earlier. The trial court denied the motion to suppress. The appellate issue was whether E.J. consented to the frisk by her actions.

The 4th DCA concluded that based on the totality of the circumstances, the trial court used the wrong standard and erred in determining that the state proved that E.J. voluntarily consented to the search. "It is not what the officers reasonably believed but whether by a preponderance of the evidence the defendant in fact gave consent." The officers did not ask for her consent. Further, "with her age and lack of experience with police, she did not know that she could refuse to consent." E.J. mimicked what she saw the arrested driver doing. Her "conduct does not yield the conclusion that she consented but merely acquiesced to the authority around her and what she expected was required in the circumstances."

E.J. v. State, 40 So.3d 922, (Fla. 4th DCA, 8/4/10)

Observations Amounted To Reasonable Suspicion To Detain

An anonymous tip was received at 3 A.M. that "two white males were trying car door handles in a residential neighborhood." A deputy responded and saw Quinn walking down the sidewalk near some homes, carrying a personal safe (the size of a small TV) cradled in his arms. At the suppression hearing the deputy testified that pedestrian activity is "highly unusual" in the subject neighborhood in the middle of the night. He also indicated that while it is not illegal to carry a personal safe down the street, it was "unusual" to do so at 3 A.M. The deputy indicated Quinn stared into a nearby backyard when he saw the deputy's police vehicle, which appeared to the deputy that Quinn was looking toward a colleague, corroborating the tip of "two" men.

Based on his observations, the deputy approached Quinn to question him about his presence in the neighborhood. Shortly after stopping Quinn, a second man emerged from behind a nearby house. The second man said he was looking at a raccoon and was there to meet Quinn. A search of the back yard results in a power cord inverter, some loose change, and a flashlight being found on the ground. The homeowner was awakened and told the deputy she did not know the men, that the property they had was not hers, and that they did not have permission to be on her property.

At this point, the men were ordered to sit on the sidewalk and were administered their *Miranda* warnings. Quinn waived his rights in writing and confessed to stealing the inverter and safe from a parked vehicle down the street. He also indicated his companion was trying door handles of other vehicles on the street.

The 5th DCA reversed the trials court's suppression order, finding the deputy did not have to witness criminal activity in order to have reasonable suspicion to detain Quinn and the other man. The deputy's actions were not based on a "hunch" but rather the "totality of the facts and circumstances combined" that provided a reasonable suspicion.

State v. Quinn, 2010 WL 3056599, --So.3d-- ,(Fla. 5th DCA, 8/6/10)

Facts Provided Probable Cause – Stop and Detention Then Arrest Of Defendant Was Appropriate

A woman was shot while in a residence in the Derby Woods subdivision in Lynn Haven, Florida, in the early morning hours of April 4, 2009. A man was out walking his dog around 1:30 a.m. when he observed a navy blue or black BMW parking near the residence where the woman was eventually shot. The dog-walker actually spoke briefly with the man that exited that vehicle.

The dog-walker later heard a gunshot, and while calling 911, he heard a vehicle start up and speed down the street. He saw "a navy blue or black sporty vehicle speed out of the subdivision and head west on Highway 390." A deputy arrived and based on information he received, he put out a BOLO for a black sporty vehicle heading west on Highway 390. The deputy then discovered a shot was fired from outside the residence into the front bedroom, where the woman had been shot in the back. No one saw the shooter, but the deputy was informed that a possible suspect might be Cuomo, a former boyfriend who was allegedly harassing and stalking the woman. The victim told the officer that Cuomo "drove a black BMW." The BOLO was updated with more information.

Another deputy pulled over a black BMW heading west on Highway 390. The vehicle was registered to Cuomo. Cuomo identified himself and the deputy detained Cuomo by handcuffing him and placing him in the back of his patrol vehicle. Cuomo was transported to the Sheriff's Office for questioning and the vehicle was impounded. The dog-walker later identified Cuomo's vehicle as the vehicle he saw in the subdivision. Cuomo's mother came to visit Cuomo at the jail in a room that was wired, and Cuomo made some incriminating statements regarding the shooting.

The trial court suppressed all evidence obtained by the detention and arrest of Cuomo, finding there was no basis for the stop and detention. The 1st DCA reversed, finding the officers not only had reasonable suspicion to justify the stop of the car, but probable cause to arrest Cuomo at the time he was taken into custody.

State v. Cuomo, 2010 WL 3398147 , --So.3d—(Fla. 1st DCA, 8/31/10)

Search Of Interior Of Vehicle Justified Using *Gant* Criteria

Williams was stopped because of his vehicle's darkly tinted windows. As the officers approached his vehicle, they could smell marijuana. One officer also saw a marijuana cigarette sitting by the gearshift. Williams was removed from the vehicle and arrested for possession of cannabis.

The interior of the car was searched incident to the arrest and a loaded handgun was found under the driver's seat, which Williams admitted was his. The trial court granted the motion to suppress, finding the search was an illegal warrantless search based on Arizona v. Gant, 129 S.Ct. 1710 (2009). The State appealed.

The 3rd DCA found the search was permissible, and the evidence is admissible. It concluded that the officers made a lawful stop and then arrested the defendant after first smelling and then seeing marijuana in his car. The officers could then legally search the vehicle, as it was reasonable to believe that evidence of marijuana possession might be found in the vehicle.

State v. Williams, 26 So.3d 594, (Fla. 3rd DCA, 8/25/10)

Officers Had Insufficient Basis To Believe Subject Possessed Marijuana With Intent To Sell

Alleyne was convicted of possession of marijuana with intent to sell within 1,000 feet of a school. He was outside a convenience store when a number of police cars pulled up. When Alleyne ran, another police car pulled up in front of him and an officer tasered him. A brown bag flew out of his hand and it contained "18 individual plastic Ziploc bags containing marijuana and a rolled up $20 bill." Total weight of the marijuana was less than 20 grams. An additional $36 dollars was found in Alleyne's pocket.

Two officers indicated their opinions that the amount of marijuana found on Alleyne "was not for personal use" and "was for drug dealing." One officer admitted he had never seen Alleyne engaged in selling marijuana and had no personal knowledge that he had ever done so. The officer also indicated he had "no idea" if Alleyne could have purchased the drug packaged the way it was found in the bag. Alleyne testified that when he saw the police coming toward him, he moved away. He testified his purchase was for personal use and that he had the money because he had a job.

The 4th DCA found the case was controlled by Valentin v. State, 974 So. 2d 629 (Fla. 4th DCA 2008)." In Valentin, the 4th DCA noted that "the police did not find any money or drug paraphernalia on the defendant and there were no other facts which would suggest an intent to sell." The 4th DCA noted the packaging and weight of the drugs in the instant case "is similar to that in *Valentin*, giving rise to similar conclusions about Alleyne's intent."

Finding that evidence which furnishes nothing more than a suspicion that the defendant committed a crime is not sufficient to uphold a conviction, the court noted Alleyne did nothing outside the store that indicated he might be selling drugs. It further stated that neither the total amount of marijuana nor the amount of cash recovered was inconsistent with personal use. The 4th DCA reversed Alleyne's conviction and remanded for entry of a judgment of conviction of possession of marijuana under 20 grams.

Alleyne v. State, 2010 WL 3418373, --So.3d-- , (Fla. 4th DCA, 9/1/10)

Public Safety Exception To Miranda Applies When Inquiring Whether Subject Has Ingested Crack Cocaine

Without administering *Miranda* warnings, police began questioning Smith when they saw him spit out several pieces of partly-chewed substances which the officers recognized from their experience to be crack cocaine. When questioned, Smith said he did not have "any more crack cocaine in him." The admission was admitted at his trial. Smith was convicted.

Smith appealed his judgment and sentence, arguing that the trial court erred in admitting his statement because when he made the statement to the officers, he had not been administered the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The State argued that Smith's pre-*Miranda* statement was admissible under the rescue doctrine, also known as the private safety exception to the Miranda rule.

The 1st DCA referred to New York v. Quarles, 467 U.S. 649 (1984), where the United States Supreme Court recognized a public safety exception to the Miranda rule, holding that statements obtained without Miranda warnings are admissible when immediate questioning is necessary to secure the safety of the public. In Benson v. State, 698 So. 2d 333 (Fla. 4th DCA 1997), the 4th DCA extended the Quarles exception to circumstances where the suspect making the pre-Miranda statement was confronted with a life-threatening medical emergency. It determined that the facts in the instant case were "virtually identical to those presented in *Benson"* and affirmed Smith's judgment and sentence.

The 1st DCA held that the private safety exception applies under the facts of this case where the police officers had an objectively reasonable concern for Mr. Smith's safety. Three key factors were noted: 1) the need for information was urgent; 2) there was a possibility of rescuing a person whose life may have been in danger; and 3) the rescue of Mr. Smith appears to be the primary purpose and motivation of the interrogator. See *Benson*, 698 So. 2d at 337. As stated by the court, "The right to remain silent would be of little practical value to a defendant who becomes comatose from a drug overdose while being read his Miranda rights."

Smith v. State, 2010 WL 3528601 , --So.3d--, (Fla. 1st DCA, 9/13/10)

Juror Cannot Access Definition Of Word Used In Jury Instruction Via Juror's "Smart Phone" or Similar Device

Tapanes argued for a new trial after conviction for first-degree murder and manslaughter with a firearm, claiming error when a juror "used a smart phone during a break in jury deliberations to look up the definition of 'prudent,' a term used in the jury instructions and during closing arguments." When raised at trial, an evidentiary hearing was held on this issue and the court determined that "here was jury misconduct based on the fact that the jury foreperson utilized his smart phone to search an internet site, Encarta, for the definition of "prudent" or "prudence." Further, the court found the misconduct was compounded by the foreperson sharing the definition with other jurors. However, the trial court found that the juror misconduct was harmless and denied the appellant's motion for new trial.

The 4th DCA did not agree. "A dictionary is not one of the materials permitted to be taken into the jury room." *Smith v. State*, 95 So. 525, 528 (Fla. 1957); *Greenfield v. State*, 739 So. 2d 1197 (Fla. 2d DCA 1999)(citing Fla. R. Crim. P. 3.400). Thus, a dictionary cannot be considered by the jurors. "Prudent" was mentioned in the jury instruction, repeatedly mentioned during closing argument, and the facts of the case centered on whether the appellant acted in a "prudent" manner by his actions. "The concept of 'prudence' is one that could be key to the jury's deliberations. "At the very least, we cannot say that there is no reasonable possibility that the juror's misconduct . . . did not affect the verdict in this case." The DCA reversed and remanded for a new trial.

Tapanes v. State, 2010 WL 3488709 , --So.3d--, (Fla. 4th DCA, 9/8/10)

BB Gun Brought To School Was Not Shown By State To Be A "Weapon" Within F.S. 790.115(2)

J.M.P. was charged in a petition for delinquency with violating section 790.115(2), Florida Statutes (2008) ("[p]ossessing or discharging weapons or firearms at a school-sponsored event or on school property prohibited"), because she brought a BB gun to school. The trial court found J.M.P. guilty beyond a reasonable doubt, but the 4th DCA reversed because the State failed to present evidence that the BB gun at issue fit within the parameters of F.S. 790.115(2).

The term "weapon" is distinctly defined in F.S. 790.115(2) which provides, in pertinent part, that "[a] person shall not possess any firearm, electric weapon or device, destructive device, or other weapon as defined in s. 790.001(13), including a razor blade or box cutter, . . . on the property of any school." A BB gun is not a firearm. *See Petz v.* State, 917 So. 2d 381, 383 (Fla. 2d DCA 2005); *Wilson v.* State, 901 So. 2d 885, 886 (Fla. 4th DCA 2005). Because a BB gun is not a firearm, electric weapon or destructive device, it is relegated to the category of "other weapon" as defined in section 790.001(13). A "weapon" is defined in section 790.001(13) as "any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, *or other deadly weapon.*" § 790.001(13), Fla. Stat. (2008) (emphasis added). Since a BB gun is not enumerated, in order to be prohibited under section 790.115(2), it must be a *deadly* weapon.

"A 'deadly weapon' has generally been defined to be one likely to produce death or great bodily injury." The Supreme Court has held that a BB or pellet gun can be a deadly weapon, and whether it is a deadly weapon is a question of fact for a jury. In the instant case, the school principal testified that she recovered a BB gun from J.M.P. at the elementary school. An officer testified that the BB gun was not loaded. There was no testimony explaining how to operate the gun or what type of injury the gun might inflict. The 4th DCA held that while a BB gun could be included in scope of F.S. 790.115(2), the evidence in this case was insufficient to demonstrate that J.M.P. possessed a deadly weapon, that that the trial court erred in denying J.M.P.'s motions for judgment of dismissal and reversed.

J.M.P. v. State, --So.3d-- , 2010 WL 3564729, (Fla. 4th DCA, 9/15/10)

------------end of case summaries—(current through 9/29/10)-------------

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 binding 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 by the DCA. 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.

Opinions issued by courts other than the DCA in which your authority resides, the State 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. Florida courts are not bound to follow another state's court opinions, but the opinion may be considered "persuasive authority" by the Florida court. Unless the opinion involves a federal court covering Florida, or the United States Supreme Court, 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.

Sometimes new 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 or 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 court opinion affect you and your agency.

Florida's District Courts of Appeal geographic boundaries: