
LEGAL BULLETIN

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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Florida Supreme Court

Proper Charge against Defendant - use of Firearm

When a charging document alleges that the defendant used a firearm in committing an offense enumerated a section of Florida law and the jury specifically finds him guilty of the offense "with a firearm" as charged in the information, the three-year mandatory minimum term authorized by the statute may be imposed, the Florida Supreme Court held.

In a 5-2 decision, the justices upheld Steven Iseley's conviction on one count of aggravated assault with a deadly weapon. The verdict form incorrectly identified the charge as aggravated assault with a firearm, and Iseley urged the appellate courts to overturn the conviction and the three-year mandatory minimum sentence that went with the firearm use. The 5th DCA reversed the conviction and ordered a new trial, saying the jury should have been instructed on aggravated assault with a deadly weapon and then been asked to make a special finding as to whether the weapon was a firearm. The DCA also concluded that failing to require a separate finding that the offense was committed with a firearm denied the jury the opportunity to exercise its inherent "pardon" power by convicting Iseley only of aggravated assault with a deadly weapon, rather than with a firearm. The Supreme Court reversed.

"In reaching this conclusion, we hold that where there is undisputed evidence that the deadly weapon used by the defendant was a firearm, an instruction on aggravated assault with a deadly weapon as a lesser included offense of aggravated assault with a firearm is not required in order to enable the jury to exercise its pardon power. Therefore, we reject the Fifth District's ruling that the verdict form in this case denied

Iseley an opportunity for a jury pardon," Justice Bell wrote for the court.

[*State v. Iseley*, 10/26/06]

Courts' Authority to Subpoena Executive Agencies

A circuit court judge does have the authority, without violating separation of powers, to subpoena information and testimony from officers of an executive branch agency regarding a matter within the jurisdiction of that court, as long as it is for narrowly defined informational purposes, the Florida Supreme Court ruled.

The justices unanimously overturned a decision of the 3rd DCA, which had determined that trial courts lack constitutional or statutory authority to issue a subpoena duces tecum to officers of state government concerning matters within their executive authority. In the instant case, a juvenile court judge directed three officers with the state Agency for Persons with Disabilities, "or other designated person(s)," to appear in court with documents to explain why a child was not yet receiving particular services through the agency. The Supreme Court concluded that both the Rules of Juvenile Procedure and Florida Statutes authorize such a subpoena "for narrowly defined informational purposes," in part because the subpoena does not demand the appearance of specific high-ranking agency officials but instead directs an appearance by whichever personnel can best address the issues before the court.

"The subpoena . . . did not require these specific officials to attend the hearing. The subpoena specifically noted that any designated person could produce the documents and appear before the court. The subpoena apparently sought to question the APD official with the most knowledge about the issue and the documents requested . . ." Justice Cantero wrote for the court. "Thus, APD could produce one of the mentioned officials or another official with knowledge, at its discretion. The subpoena does

not require the attendance of the officials specified – or of any specific individual whatsoever.”

[F.G., et al., v. Agency for Persons with Disabilities, 9/28/06]

Criminal Rules - DNA Testing

Trial judges must ask defendants, defense lawyers and prosecutors whether they know of any evidence that could be used for DNA testing before the judges can accept guilty or no-contest pleas, under new rules adopted on an emergency basis by the Florida Supreme Court.

The justices adopted the rule of criminal procedure to conform to new legislation designed to establish early in the process whether potential DNA evidence exists that could exonerate the defendant. If such evidence exists, under the new rule the trial judge can delay proceedings on the defendant’s behalf and order DNA testing. While all seven justices approved the new rule, three of them said the importance of the issue would lead them to also require that trial courts make specific findings as to the existence of DNA evidence during the plea proceedings.

“This issue is far too important, and the legislative intent for a definitive resolution too clear, to leave any ambiguity as to the existence of this evidence that may result without a definitive finding by the court,” Justice Anstead wrote, with Justices Pariente and Quince concurring.

[In Re: Amendments to Florida Rules of Criminal Procedure 3.170 and 3.172, 9/21/06]

1st District Court of Appeal

Veracity of Anonymous Informants

Because the independent statements of three separate anonymous informants tended to corroborate one another, the statements could properly be used to support a search warrant even though none of the three individuals had even been used as an informant before, the 1st DCA held.

Gerald Green pled no contest to the manufacture of methamphetamine, but argued on appeal that the evidence against him should have been suppressed because the affidavit in support of

the search warrant relied on three separate anonymous tips to create probable cause without establishing the informants’ veracity. The DCA held that, under the totality of the circumstances, probable cause for the warrant existed because the information provided by each informant bolstered the veracity of the information provided by the others.

“(U)nder the totality of the circumstances the affidavit provided sufficient probable cause for the issuance of a search warrant,” the DCA said. *[Green v. State, 12/8/06]*

Voluntariness of Consent to Search

When a police officer conducts a traffic stop, calls for a canine unit backup and instructs the second officer to park his vehicle in a way that prevents the motorist from easily fleeing, the motorist cannot reasonably be expected to believe he is free to leave and therefore his consent to a search cannot be considered voluntary, the 1st DCA held.

The DCA reversed a lower court’s denial of a motion to suppress drug evidence found in Gregory Sizemore’s car. The officer who pulled Sizemore over for a broken tag light called for backup because he believed Sizemore was acting nervously. After backup arrived, the officer concluded his investigation by giving Sizemore a warning on the tag light. As Sizemore was returning to his car, the officer stopped him and asked whether he had anything on him that would get him into trouble. Sizemore admitted to having marijuana in his pocket, and a subsequent search found more marijuana. The trial court denied Sizemore’s motion to suppress, but the DCA concluded that the use of the canine unit and the positioning of the officers’ vehicles, combined with the fact that the officer no longer had any reasonable ground to continue to detain Sizemore, made the search invalid.

“Despite the officer’s statement that the defendant was free to go, we cannot conceive that a reasonable person in appellant’s position would have believed his freedom of movement was unrestricted. We therefore conclude that appellant’s consent to search cannot be objectively viewed as voluntary, and, in the absence of a volitional search, the continued detention of the defendant was improper, requiring that the seizure of the items be suppressed,” the DCA said.

[Sizemore v. State, 10/11/06]

Evidence Suppression - expectation of Privacy

A defendant who told officers he knew nothing about luggage that contained illegal drugs cannot then argue he had an expectation of privacy regarding the luggage and therefore the drug evidence should be suppressed, the 1st DCA held.

The court rejected the appeal of Pablo Burgos, who claimed that the drugs found in the luggage should not be allowed as evidence because he was a guest in a home that was searched pursuant to a warrant. The drugs were found within the luggage, which was near Burgos as he slept in a guest bedroom.

“Given the testimony that the officers discovered Appellant sleeping in the guest bedroom and that the closed luggage was next to Appellant, but that Appellant affirmatively denied any knowledge or ownership of the luggage searched, he lacked any legitimate expectation of privacy, and the trial court correctly found that Appellant lacked standing to challenge the search,” the DCA said.

[Burgos v. State, 10/11/06]

Probable Cause - Contents of Arrest Report

The fact that an officer failed to mention in his arrest report that he stopped a vehicle because he suspected the driver was drunk does not eliminate the “objective existence” of probable cause justifying the officer’s actions, the 1st DCA said.

An officer with the Jacksonville Sheriff’s Office was monitoring drivers’ speeds when a motorist flagged him down. The motorist reported that a specific vehicle was weaving in and out of its lane and that the driver appeared to be impaired. The officer asked a fellow officer to stop the vehicle, and the driver was arrested for driving under the influence of alcohol. The DCA rejected the driver’s arguments on appeal.

“Under the facts of this case, objective evidence established probable cause to believe that respondent was impaired while he was operating his motor vehicle. Accordingly, the absence of a statement in the arrest report, indicating that (the second officer) initiated the stop for suspicion of impairment, does not operate to negate the objective existence of probable cause,” the DCA said.

[Department of Highway Safety and Motor Vehicles v. Maggert, 10/11/06]

Child Abuse Charges based on Verbal Conduct

Rejecting the conclusion of another appeals court; the 1st DCA said a man might be prosecuted for felony child abuse based solely on verbal conduct even though most acts of speech are constitutionally protected.

The court reinstated the charges against Eric Coleman, who was charged with felony child abuse after two incidents in which he drove by a 15-year-old girl and two others who were 12 and asked them offensive questions. Even though she characterized the comments as “offensive and disturbing,” the trial court ruled that Coleman’s verbal conduct was not actionable under the child abuse law based on a 2001 decision by the 4th DCA. In that earlier case, the appeals court said the statute could withstand a constitutional overbreadth challenge only if it was narrowly construed to avoid its application to speech. The 1st DCA disagreed, concluding that speech may constitute prohibited child abuse if it meets the statutory definitions of “abuse” and causing “mental injury.” Because the state never had the opportunity to prove that these conditions existed in Coleman’s case, the DCA reinstated the charges and certified conflict with the 4th DCA.

“The state will be required to demonstrate that, in pertinent part, the defendant’s comments intentionally caused a ‘discernible and substantial impairment in [the child’s] ability to function within [his or her] normal range of performance and behavior,’” the DCA said. “The trial court here was not asked to, nor did it, address the question whether the state’s information can withstand challenge on these grounds. Accordingly, we are remanding this cause for further proceedings.”

[State v. Coleman, 9/25/06]

Probable Cause for Detention of Suspect

Because an off-duty sheriff’s deputy had probable cause to believe that a man and woman had been involved in a traffic violation, his subsequent inquiry into possible domestic violence and a search that turned up illegal drugs was valid and the man’s criminal conviction stands, the 1st DCA held.

While working off-duty as a store security guard, the deputy saw a car lurch forward and, believing that a minor collision had occurred, went to investigate. When he arrived at the scene, he saw that two vehicles’ bumpers were

touching and a man was leaning into the woman's vehicle. There was no apparent damage to the vehicles, and the couple assured the deputy that everything was "okay." However, the man gave the deputy incorrect information about his identity, and the deputy remained concerned about possible domestic violence. When the deputy was unable to verify the man's identity, he arrested the man and conducted a search incident to the arrest, which turned up drug contraband. On appeal, the man argued that the deputy had no legal justification to detain him. In a 2-1 ruling, the DCA agreed with the state's argument that the potential traffic infraction gave the deputy a basis to intercede, and it was reasonable for the deputy to require each party to produce identification. Therefore, the DCA said, the events unfolded in a way that made the search valid.

"(A) S long as the officer has sufficient probable cause for the stop, the officer's subjective motivation for the stop does not render the stop unconstitutional and require suppression of evidence seized during a search incident to the arrest. Here, the deputy had probable cause to believe that a traffic violation had occurred," the DCA said. "The deputy testified that he saw the female's car lurch forward, and when he walked over to investigate, he saw that Appellant's bumper was touching her bumper. Because the deputy had probable cause to detain Appellant, it is irrelevant that his primary concern during his investigation was the prevention of domestic violence." [*Parrish v. State*, 9/25/06]

Constitutionality of Statutory Rape Law

Reaffirming a long-established Florida standard, the 1st DCA held that in statutory rape cases, the defendant's guilt is not affected by whether he knew the minor's age.

The court affirmed the conviction of Jovan Feliciano, who argued that the statutory rape law is facially unconstitutional in that it violates due process for failing to require proof that the defendant knew the minor's age. Feliciano was 26 years old and the girl was just 17 when their sexual relationship ended. State law specifies that ignorance of the victim's age is no defense, and the DCA concluded that the trial judge correctly denied Feliciano's motion to dismiss based on the constitutionality question.

"Because the Legislature has spoken to this issue with such clarity, statutory construction is not necessary. Florida's courts have never required proof of the defendant's knowledge of

the minor's age in a statutory rape case, or recognized the defendant's lack of knowledge as an affirmative defense," the DCA said. "Unemancipated minors are under a statutory disability that precludes consent to sexual activity with adult."

[*Feliciano v. State*, 9/20/06]

Agency Suspension of Driver's License

A state agency's hearing officer properly interpreted the term "traffic crash" as used in state law when it suspended a woman's license to drive, and a circuit court was wrong to overrule the agency's action, the 1st DCA held.

Sherri Williams had her license suspended after she committed a DUI in an incident that ended with her vehicle in a drainage ditch. The arresting officer did not observe Williams behind the wheel, which is usually a requirement for a warrantless traffic arrest. However, the Department of Highway Safety and Motor Vehicles cited an exception that allows such an arrest by an officer who investigates at the scene of a "traffic crash." That term is not defined in statutes, and a circuit court judge concluded that Williams' actions did not result in a "traffic crash" because she did not make impact with another vehicle or object and did only about \$100 worth of damage to her own car. The DCA reversed, granting the department's motion to reinstate its suspension of Williams' license.

"Although the term 'traffic crash' reasonably contemplates some degree of damage, it clearly does not imply that damage must have occurred to the property of another, nor does it set a minimum amount necessary in order for such an incident to legally occur," the DCA said.

[*Department of Highway Safety and Motor Vehicles v. Williams*, 9/18/06]

Workers' "Bumping" Rights eliminated by Service First, New Rule

An unfair labor claim against the state by one of its employee unions was properly rejected because once the state's "bumping" rules were replaced by the Service First legislation and a subsequent administrative rule, layoffs at state agencies were not bound by old rules that established bumping rights for experienced workers, the 1st DCA held.

The court affirmed an order by the Public Employees Relations Commission dismissing an

unfair labor practice complaint. AFSCME alleged that the state improperly refused arbitration after workers at the Department of Children and Families were laid off without regard to the bumping rights that had been established in a collective bargaining agreement incorporated into the provisions of Florida Administrative Code rule 60K-17. The DCA said the PERC order must be affirmed because the provisions of rule 60K-17 were revised by the Service First legislation in 2001 and later implemented by Rule 60L-33.004, which established new procedures for layoffs. The DCA said the case is distinguished from a similar case earlier this year in which the court reversed PERC's conclusion, because in the earlier case rule 60K-17 was still in effect at the time of the layoffs. In the more recent case, the DCA noted, that rule had been changed by the time the layoffs occurred.

“(A) T the time the reduction in the workforce of the Department of Children and Families took place, rule 60L-33.004 had already become effective, with the result that the state was no longer required to follow the procedure controlling layoffs as provided in rule 60K-17. Such a contingency was in fact contemplated by the parties' contract. Article 33 of the CBA explicitly states that if a provision of the contract contravenes any laws of the state by reason of 'existing or subsequently enacted legislation,' such provision would no longer be applied or enforced,” the DCA said.

[Florida Public Employees Council 79, AFSCME, AFL-CIO, v. State, 8/22/06]

FCAT Assistance Charges against Teacher Dismissed

The 1st DCA reversed a state agency's finding that a public school teacher should be suspended for providing her students with answers and other help on the FCAT exam. The court found that the Education Practices Commission improperly substituted its own conclusions for those of an administrative law judge.

Brevard County teacher Stacy Stinson was accused of helping students during the March 2003 administration of the FCAT, and the scores of 42 students ultimately were invalidated. Following a formal administrative hearing, the ALJ rejected the testimony of all but one student witness, finding that the testimony was not credible. The one witness believed by the ALJ contradicted the testimony of the commission's witnesses against the teacher. The ALJ

concluded that the commission had not proven the allegations against Stinson by clear and convincing evidence and recommended that the complaint be dismissed. After a hearing, the commission entered a final order rejecting or modifying a number of the ALJ's findings of fact and conclusions of law and imposing a two-week suspension followed by three years of probation. The DCA agreed with Stinson that the commission improperly changed the ALJ's findings of fact and remanded the case for entry of an order dismissing the complaint and finding Stinson not guilty.

“(T) Here was competent substantial evidence to support the judge's findings of fact, notwithstanding the fact that this evidence consisted of the testimony of only one witness, the sole student who testified for Stinson. Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence. The judge is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses. If, as in this case, the issue is primarily one of the weight or credibility of the witnesses, it does not matter that there might be competent substantial evidence to support a contrary view of the evidence,” the DCA said. “Because the judge's findings were supported by competent substantial evidence, the Commission could not reject or modify them as was done in the Final Order.”

[Stinson v. Winn, 8/22/06]

Specificity of Charging Document

In preparing a charging information, the state is not required to declare with particularity what specific legal duty a law enforcement officer was engaged in at the time of events leading to a charge of resisting an officer with violence, the 1st DCA said.

Thomas Young was stopped after an officer saw him almost cause a traffic accident. When he was asked if Young had anything dangerous in his possession, Young acknowledged having a small quantity of marijuana, which the officer confiscated. When the officer went to handcuff him, Young forcefully pushed the officer and ran. Young was tracked down and was charged with resisting an officer with violence. The defense claimed the state failed to specify the legal duty being fulfilled by the officer that gave compelled him to stop Young, and therefore the charge was insufficient. The trial court agreed and entered a judgment of acquittal. The DCA reversed, explaining that the state does not have to

provide that level of detail in the charging document. They court also found that the evidence was sufficient to justify the stop.

“The State correctly notes that Young has not cited (nor has our independent research disclosed) any Florida statute or rule that requires an information charging the crime of resisting an officer with violence pursuant to section 843.01, Florida Statutes, to set forth the exact legal duty in which the officer was engaged at the time of the offense,” the DCA said. “The State correctly notes that the specific nature of the officer’s execution of a legal duty under section 843.01 is the proper subject of the proof, not the charge.”

[*State v. Young*, 8/17/06]

2nd District Court of Appeal

Exigent Circumstances for Warrantless Search - Meth Lab

The operation of a methamphetamine lab is inherently dangerous, presents an immediate threat to public safety and is well within the scope of the exigent circumstances exception for a warrantless search, the 2nd DCA held.

Siding with a number of state and federal appellate courts outside of Florida, the DCA upheld the actions of Sarasota County sheriff’s deputies who, suspecting that meth was being manufactured inside a home, entered without a warrant in order to evacuate the occupants of the house and move them to safety. Only after the arrival of a proper warrant did the officers conduct a search inside the home, which by then had been cleared for entry by fire department investigators. Defendant Harry Barth argued on appeal that the initial entry was invalid and therefore the subsequent search was also invalid, but the DCA disagreed.

“(T) he detectives had reasonable cause to believe that Barth had a methamphetamine lab in operation within the dwelling based on their experience, facts developed during investigation, and observance of Barth’s activities that day. Thus, their initial entry into the residence was based on clear exigent circumstances and was therefore lawful,” the DCA said. [*Barth v. State*, 12/6/06]

Circuit Court not entitled to Reweigh Evidence in Reviewing Hearing Officer’s Findings

In reviewing an administrative order by certiorari, the circuit court’s task is to determine whether procedural due process was accorded in the proceedings giving rise to the order, whether the essential requirements of law were observed, and whether the administrative findings and judgment were supported by competent substantial evidence, the 2nd DCA said.

The circuit court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supported the hearing officer’s findings. If the circuit court reweighs the evidence, it has applied an improper standard of review, which is tantamount to departing from the essential requirements of law.

In this case, although the driver had an innocent explanation for the behavior that drew the arresting officer’s attention, this did not refute the officer’s testimony that when he approached to check on Stenmark’s safety, he discovered that she was, in fact, passed out behind the wheel of a car that was stopped at an intersection with the motor running. That evidence, the 2nd DCA held, supported the hearing officer’s order sustaining the suspension of Stenmark’s driver license.

[*DHSMV v. Stenmark*, 11/17/06]

Relevant and Admissible Evidence - State-of-Mind Defense

A babysitter who was charged after disrobing in front of the young boy she was caring for should have been allowed to present lay testimony bearing on her state of mind because it was relevant to her intent, the 2nd DCA said.

Sarah Slicker was found guilty of lewd or lascivious exhibition for disrobing in front of the young boy. Under the law, the state had to prove that Slicker’s intent was to act in a lewd or lascivious manner. The woman’s defense was based on her assertion that she acted during a momentary lapse in judgment caused by extreme fatigue and mental stress, some of it brought on by the child. Slicker sought to present three witnesses who had known her for several years and would testify that her mental state had deteriorated prior to the offense due to extreme stress. The state argued that the evidence would be hearsay, but the DCA disagreed because the witnesses would have testified about their own observations, and

Slicker's state of mind was relevant to determining whether she acted with lewd or lascivious intent. The DCA also rejected the state's argument that diminished capacity was not a recognized defense, concluding that Slicker attempted to offer relevant lay testimony bearing on her state of mind and mental condition at the time of the defense and did not attempt to offer expert testimony to prove she had an existing mental condition.

"The parents who employed Slicker testified that they did not observe any changes in their nanny and that what they noticed, they were told, was normal for her. But they had known Slicker only three months. The defense witnesses, however, noticed dramatic changes, and they had known Slicker for many years. The excluded evidence went to an essential element of the State's case and to the heart of Slicker's defense," the DCA said. "In order to decide whether Slicker acted with the necessary lewd intent, the jury should have been informed of the totality of the circumstances in which she acted."

[*Slicker vs. State*, 10/27/06]

Judge's Refusal to Comply with DCA Order

Faced with a trial judge who blatantly refused to comply with its order, the 2nd DCA removed the judge from considering the key issue in dispute and branded his ruling "palpably illogical" and "a hallmark of judicial capriciousness."

At issue was post-trial release for Tanya and Linda McGlade, who sought to remain free while they appealed their convictions for practicing midwifery without a license. The circuit judge declined to release the women in July, and on October 13 the DCA set aside that order and directed the judge to release the women on reasonable conditions. However, six days later the judge issued an order declining to do so. That order led to the DCA's latest involvement, in which it ordered the women released and named another judge to consider release conditions.

"(H)aving received a clear directive from the district court of appeal exercising appellate jurisdiction over the matter before him, the circuit judge was legally obliged to follow it; indeed, he was powerless to do otherwise. . . . This court, faced with recalcitrance of the sort exhibited by the circuit judge in this case, is inherently empowered to take any action necessary to effectuate its directives. This includes the power to do directly that which the errant judge has refused to do," the DCA said. "When, as here, a judge chooses to disregard an

obligation of his office, he harms the parties in the case, disserves the residents of his circuit, and undermines the constitution that was adopted for the benefit of all citizens of Florida. Under such circumstances, we do not hesitate to act." [*McGlade v. State*, 10/25/06]

"Automobile Exception" for Warrantless Vehicle Search

The "automobile exception" authorized police officers to conduct a warrantless search of a gambling suspect's car once they observed possible drug evidence within the locked vehicle, the 2nd DCA held.

LeRoy Green argued that officers needed a warrant to search his vehicle after they arrested him for gambling in an apartment complex. A search incident to the gambling arrest produced car keys, and an officer began looking for the car. When he found the vehicle, the officer shined a flashlight into the windows and saw a razor blade with white residue on it lying on the car's center console. The officer believed the residue to be cocaine, so he used Green's keys to open the door of the car. Green was charged on gambling and drug charges, but the trial court agreed with his argument that the vehicle search was illegal without a warrant. The DCA reversed, citing a 1996 U.S. Supreme Court ruling that if a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.

"Once the officer illuminated the inside of the vehicle and saw the razor blade with a white powdery residue, the officer had probable cause to believe the car contained cocaine," the DCA said. The court noted that Florida cases applying the automobile exception "to the warrantless search of a vehicle based upon probable cause do not weigh the circumstances to determine if it was reasonable for officers to obtain a search warrant, as argued by Mr. Green, or whether specific 'exigent circumstances' prevented them from doing so. Once probable cause is established, the officers may search the vehicle."

[*State v. Green*, 10/20/06]

Castle Doctrine - State's Burden to disprove Self-Defense

Admittedly struggling with the competing aspects of Florida's "castle doctrine," the 2nd DCA threw out the case against a father who was convicted of manslaughter for defending his family and their adjacent homes against a man

who threatened family members before assaulting the father.

Melvin Jenkins was convicted of manslaughter in the stabbing death of Bryan Cerezo. Evidence indicated that Jenkins' daughter had a disagreement with Cerezo's girlfriend, and Cerezo went to the trailers in which the Jenkins family lived. Jenkins and Cerezo then had a confrontation, and Cerezo threatened Jenkins' life, punched him in the face and appeared ready to continue the physical aggression when Jenkins stabbed him with a knife he carried for his job as a roofer. Three eyewitness accounts supported various elements of Jenkins' account of the fatal confrontation, although none of the three saw the entire incident. The DCA concluded that the state failed to present legally sufficient evidence to overcome Jenkins' self-defense claim, which relied in part of Florida's "castle doctrine" – the legal concept that a person is not obliged to retreat, and may instead use deadly force, when he is violently assaulted in his own house or immediately surrounding premises.

"While the defendant may have the burden of going forward with evidence of self-defense, the burden of proving guilt beyond a reasonable doubt never shifts from the State, and this standard broadly includes the requirement that the State prove beyond a reasonable doubt that the defendant did not act in self-defense," the DCA said. "We have struggled with this case nearly as hard as the jury struggled. If Mr. Jenkins had stayed inside his trailer or had returned to his trailer when Mr. Cerezo suggested that he . . . fight like a man, and perhaps called the police, it is unlikely that Mr. Cerezo would have died. On the other hand, Mr. Cerezo refused to leave Mr. Jenkins' property and was loudly threatening Mr. Jenkins and his family. Mr. Jenkins' teenage daughter was nearby, and numerous people were apparently watching the altercation but offered no assistance. Mr. Jenkins was not required to cower in his trailer while Mr. Cerezo threatened him and his family . . . Mr. Jenkins was within his right to exit his trailer, stand on the common driveway of the neighboring trailers, and demand that Mr. Cerezo leave."

[Jenkins v. State, 10/11/06]

Grounds for Lawful Arrest - use of False Name

Providing false identification to a police officer is not grounds by itself for a lawful arrest, and therefore evidence seized during such an arrest must be suppressed, the 2nd DCA said.

Robert Whyte was convicted and sentenced for burglary of a conveyance and petit theft. Whyte, who admitted he had been drinking at the time, was arrested after he identified himself to officers by using a made-up name, and a search conducted after the arrest produced evidence of the theft. On appeal, Whyte argued that the trial court should have granted his motion to suppress evidence of the theft because under section 901.36(1), F.S., his use of a fictitious name was a violation of the law only if it occurred following arrest. The DCA agreed that Whyte's arrest was based solely on his giving a false name, and therefore officers had no probable cause to believe any other crime had been committed prior to the arrest.

"Absent a reasonable suspicion or probable cause to detain or arrest Mr. Whyte on some other lawful ground, Mr. Whyte's failure to give his true name could not, alone, provide probable cause for the arrest," the DCA said. "As a result, the search was not lawful, and the evidence procured during the subsequent search should have been suppressed."

[Whyte v. State, 9/29/06]

Criminal Mischief - Intent Element

The state must show that an individual intended to cause damage to property in order for the defendant to be convicted of criminal mischief, the 2nd DCA said.

Charles Stinnett was convicted of criminal mischief after he wildly fired a gun during drunken New Year's Eve revelry after he was thrown out of a bar. Stinnett fired two shots, and the second bullet hit and damaged a car. Stinnett contended on appeal that he fired the second shot by accident and did not mean to shoot at the car and cause damage. A witness claimed he saw Stinnett aim at but miss another person, with the bullet striking the car instead. The DCA held that in order to be guilty of criminal mischief, Stinnett must have intended to hit the car and cause the damage.

"The evidence showed either that Stinnett fired the shot accidentally or that the shot hit the car when it missed the person Stinnett was attempting to shoot. Either way, there was no evidence that Stinnett intended to damage the car. Accordingly, we reverse the conviction for criminal mischief," the DCA said.

[Stinnett v. State, 8/11/06]

Improper 10-20-Life Sentence - Use of Firearm

In order for a defendant to be sentenced to a mandatory 25 years in prison under the “10-20-Life” statute, the state must allege that he used a firearm and caused death or great bodily harm, the 2nd DCA held.

Vincent Daniel was charged with attempted first-degree murder with a firearm, but the state did not allege that he discharged a firearm or that death or great bodily harm resulted. He was convicted and the trial judge sentenced him to a mandatory minimum of 25 years in prison, in accordance with the “10-20-Life” law. On appeal the state conceded that the state failed to show that Daniel used the firearm in the commission of the crime, and Daniel argued that the mandatory minimum sentence should not apply.

The DCA found that because the state only proved that Daniel had a firearm during the attempted murder, and failed to show that he actually used the weapon, the 25-year sentence must be reversed. Instead, the DCA said, Daniel should be sentenced to 10 years in prison.

[*Daniel v. State*, 8/11/06]

Clarifying Questions Re: Suspect’s Intention to Remain Silent

Investigating officers acted properly when they asked clarifying questions of a murder suspect even after the man indicated he did not want to talk to them, because the events leading up to that moment suggested the man was willing to talk, the 2nd DCA said.

Samuel Pitts was charged in Polk County with the 2000 murders of David Lee Green and James Felker. When investigators arrived at his home at 4:20 a.m., Pitts voluntarily went with them to discuss the disappearance of two men. During a consensual interview, Pitts – who was 20 years old with an IQ of 82 – made statements regarding the whereabouts of the men and even attempted to assist in locating their bodies. Pitts was interviewed several more times but was not read his *Miranda* warnings until approximately 1:00 p.m., after the victims’ bodies were found. After signing a waiver consenting to talk to investigators, Pitts was interviewed again on tape. At the beginning of the taped interview the investigator asked if Pitts wanted to talk about the incident, but Pitts answered “no sir.” The officer asked again to clarify, and this time Pitts indicated he did want to talk to investigators. Ruling on an interlocutory appeal, the DCA said the officers acted properly due to the uncertainty regarding Pitts’ intent.

“Given the uncertainty arising from the

circumstances leading up to the initiation of the final taped interview, the officers were justified in seeking to clarify Pitts’ intentions. In such circumstances, clarifying the intentions of the suspect is both warranted and necessary,” the DCA said.

[*State v. Pitts*, 8/4/06]

Officers’ Reason to Pursue Suspect

Plainclothes officers in an unmarked vehicle did not have reasonable suspicion to believe a man briskly walking away from them while talking on a cell phone was committing or about to commit, a crime the 2nd DCA said.

Michael Rhoden pled no contest to resisting officers without violence, as well as drug charges. Two plainclothes officers traveling in an unmarked car were patrolling a high-crime area when they saw Rhoden walking away quickly while looking back at their car. When the officers stopped the car and opened the doors, Rhoden began to run and the officers pursued. After the officers caught Rhoden, they found a pill bottle containing cocaine on him. On appeal, Rhoden contended the officers did not have reason to pursue him and therefore the stop and arrest were illegal. The DCA agreed and reversed the convictions.

“Rhoden was walking down the street at 1 p.m. in an area identified as a high crime area. The fact that Rhoden kept looking back at the unmarked vehicle following him was not an ambiguous act because it was not suggestive of criminal behavior,” the DCA said. “The task force members had no expectation of finding criminal activity in that specific location . . . and there had been no reports of criminal activity to which they were responding.”

[*Rhoden v. State*, 8/2/06]

3rd District Court of Appeal

Juveniles’ Right to Detention Hearing within 24 hours

Juveniles are legally entitled to a detention hearing within 24 hours of being taken into custody, and the courts violate the rights of juveniles who are not provided a hearing within that time frame, the 3rd DCA said.

The court ruled in favor of several dozen juveniles who protested the practices of the

Juvenile Division of the Eleventh Circuit Court, which has administrative procedures that call for detention hearings at 8:30 a.m. each day for juveniles who may be released to home custody and at 1:30 p.m. for those subject to recommendations of detention. These hearings are usually held the day after the juvenile is arrested, and the procedure was challenged by a juvenile who was arrested at 3:00 a.m. on a Wednesday but did not receive a detention hearing until 1:30 p.m. Thursday. The DCA said the administrative policy clearly violates the juveniles' rights in such cases, and must be discontinued.

"The mandate of these provisions is crystal clear. A child who is to be placed in detention care must receive a detention hearing within 24 hours of being physically detained by law enforcement," the DCA said. "(E)ach petitioner was denied his/her right to a timely detention hearing because the procedure utilized by the Juvenile Division of the Eleventh Circuit failed to provide a detention hearing within 24 hours of the child being taken into custody as required by Chapter 985 of the Florida Statutes."

[D.M., et al., v. Dobuler, et al., 12/6/06]

Validity of Resisting Charges Despite Officers' Illegal Entry

Even though police officers entered a man's back yard illegally, charges against him should be reinstated because two felony counts associated with resisting arrest occurred after he was placed under arrest and two other misdemeanors didn't depend on whether the officers were engaged in the lawful performance of their duties, the 3rd DCA held.

Two officers were sent during early-morning hours to a residence after neighbors complained of loud voices causing a disturbance. The officers got no answer when they knocked on the door of the home, so they went around the house to the back yard, proceeding through a gate in a fence that was posted with "no trespassing" signs. In the back yard, the officers encountered Donald Roy, who vulgarly demanded that the officers leave his yard. The encounter became increasingly hostile, and eventually Roy was arrested and charged with misdemeanor counts of simple battery and felony counts of battery on a law enforcement officer and resisting an officer with violence. The trial court agreed with Roy that the officers' entry into his yard was illegal, so therefore the felonies – which relied on the officers being engaged in the lawful performance of a legal duty – were invalid and the misdemeanors were tainted. The

DCA agreed that the officers' entry was illegal, but concluded that did not support dismissal of the charges.

"Since both (felony) acts occurred after the officer told the defendant he was under arrest, section 776.051 applies and prohibits the defendant from using violence to resist the arrest, even if the arrest was illegal," the DCA said. "For the charge of simple battery, it is not necessary for the State to establish that the officers were engaged in the lawful performance or execution of their duties."

[State v. Roy, 10/18/06]

Consensual Encounter - Investigatory Stop

A consensual law enforcement encounter with a citizen does not rise to the level of an investigatory stop when it involves officers attempting to get the citizen to leave an area because he is loitering, the 3rd DCA said.

The court rejected the appeal of a juvenile identified only as A.D., who was searched and found to have drugs in his possession only after he was asked several times to leave an area where he was loitering. When A.D. was asked to leave the area and became agitated, officers asked him to step off to the side to speak to an officer. A.D. argued that this turned the encounter into an investigatory stop requiring reasonable suspicion, but the DCA disagreed.

"Under the facts and circumstances in this case, law enforcement was not attempting to detain A.D. To the contrary, they were attempting to convince him to leave. A.D., therefore, could not reasonably argue that he or any reasonable person would have felt that he/she could not leave. The consensual encounter unfortunately turned into a valid arrest after A.D. was asked three times to leave by the officer, and refused to do so, thus elevating the consensual encounter to an arrest for trespass after warning," the court said.

[A.D. v. State, 10/4/06]

Validity of Charging Document - Lesser Included Offense

Even though the information charging a defendant with attempted first-degree murder of a law enforcement officer may have been legally deficient, it did not amount to reversible error because the defendant was actually convicted of a lesser included offense whose elements did not have to be fully listed, the 3rd DCA held.

Orett Kerr was charged by information with, among other things, attempted murder of an officer. He was convicted instead of the lesser included charge of aggravated assault on a law enforcement officer. On appeal, Kerr asserted that it was fundamental error for him to be convicted and sentenced for aggravated assault because the information failed to allege that the officer had a well-founded fear of imminent violence, which is a required element of aggravated assault. The DCA agreed that the charging information was deficient, but said it did not constitute fundamental error.

“In the instant case, the offense charged in the information (i.e., attempted first degree murder of a law enforcement officer) is a first degree felony. The offense for which Kerr was convicted and sentenced (i.e., aggravated assault) is a third degree felony, reclassified to a second degree felony because the victim is a law enforcement officer. Moreover, the charged offense carried a greater penalty than the offense for which Kerr was convicted. Hence, although the charge on the lesser included offense should not have been given to the jury, we cannot conclude that it was fundamental error to do so in this case,” the DCA said.

[Kerr v. State, 9/27/06]

Collective Bargaining - Right to Request Arbitration

A trial court improperly ordered arbitration to resolve a dispute between a county jail employee and her supervisor because only the union representing the woman was empowered to request arbitration, the 3rd DCA held.

After a workplace dispute, Miami-Dade Corrections Department employee Sandy Thomas filed a grievance against her supervisor, Deborah Byars, pursuant to the collective bargaining agreement between the county and the Police Benevolent Association. The two sides reached a settlement agreement, but then Thomas filed a defamation action against Byars. The supervisor moved to dismiss the lawsuit, but the trial court instead compelled the parties to arbitrate the claim. Byars prevailed in the arbitration proceeding, but a trial court reviewing the matter vacated the arbitration award. This was the correct decision, the DCA said, because the collective bargaining agreement specifically states that only the PBA may request arbitration.

“The parties’ individual rights of actions, therefore, are not subject to the arbitration provision,” the DCA said.

[Byars v. Thomas, 9/20/06]

Court’s Reversal of Administrative Decision

A circuit court cannot overturn an administrative agency’s decision without providing a “reasoned opinion” explaining why it did so, the 3rd DCA said.

The court ruled in an appeal stemming from separate cases in which the state Department of Highway Safety and Motor Vehicles suspended the driving privileges of two men. The men requested formal administrative hearings, which resulted in the suspensions being upheld. The men then filed certiorari petitions to overturn the hearing officers’ rulings, and the appellate division of the circuit court consolidated the cases. After oral argument, the appellate division issued a one-sentence order granting the men’s motion for appellate attorney’s fees, but offering no explanation of its reasoning. The court denied the department’s motion for clarification, so the agency asked the DCA to quash the lower court’s decision.

“(T)he appellate division cannot issue what amounts to a ‘Per Curiam Reversal,’ that is, a reversal without written opinion. “The appellate division must issue a reasoned opinion when overturning an administrative order.”

[Department of Highway Safety and Motor Vehicles v. Trauth and Llamas, 9/6/06]

4th District Court of Appeal

State’s Sale of Driver’s License Information

A trial court correctly rejected a lawsuit that claimed the state took personal driver’s license information and improperly sold it to third parties in violation of the federal Driver’s Privacy Protection Act, the 4th DCA said.

The court held that the Act does not confer a private right of action for individuals to seek relief against the state or its agencies, and rejected a takings claim in which the plaintiffs asserted that the state’s sale of the information amounted to a taking of private property. The Department of Highway Safety and Motor Vehicles argued that the plaintiffs had no protected privacy interest in information that was a public record, and the DCA affirmed the trial court’s motion dismissing the complaint.

“(A)s to the taking claim, at most what was alleged was a regulatory taking and since appellants did not and could not allege that such action deprived them of all or substantially all of the beneficial use of the purported property, there was no taking,” the DCA said.

[Collier, et al., v. Department of Highway Safety and Motor Vehicles, 12/6/06]

Entrapment - Use Female Informant to Lure Male Defendant

An otherwise law-abiding man was illegally entrapped into a drug deal by a female confidential informant who promised a sexual relationship if he would get her drugs for what she claimed was a medical necessity, actions that effectively manufactured criminal activity, the 4th DCA held.

The court threw out Peter Madera’s conviction following a no contest plea to drug charges, agreeing that he was entrapped by the informant’s actions. Madera, who was 37 at the time, had a job and had absolutely no criminal history, was approached by the woman. When he became romantically interested in her, she led him to believe the feelings were mutual. She first brought up the topic of illegal drugs, which she said were to help her cope with the pain and stress of cancer. In fact, she was a convicted drug trafficker who was on probation and was playing several other men the same way in her role as a confidential informant. The DCA said the law enforcement actions in this case were so egregious as to violate Madera’s due process rights.

“(T)here would have been no crime without the CI’s prodding and improper conduct. At the time, the Defendant was gainfully employed at a lawful occupation, had no prior criminal history, and was not even suspected of criminal activity. The CI was used here, not to detect crime, but to manufacture it. Thus . . . we find that the Defendant’s due process rights were violated by this egregious conduct and that he was objectively entrapped as a matter of law,” the DCA said. *[Madera v. State, 12/6/06]*

Immunity of County First Responders

County fire rescue personnel do not enjoy absolute immunity from liability under section 1983 of the Civil Rights Act of 1871, and therefore a woman is entitled to pursue her lawsuit against Broward County personnel over the death of her husband while in their care, the 4th DCA said.

The woman sued over alleged civil rights violations after her husband died while being transported by Broward fire rescue personnel. She alleges they did not provide sufficient care to her husband, but a trial court ruled that the personnel enjoyed absolute immunity because they were operating within the course and scope of their public employment at the time of the man’s death. The DCA cited various federal and state cases – including the 1987 Florida Supreme Court decision in *Hill v. Department of Corrections* and the 4th DCA’s ruling two years later in *Howlett v. Rose* – that establish such immunity for state agencies and their personnel. However, the DCA concluded such immunity does not apply for county personnel.

“The law is . . . well settled that counties and thus their employees may not claim sovereign immunity to a section 1983 claim. While *Hill* is still good law as to the sovereign immunity of the state and its agencies, *Howlett* establishes that no sovereign immunity is enjoyed by other governmental entities. The trial court thus erred in extending sovereign immunity to the Broward County Fire Squad officers,” the DCA said.

[Brown v. Jenne, et al., 10/25/06]

Admission of Suspect’s Statement - Corpus Delicti

The state established sufficient evidence of the corpus delicti to properly be allowed to admit the statement of a drug suspect who profanely told officers that they could keep his cocaine but that he wanted his roll of money back, the 4th DCA said.

When police officers attempted to pull over a vehicle driven by Antwuan Snell because of dark tinted windows, the vehicle sped off, but soon collided with another vehicle. Snell tried to flee but was apprehended. When an officer checked on the vehicle’s passenger, who was injured in the collision, the officer observed a plastic bag containing cocaine on the front seat in the middle of the car. Officers searched Snell and found a wad of more than \$2,000 in small bills in his pocket. Snell was talkative after the incident and told one of the officers that the police could keep the cocaine but should return his money. Snell was convicted of numerous offenses, and on appeal argued that the trial court erred in allowing the state to introduce his admissions of ownership of the cocaine before establishing the corpus delicti of the crime. The DCA disagreed, noting that the state established sufficient evidence that the crime of trafficking in cocaine had been committed.

“The state presented a sufficient evidentiary predicate to establish the corpus delicti. The primary purpose of the rule to prevent admission of a statement of a nonexistent crime or a mistake has been satisfied, and the trial court did not err in admitting the defendant’s statement of ownership of the cocaine,” the DCA said. [Snell v. State, 10/25/05]

Retrial of Ex-Police Chief’s Whistle-Blower Lawsuit

Ordering a third trial on a former police chief’s claim that he was fired due to protected whistle-blower activities, the 4th DCA said the trial court presiding over the second trial should not have removed certain issues from the jury’s consideration.

Former Hollywood Police Chief Richard Witt prevailed in the two previous trials, which involved his claim that he was fired for speaking up about wrongdoing in city hiring practices. The DCA threw out the first verdict after concluding that the city was denied the opportunity to present evidence of other actions by Witt that would have supported his firing – and would have precluded application of the whistle-blower act. On retrial, the judge applied the “law of the case doctrine” to limit jury consideration of certain issues that had been resolved in the first trial. Because the DCA’s first reversal did not confine the retrial to questions of whether the city had reason to fire Witt, the trial judge’s reliance on the law of the case doctrine – rather than submitting those matters to the jury – was in error and requires a third trial, the DCA said.

“We find merit in the City’s claim that the trial court erred in relying upon the law of the case to remove issues from the jury’s consideration in the second trial,” the DCA said. “Nothing in this court’s prior opinion limited the new trial on the whistle-blower claim to the sole issue of whether the City had reason for terminating Witt. The error in the trial court’s refusal to allow the City to litigate the (disputed) issue compels reversal without regard to the City’s additional appellate claims.”

[City of Hollywood v. Witt, 10/18/06]

Investigatory Stop - Founded Suspicion

A police officer must have a well-founded, articulable suspicion of criminal activity to obtain evidence during an investigatory stop, or else the evidence must be suppressed at trial, the 4th DCA said.

Joseph Fricano pled no contest to drug charges and argued on appeal that the evidence presented against him in court should have been suppressed. Fricano was arrested after a police officer ordered him into the back of a car after a traffic stop, then observed him trying to crush what the officer believed was a rock of crack cocaine. The DCA found that, as in its 1999 decision in *Wilson v. State*, the officer’s display of authority in ordering Fricano into the back of the car transformed the encounter into an investigatory stop. However, the court said, the stop was not supported by the required level of suspicion because Fricano was not suspected of criminal activity and the officer’s actions were not motivated by concern for his safety. Reversing, the DCA ordered a new hearing.

“(P)assengers, as opposed to drivers, are not suspected of any violation of the law and ordering a passenger into the back seat of a car does not generally serve officer safety concerns,” the DCA said.

[Fricano v. State, 10/18/06]

Investigatory Stop - Officer’s positioning of Vehicle

An officer’s use of his police vehicle to block a suspect from leaving elevates a situation from a consensual encounter to an investigatory stop, and a motion to suppress drug evidence should have been granted because the arresting officer had no reasonable suspicion to support such a stop, the 4th DCA held.

Howard Stennes sat in his vehicle, talking to the occupant of another vehicle, behind a gas station at 11:30 pm. After the other vehicle left, a marked police car pulled directly behind him, blocking Stennes from leaving. During what the officer later called a “consensual encounter,” a search discovered a marijuana pipe and cocaine rocks in Stennes’ vehicle. After his motion to suppress was denied, Stennes pled no contest but then appealed. The DCA ruled in his favor, concluding that the officer lacked a basis for such a stop.

“The officer’s blocking of (Stennes’ vehicle) created an investigatory stop and not a consensual encounter, because Stennes was no longer free to leave to avoid answering the officer’s questions. . . . To justify an investigatory stop, the arresting officer had to have a reasonable suspicion that Stennes had committed, was committing, or was about to commit a crime,” the DCA said. “The officer observed no potentially illegal activity in the interaction between the occupants of the (other

vehicle) and Stennes. Without more, the late hour and the history of burglaries in the area did not give rise to a reasonable suspicion that Stennes had committed, was committing, or was about to commit a crime.”

[*Stennes v. State*, 10/18/06]

Suppression of Evidence - “Show of Authority”

By walking silently toward a man they believe just made a drug buy, uniformed officers do not make a “show of authority” sufficient to turn what might be a consensual encounter into a stop, the 4th DCA said.

The court reversed a motion suppressing drug evidence seized by two Broward County sheriff’s detectives. The detectives were seated in their vehicle when they observed Gary Kasparian participating in what they believed was a drug buy. They got out of their vehicle and walked silently toward Kasparian, who saw them and threw down what he had in his hand. One of the detectives kept his eyes on the object, picked it up and conducted a field test indicating cocaine. The trial court concluded that the officers’ “show of authority” constituted an invalid stop and granted Kasparian’s motion to suppress the drug evidence, but the DCA reversed.

“The court found only that the officers approached wearing uniforms, badges, and weapons and did not even announce themselves before Kasparian threw down the drugs. This is how any officer could be dressed on the street. For this to constitute a “show of authority” such that it constituted a stop would essentially eviscerate the law regarding consensual encounters,” the DCA said. “(T)he officers simply walked toward Kasparian and never said anything to him before he dropped the drugs. Thus, it is more like a ‘pre-consensual encounter’.”

[*State v. Kasparian*, 10/4/06]

Witness Identification after viewing Sheriff’s Website Photo

Witnesses’ identification of the man who pointed a rifle at them cannot hold up in court because law enforcement officers failed to have them identify the suspect and instead made it easy for the witnesses to view the suspect’s picture on the Sheriff’s Office website prior to making a formal identification, the 4th DCA said.

Jose Gomez was charged with two counts of aggravated assault with a firearm involving a married couple, the Sullivans. Even though the

husband and wife were not asked to participate in a lineup or any other formal attempt to identify the suspect, they did receive numerous phone calls from the Broward County Jail saying that Gomez and another suspect were in custody. The Sullivans then viewed Gomez’ photograph on the Sheriff’s Office website before making a formal identification in court. The trial judge granted Gomez’s motion to suppress the victim’s identification, and the DCA affirmed.

“Although there was no direct evidence that the sheriff’s deputies intended the Sullivans to view Gomez’s picture, it is clear that the investigating detective and other deputies or county jail employees had communicated Gomez’s name to the Sullivans in advance of their identification. As there is no contention that the state agents were not aware that Gomez’s photo was available on the public website, the trial court could certainly conclude that the communication of Gomez’s name was the equivalent of encouraging or acquiescing in the Sullivans’ conduct,” the DCA said. “On these facts, the trial court could properly conclude that it was unnecessarily suggestive for the victims to be provided the defendant’s name and resulting access to his photo on the website before having any opportunity to identify him, thus giving rise to a substantial likelihood of irreparable misidentification.”

[*State v. Gomez*, 9/27/06]

Jury determination of Lewd Intent

It is up to jurors, not a judge, to determine whether a defendant had the intent to commit lewd or lascivious behavior in an incident, the 4th DCA said.

Jayson Santiago, who was 19 at the time, was arrested for lewd or lascivious molestation after he made contact with the clothing covering the buttocks of a person younger than 12. The trial court granted Santiago’s motion to dismiss the charges, agreeing with his argument that the state failed to assert lewd or lascivious intent. The DCA disagreed, concluding that Santiago’s intent must be decided by a jury and is not subject to dismissal by the trial court.

“In this case, it was undisputed that Santiago placed his hands on the buttocks of N.B. The only fact in dispute was whether Santiago acted with lewd or lascivious *intent*, a requisite element to be proved for the crime of lewd or lascivious molestation,” the DCA said. “(I)t is an issue which the jury must decide based upon all factual inferences and not one for the court as a matter of law.”

Exposure - Jail Cell considered Public Place

Because a jail cell can be considered a public place, an inmate's exposure of his sexual organs while in a cell may properly constitute a misdemeanor under Florida law, the 4th DCA said.

The DCA reversed a trial judge's dismissal of a misdemeanor charge against Xavier Cromartie after a female sheriff's deputy observed him masturbating in his jail cell, which was located in the jail infirmary. The deputy ordered Cromartie to stop, but he disregarded her command. The trial court threw out the charge of exposure of sexual organs, reasoning that a police officer cannot be an offended party regarding the exposure of sexual organs and that a jail cell is not a public place. The DCA disagreed, finding that the statute does not require the state to prove that there was an offended party and that a jail cell is public in that the inmate has no control over who is present at any given time.

"Cromartie's infirmary cell was open to view by any authorized employee, nursing staff, cleaning personnel, or visitors. Further, as soon as the deputy told him to stop, Cromartie was on notice that he was not alone. He, nevertheless, chose to continue his display, in violation of the statute," the DCA said.

[*State v. Cromartie*, 9/27/06]

Recovery of Attorney's Fees in RICO Cases

Following dismissal of a case that had languished for 13 years, a state agency must pay the attorney's fees of a couple against whom it had brought a civil RICO action but is not required to pay fees stemming from related criminal charges filed by local prosecutors, the 4th DCA determined.

Mark and Beatrice Marks were the subjects of a civil RICO action filed by the Department of Legal Affairs and a parallel criminal RICO action brought by local prosecutors. Because criminal prosecutors indicated that their trial was imminent, the department obtained a stay of the civil case. However, the criminal trial never took place, and eventually both cases were dismissed after 13 years. The Marks then sought attorney's fees for both cases; the trial court granted the request for fees in the civil action but denied them in the criminal case. The DCA affirmed, agreeing that statutes allow for fees in

civil RICO cases but are silent on the matter for criminal RICO cases.

"(T)here is no statutory provision that would allow the Marks to recover, from the (department), attorney's fees incurred in defending a criminal case instituted by the State Attorney's office, regardless of the validity of either case," the DCA said. "We find the Legislature clearly intended that reasonable attorney's fees be recovered in meritless civil forfeiture actions, but not in criminal actions. ... If the Legislature intended a party to recover attorney's fees recovered in a criminal forfeiture action, such intention would be laid out in the statute."

[*Marks and Marks v. Department of Legal Affairs*, 9/20/06]

Entrapment Claim based on Informant's Clothing

A trial court correctly denied the argument of a drug defendant who claimed he was entrapped because the confidential informant used by police wore loose-fitting garments and engaged him in a discussion about having sex, the 4th DCA said.

At Jerome Davis' trial, the confidential informant (CI) said she normally wore loose and provocative clothing while working for police in order to fit the role of a crack buyer. The DCA said Davis' claim that he was induced to sell crack by the woman's clothing was wholly without merit, and said the evidence showed that any small talk about sex took place after Davis returned to the woman after getting the crack cocaine she offered to buy.

"Such talk occurring after the sale could not have served as an inducement to Davis to commit the crime," the DCA said. "The evidence in the record demonstrated that Davis approached the CI . . . (and) gave the CI assurances that he could get the crack from his friend parked in a car on the other side of the bar. And he did just that. Clearly, Davis was ready and willing to sell the crack cocaine at that opportune moment."

[*Davis v. State*, 9/20/06]

Probation Revocation based on Hearsay

To revoke a defendant's probation based on allegations of spousal abuse, prosecutors must present more significant evidence than just uncorroborated hearsay, the 4th DCA said.

The court reinstated the probation Kevin Beck

received for an unrelated offense. Beck and his wife had an altercation that led her to call 911 almost an hour later and tell a dispatcher that Beck hit her. A tape of the 911 call was included among the evidence used to revoke Beck's probation. On appeal, Beck argued that the state did not establish that his wife's statement could be admitted as an excited utterance, since so much time passed between the altercation and the call. The delay led the court to believe that the wife engaged in a "reflective thought process" and therefore should have been excluded.

"The victim's emotional state while speaking to the officer does not alter our conclusion," the DCA said. "(T)he State failed to secure a ruling from the trial court that the victim's hearsay statements were admitted under an exception to the hearsay rule and our review of the record does not lead us to the conclusion that those statements qualify as excited utterances."

[*Beck v. State*, 9/20/06]

Officer's Presence once Exigent Circumstances are gone

Once an officer completes his investigation of the exigent circumstances that led him to enter a room, he no longer has legal authority to be present where the room's occupants have an expectation of privacy the 4th DCA said. While on routine patrol, Broward Sheriff's Detective Andrew Cardarelli received a tip that a suspect had cocaine in a motel room. The officer went to the motel office, verified the information he was given and found that Lawrence Reed was the renter of the room. The detective knocked on the door, and a woman answered. The officer saw a man lying on the bed and got no response when he called out Reed's name. Based on his experience and training, Detective Cardarelli went inside to check on the man, who he determined to be Reed. When Reed came to, he admitted having the cocaine, and the detective arrested him. Reed was convicted and appealed, arguing that the officer did not have enough suspicion to enter the room and that after he determined that Reed was not in danger, he should have left. The DCA agreed and reversed Reed's conviction.

"(W)hether or not Cardarelli's concern for Reed's health was legitimate and supported by the totality of the circumstances known to Cardarelli, once Cardarelli confirmed that Reed had not overdosed, he was required to leave the motel room because the exigency dissipated and no criminal activity was apparent within the room. As such, Cardarelli's stay in Reed's motel room

exceeded the scope of the exigent circumstances exception to the warrant requirement and constituted an unreasonable search and seizure violative of the Fourth Amendment," the DCA said.

[*Reed v. State*, 8/16/06]

Testimony regarding Defendant Invoking Right to Remain Silent

A trial court erred when it allowed a law enforcement officer to testify that the defendant refused to allow an interview to be taped because he wanted to invoke his right to an attorney, the 4th DCA held.

Jewel Grier was charged with various sex-related offenses. At trial the defense tried to show that an officer who questioned Grier made a mistake by failing to get a taped interview. When the state questioned the officer about why he did not get the interview on tape, the officer responded that Grier would not allow a taped interview without having his attorney present. Grier argued on appeal that the trial court should have granted a mistrial based on the officer's comment because it amounted to a comment on his decision to invoke his right to remain silent. The DCA agreed and reversed the convictions. Although the state's question and the officer's response were intended to explain the officer's actions, the DCA said, the statement was a proper basis for a mistrial.

"Grier's statement was a clear invocation of his right to an attorney, and thus, his right to remain silent. Therefore, the officer's testimony amounted to a comment on the defendant's silence," the DCA said. "(A)lthough Grier did not testify, credibility was an issue, and the jury could have construed Grier's request for an attorney as impacting the credibility of his out-of-court statement to the officer in which he denied certain aspects of the allegations."

[*Grier v. State*, 8/2/06]

5th District Court of Appeal

Defense's Opportunity to Cite Interview Transcript

The state cannot block the defense from using the full transcript of a police interview simply by declining to introduce the full interview and instead asking the officer carefully scripted questions designed to extract only yes-and-no

answers, the 5th DCA said. George Antoury was convicted of attempted sexual battery and battery. During the trial, the prosecutor chose not to introduce a tape or transcript of the interview and instead asked the interviewing officer specific questions that avoided information regarding the victim. When the defense attorney attempted to use cross-examination to get Antoury's full explanation of events into the record by quoting from the transcript, the trial court said the transcript could not be used unless it was admitted into evidence. On appeal, Antoury argued that the trial court restricted his attorney's cross-examination and that the state's scripted questioning prevented the jury from hearing the entire interview in appropriate context. Although such evidence would normally be excluded as inadmissible hearsay, the DCA said, because the state opened the door to the testimony, the defense should have been allowed to use that same evidence. Because the issue was whether the sexual contact between the defendant and the victim was consensual, it was necessary for the interview to be understood in context, the DCA said.

“(T)he trial court repeatedly limited defense counsel's ability to use the transcript to cross-examine (the detective) after the State had opened the door. Antoury argues persuasively that the State's carefully scripted version of his interview was incomplete and misleading without giving the jury the context of the entire interview. Generally, a defendant's out-of-court, self-serving, exculpatory statements are inadmissible hearsay. However, when the State ‘opens the door’ by eliciting testimony about part of the defendant's conversation with police, the defendant is entitled to cross-examine the witness about other relevant statements made during the conversation,” the DCA said.

[*Antoury v. State*, 12/1/2006]

Right to Counsel in State License Revocation Proceedings

Floridians have no right to competent counsel in administrative proceedings involving the revocation of state-issued licenses, so a Florida police officer challenging the revocation of his law enforcement certification cannot prevail on such a claim, the 5th DCA held.

A former officer appealed an order of the Criminal Justice Standards and Training Commission revoking his certification as a law enforcement officer. The revocation was based on an administrative law judge's findings that the officer committed misconduct by having sex

while on duty and then was untruthful about it during a sworn interview and an administrative hearing. Among his grounds for appeal, the officer contended that he was denied the assistance of competent counsel. However, the DCA noted that an ineffective assistance of counsel claim is premised on a violation of an individual's Sixth Amendment right to counsel, but that no such right exists in the context of administrative proceedings involving the revocation of state-issued licenses.

The DCA also rejected the officer's contention that the Sanford Police Department violated the Police Officer's Bill of Rights during its investigation, by starting an internal investigation without having received a formal complaint. The DCA said that while state law requires every law enforcement agency to establish a system for receiving, investigating and resolving complaints from outside, it does not mandate that a formal citizen complaint be received before the agency can initiate an internal investigation of one of its officers.

[*Mullins v. Florida Department of Law Enforcement*, 12/1/06]

Staleness of Warrant Information - Child Pornography

In a significant victory for law enforcement efforts against internet child pornographers, the 5th DCA reversed a lower court's determination that computerized images could not be used as evidence because information in the search warrant was “stale” and gave no assurance that the computer identified in the warrant was the one seized by officers.

Victor Felix was arrested at the end of a lengthy investigation that began when an undercover Maryland State Police officer received digital images depicting graphic child pornography. The images eventually were traced back to Felix, a Florida resident, and Florida officers served a search warrant almost six months later. The trial court granted Felix's motion to suppress evidence found on his computer, but the DCA reversed.

“Staleness should be evaluated in light of the particular facts of a given case, the nature of the criminal activity, and the evidence hoped to be found,” the DCA said. “We conclude that no bright line time period should apply to a staleness analysis in cases such as this. We conclude, as well, that after the passage of some period of time, staleness of the information contained in the affidavit will most certainly invalidate a warrant issued upon it. But not here.

In the present case the information contained in the affidavit was about five and one-half months old when the warrant was issued. Given the information in the affidavit, and in considering the totality of the circumstances, we find ourselves in agreement with the magistrate who issued the warrant, and we disagree with the trial judge who concluded that the information was stale.”

[State v. Felix, 10/6/06]

Validity of Warrantless Search

When an experienced officer detects the smell of burning marijuana, he immediately has probable cause to believe a crime has been committed and can then make an arrest and conduct a warrantless search, the 5th DCA said.

The DCA affirmed the admission of evidence against Timothy Blake, who moved to suppress marijuana evidence claiming that the officer executed an investigatory stop without probable cause. The arrest occurred after officers observed Blake and friends sitting in a truck near closed businesses during early morning hours. After Blake saw the officer, he exited the truck and walked toward the officer, who smelled a strong odor of marijuana and alcohol coming from Blake. The officer then received consent to search Blake and the truck, resulting in the discovery of the marijuana. The DCA rejected Blake’s assertion that the marijuana was found as a result of an illegal stop, noting that it has repeatedly held that the mere possession of marijuana is illegal.

“Thus, when a police officer who knows the smell of burning marijuana detects that odor emanating from a vehicle or from a person who has recently exited a vehicle, he has probable cause to believe a crime has been committed and that such person has committed it. Because the officer has probable cause, he or she is authorized to arrest the person and then to conduct a warrantless search,” the DCA said.

[Blake v. State, 10/6/06]

Incarceration of Inmates with “Mental Limitations”

Clearly agonizing over its lack of options, the 5th DCA reluctantly concluded that a probation violator was properly returned to prison even though he suffers from what the DCA called “serious mental limitations.”

After mental health experts concluded that he could lawfully plead guilty, Joshua Cardinal was sent to prison for three years for committing

lewd acts in front of a minor. At some point after his release, he violated his probation by refusing to perform community service. He admitted the violation to the trial judge and was sent back to prison. He later sought to withdraw his plea to the violation of probation. The DCA concluded that the trial court acted properly in returning Cardinal to prison, but expressed regret that it had no other options.

“As a society, we have got to find a better way of handling our mentally ill and mentally handicapped citizens than incarceration in our jails and prisons. . . . All who have come in contact with this case, including the trial judge, have concluded that Mr. Cardinal suffers from some serious mental limitations. It appears, nevertheless, that Mr. Cardinal will continue to be housed in prison,” the DCA said. “We do not mean to minimize the criminal acts for which Mr. Cardinal was imprisoned. It is unfortunate, however, that there is not a better way to both safeguard society and to handle persons such as Mr. Cardinal, other than to place him back in a prison environment.”

[Cardinal v. State, 9/29/06]

Resisting an Officer - Knowledge of Officers’ Identities

A trial court erred in refusing to instruct the jury that in order to commit the crime of resisting an officer without violence, the defendant must have known that the individuals he resisted were officers, the 5th DCA held.

Cecil Harris was arrested after he became exceedingly drunk, threatened to shoot bar employees who denied him service, and resisted and punched officers who were called to the scene. Harris was arrested for resisting with violence but was convicted of the lesser included charged of resisting without violence. On appeal, Harris argued that the trial court erred in denying his request that “knowingly and willfully” be included in the jury instruction so jurors would be required to find that Harris knew the individuals with whom he struggled were officers. The DCA agreed and ordered a new trial for Harris.

(W)e believe knowledge is an element of this offense and the jury should be so instructed, because without it, an individual may be punished for conduct that would otherwise be appropriate, such as resisting detention by an individual impersonating a law enforcement officer,” the DCA said. “Harris argues that in his case, evidence was presented that he was not aware that the men who struggled with him were

police officers and that this was his primary defense at trial. Accordingly, it was critical that the jury be correctly instructed that he had the intent to resist law enforcement officers.”

[*Harris v. State*, 8/18/06]

Double Jeopardy

A defendant’s right against double jeopardy was not violated when he was convicted to multiple offenses arising out of the same general act, the 5th DCA held.

Paul Newell was convicted of voluntary manslaughter with a weapon and aggravated battery with a deadly weapon., as well as two different counts of sexual battery. Newell argued on appeal that the convictions of both attempted manslaughter and aggravated battery violated double jeopardy rights because they stemmed from the same incident. The DCA rejected his argument and affirmed the convictions.

“The facts of the present case reflect that while the two offenses arose out of the same general act, they are separate offenses because they do not require identical elements of proof, are not degree variants of the same core offense, and aggravated battery with a deadly weapon is not always subsumed within the offense of attempted voluntary manslaughter,” the DCA said. [*Newell v. State*, 8/4/06]

State Agency’s Right to Due Process

A trial court erred by acting on its own motion to dismiss a state agency’s petition after the agency had presented its first witness but before it had a chance to present its other witnesses and evidence, the 5th DCA concluded.

The Department of Children and Families filed a petition to have a child declared dependent. During an adjudicatory hearing on the petition, the trial court summarily dismissed DCF’s petition after hearing from just one witness. The agency had not yet had an opportunity to present evidence in support of its petition. The judge’s hasty dismissal, the DCA said, violated DCF’s right to due process.

In a brief order, the appeals court reversed the dismissal order and directed the judge to conduct a new hearing on the dependency petition.

[*Department of Children and Families v. K.H. and A.A.*, 9/15/06]

Extension of Time to request Administrative Hearing

Rejecting a woman’s employment discrimination complaint, the 5th DCA noted that the general provision of administrative rules allowing a petitioner an additional five days when responding to a mailed document is specifically exempted in cases involving an agency decision that could determine his or her “substantial interests.”

Tonya Watson filed an employment discrimination complaint against the Brevard County Clerk of Courts, but the initial investigation by the Florida Commission on Human Relations found no reasonable cause. Watson was sent a notice that she could challenge the finding by petitioning for an administrative hearing within 35 days. She filed her request on the 36th day. The DCA denied Watson’s plea to have the belated petition accepted on equitable grounds and also rejected her argument that because the commission’s decision was mailed to her, Florida Administrative Code Rule 28-106.103 allows an additional five days.

The DCA noted that the same rule contains express exceptions, including a provision prohibiting the extension when the time period begins as a result of the type of notice given to a person seeking a hearing on an agency decision that does or may determine the person’s substantial interests. “Therefore, by the express terms of the rule relied upon by Watson, the five-day extension did not apply to her petition,” the DCA said.

[*Watson v. Brevard County Clerk of the Circuit Court, et al.*, 9/29/06]

Attorney General Opinions

Number: AGO 2006-35

Date: August 3, 2006

Subject: Law Enforcement Officers' Bill of Rights, Part VI, Ch. 112, Fla. Stat., provides exclusive manner for employing agency to investigate complaints filed with the employing agency against law enforcement officers. ss. 112.532 and 112.533, Fla. Stat.

This formal opinion dealt with the question of whether the Miami-Dade Police Department, as the employing law enforcement agency of a Miami-Dade Police Officer, as stated in section

112.533, Florida Statutes, is the exclusive agency responsible for the receipt, investigation and determination of complaints against the officer?

The opinion notes that Part VI, Chapter 112, Florida Statutes, commonly known as "The Police Officers' Bill of Rights" or "The Law Enforcement Officers' Bill of Rights," was enacted to ensure certain rights for law enforcement and correctional officers subject to disciplinary action by their employing agencies. When a law enforcement officer or correctional officer is subject to interrogation by members of his or her employing agency for any reason that could lead to disciplinary action, demotion, or dismissal, the interrogation must be conducted under the conditions prescribed by the statute.

The opinion quotes section 112.533(1), Florida Statutes, which provides: "Every law enforcement agency and correctional agency shall establish and put into operation a system for the receipt, investigation, and determination of complaints received by such agency from any person, which *shall be the procedure for investigating a complaint against a law enforcement and correctional officer and for determining whether to proceed with disciplinary action or to file disciplinary charges, notwithstanding any other law or ordinance to the contrary.* This subsection does not preclude the Criminal Justice Standards and Training Commission from exercising its authority under chapter 943." (Emphasis supplied.)

The opinion concludes that the plain language of the statute makes the procedures established thereunder the exclusive means by an employing agency to investigate complaints against law enforcement officers and correctional officers and for determining whether to proceed with disciplinary action, regardless of other laws or ordinances to the contrary. The opinion notes that when the Legislature prescribes a means of accomplishing something, it operates, in effect, as a prohibition against its being done in any other manner. Moreover, according to the opinion, the Attorney General's Office has previously determined that no legislative action by a municipality may contravene, repeal or modify a preexisting civil service law, charter act, or general or special law affecting the rights of municipal employees, including police officers. Therefore, the opinion reasons, it would appear that no other procedure or system may be implemented by the employing agency to investigate complaints against law enforcement and correctional officers.

Accordingly, the opinion concludes that as the

employing law enforcement agency of a Miami-Dade Police officer, the Miami-Dade Police Department is the exclusive agency responsible for the receipt, investigation and determination of complaints received by Miami-Dade pursuant to section 112.533, Florida Statutes.

Informal Opinion Letters from the Office of the Attorney General

Number: INFORMAL

Date: November 21, 2006

Subject: School Bd. member requesting records

This informal opinion request asks whether the school board may adopt a policy requiring that a request for information by an individual board member that will require more than sixty minutes of staff time to prepare must be presented to the school board for approval.

Initially, the opinion notes that a school board member is entitled to request public records pursuant to Chapter 119, Florida Statutes, as a member of the public. Section 119.07(1), Florida Statutes, clearly states that any person is authorized to inspect and receive copies of public records. The opinion notes that the Attorney General has recognized that a public officer or employee is a "person" within the meaning of Chapter 119, Florida Statutes.[1] Moreover, there is no requirement that a person requesting a public record show a special or legitimate interest before being allowed to inspect or copy such record.[2]

Thus, the opinion concludes, a school board policy which seeks to limit such access would appear to be prohibited. A school board therefore may not inquire as to the purpose for the request to view or copy a public record, nor may it condition the release of such a record to a school board member upon the approval of the school board. In such cases, however, the school board member would be subject to any charges allowed by the Public Records Law.[3]

The opinion further notes that the Public Records Law addresses access to existing records. It provides a right of access to inspect and copy an agency's existing public records; it does not mandate that an agency create new records in order to accommodate a request for information from the agency nor does it require that information be given out from the records.[4]

Accordingly, the opinion further concludes that if the policy seeks to limit the ability of a school board member to utilize staff to research and

provide information or to create new records, rather than the provision of existing records, the Public Records Law is not implicated. The opinion notes that there is no statutory provision which would prohibit the school board from adopting such a policy.[5] Rather such a matter would appear to fall within the sound discretion of the school board. The opinion further recommends contacting the Department of Education to determine if that department has addressed this issue.

[1] See Op. Att'y Gen. Fla. 75-175 (1975).

[2] See *Curry v. State*, 811 So. 2d 736, 742 (Fla. 4th DCA 2002) (the motivation of the person seeking the records does not impact the person's right to see them under the Public Records Act); *Staton v. McMillan*, 597 So. 2d 940, 941 (Fla. 1st DCA 1992), review dismissed sub nom., *Staton v. Austin*, 605 So. 2d 1266 (Fla. 1992) (reasons for seeking access to public records "are immaterial"); *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2nd DCA 1985), review denied, 475 So. 2d 695 (Fla. 1995).

[3] See, e.g., s. 119.07(4), Fla. Stat.

[4] See, e.g., Ops. Att'y Gen. Fla. 80-57 (1980) (custodian not required under Ch. 119 to give out information from the records of his or her office) and 92-38 (1992); *Wootton v. Cook*, 590 So. 2d 1039 (Fla. 1st DCA 1991) (clerk of court not required to provide inmate with list of documents from a case file that may be responsive to some forthcoming request).

[5] Cf. Op. Att'y Gen. Fla. 97-61 (1997) (attorney for a school board represents the board as a collegial body and acts at the request of the board as a collegial body and not at the request of an individual member).

Number: INFORMAL

Date: November 16, 2006

Subject: Records, investigative file on complaint

This informal opinion addresses a request on behalf of the director of the Miami-Dade Police Department, which asks whether documents such as copies of the overtime slips of a law enforcement officer that are made part of the Internal Affairs file regarding an administrative complaint filed against the officer that could lead to discipline, demotion, or dismissal, are considered exempt from release until the investigation ceases to be active.

The opinion notes that section 112.533(2)(a), Florida Statutes, provides a complaint filed against a law enforcement officer with a law enforcement agency and all information obtained during the agency's investigation of the complaint, is confidential and exempt from the provisions of s. 119.07(1) until:

"1. The investigation ceases to be active, or
2. Until the agency head or designee provides written notice to the officer who is the subject of the complaint, either personally or by mail, that the agency has concluded the investigation with a finding not to proceed, or concluded the investigation with a finding to proceed with disciplinary action or to file charges." [1]

The opinion further notes that an exemption for investigative records while the investigation is active, however, does not generally exempt otherwise public records from disclosure simply because they are transferred to the investigating agency.[2] The Public Records Act, however, cannot be used to elicit exempt or confidential material.[3] Thus, the opinion notes that in Attorney General Opinion 01-75, it was concluded that the exemption for active criminal investigative information may not be subverted by making a public records request for all public records gathered by a law enforcement agency in the course of its investigation.

More recently, in Attorney General Opinion 06-04, it was concluded that the a utilities commission's records were subject to disclosure even though some of those records were provided to the Florida Department of Law Enforcement in the course of a criminal investigation by the department. That opinion, however, cautioned that the utilities commission may not identify which of its records have been provided to the Florida Department of Law Enforcement while such records in the hands of that department constituted active criminal intelligence or investigative information.[4]

The opinion states that a similar situation would appear to be presented in the instant inquiry. Section 112.533(2), Florida Statutes, would prohibit an individual from obtaining records from the internal investigation file while the investigation is active. However, public records such as overtime slips created prior to the investigation and maintained in the law enforcement officer's personnel file would not become confidential simply because copies of such records are being used in the investigation. The personnel department would be precluded from identifying those records gathered by the law enforcement agency in the course of its

active internal investigation.

[1] See s. 112.532(6), Fla. Stat., stating that except as provided therein no disciplinary action, demotion, or dismissal may be undertaken by an agency against a law enforcement officer or correctional officer for any act, omission, or other allegation of misconduct if the investigation of such allegation is not completed within 180 days after the date the agency receives notice of the allegation by a person authorized by the agency to initiate an investigation of the misconduct.

[2] See, e.g., Op. Att'y. Gen. Fla. 01-75 (2001) (exemption for active criminal intelligence and investigative information does not exempt other public records from disclosure simply because such records are transferred to a law enforcement agency).

[3] *City of St. Petersburg v. Romine ex rel. Dillinger*, 719 So. 2d 19, 21 (Fla. 2nd DCA 1998) (Ch. 119, Fla. Stat. "may not be used in such a way to obtain information that the legislature has declared must be exempt from disclosure").

[4] *And see* Op. Att'y Gen. Fla. 96-27 (1996) (crime and incident reports that are open to the public are not converted into confidential records by s. 112.533, Fla. Stat., simply because the actions described in the crime report later formed the basis of a complaint filed pursuant to s. 112.533).

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