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# LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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FRED O. DICKINSON, EXECUTIVE DIRECTOR

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## **11th U.S. Circuit Court of Appeal**

### **Qualified immunity - beating of inmate by guards**

A group of Florida State Prison corrections officers sent to remove a prisoner from his cell are not entitled to qualified immunity for beating the inmate so severely he required nine days of hospitalization, the 11th U.S. Circuit Court of Appeals said. Members of a "cell extraction" team were sent to remove David Skrtich, an inmate who had a history of disciplinary problems including the stabbing of a guard. Evidence indicates that after Skrtich was shocked with an electronic shield so he could no longer resist, corrections officers hit, kicked and stomped him, causing serious injuries. The officers sought qualified immunity, arguing that force was necessary because of Skrtich's lack of cooperation and disciplinary history. They also argued that they are completely insulated from federal liability for excessive force in cell extractions because there are no cases in which excessive force was used in the context of a cell extraction. The 11th Circuit rejected both these arguments, affirming a lower court's denial of summary judgment and dismissal. "While Skrtich's history may have warranted the officers in undertaking extra precautions in performing the cell extraction, the evidence, viewed in the light most favorable to Skrtich, is that once Skrtich was shocked with the shield, Skrtich was incapacitated. It is not constitutionally permissible for officers to administer a beating as punishment for a prisoner's past misconduct," the Court said. "The law of excessive force in this country is that a prisoner cannot be subjected to gratuitous or disproportionate force that has no object but to inflict pain. This is so whether the prisoner is in a cell, prison yard, police car, in handcuffs on the side of the road, or in any other custodial setting. The use of force must stop when the need for it to maintain or restore discipline no longer exists. The law was clearly established long before the defendants acted that correctional officers could not use force maliciously or sadistically for the very purpose of causing harm."

[*Skrnich v. Thornton, et al.*, 10/2/01]

## **1st District Court of Appeal**

### **Discovery - state licensing exam**

A state agency does not have to turn over its entire professional licensing exam to a failed applicant because such a step would compromise the integrity of the exam, the 1st DCA held. The Department of Health successfully challenged an administrative law judge's order requiring the agency to provide all of the questions and answers to an applicant who failed the Florida Medical Licensure Examination. Statutes and administrative rules grant an examinee only limited access to the questions he missed and specifically establish that exam questions and answers are not subject to discovery. The DCA concluded that the Administrative Law Judge's order effectively allowed improper discovery of the exam. "[D]isclosure of the whole exam is not required for the challenge, and it would be contrary to the confidentiality required for the integrity of the exam," the DCA said. "The Florida Legislature has provided restrictions for disclosure of questions and answers, balanced in favor of the exam's integrity as protected by the Department. ... We agree with the Department that any discovery, whether in the presence of the ALJ or not, contravenes the statute prohibiting discovery."

[*Department of Health v. Grinberg*, 10/9/01]

### **Miranda warnings - road rage - admissions**

When a defendant is briefly detained in the course of a traffic investigation it is the circumstances of the restraint, and not an official characterization of the suspect's status, that determines whether a Miranda warning is needed, the 1st DCA held. Quinton Johnson appealed his conviction for aggravated battery arising from a road rage scuffle. Johnson challenged the admissibility of statements he made to police at the scene, contending he was in custody when he confessed to hitting the victim but had never been given his Miranda warnings. When officers arrived at the scene, one officer told Johnson

to move his truck out of the road, but the officer and Johnson disagreed on whether the officer indicated Johnson was free to leave if he wanted to. Eventually the officer walked over to Johnson and asked, "What happened?" The officer testified that since Johnson was not under arrest she found it unnecessary to read him his rights before asking the question. Johnson responded by admitting he had hit the victim in the arm with a rake. The DCA rejected Johnson's argument that his statement was inadmissible. "Although the defendant was briefly detained by the police, he was not in custody and therefore not entitled to be warned of his constitutional rights. Officer Thompson's conduct does not approach the kind of evil the (U.S. Supreme) Court had in mind when it decided the Miranda case. Here, the officer asked the defendant to remain at the scene of an altercation, in full view of the public, and then asked him an open-ended question, 'what happened?' The defendant was not isolated or confronted, and it was clear that the detention was for a limited purpose," the DCA said. [*Johnson v. State*, 10/12/01]

#### **Miranda rights - self-incriminating statement**

Where a defendant has invoked his Miranda right to remain silent, the admissibility of subsequent statements depends on whether a reasonable person would conclude that police questioning was designed to lead to a self-incriminating response, and not on what police intended from the response, the 1st DCA said. Lawrence Moore appealed his drug conviction, alleging that the evidence against him was insufficient without an inculpatory statement he made during a police custodial interrogation. Moore argued that the statement should not have been admitted because it was made after he had invoked his Miranda rights. After Moore invoked his rights, an officer asked him if he owned certain clothing, which was found in a hotel room with the drug evidence. Moore acknowledged that he owned the clothes, and this statement was later used against him at trial. This was reversible error, the DCA concluded. "It is well-established that once a suspect invokes his right to silence, no further police initiated custodial interrogation can take place unless the accused initiates further communication, exchanges, or conversations with the police. A request to remain silent is to be scrupulously honored," the DCA said. "[T]he officer's intention as to whether he was trying to elicit an incriminating response or whether he was

interested in returning items not being retained as evidence is not dispositive." [*Moore v. State*, 10/26/01]

## **2nd District Court of Appeal**

#### **Attempted firearm purchase - providing false information**

Florida's firearms transaction statute does not require a potential gun buyer to disclose information about his criminal background, and therefore a prosecution based on false answers to the question is unconstitutional, the 2nd DCA said. Robert Randall was found guilty of providing false firearm transaction information, in violation of section 790.065(12), F.S. (1999). Randall went to a pawnshop to redeem his own rifle, which he pawned on numerous occasions when he needed cash. The pawnshop clerk informed Randall that a new law required that he fill out a form promulgated by the Florida Department of Law Enforcement, and on the form Randall falsely denied having any domestic violence convictions in his criminal background. The local sheriff's office determined that Randall was on a list of individuals who were not approved to purchase a firearm, and he was arrested for his false response on the FDLE form. The DCA reversed the conviction. "Because the legislature did not require that this information be furnished when it authorized the FDLE to promulgate the form, a prosecution based on an allegedly false answer to this unauthorized question is unconstitutional," the DCA said.

[*Randall v. State*, 10/26/01]

#### **DUI manslaughter - alternative sentences**

Despite Florida's strong public policy against drunk driving, the Legislature did not exempt DUI laws from a statutory mitigator that can lessen the sentence imposed on a truly remorseful defendant, the 2nd DCA held. The Court, certifying conflict with a contrary holding by the 4th DCA, rejected the State's argument that the statutory mitigator in section 921.0026(2)(j), F.S., is not available in DUI cases because of the State's policy against DUI offenses. The State appealed a downward departure sentence given to a man whose drinking caused a fatal accident. The defendant, Paul VanBebber, pleaded nolo contendere to all charges, exhibiting what the DCA called "extreme and sincere" remorse. "[W]e are not unmindful of, and also endorse in the strongest of terms, the public policy that seeks to eradicate the scourge of drunken driving in our

society. Without going into details, this case is a prime example of the awful effects it can have on numerous lives. However, we are confident that the legislature is equally aware of this public policy," the DCA said. "Cognizant of this public policy, the legislature still did not exempt DUI crimes from application of section 921.0026(2)(j). We may not do so in its stead." Concurring separately, Acting Chief Judge Altenbernd urged the Legislature to consider giving trial judges more discretion to impose adequate alternative punishments for DUI manslaughter because automatic victim injury points always result in lengthy prison sentences for the offense. "The current system, however, incarcerates people who are not always dangerous to society. I suspect that the tax dollars that we are spending on incarceration due to mandatory victim injury points could be used more effectively in other programs addressing the very serious and real problem of DUI," he wrote.

[*State v. VanBebber*, 10/26/01]

### **3rd District Court of Appeal**

#### **Request for interpreter at administrative hearing**

The state Unemployment Appeals Commission acted within its discretion when it refused to hold a new hearing for a woman who said she needed an interpreter but made no request for one prior to her hearing, the 3rd DCA said. The Court rejected the request of Jaqueline Montanez, who appealed an order denying unemployment compensation benefits. The DCA noted that the prehearing notice advised Montanez that she could request an interpreter for the hearing but she failed to do so. In addition, the Court said, a transcript did not indicate that Montanez had any difficulty participating in the hearing. "We see no abuse of discretion in the denial of the request for a new hearing with an interpreter," the DCA said.

[*Montanez v. Compass Group USA, Inc., and Florida Unemployment Appeals Commission*, 10/10/01]

#### **Police insignia - prominently displayed**

Absence of evidence that police vehicles involved in chase of defendant had proper police insignia prominently displayed with their sirens and lights activated, barred defendant's conviction for fleeing or attempting to elude officer at high speed, the 3<sup>rd</sup> DCA said. The DCA reversed and remanded the case with instruction to reduce the conviction to a violation of section 316.1935(1). Defendant

Gorsuch was stopped during a narcotics surveillance. The three officers who stopped Gorsuch were wearing t-shirts with police insignias. After Gorsuch's passenger was removed by the officers, Gorsuch raced away without permission. During the chase that followed, Gorsuch drove against traffic, on a one-way street, at a high rate of speed and the chase ended when Gorsuch ultimately lost control of his vehicle and crashed into a building. The DCA found that it was undisputed that two of the officers were driving unmarked vehicles, and the third officer's vehicle was marked with a 15 inch City of Miami seal, on the car's door. There was no evidence, however, that any of the vehicles had an agency insignia as required by subsection 316.1935(3). While the facts demonstrate a willful attempt to elude police, the facts do not support the officers were "in an authorized law enforcement *patrol vehicle* with *agency insignia* and other jurisdictional markings ... with *sirens ... activated*," Judge Nesbitt wrote. [*Gorsuch v. State*, 10/24/01]

#### **Public records - private entity hired by public agency**

A consortium of private businesses created to perform a massive government contract must turn over records sought by a newspaper because it falls under the definition of "agency" for public records purposes, the 3rd DCA held. Dade Aviation Consultants (DAC) was formed by eight engineering and construction firms to manage a massive 10-year expansion and renovation of Miami International Airport. The joint venture served as a support staff extension of the Dade County Aviation Department and had no other purposes than to work on the airport contract through a professional services contract (PSA). At one point DAC decided to hire lobbyists as part of its team to facilitate certain activities related to the airport contract. The Miami Herald sought records from the joint venture, including those related to the lobbyists. DAC turned over many records but withheld others, including those related to lobbying activities, asserting that those were not public records. The appeals court disagreed, concluding that DAC falls under the definition of "agency" and must comply with the Public Records Law. "DAC was created for the express purpose of fulfilling the PSA to help the Department. DAC doesn't have any other clients or business. Hence, DAC's argument that just because it does a job, not everything it does is public, is unconvincing. DAC's only job is the PSA," the

Court said. "[W]hen a private entity undertakes to provide a service otherwise provided by the government, the entity is bound by the Act, as the government would be."

[*Dade Aviation Consultants v. Knight Ridder, Inc.*, 10/31/01]

#### **Grounds for investigatory stop and detention**

A suspect's unprovoked flight to elude police during a traffic stop provides reasonable suspicion that he is engaged in criminal activity and justifies an investigatory stop and detention, the 3rd DCA said. D.N., a juvenile defendant, argued that the trial court should have suppressed marijuana found during a traffic stop because police did not have sufficient justification for the stop and detention. D.N. was arrested after an officer attempted to stop a vehicle that had gone through a red light around 1:30 a.m. The car eluded police and did not stop until the driver turned his lights off and came to a stop in a dead-end parking lot. Fearing for his safety, the officer drew his gun and ordered the driver and D.N., who was a passenger, out of the car with their hands in the air. The officer saw an object fall to the ground when D.N. raised his hands. The officer retrieved the object, which turned out to be a baggie containing marijuana. D.N. was arrested for possession and the driver was arrested for fleeing. Affirming the trial court's denial of a motion to suppress, the DCA said, "Ignoring the illegal attempt to elude police, D.N. maintained that based on a simple traffic infraction, the officer could not, at gunpoint, order him to put his hands in the air. Here, the evidence was that there was criminal activity afoot. ... [R]egardless of the legality of the initial stop (or attempted stop), the statutory offense of fleeing and eluding does not require the lawfulness of the police action as an element of the offense."

[*D.N. v. State*, 10/17/01]

### **4TH District Court of Appeal**

#### **Constitutionality of law re: gun sales**

A state law making it illegal to sell a weapon to a person "of unsound mind" is not unconstitutionally vague, the 4th DCA said in reinstating a widow's lawsuit against a pawn shop. The DCA said section 790.17, F.S., is valid because its plain and ordinary meaning gives a person of ordinary intelligence a definite warning of what conduct is required or prohibited. The statute establishes a first-degree misdemeanor for selling a weapon to "any person of

unsound mind." The pawn shop was sued by a woman whose husband was killed in a robbery attempt by Jamie Lofton, a mentally retarded man who purchased the gun from the pawn shop a few days earlier. A lower court held the statute to be unconstitutionally vague, but the DCA reversed. "Although the term 'unsound mind' might be subject to differing interpretations, that does not render the statute vague. Clearly, the statute gives notice that it is a violation to entrust or to sell a dangerous weapon, such as a firearm, to a person like Lofton who because of his mental retardation, is incapable of caring for himself," the DCA held.

[*Jones v. Williams Pawn & Gun, Inc.*, 10/10/01]

#### **Public records - investigation of officer**

A law enforcement agency is required to disclose records to an officer under investigation if it notifies the officer that the investigation has been completed but not if it indicates the investigation is still active, the 4th DCA held. The DCA rejected the attempt of a deputy sheriff's union to obtain investigative files on him. Florida law requires an agency to provide the files if the investigation is no longer active, and the union argued that the investigation ended when the sheriff's office offered the deputy a pre-disposition meeting to present his side of the case. The county argued instead that the meeting was intended to give commanders more information on which to base their determination, and therefore the investigation could not be considered complete. The DCA agreed and denied the union's request for the records. "[I]t is clear that the meeting with the investigated officer is part of the information gathering process. What the officer tells the investigators will be evaluated. Discipline is not an accepted fact at this point. There is no 'finding to proceed with disciplinary action or to file charges.' Therefore, we conclude that the trial court correctly determined that the internal investigation file was still subject to the exemption" from disclosure, the DCA said.

[*Palm Beach County Police Benevolent Association v. Neumann*, 10/17/01]

#### **Whistle Blower's Act - temporary reinstatement**

A public employee who claims she was terminated in violation of the Whistle Blower's Act is not entitled to temporary reinstatement if she was not actually fired but instead refused a transfer to a different position, the 4th DCA said. Valerie Luster, an inspection department employee with a municipal housing authority, claimed she was fired in

retaliation for reporting alleged violations to federal authorities. Subsequent to her reporting, the executive director reorganized the authority and eliminated the inspection department. Luster was offered another position at the same salary; she told the executive director the position was "not really her," but that she would accept it if assigned. Luster alleges she was not given the position and was later terminated. She sought temporary reinstatement while her complaint was pending, but the DCA concluded she was not fired and therefore is not eligible for temporary reinstatement. "The statute requires temporary reinstatement pending trial of a Whistle Blower's suit when an employee has been discharged in retaliation for a protected disclosure. Where an employee has been simply transferred or demoted, there is no statutory right to temporary reinstatement. In this case, the trial court could have concluded that, at most, appellant had been transferred but refused the position offered. Thus, she was not discharged. She had a position with appellee and refused to accept it," the DCA said.

[*Luster v. West Palm Beach Housing Authority*, 10/31/01]

#### **Search and seizure - "plain feel" exception**

To justify seizure of an item during a weapons pat-down, an officer must have more than just a reasonable suspicion and must be able to support his "plain feel" identification of suspected contraband, the 4th DCA said. An officer stopped a juvenile identified only as J.D. for riding his bicycle without lights. The officer noticed a bulge in the minor's pocket and, fearing it might be a weapon, conducted a pat-down search. The officer felt a "plastic-type" bag with a substance in it and, based on his law enforcement experience, believed the substance might be marijuana. A field test showed the substance to be marijuana, and J.D. was arrested. A more thorough search turned up more marijuana. The trial court ruled that the officer did not have probable cause to seize the marijuana and suppressed the contraband, and the State appealed. The DCA affirmed. "The burden is on the State to prove that the officer had probable cause to seize items felt during a frisk for weapons. While an officer's experience and training are relevant to this determination, the State must present more than the naked subjective statement of a police officer who has a 'feeling' based on 'experience' that the item was contraband. Probable cause does not arise anytime an officer feels an object that the officer reasonably suspects to be contraband," the DCA said.

[*State v. J.D.*, 10/10/01]

#### **Search and seizure - suppression of evidence**

While making an arrest pursuant to an outstanding warrant, police are authorized to search the area within the suspected's immediate control, the 4th DCA said. The DCA reversed a trial court order suppressing firearms found near where officers arrested Alphonso Lingo on an outstanding warrant. The officers had received information that Lingo was engaging in criminal activity and determined that there was an outstanding arrest warrant for him. They entered a residence with permission of some occupants and found Lingo sitting on a bed. Lingo was immediately arrested and handcuffed. As Lingo stood up to be searched, officers noticed a bulge in the mattress where he had been sitting and, lifting the mattress, found the handgun. During the arrest, police also noticed gun cases in a doorless closet, where they found a shotgun. The trial court suppressed the evidence, concluding that the strongest argument against suppression would have been the safety of the officers, but that was not a legitimate concern because Lingo was handcuffed. The State appealed, arguing that the trial court applied the standards applicable to a search incident to a stop and frisk rather than those applicable to a search incident to arrest. The DCA agreed, noting that case law authorizes an officer making an arrest to search the area within the person's immediate presence or control.

[*State v. Lingo*, 10/10/01]

#### **Miranda rights - custodial interrogation**

A Florida murder suspect who was arrested on other charges in Canada and invoked his rights under the Canadian Charter may still be questioned by Florida police investigating the murder, the 4th DCA said. Gordon Holland was wanted in connection with a Wilton Manors murder when he was arrested in Canada after using the victim's credit card. Holland's Canadian lawyer advised him not to speak to Canadian police. When Wilton Manors detectives arrived, they introduced themselves and read Holland his Miranda warnings. Holland agreed to talk to the detectives and described the murder in detail. He was subsequently convicted and appealed, claiming the Wilton Manors detectives were precluded from interrogating him because he had previously invoked his right to counsel under the Canadian Charter, rendering inadmissible any subsequent confession in response to interrogation without his attorney present. The DCA disagreed.

"When Holland spoke with the Canadian attorney, he was only being held on the Canadian possession charges. No Canadian law enforcement agents had interrogated Holland in reference to the Florida crimes; in fact, Holland had not even been informed that he was a suspect in connection with the Florida homicide. Under the facts of this case, Holland could not invoke any of his Miranda rights prior to meeting with the Wilton Manors detectives because he had never been interrogated by the Canadian police in reference to the Florida crimes," the DCA concluded.

[*Holland v. State*, 10/10/01]

#### **Search and seizure - inadmissible evidence**

Otherwise inadmissible evidence that is derived from an unlawful stop but is inextricably intertwined with admissible evidence may be allowed in certain circumstance, the 4th DCA said. David Harris was arrested after he was spotted picking up a pill bottle from the street and drugs were found in his car. During the stop, Harris struck the arresting officer. On appeal, the DCA said the officer did not have probable cause to make the stop, and the lower court on remand reversed the drug convictions. Harris then challenged his conviction for battery on a law enforcement officer, contending that the State used inadmissible testimony about the illegal stop to prove its case. The DCA disagreed. "In this case, testimony regarding the unlawful stop is inextricably intertwined with the evidence relevant to the battery on a law enforcement officer because some information about the stop is needed for context. Even though such evidence would be inadmissible for other purposes ... it is admissible here," the DCA said.

[*Harris v. State*, 10/17/01]

#### **Testimony bolstering credibility of witness**

A police officer's testimony cannot be used to bolster the credibility of a key witness for the prosecution, the 4th DCA said. Gloria Acosta was convicted for forging and cashing a check. At trial, the prosecutor asked a detective why he had not taken handwriting samples from Sarah Riley, the state's witness who was Acosta's former accomplice. Over a defense objection, the detective responded that up to that point, everything Riley told him had appeared to be truthful. Denying Acosta's motion for a mistrial, the trial court instructed the jury to disregard the comment. The DCA reversed, concluding that the detective's statement had improperly bolstered the credibility of the witness.

"Because Riley's testimony was crucial and the defense's main emphasis was on her lack of credibility, we cannot agree with the State that the error was harmless or that it was cured by the instruction," the DCA said.

[*Acosta v. State*, 10/24/01]

## **5th District Court of Appeal**

### **Armed burglary - conviction reduced**

Where a jury concludes that a screwdriver is not brandished as a dangerous weapon against police officers, the tool cannot be used to support a conviction for armed burglary based on the same set of facts, the 5th DCA said. Neil Nicarry was stopped by police for traffic offenses but fled on foot, eventually stopping in a residential backyard shed. To enter the shed, Nicarry had to remove a screwdriver that had been keeping the door latched. When officers found him, Nicarry exited the shed holding the screwdriver and was shot twice by police. Nicarry was convicted of armed burglary of an occupied dwelling and aggravated fleeing and eluding, but was acquitted of aggravated assault on law enforcement officers. The DCA reversed the armed burglary conviction, concluding that there was insufficient evidence to support the charge based on the jury's determination that the screwdriver did not constitute a weapon capable of supporting the aggravated assault charge. "Although a screwdriver can qualify as a 'dangerous weapon' depending on how it is used, here the allegation that Nicarry 'brandished it against the law enforcement officers' was rejected by the jury in acquitting him of the aggravated assault charge," the DCA said. "[T]he jury not only acquitted defendant on this charge, it did not even find simple assault."

[*Nicarry v. State*, 10/05/01]

### **Driving suspension hearing - self-incriminating statements**

Statements made at a license suspension hearing are voluntary and do not enjoy Fifth Amendment protection, so a defendant has no constitutional right to halt the suspension hearing to avoid self incrimination, the 5th DCA held. Richard Hinman argued that his right against self-incrimination had been violated when the Department of Highway Safety and Motor Vehicles refused to abate an administrative hearing on his driving license suspension. Hinman was arrested for driving under the influence after failing a breath test, and his driver license was suspended. Hinman asked the

department for an administrative hearing to contest his license suspension, but then asked to have it abated because he feared his oral testimony could be used against him at a later criminal proceeding for the same drunk driving incident. The Department denied his request and, after a hearing, upheld the suspension. The Department argued that Hinman was not compelled to testify at the hearing and any incriminating testimony would be incorporated as part of the hearing officer's decision, which by law could not be considered in any trial for a violation of Florida's drunk driving laws. The DCA agreed. "Thus, a person being subsequently prosecuted for DUI has no right to stay the license suspension hearing. It also follows that any voluntary statements made by the person at the license suspension hearing have no Fifth Amendment protections. Their only protection stems from the provisions of the statute referenced above," the DCA said.

[*Hinman v. Department of Highway Safety and Motor Vehicles*, 10/12/01]

#### **Training requirements for agency inspectors**

A trial court properly threw out a State agency order suspending a driver's license because an agency inspector had not complied with requirements to receive his inspector's permit, the 5th DCA said. The court rejected the Department of Highway Safety and Motor Vehicles' appeal, which argued that the Circuit Court erred when it reversed the agency's suspension order based on the driver's unlawful blood alcohol level. At issue was whether the agency complied with administrative rules establishing the training requirements for inspectors who test the accuracy of breath analysis equipment. "DHSMV contends that the hearing officer made a factual determination that the inspector was a qualified agency inspector and that this determination was supported by competent substantial evidence and thus the Circuit Court improperly re-weighed the evidence or substituted its judgment for that of the agency," the DCA said. "However, whether the inspector had a valid agency inspector permit was a question of law, not of fact. As such, the Circuit Court's decision was based on its interpretation of the applicable rule, not the weight of the evidence."

[*Department of Highway Safety and Motor Vehicles v. Stevens*, 10/26/01]

#### **Blood alcohol level**

Under *State v. Miles*, the impairment presumptions are not available when blood is drawn pursuant to FAC 11D-8.012. Where the instructions allow the jury to find defendant guilty based on either impairment or BAL over .08, and the presumption instruction is erroneously given, it is impossible to determine whether the jury relied on the instruction, the 5<sup>th</sup> DCA said. Dennis Wayne Servis appealed his conviction for DUI manslaughter pursuant to section 316.193(3)(a)(b)(c)(3), Florida Statutes (1999). The State argued that the instructions on statutory presumption given to the jury were harmless error because of the overwhelming evidence of guilt and because the instructions allowed the jury to find Servis guilty either under a theory of being impaired with the statutory presumptions or that he had a blood-alcohol level of .08 or higher. "Unfortunately, however, there is no way of analyzing the jury's verdict to determine the theory upon which it relied in rendering its verdict, and if it relied upon the statutory presumptions it was error under *Miles*. We vacate the judgment and sentence and remand for a new trial," the DCA said.

[*Servis v. State*, 10/26/01]

#### **ATTORNEY GENERAL'S OPINION**

##### **Transportation of Baker Act subject**

In response to a request from the Putnam County Sheriff, the Attorney General issued an advisory opinion (2001-73, 10/17/01) stating in sum: "1) If a person is the subject of an ex parte order or certificate requiring involuntary examination and treatment under Florida's Baker Act, the single law enforcement agency designated by the county for this purpose is responsible for transporting that person to the nearest receiving facility; 2) If a person is taken into custody by a law enforcement officer for minor criminal behavior or noncriminal behavior that meets the statutory guidelines for involuntary examination under the act, the law enforcement officer taking the person into custody is responsible for transporting the person to the nearest treatment facility; 3) If a law enforcement officer arrests a person for commission of a felony and believes that the person meets the guidelines for involuntary examination or placement, the person arrested shall be processed through the criminal justice system as any other criminal suspect and is entitled to examination and treatment in the facility where he or she is held."

### **Contraband forfeiture - law enforcement trust fund**

In response to a request from the St. Lucie County sheriff, the Attorney General issued an advisory opinion (2001-78, 10/30/01) stating in sum: "Funds from the special law enforcement trust fund may be donated to a 501(c)(3) corporation that treats drug addicts recently released from jail where such funds will be directed to the renovation of buildings used by the program for residential and administrative purposes."

The materials presented are a compilation of cases from the Attorney General's Criminal Law Alert and Appellate Alert as well as summaries from the Office of General Counsel. They are being presented to alert the Division of Florida Highway Patrol and the Division of Driver Licenses of legal issues and analysis for informational purposes only. The purpose is to merely acquaint you with recent court decisions. Rulings may change with different factual situations. All questions should be directed to the local State attorney or the Office of General Counsel (850) 488-1606, SunCom 278-1606. If you care to review other Legal Bulletins, please note the web site address: DHSMV Homepage <http://www.hsmv.state.fl.us/> or FHP Homepage ([www.fhp.state.fl.us](http://www.fhp.state.fl.us))

### **Public Records Law - anti-terrorism exemptions**

In response to a request from state Senator Rod Smith, the Attorney General issued an advisory opinion (2001-75, 10/24/01) stating in sum: "1) Section 281.301, Florida Statutes, provides a broad exemption from disclosure for materials such as security plans or security needs assessments that are on file with a public agency; 2) A subpoena issued by a criminal justice agency to a non-criminal justice agency pursuant to an active criminal investigation or active criminal intelligence operation is exempt since the agency receiving the request qualifies as a 'criminal justice agency' when it is assisting a law enforcement agency in conducting an active criminal investigation; 3) A receiving law enforcement agency, such as the Florida Department of Law Enforcement, would not be required to respond to a public records request that would divulge the existence of an ongoing active criminal investigation or active criminal intelligence operation, provided that the agency transmitting the records maintains a copy of the records sent to the law enforcement agency."

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