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# **COUNTY COURT DUI/CRIMES MANUAL**

**2019 Edition**

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## **PART I: CRIMINAL PROCEDURE**

## THE ARREST

**Section 901.02**, outlines the criteria for the issuance of an arrest warrant. Specifically, in misdemeanor cases, the Court may issue a warrant for the defendant's arrest when *all* of the following circumstances are met:

- (1) A complaint has been filed only charging a misdemeanor;
- (2) the summons issued to the defendant has been returned unserved;

AND

- (3) the trial court judge, from the examination of the complainant and other witnesses, reasonably believes that the person complained against has committed an offense within the trial court judge's jurisdiction.

**However**, law enforcement officers *without an arrest warrant* make the majority of misdemeanor arrests. **Section 901.15**, states when a law enforcement officer may arrest a defendant without first obtaining a warrant. In addition, **Section 932.47 and 932.48**, allow the prosecuting attorney of the circuit court, without leave of court, to file charges by information directly with the circuit court clerk's office, which must then issue a *capias* for the defendant's arrest. **Rule 3.131(k)**, however, provides that a summons shall issue on misdemeanor cases in lieu of a *capias*. In either case, the defendant must be served. A *capias* is served by arresting the defendant. A summons is served, along with a copy of the charging document, by a process server or deputy sheriff stating what crime is being charged and when the defendant must appear in court to answer the charges. If the Defendant cannot be located, Rule 3.131(k) provides a means for an arrest warrant to be issued.

### A. THE STOP

#### 1. Reasonable Suspicion Standard

There are three levels of police-citizen encounters. The first level is a consensual encounter, the second level is an **investigatory stop** as enunciated in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and the third level is an arrest. *Popple v. State*, 626 So.2d 185, 186 (Fla.1993).

In the landmark case *Terry v. Ohio*, 392 U.S. 1, 24, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court concluded: When an officer is justified in believing that the individual whose *suspicious* behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. The Supreme Court ultimately held that where a police officer *observes* unusual conduct which leads him *reasonably* to conclude in light of his experience that *criminal activity may be afoot* and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes **reasonable** inquiries, and where nothing in the initial stages of the encounter serves to dispel his **reasonable** fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a *carefully limited search* of the outer clothing of such persons in an attempt to *discover weapons* which might be used to assault him. *Id.* at 30, 88 S.Ct. 1868.

Although an amorphous legal concept, courts have defined the reasonable suspicion standard as "more than a 'mere hunch,' but 'considerably less' than a preponderance of the evidence." *Jackson v. State*, 36 So.3d 132, 134 (Fla. 5th DCA 2010). A reasonable suspicion exists when an officer can

“point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the **investigatory stop** or seizure].” *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

“‘Reasonable suspicion’ is a less demanding standard than probable cause [the standard required for an arrest] and requires a showing considerably less than preponderance of the evidence.” *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). The minimal justification for an investigatory stop has been described as something more than a “mere hunch.” *United States v. Arvizu*, 534 U.S. 266 (2002). To determine whether something is more than a mere hunch, the Court looks at the totality of the circumstances. *Id.* at 274.

Our United States Supreme Court has made clear that officers must possess **reasonable suspicion** at the time of the seizure, and events that transpire after the seizure may not be utilized in determining **reasonable suspicion**. See *Hiibel*, 542 U.S. at 178, 124 S.Ct. 2451; *J.L.*, 529 U.S. at 271, 120 S.Ct. 1375.

Courts have attempted to clarify reasonable suspicion:

Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

*Florida v. J.L.*, 529 U.S. 266, 269–70, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000).

## 2. Investigatory Stop

In order to justify an **investigatory stop**, a police officer must have a “well-founded, articulable suspicion that a person has committed, is committing, or is about to commit a crime.” *Thomasset v. State*, 761 So.2d 383, 385 (Fla. 2d DCA 2000); see also § 901.151, (1997); *Terry*; *Saturnino–Boudet v. State*, 682 So.2d 188, 191 (Fla. 3d DCA 1996), review dismissed, 689 So.2d 1071 (Fla.1997); *Burnett v. State*, 644 So.2d 152, 153 (Fla. 2d DCA 1994); *Popple*, 626 So.2d at 186. If a police officer does not have the necessary founded suspicion to support the **investigatory stop**, the evidence obtained during the invalid search must be suppressed. *Burnett v. State*, 644 So.2d at 153.

*Wallace v. State*, 8 So.3d 492, (Fla. 5th DCA 2009): Experienced officer’s observations of hand-to-hand exchange in high crime area known for drug activity, along with other suspicious behavior, gave rise to reasonable suspicion of criminal activity justifying detention of defendant for further investigation.

However, see *Panter v. Florida*, 8 So.3d 1262, (Fla. 1st DCA 2009) where officer who observed a hand-to-hand transaction of an unknown nature between occupants of a van and a person who exited a house known for narcotics sales did not have reasonable, well-founded, particularized suspicion of criminal activity to justify investigatory stop of occupants of van.

Factors that aid the police in determining whether a reasonable suspicion exists to make an **investigatory stop** include: “[t]he time; the day of the week; the location; the physical appearance of the suspect; the behavior of the suspect; the appearance and manner of operation of any vehicle involved; [and] anything incongruous or unusual in the situation as interpreted in the light of the officer's knowledge.” *Hernandez v. State*, 784 So.2d 1124, 1126 (Fla. 3d DCA 1999).

**Practice Tip:** when conducting a motion to suppress based on whether or not the officers have a sufficient reasonable suspicion of criminal activity to warrant an investigatory stop, make sure that you get out ALL of the important information with regards to the officer's training and experience, the officer's location at the time of the stop (was it a known drug area), the time of day or night, and the defendant's behavior and actions. Remember, whether or not the officer had a reasonable suspicion of criminal activity is *an objective standard* that is based on the totality of the circumstances. Whether or not the defendant did feel free to leave or whether the officer thought the defendant was free to leave is irrelevant.

The reading of Miranda during an investigative stop will NOT *per se* turn the investigatory stop into a detention and/or seizure See *Caldwell v. State*, 41 So.3d 188 (Fla. 2010) ("The proper test is whether, based on the totality of the circumstances, a reasonable person would feel free to end the encounter and depart. While an individual act on the part of an officer may constitute a show of authority that contributes to a seizure finding, we again reject the notion that any single factor, taken alone, will be conclusive in every case in which it appears.").

Be aware, there are a number of opinions from the 3d DCA reminding us that it is improper during **TRIAL** to have an officer testify that the area where the defendant was arrested or first noticed by the officers was a "high crime area" or known for drug sales. (However, This information is only relevant during the **MOTION TO SUPPRESS** because it figures into whether the officer had reasonable suspicion or probable cause to detain or stop the defendant.

### 3. Stop and Frisk

Fla. Stat. § 901.151 is the stop and frisk law.

*Arizona v. Johnson*, 555 U.S. 323 (2009), in an opinion issued in the 2008 term, the Supreme Court unanimously determined after a car is lawfully stopped for a traffic infraction, an officer *may* conduct a pat-down of a passenger if the officer reasonably suspects that the passenger is armed and dangerous, even if the officer does not have reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. An officer may also order the driver and passengers out of a vehicle. See also *Pennsylvania v. Mimms*, 434 US 106 (1977).

Since *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its companion case of *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), the test for the limited intrusion of a **stop** and **frisk** has been reasonableness rather than probable cause. *Terry* created an exception to the probable cause requirement and thereby granted police officers a greater right to **stop** and **frisk** a suspect. To determine reasonableness, the Supreme Court in *Terry* balanced the limited violation of an individual's privacy against the opposing interests in crime prevention and detection and the police officer's safety. To justify a **stop**, a police officer must be able to point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably justify the **stop**. The Court announced the following objective standard by which a reviewing court should judge the reasonableness of the intrusion: "(W)ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry v. Ohio*, 392 U.S. at 21-22, 88 S.Ct. at 1880.

A valid **stop** does not necessarily mean that there can be a valid **frisk**. Under the *Terry* exception, a law enforcement officer, for his own protection or the safety of others, may conduct a pat down to find weapons that he reasonably believes or suspects are then in possession of the person whom he has **stopped**. *State v. Webb*, 398 So.2d 820 (Fla. 1981).

## B. SEIZURE

The standard for arrest is probable cause. The police must have probable cause that a crime was committed before they can effectuate an arrest. *See Golphin v. State*, 945 So. 2d 1174 (Fla. 2006); *See also State v. Triana*, 979 So.2d 1039 (Fla. 3d DCA 2008).

In the absence of a formal arrest, whether a person has been seized will be adjudged in accordance with the **reasonable** person standard initially articulated by the United States Supreme Court in *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (plurality opinion). There, the Court stated: We adhere to the view that a person is “seized” only when, by means of physical force or a show of authority, his freedom of movement is restrained.... We conclude that a person has been “seized” within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a **reasonable** person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, *even where the person did not attempt to leave*, would be the threatening presence of several officers, *the display of a weapon by an officer*, some physical touching of the person of the citizen, or *the use of language or tone of voice indicating that compliance with the officer's request might be compelled*. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. *Id.* at 553–55, 100 S.Ct. 1870.

Subsequent to the *Mendenhall* decision, the United States Supreme Court clarified that for a “**seizure**” to have occurred, one of two additional criteria must be satisfied: either the person must be physically subdued by a police officer *or* the person must submit to the officer's show of authority. *See California v. Hodari D.*, 499 U.S. 621, 626, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991).

An arrest is the act of the legal authority taking actual physical custody of a citizen and is a restraint on that citizen's liberty. The purpose of an arrest and resulting detention is to cause the detained person to be identified and to be forthcoming to answer some demand, charge, or accusation. *See Thomas v. State*, 583 So. 2d 336, 338 (Fla. 5th DCA 1991).

Every encounter between law enforcement and a citizen does not automatically **constitute a seizure** in the constitutional context. *See Terry*, 392 U.S. at 19 n. 16, 88 S.Ct. 1868 (“Obviously, not all personal intercourse between policemen and citizens involves ‘**seizures**’ of persons.”). As the United States Supreme Court has determined:

Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a “**seizure**” has occurred. *Id.*

The following cases discuss what constitutes a seizure, and therefore an arrest, specifically as it relates to the suppression of subsequently discovered evidence:

1. *California v. Hodari D.*, 499 U.S. 621 (1991): A group of youths, including respondent Hodari, fled at the approach of an unmarked police car. Officer Pertoso, who was wearing a jacket with “Police” embossed on its front, left the car to give chase. Pertoso did not follow Hodari directly, but took a circuitous route that brought the two face to face on a parallel street. Hodari, however, was looking behind as he ran and did not turn to see Pertoso until the officer was almost upon him, whereupon Hodari tossed away a small rock. Pertoso tackled him, and the police recovered the rock, which proved to be crack cocaine. The issue presented to the United State Supreme Court was whether, at the time he dropped the drugs, Hodari had been “seized” within the meaning of the Fourth Amendment—must be answered in the negative. The Court held to constitute a seizure of the person, just as to constitute an arrest, the quintessential “seizure of the person” under Fourth Amendment jurisprudence, there must be either the application of physical force, however slight, or, where that is absent,

submission to an officer's "show of authority" to restrain the subject's liberty. Here, no physical force was applied since Hodari was untouched by Pertoso before he dropped the drugs, and assuming Pertoso's pursuit constituted a "show of authority" enjoining Hodari to halt, Hodari did not comply with that injunction and therefore was not seized until he was tackled. Thus, the cocaine abandoned while he was running was not the fruit of a seizure and his motion to exclude evidence of it was properly denied.

2. *Perez v. State*, 620 So. 2d 1256 (Fla. 1993). *Perez v. State* is very similar to the *Hodari* case listed above in that the Courts both held that the defendant abandoned the property before they were seized. In *Perez*: City of Miami police officers were on patrol in a known high narcotics area, and observed Perez and another male who appeared to be passing an object between them. Believing the two might be engaging in a narcotics transaction, one officer exited the police car and started to walk toward Perez and either told him to freeze or stop. Perez fled on foot and the officer gave chase. Perez ran into an alley while pulling something from his waistband, and the officer heard a loud, metallic noise being dropped in the alley. The officer caught Perez who, after being given *Miranda* warnings, volunteered he became nervous and ran "because he knew the gun that he had was stolen." A revolver was recovered in the alley and Perez was charged. The evidence was suppressed, and the case appealed. The Florida Supreme Court held that the police call for the Defendant to halt and subsequent chase did not constitute a "seizure" until defendant was caught; therefore, firearm which defendant dropped during chase was abandoned and recovery of firearm was not an illegal seizure.
3. *But see Dempsey v. State*, 717 So. 2d 1071 (Fla. 1st DCA 1998) and *Robinson v. State*, 615 So. 2d 201, 203 (Fla. 3d DCA 1993). *Dempsey* holds that that evidence should be suppressed if abandonment followed an illegal search and *Robinson* holds that drugs dropped during an illegal search does not constitute voluntary abandonment.
4. *Hollinger v. State*, 620 So. 2d 1242 (Fla. 1993): Several members of the Orange County Sheriff's Department were conducting a drug sweep. They pulled into a parking lot, exited their vehicle, announced "Orange County Sheriff's Office," and approached a group of people. The officers were clad in black masks and SWAT regalia. One of the officers noticed Hollinger put his hand behind his back and dropped a tissue. The officer walked over and picked up the tissue, which proved to contain six rocks of cocaine. The Florida Supreme Court held that defendant did not voluntarily abandon cocaine he dropped behind his back when approached by police officers clad in black masks and SWAT-team-type regalia, so that cocaine was "fruit" of officers' illegal seizure. The Court stated, "*Hodari* draws a clear distinction between those who yield to the authority of the police and those who flee. A person who flees from a show of authority has not been seized, while a person who remains in place and submissive to the show of authority has been seized. Therefore, if a person submits to an officer's show of authority and does not attempt to escape, then a seizure has occurred, and dropped contraband must be suppressed if the seizure was illegal."
5. *State v. R.R.*, 697 So.2d 181 (Fla. 3d DCA 1997): the court analyzes officers' freedom to engage in consensual encounters and determines that when the officers walked up to a juvenile on his porch, they were engaging in a consensual encounter. The Court determined that there was no seizure at the time that the juvenile dropped the drugs after being approached by the officers and reverses the trial court's order suppressing the drugs based on an illegal seizure.

## ***Flight, Reasonable Suspicion, and Resisting Without Violence***

*C.E.L. v. State*, 24 So. 3d 1181 (Fla. 2009) and *Illinois v. Wardlow* 528 U.S. 119 (2000) stand for the proposition that headlong flight from officers in a high crime area provides reasonable suspicion to detain. Note that this flight must occur before the officer exerts any authority; a common fact pattern will have a subject take off when he sees a police officer. Furthermore, the flight must also be “headlong” – walking away is not enough. Since flight in a high crime area provides reasonable suspicion to detain, continued flight while the officer tries to detain the defendant is enough for Resisting Without Violence.

## **C. SEARCH**

Fla. Stat. §901.21 is the statute on point for the search of person arrested.

### Search of Vehicles

Absent a **search** warrant, there are three valid means by which law enforcement may **search** a **vehicle**: (1) incident to a valid arrest of a recent occupant of the **vehicle**; (2) under the “automobile exception” to the warrant requirement, which requires probable cause to believe contraband or fruits of the crime are in the vehicle, *see, e.g., Carroll v. United States*, 267 U.S. 132 (1925); and (3) when a **vehicle** has been impounded, as part of a reasonable inventory **search** following standardized procedure, *Patty v. State*, 768 So.2d 1126 (Fla. 2d DCA 2000).

In *Arizona v. Gant*, 129 S.Ct. 1710 (2009), the Supreme Court significantly narrowed the rule established in *New York v. Belton*, 453 U.S. 454 (1981). In *Belton* the Court held that on lawful custodial arrest of occupant of an automobile the officer may examine contents of any containers found within the passenger compartment, including closed or open glove compartments, consoles or other receptacles located anywhere within the passenger compartment as well as luggage, boxes, bags, clothing, and the like.

The holding in *Belton* was largely overruled in *Gant* where the Court held that the police may search the passenger compartment of a vehicle incident to a recent occupant's arrest ***only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search OR that the vehicle contains evidence of the offense of arrest.*** *Arizona v. Gant*, 129 S.Ct. 1710, 1712 - 1713 (U.S.Ariz.,2009)

*Brown v. State*, 24 So.3d 671 (Fla. 5<sup>th</sup> DCA 2009), disallows the exclusionary rule as a remedy for searches that were valid under *Belton* but are no longer valid under *Gant* (i.e. Pre-Gant).

NOTE: Fourth Amendment case law, as well as the extension of the exclusionary rule, are always developing. Because the officer in *Brown* was acting in good faith under the then-existing case law, you can analogize that situation to cases where a previously lawful search is now illegal under new case law. As such, the State should not be penalized for following the law *as it existed at the time of the search*. Use *Brown* to keep evidence from being excluded. *See also United States v. Leon* 468 U.S. 897 (1984).

Inventory searches pursuant to arrest and tow of the vehicle are unaffected by *Gant* and are valid. In vehicles, a “plain view” scenario is often involved, nullifying the need for a warranted search.

The U.S. Supreme Court in *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), and the Florida Supreme Court in *State v. Wells*, 539 So.2d 464 (Fla.1989), have determined that law enforcement need no longer offer the arrested recent occupant of a **vehicle** an alternative to

impoundment of the **vehicle**, as long as the officer was not acting in bad faith. The Court in *Bertine* noted that by securing the property, law enforcement served a strong governmental interest in protecting the owner's property from unauthorized interference. *Id.* at, [373-74, 107 S.Ct. at,] 742. “Many owners might leave valuables in their automobiles temporarily that they would not leave their unattended for the several days that police custody may last.” *Bertine*, quoting from *Cooper v. California*, 386 U.S. 58, 61, 87 So Ct. [S.Ct.] 788 [790-91], 17 L.Ed.2d 730 (1967). *Bertine* and *Wells* do not appear to be concerned as to whether the car was parked legally or illegally on public property. The issue lies with the motivation of the police impounding the **vehicle**. The criteria or decision to impound a **vehicle** must be based on something other than suspicion of evidence of criminal activity.

Courts have upheld the reasonableness of decisions by law enforcement officers to impound **vehicles** in cases where leaving the **vehicle** would present an inviting target for thieves or vandals. *See Gordon*, 368 So.2d at 62; *Mattson v. State*, 328 So.2d 246 (Fla. 1st DCA 1976) (impoundment valid to protect car from theft or damage where locked car was lawfully parked across from local night spot).

Pursuant to *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996), 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. *Id.* (citing *Cal. v. Carney*, 471 U.S. 386, 393, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985)); *see also United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). This “automobile exception” to the warrant requirement was applied in *Labron*, even though the owner of the vehicle was arrested and the vehicle was parked, thus making the movement of the vehicle highly unlikely.

The Supreme Court cases applying the “automobile exception” to the warrant requirement rely on two distinct rationales: that the automobile's mobility may provide exigent circumstances requiring an immediate search and that a person possesses a reduced expectation of privacy concerning the contents of an automobile. *See, e.g., Carney*, 471 U.S. at 390-93, 105 S.Ct. 2066. Thus, in *Michigan v. Thomas*, 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982), the Supreme Court stated:

In *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975). *See also United States v. Ross*, 456 U.S. 798, 807 n. 9, 102 S.Ct. 2157, 2163 n. 9, 72 L.Ed.2d 572 (1982). It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant. *See ibid. Id.* at 261, 102 S.Ct. 3079

### **Dog Sniffs**

*Florida v. Jardines*, 133 S.Ct. 1409 (2013), held that a “sniff test” by a drug detection dog conducted at the front door of a private residence constitutes a “search” within the meaning of the Fourth Amendment, and, as such, must be preceded by an evidentiary showing of wrongdoing (i.e. PC). Probable cause, not reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make under the Fourth Amendment prior to conducting a dog “sniff test” at a



private residence; and lawfully obtained evidence in search warrant affidavit did not establish probable cause to support issuance of search warrant for defendant's residence.

In *Florida v. Harris*, 133 S. Ct. 1050, 185 L.Ed.2d 61 (2013), the Court announced that certification of a narcotics-detection canine by a bona fide organization is presumptively sufficient to establish probable cause based on the dog's alert for drugs. Writing for the Court, Justice Elena Kagan said courts assessing probable cause should not prescribe "an inflexible set of evidentiary requirements." The question in this case, she said, is just like every other probable cause inquiry: Would all the facts surrounding the dog's alert lead a reasonably prudent person to think a search would reveal contraband or evidence of a crime? "A sniff is up to snuff when it meets that test," she wrote.

A dog sniff outside the context of a home is not a search. *See, e.g., United States v. Place*, 462 U.S. 896 (1983); *State v. Williams*, 565 So. 2d 714 (Fla. 3<sup>rd</sup> DCA 1990).

#### **D. WARRANTLESS ARRESTS**

Pursuant to **Section 901.15**, a law enforcement officer may arrest a subject for a misdemeanor or municipal or county ordinance, without a warrant, *only* if the defendant committed the offense in the *officer's presence*, and the arrest is made immediately or in fresh pursuit *e.g., Gasset v. State*, 490 So. 2d 97 (Fla. 3d DCA 1986).

When a law enforcement officer makes a warrantless arrest, the officer shall inform the person to be arrested of his authority and the cause of arrest except when the person flees or forcibly resists before the officer has an opportunity to inform him or when giving the information will imperil the arrest. **See Fla. Stat. § 901.17.**

In addition, Florida law provides for various **exceptions** to the "misdemeanor presence" requirement in Section 901.15.

##### **1. PRESENCE EXCEPTIONS SECTION 901.15**

When a law enforcement officer has **probable cause** to believe the defendant committed:

- a) a violation of an injunction for protection against domestic violence issued pursuant to section 741.31 or violated a protective injunction issued pursuant to 784.046 or 784.047;
- b) an act of domestic violence as defined by section 741.28;
- c) an act of child abuse as defined in section 827.03;
- d) a battery as defined in section 784.03, and the officer has some evidence of bodily harm or other corroboration by eyewitnesses;
- e) an act of criminal mischief or graffiti pursuant to section 806.13;
- f) a misdemeanor, based on an affidavit by a U.S. Government law enforcement officer, in the presence of a U.S. Government officer on Federal military property over which the State has maintained exclusive jurisdiction for such a misdemeanor;
- g) an assault on a law enforcement officer, firefighter, emergency medical provider, public transit employee, or assault or battery on a receiving facility employee;

- h) a trespass in a secure area of an airport with posted signs.

## 2. OTHER STATUTORY PRESENCE EXCEPTIONS

When a law enforcement officer has **probable cause** to believe the defendant committed:

- a) retail theft, farm theft, transit fare evasion, or trespass. Fla. Stat. § 812.015(4).
- b) a violation of Chapter 316 or 322 at a traffic crash scene when the probable cause is obtained as a result of the officer's personal investigation at the scene. Fla. Stat. § 316.645.
- c) a violation of an animal cruelty statute. See Fla. Stat. Chapter 828. However, Fla. Stat. § 828.17 requires the offender be held until a warrant can be procured.
- d) possession of marijuana pursuant to Fla. Stat. § 893.13(6)(b).
- e) carrying a concealed weapon. Fla. Stat. § 790.02.
- f) loitering and prowling. Fla. Stat. § 856.031.
- g) trespass upon the grounds of a public school facility. Fla. Stat. § 228.091(4).
- h) theft in a public lodging establishment or in a public food service establishment. Fla. Stat. § 509.162(2). In addition, an officer *or* operator of such establishments may, with probable cause to believe that theft of personal property belonging to such establishment has occurred, *detain* the individual *and take into custody* for the purpose of recovering the property. Fla. Stat. § 509.162(1).
- i) disorderly conduct on the premises of a licensed establishment. Fla. Stat. § 509.143(2).
- j) any offense in connection with a boating accident when the probable cause was obtained as a result of the officer's personal investigation at the scene of the collision. Fla. Stat. § 327.30(6).
- k) stalking. Fla. Stat. § 784.048(6).

## E. ARREST WARRANTS

**Section 901.02(2)** sets forth the criteria for obtaining an arrest warrant. **Section 901.04 and 901.16** sets forth the criteria for the execution and method of arrest pursuant to a warrant. **Section 901.19** provides that an officer having announced his authority and purpose and been refused entrance “to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, he may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be.” This includes breaking any door or window to gain access to the premises. See Fla. Stat. § 933.09. However, section 901.19 does not authorize a warrantless entry to make a misdemeanor arrest. *Ortiz v. State*, 600 So. 2d 530 (Fla. 3d DCA 1992).

### 1. KNOCK AND ANNOUNCE

The common-law principle that law enforcement officers must knock and announce their presence and provide residents a reasonable opportunity to open the door is well settled. See *Wilson v. Arkansas*, 514 U. S. 927 (1995), *see also*, 18 U. S. C. §3109 (officers can enter when serving search warrants). In *Wilson*, the U.S. Supreme Court held this rule was commanded of the Fourth Amendment, but outlined certain exceptions.

It is not necessary to knock and announce when “circumstances presen[t] a threat of physical violence,” or if there is “reason to believe that evidence would likely be destroyed if advance notice were given,” *id.* at 936, or if knocking and announcing would be “futile,” *Richards v. Wisconsin*, 520 U. S. 385, 394 (1997). The Court only requires police “have a reasonable suspicion ... under the particular circumstances” that one of these grounds for failing to knock and announce exists. The Court acknowledged “[t]his showing is not high.” *Id.* Officers are justified in forcing entry even if they must destroy property to do so when one of the exceptions is met. *United States v. Ramirez*, 523 U.S. 65 (1998); *see also* U.S. v. Banks, 540 U.S. 31 (2003).

In *Hudson v. Michigan* [547 U.S. 586], 126 S.Ct. 2159 [165 L.Ed.2d 56] (2006), a case in which it was undisputed that the **knock** and **announce** statute was violated, the United States Supreme Court held that, “exclusion [of the evidence] may not be premised on the mere fact that a constitutional violation was a ‘but-for’ cause of obtaining evidence.” *Id.* at 2164.

In *Hudson v. Michigan*, the United States Supreme Court considered whether a violation of the Fourth Amendment **knock-and-announce** rule requires the exclusion of all evidence found in the search. 547 U.S. at 588, 126 S.Ct. 2159. In *Hudson*, “[w]hen the police arrived to execute the warrant, they **announced** their presence, but waited only a short time—perhaps ‘three to five seconds,’ ...—before turning the knob of the unlocked front door and entering Hudson’s home.” *Id.* The defendant moved to suppress all of the inculpatory evidence against him, arguing that the police officers’ premature entry violated his Fourth Amendment rights. *Id.* After unsuccessfully attempting to obtain relief in the state courts, Hudson petitioned the Supreme Court for a writ of certiorari. *Id.* at 588–89, 126 S.Ct. 2159. The Supreme Court granted certiorari and denied relief, concluding that the exclusionary rule is not an appropriate remedy for a violation of the Fourth Amendment **knock-and-announce** requirement.

The Supreme Court also explained the interests protected by the **knock-and-announce** requirement: One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an **announcement** would penalize someone who did not know of the process, of which, if he had notice, it is to be presumed that he would obey it. The **knock-and-announce** rule gives individuals the opportunity to comply

with the law and to avoid the destruction of property occasioned by a forcible entry. And third, the **knock-and-announce** rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the opportunity to prepare themselves for the entry of the police. The brief interlude between **announcement** and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed. In other words, it assures the opportunity to collect oneself before answering the door.

What the **knock-and-announce** rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

*Id.* at 594, 126 S.Ct. 2159.

Note, however, that despite the holding in *Hudson*, the exclusionary rule applies to failure to knock and announce in Florida. *State v. Cable*, 51 So. 3d 434 (2010).

## 2. EXCEPTIONS TO KNOCK AND ANNOUNCE

The U.S. Supreme Court acknowledges its “reasonable wait time” standard is necessarily vague. *See United States v. Banks*, 540 U.S. 31 (2003). In *Banks*, the Court held the proper measure was not how long it would take the resident to reach the door, but how long it would take to dispose of the suspected drugs. Such a time would necessarily be extended when, for instance, the suspected contraband was not easily concealed. In *Wilson v. Arkansas*, the Court specifically declined to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement. 514 U.S. at 937, n. 4. However, in *Hudson v. Michigan*, 547 U.S. 586 (2006) the Court held the exclusionary rule does not apply to knock and announce violations.

There is also a well-developed body of case law in Florida setting out exceptions for the knock and announce rule. Examples include when the officer is justified in the belief that someone inside is in imminent danger; when compliance would place the officer in imminent danger; or when compliance would result in the destruction of evidence, or the escape of the person to be arrested. *See Napoli v. State*, 596 So. 2d 782 (1st DCA 1992) (citing *State v. Kelly*, 287 So. 2d 13 (Fla. 1972)); *Earman v. State*, 265 So. 2d 695 (Fla. 1972); *Benefield v. State*, 160 So. 2d 706 (Fla. 1964).

However, in *Kellom v. State*, 849 So. 2d 391 (Fla. 1st DCA 2003), the First District Court of Appeal held an officer’s forcible entry into a residence five seconds after knocking did not satisfy the requirements of section 933.09 because the officers had no factual basis to claim the drugs they were seeking would have been destroyed, and had no evidence that there were any weapons inside the residence. Therefore, officers must have some articulable reasoning to justify violation of the rule; otherwise, the evidence may be suppressed.

## F. ARREST OUTSIDE OFFICERS’ JURISDICTION IN FRESH PURSUIT

Generally, an officer does not have any official power to make an arrest outside the officer's jurisdiction. *See Porter v. State*, 765 So. 2d 76 (Fla. 4th DCA 2000); *State v. Sabrino*, 587 So. 2d 1347 (Fla. 3rd DCA 1991). However, pursuant to **Section 901.25**, an arrest made outside the officer's jurisdiction can be validated. Section 901.25(1) authorizes a law enforcement officer to make an arrest outside their jurisdiction for a county or municipal ordinance violation, a misdemeanor, or a violation of Chapter 316 when **pursuit** takes the officer into a neighboring jurisdiction and the officer had legally sufficient grounds to detain or arrest the subject before they left their jurisdiction.

In *Porter*, the Fourth District Court of Appeal delineated a bright line test for determining fresh pursuit. This definition was later adopted by the Third District Court of Appeal in *State v. Gelin*, 844 So. 2d 659, 661 (Fla. 3rd DCA 2003) when that Court noted “**fresh pursuit**” requires:

- a. that the police act without unnecessary delay;
- b. that the pursuit be continuous and uninterrupted; and
- c. that there be a close temporal relationship between the commission of the offense and the commencement of the pursuit and apprehension of the subject.

If the court does not find “fresh pursuit”, the law enforcement officer may be seen to have acted as a private citizen. A private citizen does have the **common law right to arrest a person who commits a felony in his presence**, or to arrest a person where a felony has been committed, and where the citizen has probable cause to believe, and does believe, the person is guilty. *Phoenix v. State*, 455 So. 2d 1024, 1025 (Fla. 1984).

The Court’s holding in *Phoenix* makes clear that an officer cannot be acting under the color of the law when making a citizen’s arrest. The holding of *Ripley v. State*, 898 So. 2d 1078 (Fla. 5th DCA 2005) also speaks to the fact that an officer cannot be acting under the color of the law when performing a citizen’s arrest; otherwise, the arrest is invalid.

## **G. NOTICE TO APPEAR IN LIEU OF ARREST**

Pursuant to Florida Rule of Criminal Procedure **3.125**, a defendant may be issued a written order in lieu of physical arrest requiring the defendant to appear in court. In many misdemeanor and ordinance violation cases, a law enforcement officer will provide the defendant with an arrest affidavit (“A-Form”) as a **Promise to Appear (P.T.A.)**. Uniform traffic citations serve as a promise to appear in traffic cases. In the notice, the defendant must provide identification information, and sign the document acknowledging a future appearance in court is mandatory. The issuance of the notice secures personal jurisdiction of the defendant, and begins the speedy trial time period. Issuance of a notice to appear does not affect the officer’s authority to conduct a search of the defendant, incident to arrest, Fla. Stat § 901.28.

If the defendant fails to appear in court, the judge shall issue an arrest warrant pursuant to Rule 3.121. This is commonly referred to as a “**bench warrant**” in County Court. The judge sets the bench warrant amount and, upon arrest, the defendant must post that amount as a bond in order to be released from custody. Otherwise, the defendant will proceed to a bond hearing from jail. A bench warrant waives the defendant’s speedy trial rights unless the warrant is later “vacated,” as opposed to “set aside.” If a bench warrant is “vacated,” it is as if the judge never issued the bench warrant. Setting aside a bench warrant simply removes the active arrest warrant from the defendant.

## **H. SERVICE OF PROCESS**

Pursuant to **Section 901.09**, in the absence of an arrest or notice to appear, personal jurisdiction over the defendant may also be obtained by the service of process in lieu of a warrant. **Section 901.10** indicates a summons shall be served in the same manner as a summons in a civil action. There are two methods of service: personal service and substitute service. **Section 48.031** governs service and states:

- (1)(a) Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein

who is 15 years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.

(b) Employers, when contacted by an individual authorized to make service of process, shall permit the authorized individual to make service on employees in a private area designated by the employer.

(2)(a) Substitute service may be made on the spouse of the person to be served at any place in the county, if the cause of action is not an adversary proceeding between the spouse and the person to be served, if the spouse requests such service, and if the spouse and person to be served are residing together in the same dwelling.

(b) Substitute service may be made on an individual doing business as a sole proprietorship at his or her place of business, during regular business hours, by serving the person in charge of the business at the time of service if two or more attempts to serve the owner have been made at the place of business.

(5) A person serving process shall place, on the copy served, the date and time of service and his or her identification number and initials for all service of process.

(6) If the only address for a person to be served, which is discoverable through public records, is a private mailbox, substitute service may be made by leaving a copy of the process with the person in charge of the private mailbox, but only if the process server determines that the person to be served maintains a mailbox at that location.

A process server's return of service on a defendant which is regular on its face is presumed to be valid absent clear and convincing evidence presented to the contrary. *Florida Nat'l Bank v. Halphen*, 641 So.2d 495 (Fla. 3d DCA 1994); *Lazo v. Bill Swad Leasing Co.*, 548 So.2d 1194 (Fla. 4th DCA 1989); *Slomowitz v. Walker*, 429 So.2d 797 (Fla. 4th DCA 1983); *Brugh v. Savings & Profit Sharing Pension Fund of United Ins. Co. of Am.*, 211 So.2d 613 (Fla. 1st DCA 1968). Further, a defendant may not impeach the validity of the summons with a simple denial of service, but must present "clear and convincing evidence" to corroborate his denial. *Halphen*, 641 So.2d at 496; *Jefferson Bank & Trust v. Levy*, 498 So.2d 450 (Fla. 3d DCA 1986).

While a plaintiff bears the ultimate burden of proving valid service of process, *M.J.W. v. Dep't. of Children & Families*, 825 So.2d 1038, 1041 (Fla. 1st DCA 2002), a "return of service that is regular on its face is presumed to be valid absent clear and convincing evidence presented to the contrary." *Telf Corp. v. Gomez*, 671 So.2d 818 (Fla. 3d DCA 1996).

"Clear and convincing evidence" is "evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue." Fla. Std. Jury Inst. (Civ.) 405.4 (adopting definition set forth in *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983)).

## 1. SUMMONS

Service of process must be accomplished through a Sheriff of the County (i.e. Miami-Dade Police Officer) or an approved process server pursuant to section 48.021. In addition, the summons must contain the nature of the offense and a time and place to appear. Fla. Stat. § 901.09(3).

The requirements for proper personal service are: **hand-delivering a copy of the information and summons directly to the defendant.** The requirements for substitute service are: **(1) delivering a**

**copy of the information and summons at the defendant's usual place of abode (i.e. address where the defendant actually lives at time of service) AND (2) leaving a copy of the information and summons with any person at least 15 years of age or older residing at the address.**

Service on **minors** is obtained by serving their parent, guardian, or guardian *ad litem*. Service on the guardian *ad litem* is unnecessary when he or she voluntarily appears or where the court orders their appearance without the service of process. A guardian *ad litem* can appear for a minor. However, if the minor is or has been married then they can be personally served. See Section 48.041. **Incompetent persons** are served by serving the person who has care or custody over them, or their legal guardian or guardian *ad litem* if one has been appointed. As with minors, service of process on the guardian *ad litem* is unnecessary where they voluntarily appear or when the court orders their appearance. See Section 48.042

## **2. CASE LAW**

*Haney v. Olin Corp.*, 245 So. 2d 671 (Fla. 4th DCA 1971): There need not be some minimum exchange of communication between a party to be served and a process server. When the person that one is attempting to serve affirmatively attempts to avoid service by closing the door in the process server's face, leaving the papers on the doorstep can become an effective delivery.

*BoatFloat, LLC. v. Central Transport Intern*, 941 So.2d 1271 (Fla. 4th DCA 2006): service is not effective when papers are merely slipped under the defendant's door. In order to avoid actually putting the papers in defendant's hands or those of a person who would constitute valid substitute service, there must be proof that the defendant affirmatively attempted to avoid service.

*Cerf v. Cerf*, 421 So. 2d 1100 (Fla. 3d DCA 1982): Defendant, an attorney, was at the Broward Courthouse addressing some criminal legal matters of his client when he was served in the hallway with process for a Dade County divorce action against him. The court refused to extend common law immunity from service for court appearances and held this was valid service.

*Gonzalez v. Totalbank*, 472 So. 2d 861 (Fla. 3d DCA 1985): Where return of service did not reflect name of person served, merely indicating that a Jane Doe was served, and there was no indication that person served was over 15 years old, as required by "substituted service" statute providing for service at deliverer's usual place of abode, the return of service was defective and the service was invalid, particularly in light of uncontradicted evidence that named defendant in question no longer resided at the address at time of purported service.

*Johnston v. Halliday*, 516 So. 2d 84 (Fla. 3d DCA 1987): Service of process was invalid, though return adequately identified party served as defendant's son, where return failed to state that son was over age 15, son resided with defendant, or that process server explained contents of papers to son.

*Telf Corp. v. Gomez*, 671 So. 2d 818 (Fla. 3d DCA 1996): Service is presumed valid when a return of service is regular on its face. The burden is on the defense to prove by **clear and convincing evidence** that the defendant was not properly served

*Rokeach v. Glickstein*, 718 So. 2d 831 (Fla. 4th DCA 1998): Service of process on defendant's husband eight to ten feet away from house, while defendant was inside house, was made at defendant's "usual place of abode" with any person residing therein, and therefore was valid service; process server waited outside house after no one had answered doorbell, saw defendant's husband emerge from driveway, stood in path of car, identified himself, described summons and complaint, and placed papers against window of car for four or five seconds before driver pulled away.

*Diaz v. State*, 10 FLW Supp. 229a (11th Jud. Cir. February 18, 2003): The officer's illegal stop and detention of the defendant's mother until she called the defendant to the door did not make service of process invalid.

### **3. RETURN OF SERVICE**

Pursuant to **Section 48.031(5)**, the return of service must contain: (a) the date and time of service; and (b) the identification number and initials of the process server.

If service is accomplished by substitution, the return must include: (a) the date and time of service; (b) the identification number and initials of the process server; (c) the summons was served at defendant's usual place of abode; (d) identity by name the person served and state that person resides at the defendant's abode; (e) indication that the person served is 15 years of age or older; and (f) that the process server informed the person served of the contents of the summons and information.

The process server's failure to record proper return of service invalidates the service unless amended. However, a return of service may be amended at any time. On amendment, service is as effective as if the return had originally stated the omitted facts.

### **4. SERVICE BY THE SHERIFF**

The Miami-Dade Police Officers act as the deputy sheriffs of Miami-Dade County. They are responsible for service of process in most misdemeanor cases. You must, however, provide a complete address or multiple addresses for the officers to attempt service upon. Also it is vital that ALL known addresses for the defendant are ascertained—this means a search of DAVID, CJIS, NCIC/FCIC, Miami Dade Clerk Property Search and SALA. Service must be attempted at ALL known addresses before the State can move for a warrant and represent that all known locals were attempted.

### **5. SERVICE THROUGH THE SAO INVESTIGATION DEPARTMENT**

The State Attorney's Office has investigators in the Graham Building who are authorized to serve a summons pursuant to section 48.021. The investigation division will classify service cases in two categories, (1) defendant's address known and (2) defendant to be located. When the defendant's address is known, a request must be accompanied by a copy of the information and an original summons prepared by the Clerk's office with at least 30 days in advanced notice. If the defendant's address is unknown, the request must be accompanied by the entire contents of the misdemeanor file. In County cases, there is an individual who can be utilized to serve process in certain situations. Additionally, if the case is a refile and the officer is a Miami Dade Police Officer, he or she may assist in service attempts.

### **6. WAIVER OF SERVICE OF PROCESS**

If the defendant or counsel for the defendant appears in court or files any pleading in court, even though service was not perfected, the defendant consents to personal jurisdiction. However, if the defendant or counsel for the defendant appears and makes clear that the appearance is for the limited purpose of contesting personal jurisdiction, service is not obtained. *See* Fla. R. Civ. P. 1.140(h)(1); *Parra v. Raskin*, 647 So. 2d 1010 (Fla. 3d DCA 1994). Such notices are commonly titled "Notice of **Limited Appearance**," and serve only to contest jurisdiction. At a hearing, if the return of service is regular on its face, the burden is on the defense to prove by clear and convincing evidence that the defendant was not properly served. *Telf Corp. v. Gomez*, 671 So. 2d 818 (Fla. 3d DCA 1996).



## 7. DEFENDANT'S FAILURE TO APPEAR

The defendant's willful failure to appear on a properly served summons without good cause is indirect criminal contempt and may be punished by a fine of not more than \$100. In addition, the trial court *shall* issue a warrant (i.e. a bench warrant). Fla. Stat. § 901.11. It is important to ensure that the judge issue a bench warrant, as merely resetting the arraignment or the sounding prejudices the State, as speedy trial time periods run during the interim, giving the defendant a windfall. The issuance of the bench warrant will waive speedy trial, even if the bench warrant is in a *de minimus* amount. Additionally, the State may ask that the trial court specifically state that a reset of the case is a "delay attributable to the defendant," which will waive speedy trial rights.

## 8. SERVICE ON A WITNESS OR LAW ENFORCEMENT OFFICER

The service of a subpoena on a witness or law enforcement officer is also governed by 48.031. The relevant portion reads:

(3)(a) The service of process of witness subpoenas, whether in criminal cases or civil actions, shall be made as provided in subsection (1). **However, service of a subpoena on a witness in a criminal traffic case, a misdemeanor case, or a second degree or third degree felony may be made by United States mail directed to the witness at the last known address, and the service must be mailed at least 7 days prior to the date of the witness's required appearance.** Failure of a witness to appear in response to a subpoena served by United States mail that is not certified may not be grounds for finding the witness in contempt of court.

(b) A criminal witness subpoena may be posted by a person authorized to serve process at the witness's residence if three attempts to serve the subpoena, made at different times of the day or night on different dates, have failed. The subpoena must be posted at least 5 days prior to the date of the witness's required appearance.

(4)(a) Service of a criminal witness subpoena upon a law enforcement officer or upon any federal, state, or municipal employee called to testify in an official capacity in a criminal case may be made as provided in subsection (1) or by delivery to a designated supervisory or administrative employee at the witness's place of employment if the agency head or highest ranking official at the witness's place of employment has designated such employee to accept such service. However, no such designated employee is required to accept service:

1. For a witness who is no longer employed by the agency at that place of employment;
2. If the witness is not scheduled to work prior to the date the witness is required to appear; or
3. If the appearance date is less than 5 days from the date of service.

The agency head or highest ranking official at the witness's place of employment may determine the days of the week and the hours that service may be made at the witness's place of employment.

(b) Service may also be made in accordance with subsection (3) provided that the person who requests the issuance of the criminal witness subpoena shall be responsible for mailing the subpoena in accordance with that subsection and for making the proper return of service to the court.

Thus, in misdemeanor and traffic cases subpoenas can be served by U.S. mail directed to the witness' last known address, mailed at least 7 days before the witness is required to appear in court. The police agencies' *liaison* departments are bound by the requirements in this section.

## **9. SERVICE OF PLEADINGS AND PAPERS**

The service of pleadings and papers is governed by Florida Rule of Criminal Procedure **3.030(b)**. Service on an attorney or party is made by delivering a copy to that party, or mailing it to their last known address. If no address is known a copy may be left with the clerk of the court who will put a copy in the courts file. The proper delivery of a copy requires:

- (1) handing it to the attorney or party;
- (2) leaving it with the secretary or other person in charge;
- (3) leaving it in a conspicuous place if no one is there;
- (4) if the office is closed, or the person to be served does not have an office, leaving it at their usual place of abode with a family member over 15 years old and informing them of the contents;
- (5) service by mail is complete upon mailing; or
- (6) electronic service is permissible so long as you include the sender's personal information, bar number, and total number of pages. Electronic service occurs when the transmission of the last page is complete. If you send it after 5:00 PM it is considered sent on the next business day that is not a Saturday, Sunday, or legal holiday.

## **BAIL, BOND, AND PRETRIAL RELEASE**

The terms "bail" and "bond" include any and all forms of pretrial release. **Fla. Stat. § 903.011** The purpose of bail is articulated in section 903.046, and includes to ensure the defendant's appearance at subsequent proceedings and to protect the community against unreasonable danger from the defendant.

**Fla. Stat. § 903.02** explains denial of bail and bail conditions. Specifically, there are limited times when a judge can change the bond imposed by another judge. Generally, a court of lesser jurisdiction cannot change a defendant's bond unless that court is the court that will try the defendant or the one that initially imposed the defendant's bail. § 903.02 explains limited exceptions to the time that one judge can change the bond imposed by another.

### **A. FIRST APPEARANCE – RULE 3.130**

After arrest, the defendant has an opportunity to address the conditions of release at a "First Appearance Hearing" (this of course pre-supposes that the Defendant does not post "standard bond" prior to the First Appearance hearing and "bond out" of jail). Pursuant to Rule 3.130, the defendant must be brought before a judicial officer **within twenty-four (24) hours** of arrest to determine conditions of pretrial release. Therefore, the first appearance hearing is often referred to as a "bond" hearing (misdemeanor first appearances are often referred to as Jail Arraignments as well). The purpose of the first appearance hearing is to:

1. advise the defendant of charges and provide a copy of the complaint;
2. advise the defendant of the right to remain silent;
3. allow the defendant to communicate with counsel, family or friends;
4. appoint counsel if the defendant is indigent; and
5. determine the conditions of pretrial release.

The rule does not provide for any remedy for failure to comply with the 24 hour time period. However, pursuant to Rule 3.133, the defendant shall be released on a recognizance bond. This is commonly referred to as an "ROR" or "Release on Own Recognizance". An ROR is a nonmonetary form of bond; the defendant simply promises to appear at a subsequent hearing.

### **B. NONADVERSARY PROBABLE CAUSE DETERMINATION – RULE 3.133**

At the first appearance hearing, the court also makes a determination of probable cause or "PC." That is, pursuant to Rule 3.133, if the defendant is in custody, a **nonadversarial probable cause determination** must be held before a judge within forty-eight (**48**) hours from the defendant's arrest. This time period may be extended by 24 hours upon a showing of extraordinary circumstances, and for an additional 24 hours upon a showing extraordinary circumstances continue to exist. Rule 3.133 specifically indicates this probable cause determination may be made at the first appearance hearing, however, the determination is still considered non-adversarial. *See also, Gerstein v. Pugh*, 420 U.S. 103 (1975).

The defendant's presence is *not* required for the probable cause determination, and the judge may rely on a sworn complaint, affidavit, deposition under oath, or testimony. That is, the judge uses the same standard when considering whether to issue an arrest warrant. If the judge finds no probable cause or the time period is not complied with, the judge must release the defendant on recognizance. **An "ROR" is the appropriate remedy, not a dismissal of the charges.** If probable cause is found, the defendant is held to answer for the charges and the release conditions are determined. In difficult and complex cases, a reset for a PC hearing whereupon the arresting officers testify is possible,

however, the constraints upon holding an individual pursuant to Rule 3.133 must always be adhered to.

### **C. PRETRIAL RELEASE – SECTIONS 903.046, 903.047, 907.041 & RULE 3.131**

Pursuant to section 907.041, the legislative intent is to release a majority of criminal defendants until they are required to appear for trial via some sort of pretrial release i.e. ROR, Pretrial Services (PTS) or a cash bond. However, the intent is to also keep the community safe, therefore, in certain instances the defendant may be held or may be required to post a significant monetary bond. This section also addresses a presumption in favor of release with non-monetary conditions. Therefore, many defendants will be released with no monetary conditions under the supervision of “pretrial release services.” No person charged with a dangerous crime as defined in §907.041(4) shall be granted non-monetary pretrial release at a first appearance hearing.

When the court requires a monetary bond, the law indicates the setting of an excessive bond is the equivalent of setting no bond, and the remedy of *habeas corpus* relief is permitted. *See, e.g., Good v. Wille*, 382 So. 2d 408 (Fla. 4th DCA 1980). *Good* sets out the factors to be considered when determining the amount of bail. *See also Sueliman v. Jenne*, 935 So.2d 120 (Fla. 4th DCA 2006). However, a bond is not *per se* excessive or unreasonable because a defendant cannot afford to post it. *Dyson v. Campbell*, 921 So. 2d 692 (Fla. 1st DCA 2006).

Many defendants in County Court will “bond out” prior to a hearing on a “standard bond.” The standard bond is \$500 on second degree misdemeanors and \$1000 on first degree misdemeanors with several exceptions (i.e. \$1000 standard bond for DUI, \$1500 standard bond for battery). A “bail bond” is a three-party contract between the government, the criminal defendant, and a surety. The surety guarantees to the government the defendant will appear at any subsequent court proceedings. *See* Section 903.045; *See also, Pinellas County v. Robertson*, 490 So. 2d 1041 (Fla. 2d DCA 1986).

#### **1. CRITERIA & CONDITIONS**

The criteria for bail release is outlined in section 903.046 and Rule 3.131. The judge shall consider:

- a. the nature and circumstances of the offense charged;
- b. the penalty provided by law;
- c. the weight of the evidence against the defendant;
- d. the defendant's family ties;
- e. the defendant's length of residence in the community;
- f. the defendant's employment history;
- g. the defendant's financial resources;
- h. the defendant's mental condition;
- i. the defendant's past and present conduct, including criminal priors, previous flight to avoid prosecution, or failure to appear at court proceedings;
- j. the nature and probability of danger the defendant's release poses to the community;
- k. the source of funds used to post bail;
- l. whether the defendant is already on release pending resolution of another criminal proceeding or probation, parole, or other release pending completion of a sentence;
- m. The street value of any drug or controlled substance connected to or involved in the criminal charge;
- n. the nature and probability of intimidation and danger to victims;

- o. whether there is probable cause to believe the defendant committed a new crime while on pretrial release;
- p. the need for substance abuse evaluation and/or treatment
- q. any other facts the court considers relevant.

Pursuant to 903.047, as a condition of any form of pretrial release, the judge shall require:

- a. the defendant refrain from criminal activity of any kind; and
- b. the defendant refrain from contact with the victim.

The addition of other conditions is left in the discretion of the judge. *Hernandez v. Roth*, 890 So. 2d 1173 (Fla. 3d DCA 2004). For example, in a DUI case, the judge may impose restrictions on drinking and require counseling. *See, e.g., Parent v. State*, 900 So. 2d 598 (Fla. 2d DCA 2004) or even enter a No Drive Order. Also in cases of stalking, GPS monitoring may also be a good condition of any pre-trial release, as well as Stay Away Order etc.

Also of note, the confrontation clause is not implicated in bond hearings, as they are not “criminal prosecutions,” but are related only to the conditions of pretrial release. *Godwin v. Johnson*, 957 So.2d 39 (Fla. 1st DCA April 26, 2007).

## 2. MODIFICATION & REVOCATION

Pursuant to Rule 3.131(d)(2), the State may apply for modification or revocation of a defendant’s pretrial release conditions upon a showing of “**good cause**” and with at least three **(3) hours** of notice to defense counsel. In order to have good cause to modify or revoke a bond, the State must show a **change in circumstances** not made known to the first appearance judge. *See Keane v. Cochran*, 614 So. 2d 1186 (Fla. 4th DCA 1993); *See also, Montgomery v. Jenne*, 744 So. 2d 1148 (Fla. 4th DCA 1999); *Gadson v. Jenne*, 882 So. 2d 531 (Fla. 4th DCA 2004). A trial judge cannot *sua sponte* increase a defendant’s bond. *Fenton v. State*, 960 So.2d 12 (Fla. 4th DCA April 27, 2007). However, a trial judge may sua sponte revoke a defendants bond if he picked up a new charge for which PC was found. *See* section § 903.0471 which provides that “notwithstanding § 907.041 a court may, on its own motion, revoke pretrial release, and order pretrial detention if the court finds probable cause to believe that the defendant committed a new crime while on pretrial release.”

The constitutionality of this section was addressed in *Parker v. State*, 843 So. 2d 871 (Fla. 2003), and the Court held the statute constitutional. However, in order to deny reinstatement of pretrial release, the court must make a finding that there are no conditions of release that could reasonably protect the community or assure the presence of the defendant at trial. *See Daniels v. Jenne*, 847 So. 2d 1081 (Fla. 4th DCA 2003).

*See Alexander v. Judd*, 930 So.2d 847 (Fla. 2d DCA 2006) for clarification with regards to the Court’s holding in *Parker*. In *Alexander*, the Court found that a defendant’s new crime that formed a basis for revocation of pretrial release was not a basis for the court to impose a no-bond holding in the second case where the defendant had never been on any form of pretrial release in second case.

In *Barns v. State*, 768 So.2d 529 (Fla. 4th DCA 2000), the court remanded the defendant into custody without bond where the defendant committed new crimes while out on pretrial release.

In *Williams v. Spears*, 814 So.2d 1167 (Fla. 3d DCA 2002): the Court revoked the pretrial release for a first crime and refused any further pretrial release in first crime if defendant commits a new crime while out on pretrial release.

### 3. PRETRIAL DETENTION – SECTION 907.041 & RULE 3.132

The criteria for holding a defendant in custody pending trial is found in section 907.041(4) and in Rule 3.132. This section is applicable to misdemeanor charges only in extreme circumstances, usually because the defendant has continually violated terms of pretrial release.

#### D. ESTREATURE AND FORFEITURE OF BOND

##### **What is a surety bail bond?**

A surety bail bond (bail and bond often used interchangeably) is essentially a three-party contract among a criminal defendant (the principal), a bondsman (the surety), and the State of Florida (the obligee).

##### **What do all the parties to this contract get and what do they promise?**

Defendant: The defendant gets released from custody and promises to pay a premium to the bondsman.

Bondsman: The bondsman gets the defendant released from state custody and promises to produce the defendant at trial.

State of Florida: The State gets the defendant's presence at trial secured by the bondsman and promises to release the defendant into the bondsman's custody.

##### **What happens if the bondsman fails to perform its promise to produce the defendant?**

A bench warrant is issued and the *bond is "estreated" or "forfeited."* See Fl. Stat. §903.26(2)(b). If the defendant shows up later that same day, the judge may set aside the estreature. *Id.*

##### **What is a bond estreature or forfeiture?**

It is essentially a non-final judicial order instructing the bondsman to pay the amount of money promised to the Clerk of Courts. In contractual terms it is liquidated damages for the surety's breach.

##### **What happens after the bond is estreated?**

The defendant has 60 days following the estreature/forfeiture before it becomes "final." Fl. Stat. §903.26(3). This time period cannot be extended under any circumstances.

##### **When should the estreature be set aside but the surety remain liable on the bond?**

- 1) **Bench Warrant Set Aside.** Before a bench warrant is set aside, the defendant must have an affidavit from the surety stating that they agree to remain liable on the bond. If they do not and you let the judge simply set aside the bench warrant and bond estreature, you are essentially stipulating to an ROR (release on recognizance).
- 2) **No Notice.** Often the lawyer for a surety will claim that the bondsman "did not receive notice" under 903.26(1)(a). In misdemeanor cases in our jurisdiction, the Clerk of Courts keeps an electronic record, or "praecipe," of sending notice to the bondsman, defendant, and defense attorney if any. Invariably, review of a praecipe will demonstrate that the bondsman did in fact receive notice. However, an attorney for the surety will file an affidavit from the bondsman stating that they did not receive notice. This procedure is loosely based on a Third

DCA opinion which stated that sworn testimony concerning lack of notice was sufficient to rebut presumption of notice from praeceipe. *See Roberts v. Lando*, 652 So.2d 1226 (3<sup>rd</sup> D.C.A. 1995). The best practice is to set aside the estreature and reset the case for a report setting in 72 hours to produce the defendant in court. The surety is getting the statutory notice from the judge and should they not produce the defendant, the bond should be estreated again and lack of notice cannot be a reason for setting it aside.

### **When should the estreature be set aside and the bond canceled?**

Certain circumstances dictate that the bond estreature should not only be set aside, but that the bond be canceled. This is often referred to as discharging the forfeiture/estreature **and** surety. When this happens, the surety is no longer responsible for producing the defendant at future court hearings. The following is an exhaustive<sup>1</sup> list of reasons that an estreature and bond cancellation should occur.

- 1) **Failure to Appear Beyond D's Control.** A determination that it was impossible for the defendant to appear as required due to circumstances beyond the defendant's control. The potential adverse economic consequences of appearing as required shall not be considered as constituting a ground for such a determination.<sup>2</sup> This provision would likely apply to defendants held in Immigration Detention Centers.
- 2) **D Insane and Confined.**<sup>3</sup>
- 3) **Surrender or Arrest of Defendant.** Surrender or arrest of the defendant if the delay has not thwarted the proper prosecution of the defendant. The court shall condition a discharge or remission on the payment of costs and the expenses incurred by an official in returning the defendant to the jurisdiction.
  - a. **Not Enough to Locate.** It is not enough for the defendant to simply be located in another jurisdiction. Surety lawyers will often state that they have found the defendant in another state or country so the bond should be discharged. It should not! The statute is clear that the defendant must be **arrested**. The lawyer will then argue that they cannot arrest in another jurisdiction because that would be kidnapping. That is a lie! A bondsman needs to begin extradition procedures under the Uniform Criminal Extradition Act codified at §941. Only when the bondsman has the defendant arrested under this law, agrees to pay costs of extradition, and the State of Florida declines extradition should the estreature be set aside and the surety discharged. *See Allegheny v. State*, 850 So.2d 669 (4<sup>th</sup> DCA 2003); *Surety Continental v. Orange County*, 798 So.2d 837 (5<sup>th</sup> DCA 2001); *County Bonding v. State* 724 So.2d 131 (3d DCA 1998). \*Be aware that the remission and setting aside estreature language is different when attorneys attempt to use remission cases to support their setting aside of the estreature.
- 4) **Case is Closed.** If a case closes out the bond estreature should be set aside and the bond should be cancelled.
- 5) **D Arrested on Bench Warrant.** If the defendant is arrested on a bench warrant, the defendant will be either in custody, out on recognizance, or out on a new bond. In any of these cases, the old surety's bond estreature should be set aside.
- 6) **Pretrial Diversion.** An original appearance bond does not secure the presence of the defendant once he enters a Pretrial Diversion program including BOT, PTI, PTD.<sup>4</sup>
- 7) **Contract Law Applies.** Attorneys may present traditional common law contract arguments as a reason to discharge the estreature and surety. This often comes in the form of mistakes on the jail card "fraudulently inducing" a surety contract or the state increasing the severity

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<sup>1</sup> The discharge of a forfeiture shall not be ordered for any reason other than as specified herein. §903.26(6)

<sup>2</sup> 903.26(5)(a)

<sup>3</sup> 903.26(5)(b)

<sup>4</sup> §903.31(2)

of the charges after bond hearing. These can be legitimate arguments that justify cancellation of the contract.

### **What is Remission?**

Remission is essentially another chance for the surety to get back its money after the bond has been estreated and the money is deposited with the clerk. Remission is granted on a regressive scale calculated by how long the defendant has voluntarily absented himself. There are basically only two ways to get remission—the arrest/surrender of the defendant or the surety’s substantial attempt to have the defendant arrested.

### **Why do we care?**

- 1) If the bondsman is released from his obligation to pay the state the endorsed amount, he has no incentive to go find the defendant and bring him to justice. Witnesses become unavailable, evidence is lost, and cases get stale. Do not be lulled by a bondsman’s promise to remain liable on a defendant in bench warrant status. Unless there is a hearing to produce the defendant and re-estreat the bond—this promise is empty.
- 2) By promising to produce the defendant, failing to produce the defendant, and getting an estreature set aside, the bondsman is essentially cashing the premium with no attached risk.



## **CHARGING DOCUMENTS**

A prosecution in County Court may be by arrest affidavit (i.e. A-form), notice to appear, traffic citation, or information. Fla. R. Crim. P. 3.140. An information is prepared by the prosecutor while the arrest form, notice to appear, or traffic citation is prepared by the law enforcement officer. These documents all serve the same purpose, to advise defendants what charges are being brought against them. The charging document can either allege a violation of a local ordinance or a state law.

### **A. SUBJECT MATTER JURISDICTION**

The courts obtain subject matter jurisdiction over the prosecution of criminal offenses through the filing of charging documents. **Pursuant to Florida Statute Section 34.01**, the County Courts have subject matter jurisdiction over all misdemeanors, except those joined with a felony, violations of county and municipal ordinances, and traffic cases involving juvenile defendants. In addition, County Courts have jurisdiction over non-criminal traffic infractions if they arise out of the same set of facts as a criminal traffic violation. **Florida Rule of Traffic Court 6.130**

Issues regarding whether County Court has jurisdiction to hear a case may arise in two scenarios. First, officers may charge the defendant with multiple misdemeanor and felony counts of DUI. Second, the defendant may commit a non-traffic related felony and a misdemeanor DUI in the same criminal episode. **Section 26.012(2)(d)** provides that Circuit Courts have jurisdiction over “all felonies and all misdemeanors arising out of the same circumstances as a felony which is also charged.” **Section 34.01(1)(a)** provides that county courts “shall have original jurisdiction in all misdemeanor cases not cognizable by the circuit courts.”

### **CONSOLIDATION ISSUES**

*State v. Coble*, 704 So. 2d 197 (Fla. 4th DCA 1998): Defendant was charged by information in county court with misdemeanor DUI. Subsequently, defendant was charged with two felonies in circuit court, which arose out of the same incident as the misdemeanor DUI. The circuit court dismissed the county court misdemeanor DUI case for lack of jurisdiction, and the State appealed. In overturning the lower court’s decision, the *Coble* court held that the county court retained jurisdiction over the misdemeanor DUI even though felony charges had been filed. The 4th DCA reasoned, “where misdemeanor and felony charges arising out of the same circumstances have been filed in both county and circuit courts, the county court is not automatically divested of jurisdiction. Rather, a motion to consolidate by either party is required to divest the county court of jurisdiction.” *Id.* at D148. (citing *State v. Woodruff*, 676 So. 2d 975 (Fla. 1996)).

Once the Circuit Court grants a motion to consolidate, the County Court is divested of jurisdiction. *Heckard v. State*, 712 So.2d 1157 (Fla. 2d DCA 1998) (Defendant charged with felony DUI filed by information in circuit court and misdemeanor driving while license suspended filed by information in county court. Defendant filed a motion in circuit court to consolidate the charges. The circuit court conditionally granted the motion subject to the consent of the county court. The District Court of Appeal held that the Circuit Court had jurisdiction over both charges, and consent by the County Court was not prerequisite to exercising jurisdiction). *See also Coble, supra* (The 4th DCA held that “[c]onsent by the county court was not a prerequisite to the circuit court exercising its jurisdiction. Once Heckard’s motion to consolidate was acted on, the county court was divested of jurisdiction...”)

*Griffith v. State*, 5 Fla. L. Weekly 1 (Fla. 9th Jud. Cir. 1997): The *nolle prosequere* of felony charges has no effect on misdemeanor charges filed only in county court. In *Griffith*, a misdemeanor DUI charge was filed in county court against the Defendant, and a felony DUI charge was filed in the circuit court against the Defendant for the same single offense. The county court charge was never

dismissed, transferred or consolidated. The court held that the *nolle prosequere* of the felony charge of DUI in circuit court had no effect on the misdemeanor charge.

*State v. Witcher*, 737 So.2d 584 (Fla. 1st DCA 1999): The First District Court of Appeal held that **double jeopardy** prohibited the State from continuing to pursue felony charges in Circuit Court after defendant pleaded guilty to misdemeanor D.U.I. in County Court.

*State v. Hernandez*, 985 So.2d 1115 (Fla. 3<sup>rd</sup> DCA 2008): Where DUI charge was filed as misdemeanor in county court, state announced that it was filing felony information in circuit court, misdemeanors were transferred to circuit court, but state did not consolidate the misdemeanor with the felony or nolle prosequere the misdemeanor, county court retained jurisdiction and should have dismissed the misdemeanor DUI when the ninety-day speedy trial period expired -- Because a conviction for the current misdemeanor DUI is required to establish the crime of felony DUI after three previous misdemeanor DUI convictions, current felony DUI charge cannot be sustained -- Trial court erred in denying felony DUI charge based on expiration of speedy trial period in underlying misdemeanor DUI in county court.

## **B. ARREST AFFIDAVITS & INFORMATIONS**

When a police officer prepares an arrest affidavit, they swear the facts alleged are true to the best of their knowledge. The prosecutor in preparing a misdemeanor information must swear under oath the prosecution is instituted in good faith. However, in preparing a felony information the prosecutor must swear under oath the prosecution is instituted in good faith and certify sworn testimony was taken from a material witness with personal knowledge.

Practice Tip: when a case looks like it is more serious than a misdemeanor, take it to your CTA or an Assistant Chief. At that time, the a-form will be reviewed and it may be necessary to have a police officer, victim, or witness come in and conduct a pre-file conference, or PFC. A PFC is the way that we get the sworn testimony necessary to bind a case up from a misdemeanor to a felony.

**\*It is very important that every time a PFC is conducted, the individual from whom testimony is taken is always put under oath.**

### **1. PENALTIES**

There is a distinction between prosecution by arrest affidavit and prosecution by information. When prosecution occurs by arrest affidavit, the State is prosecuting a violation of a local ordinance. That is, Miami-Dade County and all its municipalities have enacted an ordinance incorporating and adopting State Law misdemeanors by reference and prohibiting violation of those laws. This ordinance is called an “**enabling code**.” (e.g. Dade County Code Section 21-81; City of Miami Code Section 37-1) In addition, the County and municipalities have enacted other ordinances as violations of law.

The penalties for violation of a municipal ordinance are limited to second-degree misdemeanor penalties (e.g. \$500 fine, 60 days incarceration, and 6 months probation), regardless of the degree of the equivalent State statute. **Therefore, a defendant found guilty at trial of having committed a first-degree misdemeanor under State statutes cannot receive first-degree penalties (e.g. \$1,000 fine, 1 year incarceration, and 1 year probation) at sentencing if the prosecution occurred by arrest affidavit. The only way the defendant can be given such penalties is if the prosecution was for a State Law violation alleged by information.** Also, effective July 1, 2010 HB 1301, which can be found in Ch. 2010-112, Laws of Florida, amends s. 125.69(1), to authorize a county to

specify by ordinance that a violation of any provision of a county ordinance imposing standards of conduct and disclosure requirements as provided in s. 112.326 is punishable by a fine not to exceed \$1000 or a term of imprisonment in the county jail not to exceed 1 year.

## 2. PROCEDURAL RULES

As of July 1, 2004, the Miami-Dade County Police Department and the various Municipalities in the County changed the manner in which misdemeanor criminal offenses are charged on an arrest affidavit. The police agencies now charge most offenses by state statute without using an enabling code or without using an ordinance violation. Therefore, pursuant to **Florida Rule of Criminal Procedure 3.140(2)**, if the defendant was arrested and charged with a criminal misdemeanor by state statute, the State must file an information before the case can be closed.

However, one narrow exception is created in **Florida Rule of Criminal Procedure 3.170(a)**. Pursuant to Florida Rule of Criminal Procedure 3.170(a), the State is not required to file an information at a **First Appearance Hearing** in order to allow the Defendant to plea to a misdemeanor. Rule 3.170(a) permits the Court to take a plea on a sworn complaint in a misdemeanor charge at first appearance, and the Judge may enter judgment and sentence without the necessity of any further formal charges being filed. A review of the relevant portions of the rules reveals the following:

**Rule 3.140 Indictments; Informations:** (a) Methods of Prosecution. (2) In county courts prosecution SHALL be solely by INFORMATION, except:

prosecution in county courts for violations of municipal and metropolitan ordinances may be by affidavit (i.e. arrest form) or notice to appear pursuant to rule 3.125 (i.e. arrest form when defendant is given a promise to appear)

(g) Signature, Oath, and Certification; Information. An information charging the commission of a misdemeanor shall be signed by the State Attorney, under oath stating his or her GOOD FAITH in instituting the prosecution. No objection to an information on the ground that it was not signed or verified shall be entertained after the defendant pleads to the merits.

(m) Defendant's Right to Copy of Information. Each person who has been informed against for an offense SHALL, on application to the CLERK, be furnished a copy of the information, at least 24 hours before being required to plead to the information. A failure to furnish a copy shall not affect the validity of any subsequent proceeding against the defendant if he or she pleads to the information.

**Rule 3.170 Pleas: (a) Types of Plea; Court's Discretion.** If the sworn complaint charges the commission of a misdemeanor, the defendant may plead guilty to the charge at the first appearance hearing under rule 3.130, and the judge may thereupon enter judgment and sentence without the necessity of any further formal charges being filed.

Therefore, the prosecutor must carefully review the arrest affidavit to determine what must be filed with the court for proper prosecution.

## 3. TIME FOR FILING & AMENDMENTS

Pursuant to **Florida Rule of Criminal Procedure 3.134**, the prosecutor must file formal charges on in-custody defendants by information **30 days** from the date on which the defendant was arrested or

served with a capias. If the State fails to timely file charges, the remedy is to automatically **release the defendant on his own recognizance**, not dismiss the case.

Prior to trial, an information may be amended by the prosecutor without leave of court. *State v. Belton*, 468 So. 2d 495 (Fla. 5th DCA 1985); *State v. Stell*, 407 So. 2d 642 (Fla. 4th DCA 1981). *Belton* also stands for the proposition that an information does not have to specify a twenty-four hour period within which the crime occurred. It can allege a range of dates during which the incident took place. When the State amends the information prior to trial, dismissal is not an appropriate remedy. *Yelvington v. State*, 664 So. 2d 262 (Fla. 1st DCA 1995). However, once trial commences, the State cannot amend the information without leave of court, and the court cannot grant leave to amend the information during trial if doing so would prejudice the rights of the defendant. *State v. Clements*, 903 So. 2d 919 (Fla. 2005); *See also, State v. Anderson*, 537 So. 2d 1373 (Fla. 1989)(when procedural irregularities or technical defects are made in an information, and those problems have no bearing on the substantive rights of the parties, courts should require a showing of prejudice before dismissing the charge).

The court may allow amendments even after the beginning of trial, if there is **no prejudice** to the defendant. *Young v. State*, 632 So. 2d 245 (Fla. 3d DCA 1994) (state allowed to amend information after jury sworn, to allege an alternative charge). *See also, M.F. v. State*, 583 So. 2d 1383 (Fla. 1991)(State may amend timely filed information which improperly alleges elements of offense to correct clerical type errors even after applicable statutory period has elapsed, provided that the amendment was not intended to actually change the substantive charge and did not prejudice the rights of the accused to present a defense and get a fair trial). The State will be permitted to amend when the prejudice alleged is mere speculation. *State v. Ford*, 641 So. 2d 508 (Fla. 5th DCA 1994).

In *Bell v. State*, 930 So.2d 779 (Fla. 4<sup>th</sup> DCA 2006), the State had filed a series of Informations, and prior to trial the State indicated it was going to proceed on one information rather than the last one filed. The court noted that because this did not cause any prejudice to the defense, any error was deemed a procedural irregularity.

### C. TRAFFIC CITATIONS

**Florida Statute § 316.650**, governs the use of traffic citations in the prosecution of criminal traffic cases. *See also, Hurley v. State*, 322 So. 2d 506 (Fla. 1975). A traffic citation may be used as a charging document. In addition, if prosecution of a criminal traffic offense is by information, a traffic citation must also be prepared. See Section 316.650(10).

A uniform citation is always necessary because the citation is used to report the case disposition to Tallahassee and to impose a driver's license suspension sanction. In addition, **Florida Rules of Traffic Court Rule 6.165** states a criminal traffic prosecution shall be by citation or information, and the prosecutor must prepare a citation if the officer fails to submit a citation.

### D. PLEADING IN THE ALTERNATIVE

**Florida Rule of Criminal Procedure § 3.140(k)(5)** allows pleading in the alternative or disjunctive "when an offense may be committed by doing one or more of several acts, or by one or more of several means, or with one or more of several intents or results." *See Grant v. State*, 622 So. 2d 186 (Fla. 3d DCA 1993); *State v. Jagroo*, 41 Fla. Supp. 2d 7 (17th Jud. Cir. 1990)(discusses this issue in a DUI context); *Cooper v. State*, 429 So. 2d 833 (Fla. 3d DCA 1983); *Hall v. State*, 261 So. 2d 521 (Fla. 3d DCA 1972); *Weinstein v. State*, 348 So. 2d 1194 (Fla. 3d DCA 1977)

It is proper to allege an alternative method of committing a crime where the state anticipates there will be some evidence of the alternative method. *See Middleton v. State*, 426 So. 2d 548 (Fla. 1983); *but see, Johnson v. State*, 333 So. 2d 505 (Fla. 1st DCA 1976)(state required to choose which of two repugnant and inconsistent counts it would rely upon for conviction).

**E. JOINDER (Fla. R. Crim. P. 3.150); CONSOLIDATION (Fla. R. Crim. P. 3.151); & SEVERANCE (Fla. R. Crim. P. 3.152)**

**Rule 3.150** outlines the criteria for joinder of offenses and defendants, while **Rule 3.151** speaks to the consolidation of related offenses. The distinction between joinder and consolidation is that joinder is accomplished unilaterally by the State whereas consolidation is achieved through exercise of judicial discretion. However, joinder can be subject to judicial review by a defense motion for severance. *Sharif v. State*, 436 So. 2d 420 (Fla. 4th DCA 1983).

The severance of offenses and defendants is governed by **Rule 3.152**. The defendant has a right to sever *charges* if: (1) two or more offenses are improperly charged in a single information OR (2) two or more related offenses are charged in a single information and the defendant shows that the severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense. The court shall order a severance of *defendants* on motion of the state or a defendant if: (1) before trial, there is a showing that the order is necessary to protect the right to speedy trial; or (2) before or during trial, there is a showing that the order is appropriate to promote a fair determination of the guilt or innocence of the defendants.

The court *shall* grant severance if the standard in Rule 3.152 is met. In addition, several cases require severance.

**1. SEVERANCE OF CHARGES**

*Crossley v. State*, 596 So. 2d 447 (Fla. 1992): Trial court erred in refusing to sever trial of robbery of cashier at food store from that of robbery and kidnapping of off-duty waitress in parking lot, even though robberies were committed within a few hours of each other and only a few miles apart and defendant was arrested after second robbery while driving the first victim's car; episodes were entirely independent and there was no evidence that defendant used first victim's car to perpetrate second robbery. This case was distinguished by *Gonzalez v. State*, 9 So. 3d 725,727 (Fla. 4<sup>th</sup> DCA 2009) which stated that where the offenses are clearly connected in an episodic sense and there is no showing that severance of the properly joined offenses was necessary to promote a fair determination of the defendant's guilt or innocence, a trial court does not abuse its discretion by denying a motion to sever. (Citing *Fotopoulos v. State*, 608 So.2d 784, 790 (Fla. 1992)).

*State v. Conde*, 743 So. 2d 78 (Fla. 3d DCA 1999): Defendant's six murder charges arising from six murders by strangulation approximately two to three weeks apart could not be joined or consolidated, even though the bodies were discovered in the same vicinity; although similar, the murders were not connected and were distinct in time.

*Bateson v. State*, 761 So. 2d 1165 (Fla. 4<sup>th</sup> DCA 2000): Defendant was not entitled to severance of charge of store burglary from charges of residential burglary and grand theft, as theft of the gun from residential burglary circumstantially tied defendant to the burglary of the store and vice versa; stolen gun in a black backpack identified as belonging to defendant was found at scene of defendant's escape from the store burglary, and gunshots fired in store were fired by that gun.

*Smith v. State*, 776 So. 2d 957 (Fla. 3d DCA 2001): Trial court acted within its discretion in refusing to sever two counts of unlawful possession of a firearm by a convicted felon; defendant's possession

of two firearms within short period of time of each other, transported in same vehicle within limited area, could properly be viewed as connected or related transactions.

*Roberts v. State*, 808 So. 2d 1266 (Fla. 4<sup>th</sup> DCA 2002): Defendant who stole vehicle from used car lot, drove vehicle to insurance agency was not entitled to severance of charges of grand theft of vehicle and attempted robbery of agency.

*Tucker v. State*, 884 So.2d 168 (Fla. 2d DCA 2004): It is an abuse of discretion to refuse to sever a charge of possession of a firearm by a convicted felon from other charges involving a firearm, even if the defendant asked for the severance during trial.

*Charles v. State*, 79 So. 3d 233 (Fla. 4<sup>th</sup> DCA 2012): There was no error when the trial court denied the motion to sever counts of sexual battery (very prejudicial) and the more mundane credit card theft. In particular, the two crimes provide “the entire context out of which the criminal action occurred.” [citation] The counts explained how the defendant came into possession of the credit cards and placed both victim and defendant in the same area.

## 2. SEVERANCE OF DEFENDANTS

A severance of defendants may be ordered when it is appropriate to promote a fair determination of the guilt or innocence of the defendants. A severance is not necessary when the evidence is “presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence.” *Coleman v. State*, 610 So. 2d 1283, 1285 (Fla. 1992). In *Miller v. State*, 756 So. 2d 1072 (Fla. 4<sup>th</sup> DCA 2000), the Defendant was entitled to severance of aggravated battery charge from trial of the co-defendant where the apology to victim by the co-defendant, which acknowledged guilt of the crime and offered to pay the victim to drop the charges, undermined the defendant’s theory of self-defense.

## F. STATUTE OF LIMITATIONS

**Section 775.15** provides for the time limitations for filing criminal charges. In the case of a **1<sup>st</sup> degree misdemeanor**, prosecution must be commenced within **2** years after the offense is committed. In the case of a **2<sup>nd</sup> degree misdemeanor**, prosecution must be commenced within **1** year after the offense is committed. In the case of non-criminal violations (e.g. fatality case), prosecution must be commenced within **1** year after the offense is committed. In the case of a felony of the **1<sup>st</sup> degree**, prosecution must be commenced within **4** years after the offense is committed, and generally in all other felonies the statute of limitations is **3** years.

An offense is committed when every element has occurred; or at the time when a course of conduct or the defendant's complicity is terminated, and the period begins to run on the day after the offense is committed (e.g. *Rodriguez-Cayro v. State*, 828 So. 2d 1060 (Fla. 2d DCA 2002)(Stalking is a continuing course of conduct crime. The statute of limitations does not begin to run until the course of conduct ends.) A prosecution is commenced when the information is filed, and process must be executed without unreasonable delay. If an information is dismissed because of a defect in its form after the time period has expired, the State may refile within 3 months of the dismissal.

The limitation period does not run while the defendant is continuously absent from the State or has no reasonably ascertainable place of abode or work within the State. However, in *Netherly v. State*, 804 So 2d 433 (Fla. 2d DCA 2001), the court indicated the State must show that the absence prevented or delayed prosecution. *But see, Pearson v. State*, 867 So. 2d 517 (Fla. 1<sup>st</sup> DCA 2004)(creating a conflict by holding the 3 year extension applies sole on the defendant’s absence). Also, section 775.15(5) indicates this "tolling" shall not extend the limitations period more than 3 years.

## **ARRAIGNMENT & PLEAS**

**Florida Rule of Criminal Procedure 3.160(a)** articulates the purpose of arraignment, which is to advise the defendant of the charges in open court and allow the defendant to enter a plea to the charges. However, this requirement may be waived by the defendant.

**Pursuant to Rule 3.160(m)**, the defendant, **upon application to the clerk**, shall be given a copy of the information **at least 24 hours before** being required to plead to the charges. If the defendant is being prosecuted by arrest affidavit, promise to appear or traffic citation, the defendant is given a copy of the charging document by the law enforcement officer at the time of the offense.

### **A. WRITTEN PLEA**

If the defendant is represented by counsel, defense counsel may file a written plea of not guilty and thereby waive formal arraignment. The filing of the written plea waives arraignment and the defendant's presence at arraignment. *See, State of Florida ex rel. Evans v. Chappel*, 308 So. 2d 1 (Fla. 1975). However, the court may require the defendant's presence for arraignment if the court is not arbitrarily imposing the presence requirement. *See, Tellis v. State*, 779 So. 2d 352 (Fla. 2d DCA 2000); *but see Walters v. State*, 905 So.2d 974 (Fla. 1st DCA 2005)(declining to extend *Tellis* to other court hearings)

**Pursuant to Rule 3.160(b)**, neither a failure to arraign nor an irregularity in the arraignment shall affect the validity of any proceeding if the defendant pleads to the information on which the defendant is to be tried or proceeds to trial without objection. Also, a defendant's actions may constitute a waiver of the arraignment. *See Byrd v. State*, 380 So. 2d 457 (Fla. 1st DCA 1980) (defendant waives right to arraignment or to an irregularity in the arraignment if he goes to trial without objecting); *Hall v. State*, 187 So. 392 (Fla. 1939) (trial before defendant is formally arraigned was not error where defendant was aware of the charge and announced ready for and participated in trial)

### **B. RIGHT TO COUNSEL OR SELF-REPRESENTATION**

An indigent defendant is entitled to counsel when the State certifies jail or when the Court fails to issue an order of no incarceration (commonly referred to as an "O.N.I."). When the defendant is not entitled to court appointed counsel or waives this right, the defendant is entitled to self-representation.

#### **1. APPOINTMENT OF COUNSEL**

A defendant who is charged with a misdemeanor punishable by possible imprisonment is entitled to counsel unless the judge timely issues a **written order** guaranteeing the defendant will never be incarcerated as a result of the conviction. *See Alabama v. Shelton*, 535 U.S. 654 (2002); *See also, Case v. State* 865 So. 2d 557 (Fla. 1<sup>st</sup> DCA 2003); Rule 3.111(a) & 3.160(e).

**PRACTICE TIP:** If the defendant retains private counsel or has counsel appointed to him after an O.N.I. is entered, the State should move to strike the order.

#### **2. FARETTA INQUIRY**

When a defendant elects self-representation, the court must make a *Faretta* inquiry. *See Faretta v. California*, 422 U.S. 806 (1975). The focus of a *Faretta* colloquy under Rule 3.111 is whether a defendant is competent to waive the right to counsel, not whether he is competent to provide an adequate defense. *See State v. Bowen*, 698 So. 2d 248 (Fla. 1997) The court is required to conduct a *Faretta* inquiry to ensure the decision to waive counsel is knowing and intelligent. *See Gillyard v.*

*State*, 704 So. 2d 165 (Fla. 2d DCA 1997), *see also* *Watkins v. State*, 959 So.2d 386 (Fla. 2d DCA 2007) (setting aside a plea after defendant discharged his lawyer, but the court failed to perform a *Faretta* inquiry before accepting the defendant's plea). A proper *Faretta* inquiry consists of advising the defendant as to the dangers and disadvantages of self-representation. An appendix in the special concurrence of *Gillyard* provides a list of fifteen questions the court should ask the defendant. These questions include inquiries such as whether the defendant has ever studied law, represented themselves before, and if they know what subjects like *voir dire* and the Rules of Criminal Procedure are. *Gillyard* at 168-69.

### C. TIME TO PREPARE FOR TRIAL

**Pursuant to Rule 3.160(d)**, the defendant is entitled to a **reasonable time** in which to prepare for trial. The rule does not provide for a specific time period. *See, e.g., State v. Calle*, 560 So. 2d 355 (Fla. 5th DCA 1990). The purpose is to allow the defendant sufficient time to prepare a defense to the substantive charge. *See, Beshaw v. State*, 586 So. 2d 1284 (Fla. 3d DCA 1991)(abrogated on other grounds)(the Court held that failure to arraign the defendant until during the 15-day speedy trial window period is not improper); *But see, Johnson v. State*, 439 So. 2d 342 (Fla. 2d DCA 1983)(The State filed an amended information enlarging the time frame for the charged crime from sixty days to over one year. The defendant was arraigned and tried the same day. The court held that the defendant was not afforded an opportunity to properly prepare a defense because the amendment was one of substance rather than form.)

### D. RIGHT TO A JURY TRIAL

There are four categories of crimes for which a trial is guaranteed by the United States Constitution: 1) crimes that were indictable at common law; 2) crimes that involve moral turpitude; 3) crimes that are *malum in se* or inherently evil and 4) crimes that carry a maximum penalty of more than six months. *See Whirley v. State*, 450 So.2d 836 (Fla. 1984).

Pursuant to § 918.0157, a defendant does not have a right to a jury trial if (1) the punishment he/she will receive is for a term of six months or less; (2) the court announces that in the event of a conviction, a sentence of imprisonment will not be imposed; and (3) the defendant will not be adjudicated guilty ***unless a right to a trial by jury for such offense is guaranteed under the State or Federal Constitution.***

Therefore, a defendant may still have a right to trial by jury even if the crime is punishable by less than six months, unless the State certifies a withhold of adjudication, and the judge signs a no jail order. Even if a withhold is certified and the ONI is signed, the defendant cannot be forced to proceed to a bench trial, and still has a right to a jury trial, if it is an offense for which the defendant is guaranteed such a right under the State or Federal Constitution.

### E. PLEAS & NEGOTIATIONS

The ultimate responsibility for sentencing a defendant rests with the judge. However, the prosecuting attorney may make **recommendations** in sentencing. Rule 3.171(b). The prosecutors' responsibilities in plea negotiations are outlined in Rule 3.171(b). The prosecuting attorney **may**:

- (1) abandon other charges; or
- (2) make a recommendation, or agree not to oppose the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the trial judge; or
- (3) agree to a specific sentence; and
- (4) consult with the victim, investigating officer, or other interested persons and advise the trial judge of their views during the course of plea discussions.



**NOTE:** The Florida Constitution Section 16 and Fla. Stat. Section 921.143 affords all victims of crime **a right to be heard in the proceedings.**

In the course of plea negotiations, a prosecutor **shall** apprise the trial judge of all material facts known to the attorney regarding the offense and the defendant's background prior to acceptance of a plea by the trial judge; and maintain the record of direct discussions with a defendant who represents him or herself and make the record available to the trial judge upon the entry of a plea arising from these discussions.

The Court is never bound in sentencing by negotiations between the State and defense counsel. *See, Davis v. State*, 308 So. 2d 27 (Fla. 1975).

A defendant's plea is governed by Florida Rules of Criminal Procedure 3.170 and 3.172. Rule 3.170 describes types of pleas, when a plea may be withdrawn, and when a plea may be vacated, and Rule 3.172 governs the acceptance of guilty or no contest pleas and the procedures that must be followed by a judge in the plea colloquy.

### **VINDICTIVE SENTENCING BY THE COURT**

In *Wilson v. State*, 845 So. 2d 142, 156 (Fla. 2003), the Supreme Court reaffirmed that appellate courts should look at the *totality of the circumstances* when determining whether a defendant's constitutional right to due process was violated by the imposition of an increased sentence after unsuccessful plea negotiations that include the trial court's participation. The Court refined its earlier holding in *State v. Warner*, 762 So. 2d 507 (Fla. 2000), stating:

Judicial participation in plea negotiations followed by a harsher sentence is one of the circumstances that, along with other factors, should be considered in determining whether there is a "reasonable likelihood" that the harsher sentence was imposed in retaliation for the defendant not pleading guilty and instead exercising his or her right to proceed to trial. The other factors that should be considered include but are not limited to: (1) whether the trial judge initiated the plea discussions with the defendant in violation of *Warner*; (2) whether the trial judge, through his or her comments on the record, appears to have departed from his or her role as an impartial arbiter by either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; (3) the disparity between the plea offer and the ultimate sentence imposed; and (4) the lack of any facts on the record that explain the reason for the increased sentence other than that the defendant exercised his or her right to a trial or hearing.

The Florida Supreme Court held that "judicial involvement must be limited to minimize the potential coercive effect on the defendant, to retain the function of the judge as a neutral arbiter, and to preserve the public perception of the judge as an impartial dispenser of justice. The trial court must not initiate a plea dialogue; rather, at its discretion, it may participate in such discussions upon request of a party." *Warner* at 509. The remedy for a finding of vindictive sentencing is to resentence the defendant by a different judge. (*Warner* has been overruled in part by *State v. VanBebber*, 848 So.2d 1046 (Fla. 2003); but not for the propositions cited in this manual).

## 2. RESERVING DEFENDANT'S RIGHT TO APPEAL AFTER A PLEA

The defendant's ability to appeal a ruling after a plea exists in limited circumstances, and is known as an *Ashby* plea. In *State v. Ashby*, 245 So. 2d 225 (Fla. 1971), the Supreme Court held that a defendant may plead no contest conditioned on the right to preserve for appellate review a question of law. The Court subsequently narrowed that holding in *Brown v. State*, 376 So. 2d 382, 384 (Fla. 1979), when it held that "an *Ashby nolo* plea is permissible only when the legal issue to be determined on appeal is **dispositive** of the case."

An issue is dispositive only if, regardless of the appellate court's ruling, there will be no trial of the case. See *Vaughn v. State*, 711 So. 2d 64 (Fla. 1st DCA 1998). The *Vaughn* court stated that the correct legal test of whether the issue is dispositive is whether the state would have been able to proceed to trial without that evidence and not whether the evidence that is left might have convinced a jury. Pleading to a criminal charge while reserving the right to seek appellate review of a crucial ruling avoids an unnecessary trial. *State v. Ashby*, 245 So. 2d 225 (Fla. 1971).

## 3. VACATING A PLEA

Pursuant to **Rule 3.850**, under limited circumstances, a defendant may move to vacate, set aside, or correct a sentence. The rule provides a time period of two (2) years after the judgment and sentence are final. In addition, the 3<sup>rd</sup> DCA has determined that a plea may be vacated, "upon a showing of prejudice or manifest injustice". *State v. Evans*, 705 So. 2d 631 (Fla. 3d DCA 1998). However, vacating a plea is not proper simply because a plea colloquy was insufficient. "If the claim of innocence is meritless, or if, notwithstanding the claim of innocence, the defendant voluntarily and intelligently entered a plea of convenience, there would be no prejudice or manifest injustice."

**You must bring all motions to vacate to the attention of an Assistant Chief or the Chief of County Court as soon as possible.**

## F. COMPETENCY

Competency refers to the defendant's state of mind or mental condition after arrest and throughout the criminal proceedings against the defendant. All defendants are presumed to be sane at the time of a criminal act and competent to proceed to trial or sentencing. The exception to the defendant's presumption of competency is when the defendant has been previously adjudicated not guilty by reason of insanity or found incompetent to proceed to trial or sentencing. The defendant is then presumed incompetent until he/she has been judicially restored to competence.

### 1. Procedure for Raising Competency – Rule 3.210

Competency of the defendant may be raised by the court, defense counsel or the state when there is reasonable ground to believe that the defendant is not mentally competent to proceed. Once the issue of competency has been raised, the judge **must** immediately order an examination of the defendant. The judge must order no more than three evaluations by mental health experts and no fewer than two evaluations. The defendant can at no time waive the inquiry into competence. Once the issue has been raised, the court must address the issue. *Pate v. Robinson*, 383 U.S. 375 (1966).

Pursuant to 3.210(b), a hearing must be set within 20 days of the filing of the motion to determine the defendant's mental condition. The court must appoint experts prior to this hearing. The court may order a defendant who is not in custody to appear at a designated place for an evaluation. If the defendant will not submit to the ordered evaluation, the court may order the defendant be taken into custody to determine competency.

## **2. Scope of Examination and Reports – Rule 3.211**

The standard for competency is whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the pending proceedings. *See Pickles v. State*, 976 So. 2d 690 (Fla. 4th DCA 2008). Pursuant to § 3.211 (a)(2), examining experts shall include in their written report:

- appreciate the charges or allegations
- appreciate the range and nature of possible penalties
- understand the adversary nature of the legal process
- disclose to counsel facts pertinent to the proceedings at issue
- display appropriate courtroom behavior
- testify relevantly
- any other factors deemed relevant by the expert
- some experts will also include ability to return to competency

Fla. Stat. § 3.211(e) makes clear that the competency evaluations can only be used for the limited purpose for which they are created. However, if the defendant uses the reports for any other reasons, then in accordance with Fla. Stat. § 3.211(2), the use of the reports is governed by the rules of evidence.

## **3. Hearing and Disposition**

Once you have read the evaluations of the court appointed experts, a number of situations may occur. If both evaluations come back finding the defendant incompetent, you can stipulate to the findings of incompetency in the experts' written reports. If one evaluation comes back finding the defendant incompetent and one comes back finding the defendant competent, the State does not stipulate to incompetency. Remember, there is a presumption of competency. For the State to stipulate, two evaluations must come back finding the defendant incompetent.

Note: The court may ask you in this situation if you would like another evaluation ordered due to the differing findings. The State **does not** order these evaluations. At this point it is the State's position that there is a presumption of competence. If the defense or judge wants to order another evaluation, the State will take that into consideration, but the State by no means orders the evaluation. There may be a situation where two evaluations come back incompetent but a party does not stipulate to incompetence where there is only evaluation stating that the defendant is incompetent. In this case a competency hearing under Rule 3.212 is set which requires evidence heard through testimony from the appointed experts.

## **4. After Defendant is Deemed Incompetent**

Fla. Stat. § 3.212(d) makes clear what happens after a defendant is deemed incompetent. In a misdemeanor case, the court has one year of jurisdiction. Unlike the situation in a felony case, a defendant cannot be committed to a forensic hospital. Consequently, it is appropriate to develop a conditional release plan for the defendant.

The AOC, or Administrative Office of Courts should be contacted with regards to the defendant's conditional release plan. They will help in this process. The defendant should report back to the court on a regular basis with updates as to his or her wellbeing. Remember, the ultimate goal is to restore the defendant to competency.

It is important to think about the charge when developing a conditional release plan for the defendant. For example, if the defendant has been charged with drinking or driving, it is appropriate to ask for a no drive order. If the doctors who evaluate the defendant determine that he or she would benefit from substance abuse treatment is appropriate to ask for such treatment, and so on.

#### **5. Continuing Incompetency**

Pursuant to Rule 3.213(a), at any time after one (1) year on a misdemeanor case after determining the defendant incompetent, the court, after hearing, shall dismiss the charges if the defendant remains incompetent to proceed to trial. This is a court dismissal without prejudice. It is NOT a nolle prosequere.

## **DISCOVERY - RULE 3.220**

The purpose of discovery in criminal cases is “to avail the defense of evidence known to the state so that convictions [will] not be obtained by the suppression of evidence favorable to a defendant, or by surprise tactics in the courtroom.” *Cooper v. State*, 336 So. 2d 1133, 1138 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977).

Discovery is also intended to assure a fair trial to a defendant, *but it does not require the State to investigate or prepare the defendant’s case*. The defense must exercise due diligence. *State v. Coney*, 272 So. 2d 550, 553 (Fla. 1st DCA 1973)(notice that there is no reversible error if the information furnished to the defense is wrong because another state agency made an error). The discovery process is not intended to provide defendants with an opportunity to “create” evidence (e.g. misidentifications). *See State v. Kuntsman*, 643 So. 2d 1172 (Fla. 3d DCA 1994).

There is no general constitutional right to discovery. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The scope of the State’s discovery obligation is enumerated in Fla. R. Crim. P. 3.220(b)(1)-(4). A Defendant is only entitled to discovery if the Defendant “formally” invokes discovery by filing a “Notice of Discovery” **or** if the Defendant informally invokes discovery, without filing a notice, by participating in the discovery process. A Defendant can informally participate in discovery by taking the deposition of any person, or knowingly or purposely sharing the discovery obtained by a codefendant.(e.g. *Henderson v. State*, 745 So.2d 319 (Fla. 1999)(the Court found the defendant informally participated in discovery by making a public records request of the police agency) (Depositions in Misdemeanor cases are not a matter of right and must be motioned for and can only be granted upon “good cause shown”, *See Section B infra*).

Once the Defendant invokes discovery, the State has 15 days to comply with the demand. Once the State initially fulfills its discovery obligations, it is not then required to provide discovery to every attorney that subsequently represents the Defendant. In addition, the State has no duty to obtain documents or investigate the Defendant’s case for him. *See State v. Smith*, 641 So. 2d 1319, 1322 (Fla. 1994); *Wuornos v. State*, 644 So.2d 1000, 1006 (Fla. 1994); *State v. Medina*, 466 So. 2d 1046 (Fla. 1985)

That is, the State is not required to “make a complete and detailed accounting of the defense of all police investigatory work on a case.” *Spaziano v. State*, 570 So. 2d 289 (Fla. 1990) (citing *Moore v. Illinois*, 408 U.S. 786, 795 (1972)). Similarly, when testimony for an officer is given, the Florida Supreme Court has recognized there is no discovery violation when an officer testified regarding matters unknown by the defense, where the defendant deposed the witness and defense counsel failed to ask the pertinent questions regarding the officer’s involvement in the case. *See Street v. State*, 636 So. 2d 1297 (Fla. 1994);

### **A. PROSECUTOR’S OBLIGATION UNDER - RULE 3.220(b)**

The scope of the State’s discovery obligation is enumerated in Rule 3.220(b)(1)-(4). Within **15 days** of service of the demand, the prosecutor **shall** serve a **written** discovery exhibit disclosing to the defendant and permitting him to *inspect, copy, test, and photograph* the enumerated items within the State’s **possession or control**. Therefore, the prosecutor must disclose that the material exists and allow review, but does not have to provide the copies. *See State v. Williams*, 678 So. 2d 1356 (Fla. 3d DCA 1996).

Issues often arise when the State fails to provide discovery in a timely fashion. The most commonly sought remedy is a State-charged continuance, thus causing a delay in the case while the defendant’s speedy trial rights remain intact. Generally, the defendant has to assert a claim to the discovery

material not provided in a manner consistent with genuinely attempting to secure them for trial. That is to say, a State continuance charged without the defendant filing motions to compel should be denied. The defendant must also show prejudice by not receiving discovery. *State v. Guzman*, 697 So. 2d 1263, 1264 (Fla. 3d DCA 1997); *Rodriguez v. State*, 933 So. 2d 1263 (Fla. 3d DCA 2006).

None of these cases, however, relieve the prosecutor's obligation for discovery. They simply limit the remedy for a failure to provide it.

## 1. WITNESSES

The State must provide the **names and addresses** of all persons **known** to the prosecutor to have any information which may be relevant to the offense, any defense, or similar fact evidence, not just those witnesses the State intends to call at trial. The witnesses shall be **categorized** as "**Category A, B, or C**" witnesses. See 3.220(b)(1)(A)(i)-(iii). The State and defense have a duty to disclose witnesses as soon as they become aware of them, not when they are able to locate the witness. *Cooper v. State*, 336 So. 2d 1133 (Fla. 1976); *Thompson v. State*, 565 So. 2d 1311 (Fla. 1990).

Category A witnesses include **eye witnesses, alibi witnesses, witnesses present for a defendant's or codefendant's statement, investigative officers, Brady witnesses, and child hearsay witnesses**. In addition, **expert witnesses** must be disclosed and categorized as "Category A" witnesses, and under 3.220(b) (1)(J) the State must provide "reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons." The State also has a duty to disclose **rebuttal witnesses**, as "Category A" witnesses, whom they can reasonably anticipate. See *Lucas v. State*, 376 So. 2d 1149 (Fla. 1979); *State v. Schopp*, 653 So. 2d 1016 (Fla. 1995); *Thompson v. State*, 565 So. 2d 1311 (Fla. 1990).

Generally, there is no duty to disclose the identity of a **confidential informant (CI)**, unless the informant is to be produced at a hearing or trial, or unless the failure to disclose will infringe upon a constitutional right of the defendant. Fla. R. Crim. P. 3.220(g)(2). However, it must be revealed during discovery that a confidential informant is involved, as well as any material or information provided by the informant. This requirement is qualified by the understanding that when a confidential informant merely supplies police with information establishing probable cause for search, disclosure of that informant's identity is not required. See *State v. Mashke*, 577 So. 2d 610 (Fla. 2d DCA 1991).

If the defense moves for disclosure of the informant's identity, the defendant has the initial burden of demonstrating he "warrants an exception to the general rule of nondisclosure." *State v. Davila*, 570 So. 2d 1035, 1037 (Fla. 2d DCA 1990); *State v. Zamora*, 534 So. 2d 864 (Fla. 3d DCA 1988); *Garcia v. State*, 548 So. 2d 284 (Fla. 3d DCA 1989); *State v. Manderville*, 512 So. 2d 326 (Fla. 3d DCA 1987). The defendant must meet this burden by alleging, through sworn proof, the specific defense he seeks to establish through the confidential informant because "[d]isclosure is only helpful to the defense if the testimony of the informant would exculpate the defendant or materially vary from that of the police." *Garcia v. State*, 521 So. 2d 191, 194 (Fla. 1st DCA 1988) (quoting *State v. Acosta*, 439 So. 2d 1024, 1026-27 (Fla. 3d DCA 1983)).

Once the defendant carries his burden of showing disclosure is necessary to a specific defense, the trial court is required to conduct an *in camera* hearing to determine whether the disclosure would be relevant and helpful to the defense. *State v. Roberts*, 686 So. 2d 722, 723 (Fla. 2d DCA 1997).

## 2. STATEMENTS

Pursuant to Fla. R. Crim. P. 3.220(b)(1)(B), the State must disclose any written statement made by a witness that is signed or adopted or approved by the person making the statement, regardless of whether or not the party intends to use the statement at trial. *See also Hickey v. State*, 484 So. 2d 1271 (Fla. 5th DCA 1986). The term “statement” also includes witness statements recorded or summarized in any writing or recording. Therefore, all police reports with witness statements must be disclosed, *but the officer’s notes in preparation of creating a police report are not discoverable*.

However, the State is required to disclose a law enforcement officer’s notes if they are used to refresh a witness’ memory at trial. *See Wuornos v. State*, 644 So. 2d 1000 (Fla. 1994); *Suaziano v. State*, 570 So. 2d 289 (Fla. 1990). The State need not disclose prosecutor’s notes that did not reflect verbatim statements of any witness interviewed and had not been signed, adopted or approved by persons to whom they were attributed (i.e. pre-file notes). *Williamson v. Dugger*, 651 So. 2d 84 (Fla. 1994). The Court recognized notes included interpretation of remarks made by witnesses. *Id.* at 88.

That is, the oral and unrecorded statements of witnesses to a state attorney are work product and not discoverable. *See also, Olson v. State*, 705 So. 2d 687 (Fla. 5th DCA 1998); *Johnson v. State*, 545 So. 2d 411 (Fla. 3d DCA 1989); *Egan v. DeManio*, 294 So. 2d 639 (Fla. 1974); *State v. Donaldson*, 763 So. 2d 1252 (Fla. 3d DCA 2000)

The State must disclose the content of a witness’ statement because listing a statement exists or listing the witness to whom the statement was made is not sufficient. *See Delgado v. State*, 706 So. 2d 328 (Fla. 1st DCA 1998)(holding that disclosing the name of the witnesses who heard the defendant’s statement without disclosing the content of the statement does not alleviate the State’s discovery obligation); *Blatch v. State*, 495 So. 2d 1203 (Fla. 4th DCA 1986) (recognizing that it is error to allow the State to introduce the defendant’s oral inculpatory statement made to police, without having advised the defendant of the statement); *Valle v. State*, 566 So. 2d 1386 (Fla. 3d DCA 1990).

The State also bears a duty to disclose any statements made by a defendant or codefendant. Fla. R. Crim. P. 3.220(b)(1)(C)&(D). *See Cardona v. State*, 826 So. 2d 968 (Fla. 2002)(case reversed because the State failed to give the defendant a transcribed statement of the co-defendant).

### **3. TANGIBLE PAPERS OR OBJECTS**

The State has a duty to disclose any papers or objects that were obtained or belonged to the accused. Fla. R. Crim. P. 3.220(b)(1)(F). *See Guerrie v. State*, 649 So. 2d 928 (Fla. 4th DCA 1995)(holding that cocaine pipe found in the defendant’s purse was inadmissible and the prosecutor could not cross-examine the defendant about it because the State failed to disclose it). The State also has the duty to disclose any tangible papers or objects that the State intends to use at a hearing or trial that were not obtained from the defendant. Fla. R. Crim. P. 3.220(b) (1)(K)

There must be an intent by the State to introduce the paper or object into evidence in order to require the disclosure. *See Bateman v. State*, 566 So. 2d 358 (Fla. 4th DCA 1990); *Huffman v. State*, 472 So. 2d 469 (Fla. 1st DCA 1985); *Martin v. State*, 517 So. 2d 737 (Fla. 4th DCA 1987)(requiring certified copies of prior convictions to impeach defendant or witnesses); *State v. Coney*, 294 So. 2d 82 (Fla. 1974)(holding that the State was not required to disclose prior convictions of state witnesses because the State did not intend to use them, unless the defendant can show the inability to obtain them himself after due diligence); *Palmer v. State*, 483 So. 2d 496 (Fla. 1st DCA 1986)(holding that it is not necessary to disclose the significance of the papers or objects, merely stating that the objects or papers are available for inspection or copying is sufficient).

The State must also disclose rebuttal tangible evidence as soon as it determines that it intends to use the evidence at trial. *See Huffman v. State*, 472 So. 2d 469 (Fla. 1st DCA 1985)(no error in allowing

booking photo into evidence as rebuttal even though photo was not previously disclosed in discovery).

## **B. DEPOSITIONS**

A defendant is not entitled to a deposition in misdemeanor cases **unless good cause** is shown to the trial court. Fla. R. Crim. P. 3.220(h)(1)(D). In determining whether to allow a deposition, the court should consider:

1. the consequences to the defendant,
2. the complexity of the issues involved,
3. the complexity of the witness' testimony, and
4. the other opportunities available to the defendant to discover the information sought by deposition.

However, this prohibition is not applicable if the State takes the deposition or statement of a listed defense witness. If depositions are granted, the State does not have the obligation to physically produce the witnesses for deposition. *See Colby v. McNeil*, 595 So. 2d 115, 117 (Fla. 3d DCA 1992); *State v. Gonzalez*, 695 So. 2d 1290 (Fla. 4th DCA 1997). Therefore, if a State witness fails to appear for deposition, the State cannot be sanctioned; this includes a State-charged continuance. *See State v. Pope*, 675 So 2d 165 (Fla. 3<sup>rd</sup> DCA 1996).

## **C. MENTAL OR PHYSICAL EXAMINATION**

Pursuant to Rule 3.220(c), the defendant may be required to submit to certain physical examinations. Under this rule, the State may seek an order from the court compelling the defendant to:

1. Appear in a lineup;
2. Speak for identification by a witness;
3. Be fingerprinted;
4. Pose for photos not involving a reenactment;
5. Try on articles of clothing (gloves, etc.);
6. Permit the taking of specimens of material under defendant's nails;
7. Permit taking of samples of defendant's blood, hair, and other materials of the defendant's body not involving unreasonable intrusion;
8. Provide specimens of defendant's handwriting; and
9. Submit to a reasonable physical or medical inspection of the defendant's body.

Generally, State witnesses cannot be compelled to submit to either physical or mental evaluations. However, the court may allow such examinations under the most compelling of circumstances where it is necessary to insure a just and orderly disposition of the cause. The court would discourage the practice in any but the most extreme instances. *State v. Drab*, 546 So. 2d 54 (Fla. 4th DCA 1989).

*Macias v. State*, 515 So. 2d 206, 208 (Fla. 1987): Compelling a defendant to give voice exemplars in order to evaluate the physical properties of his voice, rather than the content of what is said, does not violate the privilege against self-incrimination. *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *Clark v. State*, 379 So.2d 97 (Fla.1979). The same principle applies even when the defendant is required to speak in the presence of the jury. *Lusk v. State*, 367 So.2d 1088 (Fla. 3d DCA 1979). Voice exemplars are usually used to assist a witness in determining identification. However, the Fifth Amendment is no more implicated where, as here, the witness contrasted the qualities of Macias' voice in court with those he had heard on a previous occasion.

The *Macias* principle applies to the other non-testimonial forms of evidence mentioned in 3.220(c).



Moreover, per *West v. State*, 912 So. 2d 665, 666 (Fla. 4<sup>th</sup> DCA 2005), the State need not provide advance notice to the Defense if the State is trying to elicit non-testimonial evidence from the defendant at trial. In *West*, the appellate court ruled that it was proper for the trial court to grant the State's motion to have defendant speak so the witness could identify the defendant's voice. The State requested this at sidebar. However, it is best practice (and good sportsmanship) to request this *in limine*.

#### **D. MOTION TO COMPEL DISCOVERY**

When a motion to compel discovery is presented to the court for a ruling, a determination should be first made as to whether the request is within the State's obligation and whether all or part of the information sought by the defendant is readily available to *him* by the exercise of due diligence through deposition, subpoena, or other means (e.g., public records requests pursuant to Fla. Stat. Chap. 119). *State v. Coney*, 272 So. 2d 550 (Fla. 1st DCA 1973). The State is *not* required to disclose information *not within the State's actual or constructive possession*. See *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995). For example, closed circuit videos from private companies are not within the State's possession or control (e.g. in a petit theft case from Target, the CCTV video taken by Target is not in the possession of the State and the State cannot be compelled to get the video or be held accountable if the video is lost or destroyed by Target. While the video will certainly help the State and the State will surely seek to get it, if the State cannot obtain it and the Defense seeks it, the State cannot be compelled by the Court to get it for the Defense.)

The discovery rule does not require the State to photocopy, collect, or hand-over documents to the Defendant. See *Palmer v. State*, 483 So. 2d 496 (Fla. 1st DCA 1986)(holding that the State had properly complied with discovery obligations by checking off boxes on a written exhibit informing Defendant which documents were available at Union Correctional Institute for inspection); *Potts v. State*, 399 So. 2d 505 (Fla. 4th DCA 1981)(recognizing that the defense counsel's failure to photocopy and inspect documents at the State Attorney's Office, pursuant to the State's discovery written exhibit, was not a State discovery violation); *State v. Williams*, 678 So. 2d 1356 (Fla. 3d DCA 1996)(the defense, not the State, must pay for the cost of photocopying discovery material).

#### **E. DEFENDANT'S DISCOVERY OBLIGATION**

Pursuant to 3.220(d), within 15 days of receipt of the State's discovery response, the defendant must furnish reciprocal discovery including a written list of defense witnesses the defendant expects to call at the hearing or trial.

#### **F. BRADY MATERIAL**

Pursuant to 3.220(b)(4), a prosecutor **must** disclose "any material information within the State's possession or control that tends to negate the guilt of the defendant as to any offense charged, regardless of whether the defendant has incurred reciprocal discovery obligations." This is known as *Brady* material, and was originally articulated by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963)(there is a large body of case law addressing *Brady* material in both Florida and Federal court far too voluminous to include in its entirety). This material information includes any which is in State, police, or expert witnesses' control. Prosecutors, to comply with *Brady*, have a duty to learn of any favorable evidence known to others acting on the government's behalf, and disclose the information if it is material. See *U.S. v. Agurs*, 427 U.S. 97 (1976)(the prudent prosecutor should resolve doubtful questions in favor of disclosure).

#### **1. LEGAL STANDARD**

The Florida Supreme Court has addressed the *Brady* standard by holding that the suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or to punishment, **irrespective of the good faith or bad faith of the prosecution**. See *Jones v. State*, 709 So. 2d 512 (Fla. 1998).

The specific test for determining the materiality of *Brady* evidence was articulated in *U.S. v. Bagley*, 473 U.S. 667 (1985), where the Court held evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. A *Brady* violation is established by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

In *Jones*, the Florida Supreme Court affirmed there are **four** elements a defendant must prove in order to obtain reversal based upon a *Brady* claim: (1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. See also *Robinson v. State*, 707 So. 2d 688 (Fla. 1998) (quoting *Hegwood v. State*, 575 So. 2d 170 (Fla. 1991)); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

However, there is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense had the information or could have obtained it through exercise of reasonable diligence. See *Provenzano v. State*, 616 So. 2d 428 (Fla. 1993); See also, *Maharaj v. State*, 778 So. 2d 944 (Fla. 2000); *Wright v. State*, 857 So. 2d 861 (Fla. 2003)

## **2. DESTRUCTION OF EVIDENCE**

The destruction or loss of evidence that is only potentially useful to the defense violates due process *only* if the defendant can show bad faith on the part of law enforcement **or** the prosecution. *Arizona v. Youngblood*, 488 U.S. 51 (1988); See also *Felder v. State*, 873 So. 2d 1282 (Fla. 4th DCA 2004) Under *Youngblood*, bad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant. The court explained that the presence of bad faith turned on the police’s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. See also, *Williams v State*, 891 So. 2d 621 (Fla. 3d DCA 2005); *Dufour v. State*, 905 So. 2d 42 (Fla. 2005). In a destruction of evidence case, a *Youngblood* analysis should be conducted on the record to perfect the record in the event of an appeal.

## G. DISCOVERY VIOLATIONS UNDER *RICHARDSON*

Pursuant to 3.220(b)(3) and (n), the court may impose sanctions on **either** party for a violation of the discovery rules. The violation of discovery disclosures is governed by *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

A *Richardson* inquiry is only triggered by a timely objection from the defense, otherwise the remedy is waived. See *Simon v. State*, 615 So. 2d 236 (Fla. 3d DCA 1993). However, the trial court has an affirmative obligation to conduct a hearing without the defendant specifically requesting a hearing once put on notice of a violation. *Evans v. State*, 770 So. 2d 1174 (Fla. 2000). The importance of a *Richardson* hearing cannot be understated. If the trial Court fails to conduct an adequate *Richardson* inquiry, after a discovery issue, reversal by a higher court is a possibility (although not a foregone conclusion, See *Smith v. State*, 7 So. 3d 473, 506 (Fla. 2009), see also *Scipio v. State*, 928 So.2d 1138 (Fla. 2006) (a harmless error analysis may still be applied on appeal if inquiry not conducted at trial level.) The better practice is to conduct a *Richardson* inquiry in the face of alleged or possible discovery violations by either side.

The court must **FIRST** determine whether a violation occurred before conducting a full hearing. *Sinclair v State*, 657 So. 2d 1138 (Fla. 1995) (a *Richardson* inquiry). Upon a timely objection and **a finding that a violation has occurred**, the court must provide a hearing (the *Richardson* hearing) to determine: (1) Whether said violation was: **INADVERTENT - OR - WILLFUL**; (2) Whether said violation was: **TRIVIAL - OR - SUBSTANTIAL**; **AND** (3) What **PREJUDICE**, if any, would the defendant suffer upon admission of evidence.

The key question in this examination is whether the defense has been procedurally prejudiced by the violation. In *Smith v. State*, 372 So. 2d 86, 88 (Fla. 1979), the Court stated the judge must first decide whether the discovery violation impaired the defendant's ability to prepare for trial, and second, the judge must determine the appropriate sanction for the violation, See also, *Thompson v. State*, 565 So. 2d 1311, 1316 (Fla. 1990).

### 1. PREJUDICE

Procedural prejudice results when there is a reasonable possibility the defendant's trial preparation or strategy would have been materially different had the violation not occurred. *State v. Schopp*, 653 So. 2d 1016, 1020 (Fla. 1995) However, surprise alone is inadequate to constitute prejudice. *Keen v. State*, 456 So. 2d 571 (Fla. 2d DCA 1984). Also, the lack of an opportunity to obtain impeachment material is insufficient to exclude witness. See *Baker v. State*, 522 So. 2d 491 (Fla. 1st DCA 1988); *Wheeler v. State*, 754 So. 2d 827 (Fla. 2d DCA 2000). If there is no prejudice, evidence should be admitted. *Holman v. State*, 347 So. 2d 832 (Fla. 3d DCA 1977)

At trial, the initial burden is on State to show that undisclosed evidence can be admitted without prejudice to defendant's right to a fair trial. *State v. Del Gaudio*, 445 So. 2d 605 (Fla. 3d DCA 1984) The burden of proof is on the State to negate prejudice. *Cumbe v. State*, 345 So. 2d 1061 (Fla. 1977) There is no prejudice where defendant through other means had been able to obtain the sought after evidence or information. *Mobley v. State*, 327 So. 2d 900 (Fla. 3d DCA 1976), *cert. denied*, 341 So. 2d 292 (Fla. 1976). Knowledge of the undisclosed evidence by a defendant's attorney cures a violation. *Palmer v. State*, 483 So. 2d 496 (Fla. 1st DCA 1986)

For example, in *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000), the Court found no discovery violation when the State introduced photos, which were never formally listed, where the photos were reproduced from slides which part of the medical examiner's business records and were made available to defendant's original counsel during discovery depositions. In *Williams v. State*, 662 So.

2d 437 (Fla. 5th DCA 1995), the court found no violation because although the prosecutor failed to furnish the dispatch card to the defense, the material was supplied to the defense by the police.

## 2. REMEDIES & SANCTIONS FOR DISCOVERY VIOLATIONS

The dismissal of a case for a discovery violations is an **extreme** sanction which should only be utilized *as a last resort*. See *State v. Del Gaudio*, 445 So. 2d 605 (Fla. 3d DCA 1984) *rev. denied*, 453 So. 2d 45 (Fla. 1984)(Dismissal of an information or indictment is an action of such magnitude that resort to such a sanction should only be had when no viable alternative exists); See also, *State v. Guzman*, 667 So. 2d 989 (Fla. 3d DCA 1996); *State v. L.E.*, 754 So. 2d 60 (Fla. 3d DCA 2000) (The reason that dismissal of criminal charges should be utilized as a last resort is that this sanction punishes the public not the state or witness who fails to appear, and the results in a windfall to the defendant).

However, the court may grant a State-charged continuance where the State has impeded the preparation of the defense by inexcusable delays in providing discovery materials to the defendant. *Colby v. McNeil*, 595 So. 2d 115 (Fla. 3d DCA 1992)(citing *Del Gaudio*, *supra*). In *Del Gaudio*, the court stated the trial court may continue the case to a date beyond the a speedy trial period if (1) an actual state discovery violation exists, and (2) a showing that late or inadequate discovery is furnished at a time which will not enable the defendant to make use of it in the preparation of his defense before the expiration of the speedy trial time period. Be aware of a State-charged continuance being the remedy when a case is being tried on a notice of expiration. Trying the case outside the fifteen day window has been accounted is tantamount to a dismissal.

The exclusion of a witness is also a drastic remedy to be used only upon the showing of a willful, substantial disregard of discovery rules, which results in prejudice. *State v. Tascarella*, 580 So. 2d 154 (Fla. 1991); *Taylor v. State*, 643 So. 2d 1122 (Fla. 3d DCA 1994); *Duarte v. State*, 598 So. 2d 270 (Fla. 3d DCA 1992); *Hernandez v. State*, 572 So. 2d 969 (Fla. 3d DCA 1990). In *Tascarella*, exclusion was an appropriate remedy because the witnesses were federal agents and could not be held in contempt by state court. However, exclusion is a severe remedy where the only prejudice shown is an inability to obtain impeachment evidence. *Miller v. State*, 636 So. 2d 144 (Fla. 1st DCA 1994).

In some instances, the State's discovery violation may be cured with a brief continuance or a recess. For example, failure to disclose a witness can be cured by giving the defendant an opportunity to examine the witness. See *King v. State*, 355 So.2d 831 (Fla. 3d DCA 1978); *Zeigler v. State*, 402 So.2d 365 (Fla. 1981); *Mobley v. State*, 327 So. 2d 900 (Fla. 3d DCA 1976); *Smith v. State*, 515 So. 2d 182 (Fla. 1987). There is no violation for State to provide supplemental witness day of trial where court allowed defense to depose the witness. *Staveley v. State*, 744 So. 2d 1051 (5th DCA 1999)

**PRACTICE TIP:** Always provide discovery in a timely fashion! Also be aware that a defense tactic is to strategically employ State-charged discovery violation continuances to set up speedy trial issues. Ensuring discovery is timely sent is a good way to save speedy issues later.

## **SPEEDY TRIAL – RULE 3.191**

The right to a speedy trial is enumerated in **Florida Rule of Criminal Procedure 3.191**. Once the defendant is charged, the State shall bring the defendant to trial within **90 days** of being taken into **custody** for a misdemeanor and **175 days** for a felony case. This is referred to as the “natural” speedy trial period. When a felony and a misdemeanor are consolidated in the Circuit Court, the misdemeanor shall be governed by the same time period applicable to the felony.

However, once the defendant is charged, the defense may **demand** a trial within 60 days, and the State must bring the defendant to trial within **50 days** of the filing of the demand. See 3.191 (b)(4)

A person shall be considered to have been brought to trial when the trial jury panel for that specific trial is sworn for voir dire examination or, on waiver of a jury trial, when the trial proceedings begin before the judge. See Fla. R. Crim. P. 3.191(c)

*See also Holmes v. State*, 883 So. 2d 350 (Fla. 3d DCA 2004). In other words, for a jury trial, the trial commences when the trial jury panel, the entire panel of twenty or more jurors brought down for voir dire, is sworn in – not when you have chosen your six jurors for your trial. For a bench trial, the trial proceedings begin once the first witness is sworn.

### **A. CUSTODY**

Custody is defined as:

- (1) when the person is **arrested** as a result of the conduct, or, criminal episode that gave rise to the crime charged, OR
- (2) when the person is **served with a notice to appear** in lieu of physical arrest. Fla. R. Crim. P. 3.191(d)

However, something more than a mere investigatory detention is required to trigger the speedy trial statute. *See State v. Lail*, 687 So. 2d 873 (Fla. 2d DCA 1997). In *Lail*, the defendant went to the police station *voluntarily*, was there for seven (7) hours, but was never formally arrested; however, he was given Miranda warnings and was placed in a holding cell. The court held that, although the defendant may have been in custody for Fourth Amendment purposes, he was not in custody for speedy trial purposes. *See also, State v. Christian*, 442 So. 2d 988 (Fla. 2d DCA 1983).

Contrast this with *State v. Hurley*, 760 So. 2d 1127, 1128 (Fla. 4<sup>th</sup> DCA 2000), where a defendant was told she was under arrest, taken to the station, but never booked. The *Hurley* court ruled that Defendant was in custody when she was told that she was under arrest.

Under subsection two, the *personal* service of a criminal traffic citation to the defendant in lieu of physical arrest also triggers the speedy trial period. In *State v. Coughlin*, 871 So. 2d 935 (Fla. 5<sup>th</sup> DCA), *rev. denied*. 884 So. 2d 21 (Fla. 2004), the court held the **mailing** of a criminal traffic citation that told the defendant that “she was to be notified” of when to appear in court for pending charges does not start the speedy trial clock (nor does it serve to initiate a criminal or civil infraction proceeding).

### **1. AMENDING CHARGES**

In some instances, an officer arrests or serves a criminal citation for one offense and later another offense is discovered to have arisen out of the same criminal episode. In this circumstance, the State

may file an information adding additional charges. However, pursuant to 3.191 the speedy trial period applies from the time the defendant is taken into custody for **all crimes that could have been charged arising out of the same conduct or criminal episode**.

For example, a defendant is cited with Leaving the Scene of an Accident. When the defendant is taken to the hospital, a blood test reveals a blood alcohol level of .12. A month later, the officer comes to the State Attorney's Office with this new evidence and the State files a new information charging DUI. In that situation the new criminal violation, DUI, even though it is charged, filed and served at a later time, is governed by the original date of arrest for Leaving the Scene of an Accident in computing the 90 days. By the same token, if the Defendant waived speedies on the first charge, speedies are waived on any subsequent charges filed arising out of the same criminal conduct or episode. *See State v. Naveira*, 873 So.2d 300 (Fla. 2004); *See also State v. Nelson*, 26 So.3d 570 (Fla. 2010) (defendant's request for continuance before filing notice of expiration of speedy trial period, but after expiration of speedy trial period, resulted in waiver of defendant's right to speedy trial on all charges arising from same criminal incident).

However, the speedy trial rule is NOT self-executing; rather, the defense must take affirmative action in order to avail himself or herself of the remedies available under the rule for the state's failure to comply with the requisite time limitations. For this reason, if an amended information adding charges is filed after the expiration of the speedy trial period, the original charges are not in effect *nolle prossed* and the defendant is not entitled to discharge without filing an expiration notice. *See State v. Clifton* 905 So. 2d 172 (5<sup>th</sup> DCA 2005)

## **2. EFFECT OF A *NOLLE PROSEQUI* OR NO ACTION**

Pursuant to Rule 3.191(o), the State cannot avoid the speedy trial rule by entering a *nolle prosse* or no action to the pending charges. When the State enters a *nolle prosse*, the speedy trial period continues to run and the State may not refile charges based on same conduct after period has expired --unless defense has waived their right to a speedy trial. . *State v. Agee*, 622 So. 2d 473 (Fla. 1993).

In *Agee*, the Court reasoned that “[t]o allow the State to unilaterally toll the running of the speedy trial period by entering a *nolle prosse* would eviscerate the rule—a prosecutor with a weak case could simply enter a *nolle prosse* while continuing to develop the case and then refile charges based on the same criminal episode months or even years later, thus effectively denying an accused the right to a speedy trial while the State strengthens its case.” *Id* at 475;

In *Genden v. Fuller*, 648 So. 2d 1183 (Fla. 1994) the Court reminds us that the speedy trial time begins to run when the accused is first taken into custody, and explains that it continues to run when the State voluntarily terminates prosecution before formal charges are filed (or “no actions” the charges). The State thus may not file charges based on same conduct after speedy trial period has expired. You will receive cases from felonies, in which the felonies have been “no actioned” or bound down, so you should be mindful of speedies on those.

Moreover, when the State announces a *nolle prosse* or a no action, the State must refile within the speedy trial time frame, and cannot receive the benefit of the 15 day window. *See State v. Williams*, 791 So. 2d 1088 (Fla. 2001), *But see, State v. Pfeiffer*, 872 So. 2d 313 (Fla. 4<sup>th</sup> DCA), *rev denied*, 891 So. 2d 552 (2004)(motion pending past expiration period; State filed a new information after court granted a sworn motion to dismiss).

In *State v. Mercer*, 112 So. 3d 523, (Fla. 2<sup>nd</sup> DCA 2013), the appellate court held that felony charges need not be filed within the ninety day speedy trial window allotted for misdemeanor.

In *State v. Jackson*, 784 So. 2d 1229 (Fla. 1st DCA 2001) the court held the State is entitled to the 175 days on a felony charge even when misdemeanor charges were filed but later *nolle prossed* after their 90-day period passed and a Notice of Expiration had been filed.

The Fourth DCA, on the other hand, held that once a Notice of Expiration was filed, the State could not then *nolle prosee* and re-file as a felony, circumventing rule 3.191(p) stating “if a defendant is not brought to trial within fifteen days after filing a notice of expiration of speedy trial time, the defendant must be “forever discharged from the crime.” *Lovelace v. State*, 906 So.2d 1258 (Fla. 4th DCA 2005 (conflict was certified with the First DCA, but subsequently dismissed by the Florida Supreme Court because *Jackson* and *Lovelace* address similar but distinct issues).

The *Jackson* court, although mindful of the decision in *State v. Agee, supra*, also noted that the State, once it has dropped the misdemeanor charges and before the case can be properly discharged in County Court, has the ability to file felony charges. When the State, under these specific facts, files felony charges, then the Circuit Court obtains exclusive jurisdiction pursuant to 26.012(2)(d) and the misdemeanor charges that at one time existed cannot be discharged because the County Court has no jurisdiction to grant the discharge.

**PRACTICE NOTE:** Do not get in the situation where we must put the *Jackson* decision to the test. Bind up or refile before the 90-day period passes. On the other hand, if you get into a predicament where it cannot be helped, then you must bring the case to an Assistant Chief ASAP.

## **B. WAIVING SPEEDY TRIAL**

A delay attributable to the defense waives speedy trial. Therefore, a (1) defense continuance; (2) joint continuance; or (3) bench warrant (if not *vacated*), waive the period. In addition, the defendant’s enrollment in the Pretrial Diversion Program (PTD), waives the speedy trial period. See *Fieler v. State*, 386 So. 2d 1310 (Fla. 3rd DCA 1980). However, this waiver must be expressly stated on the record and cannot be assumed as a defense waiver by the court. See *Hajal v. State*, 864 So. 2d 1167 (5<sup>th</sup> DCA), *rev denied*, 874 So. 2d 1193 (Fla. 2004). A Defense Continuance after the running of the natural speedy trial time waives speedy trial rights as well, *State v. Nelson*, 26 So.3d 570 (Fla. 2010).

## **C. DEMAND FOR SPEEDY TRIAL**

Pursuant to Rule 3.191(b), every person charged with a crime shall have the right to demand a trial within 60 days, by filing with the court a separate pleading entitled “Demand for Speedy Trial,” and serving a copy on the State. The trial is to be held no sooner than 5 days from filing the demand and no later than 45 days. The rule also provides that when a demand is filed, the court will hold a calendar call no later than 5 days after that filing to announce receipt of the demand and set the case for trial. However, the failure of the court to hold a calendar call on a demand that has been properly filed and served shall not interrupt the running of any time periods under this subdivision.

### **1. DEFENDANT BOUND**

“Unfortunately, there are those defendants who, although having no interest in a trial on the merits, speedy or otherwise, would use the demand for speedy trial as a gimmick with the hope of creating confusion which might result in discharge or other favorable disposition short of trial. We must be vigilant to assure that this procedural right is not abused in that fashion.” *State v. Reaves*, 609 So. 2d 701 (Fla. 4th DCA 1992).

When a demand is filed, the defendant makes a representation to the court that he has a **bona fide desire** to go to trial and that he is **ready** to go to trial in 5 days. *See State v. Reaves*, supra. In fact, 3.191(g) states a demand "binds the accused" and is a representation that the accused has "diligently investigated the case." Thus, once a demand is filed the defense is not entitled to a continuance without an order of the court and the **consent** of the State. Therefore, once a Demand is filed, if the State is ready, the case should be set for trial as soon as possible, to avoid potential NOE issues or other time emergencies.

**PRACTICE TIP:** Once a speedy demand is filed, the defense does not have to interview State witnesses (commonly referred to as "hallway interviews") unless those witnesses were added to discovery after the demand was filed. (See *Kaufman* below)

## 2. DISCOVERY ISSUES

Once a demand for speedy trial is filed, a defendant cannot engage in discovery or complain of inadequate discovery. "The filing of a demand for discovery (to which the prosecutor has fifteen days to respond) and the scheduling of discovery depositions is the antithesis of current preparedness for trial. Such actions certainly are not suggestive of the conclusion that a defendant has diligently investigated his case and that he is prepared or will be prepared for trial within five days." *State v. Kaufman*, 421 So. 2d 776 (Fla. 5th DCA 1982). However, the State's continuing obligation to provide discovery and *Brady* material is not affected. The State must still disclose additional discovery as it becomes known to the State.

## 3. MOTIONS INCONSISTENT WITH DEMAND

In *State v. Johnson*, 277 So. 2d 24 (Fla. 1973), the defendant filed a motion to dismiss alleging that the information was so vague that he could not adequately prepare a defense. The Court found that by filing this motion the defense "admitted that his demand for a speedy trial was spurious." *Id.* at 25. However, a mere filing of a motion will not always defeat a demand. In *State v. Embry*, 322 So. 2d 515 (Fla. 1975), filing of a single motion to suppress did not make a demand for speedy trial spurious.

In *State v. Velazquez*, 802 So. 2d 426 (Fla. 3d DCA 2001), the court held that the defendant had no bona fide desire to accelerate the trial date where the defendant filed a speedy trial demand twenty minutes before the prosecutor announced a *nolle prosequere*. The court held that there was no bona fide desire due to the fact that the defendant knew about the *nolle prosequere* when the speedy trial demand was made and the defendant did not notify the prosecutor individually of the speedy trial demand, but instead sent notice to the prosecutor's office in general.

## D. NOTICE OF EXPIRATION ("NOE")

Pursuant to 3.191(h), a notice of expiration of speedy trial time shall be timely if filed and served after the expiration of the periods of time for trial – 90 days. The State has a 15 day recapture window within which to try the defendant once the 90 day speedy trial time has elapsed and the notice has been filed. The fifteen days is broken up into *five* days to have a hearing on the notice of expiration and then *ten* days to go to trial on the charge. The 15 day recapture window *begins with the filing of a notice of expiration by the defendant*. The purpose of the notice is to give the State notice that the speedy trial time has elapsed, and it is the State's responsibility to set the case for trial within the 15 day window. However, notice to the State cannot come by way of a motion to discharge instead of a notice of expiration. *Dabkowski v. State*, 711 So 2d 1219 (Fla. 5th DCA 1998).

### 1. TIMELINESS



A timely filed notice of expiration is one that is filed after the 90 days have expired (i.e. 91<sup>st</sup> day). Therefore, a notice filed on the 90th day is untimely and should be stricken because the rule states a notice is timely if filed "on or after the expiration." *e.g. Sarrain v. State*, 632 So. 2d 1063 (Fla. 3d DCA 1994, where the court found an NOE premature when filed on the 175th day for a felony charge).

Moreover, a notice of expiration is not proper when the defense has caused any delays in the case. Any defense request to postpone a case is a motion for continuance waiving speedy trial rights regardless of its characterization. *State v. Frazee*, 617 So. 2d 350 (Fla. 4th DCA 1993); *See also, Blackstock v. Newman*, 461 So. 2d 1021 (Fla. 3d DCA 1985). In each case, the defendant's counsel advised the court that he was ready for trial but could not be present because he was trying another case before another judge. The holding in each case was that the defendant could not be considered available for trial during the pertinent period and thus waived the right to speedy trial.

## **2. NOTICE OF EXPIRATION (NOE) HEARING**

Under section (h), once a valid notice of expiration is filed, the State has 5 days for a hearing and 10 days from the hearing to give the defendant a trial. In certain cases, this will give the State a total of 15 days. However, there may be a case when the hearing is held on the 3rd day from the date of filing the notice. In this instance, the State **still** has **only 10 days** from the date of the hearing to bring the defendant to trial, technically shortening the window period to 13 days. However, the Florida Supreme Court has ruled that it is **harmless error** to set a trial date outside the 10 day period so long as the defendant is brought to trial within 15 days from the filing of the notice. *State v. Salzero*, 714 So. 2d 445 (Fla. 1998).

## **3. COMPUTATION OF TIME - RULE 3.040**

In computing any time period under the rules, the day of the act or event (in this case the filing of the notice of expiration or the day an individual is taken into custody) is not counted. For example, if an NOE was filed on June 1, you would start computing the 15 days beginning June 2.

*In situations where the last day of the window falls on a weekend*, Rule 3.040 directs you to the Fla. R. Jud. Admin., Rule 2.514 which states that the last day of the period should be counted, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. This rule applies to counting the 15 day recapture window despite the fact that it may, in some instances, extend the window. *See Ricci v. Parker*, 518 So. 2d 284 (Fla. 2d DCA 1987).

Rule 3.040 further directs you to the Fla. R. Jud. Admin., Rule 2.514 which provides that when computing a period of time less than seven days, "intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." This portion of the rule has the effect of lengthening the 15 day window by not counting weekends or legal holidays in computation of the 5 days available to hold *the hearing on the notice*.

## E. DISCHARGE

Pursuant to Rule 3.191(p), if the window period expires, and the defendant has not been brought to trial or the court has not extended the time, then the **remedy** for the defendant is discharge—this discharge is absolute as the defendant is forever discharged from the crime. The rule is unforgiving in its outcome, as there are no exceptions if the rule has not been complied with. However, pursuant to section (k), at a hearing on a motion for discharge, the State can object to the discharge by presenting any evidence tending to show non-availability of the defense. Once the State shows non-availability, the defense has the burden of proof to show by competent proof their availability during the period.

**However**, it is of the utmost importance to realize that the rule is **NOT self-executing!**. *See Nelson*, 26 So.3d at 574 ("Although all defendants are entitled to the benefit of the default rule, the rule is not self-executing and requires a defendant to take affirmative action to avail him- or herself of the remedies afforded under the rule based on the State's failure to comply with the time limitations.").

*State v. Thomas*, 988 So.2d 1280 (Fla. 5<sup>th</sup> DCA 2008): “[W]hen the defendant agreed to a trial date outside the speedy trial time, speedy trial was thus extended to the agreed upon date. A motion for discharge before the agreed upon trial date was therefore improper.

*State v. Suarez*, 13 So.3d 72, (Fla. 3rd DCA 2009): The issue in this case was whether incarceration in a federal prison located within the state constitutes absence from the state for purposes of the statute of limitations period. The court found that there was no obstacle to serving the arrest warrant on the defendant within the limitations period and trying him upon his release from federal prison. The defendant was therefore entitled to discharge.

*Tedder v. State*, 21 So.3d 833 (Fla 1<sup>st</sup> DCA 2009): In this case, the information was not filed within 175 days of the defendant’s arrest because the State argued that defendant was unavailable due to being found incompetent in another jurisdiction. The court found that the defendant was entitled to discharge.

*Pearson v. State*, 18 So.3d 645 (Fla. 1<sup>st</sup> DCA 2009): In this case, the fact that the defendant was out of state, in custody, did not affect the State’s obligation to file the charge within 175 days of his arrest.

## F. EXTENSION OF TIME

Pursuant to **Rule 3.191(i)**, the court may extend the time period if it has not already expired when:

- (1) stipulation by the parties;
- (2) exceptional circumstances as defined in 3.191(l);
- (3) good cause shown by the accused; or
- (4) mental competency, physical ability of the defendant to stand trial, for hearings on pretrial motions, for appeals by the state, and for trial of other pending criminal charges against the accused.

In *Brown v. State*, 715 So. 2d 241 (Fla. 1998), the Court held an extension for exceptional circumstances (the prosecutor’s illness) is valid when made during the recapture window. Thus, the Court found the language in section (i) regarding the period not having expired **includes the recapture period**.

An order extending or tolling the running of speedy trial time can be indefinite in length. *See Foster v. State*, 380 So. 2d 1081 (Fla. 3d DCA 1980); *Ferris v. State*, 475 So. 2d 201 (Fla. 1985). However, an indefinite extension can be made definite by setting a "date certain" or by a subsequent demand for speedy trial. *Ealer v. State*, 718 So. 2d 850 (Fla. 4th DCA 1998). If the reason for the extension of the speedy trial period persists, nothing prohibits either party from requesting an additional extension.

Note: A good example of recent utilization of the extension in County Court is for an extension for officers who made an arrest, but are currently deployed in combat overseas. The State has received extensions up to 6 months for the officers to be able to return from deployment and prosecute the case.

An extension of the speedy trial period is subject to constitutional scrutiny, *Barker v. Wingo*, 407 U.S. 514 (1972), and the order to extend time should be in writing and filed on the date it is ordered.

## **G. RIGHT TO SPEEDY TRIAL & DISCOVERY ISSUES**

In *Moore v. State*, 697 So. 2d 569 (Fla. 3d DCA 1997) and *State v. Guzman*, 697 So. 2d 1263 (Fla. 3d DCA 1997), the court stressed *the State does not have to provide discovery any earlier than the 15 days provided for in the rule*. In *Guzman*, the court directly discussed the speedy trial and discovery issues in the 11th Circuit by noting in a footnote:

It seems that nothing we do or say, even in the harshest terms, see *Brown*, 527 So. 2d at 210 (characterizing defense tactics as "spurious"), has much effect on the speedy trial games people play in the Eleventh Circuit. This is probably because, even if the defense efforts eventually prove unsuccessful in this court, the maneuvering along the line almost invariably results in a lengthy delay in the proceedings. Because it is usually favorable to the defense, delay (although second best to outright dismissal) is, ironically enough, what the defendant is often really after in her claims to a "speedy" trial. In an attempt to discourage the continued Mickey Mousing below, we suggest that the circuit court be at least reticent to issue a show cause order which, in prohibition, automatically stays further proceedings in the county court, perhaps opting instead, as this court often does, simply to require a response in opposition to the petition.

The speedy trial rule merely limits the time in which the State may bring a defendant to trial. The rule does not provide or require discovery, and because a criminal defendant has no constitutional right to discovery, the defendant must rely on the provisions of 3.220 if discovery is desired. Therefore, unless the court shortens the period, the State has fifteen days to respond to discovery. *State v. Miller*, 672 So. 2d 855 (Fla. 5th DCA 1996). [Note: *Miller* is unique in that the defendant was arraigned after the speedy window and defense counsel entered the Notice of Expiration along with his Notice of Appearance and Demand for Discovery.]

But don't take *Moore* or *Miller* too far – providing (all) discovery on the day of trial when there has been a speedy trial demand will result in a dismissal. *Vega v. State*, 778 So. 2d 505 (Fla. 3<sup>rd</sup> DCA 2001).

However, the court in *State v. Del Gaudio*, 445 So. 2d 605 (Fla. 3d DCA 1984), further recognizes that while the belated furnishing of discovery is not itself a basis for dismissal, it may create such a delay in the defendants' readiness for trial as to infringe upon his separate, but related, right to a speedy trial. Where material discovery is furnished at a time which will not enable the defendant to make use of it in the preparation of his defense before the expiration of the speedy trial time limits,

the court may properly continue the case to a date beyond those limits, charge the continuance to the State, and thereafter grant the defendant's motion for discharge based on the speedy trial rule violation. *See also, State v. Burnett*, 870 So. 2d 858 (Fla. 3<sup>rd</sup> DCA 2004)

In *Zyla v. Cohen*, 686 So. 2d 603 (Fla. 3d DCA 1996), a defense continuance was found to be proper where defense counsel waited until 5 days before trial to obtain maintenance documents which had been available to him for over a month.

The defense may argue the defendant is forced to choose between their right to discovery and their right to a speedy trial. In *Banks v. State*, 691 So. 2d 490 (Fla. 4th DCA 1997), the court addressed this argument by noting the 90 day speedy trial period is not of constitutional proportions and can be waived by a defense demand for discovery filed shortly before the trial date, and the defense can always file a demand.

## **H. EFFECT OF MISTRIAL, APPEAL AND WRITS**

**Fla. R. Crim. P. 3.191(m)** provides a **new** 90 day period within which to bring the defendant to trial after: (1) the granting of a new trial, (2) an order or notice from an appellate or other reviewing court for a new trial, (3) a declaration of a mistrial, or (4) an order reversing a motion for discharge. *See also, State v. Rohm*, 645 So. 2d 968 (Fla. 1994).

However, the 90 day limit after an appeal or mistrial does not apply to a defendant who has previously waived speedy trial in the first trial. *Koshel v. State*, 689 So. 2d 1229 (Fla. 5th DCA 1997). "A waiver of speedy trial waives all provisions of the speedy trial rule, including the 90 day provision of Rule 3.191(m)." *Id* at 1230; *See also, State v. Ryder*, 449 So. 2d 398 (Fla. 2d DCA 1984). In other words, if the Defendant waived his right to speedy before the appeal was filed, then the Defendant would have to file a demand for speedy to get speedies running if the Defendant's appeal is granted.

Fla. R. Crim. P. 3.191(m) is inapplicable to petitions for extraordinary writs, such as: mandamus, prohibition, quo warrant, certiorari, habeas corpus, etc. When the State files an extraordinary writ, the State needs to get an order from the trial court granting an extension of time pursuant to Fla. R. Crim. P. 3.191(i).

If a Defendant's motion to suppress is granted during the pre-trial motions, and the State wishes to appeal, the State **must** file a motion for extension of time, as well as the notice of appeal, and the order for extension must be signed by the judge. The signed order will then toll the period. *See Pouncy v. State*, 296 So. 2d 625, 627 (Fla. 3d DCA 1974) [but ignore *Pouncy's* decision about bringing misdemeanors joined with felonies to trial within ninety days. Statutes have overridden that case law.]

## **I. STATE'S SPEEDY TRIAL RIGHT**

Pursuant to **Florida Statutes Section 960.0015**, the State may also demand a speedy trial. The section reads:

(1) The state attorney may file a demand for a speedy trial **if the state has met its obligations under the rules of discovery**, the charge is a felony or misdemeanor, the court has granted **at least three continuances** upon the request of the defendant **over the objection of the state attorney**, and:

(a) If a felony case, it is not resolved within 125 days after the date that formal charges are filed and the defendant is arrested or the date that notice to appear in lieu of arrest is served upon the defendant; or

(b) If a misdemeanor case, it is **not resolved within 45 days after the date that formal charges are filed** and the defendant is arrested or the date that notice to appear in lieu of arrest is served upon the defendant.

(2) Upon the filing of a demand for a speedy trial, the trial court shall schedule a calendar call within 5 days, at which time the court shall schedule the trial to commence no sooner than 5 days or later than 45 days following the date of the calendar call. The court may, however, grant whatever further extension may be required to prevent deprivation of the defendant's right to due process.

(3)(a) The trial court may postpone the trial date for up to 30 additional days upon a showing by the defendant that a necessary witness who was properly served failed to attend the deposition and also failed to attend a subsequently scheduled deposition following a court order to appear. The court may, however, grant whatever further extension may be required to prevent deprivation of the defendant's right to due process.

(b) The trial court may also postpone the trial date for no fewer than 30 days but no more than 70 days if the court grants a motion by counsel to withdraw and the court appoints other counsel. The court may, however, grant whatever further extension may be required to prevent deprivation of the defendant's right to due process.

Therefore, in order for the State to assert its statutory right to a speedy trial, the following must have already occurred:

(1) the State has complied with all discovery requirements;

(2) three prior defense continuances have been granted over the State's objection;

AND

(3) the misdemeanor case is not resolved within 45 days of charges being filed.

The State must file a formal, written "Demand for Speedy Trial;" however the defense may be entitled to a further extension. There is currently no District Court of Appeals case law associated with this statute. See an Assistant Chief or CTA before considering such a motion.

## PRETRIAL MOTIONS

### **A. STATEMENT OF PARTICULARS**

The defense may file a motion requesting the State file a "Statement (or Bill) of Particulars", and a hearing must be held and an order entered prior to the State filing the document. "The granting of a bill of particulars in a criminal case is not founded upon a legal right but is a matter resting within the sound discretion, depending entirely upon the nature and circumstances of each particular case, of the trial court." *Winslow v. State*, 45 So. 2d 339, 340 (Fla. 1950). The purpose of a Statement of Particulars is to put the defendant on notice of "the particular acts relied upon by the State to establish the crime charged," *Hunter v. State*, 200 So. 2d 577 (Fla. 3d DCA 1967).

The filing of a statement or bill of particulars limits the State's proof at trial. That is, the document becomes the new charging document and failure to prove the crime as stated in the particulars will result in a judgment of acquittal for the defendant. The State may move to amend a bill of particulars to avoid a judgment of acquittal because of a variance between the particulars and the proof at trial. However, the State must prove the defendant is not prejudiced by this amendment. *Stang v. State*, 421 So. 2d 147 (Fla. 1982); *Hoffman v. State*, 397 So. 2d 288 (Fla. 1981).

An information or bill of particulars may properly charge a crime as occurring between two dates, when no specific date can be determined or when the crime committed was a continuing course of conduct. *State v. Bandi*, 338 So. 2d 75 (Fla. 4th DCA 1976). Where a judgment of acquittal was granted because the bill of particulars charged the wrong date, the state was not barred from retrial of the defendant on the corrected information. *State v. Beamon*, 298 So. 2d 376 (Fla. 1974).

### **B. MOTION TO DISMISS RULE 3.190(b)**

The purpose of a motion to dismiss is to challenge the legal sufficiency of the charging document. Although the motion should be filed before or upon arraignment, Fla. R. Crim. P. 3.190(c) allows the defendant to request time within which to file motions directed at the charging document. The court will usually allow the filing of the motion at a later time. *Stanfill v. State*, 384 So. 2d 141 (Fla. 1980). However, failure to attack the sufficiency of a charging document, by way of a motion to dismiss, prior to trial results in a waiver of the argument. *State v. Strickler*, 712 So. 2d 1218 (Fla. 2d DCA 1998).

Any defects can be corrected by amending the charging document prior to the hearing on the motion. Fla. R. Crim. P. 3.140(o); *State v. Ford*, 641 So. 2d 508 (Fla. 5th DCA 1994); *State v. Belton*, 468 So. 2d 496 (Fla. 5th DCA 1985); *State v. Wilkins*, 534 So. 2d 705 (Fla. 1988) (reversing lower court's dismissal of an amended information with a finding of no prosecutorial vindictiveness upon filing of amended information, with enhanced charges, after a mistrial which resulted from a deadlocked jury)

### **C. SWORN MOTION TO DISMISS RULE. 3.190(c)(4)**

The purpose of a sworn motion pursuant to 3.190(c)(4) is to establish whether or not the State has a *prima facie* case. These are often referred to as "C-4" motions. The facts on which such motion is based should be **specifically alleged** and the motion must be **sworn** to by someone with personal knowledge. The motion must allege:

- a. That the material facts are not in dispute;
- b. Specifically what the material facts of the case are, not just recite legal conclusions;
- c. That the undisputed material facts do not establish a prima facie case, or that the undisputed material facts establish a valid defense.

Failure to allege the above may cause the motion to be stricken. *State v. Sedlmayer*, 375 So. 2d 887 (Fla. 3d DCA 1979); *State v. Torres*, 375 So. 2d 889 (Fla. 3d DCA 1979); *Kassel v. State*, 382 So.

2d 1354 (Fla. 4th DCA 1980); *Ellis v. State*, 346 So. 2d 1044 (Fla. 1st DCA 1977). Even if properly alleged, however, if the undisputed facts as alleged in the motion to dismiss do not meet such burden then any response from the State is superfluous, and the motion may be summarily denied. *State v. Gutierrez*, 649 So. 2d 926 (Fla. 3d DCA 1995).

### 1. NO MATERIAL DISPUTED FACTS

Knowledge and intent are not issues to be decided on a motion to dismiss; they are generally a matter for the trier of fact. *State v. Lopez*, 522 So. 2d 997 (Fla. 3d DCA 1988); *State v. Jones*, 642 So. 2d 804 (Fla. 5th DCA 1994); *State v. Sokos*, 426 So. 2d 1044 (Fla. 2d DCA 1983) (entrapment); cf., *State v. Shorette*, 404 So. 2d 816 (Fla. 2d DCA 1981) (dismissal proper because crime charged required a specific intent and state could not controvert the fact that defendant was drunk. (Remember that intoxication is a defense to specific intent crimes.)) But see *Pinkney v. State*, 74 So. 3d 572, 574 (Fla. 2<sup>nd</sup> DCA 2011) for a discussion of how *Shorette* has been overextended.

It is improper for the trial to determine factual issues and consider the weight of conflicting evidence or the credibility of the witnesses. *Gutierrez*, supra; *State v. Jones*, 642 So. 2d 804 (Fla. 5th DCA 1994); *State v. Diaz*, 627 So. 2d 1314 (Fla. 2d DCA 1993); *State v. Fry*, 422 So. 2d 78 (Fla. 2d DCA 1982).

### 2. JURAT

The rule requires only that someone with personal knowledge swear to the motion; it does not specify by whom. In *State v. Betancourt*, 616 So. 2d 82 (Fla. 3d DCA 1993), the father of the defendant swore to the motion. The purpose of having the motion sworn to is to subject those having personal knowledge of the facts to the penalties of perjury. *Id.* at 83. The jurat must establish that the affiant is under oath and the facts being sworn to are true, not just true "to the best of my knowledge and belief." *State v. Justo*, 555 So. 2d 893 (Fla. 3d DCA 1990). Otherwise, the motion can be stricken for the deficiency. *Id.* See also, *State v. Rodriguez*, 523 So. 2d 1141 (Fla. 1988), *State v. Upton*, 392 So. 2d 1013 (Fla. 5th DCA 1981).

**Defense counsel cannot swear to the motion!** *State v. Holder*, 400 So. 2d 162 (Fla. 3d DCA 1981); *State v. Hayes*, 453 So. 2d 940 (Fla. 4th DCA 1984). Additionally, in *State v. Palmore*, 510 So. 2d 1152 (Fla. 3d DCA 1987), the court held that the sworn statement submitted by the defendant in support of his motion is an adoptive admission, and can be used against the defendant at trial during the State's case-in-chief.

### 3. TRAVERSE

"A motion to dismiss under subdivision (c)(4) of this rule shall be denied if the State files a traverse that with specificity denies under oath the material fact or facts alleged in the motion." Fla. R. Crim. P. 3.190(d) (emphasis added); *State v. Martin*, 422 So. 2d 12 (Fla. 2d DCA 1982) (State need not even present testimony if its traverse is proper); *State v. Sawyer*, 526 So. 2d 191 (Fla. 3d DCA 1988). The State is entitled to a denial of a sworn motion to dismiss only if the State files a traverse that, with specificity, denies under oath the material fact or facts alleged in the motion. *Gutierrez*, supra. The denial by the State must be in good faith, and not be based on speculation, conjecture, presumption or assumption. *Id.* at 927; See also, *State v. Wright*, 386 So. 2d 583 (Fla. 4th DCA 1980).

Although the State is under no obligation to present additional facts consistent with guilt, the State must ensure that the facts alleged in the motion constituted a prima facie case. All facts must be

considered in the light most favorable to the State, and the court must resolve all inferences against the defendant. *State v. Gale*, 575 So. 2d 760 (Fla. 4th DCA 1991).

A (c)(4) motion should only be granted where the most favorable construction to the State would not establish a prima facie case. The burden of persuasion does not shift to the State until the defendant files a motion sufficient to show that the State cannot establish a prima facie case. *State v. Armstrong*, 616 So. 2d 510 (Fla. 4th DCA 1993). Thus, even if the traverse is procedurally inadequate (insufficient to require an automatic denial) the initial burden remains on the defendant to demonstrate that there are no genuine issues of material fact and the undisputed material facts fail to establish a prima facie case. *Gutierrez*, supra; *See also Osby v. State*, 630 So. 2d 657 (Fla. 5th DCA 1994). Even in the absence of a response by the State, the defendant must meet the initial burden.

It is error not to allow the State to amend and clarify its traverse. *State v. Rodriguez*, 640 So. 2d 206 (Fla. 4th DCA 1994). Dismissal is too harsh when the State has filed a traverse in good faith, placed the defendant's interpretation of the facts in issue, and asserted that there are additional material facts that were omitted from the motion (but the State failed to allege). *Id.* at 208. The better practice is to present the additional facts.

*State v. Sawyer*, 526 So. 2d 191 (Fla. 3d DCA 1988): The court held that when the State files a traverse, the motion to dismiss must be denied even if the traverse is not filed "within a reasonable time before the hearing on the motion to dismiss."

*State v. Burnison*, 438 So. 2d 538 (Fla. 2d DCA 1983): The State filed its traverse immediately prior to the hearing although the motion had been filed almost two months previously. The court found the State's actions poor and frustrating; however, the court held that dismissal was too severe a sanction. A continuance would have been the preferred solution.

The best practice is to file the traverse as soon as possible after receiving the motion.

#### **4. DEMURRER**

Even if facts are as defendant has alleged, defendant is not entitled to dismissal as a matter of law. If the facts as sworn to are true, then the focus shifts to whether or not the defendant has committed a crime pursuant to the substantive law. You must file a memorandum of law in opposition to the motion.

The State can refile an information previously dismissed pursuant to Fla. R. Crim. P. 3.190(c)(4). The State is not barred from refiling an information on the ground that the identical information has previously been dismissed under 3.190(c)(4). Res judicata may apply, however, if the trial court is confronted with the identical motion to dismiss and the identical traverse or demurrer. *State v. Gellis*, 375 So. 2d 885 (Fla. 3d DCA 1979). Therefore, the only time you would refile is if new facts come to light or the case was dismissed for failure to file a traverse.



#### **D. MOTION TO SUPPRESS EVIDENCE RULE 3.190(h)**

Pursuant to Fla. R. Crim. P. 3.190(g)(1)(A) - (E), a motion to suppress evidence in an unlawful search may be based on the following grounds:

1. Illegally seized without a warrant;
2. Warrant is insufficient on its face;
3. Property seized is not the property described in the warrant;
4. No probable cause to believe the existence of the grounds on which the warrant was issued; or
5. Warrant was illegally executed.

The motion to suppress should be made before trial unless there was no opportunity or the defendant was not aware of the grounds for the motion. Fla. R. Crim. P. 3.190(g)(4). The court has discretion to hear the motion during trial. The judge should balance the defendant's rights with the State's right to appeal an adverse ruling. *See State v. Gaines*, 770 So. 2d 1221 (Fla. 2000). However, the State is precluded from appealing an adverse ruling on a motion to suppress that is heard during the trial. Therefore, if the court is inclined to hear the motion during trial, you might attempt to have defendant stipulate to a mistrial if the motion is granted. *See, Savoie v. State*, 422 So. 2d 308 (Fla. 1982). *State v. DeSantiago*, 791 So. 2d 1211 (Fla. 5<sup>th</sup> DCA 2001).

Pursuant to Fla. R. Crim. P. 3.190(g)(2), the motion must state:

- a. The particular evidence sought to be suppressed;
- b. The reason for suppression; and
- c. A general statement of the facts on which the motion is based.

Failure to properly allege the above is ground for denial on its face. *Herring v. State*, 394 So. 2d 433 (Fla. 3d DCA 1980); *See also, State v. Hernandez* 841 So. 2d 469 (Fla. 3d DCA 2002)

The burden is on the State to justify the search when no warrant is issued. *Andress v. State*, 351 So. 2d. 350 (Fla. 4th DCA 1977); *State v. Hinton*, 305 So. 2d 804 (Fla. 4th DCA 1975).

## **PENALTIES**

### **A. ADJUDICATION OR WITHHOLD ADJUDICATION OF GUILT**

An adjudication of guilt serves as a conviction on a defendant's record, while a withhold of adjudication does not. Adjudications are permanent, and the court may not seal or expunge the conviction. A sentence of credit for time served (CTS) can only be offered with an adjudication – not a withhold. Note that a sentence of credit time served cannot include time defendant spent in custody due to an unrelated case. *See Horton v. State*, 700 So. 2d 376 (Fla. 1997); *Horton v. State*, 684 So. 2d 257 (Fla. 3d DCA 1996) In addition, CTS is not applicable for time spent in rehabilitative centers; halfway houses; state hospitals, *McCarthy v. State*, 689 So. 2d 1095 (Fla. 5th DCA 1997); house arrest with electronic bracelet, *Fernandez v. State*, 627 So. 2d 1 (Fla. 3d DCA 1993); or, probation and restitution centers, *Smith v. State*, 619 So. 2d 994, 994 (Fla. 3d DCA 1993).

However, in *Tal-Mason v. State*, 515 So. 2d 738 (Fla.1987), the Supreme Court held that credit must be given for time spent committed to a state hospital for incompetence to stand trial. The court ruled that the "coercive commitment to a state institution was indistinguishable from pretrial detention in a 'jail,' as that term is understood in common and legal usage." *See also Maniccia v. State*, 931 So. 2d 1027, 1030 (Fla. 4<sup>th</sup> DCA 2006). Compare *Roberts v. State*, 622 So. 2d 628 (Fla.1st DCA 1993)(holding that defendant was not entitled to credit for time spent in a private psychiatric hospital because the confinement was not coercive or involuntary), *rev. denied*, 634 So. 2d 626 (Fla. 1994).

Thus, incarceration, for purposes of "CTS", has been defined as confinement in a governmental institution such that a defendant's liberty is circumscribed to the functional equivalent of custody in the county jail. *See, Thomas v. State*, 644 So. 2d 352 (Fla. 3d DCA 1994), citing *Fernandez, supra*, *rev. denied*, 639 So. 2d 977 (Fla. 1994).

Upon finding a defendant guilty in most misdemeanor cases, the court may also choose to withhold adjudication. Functionally, a withhold is not "a conviction." Therefore, a defendant may move the court to seal the record, and it may be expunged after 10 years of being sealed. Incarceration may only be imposed on a withhold of adjudication as a condition of probation.

### **B. FINES, PROBATION, AND INCARCERATION**

Generally, the maximum fine for a first degree misdemeanor is \$1,000.00 Fla. Stat. § 775.083(1)(d). The maximum fine for a second degree misdemeanor is \$500.00. Fla. Stat. § 775.083(1)(e).

Additionally, the general rule is that a probationary term may not exceed the maximum sentence prescribed for an offense, unless expressly provided by law. *Corraliza v. State*, 391 So. 2d 330 (Fla. 3d DCA 1980); *Meckel v. State*, 556 So. 2d 1240 (Fla. 5th DCA 1990); *Johnson v. State*, 519 So. 2d 724 (Fla. 2d DCA 1988); *Green v. State*, 392 So. 2d 333 (2d DCA 1981); *Williams v. State*, 402 So. 2d 537 (Fla. 5th DCA 1981); *Baldwin v. State*, 558 So. 2d 173 (Fla. 5th DCA 1990).

The maximum probation sentence for a first degree misdemeanor is one (1) year, and the maximum jail time is 364 days. Fla. Stat. Section 775.082(4)(a), (b). The maximum probation sentence for a second degree misdemeanor is six months, and the maximum jail time is 60 days. Fla. Stat. Section 775.082(4)(a), (b).

Why the difference between the probation and the jail times on a second degree misdemeanor? In order to find the answer we must read two statutes in conjunction. Fla. Stat. Section 948.15(1) states: "[d]efendants found guilty of misdemeanors who are placed on probation shall be under supervision

not to exceed 6 months unless otherwise specified by the court...." This is the exception to the general rule cited above: "unless expressly provided by law." Although Fla. Stat. Section 948.15(1) does not differentiate between first and second degree misdemeanors, Fla. Stat. Section 775.081(2) states: "[a] misdemeanor is of the particular degree designated by statute. Any crime declared by statute to be a misdemeanor without specification of degree is of the second degree."

Moreover, in *Smith v. State*, 484 So. 2d 581 (Fla. 1986), the Court held that a defendant convicted of a second degree misdemeanor could be placed on probation for more than 60 days, up to a maximum of six months, pursuant to Fla. Stat. Section 948.04(1) (predecessor of current Fla. Stat. § 948.15(1)). The statute construed in *Smith* is identical to 948.15(1). *See also, Merrett v. State*, 670 So. 2d 1055 (Fla. 3d DCA 1996); *Alderman v. State*, 356 So. 2d 928 (Fla. 2d DCA 1978); *Holloway v. State*, 393 So. 2d 1185 (Fla. 2d DCA 1981); *Corraliza v. State*, 391 So. 2d 330 (Fla. 3d DCA 1980).

## **C. PRE-TRIAL DIVERSION "PTD"**

The Pretrial Diversion Program is a program offered exclusively by the Miami-Dade County State Attorney's Office to first-time offenders. It provides these offenders with a viable alternative to a criminal conviction. Pretrial diversion consists of a course (the specific course depends upon the crime charged), sometimes community service hours, and a donation to the Denise Moon Fund. Depending on the specific charge, a stay away order and/or court ordered restitution may be added to the program. Pretrial diversion can only be offered to a person who owes restitution if there is an amount certain and that amount does not exceed \$5000.

The PTD program is designed to divert generally law-abiding citizens from the criminal courts. As a general rule, only first time offenders are eligible for PTD. PTD is run by the State Attorney's Office. **Judges may not, under any circumstances, offer PTD.** In fact, a judge cannot even participate in a PTD offer. Specifically, judges may not waive any fees or add, remove, or modify any conditions. *See Cleveland v. State*, 417 So. 2d 653 (Fla. 1982); *State v. Turner*, 636 So. 2d 815 (Fla. 3d DCA 1994).

Two providers, the Advocate Program and the Court Options Program administer various PTD courses on the State's behalf.

## **D. MENTAL HEALTH DIVERSION PROGRAM**

The November 27, 2000 Mental Health Diversion Agreement outlines the procedure that must be followed when a person is arrested or charged with a misdemeanor and needs mental health services. The goal of the agreement is to divert mentally ill defendants out of the criminal system, and provide them with the needed mental health treatment.

### **1. Examination & Issuance of Professional Certificate**

A physician, clinical psychologist, psychiatric nurse or clinical social worker will examine individuals in need of mental health services. Based upon the examination the professional may execute a Professional Certificate (also called a "PC") to initiate an involuntary examination pursuant to Fla. Stat. §394.463(2)(a).

When the Professional Certificate is issued, Corrections Mental Health will notify defense counsel, the State Attorney's Office, and the Mental Health Administrator's Office and provide them with a copy of the Professional Certificate and the name and address of the receiving facility that has agreed to provide the examination.

The receiving facility will make the following determinations: a. whether the defendant needs acute care or if the defendant appears to be mentally ill, but does not need acute services. The facility will also determine if the Defendant needs to be “Baker Acted.”

## **2. Acute Care or Community Mental Health Centers**

If after professional screening and an evaluation a defendant seems to be in need of acute care, the defendant will be referred to a Crisis Stabilization Unit or a Jackson Memorial Hospital Crisis Stabilization Unit. If the defendant appears to be mentally ill, but does not need acute services the defendant will be referred to Community Mental Health Centers that have agreed to provide the following services:

- a. Follow up appointment with the psychiatrist within 7 days of jail release;
- b. Sufficient medication to last through next follow-up appointment;
- c. Housing, as available, since temporary & housing is always needed;
- AND
- d. Tracking and linking to continued care by a case manager.

## **3. Baker Act**

If it is determined that the defendant meets criteria for involuntary placement pursuant to Baker Act, the receiving facility will provide the Baker Act Assistant State Attorney a copy of the defendant’s psycho-social history and the names, addresses and telephone numbers of any person expected to testify in support of the patient’s continued detention and the substance of their anticipated testimony. The Baker Act criteria is found under Chapter 394.

## **4. Discharge**

Upon a defendant being discharged from a mental health facility the prosecutor must determine the appropriate case resolution. In certain limited instances, for example, victimless crimes, a *nolle prosequere* may be appropriate. In other cases, a plea offer of probation may be the appropriate resolution. In making this determination, the defendant’s prior history must be considered, the victim should be spoken to, and the case should be taken to the Mental Health Attorney or the appropriate Assistant Chief.

## **E. HABITUAL MISDEMEANOR OFFENDER STATUTE**

**Florida Statutes § 775.0837** creates a habitual misdemeanor classification. Habitual misdemeanor offender means a defendant who is before the court for sentencing for a **specified misdemeanor** offense and who has previously been convicted, as an adult, of **four or more** specified misdemeanor offenses which meet the following criteria:

- 1) The prior offenses and the current misdemeanor are separate offenses that are not part of the same criminal transaction or episode.
- 2) The offenses were committed within 1 year of the date that the current misdemeanor for sentencing was committed.

NOTE: only one count from each case counts. For example, if a defendant had a particularly bad night, picked up a Disorderly Intoxication, Battery, and Trespassing, and took CTS to each count, you may only count one qualifying offense from that case (as opposed to three).

If the court finds the defendant to be a habitual misdemeanor offender, the court **must** sentence the offender as such **unless** the court makes a finding that an alternative disposition is in the *best interests of the community and the defendant*. As a habitual misdemeanor offender, the defendant shall be sentenced to:

- 1) a term of 6 months to a year in a county jail, but not to exceed 1 year;
- 2) a term of 6 months to a year in a residential treatment program, community-based treatment program, or a combination of the two; or
- 3) a term of 6 months to a year in a monitored home detention program.

Qualifying Offenses:

**Chapter 741**

Including Domestic Violence charges

**Chapter 784**

Including Assault and Battery

**Chapter 790**

Including Weapons and Firearms charges.

**Chapter 796**

Including Prostitution and Solicitation of Prostitution

**Chapter 800**

Including Lewd and Lascivious Behavior, Indecent Exposure

**Chapter 806**

Including Arson and Criminal Mischief

**Chapter 810**

Including Burglary, Trespass, Possession of Burglary Tools

**Chapter 812**

Including Theft, Robbery, Possession of Stolen Property

**Chapter 817**

Including Fraudulent Practices

**Chapter 831**

Including Forgery and Counterfeiting

**Chapter 832**

Including Worthless Checks

**Chapter 843**

Including Obstruction of Justice, Resisting Arrest

**Chapter 856**

Including Disorderly Intoxication, Loitering and Prowling

**Chapter 893**

Including Drug Possession, Possession of Drug Paraphernalia

**Chapter 901**

Including False Name to Law Enforcement Officer

Non-Qualifying Offenses: Disorderly Conduct, Drinking in Public, Urinating in Public, Contracting without a License, and DUI/Traffic Offenses.

## **F. RESTITUTION**

Pursuant to **Section 775.089**, in addition to any other penalty, the court **shall** order the defendant to pay restitution for damage or loss caused directly or indirectly by the defendant's offense and damage or loss related to the defendant's criminal episode. The purpose of restitution is to compensate the victim and make the victim whole. Thus, restitution must be part of any plea or sentence whenever there is a victim who suffered monetary losses as a result of a crime.

## 1. CAUSAL CONNECTION

There must be a causal connection between the defendant's criminal offense and the damages suffered by the victim. It is not necessary that the offense charged describe the damage done to support restitution ordered, only that the damage bear a significant relationship to the offense. *JSH v. State*, 472 So. 2d 737 (Fla. 1985).

However, in LSA cases and NVDL cases, where damage was caused by leaving the scene or driving without a valid driver's license, the courts have deemed that no causal connection exists with the defendant's criminal episode and the damage. Consequently, most judges will not impose restitution as part of a sentence. *See, e.g., State v. Williams*, 520 So. 2d 276, 277 (Fla. 1988). You may however include restitution as part of a plea offer.

## 2. DOUBLE JEOPARDY

"Once a trial court renders a final order imposing restitution, double jeopardy considerations prohibit it from subsequently increasing the amount." *M.H. v. State*, 698 So. 2d 395, 397 (Fla. 4th DCA 1997)(citing *Strickland v. State*, 681 So. 2d 929, 930 (Fla. 3d DCA 1996); *Farber v. State*, 409 So. 2d 71 (Fla. 3d DCA 1982); *Macias v. State*, 572 So. 2d 22, 23 (Fla. 4th DCA 1990)); *see also Ford v. State*, 829 So. 2d 946 (Fla. 4th DCA 2002)(crime victim entitled to notice of right to request restitution, but not entitled to vacate defendant's plea in violation of defendant's right not to be placed in double jeopardy).

For this reason, it is best practice to reserve on the restitution amount at the time of the plea if you are not certain of the amount. You may then later have a restitution to determine the appropriate amount.

## 3. JURISDICTION

Fla. Stat. § 775.089(3)(a) indicates the Court has jurisdiction in a misdemeanor case to enforce restitution orders for a period of **five (5) years** from the date restitution is ordered. The Supreme Court has held that a Court can order restitution within **60 days** of sentencing. However, the determination of the amount of restitution can be made beyond the 60 day period. *State v. Sanderson*, 625 So. 2d 471 (Fla. 1993); *See also, L.O. v. State*, 718 So. 2d 155 (Fla. 1998); *Bunch v. State*, 745 So. 2d 400 (Fla. 5th DCA 1999).

## 4. FAILURE TO IMPOSE RESTITUTION AT SENTENCING

Fla. Stat. § 775.089 provides that the trial court is required at sentencing to order that the defendant make restitution to the victim. Restitution is a mandated part of sentencing. *See Ridley v. State*, 890 So.2d 1261 (5th DCA 2005); *Long v. State*, 876 So.2d 718 (5th DCA 2004). If restitution is not imposed at sentencing, the State has 60 days to file a motion to modify the sentence under Fla. R. Crim. P. 3.800 (c). *See Bunch v. State*, 745 So. 2d 400 (Fla. 5th DCA 1999); *Grice v. State*, 528 So. 2d 1347 (Fla. 1st DCA 1988).; *State v. Sanderson*, 625 So. 2d 471(Fla. 1993). An amount does not need to be set in the order. The amount can be determined at a later date.

If the judge does not order restitution or only orders a portion of restitution, according to Fla. Stat. § 775.089, the court is required to state on the record the reasons for its decision.

## 5. DETERMINING RESTITUTION

When the court is determining restitution, it is not restricted to a “fair market value” standard. The court should consider fair market value through (1) direct testimony; (2) use of the item; and (3) condition at time of damaging offense. According to *Domaceti v. State*, 616 So. 2d 1148 (Fla. 4th DCA 1993), the Court must look at 1) original cost; 2) manner in which items were used; 3) their general condition and quality; and 4) percentage of depreciation. Unless fair market value does not adequately compensate the victim for his losses, this figure, and not replacement value, must be used in determining restitution. *Epley v. State*, 11 So.3d 1006 (Fla. 1<sup>st</sup> DCA 2009). Note -- State cannot use trial testimony from victims in lieu of their testimony at a subsequent restitution hearing. *Nickelson-Ippolito v. State*, 17 So.3d 1257 (Fla. 2<sup>nd</sup> DCA 2009).

With regards to determining restitution for unknown victims, the court can reserve jurisdiction with regards to determining restitution until the victims become identified. *See Seidman v. State*, 847 So.2d 1144 (4th DCA 2003).

### a. Defendant’s Ability to Pay

Unlike in civil judgments, the trial court should conduct a hearing regarding the defendant’s ability to pay before an amount of restitution is ordered. The burden of demonstrating the present financial resources and the absence of potential future financial resources of the defendant and his dependents is on the defendant. *See*, Fla. Stat. § 775.089(7).

### b. Speculative Figure

Speculative evidence is insufficient to support an award for investigative costs. *Glaubius v. State*, 688 So. 2d 913 (Fla. 1997).

Restitution award based on estimated time figures made before actual work was completed, reversed for factual determination of the actual time spent to repair damages. *Stocks v. State*, 687 So. 2d 325 (Fla. 5th DCA 1997).

Restitution may not be awarded for loss of business expenses where the measure of damages is speculative and difficult to prove. *Osteen v. State*, 616 So. 2d 1215 (Fla. 5th DCA 1993).

Restitution award for embezzled rents reversed without proof of how many apartments were actually rented at time of crime. *Delks v. State*, 622 So. 2d 624 (Fla. 2d DCA 1993).

Lost profits held too speculative. *Garay v. State*, 708 So. 2d 631 (Fla. 5th DCA 1998); *but see Nix v. State*, 604 So. 2d 920 (Fla. 1st DCA 1994)(court disallowed lost profit and taxes but held that if they had been prepaid, they could have been awarded).

### c. Bankruptcy

A defendant is still obligated to pay for restitution despite discharge in bankruptcy. In *Baker v. State*, 616 So. 2d 571 (Fla. 5th DCA 1993), the court held it may order restitution for a “debt” discharged in bankruptcy. *See also*, Fl. Stat. Section 775.089(10)(b); *State v. Arriagada*, 678 So. 2d 1381 (Fla. 4th DCA 1996).

### d. Offset

Any restitution paid shall be set off against any subsequent independent civil recovery. However, fact that victim has an enforceable civil obligation covering a loss does not

divest the court of the power to order restitution under section 775.089. *Vereen v. State*, 703 So. 2d 1193 (Fla. 4th DCA 1997).

A trial court is required to conduct an evidentiary hearing to determine if there is an overlap between recovery in civil case and amount of restitution. *Weinstein v. State*, 745 So. 2d 1085 (Fla. 4th DCA 1999)

Where stolen property is recovered, the amount of restitution must be offset by the salvage value of the property returned. *M.E.I. v. State*, 525 So. 2d 467 (Fla. 1st DCA 1988); *see also JK v. State*, 695 So. 2d 868 (Fla. 4<sup>th</sup> DCA 1996) (Restitution has not abandoned the concept of mitigation of damages.)

**e. Restitution is not limited to maximum dollar amount defining offense**

While the second degree misdemeanor criminal mischief is limited to damages of \$200, this does not preclude the State from seeking restitution for the victim in excess of \$200. The principal purpose of restitution is to make victims of crime whole by restoring in them value of that which they have lost as result of crime, rather than punish wrongdoer. Therefore, the court in *J.O.S v. State*, 668 So. 2d 1082 (Fla. 1st DCA 1996), explained that it could not “perceive [any] good reason why the amount should be limited arbitrarily by the maximum dollar value of the offense which a defendant is found to have committed.”

**f. Co-Defendants**

Defendant can be held jointly and severally accountable with his co-defendants for restitution resulting from their joint criminal act. *R.E.P. v. State*, 728 So. 2d 341 (Fla. 1st DCA 1999).

## **6. CONDUCTING A RESTITUTION HEARING**

Pursuant to Fl. Stat. 775.089(7), the burden of demonstrating the amount of loss sustained by the victim as a result of the offense is on the State by a preponderance of the evidence. Failure to provide substantial evidence as to the amount of restitution owed is reversible error.

In *Montalvo v. State*, 705 So. 2d 984 (Fla. 3d DCA 1998), the Court liberally construed the burden of proof and the degree of proof necessary to support an award of restitution. “The courts have repeatedly distinguished the proof necessary to impose restitution from that required in civil actions. “We recognize that the degree of proof normally introduced in a restitution hearing will not be as extensive as in a civil trial.” *See, Bianco v. State*, 594 So. 2d 861 (Fla. 4th DCA 1992); *J.K. v. State*, 695 So. 2d 868 (Fla. 4th DCA 1997). The *Montalvo* court also found that in setting a monetary amount for restitution, a court is not limited to the damage calculation that would be recoverable in a civil action, but may exercise its discretion as required to further the purposes of restitution. Finally, the court, acknowledging that restitution awards cannot be speculative, found that the victim was entitled to the face value of the cruise line tickets that had been stolen by the defendant.

The victim is qualified to testify as to the value of the item for purposes of determining restitution. The amount of restitution cannot be mere speculation; it must be based on competent [admissible] evidence. *Glaubis v. State*, 688 So. 2d 913 (Fla. 1997). *See also J.L. v. State*, 684 So. 2d 883 (Fla. 3d DCA 1996); *Hercule v. State*, 655 So. 2d 1256 (Fla. 3d DCA 1995); *K.F. v. State*, 746 So. 2d 493 (Fla. 1st DCA 1999).

However, the evidence cannot be based solely on hearsay. *Louis v. State*, 654 So. 2d 1290 (Fla. 3d DCA 1995); *See also, Atkins v. State*, 728 So. 2d 288 (Fla. 2d DCA 1999). *J.L. v. State*, 684 So. 2d



883 (Fla. 3d DCA 1996). Medical bills are admissible as non-hearsay evidence, In *A.J. v. State*, 677 So. 2d 935 (Fla. 4th DCA 1996), the court found that the medical bills introduced through the victim were non-hearsay because the bills constituted part of a contract that created a specific debt for a specific amount. The court stated that “a witnesses’ testimony that she received a medical bill and either made payment, or did not challenge it, is testimony concerning offer and acceptance, the words of a contract. Words of a contract, often characterized as verbal acts, are non-hearsay because they have independent legal significance - the law attaches duties and liabilities to their utterance.”

**IMPORTANT:** The court may conduct a restitution hearing and ultimately order the defendant to pay restitution even when the defendant fails to show for the restitution hearing. *Avery v. State*, 838 So. 2d 1247 (Fla. 2d DCA 2003).

## **7. ENFORCEMENT OF A RESTITUTION ORDER**

### **a. Income Deduction Order (IDO) (Fla. Stat. 775.089(12))**

Upon entry of the restitution order, a separate order can be entered for the IDO. It orders a payer to deduct the amount due. It is effective as long as restitution order is effective or by order of the court. The court must give the defendant a statement of rights, remedies and duties but the IDO may only be contested on the ground of mistake of fact re: amount owed. The defendant must notify the clerk of court within 7 days after he changes his address, the payer and payer’s address.

### **b. Civil Restitution Lien - See, Fl. Stat. § 960.291 - 292.**

### **c. Civil or Criminal Contempt**

## **8. APPEALING RESTITUTION ORDERS**

Fla. Stat. § 924.07(k) authorizes the State to appeal “an order denying restitution under section 775.089.” This includes a partial order partially denying claim for restitution. *See, State v. Allen*, 743 So. 2d 532 (Fla. 1st DCA 1997).

## **9. IMPACT OF AN APPEAL ON RESTITUTION**

A trial court does not have jurisdiction to enter an order of restitution after a notice of appeal has been filed. This is true even if the court ordered restitution but reserved on the amount. *Nguyen v. State*, 655 So. 2d 1249, 1250 (Fla. Dist. Ct. App. 1995)

## **CONTEMPT OF COURT**

Generally, contempt is an offense against the lawful authority of the court. “If the matter complained of constituting contempt, when fairly interpreted, does not have a reasonable tendency to degrade or to embarrass or hinder . . . a judge in performing his own duty, or to affect a mind of reasonable fortitude, it is not a criminal contempt for which imprisonment may be lawfully adjudicated, particularly when an intent to offend is denied under oath.” *Thompson v. State*, 427 So. 2d 341 (Fla. 1st DCA 1983)

### **A. STANDARD**

“[T]he test in determining whether conduct constitutes criminal contempt is whether the conduct interferes with or impugns the judicial function, not whether it causes a particular judge to feel aggrieved or vexed.” The behavior must violate a court order. There must be testimony that the defendant’s conduct obstructed, interrupted, prevented, or embarrassed the administration of justice. *Via v. State*, 633 So. 2d 1198 (Fla. 2d DCA 1994).

### **B. TYPES OF CONTEMPT**

#### **1. DIRECT Criminal Contempt – Rule 3.830**

Pursuant to Fla. R. Crim. P. Rule 3.830, *direct* criminal contempt results from conduct committed in the actual presence of the court.

The State must show beyond a reasonable doubt that the defendant’s conduct substantially disrupted or delayed the court proceedings or that he acted willfully and intentionally to interfere with the orderly conduct of the proceedings. *Berman v. State*, 751 So. 2d 612 (Fla. 4th DCA 1999); *Kramer v. State*, 800 So. 2d. 319 (2d DCA 2001).

However, the defendant must be given the opportunity to present evidence as to why he should not be found in contempt. The defendant shall also be permitted to present evidence of excusing or mitigating factors. Fla. R. Crim. P. Rule 3.830.

Examples:

Attorney, who in the presence of the judge, in open court, made the following remarks, “This is a circus proceeding.” Attorney also made further references to the court calling it a “kangaroo court.” These comments by the attorney were “criminally contemptuous on their face and require no explanation by the judge as to why they are deemed contemptuous.” However, this case was reversed on other grounds - the court did not follow the proper procedure for conducting direct criminal contempt proceedings outlined in Rule 3.830. The judge did not give the defendant a chance to show why he should not be found in contempt. The court is then required to allow the defendant an opportunity to present evidence of excusing or mitigating circumstances. *Martin v. State*, 711 So. 2d 1173 (Fla. 4th DCA 1998).

Public defender slammed fist on table and loudly shouted, “Yessss” after jury returned not guilty verdict. The trial court’s finding of direct criminal contempt was reversed. Trial court was reversed for not properly following the procedures outlined in Rule 3.830 for the same reasons as stated in *Martin*, supra. The Court found that strict compliance with rule 3.830 is necessary in order to assure the necessary safeguards of procedural due process for direct contempt proceedings. Furthermore, the trial court was reversed because the 4th DCA concluded that this conduct was not contemptuous - did not tend to hinder the administration of justice or was calculated to cause harm. Neither the

transcript of the proceedings nor the trial court's factual findings in the amended order establish beyond a reasonable doubt that appellant's conduct, though undignified and unprofessional, was disruptive and harmful to the integrity of the court. *Berman v. State*, 751 So. 2d 612 (Fla. 4th DCA 1999), *see also* *Woodie v. Campbell*, 960 So.2d 877, (Fla. 1st DCA 2007)(no direct criminal contempt when a judge did not hear remarks made by an angry defendant's mother).

Trial court held witness in direct criminal contempt for witness' failure to testify pursuant to a trial subpoena. This direct contempt verdict was affirmed. *Allen v. State*, 739 So. 2d 166 (Fla. 3d DCA 1999). Additionally, cursing or foul language in the Courtroom is punishable by direct criminal contempt, assuming the protocol in Rule 3.830 is followed, *See Jones v. State*, 360 So.2d 157 (Fla. 3 DCA 1978).

## **2. Indirect Criminal Contempt – Rule 3.840**

Pursuant to Fla. R. Crim. P. Rule 3.840, indirect criminal contempt results from conduct that has occurred outside the presence of a judge that violates a court order.

The State must prove beyond a reasonable doubt that the defendant willfully violated a court order. *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985); *Brown v. Smith*, 705 So. 2d 682 (Fla. 3d DCA 1998).

If the indirect criminal contempt charge is predicated upon a court's order requiring the defendant to pay an amount of money, the movant has the presumption that the defendant has the ability to pay. This presumption places the burden on the defendant to come forward with evidence to show that, due to circumstances beyond his control, he has no ability to pay. *Id.* (*Bowen* rejected the argument that this presumption improperly infringes upon defendant's Fifth Amendment privilege).

Examples:

*Wasserman v. State*, 671 So. 2d 846 (Fla. 2d DCA 1996): Attorney's out-of-court statements to judicial assistant did not constitute clear and present danger to orderly administration of justice and, thus, could not be punished as indirect criminal contempt.

*Micciche v. State*, 626 So. 2d 1028 (Fla. 3d DCA 1993): Requires the State to show the defendant willfully disobeyed court order. Where evidence insufficient to support fact witness willfully failed to attend deposition, indirect criminal contempt is improper.

*Rhoads v. State*, 817 So. 2d 1089 (Fla. 2d DCA 2002): That the defendant's testimony is different from the State's witnesses is insufficient for the court to have judicial knowledge of the falsity of the defendant's testimony as grounds to hold him/her in contempt.

*Tejada v. State*, 729 So. 2d 965 (Fla. 3d DCA 1999): Defendant lied under oath to the judge to induce judge to release defendant's friend on bond. Judge found out several days later when defendant admitted lying under oath to the judge at the previous court hearing. The trial court then found defendant in direct criminal contempt. The Third DCA reversed. The Court held that because a number of days had passed between the contemptuous conduct and the trial court's finding of direct criminal contempt, this case should have been brought as an indirect criminal contempt case – providing defendant with notice and an opportunity to be heard as outlined in Rule 3.830 and 3.840.

*Lawrence v. Lawrence*, 384 So. 2d 279 (Fla. 4th DCA 1980): "One may not be held in indirect criminal contempt for violation of an order or provision of judgment which is not clear and definite to make the party aware of its command and direction."

*Kranis v. Kranis*, 313 So. 2d 135 (Fla. 3d DCA 1975): Indirect criminal contempt conviction was reversed where court's order was vague. Judge's Order did not specifically provide the time defendant was required to make payments.

*Rouse v. Rouse*, 595 So. 2d 1013 (Fla. 2d DCA 1992): Contempt conviction reversed because judge's order not specific enough to apprise defendant of what he was required to do on the court order.

### **3. Civil Contempt**

The purpose of civil contempt is to obtain compliance on the part of a person subject to an order of the court. Because incarceration is utilized solely to obtain compliance, it must be used only when the contemnor has the ability to comply. This ability to comply is the contemnor's "key to his cell." The purpose of criminal contempt is to punish. Criminal contempt proceedings are used to vindicate the authority of the court or to punish for an intentional violation of an order of the court. *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985). "On the other hand, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant." *Kramer v. State*, 800 So.2d 319 (2d. DCA 2001); *Parisi v. Broward County*, 769 So. 2d 359 (Fla. 2003).

The courts have stated that in civil contempt proceedings there is no presumption of innocence and the burden of proof is upon the party bringing the charge to prove the facts by a preponderance of the evidence. See, *Martin v. State*, 194 So. 2d. 8, 11 (Fla. 3d DCA 1967).

"Because civil contempt sanctions are "coercive and avoidable through obedience," they may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard, without the constitutional protections required in criminal cases." *Pompey v. Cochran*, 685 So. 2d 1007 (Fla. 4th DCA 1997). The court later stated that the protections afforded one who faces civil contempt charges are those procedures outlined in *Bowen*, supra. Here, however, the contemnor failed to appear for the contempt hearing. The trial court immediately found the defendant in civil contempt. The trial court further found that the defendant did not rebut the presumption that he had the ability to pay the purge amount because he failed to show for the hearing. The trial court then incarcerated the defendant. The 4th DCA reversed, finding that the civil contempt proceeding turned into a criminal contempt proceeding without affording the defendant the due process protections required for criminal contempt.

### **C. RULE TO SHOW CAUSE**

A Petition for Rule to Show Cause sets forth the allegations specifically as to why defendant should be held in either indirect criminal or civil contempt, and the Prosecutor must specify on the Petition whether the charge is civil or indirect criminal contempt. The Petition for Rule to Show Cause must be notarized and there must be a jurat where the prosecutor under oath, verifies that all the facts stated in the Petition are true and correct based upon receiving testimony under oath from the victim.

*Grant v. State*, 464 So. 2d 650 (Fla. 4th DCA 1985): Order to show cause did not recite facts constituting contempt nor did it apprise the defendant of whether the contempt was civil or criminal – indirect criminal contempt charge reversed.

*Micciche v. State*, 626 So. 2d 1028 (Fla. 3d DCA 1993): Defendant must be apprised of whether charge is civil or criminal contempt - in this case the Court reversed a contempt conviction because defendant was not apprised in the order to show cause whether the defendant faced civil or indirect criminal contempt proceedings.

*A.L.B. v. State*, 675 So. 2d 668 (Fla. 1st DCA 1996): In an Order to Show Cause “the Rule” must be made on the judge’s own motion or on an affidavit by someone having knowledge of the facts - See Rule 3.840(a). In this case indirect contempt charge affirmed where trial court issued order to show cause sua sponte.

*Baker v. Green*, 732 So. 2d 6 (Fla. 4th DCA 1999): Order to show cause for contempt o.k. if based on sworn testimony - where there was no affidavit of any person having knowledge of the facts or sworn testimony to support the issuance of the contempt order, this is fundamental error and indirect criminal contempt conviction was reversed.

*Paris v. Paris*, 427 So. 2d 1080 (Fla. 1st DCA 1983): The order to show cause for a charge of indirect criminal contempt must be predicated on a sworn affidavit of a person with knowledge of the facts, the verification of a prosecuting attorney based on sworn testimony given to him, or testimony under oath before the issuing judge

The Rule to Show Cause shall state the essential facts constituting the criminal contempt charged requiring the defendant to appear and show cause why the defendant shall not be held in contempt of court.

After the arraignment on the Rule, the hearing takes place. The defendant is entitled to court-appointed counsel just like a criminal case where the Court and the State certify jail. Defendant entitled to same due process for indirect criminal contempt proceedings as he is entitled to in regular criminal cases (except right to jury trial see below). *Brown v. Smith*, 705 So. 2d 682 (Fla. 4th DCA 1998).

Person found in indirect criminal contempt cannot be sentenced more than 6 months without the benefit of a jury trial. (Unless defendant waives such right). With a jury trial, the maximum sentence is 1 year in jail. The maximum fine under either scenario is \$500. *Blalock v. Rice*, 707 So. 2d 738 (Fla. 2d DCA 1997). Right to jury trial only if sentence is greater than 6 months. Defendant is not entitled to a jury trial for criminal contempt if the sentence is less than 6 months jail. *Attwood v. State*, 687 So. 2d 271 (Fla. 4th DCA 1997). Defendant was charged with 5 counts of indirect criminal contempt, arising from the same judge, and all counts arose from separate acts of the same violation of the court’s order. The defendant was sentenced to 5 months on all 5 counts consecutively (over 2 years in jail). The Court held that the defendant was not entitled to a jury trial. *Aaron v. State*, 345 So. 2d 641 (Fla. 1977).



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## **PART 2: SUBSTANTIVE CRIMES**

## **ASSAULT - F.S. 784.011**

### **A. ELEMENTS**

**To prove the crime of Assault, the State must prove the following three elements beyond a reasonable doubt:**

- 1. (Defendant) intentionally and unlawfully threatened, either by word or act, to do violence to (victim).**
- 2. At the time, (defendant) appeared to have the ability to carry out the threat.**
- 3. The act of (defendant) created in the mind of (victim) a well-founded fear that the violence was about to take place.**

### **B. PENALTIES**

Second Degree Misdemeanor

Maximum 60 days in jail. (775.082(4)(b))

Maximum \$500 fine. (775.083(1)(e))

Maximum 6 months reporting probation

### **C. CASE LAW**

#### **Overt Act Required**

There must be some overt act sufficient to demonstrate a threat directed at the person placed in fear. Battles v. State, 288 So.2d 573 (Fla. 2d DCA 1974)(No assault when defendant exited store with a gun in his hand, officers responding were in front of the door as defendant exited, but defendant did not know that the officers were there).

#### **Victim must have well-founded fear**

The victim must have a well-founded fear that violence is imminent. State v. Von Deck, 607 So.2d 1388 (Fla. 1992); O.D. v. State, 614 So.2d 23 (Fla. 2d DCA 1993)(unarmed threat from across the street to one day kill the victim is insufficient; no overt act and no fear that violence is imminent).

A victim need not testify that they were afraid to sustain an assault conviction. Actual fear need not be shown where the situation is one that would create fear in a reasonable person's mind. Gilbert v. State, 347 So.2d 1087 (Fla. 3d DCA Dunn v. State, 397 So.2d 748 (Fla. 2d DCA 1981); Biggs v. State, 745 So.2d 1051 (Fla. 3d DCA 1999); Sullivan v. State, 898 So.2d 105 (Fla. 2d DCA 2005); 1977).

P.R. v. State, 782 So 2d 509, (Fla. 2d DCA 2001): There is no assault where a victim is not aware that he is about to be hit. A conviction for aggravated assault was reversed where the testimony from the victim was that he did not see the defendant approach from behind, pick up a chair and hit him in the head.

### **Conditional threat not an assault**

James v. State, 706 So.2d 64 (Fla. 5th DCA 1998): Fear must be present in the person that the defendant threatened. An assault does not occur when a defendant threatens another by word or act but instead places another in fear.

Butler v. State, 632 So.2d 684 (Fla. 5th DCA 1994): Conditional threat to do injury at some unspecified future time based upon possible eventuality is not an "assault," absent apparent ability to do so and overt act.

Benitez v. State, 901 So.2d 935 (Fla. 4th DCA 2005): To determine whether a "threat" exists, you must look at the defendant's words or acts, not the reaction of the person perceiving such word or act.

### **Charging document must allege fear**

The charging document must allege that victim was placed in fear. State v. Von Deck, 607 So.2d 1388 (Fla. 1992).

### **Jury Trial**

Defendant charged with assault is entitled to a jury trial because the offense is malum in se and was indictable at common law. Antonacci v. State, 504 So.2d 521 (Fla. 5th DCA 1987).

### **Assault on a Law Enforcement Officer – 784.07(2)(a)**

Assault on a LEO is a First Degree Misdemeanor.

To prove the crime of Assault on a [Law Enforcement Officer] [Firefighter] [Emergency Medical Care Provider] [Traffic Accident Investigation Officer] [Traffic Infraction Enforcement Officer] [Parking Enforcement Specialist] [Security Officer employed by the Board of Trustees of a Community College] [Federal Law Enforcement Officer], the State must prove the following six elements beyond a reasonable doubt:

1. (Defendant) intentionally and unlawfully threatened, either by word or act, to do violence to (victim).
2. At the time, (defendant) appeared to have the ability to carry out the threat.
3. The act of (defendant) created in the mind of (victim) a well-founded fear that the violence was about to take place.
4. (Victim) was at the time a [law enforcement officer] [firefighter] [emergency medical care provider] [traffic accident investigation officer] [traffic infraction enforcement officer] [parking enforcement specialist] [security officer employed by the board of trustees of a community college] [federal law enforcement officer].
5. (Defendant) knew (victim) was a [law enforcement officer] [firefighter] [emergency medical care provider] [traffic accident investigation officer] [traffic infraction enforcement officer] [parking enforcement specialist] [security officer employed by the board of trustees of a community college] [federal law enforcement officer].
6. At the time of the assault, (victim) was engaged in the lawful performance of [his] [her] duties.



**Enhanced Penalties:** This statute covers Assaults committed on law enforcement officers, firefighters, emergency medical care providers, public transit employees, and non-sworn law enforcement agency employees who are certified as agency inspectors, blood alcohol analysts, or breath test operators while such employees are in uniform and engaged in processing, testing, evaluating, analyzing, or transporting a person who is detained or under arrest for DUI.

**Security Officers:** Pursuant to F.S. 784.07, Assaults and/or Batteries committed on licensed security officers who are “wearing a uniform...one patch or emblem visible...identifies employing agency and person as a licensed security officer.”

**Note:** The “lawful performance of his duties” element is like that same element for 843.02 (Resisting Without Violence). If the assault occurs during a detention or an arrest, it must be a *lawful* detention or arrest. For example, Investigatory stop of juvenile was not justified, and thus police officer was not in lawful performance of his duties when juvenile spit on him, as required for a finding that juvenile committed battery on a law enforcement officer, even though juvenile's mother had reported existence of an ex parte pick-up order for juvenile based on a failure to appear at a hearing on involuntary treatment for substance abusers; nothing supported contention that failure to appear at hearing was a crime, officer who first contacted juvenile made no effort to confirm existence of order, and nothing indicated that first officer had a reasonable suspicion that juvenile was engaged in criminal activity or was armed and dangerous. C.B. v. State, 979 So.2d 391 (Fla. 2<sup>nd</sup> DCA 2008).

You may infer a defendant's knowledge that his victims were law enforcement based on the circumstances: Evidence was sufficient to establish that defendant knew that detectives who chased him in vehicle and on foot were police officers, as was required for conviction for aggravated assault with a firearm on law enforcement officer; two different vehicles had blue lights, and four men, one of whom was wearing t-shirt with police markings, made concerted effort to apprehend defendant. Nelson v. State, 753 So.2d 648 (3<sup>rd</sup> DCA 2000).

#### **D. ASSAULT PREDICATE QUESTIONS**

1. Please state your name and occupation.
2. Where were you on \_\_\_\_\_?
3. Did you have the occasion to meet a person who later became known to you as \_\_\_\_\_ on that date and at that location?  
(defendant)
4. Do you see (him/her) in court today?
5. Would you identify (him/her) by an article of clothing?
6. Please let the record reflect that the witness/victim has identified the defendant.
7. What, if anything, happened at that time and location?
8. How did you first meet the defendant?
9. What, if anything, did he do?
10. What, if anything, did he say?
11. What, if anything, happened between you and the defendant?
12. Did he make any threats?
13. Did he advance towards you?
14. Was he armed? (Only ask if Defendant was armed)
15. Were you placed in fear?
16. Were you placed in fear by the defendant's actions and/or words?
17. Did you believe that the defendant had the ability to carry out the threat?
18. On what did you base this?
19. Did you believe that the threat would be carried out right away?
20. Did all this occur in Miami-Dade County, Florida, City of \_\_\_\_\_.

## E. FELONY BINDUP

### 1. Aggravated Assault - Florida Statute 784.021

To prove the crime of Aggravated Assault, the State must prove the following four elements beyond a reasonable doubt. The first three elements define assault.

1. (Defendant) **intentionally and unlawfully threatened, either by word or act, to do violence to** (victim).
2. **At the time,** (defendant) **appeared to have the ability to carry out the threat.**
3. **The act of** (defendant) **created in the mind of** (victim) **a well-founded fear that the violence was about to take place.**

*Give 4a or 4b as applicable. If 4b is alleged, give the elements of the felony charged.*

4. a. **[The assault was made with a deadly weapon.]**  
  
b. **[The assault was made with a fully-formed, conscious intent to commit** (felony charged) **upon** (victim).]

Cannon v. State, 456 So.2d 513 (Fla. 5th DCA1984): Simple assault is a lesser-included of aggravated assault.

### 2. Deadly Weapon

Lavin v. State, 754 So.2d 784 (Fla. 3d DCA 2000): Aggravated assault requires proof of a specific intent to do violence to the person of another.

Duba v. State, 446 So.2d 1167 (Fla. 5th DCA 1984): Whether object is deadly weapon is question of fact to be determined by jury from evidence, taking into consideration its size, shape and material and manner in which it was used or was capable of being used; all facts having probative value as to these matters are admissible on this issue and arguable by counsel and this includes facts related to whether an object which may be capable of producing death or great bodily harm only by expelling projectile was, at relevant time, capable in fact of doing so.

Mason v. State, 665 So.2d 328 (Fla. 5th DCA 1995): Evidence supported conviction of defendant for aggravated assault; defendant had made threat to kill victim, use of gun supplied apparent ability to do so and created fear in victim that violence was imminent, and use of gun also supplied aggravation element.

Mitchell v. State, 888 So.2d 665 (Fla. 1st DCA 2004): "To-wit" language in information charging defendant with aggravated assault, identifying the specific means by which the defendant put the victim in fear, was surplusage rather than an essential element of the offense.

J.M. v. State, 872 So.2d 985 (Fla. 1st DCA 2004): There was sufficient testimony and evidence in record to support trial court's conclusion that juvenile's display of knife blade and threat to poke victim with pocket knife in chest made pocket knife a deadly weapon.

## **BATTERY - F.S. 784.03**

### **A. ELEMENTS**

To prove the crime of Battery, the State must prove the following element beyond a reasonable doubt:

*Give 1 or 2 as applicable.*

1. [(Defendant) **intentionally touched or struck** (victim) **against [his] [her] will.**]
2. [(Defendant) **intentionally caused bodily harm to** (victim).]

### **B. PENALTIES**

First Degree Misdemeanor - Maximum 1 year in jail or probation & \$1000 fine

Under Florida Statute 784.03(2), a person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this subsection, "conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered.

### **C. CASE LAW**

**State is not required to choose a theory:** Battery can be committed in either of the two methods listed above. There is no reason why a judge should ask the State to choose which theory of battery we will proceed on, to-wit: unlawful touching or causing bodily harm. F.R.Cr.P. 3.140(k)(5) specifically addresses this situation. It states that "for an offense that may be committed by doing one or more of several acts, or by one or more of several means, or with one or more of several intents or results, it is permissible to allege in the disjunctive or alternative such acts, means, intents, or results. The disjunctive nature and overall wording scheme of the Florida battery statute is analyzed by the United States Supreme Court in *Johnson v. United States*, 130 S.Ct. 1265 (2010), the Court also succinctly stated, "The element of "actually and intentionally touching" under Florida's battery law is satisfied by any intentional physical contact, no matter how slight".

**Person:** The word "person" in battery statute includes an object that has such an intimate connection with the person as to be regarded as a part or extension of the person, such as clothing or an object held by the person. In this case, the purse the victim was holding was ripped from her – court held that a battery occurred.

Malczewski v. State, 444 So.2d 1096 (Fla. 2nd DCA 1984): A battery does exist where a victim is not actually touched, so long as there is contact with something intimately connected to the victim.

Clark v. State, 783 So.2d 967 (Fla. 2001): A car may be considered to be intimately connected to a victim in order to satisfy the touching element of battery.

**Force:** The force used does not have to be sufficient to cause injury. L.D. v. State, 355 So. 2d 816 (Fla. 3d DCA 1978); D.C. v. State, 436 So. 2d 203 (Fla. 1st DCA 1983)(any intentional touching of another person against that person's will is technically a criminal battery), *See also Johnson v. United States*, 130 S.Ct. 1265 (2010).

**Transferred Intent:** The doctrine allows the transfer of intent from one victim to another. For some charges, however, it must be the same "type" of victim. *See, D.J. v. State*, 651 So. 2d 1255 (Fla. 1st

DCA 1995)(student intended to strike another student; instead struck a teacher. Cannot be guilty of battery on a school employee).

**Consent:** Lack of consent can be shown by evidence of circumstances surrounding the contact. Ricci v. State, 3 FLW Supp. 384 (9th Cir. Aug. 30, 1995).

**Self-Defense Jury Instruction:** Self-defense is the most common defense to battery. A defendant is entitled to a self-defense instruction when there is sufficient evidence to support it regardless of how weak or improbable the evidence. Arthur v. State, 717 So. 2d 193 (Fla. 5th DCA 1998).

However, it must be noted that despite the standard above (entitling a defendant to a self-defense instruction regardless of how weak or improbable the evidence), Florida does not recognize the "imperfect self-defense" doctrine in murder cases, which provides a defense for an honest but unreasonable belief in the necessity to defend oneself. As such, the court did not err in refusing to give a jury instruction on this defense. Hill v. State, 979 So.2d 1134 (Fla. 3<sup>rd</sup> DCA 2008).

**Spitting:** Spitting on another person can be intentional touching that supports a battery conviction. Spivey v. State, 789 So.2d 1087 (Fla. 2nd DCA 2001); Mohansingh v. State, 824 So. 2d 1053 (Fla. 5th DCA 2002).

**Attempted Battery:** Attempted battery is a criminal offense. Henderson v. State, 370 So.2d 435 (Fla. 1st DCA 1979). Attempted battery is a second-degree misdemeanor and a lesser-included offense of battery.

**Enhanced Penalties:** Pursuant to F.S. 784.07, Assaults and/or Batteries committed on law enforcement officers, firefighters, emergency medical care providers, public transit employees, and non-sworn law enforcement agency employees who are certified as agency inspectors, blood alcohol analysts, or breath test operators while such employees are in uniform and engaged in processing, testing, evaluating, analyzing, or transporting a person who is detained or under arrest for DUI.

**Security Officers:** Pursuant to F.S. 784.07, Assaults and/or Batteries committed on licensed security officers who are "wearing a uniform...one patch or emblem visible...identifies employing agency and person as a licensed security officer."

**Off Duty Officers:** In order to sustain a conviction for battery on a law enforcement officer, "the battery must occur when the officer is engaged in the lawful performance of his/her legal duty, and not when they are engaged in activities exclusively for the interest of the private employer. Nicolosi v. State, 783 So. 2d 1095 (Fla. 5<sup>th</sup> DCA 2001).

However, "Once he identified himself as a police officer and attempted to detain the defendant for investigation of a shoplifting offense, defendant's battery could be prosecuted as a battery on a law enforcement officer." State v. Hartzog, 575 So. 2d 1328 (Fla. 1<sup>st</sup> DCA 1991). See also, Nelson v. State, 753 So. 2d 648 (Fla. 3d DCA 2000) and Hughes v. State, 400 So. 2d 533 (Fla. 1<sup>st</sup> DCA 1981) (off duty officer engaged in lawful performance of duties when arresting suspect for shoplifting).

**D. BATTERY PREDICATE QUESTIONS**

1. Please state your name and occupation.
2. How long have you been so employed?
3. Do you remember where you were on \_\_\_\_\_?
4. How did you come to be at that location?
5. Did you have an occasion to observe a person who later became known to you as \_\_\_\_\_ on that date and location?  
(defendant)
6. Do you see (him/her) in court today?
7. Would you point (him/her) out?

**LET THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE DEFENDANT.**

8. What, if anything, happened at that time and location?
  - a. How did you first meet the defendant?
  - b. What, if anything, did he/she do?
  - c. What, if anything, did he/she say?
9. What if anything happened between you and the defendant?
  - a. Did he make any threats?
  - b. Did he advance toward you?
  - c. Was he armed?
10. Did the defendant touch you in any way? How?
11. Did you consent to this touching?
12. Were you injured in any way? How? (Ask only if bodily harm alleged)
13. Did you do anything to provoke the defendant?
14. Did all this occur in Miami-Dade County, Florida, City of \_\_\_\_\_?

## E. FELONY BINDUP

### 1. Statutes

#### **Aggravated Battery - Florida Statute §784.045:**

To prove the crime of Aggravated Battery, the State must prove the following two elements beyond a reasonable doubt. The first element is a definition of battery.

1. (Defendant)

**[intentionally touched or struck (victim) against [his] [her] will].**  
**[intentionally caused bodily harm to (victim)].**

*Give 2a or 2b as applicable.*

2. (Defendant) **in committing the battery**

a. **intentionally or knowingly caused**

**[great bodily harm to (victim)].**  
**[permanent disability to (victim)].**  
**[permanent disfigurement to (victim)].**

b. **used a deadly weapon.**

*Definition. Give if 2b alleged.*

A weapon is a “deadly weapon” if it is used or threatened to be used in a way likely to produce death or great bodily harm.

#### **Felony Battery; Domestic Battery by Strangulation – Florida Statute §784.041**

To prove the crime of Domestic Battery by Strangulation, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) **knowingly and intentionally impeded the normal [breathing] [circulation of the blood] of (victim) against [his] [her] will [by applying pressure on the throat or neck of (victim)] [by blocking the nose or mouth of (victim)].**
2. **In so doing, (Defendant) [created a risk of great bodily harm to (victim).] [caused great bodily harm to (victim).]**
3. (Defendant) **was [a family or household member of (victim).] [in a dating relationship with (victim).]**

### 2. Great Bodily Harm

Coronado v. State, 654 So.2d 1267 (Fla. 2nd DA 1995): Great bodily harm," in the context of aggravated battery, defines itself and means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises as are likely to be inflicted in a simple assault and battery. Here the victim suffered facial numbness and great pain around the eye.

C.A.C. v. State, 771 So.2d 1261 (Fla. 2nd DCA 2000): There was insufficient evidence to establish that an eleven-year-old victim suffered great bodily harm during a physical altercation with a ten-year-old juvenile who stabbed victim two or three times in the back with a fork. Victim had scratches, swelling and puncture marks on his back but did not receive medical treatment for injuries. State failed to present evidence to establish that a fork, as used in instant case, was likely to cause great bodily harm.

### **3. Deadly Weapon**

V.M.N. v. State, 909 So.2d 953 (Fla. 4th DCA. 2005): Darts from a blow-gun are considered to be a deadly weapon.

Nguyen v. State, 858 So.2d 1259 (Fla. 1st DCA 2003): State failed to prove that stun gun used by defendant either caused great bodily harm or constituted a deadly weapon. Evidence appears insufficient to support charge of aggravated battery for causing great bodily harm where there was no testimony that victim required medical attention for her burns or that she had any lasting ill effects or scars from the use of the stun gun. Evidence appears insufficient to support charge of aggravated battery based on the use of a deadly weapon where there was no testimony that a stun gun qualifies as a deadly weapon by its ordinary use and there was insufficient evidence to establish that a stun gun was a deadly weapon in the manner it was used on victim.

Smith v. State, 969 So. 2d 452, 455 (Fla. 1<sup>st</sup> DCA 2007): Even bleach can be a deadly weapon

### **4. Pregnant Person**

**To prove the crime of Aggravated Battery, the State must prove the following three elements beyond a reasonable doubt. The first element is a definition of battery.**

- 1. (Defendant) [intentionally touched or struck (victim) against her will] [intentionally caused bodily harm to (victim)].**
- 2. (Victim) was pregnant at the time.**
- 3. (Defendant) in committing the battery knew or should have known that (victim) was pregnant**



## **CARRYING A CONCEALED WEAPON - F.S. 790.01**

### **A. ELEMENTS**

To prove the crime of Carrying a Concealed [Weapon] [Firearm], the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) **knowingly carried on or about [his] [her] person [a firearm] [a weapon] [an electric weapon or device].**
2. **The [firearm] [weapon] [electric weapon or device] was concealed from the ordinary sight of another person.**

### **B. PENALTIES**

First Degree Misdemeanor - Maximum 1 year in jail or probation & \$1000 fine.

### **C. WHAT IS A CONCEALED WEAPON?**

Fla. Stat. Section 790.001(3)(a) defines concealed weapon as: "any dirk, metallic knuckles, slung shot, Billie, tear gas gun, chemical weapon or device, or other deadly weapon carried on or about a person in such a manner as to conceal the weapon from the ordinary sight of another person." Therefore, the object must be either one enumerated in the definition or classify as "other deadly weapon."

**Note:** Weapons – Definitions - Amends s. 790.001(13) to specifically include the term “knife” in the definition of “weapon”. Added to the **exclusions** from this definition (currently firearm or common pocketknife) are “plastic knife” and “blunt-bladed table knife.” **Because firearms are excluded from the definition of ‘weapons’, any CCW case you get where the weapon in question is a firearm must be bound up to the felony charge of Carrying a Concealed Firearm.**

On or about the person; and hidden from the ordinary sight of another person. State v. Pollock, 600 So. 2d 1313 (Fla. 3d DCA 1992).

### **D. CASE LAW**

#### **What does “on or about the person” mean?**

"[O]n or about the person means physically on the person or readily accessible to him. This generally includes the interior of an automobile and the vehicle's glove compartment, whether or not locked." Ensor v. State, 403 So. 2d 349, 354 (Fla. 1981)(although this case deals with a firearm, it construes identical language: "on or about the person" and "ordinary sight of another person"). (Ensor is refined and restricted by Dorelus v. State, 747 So.2d 368 (Fla. 1999) on other issues)

#### **What does “ordinary sight of another” mean?**

"Ordinary sight of another person means the casual and ordinary observation of another in the normal associations of life. Ordinary observation by a person other than a police officer does not generally include the floorboard of a vehicle, whether or not the weapon is wholly or partially visible." Absolute invisibility is not required for a weapon to be concealed. Ensor v. State, 403 So. 2d 349, 354 (Fla. 1981). Dorelus v. State, 747 So.2d 368 (Fla. 1999) states that ‘ordinary sight of another person’ turn on whether the person in proximity to the person with the firearm may by ordinary observation know the questioned object to be a firearm.

### **Weapon does not have to be completely concealed**

A weapon need not be completely concealed to be a "concealed weapon" within the meaning of the statute. State v. Reid, 542 So. 2d 453 (Fla. 3d DCA 1989). In any event, it is a question for the jury to decide. Id. at 454. See also, Myers v. State, 546 So. 2d 754 (Fla. 3d DCA 1989)(probable cause to believe defendant concealed weapon from sight of the ordinary person where officer saw the barrel of the revolver protruding from under the driver's seat); State v. Strachan, 549 So. 2d 235 (Fla. 3d DCA 1989)(firearm on the floor of vehicle in plain view of officer does not preclude it from being "concealed" within the statute); State v. Pollock, 600 So. 2d 1313 (Fla. 3d DCA 1992); L.G. v. State, 693 So. 2d 1020 (Fla. 3d DCA 1997).

However, a weapon that is securely encased or not otherwise readily accessible for immediate use is not a violation of this section. Dixon v. State, 831 So. 2d 775 (Fla. 4th DCA 2002).

### **What is an "other deadly weapon"?**

"A deadly weapon is any instrument which will likely cause great bodily harm when used in the ordinary and usual manner contemplated by its design and construction." Robinson v. State, 547 So. 2d 321 (Fla. 5th DCA 1989). "An object can become a deadly weapon if its sole modern use is to cause great bodily harm." Id. at 323 (citing, R.V. v. State, 497 So. 2d 912 (Fla. 3d DCA 1986)(nunchakus originally designed as farm tools used to separate chaff from grain but now used as potentially lethal devices in martial arts and have no constructive social utility)).

An object can also be construed a deadly weapon because of its use or threatened use during the alleged crime. State v. Tremblay, 642 So. 2d 64 (Fla. 4th DCA 1994)(absent competent, substantial evidence that defendant used an ice pick in a threatening manner toward police officers at the time and place of arrest, an ice pick did not qualify as a "concealed weapon".); See also, Robinson, supra (citing, R.T. v. State, 448 So. 2d 604 (Fla. 3d DCA 1984); Duba v. State, 446 So. 2d 1167 (Fla. 5th DCA 1984); McCray v. State, 358 So. 2d 615 (Fla. 1st DCA 1978); P.C. v. State, 589 So. 2d 438 (Fla. 3d DCA 1991)(letter opener not a deadly weapon unless used as such); State v. Bradbury, 4 FLW Supp. 121 (Fla. 15th Judicial Cir. 1996)(ax handle not a deadly weapon); Atty.Gen.Op. October 11, 1951 (ice pick not a weapon unless used or carried as such).

"A razor blade, like a nail file, keys or hat pin, is a common household item which when carried on or about a person, such as in a lady's pocketbook, is not a concealed weapon unless it is used in a threatening manner so that it might be considered deadly." Robinson, supra, at 323; But see, Fletcher v. State, 472 So. 2d 537 (Fla. 5th DCA 1985)(razor blade found to be a deadly weapon because defendant held the blade to the victim's throat).

Whether a seven-inch straight edged razor was weapon, so as to support finding that juvenile who carried razor was delinquent for carrying concealed weapon, was question for finder-of-fact, given that such razors were no longer common household items. R.R. v. State, 826 So.2d 465 (Fla. 5<sup>th</sup> DCA 2002)

**"[A] pocket knife, clasp knife or jack knife with blade approximately four inches long is a 'common pocket knife' within the meaning of the exception set out in [790.001(13)], in the absence of evidence that it was used or was carried for use as a weapon." J.R.P. v. State, 979 So.2d 1178 (Fla. 3d DCA 2008) ; L.B. v. State, 700 So. 2d 370 (Fla. 1997); See, Atty.Gen.Op. October 11, 1951; see also, State v. Ortiz, 504 So. 2d 39 (Fla. 2d DCA 1987).**

A Chinese star in and of itself is a deadly weapon and therefore falls into the category of "other deadly weapon" in the concealed weapons statute. C.A.W. v. State, 817 So. 2d 1077 (Fla. 5th DCA 2002).

State v. A.D.H., 429 So.2d 1316 (Fla. 5thDCA 1983): A butcher knife can be considered a “weapon” under 790.01.

**Florida Statute 790.25** “Lawful ownership, possession and use of firearms and other weapons”, subsection 3, provides a list of lawful uses for weapons and firearms. 790.053 and 790.06 do not apply.

Attorney General Op. October 11, 1951: Pocket knives, under four inches are ok.

### **Question of Fact for the Jury**

The Supreme Court of Florida has held that “the issue of concealment is ordinarily an issue for the trier of fact. Dorelus v. State, 747 So.2d 368, 373 (Fla. 1999). In Dorelus, the Florida Supreme Court modified its holding in Ensor v. State, 403 So.2d 349 (Fla. 1981), that a concealed weapon is always for the jury.

Factors that need to be taken into consideration by the trial court in determining whether a weapon has been carried in a manner as to be hidden from ordinary sight: “the location of the weapon within a vehicle . . .; whether and to what extent the weapon was covered by another object, such as a sheet or towel; testimony that the defendant utilized his body in such a way as to conceal a weapon that would otherwise have been detectable by ordinary observation; the nature and type of weapon involved; and observations of police officer that he or she recognized object as weapon. Id.

The Fourth District Court of Appeal of Florida held that whether a kitchen knife concealed in the waistband of the defendant’s pants was a concealed weapon was a question of fact for the jury. Garcia v. State, 789 So.2d 1059, 1061 (Fla. 4th DCA 2001).

The Fifth District Court of Appeal noted that whether a weapon is concealed is ordinarily an issue for the trier of fact. Bllice v. State, 825 So.2d 447 (Fla. 5th DCA 2002). The court further found that based on the circumstances of the case, specifically, the time and location of the parked car, the testimony about where the gun was when the officers first found it, and the fact that the gun was partially covered by a jacket, the court found that the defendant was in possession of a concealed weapon.

R.R. v. State, 826 So.2d 465 (Fla. 5<sup>th</sup> DCA 2002): Whether a seven-inch straight edged razor blade constitutes a weapon is a question of fact for the jury.

### **On or About Person**

Shotgun on floorboard of pickup truck was "on or about the person" for purposes of statutory prohibition against carrying concealed weapon. Mense v. State, 570 So.2d 1390 (Fla. 3d DCA 1990).

As a matter of law, steak knife does not constitute "deadly weapon," as used in statutory definition of weapon; although steak knife could be used to inflict death, carrying steak knife in concealed manner is neither per se lawful nor per se unlawful. Nystrom v. State, 777 So.2d 1013 (Fla. 2d DCA 2000).

Switchblade knife found during inventory search was securely encased in closed center console of vehicle, and thus, fell within statutory exception\* to prohibition against carrying concealed weapon. Dixon v. State, 831 So.2d 775 (Fla. 4th DCA 2002). \*See F.S. 790.025(3)(1) & (5) for private conveyances and weapons securely encased.

Smith v. State, 687 So.2d 875 (Fla. 2d DCA 1997): A defendant cannot be presumed to have knowledge of the presence of a firearm in a vehicle where there was joint possession of the vehicle.

**E. CHAPTER 790 – Weapons and Firearms**

**F.S. 790.053 Open Carrying of Weapons:**

It is unlawful for any person to openly carry on or about his or her person any firearm or electric weapon or device.

An amendment to **790.053(1)**, dealing with open carry of weapons, now provides that it is not illegal for a person with a CCF license to “briefly and openly display the firearm to the ordinary sight of another person, unless the firearm is intentionally displayed in an angry or threatening manner, not in necessary self-defense.”

Although it would seem to go without saying that a person license to carry a concealed firearm can lawfully carry the firearm in a vehicle, new subsection **790.06(12)(b)**, now specifically provides, if it is being carried or stowed in the vehicle “for lawful purposes.”

Any person who violates this section commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Definitions under s. 790.001:

(6) “Firearm” means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term “firearm” does not include an antique firearm unless the antique firearm is used in the commission of a crime.

(14) “Electric Weapon or Device” means any device which, through the application or use of electrical current, is designed, redesigned, used or intended to be used for offensive or defensive purposes, the destruction of life or the infliction of injury.

NOTE: NO EXCEPTION IF DEFENDANT HAS A CONCEALED WEAPONS PERMIT!

**Exception for Self-Defense:** allows the open carrying of a stun gun or non-lethal electric weapon or device designed solely for defensive purpose, so long as weapon does not fire a dart or projectile.

**F.S. 790.25** enumerates the instances in which one may lawfully possess, and use firearms.

**F.S. 790.06 Concealed Weapons or Firearm Permit.**

**F.S. 790.10 Improper Exhibition of Dangerous Weapons or Firearms:**

**To prove the crime of Improper Exhibition of a [Weapon] [Firearm], the State must prove the following three elements beyond a reasonable doubt:**

- 1. (Defendant) had or carried [a weapon] [a firearm] [a dirk] [a sword] [a sword cane] [an electric weapon or device].**
- 2. (Defendant) exhibited the [weapon] [firearm] [dirk] [sword] [sword cane] [electric weapon or device] in a rude, careless, angry, or threatening manner.**
- 3. [He] [She] did so in the presence of one or more persons.**

A person so offending shall be guilty of a misdemeanor of the first degree.

NOTE: NO EXCEPTION IF DEFENDANT HAS A CONCEALED WEAPONS PERMIT!

**F.S. 790.15 Discharging Firearms in Public:**

**To prove the crime of Discharging a Firearm [in Public] [on Residential Property], the State must prove the following element beyond a reasonable doubt:**

*Give a, b, c, and/or d as applicable.*

- a. [(Defendant) knowingly discharged a firearm in a public place.]**
- b. [(Defendant) knowingly discharged a firearm [on] [over] the right of way of a paved public road, highway, or street.]**
- c. [(Defendant) knowingly discharged a firearm over an occupied premises.**
- d. [(Defendant) [recklessly] [negligently] discharged a firearm outdoors on property [used primarily as the site of a dwelling] [zoned exclusively for residential use].]**

**Note:** the backyard of one's home is not a public place within the meaning of F.S. §790.15(1). C.C. v. State, 701 So.2d 423 (Fla. 4<sup>th</sup> DCA 1997).

**F. CARRYING A CONCEALED WEAPON PREDICATE QUESTIONS**

1. State your name and occupation.
2. How long have you been so employed?
3. Directing your attention to \_\_\_\_\_ at about \_\_\_\_\_, were you on duty?
4. Where were you?
5. Is that in Miami-Dade County, Florida, City of \_\_\_\_\_?
6. At that date, time and location, did you have occasion to encounter someone who later became known to you as \_\_\_\_\_?  
(Defendant)
7. Is that person here today?
8. Would you please point him/her out and describe an article of clothing he/she is wearing?

**LET THE RECORD REFLECT THE OFFICER HAS CORRECTLY IDENTIFIED THE DEFENDANT.**

9. Will you describe how you first came into contact with the defendant?
10. What did you see the defendant do?
11. Did the defendant have a weapon in his/her possession?
12. Please describe the weapon.
13. Prior to beginning trial or motions, ask the clerk to have the weapon marked for identification. At this time ask opposing counsel or pro se defendant if he or she wishes to inspect it (But use caution- do not hand the defendant a loaded firearm!); ask court to approach officer.)
14. Officer, I have handed you an item that has been marked as State's Exhibit \_\_\_\_ for identification. Can you examine it and tell me if you recognize it?
15. What is it?
16. Is it the same weapon you found the defendant in possession of on \_\_\_\_\_?
17. How do you know it is the same weapon?
18. Is it in substantially the same condition as it was when you first discovered it? (Have officer explain any difference.) (Move weapon into evidence.)
19. How did you come across the weapon?
20. Was the weapon concealed? How? (Have officer demonstrate.)
21. Where was the weapon in relation to the defendant?
22. What, if anything, did the defendant say? (Ask only if a statement was made and Miranda, if required, was satisfied.)
23. [If knife] How long is the blade of that knife? How do you know?

**Note:** In certain factual circumstances where the conclusions are not obvious, you may need to ask more questions to demonstrate to the Judge or jury that (1) the defendant must have known he/she possessed the weapon and (2) the weapon was concealed from the ordinary sight of a casual observer.

## **CONTRACTING WITHOUT A LICENSE**

### **A. ELEMENTS**

#### **Fla. Stat. § 489.127(1)(f)**

1. Defendant
2. Engaged in the business or acted in the capacity of a contractor

#### **OR**

Advertised himself or herself or a business organization as available to engage in the business or act in the capacity of a contractor

3. without being duly registered or certified or having a certificate of authority.

#### **Fla. Stat. §489.127**

No person shall:

- (a) Falsely hold himself or herself or a business organization out as a licensee, certificate holder, or registrant;
- (c) Present as his or her own the certificate, registration, or certificate of authority of another;
- (d) Knowingly give false or forged evidence to the board or a member thereof;
- (e) Use or attempt to use a certificate, registration, or certificate of authority which has been suspended or revoked;
- (i) Willfully or deliberately disregard or violate any municipal or county ordinance relating to uncertified or unregistered contractors.

#### **Other Relevant Statutes**

Fla. Stat. 489.111~ Licensing Exam Eligibility/Requirements

Fla. Stat. 489.113~ Qualifications and Restrictions for Practice (A licensed contractor may perform work under contract within the scope of the contractor's license or a licensed contractor under contract may subcontract other licensed contractors to perform remaining work on the contract.)

Fla. Stat. 489.115~ Certification/Registration and Cont. Educ. Courses

Fla. Stat. 489.116~ Inactive and Delinquent Status

Fla. Stat. 489.117~ Registration; Specialty Contractors

Fla. Stat. 489.119~ Business Organizations (Whose name does the Certification or Registration go in)

Fla. Stat. 489.1195~ Responsibilities

Fla. Stat. 489.121~ Emergency Registration upon Death of Contractor (Permits an unlicensed contractor to finish job, under certain conditions and upon board approval when the licensed contractor dies.)

Fla. Stat. 489.128~ Contracts entered into by unlicensed Contractors Unenforceable in law or in equity.

Fla. Stat. 489.129~ Disciplinary Proceedings

## B. DEFINITIONS

Fla. Stat. §489.105:

(3) "**Contractor**" means the person who is qualified for, and is only responsible for, the project contracted for and means, except as exempted in this part, the person who, for compensation, undertakes to, submits a bid to, or does himself or herself or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others; and whose job scope is substantially similar to the job scope described in one of the subsequent paragraphs of this subsection.

(a) "**General contractor**" means a contractor whose services are unlimited as to the type of work which he or she may do, who may contract for any activity requiring licensure under this part, and who may perform any work requiring licensure under this part, except as otherwise expressly provided in s. 489.113.

(b) "**Building contractor**" means a contractor whose services are limited to construction of commercial buildings and single-dwelling or multiple-dwelling residential buildings, which do not exceed three stories in height, and accessory use structures in connection therewith or a contractor whose services are limited to remodeling, repair, or improvement of any size building if the services do not affect the structural members of the building.

(c) "**Residential contractor**" means a contractor whose services are limited to construction, remodeling, repair, or improvement of one-family, two-family, or three-family residences not exceeding two habitable stories above no more than one uninhabitable story and accessory use structures in connection therewith.

(e) "Roofing contractor"

(f) "Class A air-conditioning contractor"

(g) "Class B air-conditioning contractor"

(j) "Commercial pool/spa contractor"

(k) "Residential pool/spa contractor"

(m) "Plumbing contractor"

(r) "**Specialty contractor**" means a contractor whose scope of work and responsibility is limited to a particular phase of construction and whose scope is limited to a subset of the activities described in the categories established in one of the paragraphs of this subsection.

(6) "**Contracting**" means, except as exempted in this part, engaging in business as a contractor and includes, but is not limited to, performance of any of the acts as set forth in subsection (3) which define types of contractors. The attempted sale of contracting services and the negotiation or bid for a contract on these services also constitutes contracting. If the services offered require licensure or agent qualification, the offering, negotiation for a bid, or attempted sale of these services requires the corresponding licensure. However, the term "contracting" shall not extend to an individual, partnership, corporation, trust, or other legal entity that offers to sell or sells completed residences on property on which the individual or business entity has any legal or equitable interest, if the services of a qualified contractor certified or registered pursuant to the requirements of this chapter have been or will be retained for the purpose of constructing such residences.



(7) "**Certificate**" means a certificate of competency issued by the department as provided in this part.

(8) "**Certified contractor**" means any contractor who possesses a certificate of competency issued by the department and who shall be allowed to contract in any jurisdiction in the state without being required to fulfill the competency requirements of that jurisdiction.

(9) "**Registration**" means registration with the department as provided in this part.

(10) "**Registered contractor**" means any contractor who has registered with the department pursuant to fulfilling the competency requirements in the jurisdiction for which the registration is issued. Registered contractors may contract only in such jurisdictions.

(11) "**Certification**" means the act of obtaining or holding a certificate of competency from the department as provided in this part.

Additional definitions can be found in the statute!

## C. PENALTIES

First Degree Misdemeanor - Maximum 1 year in jail and Maximum \$1000 fine.

**Note:** Any unlicensed person who commits a violation of subsection (1) after having been previously found guilty of such violation commits a felony of the third degree. F.S. 489.127(2)(b). Fla. State §489.127(2)(c): Any unlicensed person who commits a violation of subsection (1) during the existence of a state of emergency declared by executive order of the Governor commits a felony of the third degree.

## D. CASE LAW

**An Inactive or Suspended Certificate:** When the certificate of competence is inactive, the defendant is properly charged with Contracting Without a License. State v. Summerlot, 711 So. 2d 589 (Fla. 3d DCA 1998). See also F.S. 489.127(1).

Fla. Stat §489.127 - For purposes of this subsection, an inactive or suspended certificate, registration, or certificate of authority is not duly certified or registered and is considered unlicensed. An occupational license certificate issued under the authority of chapter 205 is not a license for purposes of this part.

Deep South Systems Inc., v. Heath, 843 So.2d 378 (Fla. 2d DCA 2003). Contracts entered into with an unlicensed contractor is unenforceable in law and in equity. See Fla. Stat. §489.128(1).

**Piercing the Corporate Veil:** If the defendant holds himself out as a licensed contractor and the corporation as a licensed entity, and does not make a distinction between himself and the corporation, then he can be held liable for damages. Anden v. Litinsky, 472 So. 2d 825 (Fla. 4th DCA 1985).

**Fictitious Name:** Riverwalk Apartments, L.P. v. RTM General Contractors, Inc., 779 So. 2d 537 (Fla. 2d DCA 2000). Construction company's fictitious name registration and licensed contractor's filing as qualifying agent for company doing business under fictitious name did not

cure allegation that contract was unenforceable on ground that contractor who actually performed the work was unlicensed.

**IMPORTANT: Washington v. State, 18 So.3d 1221 (Fla. 4<sup>th</sup> DCA 2009):** Discusses the requirements for getting certificates of non-licensure into evidence. The court stated that they are testimonial in nature and subject to Crawford confrontation rights. This means that the person who testifies cannot be simply a custodian of records, but must have actually run the information through their system and be able to testify and be cross examined about the results. Otherwise, a “certificate of licensure” is testimonial because it was prepared in preparation for trial.

**Judge May Order Restitution:** Restitution is authorized for “[d]amage or loss caused directly or indirectly by the defendant's offense” and for “[d]amage or loss related to the defendant's criminal episode.” § 775.089(1)(a) 1.2., Fla. Stat. (2005). One purpose of the statute criminalizing unlicensed contracting is to ensure that certain contractors meet minimum levels of competence.<sup>2</sup> Deficient workmanship on the contracted job is “related” to the offense of contracting without a license. Bianchini v. State, 77 So. 3d 247, 248 (Fla. 4<sup>th</sup> DCA 2012).

## **E. MIAMI-DADE COUNTY METROPOLITAN CODE SECTION 10-2**

Miami-Dade County has enacted an ordinance that is entitled, “**Certificate of competency and license required, classification and scope of work.**” Generally, the ordinance requires any person, firm, or corporation to obtain a certificate of competency, and a license, where required, before working or contracting to work. Miami-Dade Code Section 10-2

The scope of work for each person, corporation, etc. holding a certificate of competency shall be limited to work as described in the classification for which a certificate of competency is held. Miami-Dade Code Section 10-2(II).

Special standards, as well as special kinds of examinations, may apply for particular trades or specialties. Miami-Dade Code Section 10-9(a).

Therefore, consult the Miami-Dade County Metropolitan Code when investigating your Contracting Without a License case to see if your Defendant required a special license, but failed to obtain the requisite one.

**Contractor** is defined in Miami-Dade Code Section 10-1 as any person, firm, joint venture or corporation that engages in the business under express or implied contract, in any of the trades, or who undertakes or offers to undertake or purports to have the capacity to undertake, or submits a bid to, or does himself, or by or through others, engages in the business of doing a trade.

**Trade** is defined in Miami-Dade Code Section 10-1 to include but shall not be limited to construction, repair, removal of buildings, plumbing work, electrical work, mechanical work, engineering construction work, and equipment rental including the supply of equipment operators or supervision of equipment operators in the performance of their work.

## **F. DISCOVERY CHECKLIST**

- \_\_\_ Information (Charging Document)
- \_\_\_ Defendant's Priors
- \_\_\_ Witness List w/ Victim/Homeowner & Investigator/Officer(s)
- \_\_\_ Building & Zoning (County Licensure)
- \_\_\_ Custodian of Records
- \_\_\_ Department of Business and Professional Regulation (State Licensure)
- \_\_\_ Occupational Licenses
- \_\_\_ Employees of alleged contractor
- \_\_\_ Co-Defendant(s)
- \_\_\_ Certificate of Non-Licensure (State & County)
- \_\_\_ Contract/Proposal/Estimate
- \_\_\_ Victim/Homeowner Complaint Affidavit
- \_\_\_ Investigative Reports by Agency, O/I Reports
- \_\_\_ Statements of Defendant (oral or written)
- \_\_\_ Permits
- \_\_\_ Business Cards/Advertisements
- \_\_\_ Receipts
- \_\_\_ Corporate Documents (Tallahassee Records)
- \_\_\_ Defendant's Bank Account Records
- \_\_\_ Signature Card
- \_\_\_ Corporate Resolution
- \_\_\_ Account Application Forms
- \_\_\_ Bank Statements (proof that money given by victim was deposited)
- \_\_\_ Checks payable to or cashed by the Defendant
- \_\_\_ Video or Photos
- \_\_\_ Victim's Canceled Checks (those showing defendant or his alleged employees endorsed)
- \_\_\_ Miranda Waiver (if applicable)

**G. CONTRACTING WITHOUT A LICENSE PREDICATE QUESTIONS  
VICTIM**

1. Please state your name for the record
2. On \_\_\_\_\_ did you come into contact with the (defendant)\_\_\_\_\_?
3. Could you please point him or her out by an article of clothing.

**LET THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE DEFENDANT**

4. Introduce the contract entered into between the Defendant and the Victim (If only an oral contract, then skip to #5)
  - a. Ask the Clerk to mark the contract for identification purposes (try to do this before the trial begins).
  - b. "I am now showing you what has previously been marked as State's Exhibit \_\_ for Identification. Do you recognize it? What is it?"
  - c. "How do you recognize it?"
  - d. "Do any names appear on the document? What names? Are there any dates on the document? What dates?"
  - e. "Is this the contract that you entered into with the Defendant in this case?"
  - f. "What kind of services/repairs were covered in this contract?"
  - g. Move the contract into evidence.
5. Question the victim as to the details of the contract, e.g. what work was to be done/what work was actually performed, what problems exist, etc. Also question the victim as to whether or not he/she needed to hire another contractor to complete the work. You must establish that the Defendant did the work or was in charge of the job, and therefore, is responsible.
6. Did the Defendant sign this contract in your presence? (ask as applicable)
7. Was the work you contracted for to be performed in Miami-Dade County, Florida?
8. Introduce all checks, if any and if available, given to the Defendant by the Victim, and any receipts given to the Victim in return.  
Note: If the checks were made out to an individual, and the Defendant is a corporation, establish through the victim's testimony that the payee is a corporate employee.
9. Introduce any business cards the individual, as a corporate representative, gave to the Victim.  
  
Note: You may be able to prove the corporate connection through corporate records, if the payee is listed on those records.
10. Did the Defendant ever represent to you that he was a licensed contractor and would obtain all of the proper permits to perform the work contracted for?

**CUSTODIAN OF RECORDS (LICENSING OF THE DEFENDANT)**

1. Name and occupation.
2. Duties as a Custodian of Records.
3. Have you ever searched your records, in the course of your employment for a license [to engage in the business he/she contracted for] for this Defendant?
4. What did your search reveal?

**Note:** On occasion, you may encounter a Defendant that has a valid Certificate of Competency for only one particular area of contracting work (e.g., plumbing, roofing, etc.), but pulls a permit to do another type of unauthorized work.

5. Does a person need a license for the type of work defendant was doing?

#### **CUSTODIAN OF RECORDS (LOCAL PERMITS PULLED BY DEFENDANT)**

1. Name and occupation.
2. Duties as a Custodian of Records.
3. Have you ever searched your records, in the course of your employment, for a permit to install a roof, build an addition, etc., at [the address where the work was performed]?
4. What did your search reveal?
5. Does a person need a license for the type of work defendant was doing?

#### **PREDICATE QUESTIONS FOR MIAMI-DADE COUNTY CODE § 10-3**

On some occasions, you may prosecute this offense as a violation of Miami-Dade County Code §10-3, on those occasions, the following predicate questions can be used. Some of the questions are useful for prosecutions under the State statute as well.

1. Introduce the Certificate of Incorporation as a self-authenticating certified copy of a document of public record (Fla. Rules of Evidence 90.902 and 90.955) (State's Exhibit #1)
2. If the work was done under the corporate name, you must introduce into evidence the Certificate of Incorporation (Fla. Rules of Evidence 90.902).

#### **VICTIM**

3. Please state your name for the record.
4. Introduce contract between victim and corporation/individual (victim will bring the contract). (If only an oral contract, skip this)
  - a. Ask the clerk to mark the contract for identification.
  - b. I show you what has been marked as State's Exhibit #2 for identification, and do you recognize it?

- c. How do you recognize it?
  - d. Is this the contract you entered into with the defendant to have installed, repaired, etc.?
  - e. Move it into evidence.
5. Question the victim as to the details of the contract, what was done/not done and what the problem is. You must establish that the defendant did the work or was in charge of the job and therefore responsible.
  6. Do you see in this courtroom today the person with whom you entered this contract?
  7. Point him or her out.

**LET THE RECORD REFLECT THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT.**

8. Does the defendant's name appear on this contract?
9. Did he sign it in your presence? (If the victim did not see the defendant sign the contract, do not ask this question.)
10. Was the work you contracted for to be done in Miami-Dade County?
11. Introduce all checks given to defendant by the victim, if available, and any receipts given to the victim. (If checks are made out to an individual, and the defendant is a corporation, establish through the victim's testimony that the payee is a corporate employee. Introduce any business card the defendant, a corporation representative, gave the victim to show this connection. You may be able to prove this connection through corporate records if the payee is listed on those records.)
12. Did the defendant ever represent to you that he was a licensed contractor and would obtain the proper permits? (Ask only if answer is yes.)

**BUILDING AND ZONING INSPECTOR**

1. Name and occupation.
2. Have you had an occasion to visit the premises located at (address where work was done) in the scope of your employment?
3. Why did you go to these premises?
4. When was the first time you went?
5. What did you observe at that time?
6. Did you go to these premises on subsequent occasions? When?
7. When was the last time you visited these premises? (Usually the day before trial.)
8. What were your observations then?

9. Did you observe this in Miami-Dade County, Florida?

#### **CUSTODIAN OF RECORDS (LICENSING)**

1. Name and occupation.
2. Duties.
3. Have you ever searched your records in the course of your employment for a Certificate of Competency for Defendant?
4. What did this search reveal? (The defendant does not possess the requisite Certificate of Competency.)

The foregoing questions are sufficient to prove the charge of Contracting Without a Valid Certificate of Competency. Occasionally, however, you will have a situation when an individual has a Certificate of Competency for one type of work (plumbing, electrical, etc.) and pulls a permit to do another kind of work (roofing, building, etc.). In this situation ask these questions:

#### **CUSTODIAN OF RECORDS (LOCAL)**

1. Name and Occupation.
2. Duties.
3. Have you ever searched your records in the course of your employment for a permit to install a roof, build an addition etc., at (address where work was done)?
4. What did your search reveal? (A permit was pulled by the defendant to install a roof, build an addition, etc.)

#### **CUSTODIAN OF RECORDS (LICENSING)**

1. Name and Occupation.
2. Duties.
3. Have you ever searched your records in the course of your employment for a Certificate of Competency for Defendant?
4. What did your search reveal?

## **CONTRIBUTING TO THE DELINQUENCY OF A CHILD**

Fla. Stat. §827.04

### **A. ELEMENTS**

To prove the crime of Contributing to a child's becoming a [delinquent child] [dependent child] [child in need of services], the State must prove the following element beyond a reasonable doubt:

[(Defendant) **knowingly** (read act alleged from charge), **which**

**[caused]**

**[tended to cause or encourage]**

**[contributed to]**

(victim) **[to become] [becoming] a [delinquent] [dependent] child [in need of services].]**

[(Defendant) **by**

**[act]**

**[threat]**

**[command]**

**[persuasion]**

**[induced] [endeavored to induce] (victim) to**

**[perform any act]**

**[follow any course of conduct]**

**[live]**

**so as to cause or tend to cause (victim) to**

**[become a dependent child].]**

**[remain a dependent child].]**

**[become a delinquent child].]**

**[remain a delinquent child].]**

**[become a child in need of services].]**

**[remain a child in need of services].]**

### **B. PENALTIES**

First Degree Misdemeanor - Maximum 1 year in jail & Maximum fine of \$1000.

### **C. CASE LAW**

**Underlying criminal act does not need to be achieved.** Violation occurs when individual commits act that a person of common understanding would know the acts would cause, tend to cause, encourage, or contribute to delinquency or dependency of person under age 18. Broers v. State, 606 So.2d 480 (Fla. 2d DCA 1992).

**Note:** To prosecute any offense under 827.04, the court does NOT have to first find that a child is delinquent, dependent, or a child in need of services to prosecute a violation of this section. If a child has already been found to be delinquent, dependent, or a child in need of services, a prosecution may still go forward under this section. (F.S. 827.04(2))



## **D. DEFINITIONS**

**Child or Youth:** Any unmarried person under the age of 18 years who has not been emancipated by order of the court (F.S. 39.01[12])

**Child who is found to be dependent:** A child who, is found by the court:

1. To have been abandoned, abused, or neglected by the child's parents or legal custodians;
2. To have been surrendered to the department, the former Department of Health and Rehabilitative Services, or a licensed child-placing agency for purpose of adoption;
3. To have been voluntarily placed with a licensed child-caring agency, a licensed child-placing agency, an adult relative, the department, or the former Department of Health and Rehabilitative Services, after which placement, under the requirements of the chapter, a case plan has expired and the parent or parents or legal custodians have failed to substantially comply with the requirements of the plan;
4. To have been voluntarily placed with a licensed child-placing agency for the purposes of subsequent adoption, and a parent or parents have signed a consent pursuant to the Florida Rules of Juvenile Procedure;
5. To have no parent or legal custodians capable of providing supervision and care;
6. To be at substantial risk of imminent abuse, abandonment, or neglect by the parent or parents or legal custodians; or
7. To have been sexually exploited and to have no parent, legal custodian, or responsible adult relative currently known and capable of providing the necessary and appropriate supervision and care. (F.S. 39.01 [15])

### **Knowledge**

State v. Kito, 888 So.2d 114 (Fla. 4th DCA 2004). Knowledge means that there is a substantial and unjustifiable risk that the acts engaged in would cause or tend to cause or encourage delinquency. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of conduct that a law abiding person would observe in the actors situation. In this case, the minor testified that the defendant was probably not aware of the fact that she drank liquor and smoked marijuana on a few occasions when he was home that was given to her by the defendants wife.

### **Delinquency**

Broers v. State, 606 So.2d 480 (Fla. 2d DCA 1992). The crime is committed when a defendant commits the act that causes or tends to cause or encourages or contributes to the delinquency of a person under age eighteen (18).

## E. DISCOVERY CHECKLIST

**NOTE:** If you are prosecuting any case where the Department of Children and Family Services (DCFS) has filed a report, refer to Chapter 39 - Proceedings Relating to Children - on how to obtain the information and what is discoverable.

- \_\_\_ Is Defendant Properly Charged?
- \_\_\_ Information (charging document, make sure to list the minor victim by initials only in the information)
- \_\_\_ Defendant's Priors
- \_\_\_ Witness List
- \_\_\_ Victim (initials only for minors)
- \_\_\_ Guardian
- \_\_\_ Detective/Investigator/Officer(s)
- \_\_\_ Department of Children and Family Services Investigator
- \_\_\_ Guardian *Ad Litem* (if appointed, must be notified of all hearings)
- \_\_\_ School (teacher(s), counselor(s), etc.)
- \_\_\_ Other Witnesses of Incident
- \_\_\_ DCFS Report/Photos/Videos (you must familiarize yourself with F.S. 39.202 before handling these)
- \_\_\_ Investigative Reports by Agency, O/I Reports, Photos
- \_\_\_ Statements of Defendant (oral or written)
- \_\_\_ Child Hearsay
- \_\_\_ Statements
- \_\_\_ Motion in Limine
- \_\_\_ Miranda Waiver (if applicable)
- \_\_\_ *Williams* Rule (if applicable)

## **CRIMINAL MISCHIEF**

§ 806.13(1)-(2), Fla. Stat.

**To prove the crime of Criminal Mischief, the State must prove the following three elements beyond a reasonable doubt:**

- 1. (Defendant) injured or damaged [real] [personal] property.**
- 2. The property injured or damaged belonged to (person alleged).**
- 3. The injury or damage was done willfully and maliciously.**

*Give if applicable.*

**Among the means by which property can be injured or damaged under the law is the placement of graffiti on it or other acts of vandalism to it.**

*Definitions.*

**“Willfully” means intentionally, knowingly, and purposely.**

**“Maliciously” means wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person.**

*Degrees. Give as applicable.*

**If you find the defendant guilty of criminal mischief, you must determine whether the State proved beyond a reasonable doubt that:**

- a. [the damage to the property was \$1,000 or greater.]**

- Felony of the third degree

**[by reason of the damage, there was an interruption or impairment of a business operation or public communication, transportation, supply of water, gas or power, or other public service which cost \$1,000 or more in labor and supplies to restore.]**

- b. [the damage to the property was greater than \$200 but less than \$1,000.]**

- First degree misdemeanor

- c. [the damage to the property was \$200 or less.]**

- Second degree misdemeanor

- d. [the property damaged was a church, synagogue, mosque, or other place of worship or any religious article contained therein].**

- e. [the defendant has previously been convicted of criminal mischief].**

- The offense under this paragraph for which the person is charged shall be reclassified as a felony of the third degree.

§ 806.13(5) (a), Fla. Stat.

**The amounts of value of damage to property owned by separate persons, if the property was damaged during one scheme or course of conduct, may be aggregated in determining the total value.**

### Lesser Included Offenses

CRIMINAL MISCHIEF — 806.13(1)(b)1			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

CRIMINAL MISCHIEF — 806.13(1)(b)2			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Criminal mischief		806.13(1)(b)1	12.4
	Attempt	777.04(1)	5.1

CRIMINAL MISCHIEF — 806.13(1)(b)3			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Criminal mischief		806.13(1)(b)1	12.4
Criminal mischief		806.13(1)(b)2	12.4
	Attempt	777.04(1)	5.1

### Comment

It is error to inform the jury of a prior criminal mischief conviction. Therefore, if the information or indictment contains an allegation of one or more prior criminal mischief convictions, do not read the allegation and do not send the information or indictment into the jury room. If the defendant is found guilty of criminal mischief, the historical fact of a previous criminal mischief conviction shall be determined beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

**Note:** Graffiti cases have enhanced penalties, as listed below:

Florida Statute 806.13(6)(a)-(7)(c) provides additional specific penalties that **SHALL** be imposed when the charge involves Graffiti.

1. Fines
  - i. For a first conviction, not less than \$250.00
  - ii. For a second conviction, not less than \$500.00
  - iii. For a third or subsequent conviction, not less than \$1000.00

2. Community Service

In addition to any other criminal penalty, any person convicted of under this section, shall be required to perform at least 40 hours of community service and, if possible, perform at least 100 hours of community service that involves the removal of graffiti.

### Right to a Jury Trial

Accused in a criminal mischief prosecution has a right under the Florida and United States Constitutions to a jury trial, considering that the offense is malum in se and was indictable at common law. *Reed v. State*, 470 So.2d 1382 (Fla. 1985).

## CASE LAW

### General Intent

Criminal Mischief is not a specific intent crime, and it does not require proof of a specific intent to injure or damage the property, *rather it is a general intent crime that requires an act by the defendant that is willful (intentional) and wrongful (with evil intent and the knowledge that injury or damage will or may be caused)*. M.H. v. State, 936 So.2d 1 (Fla. 3d DCA 2006).

In the Interest of J.G., a juvenile should have been acquitted of criminal mischief, based on incident in which he intended to strike victim with closed fist but instead struck victim's automobile, shattering rear window, as doctrine of transferred intent did not apply. A defendant that intends to strike another person but instead strikes another's property, cannot be found guilty of criminal mischief. Id. at 1285 (the doctrine of transferred intent does not apply in this instance). In the Interest of J.G., 655 So. 2d 1284 (Fla. 4th DCA 1995).

### Malice

While malice does not require a specific intent to damage the property, *malice cannot be presumed based upon a finding of property damage*. Therefore, one must look to the circumstances surrounding the conduct which caused the damage, to determine whether the element of malice was present. J.R.S. v. State, 569 So.2d 1323, 1325 (Fla. 1st DCA 1990).

M.H. v. State, 936 So.2d 1 (Fla. 3d DCA 2006). (Juvenile willfully and maliciously caused damage to the victims scooter by intentionally driving scooter through a narrow opening in a fence to elude police, with knowledge that such action would or could cause damage to the scooter. Conviction sustained even if juvenile lacked specific intent to cause damage.) Criminal mischief is not a specific intent crimes, and it does not require proof of a specific intent to injure or damage the property of another. But See H.F. v. State, 927 So2d 163 (Fla. 3d DCA 2006), where defendant bumps victim, takes victim's phone and phone falls and breaks. The difference in factual scenarios lead the court to hold that there was insufficient evidence to show the juvenile intended to damage or destroy victim's telephone when it broke as juvenile reached to grab it. The defendant's petit theft conviction was affirmed, but his conviction on the criminal mischief was not.

**THE QUESTION TO ASK YOURSELF IN DETERMINING WHETHER THE REQUISITE INTENT FOR CRIMINAL MISCHIEF EXISTS IS:** Do the underlying facts of the case demonstrate that the defendant should have known injury or damage to property would or may be caused by his/her actions?

The element of malice necessary for a conviction of criminal mischief was not present when a juvenile who was attempting to run out of school, pushed on an exit door bar numerous times until he broke the door's mechanism. W.F. v. State, 979 So.2d 1171 (Fla. 3<sup>rd</sup> DCA 2008).

J. A. v. State, 684 So.2d 264 (Fla. 4th DCA 1996). No intent was found where a little boy started a fire that damaged another's property. Obviously, the child did not possess the requisite intent to sustain a conviction for this charge.

### Transferred Intent

Intent to cause harm to a person cannot be transferred to real personal property. In the Interest of J.G., 655 So. 2d 1284 (Fla. 4<sup>th</sup> DCA 1995) a juvenile should have been acquitted of criminal mischief, based on an incident where he intended to strike a victim with closed fist but instead struck victim's automobile, shattering rear window, as doctrine of transferred intent did not apply. A defendant that intends to strike another person but instead strikes another's property,

cannot be found guilty of criminal mischief. Id. at 1285. See Also Sanchez v. State, 909 So. 2d 981, 985 (Fla. 5<sup>th</sup> DCA 2005) (defendant struck a store clerk with the intent to rob him and in the process damaged the clerk's phone, there was insufficient evidence the ill will or malice was in any way redirected from the clerk to the telephone and thus, the evidence did not show that defendant specifically intended to damage telephone, as required for criminal-mischief conviction); Insignares v. State, 847 So. 2d 1063 (Fla. 3d DCA 2003) (reversing conviction for criminal mischief based on insufficient intent to damage the property of another; holding that the intent to damage the property of another does not arise by operation of law where the actor's true intention was to cause harm to the person of another).

### **Causal Nexus**

Juvenile's adjudication on criminal mischief charge based on damage he allegedly caused when he stuck a hanger into a turnstile, was not supported by evidence; no evidence was ever offered to support allegation that turnstile in question had actually been damaged. C.B. v. State, 721 So.2d 785 (Fla. 3d DCA 1998)

R.R.W v. State, 915 So.2d 633 (Fla. 2d DCA 2005). Judgment of acquittal should have been granted where State failed to present evidence showing that the defendant caused the damage. Testimony of witness during trial was that he saw the minor on top of the car, jumping but he was not close enough to tell if the minors action had caused any damage (especially considering that car was old and had been sitting for a while).

### **Attempted Criminal Mischief**

Offense was reduced from criminal mischief to attempted criminal mischief when State failed to show actual damage. The court held a conviction for criminal mischief was improper where there was no proof that the rocks thrown by the defendant actually damaged the school. However, a conviction for attempted criminal mischief was appropriate because it was found the defendant endeavored to damage property and made an ineffectual act toward that end. N.R. v. State, 452 So.2d 1052 (Fla. 3d DCA 1984)

### **Amount of Damages**

Value of property damage is relevant only to the severity of the crime of criminal mischief. Clark v. State, 746 So.2d 1237 (Fla. 1st DCA 1999)

Failure to prove the amount of damage will **not** cause the prosecution to fail. State needs only prove that damage occurred, not the amount of damages. The defendant in this case, however, failed to preserve the issue for appeal. Stanley v. State, 626 So.2d 1004 (Fla. 2d DCA 1993) See, R.A.P. v. State, 575 So.2d 277 (Fla. 1st DCA 1991)(court found sufficient evidence for a misdemeanor conviction, not felony based on the testimony of a passenger who was experienced in fiberglass repair and estimated damages at \$600-\$700).

S.P. v. State, 884 So.2d 136 (Fla. 2d DCA 2004). Defendants felony conviction was modified to reflect misdemeanor conviction for Criminal Mischief where State failed to prove amount of damages was \$1000 or more. Victim attempted to substantiate the value of the item but because it was hearsay, defense counsels objections were sustained.

A.D. v. State, 866 So.2d 752 (Fla. 2nd DCA 2004). Evidence presented was not sufficient to prove felony threshold amount, where the only people who testified were the victims. There was no evidence of *actual monetary damage* proven only *amount of damage*.

**PRACTICE POINTER:** Worst case scenario, if you have no evidence of the amount of damage, you can argue that any damage to the property will support a second degree misdemeanor conviction.

R.C.R. v. State, 916 So.2d 49 (Fla. 4th DCA 2005). The amount of damage element may not be proved by what it may ultimately take to make the victim whole again, but by the value of what was lost. Here, the victims vehicle was very old The defendant had recently purchased the car for nearly twenty five percent of the repair bill.

J.W.S v. State, 899 So.2d 1276 (Fla. 2nd DCA 2005). Court reversed a minors adjudication where there was insufficient evidence regarding whether the defendant caused any damage to the fence in question. Testimony revealed that fence had been previously damaged and that there was no proof that the defendant caused any additional damage.

### **Ownership**

Ownership of the property damaged by someone other than the defendant is a material element of the offense. The standard for ownership is not the same as in property law; it is met by “any possession which is rightful against the defendant and is satisfied by proof of special or temporary ownership, possession, or control.” D.S.S. v. State, 850 So.2d 459 (Fla. 2003). EX: Tenant, although not the true owner of property (as defined by property law) has a cause of action/can be the victim in a criminal mischief case where defendant has damaged the property on which tenant resides.

### **Co-Defendants or Group of Actors**

When the damage is caused by a group, each member of the group is criminally responsible for the acts of the others. R.A.P. v. State, 575 So. 2d 277 (Fla. 1st DCA 1991)

Mere presence at, and flight from, the scene of the mischief is insufficient. G.H. v. State, 599 So. 2d 231 (Fla. 3d DCA 1992).

## CRIMINAL MISCHIEF PREDICATE QUESTIONS

### QUESTIONS FOR OWNER OF PROPERTY *IF NOT AN EYEWITNESS*

1. State your name and address, please.
2. Are you the owner of \_\_\_\_\_?  
(damaged property)
3. Did anything unusual happen to that property on or about \_\_\_\_\_?
4. What type of damage was done?
5. What was the extent of the damage?
6. Do you know the defendant in this case?
7. Did you give the defendant permission to tamper with your property in this manner?
8. Did this damage to your property take place in Miami-Dade County, Florida, City of \_\_\_\_\_?

### WITNESS

1. Please state your name and occupation.
2. Were you so employed on \_\_\_\_\_?
3. Where were you at \_\_\_\_\_ on that date?
4. Did you have an occasion then to observe a person who later became known to you as \_\_\_\_\_?
5. Is that person in the courtroom today?
6. Could you please point at him/her?
7. Could you describe some article of his/her clothing?

### LET THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE DEFENDANT.

8. Please relate the circumstances of that occurrence.
9. What was the defendant doing when you saw him?
10. Was he using any instrument?
11. What was being damaged?
12. What type of damage was being done?
13. What was the extent of the damage?
14. What did the defendant do when he observed you?
15. Were you able to ascertain who owned the property?
16. Did all this take place in Miami-Dade County, Florida, City \_\_\_\_\_?



## **ANIMAL CRUELTY**

§ 828.12(1), Fla. Stat.

### **A. ELEMENTS**

To prove the crime of Animal Cruelty, the State must prove the following element beyond a reasonable doubt:

*Give a, b, or c as applicable.*

(Defendant)

- a. unnecessarily [overloaded] [overdrove] [tormented] [mutilated] [killed] an animal.**
- b. deprived an animal of necessary [sustenance] [shelter].**
- c. carried an animal in or upon a vehicle [or otherwise] in a cruel or inhumane manner.**

*Definition. Give if applicable.*

**["Torment"] [A "cruel" manner] includes every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue when there is reasonable remedy or relief, except when in the interest of medical science.**

**See also Fla. Stat. §828.13 and §828.073**

### **B. PENALTIES**

First Degree Misdemeanor

Maximum 1 year in jail. (775.082(4)(a))

Maximum \$5,000 fine. (828.12(1))

### **C. CASE LAW**

The animal cruelty statute is a general intent crime. The fact that the statute requires a general intent rather than specific intent does not render it unconstitutional. Reynolds v. State, 842 So.2d. 46 (Fla. 2002).

The statute is not vague as to the definition of "animal". There is no valid due process argument for defendant to make. A "raccoon" meets the definition for animal under the statute. Wilkerson v. State, 401 So.2d 1110 (Fla. 1981).

In Aaroe v. State, 788 So.2d 340 (Fla. 5th DCA 2001): The defendant was guilty of animal cruelty. The defendant shot a cat.

State v. Rigoberto Zamora, 3 Fla. L. Weekly Supp. 696b (11th Jud. Ct. 1995): The issue presented to this Court by the defense is whether § 828.12, Fla. Stat. is unconstitutional as a violation of the Free Exercise Clause of the First Amendment to the United States Constitution. This Court finds that the defendant has failed to demonstrate a substantial burden upon his exercise of the Santeria Faith. There is not one scintilla of evidence *or* argument before this court that the Santeria faith requires that animals suffer during ritualistic slaughter. Section 828.22(3), Fla. Stat. specifically states ``nothing in this act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group." This subsection then goes on to exempt ritual slaughter from the provisions of the act, if that slaughter is done in accordance with ``humane methods." *If the defendant can just as easily use a sharp instrument to cut the carotid*

*artery, as he can use a dull one which causes lingering pain and suffering, and still fulfill the religious ritualistic slaughter requirements of his faith, then government regulation of the method of slaughter does not place a substantial burden on the practice of his religion.*

State v. Wilson, 464 So.2d 667 (Fla. 2d DCA 1985). It was held that F.S.A. § 828.13, “*depriving an animal of sufficient food, water, air, and exercise*”, was not unconstitutionally vague when measured by common understanding and practice.

Brinkley v. County of Flagler, 769 So 2d 468 (Fla. 5th DCA 2000) & Fla. Stat. §828.073. Appellate court found that there was no error in removal of animals from possession of party found not to have fitness and ability to adequately provide for animals and to enter injunction enjoining party from possessing animals. Fourth Amendment protection from unreasonable searches and seizures is applicable to statute which gives law enforcement officers and humane society agents the right to remove animals from property and to provide care to animals in distress. Here an officer and an animal cruelty investigator went to defendants farm after receiving a tip that animals were being kept in unhealthy conditions. When the officers arrived they immediately smelled a foul odor and saw piles of feces throughout the lawn as they stood in front of the gate. The officers called for someone inside the house but no one responded. At that time the officers went through the gate where they observed more feces, a dead dog carcass that leaked bodily fluids onto a living dog beneath it and animals living in cages that were too small.

#### **D. WITNESSES**

1. Arresting Officer
2. Agents of the Humane Society, SPCA or Miami-Dade County Animal Services
3. Civilian eyewitnesses
4. Veterinarian – Important. Your Vet is your expert witness. You will qualify him/her as an expert and ask either hypothetical questions (if he did not examine the animal in question) or opinion testimony (if he did examine the animal in question) about whether or not the act constituted cruelty.

#### **E. DEFINITIONS**

##### **“Animal”**

Includes every living dumb creature.

##### **“Abandon”**

Means to forsake an animal entirely or to neglect or refuse to provide or perform the legal obligations for care and support of an animal by its owner.

### **“Torture”, “Torment” and “Cruelty”**

Includes every act, omission, or neglect whereby unnecessary pain or suffering is caused, except when done in the interest of medical science. Cruelty includes "every act, omission, or neglect ... permitted or allowed to continue when there is a reasonable remedy or relief..."

### **“Owner”, “Person”, “Possessor” or “Custody”**

Includes corporations and the knowledge of acts of agents and employees of corporations in regard to animals transported, owned, employed by or in the custody of a corporation. Includes any owner, custodian, or other person in charge of an animal.

## **F. Unacceptable Defenses to Neglect**

- 1) “I am not the owner”: The State looks to see if the animal can be owned or possessed or in the custody or control of the perpetrator. If the defendant has control over the animal’s welfare, then the defendant is responsible regardless of ownership.
- 2) A person’s financial status is not a defense. “I could not afford to take the animal to the vet”-Lack of veterinary care shelter etc. is not a defense- the animal can be taken to an animal shelter such as the SPCA.
- 3) Ignorance is NOT a defense to a crime. Examples include:
  - a. “I did not know I could have the animal taken to the vet.”
  - b. “I thought the animal would recover.”
- 4) Caretakers age or disability is not an excuse or defense – “I’m not well and not physically able to care for the animal.” If the disability is such that the defendant cannot care for an animal, the defendant should not have had the animal in the first place.

## **G. PRACTICE POINTERS**

**Case Preparation:** In order to properly prepare for an animal cruelty case you must do the following:

- a. Request pictures. You may have to contact the officer or investigator directly for the pictures
- b. Order the OIR report
- c. Contact Lorie Wagoner of SPCA (if animals were impounded)
- d. Order 911 tapes, if any
- e. Request medical reports from veterinarian
- f. File an information
- g. PFC the witnesses:
  - i. Veterinarian : The Vet is your expert witness. When a veterinarian testifies, the jury understands the gravity of the abuse more clearly. The veterinarian can describe medical terminology, describe the medical condition of the animal, and determine the period of suffering and so much more. The doctor’s testimony is immeasurable in cruelty cases. As such , so will you. Beware! The Vet is often solo practitioner who volunteers time to the SPCA. The Vet often practices out of the county. Please be sensitive of the vets time when setting PFC’s and trial dates.
  - ii. Investigator :The investigator can describe with detail the animal and the environment. The investigator often wants input in the plea offer as well.
  - iii. Civilian witnesses
  - iv. Arresting officer
- h. SEE CHIEF!!!

## **CULPABLE NEGLIGENCE**

§ 784.05, Fla. Stat.

To prove the crime of Culpable Negligence, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant)

*Give 1a or 1b as applicable.*

- a. [exposed (victim) to personal injury].
- b. [inflicted actual personal injury on (victim)].

2. [He] [She] did so through culpable negligence.

*Give if 1a alleged.*

**Actual injury is not required.**

### *Definition*

Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care for others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard for human life, or for the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard for the safety and welfare of the public, or shows such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

## **B. PENALTIES**

Second Degree Misdemeanor - **EXPOSED VICTIM TO PERSONAL INJURY**

Up to 60 days in Jail (775.082(4)(b))

Up to \$500 fine (775.083(1)(e))

First Degree Misdemeanor - **INFLECTED ACTUAL PERSONAL INJURY ON VICTIM**

Maximum 1 year in jail (775.082(4)(a))

Maximum \$1000 fine (775.083(1)(d))

## **C. CASE LAW**

**What is culpable negligence?**

Reckless indifference OR grossly careless disregard for the safety of others. J.C.M. v. State, 375 So. 2d 873 (Fla. 2d DCA 1979).

Culpable negligence is recklessness of a gross and flagrant character, which evinces reckless disregard for the safety of others; it is that entire want of care, which raises a presumption of indifference to consequences. Killingsworth v. State, 584 So. 2d 647 (Fla. 1st DCA 1991).

The crime of “culpable negligence” consists of exposing another person to personal injury or inflicting actual personal injury through culpable negligence; “culpable negligence” is defined as reckless indifference or grossly careless disregard for the safety of others. J. C. M. v. State, (Fla. 2<sup>nd</sup> DCA 1979).

### **Cases holding NO culpable negligence**

Attempted culpable negligence does not exist. Tyson v. State, 646 So. 2d 816 (Fla. 1st DCA 1994).

Under the *Carawan* rationale, Defendant cannot be adjudicated of both throwing deadly missile offense and culpable negligence. This “single act” of hurling a rock through an automobile windshield could constitutionally give rise to no more than a single conviction. T.J. v. State, 534 So. 2d 811.

A defendant’s conviction for culpable negligence was not supported by evidence that he was sitting in an automobile holding a pistol, which he held between his legs and not pointing it at anyone, when the pistol accidentally discharged and the bullet ricocheted and struck a child standing nearby. Killingsworth v. State, 584 So. 2d 647 (Fla. 1st DCA 1991).

**D. CULPABLE NEGLIGENCE PREDICATE QUESTIONS**

1. Please state your name and occupation for the record
2. How long have you been so employed?
3. Directing your attention to \_\_\_\_\_ at about \_\_\_\_\_, were you on duty?
4. Where were you?
5. Is that in Miami-Dade County, Florida?
6. At that date, time and location, did you have occasion to encounter someone who later became known to you as \_\_\_\_\_?  
(defendant)
7. Is that person here today?
8. Would you please point him/her out and describe an article of clothing he/she is wearing?

**LET THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE DEFENDANT.**

9. Will you describe how you first came into contact with this defendant?
10. What was the defendant doing when you first came into contact with him/her?
11. Who was the defendant with? (establish other person present)
12. What did the defendant do to him/her? (establish harm or exposure of harm to other person)
13. Please describe the nature of the defendant's actions. (establish reckless indifference or gross disregard)
14. Could the defendant have avoided these actions?
15. Did any of the defendant's actions appear accidental?
16. Did the defendant's actions endanger the safety of the other party?
17. How did the defendant's action expose the other party to injury? (2<sup>nd</sup> Degree) OR How did the defendant's actions cause injury to the other party? (1<sup>st</sup> Degree)

## **DISORDERLY CONDUCT**

§ 877.03 Fla. Stat

### **A. ELEMENTS**

did unlawfully:

commit an act that was of a nature to corrupt the public morals, outrage the sense of public decency,

affect the peace and quiet of persons who might witness it,

**and/or**

engage in brawling or fighting

**and/or**

engage in such conduct as to constitute a breach of the peace or disorderly conduct

**NOTE: The Florida Supreme Court does not have jury instructions for disorderly conduct. If you are proceeding to jury trial, you MUST create your own jury instructions and email it to the Legal Department for approval.**

### **B. PENALTIES**

Second Degree Misdemeanor

Maximum 60 days in jail (775.082(4)(b))

Maximum \$500 fine (775.083(1)(e))

### **C. CASE LAW**

#### **WORDS ALONE**

Breach of peace statute applies only to words which by their very utterance inflict injury or tend to incite immediate breach of peace or to words, known to be false, reporting some physical hazard in circumstances where such report creates clear and present danger of bodily harm to others; thus no words except “**fighting words**” or words like shouts of “**fire**” in crowded theatre fall within its proscription and otherwise does not proscribe use of language in any fashion or exhibition of motion picture films. State v. Saunders, 339 So. 2d 641 (Fla. 1976); See also Wiltzer v. State, 756 So. 2d 1063 (2000).

Simply yelling and screaming is insufficient to constitute offense of disorderly conduct. Chandler v. State, 744 So. 2d 1058 (1999).

#### **WORDS + CROWD**

In cases that involve a crowd or group, you need to elicit testimony as to how the crowd reacted to the defendant’s words, and the make-up of the crowd.

Crowd included merely curious bystanders = no disorderly conduct. L.A.T. v. State, 650 So. 2d 214 (Fla. 3d DCA 1995)

Crowd was either curious or annoyed = no disorderly conduct. Smith v. State, 967 So. 2d 937 (Fla. 2<sup>nd</sup> DCA 2007).

Defendant's actions drew a **large hostile** crowd = disorderly conduct. W.M. v. State, 491 So. 2d 335 (Fla. 3d DCA 1986).

Defendant's loud, belligerent, accusatory tirade, targeted at an officer, was such that it **excited** the gathering crowd (of upwards of ten people) to such a level that a second officer **developed safety concerns** = Disorderly Conduct. Marsh v. State, 724 So.2d 666 (Fla. 5<sup>th</sup> DCA 1999).

### **Cases holding Disorderly Conduct existed**

Defendant hindered the officer in making an arrest by his actions and words. The defendant's physical actions required the officer to repeatedly push him back and tell him to stay away. The defendant also protested loudly and engaged in name-calling. The court held that the defendant's nonverbal acts which disturbed or interfered with another's arrest breached the peace and supported a finding of disorderly conduct. C.L.B. v. State, 689 So. 2d 1171 (Fla. 2d DCA 1997).

Bradshaw v. State, 286 So. 2d 4 (Fla. 19723). The atmosphere surrounding the incident is always relevant in determining whether disorderly conduct statute has been violated. The Court properly sustained a conviction for disorderly conduct where the Defendant at a nighttime Carnival refused to leave and caused a crowd of 100 to 150 to gather and the Officer was trying to prevent the possibility of a riot erupting resulting in injury to innocent bystanders.

### **Cases holding Disorderly Conduct did NOT exist**

Defendant's behavior or yelling into his cell phone and using profanity, while standing in bank's doorway, did not constitute "fighting words" or incite the crowds to action, people were coming out of the bank and, as they did, they stopped to watch defendant, and there was no evidence that the crowd gathered out of any purpose other than curiosity or to observe defendant's behavior. Fields v. State, 24 So. 3d 646 (Fla. 3d 2009).

Evidence that defendant was "cussing" and arguing in loud voice after law enforcement officer told him to calm down was insufficient to support his conviction for disorderly conduct, where events occurred in defendant's dwelling and there was no evidence that his conduct incited others to breach peace or posed imminent danger to others. Miller v. State, 667 So.2d 325 (Fla. 1st DCA 1995).

### **Watch out for cases where the Defendant is charged with both Disorderly Conduct and Resisting Officer Without Violence**

In cases involving a detention, the State is required to show that the officer had a reasonable suspicion that the detainee was committing a crime. In this case, the Defendant did not commit disorderly conduct when the Defendant shouted and used foul language. Therefore, the officer did not have the requisite reasonable suspicion and the officer was not performing a legal duty. Trial court's finding that the defendant committed resisting officer without violence was reverse. C.N. v State, 49 So. 3d 831 (Fla. 2d 2010).

### **Self-Defense is a viable Defense to Brawling and Fighting**

When charged with disorderly conduct, a defendant who does not initiate the fight and acts to protect himself or herself from the attacker may assert self-defense. S.D.G. v. State, 919 So. 2d 704, 715 (Fla. 5<sup>th</sup> DCA 2006). M.L.J. v State, 93 So 3d 348 (Fla. 2<sup>nd</sup> 2012). The defense applies only if the Defendant did not provoke the fight. D.M.L. v State, 773 So. 2d 1216, 1217 (Fla. 3d DCA 2000).



**D. DISORDERLY CONDUCT PREDICATE QUESTIONS**

1. Please state your name and occupation.
2. Were you so employed on \_\_\_\_\_?
3. How long have you been so employed?
4. Where were you at on \_\_\_\_\_?
5. Did you have an occasion to meet a person who later became known to you as \_\_\_\_\_ on that date and at that location?
6. Do you see (him/her) in court today?
7. Would you point (him/her) out?
8. Could you please describe an article of (his/her) clothing?

LET THE RECORD REFLECT THE WITNESS/VICTIM HAS IDENTIFIED THE DEFENDANT.

9. What first drew your attention to the defendant?
10. What happened at that time and location?
11. What exactly was the defendant doing?
12. What, if anything, did he say?
13. Please describe the defendant's demeanor.
14. Did the defendant have contact with any other people in the area?
15. What type of area did this all take place in?
16. Were there any open businesses?
17. Were there people in the area?
18. Did you see anyone approach the scene to watch?
19. What did you do then?
20. How did the defendant respond?
21. Please describe the defendant's attitude.
22. Did this all occur in Miami-Dade County?

## **DISORDERLY INTOXICATION**

§ 856.011,.

### **A. ELEMENTS**

**To prove the crime of Disorderly Intoxication, the State must prove the following two elements beyond a reasonable doubt:**

*Give a or b as applicable.*

**a. [1. (Defendant) was intoxicated, and**

**2. [He] [She] endangered the safety of another [person] [property].]**

**b. [1. (Defendant) was intoxicated or drank any alcoholic beverage in a [public place] [in or upon a public conveyance] and**

**2. [He] [She] caused a public disturbance.]**

*Definition*

**"Intoxication" means more than merely being under the influence of an alcoholic beverage. Intoxication means that the defendant must have been so affected from the drinking of an alcoholic beverage as to have lost or been deprived of the normal control of either [his] [her] body or [his] [her] mental faculties, or both. Intoxication is synonymous with "drunk."**

*Optional Definition*

**A "public place" is a place where the public has a right to be and to go.**

**The defendant's admission that [he] [she] drank an alcoholic beverage is not sufficient by itself to prove beyond a reasonable doubt that [he] [she] was under the influence of an alcoholic beverage but this admission may be taken into consideration along with other evidence.**

### **Lesser Included Offenses**

No lesser included offenses have been identified for this offense.

### **B. PENALTIES**

Second Degree Misdemeanor - Maximum 60 days in jail and Maximum \$500 fine

### **C. CASE LAW**

The defendant's admission that he drank an alcoholic beverage is not sufficient by itself to prove beyond a reasonable doubt that he was under the influence of an alcoholic beverage, but this admission may be taken into consideration along with other evidence.

#### **Cases holding Disorderly Intoxication existed**

Lauxman v. State, 402 So. 2d 432 (Fla. 5th DCA 1981): The arrest of the defendant for disorderly intoxication was lawful, as was the search incident to the arrest, where it was clear from facts in the record that defendant was intoxicated when arrested and causing a public disturbance.

State v. Presley, 458 So. 2d 847 (Fla. 5th DCA 1984): Conduct on part of the defendant in calling a bar patron an offensive name, in consequence of which he was kicked out of the bar and in thereafter

standing in the roadway yelling so as to cause passing cars to change directions of movement to avoid hitting him was sufficient to give police officer reason to believe that defendant was creating a public disturbance and, hence, to arrest defendant for disorderly intoxication.

Ivey v. State, 779 So.2d 662 (Fla. 1st DCA 2001). Appellants conviction was overturned since the evidence was insufficient to establish that he cause a public disturbance.

### **Cases holding Disorderly Intoxication did NOT exist**

Jernigan v. State, 566 So. 2d 39 (Fla. 1st DCA 1990): The police dispatcher did not commit disorderly intoxication when he arrived at station distraught over relationship, used profanity; threw his keys; and crumbled and threw down sunglasses, was escorted to loading ramp, stiffened arms to prevent being handcuffed, put arresting officer in headlock, and ripped officer's shirt. In order to sustain a conviction for disorderly intoxication, State must prove that person is intoxicated and that public safety is endangered.

Papalas v. State, 645 So. 2d 153 (Fla. 1st DCA 1994): Officer's observation of defendant staggering down side of road was insufficient to provide probable cause to believe defendant was guilty of disorderly intoxication absent evidence to show she was, at time of arrest, endangering anyone or creating public disturbance; although defendant was intoxicated, she was not causing a disturbance.

Blake v. State, 433 So.2d 611 (Fla. 1st DCA 1983). Action of defendant, who was holding a beer can and smelled strongly of alcohol, in flapping his arms around and saying he wanted to know why he was always picked on did not amount to disorderly intoxication.

Royster v. State, 643 So.2d 61 (Fla. 1st DCA 1994). A front porch is not within the definition of "public place" for purposes of this statute.

### **DISORDERLY INTOXICATION PREDICATE QUESTIONS**

1. State your name and occupation.
2. Were you so employed on \_\_\_\_\_?
3. Where were you on \_\_\_\_\_?
4. Did you come into contact with someone who later became known to you as \_\_\_\_\_?
5. Is that person in the courtroom today? Could you please identify (him/her)?

#### **LET THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE DEFENDANT.**

6. What happened at that time and location?
7. What first attracted your attention to the defendant?
8. What exactly was the defendant doing?
9. Please describe the area the defendant was in. (if appropriate)
10. Any people in the area?
11. Any open businesses?
12. Did the defendant's actions endanger any one? How?
13. Did the defendant make any statements to you?
14. Could you please describe the defendant's physical appearance?
15. What, if anything, did you notice about the defendant's eyes and face?
16. What, if anything, did you notice about the defendant's walk?
17. What, if anything, did you notice about the defendant's speech?
18. Have you had an occasion to observe intoxicated persons prior to the date in question?
19. Have you arrested people before for disorderly intoxication?
20. Have you had any training in the signs of intoxication?
21. Did you form an opinion as to the defendant's sobriety at the time in question?
22. What is that opinion?
23. Did all this occur in Miami-Dade County, Florida, City of \_\_\_\_\_?

**EXPOSURE OF SEXUAL ORGANS**  
(IN A VULGAR OR INDECENT MANNER)  
§ 800.03,.

To prove the crime of [Indecent Exposure] [or] [Nakedness], the State must prove the following four elements beyond a reasonable doubt:

1. (Defendant)

[exposed or exhibited [his] [her] sexual organs].  
[was naked].

2. [He] [She] [did so] [was naked]

[in a public place].  
[on the private premises of another].  
[so near the private premises of another as to be seen from those private premises].

3. (Defendant) intended the [exposure or exhibition of [his] [her] sexual organs] [or] [nakedness] to be in a vulgar, indecent, lewd, or lascivious manner.

4. The [exposure or exhibition of the sexual organs] [or] [nakedness] was in a vulgar, indecent, lewd, or lascivious manner.

Proof of mere nudity or exposure is not sufficient to sustain a conviction.

*Definitions.*

As used in regard to this offense the words "vulgar," "indecent," "lewd," and "lascivious" mean the same thing. They mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.

Acts are not vulgar, indecent, lewd, or lascivious unless such acts cause offense to one or more persons viewing those acts or unless the acts substantially intrude upon the rights of others.

A "public place" is any place intended or designed to be frequented or resorted to by the public.

**Lesser Included Offenses**

<b>EXPOSURE OF SEXUAL ORGANS — 800.03</b>			
<b>CATEGORY ONE</b>	<b>CATEGORY TWO</b>	<b>FLA. STAT.</b>	<b>INS. NO.</b>
None			
	Unnatural and lascivious act	800.02	11.8

**B. PENALTIES**

First Degree Misdemeanor: Maximum 1 year in jail & Maximum \$1,000 fine

## C. DEFINITIONS

As used in regards to this offense the words “vulgar,” “indecent,” “lewd” and “lascivious” mean the same thing. They mean an unlawful indulgence in lust or a wicked, lustful, unchaste, licentious or sensual intent on the part of the person doing the act.

Acts are not vulgar, indecent, lewd or lascivious unless such acts cause offense to one or more persons viewing those acts or unless the acts substantially intrude upon the rights of others. Note: See “no person need be offended” case law hereunder.

A “public place” is any place intended or designed to be frequented or resorted to by the public.

## D. CASE LAW

### Nudity

Nudity, in and of itself, has been deemed to be lewd and lascivious in some cases. The courts have examined the context within which the exposure takes place and the acts associated with the exposure. The Supreme Court in Hoffman v. Carson, 250 So. 2d 891 (Fla. 1971), stated that “because of the nature of the statute [800.03], the terms in question must be construed as necessarily relating to a lascivious exhibition of those private parts of a person which common propriety requires to be customarily kept covered in the presence of others. This construction necessarily applies also to the language, 'or so to expose or exhibit his person in such place, or to go or be naked in such place.' Id. at 893.

In other words, there must be an intentional, lewd and lascivious exhibition or exposure of the sexual organs. **Mere exposure will not be enough.** See, Goodmakers v. State, 450 So. 2d 888 (Fla. 2d DCA 1984)(sleeping naked on a dock, without deliberate exposure to others, and without sexual arousal, not lewd and lascivious behavior); Payne v. State, 463 So. 2d 271 (Fla. 2d DCA 1984)(urinating in a public parking lot not lewd and lascivious behavior)

**Practice Pointer:** Where defendant is simply urinating in public, but is being charged with exposure of sexual organs or lewd and lascivious behavior, an information must be filed amending the charge to *sanitary nuisance* a Miami-Dade Code violation; Duvallon v. State, 404 So. 2d 196 (Fla. 1st DCA 1981)(marching in front of the state capitol wearing only cardboard sign on front and back avoiding exposure of sexual organs not lewd and lascivious behavior). In these cases, the courts found no lustful intent on the part of the perpetrators.

### Intent

Ross v. State, 876 So 2d 684 (Fla. 4thDCA 2004): County court conviction for violating section 800.03 by wearing, in retail store, short shorts that were substantially sure to lead to exposure of penis. Defendant's argument that exposure was accidental and without lascivious intent were factual matters that trial judge decided against defendant.

W.R.H. v. State, 763 So.2d 1111 (Fla. 4th DCA 1999): Trial court did not err in denying motion for judgment of acquittal because since the State proved that defendant exposed his sexual organs with lascivious intent. Evidence that defendant intended to expose himself in offensive, vulgar manner while on public street was sufficient to support conviction. There was no merit to claim that the defendant cannot be punished under statute because there was no sexual/lascivious intent. Statute makes it unlawful to expose sexual organs in public in a vulgar or indecent manner.

### No Person Need Be Offended

State v. Kees, 919 So 2d 504 (Fla. 5<sup>th</sup> DCA 2005): Circuit court acting in its appellate capacity departed from essential requirements of law when it affirmed county court's dismissal of criminal charges on ground that there was no evidence that anyone within the class of persons to be protected by the statutes at issue was offended by defendants' conduct, which occurred in public place. Specific statutes involved in prosecution do not, on their face, require state to submit proof that anyone was offended by prohibited conduct. Review of case law makes clear that consideration of whether someone was offended by a defendant's lewd conduct was added by courts only in circumstances when charge of lewdness was being applied to conduct occurring in private places. Even if court were to have concluded that an element of "offensiveness" was contained in the statutes at issue, in order for this element to be constitutionally valid, an objective reasonable person standard would have to be applied, and application of this standard to the instant case would lead court to conclude that conduct observed by undercover officers was sufficient to at least create issue of fact for jury as to whether defendants' conduct was offensive.

Wonvetye v. State, 648 So. 2d 797 (Fla. 4th DCA 1994): The defendant masturbated as he looked into bedroom windows where young girls were sleeping. The court found this to be a violation of 800.03. It is unlikely that the girls witnessed the offense. Otherwise, the defendant would have been charged with a felony under 800.04.

**Practice Pointer:** When going to trial on this offense, it is imperative that you print all case law in this section. It will become important with regards to the jury instruction.

#### **Exception for places set apart for that purpose**

In Hoffman v. Carson, supra, the Court found that a dancer exposing her sexual organs ("going totally nude") in the course of her performance at a lounge, violated 800.03. The Court went on to say that a lounge is not one of the places within the ambit of the statute's exception of "any place provided or set apart for that purpose." Places that would fall within the exception: public restroom, bathing and locker room facilities, and those places in which nudity or exposure is necessarily expected outside the home and the sphere of privacy protected therein.

#### **When dealing with children - SEE CHIEF**

#### **Masturbation in Public Places**

Masturbation in the stall of a public restroom = not a crime. Ward v. State, 636 So. 2d 68 (Fla. 5th DCA 1994).

State v. Barbalace, 3 FLW Supp. 181 (County Court 15th Cir. 1995): The defendant rode his bike with only a waist length leather jacket, exposing his genitalia, without touching himself or maintaining an erection. The County Court found him guilty of violating 800.03.

**E. EXPOSURE OF SEXUAL ORGANS PREDICATE QUESTIONS**

1. State your name and occupation.
2. Were you so employed on \_\_\_\_\_?
3. How long have you been so employed?
4. Did you have an occasion to meet a person who later became known to you as \_\_\_\_\_  
on \_\_\_\_\_?
5. Is that person in the courtroom today?
6. Could you please point (him/her) out?

**LET THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE DEFENDANT.**

7. Where was he when you first observed him?
8. Exactly what was he doing?
9. How was the defendant dressed?
10. What, if any, part of the defendant's body did you observe?
11. What type of area was this?
12. Was this a public area?
13. Were there other people in the area? (Ask only if answer is yes).
14. Where were these people in relation to him?
15. Where were you when you first observed him?
16. Was the defendant clearly visible from where you were?
17. How did watching the defendant perform this act(s) affect you?
18. Was it offensive to you?
19. Did all this take place in Miami-Dade County, Florida, City of \_\_\_\_\_?



## **LOITERING OR PROWLING**

§ 856.021,.

### **A. ELEMENTS**

To prove the crime of Loitering or Prowling, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) loitered or prowled in a place, at a time, or in a manner not usual for law-abiding individuals.
2. Such loitering and prowling was under circumstances that warranted justifiable and reasonable alarm or immediate concern for safety of persons or property in the vicinity.

#### *Circumstances*

Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person:

1. Takes flight upon appearance of a law enforcement officer.
2. Refuses to identify [himself] [herself].
3. Manifestly endeavors to conceal [himself] [herself] or any object.

Unless flight by the person or other circumstances makes it impracticable, a law enforcement officer shall afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting [him] [her] to identify [himself] [herself] and explain [his] [her] presence and conduct.

No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.

### **B. PENALTIES**

Second Degree Misdemeanor

Maximum 60 days in jail. (775.082(4)(b))

Maximum \$500 fine. (775.083(1)(e))

### **C. CASE LAW**

#### **Purpose**

“The whole purpose of the statute is to provide law enforcement with a suitable tool to prevent crime and allow a specific means to eliminate a situation which a reasonable man would believe could cause a breach of the peace or a criminal threat to persons or property.” The statute “requires a delicate balancing between the protection of the rights of individuals and the protection of individual citizens from imminent criminal danger to their persons or property.” Ecker v. State, 311 So. 2d 104 (Fla. 1975).

The purpose of the loitering and prowling statute must not be confused. In Berry v. State, 973 So.2d 1255 (Fla. 1<sup>st</sup> DCA 2008) an Officer stopped a defendant who was walking behind a closed store at 8:30 in the evening. The Officer could not state what crime he thought the defendant was going to commit and added "that's why they have a loitering and prowling statute." The court disagreed and defendant's motion to suppress evidence found in a search of the defendant was granted.

### **Officer must personally observe defendant's conduct**

Madge v. State, App. 4 Dist., 160 So.3d 86 (2015): An officer's observations are critical to satisfying the state's burden of proof for the crime of loitering and prowling. In this case, evidence was insufficient to establish that defendant, who reportedly attempted to enter a car of a lay witness in a restaurant parking lot, committed the offense of loitering and prowling; no evidence indicated that responding police officer personally observed any alarming behavior which presented an immediate concern for the safety of persons or property.

### **Opportunity to dispel**

Von Goff v. State, 687 So. 2d 926 (Fla. 2d DCA 1997) "Concern or alarm" in this section is fear of an immediate threat to public safety or order.

G.G. v. State, 903 So. 2d 1031 (Fla. 4<sup>th</sup> DCA 2005): Officer observed a juvenile during early morning hours emerge from behind a shopping plaza. Upon seeing patrol unit he ran behind the plaza. Motion for judgment of acquittal should have been granted where the state failed to establish imminent breach of peace or threat to public safety. Although juvenile's brief flight from officer and initial failure to give officer his correct name was sufficient to raise alarm in officer, that alarm was dispelled when juvenile shortly thereafter revealed his correct name, address, and birth date.

S.P. v. State, 833 So. 2d 267 (Fla. 3d DCA 2002): Loitering and prowling does not exist where the evidence only shows that juvenile was seen crouched down by bushes at a cemetery wall near several vehicles visiting the cemetery on Christmas Day afternoon.

Rucker v. State, 921 So. 2d 857 (Fla. 2d DCA 2006): Officer who observed defendant, wearing pants that were wet or muddy, walking down road in daylight in primarily rural residential area which had been designated a "hot spot" because of its history of burglaries did not have probable cause to arrest defendant for loitering and prowling.

Grant v. State, 854 So 2d 240 (Fla. 4<sup>th</sup> DCA 2003): Although officers witnessed defendant and two other men walking in area of Farmer's Market in early morning hours. There was nothing to suggest that defendant was acting in an abnormal way at time and place of encounter with officers. Neither fact that restaurant in vicinity had previously been burglarized nor fact that men gave officers inconsistent explanations for their presence provided probable cause for arrest. Since the evidence presented did not demonstrate that defendant was engaged in any activity that indicated an imminent breach of peace or threat to public safety, trial court erred in finding probable cause to justify arrest.

A.D. v. State, 817 So 2d 1027 (Fla. 3d DCA 2002): Officers' observation of juvenile walking down the street at 4:30 in the morning is, by itself, legally insufficient to support adjudication for loitering and prowling. There was no evidence that juvenile's behavior pointed to the commission of future criminal activity, as required for loitering and prowling conviction.

C.H.S. v. State, 795 So.2d 1087, (Fla. 2d DCA 2001): A juvenile standing behind a closed business at 2:30 a.m. in high crime area in which there had been prior burglaries is not loitering and prowling,

officer did not articulate specific facts showing imminent breach of peace or threat to public safety. The juvenile's failure to give reasonable explanation for presence was not sufficient to prove offense of loitering and prowling beyond reasonable doubt.

Rinehart v. State, 778 So. 2d 331 (Fla. 2d DCA 2000): Where deputy sheriff observed defendant and a woman enter a parked vehicle outside a building that housed a business and apartments in the early morning hours, deputy's action in approaching vehicle and asking occupants what they were doing there was a valid police-citizen encounter. Initial encounter turned into a *Terry* stop or investigatory detention when deputy separated defendant and his companion outside vehicle to question them further. Investigatory stop was not legal where deputy did not have founded suspicion that defendant was committing offense of loitering and prowling.

R.M. v. State, 754 So. 2d 849 (Fla. 2d DCA 2000): Witness called police after seeing a young man and woman pulling on the door handles of cars in the parking lot of a car dealership at 11:00 PM. Police stopped defendant and a companion as they were walking along a public street in the vicinity of the dealership. Defendant gave inconsistent answers as to what he was doing there and witness was unable to identify defendant as the person he had seen in the parking lot. The evidence was insufficient to support a conviction. The statute requires proof that suspect's actions created an immediate concern for safety of nearby property, and mere suspicion of future conduct would not satisfy the statute.

E.C. v. State, 724 So.2d 1243 (Fla. 4<sup>th</sup> DCA 1999): Officer's observation of juvenile and two friends around 11:00 p.m. walking back and forth in front of strip center, occasionally peeking around the corner of one store to view a convenience store parking lot next door, walking through strip center parking lot and into alley behind it, walking across the street in front of a parking garage and sitting on the curb, and eventually walking across the street to the parking lot of a regional mall was not sufficient to warrant justifiable and reasonable alarm or immediate concern for safety of persons and property in the vicinity. Fact that officer found flat-head screwdriver of type used to steal cars in juvenile's back pocket does not amount to loitering and prowling.

Mash v. State, 920 So.2d 67 (Fla. 1st DCA 2005): Officers did not have probable cause to arrest defendant who was standing on street corner at midnight where officers did not observe defendant loitering and prowling under circumstances that warrant concern for the safety of persons or property in the vicinity. The officer's belief of an imminent drug transaction does not necessarily warrant concern for public safety.

Fla. Stat 856.021(2) provides examples of when alarm or immediate concern is justified:

1. Flight upon appearance of a law enforcement officer
2. Refusal to identify himself or herself, or
3. Manifestly endeavoring to conceal oneself or any object.

### **On-going criminal activity**

D.A. v. State, 471 So. 2d 147 (Fla. 3d DCA 1985): The court describes the first element of the statute as "forward-looking." Finding that the statute is not "directed at suspicious after-the-fact criminal behavior which solely indicates involvement in a prior, already completed . . . criminal act." The goal is to stop crime before it occurs rather than use this statute as a "catch all" for any suspicious activity.

However, this does not prevent officers from arresting suspects who are involved in ongoing criminal activity. "The commission of a prior on going . . . crime" does not negate the first element. As long as the crime is continuing, the fact that it is already started before the police arrive does not make the

crime exclusively in the past. For examples of this sort of fact pattern see: (1) Hardie v. State, 333 So. 2d 13 (Fla. 1976); (2) Bell v. State, 311 So. 2d 179 (Fla. 1975); (3) In re A.R., 460 So. 2d 1024 (Fla. 4th DCA 1984), which are discussed below.

Springfield v. State, 481 So. 2d 975 (Fla. 4th DCA 1986): The officer recognized the defendant as someone he had arrested before for burglary. He stopped the defendant saw he was carrying a tape recorder and asked him where he got it. The defendant said he found it in the garbage. The officer found this explanation unlikely, since the tape recorder was clean. Additionally, the defendant had offered similar explanations when he was convicted of burglary. The defendant was also unable to explain his presence in the residential area. The facts indicate "only that appellant had already committed a crime, but not that any future criminal activity was imminent."

S.F. v. State, 354 So. 2d 474 (Fla. 3d DCA 1978): The court found that before the crime can be established it must be shown that:

- a. The police prior to any arrest for said offense gave the accused an opportunity to dispel any alarm or immediate concern . . . by requesting the accused to identify himself and explain his presence and conduct;

**OR**

- b. There were circumstances which made it impracticable for the police to give the accused such an opportunity." Id. at 475. "The absence of such a requisite showing is fatal to the state's case."

L.L.J. v. State, 334 So. 2d 656 (Fla. 3d DCA 1976): The defendant and his friend were arrested after running away from an officer, who observed them walking between cars in a garage airport. "It is clear from the record that the State failed to introduce evidence that the police gave the appellant an opportunity to explain his presence and conduct or to show circumstances making it impracticable to give the appellant such an opportunity, pursuant to the requirements of 856.021, Fla. Stat." Reversed.

T.J. and D.M. v. State, 452 So. 2d 107 (Fla. 3d DCA 1984): There was a "BOLO" out for three black males who were grab purses. Officer passed through a high crime area, where he approached the defendants. "When the juveniles told the officer they were selling avocados, and he observed that they had no avocados in their possession, the totality of the circumstances gave the officer probable cause to arrest them for loitering and prowling."

**Note:** Be careful not to shift the burden. See Smith v. State, 695 So. 2d 864 (Fla. 4th DCA 1997): The State's repeated references to the defendant's failure to explain his presence and conduct constituted reversible error, since the defendant was not required to explain his presence or conduct.

### **Immediate Concern**

Stephens v. State, 987 So.2d 182 (Fla. 2d DCA 2008): Defendant was standing in a parking lot adjacent to a closed grocery store, as a marked patrol car drove by the he moved into the shadows and ducked behind a parked car. The officer circled the lot and when he came back into the parking lot toward defendant, he stood up and discarded an small item and began to scratch lottery tickets. The defendant's conduct did not warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property located in his vicinity as required by statute.

Ellis v. State, App. 2 Dist., 157 So.3d 467 (2015): Insufficient evidence existed that defendant intended to commit harm to person or property in the very near future, as required to support loitering or prowling conviction, even though police officer testified he believed defendant was an imminent threat to residents of apartment complex because he was walking around complex and did not live there; defendant was walking out in the open, briefly entered an adjacent building, walked backed to closed vehicular gate, and after a short time, exited complex and walked toward officer.

### **Are Miranda Rights required?**

Miranda warnings do not necessarily have to be read to the defendant before questioning him in order to dispel concern. The State's argument should be that because the defendant was not in custody at the time of an encounter by a police officer, that Miranda warnings are not required to be read.

Davis v. State, 698 So. 2d 1182 (Fla. 1997): The court held that Miranda warnings are required whenever the State seeks to introduce against a defendant statements made by the defendant while in custody and under interrogation. Absent one or the other, Miranda warnings are not required. See also, Alston v. Redman, 34 F.3d 1237 (3d Cir.1994)(citing Miranda, 384 U.S. at 477-78).

### **LOITERING AND PROWLING FOUND TO EXIST**

State v. Cortez, 705 So. 2d 676 (Fla. 3d DCA 1998): Officer issued a BOLO for defendants because a citizen had witness them try to enter into the house next to him. The Defendants argued that no warrantless arrest could be made because the offense did not occur in the officer's presence. Defendant's relied on two 3rd DCA cases Chamson v. State, 529 So. 2d 1160 (Fla. 3d DCA 1988), and Carter v. State, 516 So. 2d 312 (Fla. 3d DCA 1987), as well as K.R.R. v. State, 629 So.2d 1068 (Fla. 2<sup>nd</sup> DCA 1994), *infra*, for the proposition that there can be no warrantless arrest where the officer does not witness the Loitering and instead relies on a citizen witness.

There was P.C. to arrest based on circumstances. The court distinguished the cases cited by the Defendants because those cases do not discuss or cite 856.031, Fl. Stat. which allows for warrantless arrest in L & P cases where delay in procuring warrant would allow loiterer or prowler to escape. The Court also addresses Ecker, *infra*. The Court cites language in Ecker, which specifically allows for a prosecution for L & P based on citizen witnesses, even if the officer did not observe the Defendant commit the offense.

The Florida Supreme Court found that this 3rd DCA decision was the only case to address the effect of Section 856.031 on warrantless arrests for loitering and prowling and, even though it dismissed the appeal on other grounds, it stands for the confirmation that Cortez is the current binding authority on the issue. See, Cortez v. State, 731 So. 2d 1267 (Fla. 1999). This is a reasonable interpretation of the Supreme Court's actions, otherwise it would have accepted the appeal and issued a final and binding opinion on the issue.

Bell v. State, 311 So. 2d 104 (Fla. 1975): At 1:20 a.m. the defendant was seen hiding in the bushes of a private home. When the officer arrived at the call he saw the defendant jump from the fence surrounding the house and run. The officer arrested the defendant. "The defendant's hiding on private property behind a bush at 1:20 in the morning would cause a reasonable person to be concerned for his safety or the safety of property in the vicinity."

State v. Gibbons, 617 So. 2d 854 (Fla. 2d DCA 1993): The defendant fit the description from the BOLO. When the officer ordered the defendant to stop the defendant initially tried to get away but stopped when the dog barked. The officer noticed in the bag, a bankcard, cassette tapes, sunglasses, an envelope and a car title. The address on the envelope was from a house across the street from where the defendant was stopped. The officer asked routine questions and the defendant said he just

left McDonald's where he worked, but in fact the defendant had come from the opposite direction. At this point the officer read Miranda. The defendant could not give a reasonable explanation about the contents of his bag so the defendant was placed under arrest. There was sufficient evidence for loitering or prowling.

State v. Lockretis, 657 So. 2d 1237 (Fla. 2d DCA 1995): At 1:05 a.m. an officer observed the defendant stop his car in front of a duplex, turn off his lights, and quickly back up. The defendant was white and not a resident. When the defendant came out of the duplexes, the officer approached him and gave him Miranda. The defendant waived and pointed to duplex and said he was going there to see Bill. The officer checked the housing list and saw that duplex was vacant. The defendant then changed his story and the officer placed the defendant under arrest. "Under the totality of the circumstances the defendant's arrest for loitering and prowling was supported by probable cause."

State v. Coron, 411 So. 2d 237 (Fla. 3d DCA 1982): The officer saw the defendant who was staggering, and had dried grass in his hair and on his back. The defendant's shoes were wet (it had not rained), his speech was slurred and his face was flushed. When asked what he was doing there the defendant gave conflicting stories. The arrest was predicated on facts "which were more than sufficient to cause a reasonable person to be concerned for his safety or the safety of property in the vicinity."

State v. Jones, 454 So. 2d 774 (Fla. 3d DCA 1984): The officers called for the defendant saying they wanted to talk to him. The defendant replied "What about"? The officers asked why he had been pushing a shopping cart. The defendant said he did not know anything about it. When the officers told him they saw him pushing the cart, the defendant then said he had been asked to keep an eye on it for someone else. Post Miranda the defendant said he lived in Overtown. The officers pointed out that he had been walking in the opposite direction. The defendant then said he was going to get a soda at a gas station. There was probable cause for the arrest for loitering and prowling.

In the Interest of A.R., 460 So. 2d 1024 (Fla. 4th DCA 1984): Between 10:00 and 11:00 p.m., officers observed the defendant walking with a friend in a high crime area. The officers saw the defendant stand on the sidewalk and watch traffic while his companion went into a car lot and peeked into car windows while attempting to open car doors. At trial the companion testified that he was looking for a tire iron and that the defendant had nothing to do with it. The state presented sufficient evidence to sustain the conviction.

Hardie v. State, 333 So. 2d 13 (Fla. 1976): At 2:55 a.m. officers saw the defendant riffling through the glove compartment. The officers approached him and saw the contents of the glove compartment strewn on the floor. The officers asked him if this was his car and at first the defendant said yes. They asked him his name and the defendant gave it. When asked where he lived the defendant said "I don't have to tell you anything. I want to talk to my attorney." When asked again if it was his car, the defendant said no. When asked why he was in the other car the defendant denied being there. The defendant was then arrested. There was "overwhelming evidence of alarm for the safety of property in the vicinity."

B.J. v. State, 951 So.2d 100 (Fla. 4<sup>th</sup> DCA 2007): Juvenile defendant was found hiding in the back of a truck that was parked after midnight at a location where a burglary had been committed. He refused to answer the officer's questions regarding why he was in the area. These facts were sufficient to support an adjudication for loitering and prowling.

## **LOITERING AND PROWLING NOT FOUND TO EXIST**

J.S.B. v. State, 729 So.2d 456 (Fla. 2d DCA 1999): J.S.B. identified himself and indicated they had pulled car over because it was overheating, and were looking for water spigot, after being mirandized. Deputy doubted statements because he saw spigot around front. No evidence of burglary or attempt was presented. No demonstration of imminent breach of the peace or threat to public safety.

E.C. v. State, 724 So.2d 1243 (Fla. 4th DCA 1999): Upon thinking some criminal activity would take place three males were taken down. Pursuant to pat down a screwdriver (of type used to steal cars) was found in the pocket of E.C.. E.C. said he was waiting for a ride, but couldn't tell from whom. Nothing about the behavior was sufficiently alarming enough to raise immediate concern. Also, while possession of screwdriver gives support to suspicion of criminal activity after the fact, the L & P must be completed prior to any police action.

R.D.W. v. State, 659 So. 2d 1193 (Fla. 2d DCA 1995): Officers observed some boys on bikes ride through parking lots. In one parking lot, the boys hid their bikes and scanned the lot looking at cars and people. They got back on their bikes and rode off a few minutes later. Nothing about the boys actions indicated that public safety was threatened.

K.R.R. v. State, 629 So. 2d 1068 (Fla. 2d DCA 1994): The defendant and his companion were 300 yards from where the theft occurred only ten minutes after the report came in. The officer testified that the defendant was coming from the general direction of the theft and that there were no businesses or residences around. He also testified that people are not normally seen walking in the area after midnight. The court held that "the instant facts are legally insufficient under the statute."

E.B. v. State, 537 So. 2d 148 (Fla. 2d DCA 1989): Defendant and a friend were riding bikes when they saw the officer behind them and lost control of their bikes. The officer asked them what they were doing in the area. They initially refused to identify themselves, and then they gave a false name and said they had gotten lost on the way home. The court held the State failed to establish the elements of loitering and prowling.

W.A.E. v. State, 654 So. 2d 193 (Fla. 2d DCA 1995): Wright observed the defendant walking on a sidewalk that ran along the house. The defendant tried to flee but was apprehended. The defendant told Wright that he was looking at the bicycles because he thought one of them belonged to a friend who had a bike stolen. An officer arrived and the defendant told the officer the same story. There was no testimony that the defendant was in the Wright's yard and being on the sidewalk is in itself legally insufficient for loitering and prowling. Although the defendant ran from Wright he did not run from the officer and he gave both men explanations about his presence.

In the Interest of O.W., 423 So. 2d 1029 (Fla. 4th DCA 1982): While talking to some boys in a tree, the officer saw three other boys (one of which was the defendant) run out from some bushes through a field where homes were located. The officer called to the boys but they kept running. When he finally stopped them they said they were skipping school. The evidence was insufficient to support the arrest of the boys for loitering and prowling.

T.W. v. State, 675 So. 2d 1018 (Fla. 2d DCA 1996): The act of carrying a chain saw near a closed pawn shop in the early morning hours did not warrant a justifiable/reasonable alarm or concern for safety of persons or property in the area.

Freeman v. State, 617 So. 2d 432 (Fla. 4th DCA 1993): A police officer's observation of defendant and companion jumping a high wall and starting to walk away from officer did not justify a warrantless arrest for loitering and prowling.

B.A.O v. State, 932 So.2d 301 (Fla. 2d DCA 2006): Court erroneously found that Juvenile had committed delinquent act of loitering and prowling even though there was no evidence that juvenile's actions in carrying a bicycle inside an apartment complex during early morning hours constituted an imminent threat to property or people in the area. Mere suspicion of criminal activity will not support a conviction for loitering and prowling.



#### **D. LOITERING AND PROWLING PREDICATE QUESTIONS**

1. What is your name and occupation?
2. What were your duties on \_\_\_\_\_(date of the offense)?
3. At what time and at what place did you encounter \_\_\_\_\_?
4. Do you see that person in the courtroom today?
5. Could you identify that person by an article of clothing?

#### **LET THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE DEFENDANT.**

6. Did all of this occur in Miami-Dade County, Florida, City of \_\_\_\_\_?
7. What kind of area is this?
8. When the defendant was first observed, what was the defendant doing?
9. What kind of activities are normally performed at \_\_\_\_\_ at \_\_\_\_\_?  
(location) (time)
10. Were there other people in the vicinity at this time? If so, what were they doing?
11. How long was the defendant observed?
12. Describe the defendant's other actions, if any.
13. Did the defendant observe the police?
14. What did the defendant do upon observing the police?

**Note:** If defendant flees or attempts to hide himself or any object, bring this out clearly, because the statute presumes that these acts justify the policeman's alarm for the community's safety.

15. What action was taken by you?
16. Did the defendant's actions cause you to be alarmed for the safety of persons or property in the immediate area?
17. Why were you alarmed?
18. Upon the defendant's detention, what action was taken? (Frisk, struggle, transport, etc.).
19. Were the defendant's Miranda rights read?
20. Please explain this procedure.
21. Did the defendant indicate he understood his rights?

**Note:** If the defendant refused to waive rights, ask: “Did you give the defendant an opportunity to dispel your alarm for the public safety and was your alarm dispelled?”

**Note:** If the defendant waived his rights and responded, ask: “What did you ask the defendant? What did the defendant respond? Was your alarm dispelled by this? Why not?”

22. Did you take any action to verify what the defendant told you? (If applicable)

**Note:** If the defendant refused to identify himself, statute will presume the alarm. This means the defendant refused to tell the officer his name. It does not mean that he refused to produce identification, which probably cannot be constitutionally required.

## **OBSCENE OR HARASSING TELEPHONE CALLS**

§365.16, Fla. Stat.

### **A. ELEMENTS**

1. Whoever:

- a. Makes a telephone call to a location at which the person receiving the call has a reasonable expectation of privacy; during such call makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, vulgar, or indecent; and by such call or such language intends to offend, annoy, abuse, threaten, or harass any person at the called number;
- b. Makes a telephone call, whether or not conversation ensues, without disclosing his or her identity and with intent to annoy, abuse, threaten, or harass any person at the called number;
- c. Makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number;

OR

- d. Makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number,
2. Whoever knowingly permits any telephone under his or her control to be used for any purpose prohibited by this section is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

**NOTE: The Florida Supreme Court does not have jury instructions for disorderly conduct. If you are proceeding to jury trial, you MUST create your own jury instructions and email it to the Legal Department for approval.**

### **B. PENALTIES**

Second degree misdemeanor

Maximum 60 days in jail. (775.082(4)(b))

Maximum \$500 fine. (775.083(1)(e))

Each subsection can be charged if applicable i.e. 365.16(1)(A) obscene and harassing; 365.16(1)(B) abuse and annoy; 365.16(1)(C) ring to harass and 365.16(1)(D) repeated to harass.

### **C. CASE LAW**

Durie v. State, 901 So. 2d 1171 (5<sup>th</sup> DCA 2005): If a phone call was made not solely to harass, but to communicate, then it is less likely to be classified as harassing or obscene. This case also holds that Section 365.16(1) does not apply to governmental offices because there is no expectation of privacy. Subsections (b) and (c) do not apply when the defendant discloses his identity and leaves messages, and subsection (d) does not apply because the intent of the telephone calls was not solely to harass but instead to intend to speak with the Assistant Attorney General to convince him that he

had been wrongly accused of a crime. Note: This case gives a very good explanation of the harassing telephone call statute. See Also U.S. v Darsey, 342 F. Supp 311(E.D. Pa 1972) for an explanation of the federal equivalent of this statute.

### **Business Lines**

Victim ran business out of his home. He had a separate telephone line for the business. He received obscene and harassing telephone calls on that line. The statute requires that the calls be made to a location where the recipient has a reasonable expectation of privacy. While the victim does enjoy an expectation of privacy in his home, that expectation does not extend to his business telephone line. Therefore, because it was a business line, no such expectation existed. The trial judge should have granted defendant's Motion for Judgment of Acquittal. Avrich v. State, 936 So. 2d 739 (3d DCA 2006).

### **Constitutionality**

Statute criminalizing the making of obscene or harassing telephone calls did not violate defendant's right to free speech, as narrowed to excise indefinite and vague terms "offend" and "annoy." Gilbreath v. State, 650 So. 2d 10 (Fla. 1995).

Whatever minimal free speech value may be associated with an unwanted, anonymous, abusive telephone call simply because it is affected through verbal means, such value is clearly outweighed by the substantial privacy interest of listener; these privacy interests constitutionally entitle state to protect him from unwilling subjection to verbal or nonverbal abuse. State v. Elder, 382 So. 2d 687 (Fla. 1980).

## **D. PRACTICE POINTERS AND PROCEDURE**

**Subpoena Phone Records and list Records Custodian:** Always subpoena the telephone records, both for the victim and the defendant's telephone numbers. These phone records are kept by anyone one of the various telephone companies. The records should indicate both incoming and outgoing calls, this way you can match the defendant's outgoing call to the victim's number with the incoming call into the victim's number. The best way to get these records into evidence is by listing and calling the Records Custodian of that phone company.

**Request a Stay Away Order at Arraignment.** Determine if a Stay Away order was requested at bond hearings or arraignment. If no stay away order was requested, set the case on calendar ASAP for a stay away order to be issued. The Defendant must be present. Once issued make sure that a copy is sent to the Victim.

**File or Amend an Information.** If Information has already been filed in the case, determine if the Information is correct or needs to be amended based upon new information obtained. For ***Obscene or Harassing Telephone Calls***, the correct statute is FS § 365.16. Double check to make sure that the correct statute and subsection is charged.

**Determine if Case Should be Bound Up:** Based upon the sworn statements gathered at the PFC, determine if the case should be bound up to a felony as an aggravated stalking (see stalking section for elements of aggravated stalking).

**Taped Evidence:** Before day of trial, listen to and make sure the tape works. Prior to trial, have your witness come in to listen to the tape. After they have listened to tape, make sure they initial it so they can identify it for trial. If the tape is in a language other than English make sure you drop

off the tape with the Court Translator's office prior to trial. Do this IMMEDIATELY, since it can take up to 8 weeks to have the tape translated!!! Prior to trial, have your witness read the transcripts to make sure it fairly and accurately represents what they understand to have been on the recording. (So that they don't have to read it through during the trial.)

English Transcripts of a tape recorded in a different language are ADMISSIBLE into Evidence so long as the transcripts were prepared by a Certified Court Translator. (List court translator as a witness, just in case there is an issue with their credentials.) English Transcript of English-language tape is not admissible into evidence. However, they may be provided as a demonstrative aid. Therefore, make sure the transcripts are accurate. If there are any inaudible portions, make sure they are not material, or else you may not be able to use them. Also, make sure you have the copies of transcripts ready for each juror

**Contact all of your witnesses.** It is important to know what your witnesses will testify to at trial. You may have Investigations do "locates" on your witnesses if necessary and only with the approval of an Assistant Chief. If you learn of new witnesses through your pre-trial conferences or from paperwork you receive during the course of your handling of the case, have the new witnesses brought in for a pre-trial conference and added to your witness list.

**Keep the Victim informed of all court dates.** Please let the victim know about upcoming sounding and trial dates. They have a right to be heard at sentencing and deserve to be included in the process and present at every hearing. Further, as your victim may be apprehensive about appearing in court or talking to someone other than yourself, advise the victim that a victim witness coordinator will contact him or her concerning upcoming trial dates. Please furnish the victim with the name of the person that will contact them in order to place them at ease

## **E. OBSCENE OR HARASSING TELEPHONE CALLS PREDICATES**

### **VICTIM**

1. Please state your name.
2. Where were you at on \_\_\_\_\_ at \_\_\_\_\_?
3. Did you receive any unusual phone calls that day?
4. How many phone calls did you receive?
5. At what time(s) did you receive the call(s)?
6. Please describe in detail the content of each phone call.
7. Did you recognize the caller's voice?

Note: Only ask this question if there is voice recognition. Then continue to ask elicit the relationship between the victim and defendant and establish **identity & venue**.

8. Did the caller identify himself/herself?
9. Did you feel offended, annoyed, threatened, or harassed by the phone call(s)?
10. Why?
11. Do you have caller ID?

*Note: Only ask if answer is yes. Then ask if the same number kept showing.*

12. Do you have an answering machine?

*Note: Only ask if answer is yes.*

13. Did the defendant leave any messages?
14. Were these messages recorded on a tape?

## **F. HOW TO GET A TAPE INTO EVIDENCE**

**NOTE:** Prior to trial, have your witness come in to listen to the tape. After they have listened to tape, make sure they initial it so they can identify it for trial.

### **ENGLISH LANGUAGE TAPE.**

- a. I call your attention to State's Exhibit 1-A for Identification, do you recognize it? **HOLD UP THE TAPE.**
- b. What do you recognize it to be?

- c. How do you recognize it?
- d. Please describe the circumstances surrounding the recording of this tape.
- e. Would you please describe, briefly, its contents?
- f. Are the contents on this tape a fair and accurate representation of what you heard on DATE OF INCIDENT?
- g. Has this tape been altered, erased, or added to since the date on which the tape was made?
- h. At this time, State moves State's Exhibit 1A for identification into evidence as State's \_\_\_\_.

Note: Some courts may find that a foundation for chain of custody should be laid. However, a tape should be "non-fungible," and therefore would not be necessary. Of course, many textbooks still warn the dangers of not laying a chain of custody. There do not appear to be any FL cases that say one must have a "chain of custody" predicate for tapes. Just in case, ask the following question: "Has the tape continuously been in your custody since the date on which you made it?"

#### **NON-ENGLISH LANGUAGE TAPE.**

- a. I call your attention to State's Exhibit 1-A for Identification, do you recognize it? HOLD UP THE TAPE.
- b. What do you recognize it to be?
- c. How do you recognize it?
- d. Please describe the circumstances surrounding the recording of this tape.
- e. Are the contents of this tape in English?
- f. If not, what language is on the tape?
- g. Do you speak this language?
- h. Are you fluent in this language?
- i. How is it that you are fluent in this language?
- j. Would you please describe, *briefly*, the contents on this tape?
- k. Are the contents on this tape a fair and accurate representation of what you heard on DATE OF INCIDENT?
- l. Has this tape been altered, erased, or added to since the date on which the tape was made?
- m. At this time, State moves State's Exhibit 1A for identification into evidence as State's \_\_\_\_.

## **G. HOW TO GET ENGLISH LANGUAGE TRANSCRIPTS INTO EVIDENCE**

1. I call your attention to State's Exhibit 1-A for Identification. (Transcripts)
2. Do you recognize it?
3. What do you recognize it to be? (English transcripts of the foreign language recording)
4. How do you recognize it?
5. Did you read these transcripts prior to trial?
6. What language are these transcripts in?
7. Do you speak this language?
8. Are you fluent in this language?
9. How is it that you are fluent in this language?
10. Are the contents on these transcripts a fair and accurate translation of what you heard on the recording taken on DATE OF INCIDENT?
11. Has anything on these transcripts been altered, erased, or added to since the date on which the original recording was made?
12. At this time, State moves State's Exhibit 1A for identification into evidence as State's \_\_\_\_.

## **CUSTODIAN OF PHONE RECORDS**

1. What is your name and occupation?
2. How long have you been employed by?
3. What are your responsibilities there?
4. Mr./Ms. \_\_\_\_\_, did you receive a subpoena directing your company to produce certain records for this trial?
5. Did you bring those with you today?
  - a. Have the exhibit marked
  - b. Show the exhibit to the defense attorney
  - c. Show the exhibit to the witness.
6. I am showing you what has been marked State's Exhibit \_\_\_\_\_ for identification. Do you recognize it?
7. What do you recognize State's Exhibit \_\_\_\_\_ for identification to be?
8. What kind of record is it?
9. What use does your company make of this kind of record?
10. What kind of information is on such a record?
11. Who enters and receives the information that appears on such a record?



12. What then happens to such a record?
13. I am again directing your attention to State's Exhibit \_\_\_\_\_ for identification. Was that record made by a person with knowledge of (or made from information transmitted by a person with knowledge of) the acts and events appearing on it?
14. Was the record made at or near the time of the acts and events appearing on it?
15. Is it the regular practice of Bellsouth to make such a record?
16. Was that record kept in the course of a regularly conducted business activity?

(MOVE FOR ADMISSION OF THE EXHIBIT IN EVIDENCE.)

17. I am directing your attention to what is now State's Exhibit \_\_\_\_ in evidence, can you please tell the court (jury) what information is on that record? (Witness will testify that phone number X placed a telephone call to phone number Y at a certain time. There will probably be several calls on various different dates).
18. Who is telephone number \_\_\_\_\_ registered to?  
(defendant's number)
19. And who is telephone number \_\_\_\_\_ registered to?  
(victim's number)
20. Did all of this occur in Miami-Dade County, Florida.

**PETIT THEFT**

§ 812.014, Fla. Stat.

To prove the crime of Theft, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) **knowingly and unlawfully [obtained or used] [endeavored to obtain or to use] the** (property alleged) **of** (victim).
2. [He] [She] **did so with intent to, either temporarily or permanently,**
  - a. **[deprive (victim) of [his] [her] right to the property or any benefit from it.]**
  - b. **[appropriate the property of (victim) to [his] [her] own use or to the use of any person not entitled to it.]**

*Degrees. Give as applicable.*

If you find the defendant guilty of theft, you must also determine if the State has proved beyond a reasonable doubt whether:

- a. **[the value of the property taken was \$100 or more but less than \$300.]**
- b. **[the value of the property taken was less than \$100.]**

*§ 812.012(3), Fla. Stat.*

**“Obtains or uses” means any manner of**

- a. **Taking or exercising control over property.**
- b. **Making any unauthorized use, disposition, or transfer of property.**
- c. **Obtaining property by fraud, willful misrepresentation of a future act, or false promise.**
- d. **Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, deception; or other conduct similar in nature.**

**“Endeavor” means to attempt or try.**

*§ 812.012(4), Fla. Stat.*

**“Property” means anything of value, and includes:**

**[real property, including things growing on, affixed to and found in land.]**  
**[tangible or intangible personal property, including rights, privileges, interests, claims**  
**[services.]**

*§ 812.012(6), Fla. Stat.*

**“Services” means anything of value resulting from a person's physical or mental labor or skill, or from the use, possession, or presence of property, and includes:**

**[repairs or improvements to property.]**  
**[professional services.]**

[private, public or government communication, transportation, power, water, or sanitation services.]  
[lodging accommodations.]  
[admissions to places of exhibition or entertainment.]

§ 812.012(10), Fla. Stat.

“Value” means the market value of the property at the time and place of the offense, or if that value cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the offense.

If the exact value of the property cannot be ascertained, you should attempt to determine a minimum value. If you cannot determine the minimum value, you must find the value is less than \$100.

*Theft Pursuant to One Scheme. Give if applicable.*

Amounts of value of separate properties involved in thefts committed pursuant to one scheme or course of conduct, whether the thefts are from the same person or several persons, may be added together to determine the total value of the theft.

## **INFORMATION/CHARGES**

**Note:** Officers will often charge a Defendant with PETIT RET THFT <300 pursuant to 812.015(8). This charge no longer exists. You must file an information and amend the charge. There are numerous charges you can file.

### **1) 812.014(3)(B) Petit theft with prior convictions:**

- a. 1<sup>st</sup> degree misdemeanor, punishable by 364 days in Dade County Jail and/or \$1,000 fine.
- b. You must have *certified* convictions for the convictions you list in the information.
  - i. Any such written judgment of guilty of a petit theft, or a certified copy thereof, is admissible in evidence in the courts of this state as prima facie evidence that the fingerprints appearing thereon and certified by the judge are the fingerprints of the defendant against whom such judgment of guilty of a petit theft was rendered.
  - ii. If the Defense challenges the prior conviction, you will need to a fingerprint tech to the stand to compare latents and standards in order to establish the element of a prior conviction. You need to contact TKG and have them send over a fingerprint tech. They have limited means of transportation and it takes approximately half an hour for them to get to REG. They can be reached at 786-263-5446.
  - iii. It is error to inform the jury of a prior theft conviction. Therefore, if the information or indictment contains an allegation of one or more prior theft convictions, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty of a theft, the historical fact of a previous theft conviction shall be determined beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).
  - iv. If the defendant has been previously convicted of *any* theft 2 or more times, it is technically a third degree felony and you may choose to bind your case up. However, before doing so, please consult an Assistant Chief.
  - v. Robbery conviction can be used as a prior theft conviction. *Grimes v. State*, 724 So. 2d 614 (Fla. 5th DCA 1998)

### **2) 812.014(2)(e) PETIT THEFT, \$100 OR MORE, LESS THAN \$300**

- a. 1<sup>st</sup> degree misdemeanor, punishable by 364 days in Dade County Jail and/or \$1,000 fine.
- b. See below for discussion on how to prove value of stolen goods.

### **3) 812.014(3)(A) PETIT THEFT**

2nd Degree Misdemeanor, punishable up to 60 days in Dade County Jail and \$500 fine.

## **C. CASE LAW**

### **LIVE OBSERVATIONS VIA CLOSED-CIRCUIT TELEVISION (CCTV)**

- Testimony describing events that were observed live and recorded do not violate the best evidence rule, even if the recording is not admitted in evidence. J.J. v. State, 3D14-2328, 2015 WL 4268445 (Fla. 3d DCA 2015)

### **VALUE OF GOODS**

- For purposes of grading the offense of theft, the value of the property is the market value of the property at the time and place of the offense. § 1115.
- The State can meet its burden of proving value for purposes of theft of retail merchandise by introducing evidence of the sale price as stated on the price tag. F.T. v. State, 146 So. 3d 1270 (Fla. 3d DCA 2014) review denied, 157 So. 3d 1043 (Fla. 2014); Scott v. State, 519 So. 2d 734 (Fla. Dist. Ct. App. 3d Dist. 1988).
- Testimony by the owner of stolen property who deals in the type of property stolen on a day-to-day basis and is able to testify with some degree of certainty as to its fair market value at the time of the theft also is sufficient to establish the value of the property. L.R. v. State, 832 So. 2d 875 (Fla. Dist. Ct. App. 5th Dist. 2002); Ramirez v. State, 448 So. 2d 1 (Fla. Dist. Ct. App. 3d Dist. 1984).
- The market value of the stolen property at the time of the theft, however, must be established beyond and to the exclusion of every reasonable doubt to sustain a grand theft conviction. Steffen v. State, 901 So. 2d 950 (Fla. Dist. Ct. App. 4th Dist. 2005).
- Direct evidence of value of the property stolen may also be shown by the direct testimony of a defendant. Martin v. State, 911 So. 2d 821 (Fla. Dist. Ct. App. 5th Dist. 2005).
- In the absence of direct testimony as to the market value of property at the time of the theft, the court should examine the evidence in the light of four factors: (1) original market cost; (2) manner in which the item has been used; (3) its general condition and quality; and (4) its depreciation percentage. Negron v. State, 306 So. 2d 104 (Fla. 1974); Jones v. State, 958 So. 2d 585 (Fla. Dist. Ct. App. 2d Dist. 2007); Smith v. State, 955 So. 2d 1227 (Fla. Dist. Ct. App. 5th Dist. 2007); Mansfield v. State, 954 So. 2d 74 (Fla. Dist. Ct. App. 4th Dist. 2007); Mitchell v. State, 917 So. 2d 1056 (Fla. Dist. Ct. App. 2d Dist. 2006); S.M.M. v. State, 569 So. 2d 1339 (Fla. Dist. Ct. App. 1st Dist. 1990).
- Testimony as to the cost or purchase price of the stolen property is insufficient in itself to establish the value of such property at the time of the theft. Negron v. State, 306 So. 2d 104 (Fla. 1974); S.A.S. v. State, 970 So. 2d 483 (Fla. Dist. Ct. App. 2d Dist. 2007); C.G.H. v. State, 968 So. 2d 94 (Fla. Dist. Ct. App. 2d Dist. 2007); Pickett v. State, 839 So. 2d 860 (Fla. Dist. Ct. App. 2d Dist. 2003); Green v. State, 603 So. 2d 130 (Fla. Dist. Ct. App. 3d Dist. 1992).
- An estimate of the value of the items, without more, is insufficient to establish theft. A.D. v. State, 30 So. 3d 676 (Fla. Dist. Ct. App. 3d Dist. 2010).
- Purchase price and other circumstances can be sufficient evidence of market value in an appropriate theft case. West's F.S.A. §§ 812.012(10)(a), 812.014(2)(c). Lucky v. State, 25 So. 3d 691 (Fla. Dist. Ct. App. 4th Dist. 2010).
- Cash register "receipt" generated by department store shortly after defendant's theft, showing the usual, customary retail price of the stolen goods, established the value of the stolen goods in prosecution for grand theft, notwithstanding department store's internal policy of booking the value of stolen goods at the higher "manufacturer's suggested retail price" (MSRP).

West's F.S.A. § 812.012(10)(a) 1. Jackson v. State, 23 So. 3d 206 (Fla. Dist. Ct. App. 4th Dist. 2009).

- Pate v. State, 915 So.2d 250 (Fla. 5th DCA 2005). Where jury made no finding concerning the dollar amount involved in petit theft charge, written judgment in connection with this offense should reflect second-degree misdemeanor rather than first-degree misdemeanor.

### **CORPUS DELICTI**

- The corpus delicti in a charge of larceny consists of two elements:
  - (1) that the property was lost by the owner; and
  - (2) that it was lost by a felonious taking or, more explicitly, that the property was taken without the consent of the owner and with the requisite felonious intent. See 20 Fla.Jur., Larceny, section 58, and cases cited therein.
- It must be shown that the specific crime charged has been committed, but it is not necessary that the corpus delicti be proved beyond a reasonable doubt in order to introduce a confession or admission. \*550 Adams v. State, 153 Fla. 68, 13 So.2d 610; Lambright v. State, 34 Fla. 564, 16 So. 582; McElveen v. State, Fla.1954, 72 So.2d 785.
- Thus when the corpus delicti has been prima facie proved by either positive or substantial evidence, the confession of the defendant is admissible and may be considered and weighed along with other competent evidence. Groover v. State, 82 Fla. 427, 90 So. 473, 26 A.L.R. 373, 375; Cross v. State, 96 Fla. 768, 119 So. 380; and see also Sciortino v. State, Fla.App.1959, 115 So.2d 93,
- In theft cases you may use a picture if the store employees and the officers have followed the proper procedure as set forth in Fla. Stat. 90.91. If no picture is available, or it is not admissible because of a failure to follow the proper procedure, then you can rely on the following cases: Williams v. State, 117 So. 2d 548 (Fla. 2d DCA 1960) (upholding introduction into evidence of defendant's confession even in the absence of the introduction of the stolen items);
- Hodges v. State, 176 So. 2d 91 (Fla. 1965) (granting new trial for defendant due to admission of defendant's statements without any evidence that larceny had occurred); Smith v. State, 305 So. 2d 868 (Fla. 3d DCA 1975) (State need not produce stolen power saw in order to satisfy defendant's right to confrontation when State introduced two photographs of the power saw); Harrison v. State, 403 So. 2d 565 (Fla. 3d DCA 1981) (introduction of photographs of metallic knuckles was enough competent evidence that defendant possessed the metallic knuckles despite failure to introduce the item itself into evidence); and Butler v. State, 348 So. 2d 627 (Fla. 3d DCA 1977) (State need not introduce into evidence the object from which defendant's fingerprint was lifted, particularly when the object was unavailable to the State at the time of trial).

### **PRACTICE POINTER:**

- Generally, a loss prevention officer will be your main witness. Contact the LPO prior to trial. Inquire if there are any surveillance, photographs, incident reports, and/or admissions from the Defendant. Additionally, ask the LPO how they learned the defendant's name and biographical information. This may be useful in proving the defendant's identity at trial. Many times the LPO will show up to court on trial date with a video. The defense will jump at the opportunity to request a state charged continuance, but remember that Loss Prevention for a store is not a State agency and evidence they possess is not in the State's possession or control

**D. PETIT THEFT AND RETAIL THEFT PREDICATE QUESTIONS**

1. State your name and occupation. (Witness must be an agent of the business.)
2. Were you employed in that capacity on \_\_\_\_\_?
3. Do you remember where you were on \_\_\_\_\_?
4. Did you have the occasion to meet a person who later became known to you as \_\_\_\_\_ on that date, time and location?
5. Is that person in the courtroom today?
6. Could you please identify him in some way?

**LET THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE DEFENDANT.**

7. Where was that person when you first observed him?
  - a. How far away from the person were you?
  - b. Was anything obstructing your view?
  - c. What drew your attention to (him/her)?
8. What, if anything, did you observe that person do?
  - a. Show that defendant picked up items
  - b. Describe items
  - c. Describe what the defendant did with them
9. What, if anything, did that person do next? (Defendant must have walked by cashier or left store without paying. Bring out how people normally pay at cashier and the defendant did not.)
10. Where did you stop that person?
11. What did you do with that person?

**(DEFENDANT TAKEN TO SECURITY OFFICE)**

12. Did you recover any property?
13. What did you do with the property? (Show that this witness had the evidence in a secure place).
14. Do you have those items with you today?

**(MARK BAG FOR IDENTIFICATION)**

15. Can you identify this bag?
16. How do you know this is the same bag?

**Note:** Elicit from witness all identification marks on outside of bag.

17. Is this bag in substantially the same condition as when you placed the items in the bag and sealed (closed) the bag?

(OPEN THE BAG - REMOVE THE ITEMS FROM THE BAG - MARK EACH ITEM INDIVIDUALLY FOR IDENTIFICATION.)

18. (For each item) Can you identify this item?

a. How?

b. Did you mark it anywhere? (Ask -only if witness marked the items.)

19. Who are these items the property of?

20. What is their approximate value?

21. Are these items in substantially the same condition as they were when you retrieved them from the defendant?

(MOVE EACH ITEM INTO EVIDENCE AS STATE'S EXHIBIT.)

22. What, if anything, happened next?

a. Were the police called?

b. Was the defendant arrested?

23. Did all of this occur in Miami-Dade County, Florida, City of \_\_\_\_\_?

**Note:** See Florida Statute s §812.022 and §812.028.

## **POSSESSION OF DRUG PARAPHERNALIA**

§ 893.147(1), Fla. Stat.

To prove the crime of Use or Possession of Drug Paraphernalia, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) used or had in [his] [her] possession with intent to use drug paraphernalia.
2. (Defendant) had knowledge of the presence of the drug paraphernalia.

*Definitions.*

*Possession.*

To “possess” means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means:

- a. The paraphernalia is in the hand of or on the person,
- b. The paraphernalia is in a container in the hand of or on the person, or
- c. The paraphernalia is so close as to be within ready reach and is under the control of the person.

*Give if applicable.*

Mere proximity to a paraphernalia is not sufficient to establish control over that paraphernalia when it is not in a place over which the person has control.

Constructive possession means the paraphernalia is in a place over which the (defendant) has control, or in which the (defendant) has concealed it.

In order to establish constructive possession of a controlled substance if the controlled substance is in a place over which the (defendant) does not have control, the State must prove the (defendant's) (1) control over the controlled substance and (2) knowledge that the controlled substance was within the (defendant's) presence.

Possession may be joint, that is, two or more persons may jointly possess an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of paraphernalia, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of paraphernalia, knowledge of its presence may not be inferred or assumed.

*Drug Paraphernalia. § 893.145, Fla. Stat.*

The term “drug paraphernalia” means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing,



injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:

*Give specific definition as applicable.*

1. Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.
2. Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.
3. Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.
4. Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.
5. Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.
6. Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting controlled substances.
7. Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.
8. Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.
9. Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.
10. Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.
11. Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.
12. Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:
  - a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls.
  - b. Water pipes.
  - c. Carburetion tubes and devices.
  - d. Smoking and carburetion masks.
  - e. Roach clips: meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.

- f. Miniature cocaine spoons, and cocaine vials.**
- g. Chamber pipes.**
- h. Carburetor pipes.**
- i. Electric pipes.**
- j. Air-driven pipes.**
- k. Chillums.**
- l. Bongs.**
- m. Ice pipes or chillers.**

*Relevant factors. § 893.146, Fla. Stat.*

**In addition to all other logically relevant factors, the following factors shall be considered in determining whether an object is drug paraphernalia:**

- 1. Statements by an owner or by anyone in control of the object concerning its use.**
- 2. The proximity of the object, in time and space, to a direct violation of this act.**
- 3. The proximity of the object to controlled substances.**
- 4. The existence of any residue of controlled substances on the object.**
- 5. Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom [he] [she] knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.**
- 6. Instructions, oral or written, provided with the object concerning its use.**
- 7. Descriptive materials accompanying the object which explain or depict its use.**
- 8. Any advertising concerning its use.**
- 9. The manner in which the object is displayed for sale.**
- 10. Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.**
- 11. Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.**
- 12. The existence and scope of legitimate uses for the object in the community.**
- 13. Expert testimony concerning its use.**

*Knowledge of the illicit nature of the controlled substance. Give if applicable. § 893.101(2) and (3), Fla. Stat.*

**Knowledge of the illicit nature of the controlled substance is not an element of the offense of (insert name of offense charged). Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense. (Defendant) has raised this affirmative defense. However, you are permitted to presume that (defendant) was aware of the illicit nature of the controlled substance if you find that (defendant) was in actual or constructive possession of the controlled substance.**

**If from the evidence you are convinced that (defendant) knew of the illicit nature of the controlled substance, and all of the elements of the charge have been proved, you should find (defendant) guilty.**

**If you have a reasonable doubt on the question of whether (defendant) knew of the illicit nature of the controlled substance, you should find (defendant) not guilty.**

#### **Lesser Included Offenses**

<b>POSSESSION OF DRUG PARAPHERNALIA — 893.147(1)</b>			
<b>CATEGORY ONE</b>	<b>CATEGORY TWO</b>	<b>FLA. STAT.</b>	<b>INS. NO.</b>
None			
	Attempt	777.04(1)	5.1

#### **B. PENALTIES**

First Degree Misdemeanor - Maximum 1 year in jail and Maximum fine of \$1000.

#### **C. NEXUS**

Nexus is the key word when dealing with this charge. Ask: Is there evidence linking the object to drug use or activity? F.S. § 893.146 lists factors used to determine whether the object is drug paraphernalia. As a practical matter, at arraignment, the judge may ask you, “State, is there a nexus?” **Be prepared to demonstrate that a sufficient nexus exists within the charging document.**

- Statements regarding the paraphernalia’s use by an owner or by anyone in control of the object.
  - Dubose v. State, 560 So.2d 323 (Fla.1<sup>st</sup> DCA 1990): The court held that the defendant’s statement that he was going to the apartment to smoke crack was not sufficient evidence to prove circumstantial possession of drug paraphernalia. The court held that the state had to show evidence thru incriminating statements that Dubose actually used or intended to use those specific objects for smoking cocaine or marijuana.
- The proximity of the object, in time and space, to a direct violation of this act.
- The proximity of the object to controlled substances.
  - Grady v. State, 753 So. 2d 744 (Fla.3d DCA 2000): The court affirmed a conviction for possession of drug paraphernalia where a small gold scale was found clipped to the

defendant's pants pocket. The court found that the evidence was sufficient to charge the defendant with possession of drug paraphernalia due to the fact that the defendant was also in possession of a cigarette containing traces of cocaine and 53 ounces of marijuana. The court held that there is no requirement that the defendant be convicted of the nearby controlled substance to uphold a conviction of drug paraphernalia.

- The existence of any residue of controlled substances on the object
  - Nixon v. State, 680 So.2d 506 (Fla.1<sup>st</sup> DCA 1996): The court held that the presence of homemade crack pipes in the defendant's pocket and boot were not sufficient to convict a defendant for possession of drug paraphernalia without evidence of drug residue.
  - Steele v. State, 561 So.2d 638 (Fla. 1<sup>st</sup> DCA 1990): The court held that the presence of even a minuscule quantity of drug residue is sufficient circumstantial evidence to prove the element of the intent to use the paraphernalia for drug use.
  - Goodroe v. State, 812 So.2d 586 (Fla. 4<sup>th</sup> DCA 2002): The court held that the evidence was insufficient for the defendant's conviction of possession of drug paraphernalia even though the arresting officer testified that there was some type of residue in the pipe. The court held that the conviction could not be upheld due to the fact that the residue was not tested and no evidence was presented that the residue was a controlled substance.
- Instructions provided with the object concerning its use.
- Any advertising concerning its use
- The manner in which the object is displayed for use.

## **D. CASE LAW**

### **Synthetic Drugs**

There was reasonable doubt whether the substance was real marijuana or synthetic marijuana. Therefore, the evidence is insufficient to establish beyond a reasonable doubt that defendant used or possessed with intent to use the ear dropper to inhale a controlled substance. C.M. v. State, 83 So. 3d 947 (Fla. 3<sup>rd</sup> DCA 2012).

Mayhue v. State, 659 So.2d 417 (Fla. 2nd DCA 1995). Officer observed defendant pushing a television in a cart in a high crime area. Officer admittedly approached defendant because the officer believed that he looked suspicious. Since those facts do not give rise to founded suspicion the paraphernalia that was found on defendant should have been suppressed.

State v. White, 13 Fla. L. Weekly Supp. 703a (13th Jud. Circ. 2006). Issue of knowledge of presence of contraband is not subject to pre-trial motion to dismiss. Defendant was upstairs in residence with guest at time that officers found contraband downstairs on top of television and on shelf in plain view, and there is no evidence that defendant or guest made any statement indicating knowledge of presence of contraband or evidence that at time warrant was executed defendant had ability to exercise dominion and control over contraband, motion to dismiss is granted.

### **PLEASE SEE DISCUSSION ON CONSTRUCTIVE POSSESSION UNDER POSSESSION OF CANNABIS.**

## **E. POSSESSION OF DRUG PARAPHERNALIA PREDICATE QUESTIONS**

### **CHEMIST**

1. Please state your name.
2. What is your occupation?
3. What are your duties?
4. What kind of training and/or education do you have in this field?
5. Have you tested drugs?
6. How many times?
7. Have you ever tested a substance to determine whether it is \_\_\_\_\_?  
(drug)
8. How many times?
9. How many \_\_\_\_\_ analysis per week?
10. Is analysis a regular part of your duty as \_\_\_\_\_?
11. Have you ever been qualified as an expert in this area?
12. How many times?
13. Have you ever testified as an expert with respect to the chemical characteristic of  
\_\_\_\_\_?  
(drug)

#### **TENDER AS AN EXPERT**

14. Show previously marked exhibit.
15. What is it?
16. How do you know when you received it?
17. From whom?
18. Any markings? What are the markings?
19. Inventory? County property #?
20. Has evidence been continuously under your Care, Custody, Control (CCC) since you received it from property to when you tested it?
21. Same condition now as when you first received it? (No, my changes.)
22. Why was it sent to you?
23. Describe test?
24. When you finished testing, what did you do with the substance? (Repackage & send)

25. Is it in same or substantially same condition when you repackaged it?
26. Any evidence of tampering?
27. From the test, were you able to form an expert opinion of what the substance was?
28. Within a reasonable degree of scientific certainty, can you tell me what the substance is?
29. Enter into evidence
30. What were the procedures you followed to make these tests?
31. From these tests, were you able to form an expert opinion as to what the exhibit is or contains?
32. State the opinion.
33. Please explain how you arrived at this opinion.

## **POSSESSION OF MARIJUANA**

§ 893.13(6)(b), Fla. Stat.

### **A. ELEMENTS**

Certain drugs and chemical substances are by law known as “controlled substances.” (Specific substance alleged) is a controlled substance.

**To prove the crime of (crime charged), the State must prove the following three elements beyond a reasonable doubt:**

- 1. (Defendant) possessed a certain substance.**
- 2. The substance was (specific substance alleged).**
- 3. (Defendant) had knowledge of the presence of the substance.**

*Definition.*

*Possession.*

To “possess” means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means:

- a. The controlled substance is in the hand of or on the person, or
- b. The controlled substance is in a container in the hand of or on the person, or
- c. The controlled substance is so close as to be within ready reach and is under the control of the person.

*Give if applicable.*

Mere proximity to a controlled substance is not sufficient to establish control over that controlled substance when it is not in a place over which the person has control.

Constructive possession means the controlled substance is in a place over which the (defendant) has control, or in which the (defendant) has concealed it.

In order to establish constructive possession of a controlled substance if the controlled substance is in a place over which the (defendant) does not have control, the State must prove the (defendant’s) (1) control over the controlled substance and (2) knowledge that the controlled substance was within the (defendant’s) presence.

Possession may be joint, that is, two or more persons may jointly possess an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a controlled substance, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a controlled substance, knowledge of its presence may not be inferred or assumed.

*Knowledge of the illicit nature of the controlled substance. Give if applicable. § F.S. 893.101(2) and (3), Fla. Stat.*

**Knowledge of the illicit nature of the controlled substance is not an element of the offense of (insert name of offense charged). Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense. (Defendant) has raised this affirmative defense. However, you are permitted to presume that (defendant) was aware of the illicit nature of the controlled substance if you find that (defendant) was in actual or constructive possession of the controlled substance.**

**If from the evidence you are convinced that (defendant) knew of the illicit nature of the controlled substance, and all of the elements of the charge have been proved, you should find (defendant) guilty.**

**If you have a reasonable doubt on the question of whether (defendant) knew of the illicit nature of the controlled substance, you should find (defendant) not guilty.**

## **B. PENALTIES**

First Degree Misdemeanor (below 20 grams)

Maximum 1 year in jail. (775.082(4)(a))

Maximum fine of \$1000. (775.083(1)(d))

**Note:** 893.13(6)(d) - The Legislature carved out an exception to the misdemeanor presence requirement for a Law Enforcement Officer to make an arrest for a violation of this section.

There will be an automatic 2 year driver's license suspension upon a conviction for this charge. The defendant must be advised of said suspension before taking any plea.

## **C. FACTORS TO DETERMINE WHETHER PC FOR ARREST EXISTS**

### **The Training and Experience of Law Enforcement**

A well-trained officer with years of drug experience is not necessarily more credible than any other police officer. However, such an officer is more likely to know what to observe and to distinguish innocent behavior from incriminating behavior. See, P.L.R. v. State, 455 So. 2d 363 (Fla.1984) (officer observed that manila envelopes were used to store nickel bags of marijuana in over 100 occasions); Doctor v. State, 596 So. 2d 442 (Fla.1992).

### **The Quality of the Surveillance Procedures.**

A well-controlled surveillance operation with good visibility and with adequate methods to both obtain and preserve evidence allows the state to present detailed proof at the suppression hearing.

### **The History of the Specific Location Under Surveillance.**

Rumor and reputation are no substitute for fact. Actual proof of ongoing or recent drug activity at a specific location is far more likely to assist in establishing probable cause than a general belief that an entire street or neighborhood is a "high drug area."



### **Recent Events at the Location**

The fact that drugs were sold at a location last month may not necessarily indicate that drugs will be sold there tomorrow. Detailed information proving prior sales to other persons *immediately* preceding the arrest may establish the difference between reasonable suspicion and probable cause.

### **Prior Knowledge of the Parties Involved**

If the police develop information prior to an arrest concerning the parties' involvement with drugs; that information may help transform reasonable suspicion into probable cause.

### **A Detailed Description of the Entire Event**

The case law is replete with instances in which one or two factual details observed by an officer transforms reasonable suspicion into probable cause. Likewise, case law includes examples of premature arrests made before enough circumstances have occurred to establish probable cause. Whenever an officer recalls a detail on the witness stand that is not in his or her arrest report, the officer's credibility becomes a significant issue. Although an officer specializing in drug offenses may be more observant of critical evidence, the many transactions that he or she observes must make it difficult to recall each transaction with detail. Thus, detailed testimony of the event, buttressed by a timely written arrest report containing those details, is often critical at a suppression hearing.

### **Marijuana Identification without Lab Testing**

While testimony from the chemist who performed the laboratory testing of seized marijuana is always preferable, it is possible to prove the identity of the substance without a chemist and lab report.

### **Expert Witness**

- This is not a Daubert issue, this is a Rule 702 issue, as you will need to establish that the officer is sufficiently trained and experienced (qualifications) and has enough facts from your case to give an opinion on identification (reliability).
- [NOTE: Marijuana is different from crack, cocaine, and heroin due to its physical characteristics (odor, color, appearance, texture, packaging, weight, paraphernalia, circumstances, etc.)]
- **The witness will have to be listed as an expert witness and satisfy Rule 702.**
- Most likely, this will be a police officer (unless you have a drug dealer/user, see Brooks).
- In most cases, unless the police officer has person knowledge (i.e. personal use experience they want to testify about...) of the identity of the substance, list the officer specifically as an expert, not just an "A" witness, otherwise it is a Richardson issue:

**Kipp v. State, 128 So. 3d 879, 881-82 (Fla. 4<sup>th</sup> DCA 2013)** – talks about requirement to list as an expert...

"Florida Rule of Criminal Procedure 3.220(b)(1)(A)(i) requires the state to disclose "expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify." It is not enough to list such witnesses as Category A witnesses; the state is also required to indicate that the witness will testify as an expert. *See Thomas v. State*, 63 So.3d 55, 59 (Fla. 4th DCA 2011) (finding the state violated its discovery obligation when it listed an officer as a Category A witness but failed to designate him as an expert, and officer testified as an expert in street level drugs); *Luis v. State*, 851 So.2d 773, 776 (Fla. 2d DCA 2003) (holding that where the state intended to qualify an officer as an expert in narcotic investigations, state's failure to indicate in its discovery exhibit that the officer was an expert witness constituted a discovery violation)."

## QUALIFICATIONS & RELIABILITY:

- Officer listed as an expert for purposes of MJ ID will need to establish sufficient training and experience with marijuana, and will have to provide sufficient details to support ID.
- Florida courts allow for non-chemical identification of drugs, especially marijuana because of its unique characteristics.
- You will have to prep your officers to articulate their training and experience (not just say “I have received training, and I am experienced”), confirmations by lab tests, and have them give very detailed testimony about what they observed (use 4 out of five senses...not taste...) and the circumstances surrounding the seizure – packaging, location, how held/possessed, paraphernalia, etc. All these details will allow for the opinion that the substance is marijuana, as opposed to something else.
- **Sinclair v. State, 995 So.2d 552, 555-57 (Fla. 3d DCA 2008)** a PVH case, so watch for hearsay, but still applicable.
  - “marijuana identification by nonscientific means is a settled issue in Florida law”
  - “the suspect substance must possess a distinctive set of physical characteristics that render it amenable to non-chemical identification, and the witness identifying the substance must possess an experiential background sufficient for the court to conclude that his or her identification is reliable.”
- *United States v. Dolan*, 544 F.2d 1219, 1221 (4th Cir.1976) (“[L]ay testimony and circumstantial evidence may be sufficient, without the introduction of an expert chemical analysis, to establish the identity of the substance involved in an alleged narcotics transaction.”);

### **Pama v. State, 552 So. 2d 309, 311 (Fla. 2d DCA 1989)**

**“It is not necessary for the state to prove the identification of marijuana by chemical or scientific means.** Dean v. State, 406 So.2d 1162 (Fla. 2d DCA 1981), review denied, 413 So.2d 877 (Fla.1982); A.A. v. State, 461 So.2d 165 (Fla. 3d DCA 1984); State v. Raulerson, 403 So.2d 1102 (Fla. 5th DCA 1981). In this case, an experienced law enforcement officer examined twenty bales and identified the substance in those bales as marijuana. Accordingly, the state adequately proved that at least twenty bales contained marijuana.

The state may prove the identity of a controlled substance by **circumstantial evidence such as the substance's appearance, odor, and packaging, by the circumstances under which the substance was seized**, A.A.; the manner by which the substance was being **transported**, a person's **on-the-scene remarks identifying** the substance, Raulerson; *United States v. Harrell*, 737 F.2d 971 (11th Cir.1984), cert. denied, 470 U.S. 1027, 105 S.Ct. 1392, 84 L.Ed.2d 781 (1985); and circumstances surrounding the **sale or use of the substance**. Harrell.

In this case, there was evidence that **law enforcement officers smelled the distinctive odor of marijuana; the substance was packaged in a way that marijuana is commonly packaged; the substance was being transported on a boat which was stuffed with 234 bales and contained neither crabs which had been caught nor ice to store the night's catch; and all of the twenty bales which were examined contained marijuana. We find that when all of this circumstantial evidence is considered together, there is a sufficient basis to support the conclusion that the remaining 214 bales contained marijuana**

**Robinson v. State, 818 So. 2d 588, 589 (Fla. 5<sup>th</sup> DCA 2002)** – Judge's discretion on sufficiency of qualifications, standard is abuse of discretion.

“At trial, one of the arresting officers testified that the cigar discovered in Robinson's car contained marijuana. The officer's conclusion was based on his **training, four years of experience handling marijuana, and Robinson's own admission, as well as the cigar's form, odor and appearance...**

“A witness may be qualified as an expert based on his or her knowledge, skill, experience, training or education to render an opinion if it will assist the jury in determining a fact in issue. § 90.702, Fla. Stat. (2001). The courts generally agree that the identification of illegal drugs may be proven by

expert witnesses. *Brooks v. State*, 762 So.2d 879 (Fla.2000); *J.S. v. State*, 691 So.2d 20, 20 (Fla. 3d DCA 1997) (citing *Pama v. State*, 552 So.2d 309 (Fla. 2d DCA 1989); *A.A. v. State*, 461 So.2d 165 (Fla. 3d DCA 1984)); *State v. Raulerson*, 403 So.2d 1102 (Fla. 5th DCA 1981).<sup>1</sup> Therefore, chemical or scientific testing is not necessary for the state to prove that a particular substance is an illegal drug. *J.S.; Raulerson*. **A law enforcement officer, for example, with adequate experience with narcotics can identify a substance as marijuana by its appearance and odor. *J.S.; Raulerson*.** Robinson specifically contends that the officer who testified was not qualified to render an opinion that the substance in the cigar was marijuana. However, “[i]t is **within the trial court's discretion to determine a witness's qualifications to express an opinion as an expert, and the court's determination in this regard will not be reversed absent a clear showing of error.**” *Brooks*, 762 So.2d at 892 (citations omitted); *see also Ramirez v. State*, 542 So.2d 352 (Fla.1989). The trial court found that the arresting officer had sufficient training and experience with marijuana to qualify him to render an opinion that the substance was indeed marijuana. We see nothing in the record to indicate that the trial court abused its discretion in making this decision.”

**J.S. v. State, 691 So. 2d 20 (Fla. 3d DCA 1997)**

“It is not necessary for the state to prove the identification of marijuana by chemical or scientific means. *Pama v. State*, 552 So.2d 309 (Fla. 2d DCA 1989); *A.A. v. State*, 461 So.2d 165 (Fla. 3d DCA 1984). An officer with adequate experience in the narcotics field and marijuana in particular, can identify a substance as marijuana by its appearance and odor. *Id.* Thus, the fact that the substance was not tested does not preclude the instant adjudication. Also, the trial judge used his discretion in determining the two officers here could testify as experts, and no clear error as to that decision has been shown. *See Terry v. State*, 668 So.2d 954, 960 (Fla.1996).”

**A.A. v. State, 461 So. 2d 165, 166-67 (Fla. 3d DCA 1984)** – qualifications of officer, types of observations.

“The officer had been with the police department for **nine years and had spent four years in a special narcotics unit**. During this time he had taken **numerous courses** related to narcotics investigation. The officer testified that during his career he had **viewed and smelled “tons” of marijuana and that his identifications of substances as marijuana had always been corroborated by lab tests**. The trial court, therefore, did not abuse its discretion by finding the officer qualified, through his training and extensive work experience, as an “expert” in marijuana identification. § 90.702, (1983). *See Jones v. State*, 440 So.2d 570, 574 (Fla.1983); *Turner v. State*, 388 So.2d 254 (Fla. 1st DCA), *dismissed*, 394 So.2d 1154 (Fla.1980).<sup>1</sup>

The officer's opinion that the substance seized in the present case was marijuana was based upon his **sensory perceptions of sight and smell, as well as the facts that the substance was in a clear plastic baggie and the juvenile possessed “rolling papers.”** In essence, the juvenile argues that this is an insufficient basis for the opinion and that something more in the line of scientific or chemical proof is required. We disagree.

**Our sister courts have consistently held that it is not necessary for the state to prove the identity of marijuana by chemical or scientific proof.** *See Dean v. State*, 406 So.2d 1162 (Fla. 2d DCA 1981), *review denied*, 413 So.2d 877 (Fla.1982); *State v. Raulerson*, 403 So.2d 1102 (Fla. 5th DCA 1981); *Turner*. Although scientific tests are probative in identifying marijuana, they are not the only means by which the state can prove its case. Testimony on other facts, such as a substance's appearance and smell and the circumstances under which it was seized, can be used to meet the state's burden of proving beyond a reasonable doubt that a substance is marijuana. *Raulerson; Turner*. It is generally held that an officer with adequate experience in the narcotics field, and marijuana in particular, can identify a substance as marijuana by its appearance and odor. *See Turner* (“numerous cases hold that marijuana is not difficult to characterize without chemical analysis and that testimony of officers who have had experience searching for and identifying marijuana is sufficient” to meet the state's burden of proof) (quoting *State v. Ostwald*, 180 Mont. 530, 591 P.2d 646, 652 (1979));

*Mishmash v. State*, 423 So.2d 446 (Fla. 1st DCA 1982) (law enforcement officials trained in the detection of contraband have no difficulty recognizing both the smell and packaging of marijuana), *review denied*, 434 So.2d 888 (Fla.), *review denied*, 434 So.2d 889 (Fla.1983), *cert. denied*, 464 U.S. 1071, 104 S.Ct. 980, 79 L.Ed.2d 217 (1984); *Dean* (testimony of officer, experienced in narcotics investigation and trained to recognize marijuana, that occupants of a car passed around a cigarette in a manner commonly used in smoking marijuana coupled with his testimony that he smelled a strong odor of marijuana coming from the car was sufficient evidence for the jury to convict the occupants of possession of marijuana). *See also United States v. Ferguson*, 555 F.2d 1372 (9th Cir.1977) (experienced officer may identify substances with which he is familiar, i.e., marijuana); *Cooper v. State*, 629 S.W.2d 69 (Tex.App.1982) (experienced officer's testimony as to identity of substance as marijuana is sufficient to establish identity of contraband), *rev'd on other grounds*, 648 S.W.2d 315 (Tex.Crim.App.1983); *Davenport v. State*, 510 P.2d 988 (Okla.Crim.App.1973) (testimony of officer \*167 trained in narcotics that substance is marijuana is sufficient to identify it). *See generally* Annot., 75 A.L.R.3d 717.”

**Dean v. State, 406 So. 2d 1162, 1164 (Fla. 2d DCA 1981)** – Qualifications generally.

“Officer Reaume had substantial experience in narcotics investigation and was trained to recognize marijuana. His testimony that he saw all three occupants of the car smoking a cigarette in a manner commonly used in smoking marijuana coupled with his statement that he smelled a strong odor of marijuana smoke coming from the car immediately thereafter provided sufficient evidence for the jury to find, as it did find, that Tommy Dean had possessed not more than twenty grams of marijuana. The introduction of the contraband or the production of a chemical analysis is not always essential to a conviction for possession of a controlled substance. *State v. Raulerson*, 403 So.2d 1102 (Fla. 5th DCA, 1981). *See Sommers v. State*, 404 So.2d 366 (Fla.2d DCA 1981).”

### **Field Tests**

- The use of a field test is admissible and will support overall ID if properly explained and administered.

## **E. ADMISSION OF MARIJUANA IN EVIDENCE**

Where state failed to introduce cocaine, put on no evidence as to its destruction, and Defendant objected to its non-introduction, convictions reversed. *Mack v. State*, 711 So. 2d 1154 (Fla. 2d DCA 1998) (citing *G.E.G. v. State*, 417 So. 2d 975 (Fla. 1982)).

In *G.E.G. v. State* the Florida Supreme Court held that when a defendant is charged with the possession of a controlled substance, that substance, if available, must be introduced into evidence, but a defendant who fails to object to its non-introduction may not be heard to complain of error on appeal. The Court expressly required a defense objection to the non-introduction of the evidence. It also suggests that courts will allow the State to reopen its case, if rested, to admit the evidence. Finally, the court found that the exception to the rule was if the drugs were unavoidably destroyed during testing.

In *Trinidad v. State*, 615 So. 2d 806 (Fla. 3d DCA 1993): The police officer testified that he had found a portion of a marijuana cigarette as a result of a search of the defendant. The only evidence relating to the marijuana charge was his conclusion that the cigarette was marijuana. The marijuana was available, but not brought to court. The court found that since the marijuana cigarette was available, it had to be introduced into evidence. The police officer's opinion was insufficient without the admission of the marijuana in evidence. Thus, the officer can testify in lieu of a chemical analysis as to whether the substance was marijuana based on the factors listed above. However, that testimony must be accompanied with the admission of the marijuana in question.

Marrissette v. State, 780 So.2d 1020 (Fla. 4th DCA 2001) is the latest case to follow G.E.G. and Trinidad. In Marrissette, the court placed the burden on the State, via testimony, to prove that the drugs were unavoidably destroyed during testing.

The Moral of the Story.....

INTRODUCE THE MARIJUANA!!!! Have your officers bring it to court or immediately go back and retrieve it. Be aware, if the marijuana is tested the lab tech must be brought in or you will have no chain of custody. In most misdemeanor cases you may want to instruct the officer when they go back to retrieve evidence not to have it tested if they can testify as to their training and experience in identifying the substance and you introduce the marijuana. If the marijuana was unavoidably destroyed during testing, someone (preferably the chemist) would have to testify to that.

#### **F. CONSTRUCTIVE POSSESSION - F.S. § 893.13(6)(a)**

It is unlawful for any person to be in actual or **constructive possession** of a controlled substance.

##### **Elements**

Constructive possession exists where a defendant does not have physical possession of contraband but:

- a. Knows it is within his presence,
- b. Has the ability to maintain control over it, and
- c. Knows of the illicit nature of the contraband. Torres v. State, 520 So.2d 78 (Fla. 3rd DCA 1988); Brown v. State, 428 So. 2d 250, 252 (Fla.1983); Dupree v. State, 705 So. 2d 90, 94 (Fla. 4th DCA 1998).

##### **General Case Law**

Constructive possession exists where a defendant does not have actual, physical possession of the controlled substance, but knows of its presence on or about the premises, and has the ability to exercise and maintain control over the contraband. Harris v. State, 954 So.2d 1260 (Fla. 5<sup>th</sup> DCA 2007) citing Green v. State, 754 So.2d 163 (Fla. 5th DCA 2000).

“Mere proximity to contraband is not by itself sufficient to prove possession, dominion and control may be inferred from the ability to exercise control over the premises where they are found.” State v. Reese, 774 So.2d 948 (Fla. 5<sup>th</sup> DCA 2001) citing to Johnson v. State, 456 So.2d 923, 924 (Fla. 3d DCA 1984).

A common fact pattern requiring application of the law of constructive possession occurs where drugs are found concealed in a vehicle occupied by two or more persons. If the area in which contraband is found is within the defendant's exclusive possession, then his "guilty knowledge of the presence of the contraband, together with his ability to maintain control over it, may be inferred." Wale v. State, 397 So. 2d 738, 739-40 (Fla. 4th DCA 1981).

However, if contraband is found in a place that is in joint, rather than exclusive, possession of a defendant, then knowledge of the contraband's presence and the ability to control it will **not** be inferred from the accused's ownership of the premises or presence near the contraband, **but must be**

**established by independent proof.** Brown, supra; Williams v. State, 724 So. 2d 1214, 1215 (Fla. 4th DCA 1998). Such proof may consist of evidence of actual knowledge of the contraband's presence, evidence of incriminating statements or actions, or other circumstances from which a jury might lawfully infer the defendant's actual knowledge of the presence of contraband. Dupree, supra. When there is joint possession of the location where contraband is found, a defendant's proximity to the contraband, without more, is **not** sufficient to establish constructive possession. McClain v. State, 559 So. 2d 425 (Fla. 4th DCA 1990); Moffatt v. State, 583 So. 2d 779 (Fla. 1st DCA 1991); Agee v. State, 522 So. 2d 1044 (Fla. 2d DCA 1988).

Additionally, see G.T.L. v. State, 710 So. 2d 746 (Fla. 5th DCA 1998)(state established juvenile's constructive possession of bag of cannabis that was discovered under his book bag.).

### **Cases Finding Constructive Possession**

State v. Reese, 774 So. 2d 948 (Fla. 5<sup>th</sup> DCA 2001): The Court found the State established constructive possession by alleging that the defendant was standing in the open front doorway of her house and immediately shut the door when she saw officers arrive, and that she was next seen standing alone in the doorway of the bathroom where drugs were found in the toilet bowl.

State v. Dickerson, 811 So.2d 744 (Fla. 2d DCA 2002): Facts could present a prima facie case for constructive possession against passenger of car where baggies were found below driver's seat, between driver's seat and in center console, defendant gave officer's a false name and admitted knowing the cocaine was in the car

State v. Wallace, 734 So. 2d 1126 (Fla. 3d DCA 1999): Defendant had constructive possession of contraband in apartment sufficient to support of a conviction although he wasn't listed as a tenant where circumstantial evidence showed that he resided there and shared bedroom closet containing contraband and it was reasonable to assume that defendant was aware of narcotics lying in plain view on top shelf of bedroom closet.

Smith v. State, 776 So. 2d 957 (Fla. 3d DCA 2000): Evidence sufficient for constructive possession of gun seized from trunk of car where defendant was the driver and sole occupant of the case and defendant had bullets and a magazine clip in his pockets that matched gun found in trunk.

Duncan v. State, 986 So.2d 653 (Fla. 4<sup>th</sup> DCA 2008): Pursuant to a search warrant, officers found cocaine in plain view in a common area in a residence where defendant lived. The jury could legally find that defendant had constructive possession of the drugs.

State v. Holland, 975 So.2d 595 (Fla. 2d DCA 2008) Search warrant was executed on defendant's home. Contraband was found in the master bedroom in close proximity to her personal belongings. Even though other persons lived in the house, this evidence was sufficient to defeat a motion to dismiss based on a claim of constructive possession.

## **Cases Not Finding Constructive Possession**

Sundin v. State, 27 So.3d 675 (Fla. 2<sup>nd</sup> DCA 2009) Opinion Filed July 15, 2009: Upon entering a hotel room which had been under surveillance, officers observed the defendant lying on one of the room's queen sized beds and a female seated at the end of the other bed. A glass pipe with cocaine residue was observed on a nightstand between the beds. The pipe was approximately a foot away from the defendant and was within arm's reach. Defendant denied the pipe belonged to him and the woman denied any knowledge of the pipe. The court said the State's evidence established nothing more than the fact the defendant was a visitor of a resident of the hotel room. "Without independent proof of Sundin's control over the pipe, the State failed to establish his constructive possession." Id.

State of Florida v. Michael Paul Cole, 15 Fla. L. Weekly Supp. 930a (13<sup>th</sup> Circuit June 5, 2008): Although fact that cannabis was on floor at defendant's feet would probably be sufficient to establish knowledge elements of constructive possession, where there is no evidence that defendant exercised dominion and control over cannabis in jointly occupied vehicle, constructive possession cannot be granted.

### **Practical Considerations**

If the police seized the marijuana and the substance was tested, the State should have a copy of the lab report. That report must be turned over to defense counsel in discovery pursuant to Fla. R. Crim. P. 3.220. Additionally, the chemist must be listed in discovery.

When reviewing mail, if you find a lab report with test results, please mark it as DISCO and instruct your secretary to send the report to the defense attorney and list and subpoena the chemist.

### **KNOWN DRUG AREAS**

It is improper during trial, to have an officer testify that the area where the defendant was arrested or first noticed by the officers, etc., was a "high crime area" or a known for drugs sales unless it becomes relevant during the case as to the motive as to why the officers may have arrested the defendant or why they were in a particular area - for example, if the defendant claims during trial that the only reason the officers stopped the defendant was only to harass the defendant. Generally, such testimony to just explain why the officer was there is not relevant enough to outweigh the prejudicial impact of this testimony. Even without a motion in limine by the defendant, you should instruct your officers not to make such references in their trial testimony. However, this testimony, although not relevant at TRIAL, is relevant for motions to suppress because why the officer is where he is often figures into whether the officer had reasonable suspicion or probable cause to detain or stop or arrest a defendant

## G. POSSESSION OF MARIJUANA PREDICATE QUESTIONS

1. Name and occupation.
2. How long have you been so employed?
3. What were your duties on the date of the offense?
4. On \_\_\_\_\_ at around \_\_\_\_\_ did you come into contact with someone who later became known to you as \_\_\_\_\_?  
(defendant)
5. Do you see that person in the courtroom today?
6. Could you please point him/her out?

### LET THE RECORD REFLECT THE WITNESS HAS CORRECTLY IDENTIFIED THE DEFENDANT.

7. Did this occur in Miami-Dade County, Florida, City of \_\_\_\_\_?
8. What kind of area is \_\_\_\_\_? (Describe in more detail if it is helpful to understand the case).
9. How did you first come into contact with the defendant?

**Note:** At this point, probable cause for the search must be established - whether authorized by search warrant, incident to lawful arrest, seen in plain view or place where the officer had a right to be, detection of an odor which the officer knew to be marijuana, because the officer sold defendant marijuana (or vice versa), etc.

**Note:** Once probable cause and the lawful seizure of the contraband is established, the contraband should be introduced into evidence as follows:

(MARK THE EVIDENCE AS STATE'S EXHIBIT #1 FOR IDENTIFICATION.)

10. I'm showing you what has been marked as State's Exhibit #1 for identification.
11. Can you identify this?
12. How can you identify it?

**Note:** Elicit from officers any markings; if any, which he wrote on the package.

13. When did you so mark it?
14. Where did you first see the marijuana?
15. How did the marijuana come into your possession?

16. What did you do with it?

**Note:** Elicit information up to the point where the officer placed the marijuana into the property room.



**Note: Chain of Custody**

Marijuana is a “fungible” piece of evidence. That means it is necessary you lay a chain of custody for purposes of introducing it into evidence. In simple terms, that means you must show the marijuana you are seeking to introduce is the same marijuana that was collected at the scene.

Marijuana may not be admitted only if the party seeking to exclude it (defense) has shown a reasonable probability of tampering. Talpis v. State, 703 So. 2d 453 (Fla. 1997). A break in the chain of custody (missing a witness that may have handled the evidence) does not preclude admission. See, Beck v. State, 405 So. 2d 1365 (Fla. 4<sup>th</sup> DCA 1981). If a break exists and the defense objects, what should the court do? The court should consider the probability that evidence has been tampered with during the interim for which it was unaccounted. Bush v. State, 543 So. 2d 283 (Fla. 2d DCA 1989).

**Note:** If the marijuana was analyzed when you introduced it into evidence it will not be in substantially in the same condition as it was when the officer placed it in the property room. Since the marijuana has been analyzed it will be placed in a plastic see-through packaging by the lab technician. You will have to complete your chain of custody questioning with the lab technician and introduce the marijuana through him/her.

**IF MARIJUANA NOT ANALYZED**

**Note:** Case law allows you to introduce the marijuana with the officer if he is experienced in the field. (A.A. v. State, 461 So. 2d 165 (Fla. 3d DCA 1984))

17. Is this package in substantially the same condition as when you placed it in the property room?
18. Have you specialized in any particular field of investigation? How long? (Ask only if the answer is yes.)
19. Have you attended any specialized schools or had any specialized training regarding drugs? (Ask only if the answer is yes.)
20. In your years as a police officer and through training and experience on approximately how many occasions have you observed (or smelled) or come into contact with marijuana?
21. Have you ever identified a substance as being marijuana and had the forensic chemical analysis result in a finding that the substance was not marijuana?
  - a. Tender witness as expert
  - b. Open package
22. I show "State's Exhibit #1" for identification.
23. Based upon your past experience and training, do you have an opinion as to what this substance is?
24. What is it?
25. Move into evidence.

**LAB TECHNICIAN**

**Note:** At this point either get defense counsel to stipulate to the results of the lab report (determine this in advance so you have time to get the lab technician to court if there is no stipulation) or put on the lab technician and question as follows:

1. Name and occupation.
2. How long have you been employed there?
3. What are your duties?
4. What type of training did you receive to qualify for this position?
5. Have you had occasion to chemically analyze substances to determine whether the substance is or contains a narcotic or narcotic type drug?
6. How many times?
7. Have you had occasion to analyze substances to determine whether the substance is or contains marijuana?
8. How many times?
9. How many such analysis do you make in a given week?
10. Do you make these analysis as a regular part of your duties?
11. Do you have occasion to qualify in courts of this State as an expert in this area?
12. How many times?
13. Pursuant to qualifying as an expert, have you had an occasion to actually testify as an expert with respect to the chemical character of a particular substance?
14. Move Court to declare a witness an expert in field of chemistry and analysis of marijuana.
15. Show the exhibit.
16. Ask witness to identify the exhibit.
17. How can you identify it?
18. When was it marked?
19. When was it received or submitted?
20. Where was this done?
21. How did you come in possession of this exhibit?
22. Has this been continuously under your care, custody or control, since it came into your possession?

23. For what purpose did the exhibit come into your possession?

(MOVE EXHIBIT INTO EVIDENCE.)

24. When you received the exhibit, what procedure did you follow?

25. Did you make an analysis? When?

26. What type of tests did you make?

27. What were the procedures you followed to make these tests?

28. From these tests, were you able to form an expert opinion as to what the exhibit is or contains?

29. State the opinion.

30. Explain how you arrived at this opinion.

## **PROSTITUTION**

§ 796.07(2)(e), Fla. Stat.

To prove the crime of Offering to Commit, Committing, or Engaging in [Prostitution] [Lewdness] [Assignment], the State must prove the following element beyond a reasonable doubt:

(Defendant) [offered to commit] [committed] [engaged in] [prostitution] [lewdness] [assignment].

*Give if applicable. Fla. Stat. § 796.036.*

If you find the defendant guilty of Offering to Commit, Committing, or Engaging in [Prostitution] [Lewdness] [Assignment], you must then determine whether the State has proven beyond a reasonable doubt that:

- a. A minor was engaged in the [prostitution] [lewdness] [assignment] [sexual conduct] [(other conduct prohibited in Chapter 796)]; and,
- b. The minor was not the person charged in this case.

*Definitions.*

“Prostitution” is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

“Lewdness” is any indecent or obscene act. “Indecent” means wicked, lustful, unchaste, licentious, or sensual intention on the part of the person doing the act.

“Sexual activity” means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation; however, the term does not include acts done for bona fide medical purposes.

“Assignment” includes the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement.

## **PENALTIES**

### **1<sup>st</sup> Offense:**

Second Degree Misdemeanor  
Maximum 60 days in jail. (775.082(4)(b))  
Maximum \$500 fine. (775.083(1)(e))

### **2<sup>nd</sup> Offense:**

First Degree Misdemeanor  
Maximum 1 year in jail. (775.082(4)(a))  
Maximum fine of \$1000. (775.083(1)(d))

**Note:** Third and subsequent convictions are 3<sup>rd</sup> degree felonies

## SOLICITING FOR PROSTITUTION, LEWDNESS, OR ASSIGNATION

§ 796.07(2)(f), Fla. Stat.

### A. ELEMENTS

To prove the crime of Soliciting for [Prostitution] [Lewdness] [Assignment], the State must prove the following element beyond a reasonable doubt:

(Defendant) [solicited] [induced] [enticed] [procured] another to commit [prostitution] [lewdness] [assignment].

*Give if applicable. Fla. Stat. § 796.036.*

If you find the defendant guilty of Soliciting for [Prostitution] [Lewdness] [Assignment], you must then determine whether the State has proven beyond a reasonable doubt that:

- a. A minor was engaged in the [prostitution] [lewdness] [assignment] [sexual conduct] [(other conduct prohibited in Chapter 796)]; and,
- b. The minor was not the person charged in this case.

*Definitions.*

“Prostitution” is the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

“Lewdness” is any indecent or obscene act. “Indecent” means wicked, lustful, unchaste, licentious, or sensual intention on the part of the person doing the act.

“Sexual activity” means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation; however, the term does not include acts done for bona fide medical purposes.

“Assignment” includes the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement.

To “solicit” means to ask earnestly or to try to induce the person solicited to do the thing solicited.

To “procure” means to persuade, induce, prevail upon or cause a person to do something.

### B. PENALTIES

2<sup>nd</sup> Degree misdemeanor  
Mandatory \$5,000 fine.

**NOTE:** You need to make sure the Defendant is charged correctly. If the Defendant was prostituting, he or she needs to be charged under § 796.07(2)(e), Fla. Stat. If the Defendant was a “John,” he needs to be charged under 796.07(2)(f). This is extremely important because under 796.07(2)(f) there is a **mandatory \$5,000 fine** with a conviction or withhold of adjudication.

When you get a prostitution Aform, read the Aform and scan for potential human trafficking. If you come across an Aform that indicates potential human trafficking, you are to immediately contact an Assistant Chief and wait for further instructions.

## C. CASE LAW

### Definition of Lewd and Lascivious

Lewd and lascivious is defined as those acts involving an "indulgence for lust, signifying that form of immorality which has a relation to sexual impurity." Chesebrough v. State, 255 So. 2d 675, 677 (Fla. 1971). Furthermore, "[l]ewd, 'lascivious', and 'indecent' are synonyms and connote wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator." *Id.* (citing to Boles v. State, 27 So. 2d 293 (Fla. 1946)).

Courts have recognized that defining "lewd and lascivious" behavior is not an easy task. In Egal v. State, 469 So. 2d 196 (Fla. 2d DCA 1985), the court stated that the "precise meaning of the words 'lewd and lascivious' in particular contexts must be developed on a case by case basis." "It would be . . . difficult or impossible to detail in a statute book all the acts which would constitute lewd and lascivious behavior." Chesebrough, 255 So. 2d at 678.

In Chesebrough, the court held that exposing a young child to a view of sexual intercourse between his mother and stepfather constituted lewd and lascivious behavior. The mother wanted to show her fourteen (14) year old son how "babies were made." She allowed the fourteen year old to watch while she had sexual intercourse with the stepfather.

In State v. Waller, 621 So. 2d 499 (Fla. 2d DCA 1993): An undercover officer went to a lounge where a dancer performed a lap dance in exchange for five dollars. The dancer simulated sexual intercourse and rubbed various parts of her body against the officer's genital area. The Court ruled that the **determination of lewdness is not to be resolved on a motion to dismiss; the jury should decide it.** The court went on to state that they had already determined that lap dancing at this same establishment constituted lewd and lascivious behavior. *Id.* (citing, Hoskins v. Dept. of Business Regulation, 592 So. 2d 1145 (Fla. 2d DCA 1992) (lap dancing is lewd where dancer rubs parts of their bodies, including genital areas, breasts and buttocks, through brief clothing against the patrons' genital areas and faces and included simulated sexual activity)). See also, G & B of Jacksonville, Inc. v. Dept. of Business Regulation, 362 So. 2d 951 (Fla. 1st DCA 1978) (lewdness found where dancer continually rubbed her buttocks and vaginal area against the legs of undercover officer posing as a patron).

In State v. Davis, 623 So. 2d 622 (Fla. 4th DCA 1993): The court reversed the trial court's order dismissing the information that charged a violation of 796.07(3)(a) [now 796.07(2)(e)1]. In this case, the officer went into a private room with the "model," she danced topless in close proximity to the officer, encouraged him to masturbate, and placed his hand on her inner thigh.

State v. Willets, 2 FLW Supp. 478 (County Court 15th Judicial Cir. September 20, 1994): The court dismissed lewdness charges filed under 796.07(2)(e) because the state could not produce evidence that defendant's actions offended any person other than the officer. In Hoskins and G & B, supra, there were no witnesses other than the officers. Willets, however, is a County Court opinion from Broward and not binding. Whereas, Hoskins and G & B are binding, since there is no 3d DCA case on point.

Harris v. State, 13 Fla. L. Weekly Supp. 666a (9th Jud. Circ. 2006). Alleged error in not admitting into evidence under best evidence rule an audiotape of conversation between defendant and undercover prostitution decoy was not preserved for appeal where, although defense stated in opening argument that tape would corroborate facts, defense did not object to decoy's testimony concerning conversation. No abuse of discretion in refusing to allow defendant to present personal testimony concerning lack of prior criminal record. There was no abuse of discretion in refusing to instruct jury on entrapment where defendant testified that conversation with decoy enticed and induced him but did not allege that decoy lured him into committing crime by persuasion, inducement or any other coercive tactics, and no evidence was adduced to show that decoy did so.

Haddaway v. State, 891 So. 2d 631 (Fla. 5th DCA 2005). State failed to establish evidence of any exchange of money or any agreement between defendant and her companion in a parked car to perform a sex act for money. Payment for sex is core element of crime and must be established beyond a reasonable doubt.

R.R. v. State, 673 So. 2d 933 (Fla. 5th DCA 1996). Finding of guilt of solicitation for prostitution reversed where vague testimony by police employee who posed as prostitute was insufficient to warrant finding of guilt.

State v. Farino, 915 So. 2d 685 (Fla. 2nd DCA 2005). Fact that undercover police officer acting in his official capacity was the only witness allegedly offended by the conduct of defendants who were employees of adult entertainment establishments did not preclude conviction of such defendants for lewdness; statute prohibiting lewdness defined it as any indecent or obscene act and did not include as an element that a witness be offended by the conduct.

#### D. PROSTITUTION PREDICATE QUESTIONS

1. Please state your name and occupation.
2. How long have you been employed?
3. What were your duties on \_\_\_\_\_ at around \_\_\_\_\_?
4. How were you dressed that day?
5. With whom were you working?
6. At that place and time did you come into contact with (defendant's name)\_\_\_\_\_?
7. Do you see that person in the courtroom today?
8. Would you point him or her out and describe them by an article of clothing?

#### LET THE RECORD REFLECT THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT.

9. Please describe the immediate area you were working (with reference to buildings, people, traffic, lighting and any other relevant conditions)
10. When the defendant was first observed, what was the defendant doing?
11. Did either you or the defendant approach the other?
12. Was there any conversation between the defendant and yourself? What was the conversation?
13. What did you take the defendant to mean by " \_\_\_\_\_ " (if ambiguous)? Why and how do you know? (if necessary)
14. Did the defendant take any action incident to the conversation (i.e. enter car or room, touch witness, money changed hands, etc.)? What, if anything, did you do next?
15. Did all this occur in Miami-Dade County?

**Note:** If the **entrapment defense** is raised, which it often is in these cases, the State must prove that the defendant was predisposed to commit the offense. This is accomplished by prior convictions, defendant's reputation, establishing the officers reasonable suspicion that the defendant engaged in illegal activities, or by showing the defendant's readiness to commit the crime. *Story v. State*, 355 So. 2d 1213 (Fla. 4th DCA 1978).



## **RESISTING OFFICER WITHOUT VIOLENCE**

§ 843.02, Fla. Stat.

### **A. ELEMENTS**

**To prove the crime of Resisting Officer without Violence, the State must prove the following four elements beyond a reasonable doubt:**

*Note to Judge: An issue arises when the State charges that the defendant resisted Officer X or Officer Y. Under the current law, a defendant can commit only one count of Resisting Without Violence even if several officers are involved in the same event. See Wallace v. State, 724 So. 2d 1176 (Fla. 1998). One possible remedy for this problem would be to instruct:*

**To prove the crime of Resisting Officer without Violence, the State must prove all of the following four elements beyond a reasonable doubt as to at least one of the alleged victims named below:**

1. (Defendant) [resisted] [obstructed] [opposed] (victim).
2. At the time, (victim) was engaged in the [execution of legal process] [lawful execution of a legal duty].
3. At the time, (victim) was [an officer] [a person legally authorized to execute process].
4. At the time, (defendant) knew (victim) was [an officer] [a person legally authorized to execute process].

*In giving the instruction below, insert the class of officer to which the victim belongs, e.g., law enforcement officer, correctional officer. See Wright v. State, 586 So. 2d 1024 (Fla. 1991). See § 843.02 Fla. Stat. for the type of officer covered by this statute.*

**The court now instructs you that every (name of official position of victim designated in charge) is an officer within the meaning of this law.**

### **B. PENALTIES**

First Degree Misdemeanor - Maximum 1 year in jail & Maximum fine of \$1000.

### **C. CASE LAW**

#### **General**

**C.E.L. v. State, 24 So.3d 1181 (Fla. 2009)** “An obstruction without violence charge is supported if an individual obstructs an officer in the lawful performance of his or her legal duty. § 843.02, Fla. Stat. (2007). Under the statute's plain language, it is of no consequence whether the obstructing conduct is initiated before the officer has any legal duty to act. The essential inquiry should instead focus on whether the officer was lawfully executing a legal duty when the obstructing conduct occurred. As the Second District aptly stated, “[t]here is no reason that a person who knowingly defies an officer's lawful command to stop in such circumstances should be absolved from responsibility under section 843.02 ... Under section 843.02, lawful police action based on *Wardlow* should not be treated differently than lawful police action based on other grounds.” C.E.L., 995 So.2d at 563... The plain language of section 843.02 makes it an offense for any person to resist, without violence, a law enforcement officer when the officer is

engaged in a lawfully executed legal duty. Under Wardlow, the moment C.E.L. took flight in a high-crime area, the officers were provided with reasonable suspicion to warrant an investigatory stop. Therefore, the officers were engaged in the lawful execution of a legal duty. Thus, C.E.L.'s continued flight in defiance of the officers' lawful command constituted the offense of resisting an officer without violence under section 843.02." Id. at 1187.

### **Arrest**

A defendant may peacefully resist an **unlawful** arrest. L.A.T. v. State, 650 So. 2d 214, 217 (Fla 3d DCA 1995)(citing, Lee v. State, 368 So. 2d 395 (Fla. 3d DCA 1979)).

However, **under no circumstances, however, may a defendant use physical force to resist an arrest.** Fla. Stat. Section 776.051.

It is not necessary that the underlying criminal activity providing the basis for the arrest result in a charge and conviction. It is only necessary that the officer has a founded suspicion of criminal activity to make the detention. See State v. Dwyer 317 So.2d 149, 150 (Fla. 2d DCA 1975); Smith v. State, 292 So.2d 69, 70 (Fla. 3d DCA 1974). However, see also B.D.H. v. State, 903 So.2d 390 (Fla. 3d DCA 2005). Here the defendant was initially arrested for assault and then resisting without after attempting but failing to flee. In this case, at trial the assault victim failed to appear. Additionally, the officers were not present on the scene when the incident occurred. The defendants delinquent adjudication was reversed because the lawfulness of the assault arrest was not proved.

### **Lawful Execution of a Duty**

P.B. v. State, 899 So.2d 480 (Fla. 3d DCA 2005). Police officer who chased juvenile that she observed exchanging money for what officer believed was drugs was engaged in the lawful performance of her duty at the time of juvenile's arrest, and thus juvenile could be convicted of resisting arrest without violence after he hit officer, knocked her to the ground, and ran away when officer attempted to handcuff him; officer's observation of the suspected drug transaction gave her a reasonable suspicion of criminal activity warranting an investigatory stop.

R.E.D. v. State, 903 So.2d 206 (Fla. 3d DCA 2004). Police officer was not involved in process of detaining anyone when he encountered juvenile, and thus, was not engaged in lawful execution of any legal duty so as to support juvenile's adjudication of delinquency for obstructing police officer engaged in lawful exercise of legal duty without violence. When juvenile warned two unnamed males of officer's presence by saying "99...", officer was not yet prepared to arrest two unnamed males and had no other basis upon which to prevent escape of unnamed males as suspects. Just because the unnamed males had simply approached target house they were not involved in any criminal activity, and were never arrested.

L.K.B. v. State, 697 So. 2d 191 (Fla. 5th DCA 1997): The court found that the police officer was executing a lawful duty. The Defendant and a companion were lounging in front of a all-night drug store near a pay phone for several hours. The officer arrived in response to the store manger's 911 call. Upon arrival the Defendant refused to provide identification to officer and ran away. Here the investigation of a 911 call, equated to the execution of a lawful duty.

Bassett v. State, 31 Fla. Law Weekly D2606a (Fla. 4<sup>th</sup> DCA). Officers were called to the scene of a domestic disturbance. The wife came outside to speak to the officers. When the wife turned to go inside, the defendant slammed the door in the officer's face. The officer continued inside

and engaged in a physical struggle with the defendant. Defendant could properly be convicted of resisting an officer. The officer attempted to gain entrance to the house based on safety concerns he had for the wife. Thus, he was executing a lawful duty.

Sinquefield v. State, 1 So.3d 370 (Fla. 2d DCA January 30, 2009): Police officer was not engaged in lawful execution of a legal duty when he attempted to detain defendant at time when officer was outside his jurisdiction and acting as a private citizen.

N.H. v. State, 890 So.2d 514 (Fla. 3d DCA 2004). The totality of N.H.'s conduct toward the police in this case-refusing to identify himself, refusing to sit and thus comport himself so that the officers could investigate and finally physically threatening them, all as found by the trial court- was sufficient to support the finding of the trial court that the defendant committed the offense of resisting without violence and that the officers were engaged in the lawful execution of a legal duty when the juvenile resisted.

### **Terry Stop Situations**

When the arrest is initially for the resisting itself, then there is no underlying arrest to examine. A resisting arrest without violence charge will not be upheld if the arrest for the underlying charge is an unlawful arrest or when the officer has no basis to detain an individual. See, F.B. v. State, 605 So. 2d 578 (Fla. 3d DCA 1992)(where officer has no reasonable suspicion to detain an individual, the individual's actions in ignoring officer's command to stop cannot constitute resisting arrest); D.A. v. State, 636 So. 2d 863 (Fla. 3d DCA 1994)(legality of the arrest is an essential element of resisting arrest without violence); Smith v. State, 546 So. 2d 459 (Fla. 4th DCA 1989); Johnson v. State, 395 So. 2d 594 (Fla. 2d DCA 1981).

### **Flight alone**

Flight alone will not sustain a conviction. See, Nelson v. State, 543 So. 2d 1308 (Fla. 2d DCA 1989). In S.G.K. v. State, 657 So. 2d 1246 (Fla. 1st DCA 1995), a Trooper arrested the defendant for resisting arrest. The "resisting" occurred when the defendant ran away from an accident scene upon seeing the Trooper. Unbeknownst to the Trooper, the defendant had been a passenger in the vehicle involved in the accident. The Trooper caught up with the defendant and arrested him. The Trooper could not articulate a reasonable suspicion of criminal activity to detain the defendant.

Thus, the court held that the State failed to prove the first element, lawful execution of a legal duty. This does not mean that the State must always present "reasonable suspicion of criminal activity" evidence. The State in S.G.K. needed to show reasonable suspicion since the legal duty being executed by the Trooper was a detention. Furthermore, in S.G.K. the Trooper never asked, advised, ordered, or otherwise communicated to the defendant to stop running away.

Similarly, in Hussey v. State, 33 FLW D64a (Fla. 3d DCA January 4, 2008) the court held there was an insufficient basis to support a Terry stop where officers arrested a defendant who "was crouching next to a wall on a public street near a closed business-where he was clearly seen in broad daylight at 7:40 p.m. on a June afternoon-and that he walked away from the officer's first attempt to contact him." The court further held that the officer was not engaged in the lawful performance of a legal duty and defendant's convictions for battery on a law enforcement officer and resisting an officer were reversed.

### **“Reasonable Suspicion” of criminal activity**

*See generally C.E.L. v State*, 24 So.3d 1181 (2009).

However, flight when combined with other factors is resisting without violence. Perry v. State, 593 So. 2d 1165 (Fla. 1st DCA 1992) (Defendant’s flight, coupled with his apparent knowledge that he was the target of a lawful arrest by police, constituted obstruction of the execution of legal duty by police attempting to make an arrest.) L.K.B. v. State, 697 So. 2d 191 (Fla. 5th DCA 1997)(Refusal to provide identification and flight supported conviction). (Juvenile arrested for obstructing or opposing an officer without violence after he ran from two approaching officers in a high crime area and then failed to stop after a police command was sufficient to support adjudication for resisting officer without violence, receding from J.D.H. v. State, 967 So.2d 1128.)

### **Subject of Detention or Investigation**

A resisting arrest charge will be sustained if the defendant's conduct interferes with the officer's investigation. In City of Ft. Lauderdale v. Plisko, 6 FLW Supp. 234 (County Court 17th Jud. Cir. Jan. 1999), the officer came upon Defendant in dead end alley in high drug area. Officer observed Defendant talking to known drug dealer, and then watched as money changed hands. Officer approached the two, at which point they both fled on foot. The officer yelled "stop, police", but the two continued to run away. The Defendant was apprehended, but would not submit. The officer had to collar, trip and handcuff the Defendant. The Court on these facts held this was resisting. Applying 901.151 Fla. Stat. the Court found that the officer had reasonable suspicion of a crime based on his experience of the area and what he witnessed, and thus could temporarily detain the Defendant.

Barrios v. State, 807 So.2d 814 (Fla. 4th DCA 2002): Defendant was a passenger in a lawfully stopped car. Due to his intoxicated condition, he had difficulty in complying with the officer's request that he stand by the vehicle. During one conversation with the officer, the defendant faced him with his fists clenched. He was then arrested for resisting and contraband was discovered in a subsequent search. This evidence was suppressed. The officer had no reasonable suspicion to detain the defendant, who was free to resist the officer's instructions. Defendant's conviction for resisting arrest was reversed.

### **False Name**

Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, 124 S.Ct. 2451 (2004): the defendant was arrested for refusing to identify himself to a police officer during an investigative stop involving a reported assault. The US Supreme Court held that interrogation relating to one’s identity or request for identification by police does not, by itself, constitute Fourth Amendment seizure. The Court held that the officer’s request was “common sense” when investigating a potential domestic abuse involving a motorist and not an effort to obtain an arrest for failure to identify after a Terry stop yielded insufficient evidence. Further, it was not a violation of the defendant’s Fifth Amendment rights when his belief was that it was “ none of the officer’s business”.

Olsen v. State, 691 So.2d 17 (Fla. 3d DCA 1997): The defendant, subsequent to arrest gave officer a false name. The Court receded from its opinion in Z.P. v. State, 440 So. 2d 601 (Fla. 3d DCA 1983), and held this was resisting.

K.A.C. v. State, 707 So. 2d 1175 (Fla. 3d DCA 1998): A juvenile who was being investigated for possible truancy was under a legal obligation to answer officers' questions as officers' had a legal duty to transport him to school, and the juvenile's refusal to provide information constituted offense of resisting without violence.

J.P. v. State, 855 So. 2d 1262 (Fla. 4th DCA 2003). State failed to establish that juvenile was lawfully detained at time identification was requested. Although state was attempting to rely on fellow officer rule as justification for legality of detention, there were no observations of fellow officer on the record, and observations of requesting officer were not sufficient to provide reasonable suspicion that juvenile had committed, was committing, or was about to commit crime of trespassing. Mere presence in parking lot of open quasi-public business not sufficient to constitute crime of trespass, and there was no record evidence that requesting officer was aware that juvenile had been asked to leave premises. Lawful detention is condition precedent to crime of giving fictitious name under section 901.36. It was error to deny motion for judgment of acquittal on charge of resisting officer without violence. Mere flight of juvenile, a passenger in a stopped vehicle that was not suspected of any personal criminal behavior, not sufficient to sustain conviction for resisting without violence.

Dubois v. State, 31 FLW D154 (Fla. 2nd DCA 2006). Defendant's act of giving false name to officer who was called to scene where defendant's vehicle had been rear-ended by another vehicle did not violate condition requiring that she live and remain at liberty without violating the law for probation revocation purposes. To constitute a crime, giving of false name must occur during an arrest or lawful detention.

A.A.R. v. State, 929 So. 2d 737 (Fla. 4th DCA 2006). Juvenile was erroneously adjudicated delinquent for giving false name to police officer where juvenile recanted and provided his true name to the officer before he was arrested, transported, or booked, and before any serious harm was done. Common law recantation defense applies to violations of false name statute

**NOTE:** When giving false information is charged as "Obstruction by Disguise" under 843.03, the charge **must** be amended to "Resisting Without Violence", under 843.02. See Leland v. State, 386 So.2d 622 (Fla. 3d DCA 1980) holding that a person does not commit the misdemeanor offense of obstruction by a disguised person under 843.03 by the sole act of giving, a false name to a police officer upon being stopped by said officer. See also Hartley v. State, 372 So.2d 1180 (Fla. 2d DCA 1979).

**Note: SECTION 901.36** went into effect in July of 1999. It makes it a first-degree misdemeanor for a person who has been arrested or lawfully detained to give a false name, or otherwise falsely identify himself or herself to a law enforcement officer or any county jail personnel. If such conduct results in an adverse effect to another person it is a felony of the third degree.

### **Third Person Interference**

Wilkerson v. State, 556 So. 2d 453 (Fla. 1st DCA 1990): The defendant yelled and cursed at officers and refused to leave area where officers were making arrests. The officers arrested her for resisting after several requests were made by the officers for her to leave the area. The court found that her refusal to leave the area constituted the violation. This violation did not interfere with her free speech rights to yell whatever she wanted at the officers; instead the focus is on her conduct.

Lawrence v. State, 668 So. 2d 701 (Fla. 5th DCA 1996): Officers were justified in arresting the defendant for interfering with officers' investigation of a domestic dispute that involved a firearm, officers had not found that weapon and their investigation was continuing. The Defendant was highly agitated, refused officer's request to sit down and stay out of the way of their investigation on at least four occasions, and Defendant placed herself between the officer and her husband, whom officers were questioning.

### **Can speech alone constitute resisting?**

Generally, words alone cannot support a charge of obstruction of justice. See D.G. v. State, 661 So. 2d 75 (Fla. 2d DCA 1995). However, the courts have carved out several exceptions to this rule. The majority of these exceptions stem from cases, where defendant's words affect the officer's investigation. In order to sustain a conviction, the following should be elicited:

Was the defendant the target of the investigation?

If she was not the target, was the actual target caught?

Was the defendant part of the criminal activity (i.e. lookout)?

### **"99" Cases**

Police did not have probable cause to arrest defendant for obstruction of justice arising out of the defendant's yelling the street term "ninety-nine" (a street term used to alert drug dealers that police are in the area) while undercover officers were attempting a drug bust of a drug dealer, where the defendant was not the target of the drug bust and officer was unaware if the actual target was caught. State v. Dennis, 684 So. 2d 848 (Fla. 3d DCA 1996).

S.D. v. State, 627 So. 2d 1261 (Fla. 3d DCA 1993)(defendant charged for a violation of 843.06, refusal to assist): The Court held that an individual's verbal warnings to others in the area that apparent drug sellers were instead police officers conducting a drug sting operation, constituted free speech.

Porter v. State, 582 So. 2d 41 (Fla. 4th DCA 1991): Officers arrested a lookout for drug dealers for obstructing under 843.02. Defendant yelled out coded messages so the dealers could avoid the officer's drug sweep. The court found that the defendant's warnings constituted a violation of 843.02. The defendant was part of the criminal activity.

## **D. JURY INSTRUCTION - "LAWFUL EXECUTION OF A LEGAL DUTY"**

During a trial for resisting arrest without violence, the defendant had raised the defense that he was not aware that the person he ran away from was a law enforcement officer. The judge instructed the jury that the arrest in question was a lawful execution of a legal duty. This was error. The court should have instructed the jury that the legality of the arrest was a factual issue for them to decide. Campbell v. State, 812 So. 2d 540 (Fla. 4th DCA 2002)

### **RESISTING WITHOUT VIOLENCE PREDICATE QUESTIONS**

1. Name and occupation.
2. Were you employed in that capacity on \_\_\_\_\_?  
(date)
3. How long have you been so employed?
4. Drawing your attention to \_\_\_\_\_, on that date, do you remember where you were?  
(time)
5. Where was that?
6. Is that in Miami-Dade County, Florida, City of \_\_\_\_\_?
7. Did you have an opportunity to come in contact with a person who later became known to you as \_\_\_\_\_?  
(defendant)
8. Do you see that person in court today?
9. Would you point (him/her) out?

#### **LET THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE DEFENDANT.**

10. Would you describe what, if anything, occurred?

(Must show officer attempting to execute some type of legal duty or legal process: e.g. arrest, search, seizure, investigation, etc.)

11. Would you describe the defendant's actions (behavior)?

(Get out that defendant resisted or obstructed the enforcement officer in some way without violence.)

**STALKING**  
Fla. Stat. § 784.048

**A. ELEMENTS**

1. Willfully, maliciously, AND repeatedly,
2. Follows

**OR**

3. Harasses

**OR**

4. Cyberstalks

**B. PENALTIES**

First Degree Misdemeanor - Maximum 1 year in jail and Maximum fine of \$1000.

**C. DEFINITIONS**

**“Harass”**

To engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.”

**“Course of Conduct”**

A pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of ‘course of conduct.’ Such constitutionally protected activity includes picketing or other organized protests.”

**“Cyberstalk”**

“ To engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose”

**D. FELONY (“AGGRAVATED”) STALKING F.S. 784.048 (Three Possible Scenarios)**

**1. Elements**

- a. Willfully, maliciously, and repeatedly,
- b. Follows or harasses or Cyberstalks, and
- c. Credible threat intended to instill fear of bodily harm,

**OR**

- a. Knowingly, willfully, maliciously, and repeatedly,
- b. Follows, harasses, or cyberstalks and either
  1. Violates a repeated violence injunction, OR
  2. Violates a domestic violence injunction, OR



3. Violates any other court-imposed prohibition of conduct toward the subject person or that person's property,

**OR**

- a. Willfully, maliciously, and repeatedly,
- b. Follows or harasses, and
- c. Victim is under 16 years of age

## **2. Definitions**

**Credible Threat of Harm:** “Any person who willfully, maliciously, and repeatedly follows or harasses another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s.775.084.”

**Violation of an Injunction:** “Any person who, after an injunction for protection against repeated violence pursuant to s. 784.046, or an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows or harasses another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s.775.084.”

**A Minor Victim:** “Any person who willfully, maliciously, and repeatedly follows or harasses a minor under 16 years of age commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s.775.084.”

## **A. APPLICATION OF STATUTE**

The Florida Supreme Court has held that the current stalking statute is not unconstitutionally vague or overbroad. See, Bouters v. State, 659 So. 2d 235 (Fla. 1995); Gilbert v. State, 659 So. 2d 233 (Fla. 1995); See also, Pallas v. State, 636 So. 2d 1358 (Fla. 3d DCA 1994); State v. Tremmel, 644 So. 2d 102 (Fla. 2d DCA 1994). In this vein, Bouters states that “the conduct described at length in the stalking statute is clearly criminal and is unprotected by the First Amendment. ‘While the First Amendment confers on each citizen a powerful right to express oneself, it gives the [citizen] no boon to jeopardize the health, safety, and rights of others ... when protected speech translates into criminal conduct, even the Free Speech Clause balks.’ Id. at 237.

### **“Willfully”**

The statute's requirement that the defendant “willfully” act presents little difficulty for the State, and demands only a common-sense explanation to the jury. In Arnold v. State, 755 So. 2d 796 (Fla. 2d DCA 2000), the court ruled that, in the context of criminal violations, “willfully” implies that a defendant has acted voluntarily and consciously, not accidentally.

### **“Maliciously”**

The stalking statute does not define “maliciously.” Nor is there case law, on point. Therefore, any guidance must be gleaned from persuasive authority. It is important, as one searches for such guidance, to understand the legal dichotomy of, on one hand, “legal malice,” and on the other, “actual malice.” Below is a list of synonyms and a discussion of the significance of each.

<b>“Legal Malice”</b>	<b>v.</b>	<b>“Actual Malice”</b>
“Malice in law”		“Malice in fact”
“Implied malice”		“Express malice”
“Inferred malice”		
“Constructive malice”		
“Technical malice”		

The concept of “legal malice” is a State’s friend, in that, it allows for inferences regarding the defendant’s mens rea. If the State were forced to demonstrate actual malice, beyond a reasonable doubt, the State would rarely be able to meet its burden. The reason is simple: only the defendant knows his or her state of mind at the time of the crime. It is impossible for the State to exclude every reasonable doubt, as we cannot open up the defendant’s head to gain access to his thoughts. Thus, the State will advocate for a more flexible, “legal malice” standard, which allows for an inference of malice from the circumstances. Conversely, the defense will argue for a stricter, “actual malice” standard. In stalking cases, this is often the most important battle, if not the entire war.

Another practical problem with the use of an “actual malice” standard is that it subverts the statute’s ability to remedy the evil it is intended to remedy. One can imagine a fact pattern wherein the defendant is under a delusion that they are in love with the victim. However, their conduct is otherwise violative of the statute. If actual malice were the standard, defendant would not be guilty of stalking. This is clearly inconsistent with the legislative purpose of the statute, *supra*.

### **Statutory Definition**

#### **a. F.S. 775.01 (“Common Law of England”)**

“The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.”

This statute allows the State to argue that common law definitions of “malicious” should control in the absence of specific statutory or judicial definition. Thus, the court should look to those definitions, cited above, from Black’s Law Dictionary.

#### **b. F.S. 827.03(2)(b) (“Aggravated Child Abuse”)**

“ ‘[a]ggravated child abuse’ occurs when a person ... maliciously punishes ... a child.”

State v. Gaylord, 356 So. 2d 313 (Fla. 1978)

**Rule:** “Maliciously” within the context of this statute does not mean legal malice, but rather means actual malice. See also, Young v. State, 753 So. 2d 725 (Fla. 1st DCA 2000).

**Important:** It is clear that the Gaylord court was preoccupied with interpreting the child abuse statute as narrowly as possible to address a constitutional vagueness challenge. Thus, the court chose the “actual malice” standard, the narrower of the two possible interpretations. Furthermore, the child abuse statute is intended, in large part, to address interfamily events, which is a sphere rarely invaded by the state. Thus, it is not surprising that the court chose the higher, actual malice standard.

**“Repeatedly”**

Butler v. State, 715 So. 2d 339 (Fla. 4th DCA 1998): The court held that the State had not presented sufficient proof of repeated acts to sustain a conviction. Evidence that defendant and victim were involved in violent incidents on two occasions six months apart was insufficient to establish harassment, as victim did not testify as to emotional distress, and there was no testimony establishing a series of acts. Furthermore, there were no other incidents of violence, and the defendant and victim reconciled one or more times between the incidents. (Please note the very narrow, fact-specific nature of this decision.)

T.B. v. State, 990 So.2d 651 (Fla. 4<sup>th</sup> DCA 2008): Sufficient evidence established that juvenile engaged in “repeated” harassment of victim, so as to support guilty finding for misdemeanor stalking, where juvenile taunted victim with the words “faggot” and “queer” three times over the course of around 90 minutes, with each incident separated in time by at least 15 minutes.

**“Follow”**

The statute’s requirement that the defendant “willfully” act presents little difficulty for the State, and demands only a common-sense explanation to the jury.

**“Harass”**

Pallas v. State, 636 So.2d 1358 (Fla. 3d DCA 1994): The existence of substantial emotional distress is determined under a reasonable person standard, i.e., whether a reasonable person in the victim’s situation would be caused substantial distress by the defendant’s conduct. The court held that frequent and disturbing phone calls (up to 50 calls a day starting at 7:00 AM) coupled with verbal threats may constitute harassment.

McKinnon v. State, 712 So. 2d 1259 (Fla. 1st DCA 1998): The court held that evidence that defendant first called victim and then visited victim’s apartment complex in violation of a restraining order, and that victim was frightened by defendant’s presence was sufficient for jury to find that defendant harassed victim and was guilty of aggravated stalking. (cf. Butler, supra).

Seitz v. State, 867 So 2d 421 (Fla. 3d DCA 2004). Defendant engaged in stalking victim by harassment when he publicly published and disseminated pharmaceutical records of victim and caused victim to suffer emotional distress. No direct or indirect contact with victim is required for conviction of stalking by harassment.

Ravitch v. Whelan, 851 So.2d 271 (Fla. 5th DCA 2003). Determining whether an incident creates substantial emotional distress, under statute defining crime of stalking as willfully, maliciously, and repeatedly following or harassing another person, courts use a reasonable person standard, not a subjective standard.

### **“Parameters of Stalking”**

Goosen v. Walker, 714 So. 2d 1149 (Fla. 4th DCA 1998): The court held that a neighbor’s videotaping of complainants on two to four occasions during preceding four months, when complainants were in their own yard or adjoining area, constituted stalking, and was not a constitutionally-protected activity.

Miller v. State, 4 So. 3d 732 (Fla. 1<sup>st</sup> DCA 2009): in aggravated stalking trial, jury was instructed they could find defendant guilty of acting maliciously even if it found only that he acted in disregard of an injunction for protection against domestic violence.

## **F. PROSECUTIONAL DISCRETION**

Prosecutor had discretion to prosecute defendant under the aggravated stalking statute, rather than under the misdemeanor “harassing telephone call statute”, when defendant’s conduct included making harassing phone calls to his ex-wife. The prosecutor has discretion in deciding whether and how to prosecute a defendant. Seybel v. State, 693 So. 2d 678 (Fla. 4th DCA 1997).

## **G. JURY INSTRUCTIONS**

### **1. Standard Jury Instructions**

#### **a. Stalking (F.S. 784.048(2))**

“Before you can find the defendant guilty of Stalking, the State must prove the following element beyond a reasonable doubt:

(Defendant) willfully, maliciously, and repeatedly followed or harassed or Cyberstalked (victim).

“Harass” means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.”

#### **b. Aggravated Stalking (F.S. 784.048(3))**

“Before you can find the defendant guilty of Aggravated Stalking, the State must prove the following two elements beyond a reasonable doubt:

(Defendant) willfully, maliciously, and repeatedly followed or harassed or Cyberstalked (victim).

(Defendant) made a credible threat with the intent to place (victim) in reasonable fear of death or bodily injury.

“Harass” means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

“Credible threat” means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.”

c. **Aggravated Stalking (F.S. 784.048(4))**

“Before you can find the defendant guilty of Aggravated Stalking, the State must prove the following two elements beyond a reasonable doubt:

(Defendant) knowingly, willfully, maliciously, and repeatedly followed or harassed or cyberstalked (victim).

(Defendant) did so in violation of:

1. An injunction for protection against repeat violence.
2. An injunction for protection against domestic violence.
3. Any [other] court imposed prohibition of conduct toward (the victim) or (victim’s) property.

“Harass” means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

“Credible threat” means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.”

d. **Aggravated Stalking (Victim under 16 years of age)(F.S. 784.048(5))**

“Before you can find the defendant guilty of Aggravated Stalking, the State must prove the following two elements beyond a reasonable doubt:

(Defendant) willfully, maliciously, and repeatedly followed or harassed or cyberstalked (victim).

At the time of (defendant’s) actions, (victim) was under 16 years of age.

“Harass” means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.”

## **H. PROCEDURAL CASE LAW**

### **Statute of Limitations**

Stalking is a continuing course of conduct crime. The statute of limitations does not begin to run until the course of conduct ends. Rodriguez-Cayro v. State, 828 So. 2d 1060 (Fla. 2d DCA 2002).

### **Limitations on Sentencing**

Folsom v. State, 638 So. 2d 591 (Fla. 3d DCA 1994): Defendant, who was convicted of aggravated stalking, a third-degree felony, could not be sentenced to a period of incarceration plus probation in excess of five years.

May v. State, 670 So. 2d 1103 (Fla. 2d DCA 1996): An order requiring the defendant to stay away from the victim and the victim’s family after release from a jail sentence of 364 days is invalid because it exceeds the statutory maximum sentence.

Inge v. State, 740 So. 2d 1219 (Fla. 4th DCA 1999): The guidelines scoresheet offense level may not be based on the offense of stalking after an injunction (784.048(4)), rather than

aggravated stalking (784.048(3)), since the information only referenced aggravated stalking (784.048(3)).

### **Discovery**

Portner v. State of Florida, 802 So. 2d 442 (Fla. 4th DCA 2001). State's general reference to "all pleadings" from civil suit did not encompass deposition and was insufficient to comply with rule 3.220(b)(1)(C) requirement to disclose any recorded statements of defendant. Argument that no discovery violation occurred because defense counsel created discovery problems by late disclosure of documents from the civil case lacks merit since criminal discovery rules impose a continuing duty to disclose. Trial court erred in failing to conduct *Richardson* hearing. A new trial was ordered because the appellate court cannot say beyond a reasonable doubt that defendant was not procedurally prejudiced by surprise use of deposition where defendant may have elected not to testify and place his credibility before jury if he had been aware that state was prepared to impeach him with contradictory deposition testimony.

## **I. DOUBLE JEOPARDY**

State v. Jones, 678 So.2d 1336 (Fla. 5th DCA 1996): Defendant was arrested and charged with "stalking after an injunction" for an act which occurred on April 30<sup>th</sup>, 1995. Following his arrest, between May 1<sup>st</sup> and May 16<sup>th</sup>, Defendant continued to stalk Victim, and was subsequently charged, for a second time, with "stalking after an injunction." Defendant was subsequently acquitted in the first case. The defendant's apprehension and arrest in the first case concluded the factual event, which formed the basis for that arrest, and began a separate and distinct factual event. The convictions violated double jeopardy because the stalking offenses were based on one course of conduct.

State v. Marinelli, 706 So.2d 1374 (Fla. 2d DCA 1998): Defendant was charged with four counts of aggravated stalking, each count stating that the conduct occurred over the same period, January 2<sup>nd</sup> through February 3<sup>rd</sup>. Defendant was convicted of two of the counts. Defendant was adjudicated guilty of two offenses based on one course of conduct; that conduct beginning January 2<sup>nd</sup>, and ending February 3<sup>rd</sup>. Therefore, the convictions violate double jeopardy.

Eichelberger v. State, 949 So. 2d 358 (Fla. 2d DCA 2007): Three separate aggravated stalking convictions were found to violate defendant's right against double jeopardy where the state did not allege or establish the end of one course of conduct and the start of a new course of conduct.

## **J. PRACTICE POINTERS AND PROCEDURE**

### **"Course of Conduct"**

One of the most important aspects of your case will be your ability to clearly relay to the jury the chronology of contacts between the defendant and the victim. To this end, it is vitally important that you make contact with the victim as early as possible in the process. Ask them to write down everything that has happened, as well as anything that might occur in the future, in as much detail as possible. If the jury does not have dates and times on which to hang a conviction, it will make your job that much more difficult.

### **"Maliciously"**

As one can tell from the discussion of the concept of malice, supra, the manner in which one explains this concept to the judge and jury will impact heavily on the success of your case. Act proactively, and set the tone from the start, speaking about malice in terms of legal malice. Object vehemently to efforts for any contradictory jury instruction.

1. **Contact the Victim.** Introduce yourself as the prosecutor on the case via telephone and letter.
2. **Request a Stay Away Order at Arraignment.** Determine if a Stay Away order was requested at Bond hearings or arraignment. If no stay away order was requested, set the case on calendar ASAP for a stay away order to be issued. The Defendant must be present. Once issued make sure that a copy is sent to the Victim.
3. **Set up a Pre file Conference:** Set a PFC if one has not already been conducted. The pre file conference is important to the victim and the prosecutor for the following reasons:
  - a. **Victim contact:** The PFC allows the victim to place a face on the person handling the case thus placing the victim at ease. The PFC also allows a face-to-face discussion concerning possible plea offers in the case.
  - b. **Investigation purposes:** The PFC enables the prosecutor gain more information about the case Further, the PFC enables the prosecutor to pinpoint the exact date of the incident or determine the course of conduct alleged thus allowing the amendment of the information with a beginning and ending date of the offense. In addition, the PFC will enable the prosecutor to determine whether the case should remain on the county court level, transferred to domestic violence or bound up to the felony level.
4. **File or amend an Information.** If Information has already been filed in the case, determine if the Information is correct or needs to be amended based upon new information obtained.
  - a. In filing an information, take into account the definition of Course of conduct.
  - b. “Course of conduct” is defined as a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.
  - c. In preparing the Information, make sure that the dates correspond with the dates given to you by the victim or the OIR/A- form. Make sure that the dates meet the above definition.
  - d. Make sure that there is a beginning and ending date on the Information for the period of criminal activity alleged.
  - e. As to the *type* of conduct alleged, make sure that the conduct meets the definition of harass. “Harass” is defined as engaging in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.
  - f. Determine in all cases, determine whether the case should remain in county court or bound up to the felony level based upon the sworn statements gathered at the PFC.
5. **Double check the witness list.** Make sure all witnesses are listed. If videotapes, 911, dispatch, or audiotapes are evidence, make sure that the custodian of records is subpoenaed.
6. **Check the speedy trial date.** Take note of the speedy trial date. Please explain to the victim the importance their availability and appearance at trial.
7. **Speak with an Assistant Chief regarding a potential plea offer.** Contact the victim and get the plea offer approved. Please note that only an Assistant Chief can modify plea offers.

If the victim or the defense wishes to modify the plea, an Assistant Chief must be informed. **PTD is never offered in stalking cases.**

8. **Contact all of your witnesses.** It is important to know what your witnesses will testify to at trial. You may have Investigations do “locates” on your witnesses if necessary and only with the approval of an assistant chief. If you learn of new witnesses through your pre-trial conferences or from paperwork you receive during the course of your handling of the case, have the new witnesses brought in for a pre-trial conference and added to your witness list.
9. **Keep your Assistant Chief informed of when you are sounding and going to trial.** Talk to your Assistant Chief about the case. The Assistant Chief may have suggestions on how to best prosecute the case.
10. **Keep the Victim informed of all court dates.** Please let the victim know about upcoming sounding and trial dates. They have a right to be heard at sentencing and deserve to be included in the process and present at every hearing. Further, as your victim may be apprehensive about appearing in court or talking to someone other than yourself, advise the victim that a victim witness coordinator will contact him or her concerning upcoming trial dates. Please furnish the victim with the name of the person that will contact them in order to place them at ease.

**If a case has sounded ready for trial, contact the victim by telephone.** Call the victim and all witnesses the day the case is sounded ready for trial, and call them again the day before the trial to remind them of the trial date and time.



## **TRESPASS—IN STRUCTURE OR CONVEYANCE**

§ 810.08, Fla. Stat.

### **A. ELEMENTS**

**To prove the crime of Trespass in a [Structure] [Conveyance], the State must prove the following three elements beyond a reasonable doubt:**

*Give a. for trespass and/or b. for trespass after warning to depart.*

- a.1. (Defendant) willfully entered or remained in a [structure] [conveyance].**
- 2. The [structure] [conveyance] was in the lawful possession of (person alleged).**
- 3. (Defendant's) entering or remaining in the [structure] [conveyance] was without authorization, license, or invitation by (person alleged) or any other person authorized to give that permission.**
- 1. (Defendant) had been authorized, licensed, or invited to enter or remain in a [structure] [conveyance].**
- 2. [The owner] [The lessee] [A person authorized by the owner or lessee] of the premises warned (defendant) to depart.**
- 3. (Defendant) refused to depart.**

Authority to enter or remain in a [structure] [conveyance] need not be given in express words. It may be implied from the circumstances. It is lawful to enter or remain in a [structure] conveyance] of another if, under all the circumstances, a reasonable person would believe that [he] [she] had the permission of the owner or occupant.

*Definitions. Give as applicable.*

§ 810.08(3) Fla. Stat.

“Person authorized” means an owner or lessee, or his or her agent, or any law enforcement officer whose department has received written authorization from the owner or lessee, or his or her agent, to communicate an order to depart the property in case of a threat to public safety or welfare.

“Willfully” means intentionally, knowingly, and purposely.

§ 810.011(1), Fla. Stat. and *State v. Hamilton*, 660 So. 2d 1038 (Fla. 1995).

“Structure” means any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure.

§ 810.011(3), Fla. Stat.

“Conveyance” means any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car; and to enter a conveyance includes taking apart any portion of the conveyance.

*While armed.*

If you find the defendant guilty of trespass in a [structure] [conveyance], you must then determine whether the State proved beyond a reasonable doubt that the defendant was armed or armed [himself] [herself] with a firearm or other dangerous weapon during the trespass.

*Human being in structure or conveyance.*

If you find the defendant guilty of [attempted] trespass in a [structure] [conveyance], you must then determine whether the State proved beyond a reasonable doubt that there was a human being in the [structure] [conveyance] at the time of the [attempted] trespass.

§ 790.001(6), *Fla. Stat. Give if applicable.*

A "firearm" is any weapon, including a starter gun, which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. [The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime.] *See § 790.001(1) Fla. Stat. for the definition of "antique firearm" and § 790.001(4) Fla. Stat. for the definition of "destructive device."*

A "dangerous weapon" is any weapon that, taking into account the manner in which it is used, is likely to produce death or great bodily harm.

#### Lesser Included Offenses

<b>TRESPASS IN STRUCTURE OR CONVEYANCE — 810.08</b>			
<b>CATEGORY ONE</b>	<b>CATEGORY TWO</b>	<b>FLA. STAT.</b>	<b>INS. NO.</b>
None			
	Attempt (except refuse to depart)	777.04(1)	5.1

**TRESPASS—ON PROPERTY OTHER THAN A  
STRUCTURE OR CONVEYANCE**

§ 810.09(1)(a)1 and 2, Fla. Stat.

To prove the crime of Trespass on Property other than a Structure or Conveyance, the State must prove the following four elements beyond a reasonable doubt:

1. (Defendant) willfully entered upon or remained in property other than a structure or conveyance.
2. The property was [owned by] [in the lawful possession of] (person alleged).
3. *Give one of the following paragraphs, as applicable.*  
*Give if §810.09(1)(a)1 is charged.*  
Notice not to enter upon or remain in that property had been given by [[actual communication to the defendant] [[posting] [fencing] [cultivation] of the property in the manner defined in this instruction]].  
  
*Give if §810.09(1)(a)2 is charged.*  
The property was the unenclosed curtilage of a dwelling and (defendant) entered or remained with the intent to commit a crime thereon other than trespass.
4. (Defendant's) entering upon or remaining in the property was without authorization, license, or invitation from (person alleged) or any other person authorized to give that permission.

Authority to enter upon or remain in property need not be given in express words. It may be implied from the circumstances. It is lawful to enter upon or remain in the property of another if, under all the circumstances, a reasonable person would believe that [he] [she] had the permission of the owner or occupant.

*Definitions.*

§810.011(1) Fla. Stat. and *State v. Hamilton*, 660 So. 2d 1038 (Fla. 1995).

“Structure” means a building of any kind, either temporary or permanent, which has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding it.

§ 810.011(3) Fla. Stat.

“Conveyance” means any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car; and “to enter a conveyance” includes taking apart any portion of the conveyance.

§ 810.09(3) Fla. Stat.

“Person authorized” means any owner, his or her agent, or a community association authorized as an agent for the owner, or any law enforcement officer whose department has received written authorization from the owner, his or her agent, or a community association authorized as an agent for the owner, to communicate an order to leave the property in the case of a threat to public safety or welfare.

§ 810.09(1)(b) Fla. Stat.

“Unenclosed curtilage of a dwelling” means the unenclosed land or grounds, and any outbuildings, that are directly and intimately adjacent to and connected with the dwelling and necessary, convenient, and habitually used in connection with that dwelling.

*§ 810.011(2) Fla. Stat.*

“Dwelling” means a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night.

“Willfully” means intentionally, knowingly, and purposely.

*§ 810.011(5)(a)1. and (b), Fla. Stat. Give if applicable.*

Notice not to enter upon property may be given by posting signs not more than 500 feet apart along and at each corner of the property's boundaries. The signs must prominently state, in letters not less than two inches high, the words “No Trespassing.” The signs also must state, with smaller letters being acceptable, the name of the owner or lessee or occupant of the land. The signs must be placed so as to be clearly noticeable from outside the boundary lines and corners of the property. [If the property is less than five acres in area, and a dwelling house is located on it, it should be treated as posted land even though no signs have been erected.]

*§ 810.011(6), Fla. Stat. Give if applicable.*

Notice not to enter property may be given by cultivation of the property. “Cultivated land” is land that has been cleared of its natural vegetation, and at the time of the trespass was planted with trees, a crop, an orchard or a grove, or was a pasture. [Fallow land, left that way as part of a crop rotation, is also “cultivated land.”]

*§ 810.011(7), Fla. Stat. Give if applicable.*

Notice not to enter property may be given by fencing the property. “Fenced land” is land that has been enclosed by a fence of substantial construction. The fence may be made from rails, logs, posts and railings, iron, steel, barbed wire or other wire or material. The fence must stand at least three feet high. [If a part of the boundary of a piece of property is formed by water, that part should be treated as legally fenced land.]

*Give if applicable.*

When every part of property is either posted or cultivated or fenced, the entire property is considered as enclosed and posted land.

*Enhanced penalty. Give if applicable.*

If you find the defendant guilty of trespass on property other than a structure or conveyance, you must then determine whether the State proved beyond a reasonable doubt that the defendant was armed with a firearm or other dangerous weapon during the trespass.

*§ 790.001(6), Fla. Stat. Give if applicable.*

A “firearm” is any weapon [including a starter gun] which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. [The term “firearm” does not include an antique firearm unless the antique firearm is used in the commission of a crime.]

*See § 790.001(1), Fla. Stat. for the definition of “antique firearm ” and § 790.001(4), Fla. Stat. for the definition of “destructive device.”*

**A “dangerous weapon” is any weapon that, taking into account the manner in which it is used, is likely to produce death or great bodily harm.**

## Lesser Included Offenses

<b>TRESPASS ON PROPERTY OTHER THAN STRUCTURE OR CONVEYANCE — 810.09(1)(a)</b>			
<b>CATEGORY ONE</b>	<b>CATEGORY TWO</b>	<b>FLA. STAT.</b>	<b>INS. NO.</b>
None			
	Attempt	777.04(1)	5.1

### C. CASE LAW

#### **Intent**

State must show evidence that Defendant entered intentionally, knowingly and purposely. See, Rozier v. State, 402 So. 2d 539 (Fla. 5th DCA 1981). The trespass statute refers to a general intent and means that, as in burglary, the entry or remaining be intentionally, knowingly and purposely done. See also, Patterson v. State, 512 So. 2d 1109, 1110 n. 1 (Fla. 1st DCA 1987). Under Florida Standard Jury Instructions (Criminal), "willfully means intentionally and purposely"; Fla.Std.Jury Instr. (Crim.) [p. 141] (Under section 810.09, Florida Statutes, "[w]illfully means intentionally and purposely").

#### **Curtilage**

Freeman v. State, 743 So. 2d 603 (Fla. 4th DCA1999): Stated that conduct can be characterized as trespass in a structure or conveyance only if the area surrounding the building is considered curtilage. In order for an area surrounding the property to be considered curtilage, there must be some type of enclosure. The area must be enclosed in some manner. See also, L.K.B. v. State, 677 So. 2d 925 (Fla. 5th DCA 1996).

Ruiz v. State, 23 So. 3d 208, (Fla. 4<sup>th</sup> DCA 2009): Defendant was arrested for trespass in a structure when he refused to leave the parking lot of a nightclub. Because the lot was not enclosed, it did not fit within the definition of curtilage. Conviction was reversed.

B.W. v. State, 973 So. 2d 657 (Fla. 3d DCA 2008): Open, unfenced stairway leading from the walkway to the front porch and entrance doors was not within structures cartilage for purposes of trespass in a structure.

#### **Proper Notice**

The owners of rental property gave Law enforcement officers permission to arrest trespassers. Officers saw the defendant on the property. He appeared nervous and walked away as the officer approached. Defendant was arrested for trespassing, and a subsequent search revealed cocaine. The arrest was illegal and the drugs were suppressed. There was no proof that defendant received actual notice that he could not be on the property, and the property was not properly posted. Baker v. State, 813 So. 2d 1044 (Fla. 4th DCA 2002).

#### **Authority to Enter**

When an invitation has been extended to enter an open business, actual communication is necessary to put a person on notice that he is no longer welcome on the property and may be arrested for trespass irrespective of whether property was posted. Smith v. State, 778 So.2d 329 (Fla. 2<sup>nd</sup> DCA 2000).

The fact that a person may be exercising first amendment rights while violating otherwise proper restrictions upon his or her entry to a public facility does not insulate that person from prosecution for trespass. J.L.S. v. State, 947 So. 2d 641 (Fla. 3d DCA 2007).

### **Trespass beyond the Limits Permitted to the Invitee**

Defendant was doing work on the exterior of the victim's house. The victim had given him permission to use the bathroom that was inside the back door. The defendant was later convicted of Trespass and Grand Theft of jewelry taken from the upstairs bedroom. The convictions were affirmed. The victim's consent to entry was limited to the downstairs bathroom only. Gruver v. State, 816 So. 2d 835 (Fla. 5th DCA 2002).

### **Trespass in a Structure or Conveyance**

A.M. v. State, 678 So.2d 914 (Fla.1st DCA 1996). A bicycle is not considered a “conveyance.”

M.J.S. v. State, 453 So2d 870 (Fla. 2d DCA 1984). A construction backhoe (large machine that moves heavy items) is not considered a “conveyance.”

D.E. v. State, 725 So. 2d 1269 (Fla. 4d DCA 1999). Error to adjudicate juvenile delinquent for trespass in an occupied conveyance where juvenile was discovered sleeping in a stolen vehicle along with his co-defendants, but no owner or other innocent victim was occupying vehicle at time of trespass

E.A.B. v. State, 851 So.2d 308 (Fla. 2d DCA 2003). Fact that defendant (passenger) put gas in stolen vehicle is not evidence of knowledge that car was stolen.

**Evidence of Theft F.S. 812.022(6):** If a person is in possession of a stolen motor vehicle and either the ignition mechanism has been bypassed or the steering wheel locking mechanism has been broken or bypassed, there is an inference that the person knows or should have known that the motor vehicle was stolen, unless he offers a satisfactory explanation.

J.D. v. State, 604 So. 2d 936 (Fla. 3d DCA 1992): The defendant was a passenger in a stolen car. The car ignition had been punched out, the radio had been removed and the speakers were missing. The defendant testified at trial that he did not know the car was stolen until after the car was already moving. Since the car was moving he was unable to get out of the car. The defense moved for JOA arguing that the trespass was not willful. The court held, "the trial court was entitled to believe on this evidence that the respondent had knowledge that the car was stolen when he entered the vehicle in view of the damage to the car..."

R.M. v. State, 763 So. 2d 1060 (Fla. 4th DCA 1999): The trial court denied motion for judgment of acquittal on the following facts. Defendant was passenger in car reported recently stolen. Officer turned on siren and attempted to stop for running red light. Defendant with others fled from truck on foot. Defendant said he did not know truck was stolen. Officer found bolt cutters, which Defendant admitted, were his. Officer subsequently learned truck was stolen. Court held that trial court was proper in denying motion for JOA. Court noted that presence in a stolen vehicle with flight at threat of apprehension is sufficient circumstantial evidence for trier of fact to infer guilt.

### **Person Authorized/Authority of Officer**

Person authorized means any owner or lessee, or his agent, or any law enforcement officer whose department has received written authorization from the owner or lessee, or his or her agent, to communicate an order to depart the property in the case of a threat to public safety or welfare. (810.08(3)).

Generally, in order to sustain a prima facie case for criminal trespass, an arrest affidavit for criminal trespass requires a trespasser to remain on the premises after being warned or ordered to leave the premises by someone authorized to do so. Where the trespasser has not been warned previously, the officer is limited to warning or ordering the trespasser to leave the premises. An officer must have authority to warn the trespasser to leave the premise. However, such “authority” is not an element of the criminal charge of trespass. As such, it is not required to be included in the arrest affidavit.

The crime of trespass under Section 810.09 has been satisfied if the alleged trespasser defies an order to leave, personally communicated to him/her by the owner of the premises or by an “authorized person.” See, State v. Dye, 346 So. 2d 538 (Fla. 1977). Authorized persons include: school board employees specifically given discretion to control over school property. Id.

### **Defense**

Haugabrook v. State, 827 So.2d 1065 (Fla. 2d DCA 2002). Consent to enter one’s property is an *affirmative* defense.

### **Charging Document**

Henig v. State, 820 So.2d 1037 (Fla. 4th DCA 2002). The information or charging document must specifically allege that there was a human being in the dwelling at the time of the offense to sustain a charge under Fla. Stat 810.08(2)(b).

#### **D. TRESPASS PREDICATE QUESTIONS**

1. State your name and occupation, please.
2. Were you so employed on \_\_\_\_\_? (For P.O. or security guard)  
(date of arrest)
3. On that date, do you recall where you were at approximately \_\_\_\_\_?  
(time)
4. On that date, at \_\_\_\_\_, did you have an occasion to observe a person who later became known to you as \_\_\_\_\_?
5. Do you see him/her here in Court today?
6. Will you please describe for the Court what he/she is wearing?

#### **LET THE RECORD REFLECT THE WITNESS HAS IDENTIFIED THE DEFENDANT.**

7. Can you please tell the Court the circumstances under which you saw the defendant?
8. What was your purpose for being at \_\_\_\_\_?

**Note:** You must establish that your witness is either the owner of the structure/conveyance or is a lessee of the premises, or is a person authorized by the owner or lessee to direct the defendant to leave.

9. Did you have an occasion to speak to the defendant?
10. What did you say? (Must establish that the witness directed the defendant to depart and that the defendant refused to do so.)
11. What did the defendant say or do, if anything?
12. Had you previously warned the defendant that he was not authorized to be there? When?  
(Only ask if the answer is yes)
13. Had the defendant any authority or licenses to be \_\_\_\_\_?
14. Was he invited to enter or remain in \_\_\_\_\_?

**Note:** If crime is charged as first degree, you must elicit testimony that a human being was in the structure/conveyance at the time the defendant trespassed.

15. Did all this occur in Miami-Dade County, Florida, City of \_\_\_\_\_?



## **WORTHLESS CHECK**

§ 832.05(2),.

*This statute applies to a variety of orders to pay money and "commercial paper," and to a variety of types of drawees and transactions. The charge has been framed to cover the most common transaction encountered in criminal litigation. It can be readily modified to fit other transactions covered by the statute.*

**To prove the crime of (crime charged), the State must prove the following [six] [seven] elements beyond a reasonable doubt:**

1. (Defendant)

[drew]  
[made]  
[uttered]  
[issued]  
[delivered]

**the check admitted in evidence as State Exhibit \_\_\_\_\_.**

2. **When (defendant) did so, there was not sufficient money on deposit in the bank to pay the check.**
3. (Defendant) **knew when [he] [she] wrote the check that [he] [she] did not have sufficient money on deposit with the bank.**
4. (Defendant) **knew [he] [she] had no arrangement or understanding with the bank for the payment of the check when it was presented.**
5. **The check was in the amount of \$150 or more.**

*Give 6a when payee exchanges for value.*

6. a. (Person or business alleged), **to whom the check was payable, transferred it to (as alleged) in exchange for (goods or money alleged).**

*Give 6b when subsequent holder exchanges for value.*

- b. (Holder alleged) **transferred the check to (as alleged) in exchange for (goods or money alleged).**

*Give 7 only if not exchanged for money.*

7. **The (goods) had some monetary value.**

*Defenses. Give if applicable.*

**Even if you find all these elements are proved, you should go on to consider the defense.**

**You must find the defendant not guilty if you find that either of the following three defenses have been proved:**

1. (Name of payee or holder) **knew that (defendant's) funds and credit at the bank at the time the check was given were insufficient to pay the check; or**

2. (Name of payee or holder) **had good reason to believe that** (defendant's) **funds and credit at the bank at the time the check was given were insufficient to pay the check;**  
**or**
3. **The check was post-dated.**

*Give if applicable.*

**When an employee of a business receives a check, the business must be regarded as knowing whatever the employee knows about the check.**

**NOTE:** Fla. Stat. §832.05(5): It is not a defense or grounds to dismiss Criminal Prosecution under this section by presenting evidence that the dishonored check was paid.

## **B. PENALTIES**

First Degree Misdemeanor (if the check or value of received item is less than \$150)

Maximum 1 year in jail. (775.082(4)(a))

Maximum \$1000 fine. (775.083(1)(d))

## **C. CASE LAW - GENERALLY**

Stephens v. State, 324 So. 2d 190 (Fla. 1st DCA 1975): The chairman and majority stockholder of a corporation signed and delivered two corporate checks that were returned for insufficient funds. He later admitted that he knew the account had insufficient funds to cover the checks. The state charged him with “ delivering a check knowing at the time of delivery of said check ‘... that the defendant did not have sufficient funds on deposit in or credit with such bank ...’ ” Id. at 192. The state proved that the corporation had insufficient funds, not Stephens. Conviction reversed. Obviously, the state failed to prove the offense as charged.

Wells v. State, 807 So.2d 132, (Fla. 3d DCA): Defendant could properly be held criminally liable where worthless check was a corporate check which defendant signed as an officer of the corporation.

Graham v. State, 779 So.2d 370 (Fla. 2d DCA 2000): No error in ordering restitution, although restitution was not part of plea agreement, based on amended statute, which mandates award of restitution. Since 1984, when the restitution statute was amended restitution became mandated, and the defendant was put on notice that it will be considered as a part of every sentence pursuant to Fla. Stat. § 775.089(1)(a) (1997).

Wells v. State, 807 So.2d 132, (Fla. 3d DCA 2002): Where jury was instructed that one element to be established was that defendant “uttered or issued or delivered” worthless check, there was no fundamental error in failing to give the jury a definition of the word “uttered.” State had benefit of statute which provides that “delivery of a check payment of which is refused by drawee because of lack of funds or credit, shall be prima facie evidence of intent to defraud or knowledge of insufficient funds’.

Raymond Morin v. State, 790 So 2d 588 (Fla. 5th DCA 2001): No error in not giving instruction on defense that payee knew of the insufficiency of the funds at time of tender where there was no evidence offered to support defense.

## D. PROVING IDENTITY

There are two ways of proving identity:

1. Person to whom the check was presented identifies the defendant

**OR**

2. Fla. Stat. §832.07 Prima facie evidence of intent; identity

Section 2 of this Statute states the elements to establish Prima Facie evidence of *Identity/Knowledge*.

- (a) In any prosecution or action under the provisions of this chapter, a check, draft, or order for which the information required in paragraph (b), paragraph (d), paragraph (e), or paragraph (f) is available at the time of issuance constitutes prima facie evidence of the identity of the person issuing the check, draft, or order and that such person is authorized to draw upon the named account.

- (b) To establish this prima facie evidence:

The driver's license number or state identification number, specifying the state of issuance of the person presenting the check must be written on the check; or

The following information regarding the identity of the person presenting the check must be obtained by the person accepting such check: The presenter's full name, residence address, home phone number, business phone number, place of employment, sex, date of birth, and height.

- (c) The information required in subparagraph (b)2 may be provided by either of two methods:

The information may be recorded on the check; or

The number of a check-cashing identification card issued by the acceptor of the check may be recorded on the check. In order to be used to establish identity, such check-cashing identification card may not be issued until the information required in subparagraph (b)2. has been placed on file with the acceptor of the check.

- (d) If a check is received by a payee through the mail or by delivery to a representative of the payee, the prima facie evidence referred to in paragraph (a) may be established by presenting the original contract, order, or request for services that the check purports to pay for, bearing the signature of the person who signed the check, or by presenting a copy of the information required in subparagraph (b)2. which is on file with the acceptor of the check together with the signature of the person presenting the check.

- (e) If a check is received by a payee and the drawer or maker has a check-cashing identification card on file with the payee, the prima facie evidence referred to in paragraph (a) may be established by presenting the signature found on the check-cashing identification card bearing the signature of the person who signed the check.( *i.e. Signature Card*)

- (f) Applies to checks written to the Department of Revenue.

## **E. PROVING KNOWLEDGE**

Proving the defendant's knowledge of insufficient funds at the time of the transaction requires the testimony of bank officials. The bank's custodian of records would be called to testify to the following:

- a. The defendant had an account at the bank on the date of the offense;
- b. The balance in the account on the date of the offense was less than the amount of the check written by the defendant;
- c. The bank sent notice to the defendant on the status of his account and his balance.

The prosecutor should introduce these records under the business records exception at trial.

If the payee (person who accepts the check) has knowledge at the time that he or she is given the check that there are insufficient funds in the defendant's account, the defendant cannot be convicted for making a worthless check.

Rigaud v. State, 404 So.2d 791 (Fla. 3<sup>rd</sup> DCA 1981): Where a payee of check had reason to believe that the drawer did not have sufficient funds on deposit to insure payment on check, defendant could not be convicted of knowingly making a worthless check.

Williams v. State, 604 So.2d 10 (Fla. 3<sup>rd</sup> DCA 1992): Defendant could not be convicted of obtaining property in return for a worthless check where the defendant told the salesman that there were insufficient funds in the account to cover the amount of the check but assured him that he would transfer more money into the account and the salesman accepted the check.

Wells v. State, 807 So.2d 132 (Fla. 3<sup>d</sup> DCA 2002): Whether it was plausible to believe that defendant did not know financial position of corporation was question for jury determination.

Miranda v. State, 773 So.2d 1195 (Fla. 2<sup>d</sup> DCA 2000): Knowledge that there are insufficient funds is essential element of crime of obtaining property in return for worthless check. Testimony of bank representative that account contained sufficient funds to pay check the day after check was delivered **rebutted** prima facie showing of knowledge, which arises from delivery of worthless check.

## **F. PROVING THE CHECK IS WORTHLESS**

The canceled check with a bank stamp is prima facie evidence of:

- a. making or uttering of the check
- b. the due presentation to the bank for payment
- c. and the dishonor thereof
- d. for the reasons written

## **G. DISCOVERY CHECKLIST**

- \_\_\_ Information (Charging Document)
- \_\_\_ File NOTICE of Intent to Rely on Certified Business Records
- \_\_\_ Defendant's Priors
- \_\_\_ Witness List
- \_\_\_ Victim
- \_\_\_ Bank Records Custodian
- \_\_\_ Investigative Reports by Agency, O/I Reports (if applicable)
- \_\_\_ Statements of Defendant (oral or written) (if applicable)
- \_\_\_ Business Cards (if applicable)
- \_\_\_ Receipts (if applicable)
- \_\_\_ Defendant's Bank Account Records
- \_\_\_ Signature Card
- \_\_\_ Bank Statements (months before, of, and after the check(s) in question)
- \_\_\_ Checks payable to or cashed by the Defendant
- \_\_\_ Miranda Waiver (if applicable)
- \_\_\_ *Williams* Rule (if applicable)

## **H. ORDERING DOCUMENTS**

You can order several different types of corporate documents by searching for the documents using the entity's name and the defendant's name as well as other categories at:

<http://www.sunbiz.org/corpweb/inquiry/cormenu.html>.

In order to get certified copies of certain corporate documents you need to send a written request on SAO letterhead (the request must specify the name of the corporation or entity, the name of the requested document, and (if we have it) the document number).

Send the written requests to:

**Florida Department of State**  
Division of Certifications  
**PO Box 6327**  
**Tallahassee, FL 32314**

You can get unofficial document copies as well as the document numbers at the above noted website. This will help you in your initial investigation of defendants that write bad checks. However, please remember that you need the certified copies for trial.

## I. WORTHLESS CHECK PREDICATE QUESTIONS

### PERSON ACCEPTING CHECK

1. Please state your name.
2. Where are you employed?
3. Were you employed in that capacity on \_\_\_\_\_?  
(date)
4. Did you encounter someone who you later came to know as \_\_\_\_\_ on that  
date? (defendant)
5. Is he/she in court?
6. Please identify him/her by an article of clothing.

### LET THE RECORD REFLECT THAT THE WITNESS/VICTIM HAS IDENTIFIED THE DEFENDANT.

7. Did you have a business transaction with the defendant on that date?
8. What did the defendant purchase?
9. Who owned these items?
10. What is the value of these items?
11. How did the defendant pay for the purchase?
12. What was the amount of the check?
13. Did you see the defendant sign the check?

**Note:** §832.07(2)(d) requires that the witness see the defendant sign the check and then the witness must initial the check.

14. Did you initial the check?
15. Did you put a physical description of the defendant on the check?

**Note:** §832.07(2)(b) lists what must be included in the physical description. §832.07(c) allows for this information to be on file if the defendant has a check cashing card).

16. What was the information you put on the check?
17. Did the defendant make any statements regarding the validity of the check?

**Note:** Defendant must not have asked the witness to delay depositing the check or have postdated the check.

18. Did the defendant take the purchase with him/her?

19. Did anything occur with this check?

**Note:** §832.05(7) says the return of the check from the bank unpaid, with the reason for not honoring it written on it is prima facie evidence).

20. I am now showing you State Exhibit number \_\_\_\_\_for identification. Can you identify it?

21. How do you recognize it?

MOVE CHECK INTO EVIDENCE.

22. Did you notify the defendant that the check had been returned? How did you do this? (§ 832.07(1)(a) dictates the form of notice.)

23. Do you have a copy of the letter?

24. I am now showing you State's Exhibit number \_\_\_\_\_for identification. Do you recognize it?

25. What is it?

26. How do you recognize it?

MOVE LETTER INTO EVIDENCE.

27. How did you send it? (Must be certified or registered mail, return receipt requested.)

28. Did you receive a return receipt?

29. I am now showing you State's Exhibit number \_\_\_\_\_for identification (receipt). Do you recognize it?

30. How do you recognize it?

MOVE RECEIPT INTO EVIDENCE.

31. Did all of this occur in Miami-Dade County, Florida, City of \_\_\_\_\_?

### **CUSTODIAN OF RECORDS**

1. Please state your name.

2. Where are you employed?

3. What is your position at \_\_\_\_\_?  
(bank)

4. Does the defendant have an account with the bank you are employed at?

5. Are there any records of an account at \_\_\_\_\_ under the defendant's name?  
(bank)
6. Does \_\_\_\_\_ require any standard records, such as a signature card?  
(bank)
  - a. Is the signature card used to open the account?
  - b. Does the signature card have the defendant's signature on it?
7. Did the defendant have less money in account on date check was written than face value of check?
8. Was the defendant informed that there was less money in account than the face value of the check by mail? When?
7. Did you examine the questioned documents under \_\_\_\_\_?  
(case number)
8. Did the defendant give you a handwriting sample? (Introduce handwriting sample)
9. Did you receive a check from the defendant? (Introduce the check)
10. Did you compare the writing on the check to the one on the sample?
11. Explain how you compared the writing on the check to the sample's writing.
12. What did you find from comparing the check and sample?



## FLORIDA FISH AND WILDLIFE VIOLATIONS

The Florida Legislature passed and the Governor signed a bill creating a new penalty structure for fish and wildlife violations. The bill also allows FWC to become a member of the Wildlife Violators Compact, which is currently in effect in 22 states. The bill became law on *July 1, 2006*.

The effect of the new penalty provisions is to make penalties for marine fish and wildlife violations more uniform and to punish repeat offenders more severely. The new penalty provisions also treat commercial fishermen differently than recreational fishermen. The Wildlife Violators Compact parallels the driver's license compact. There will be reciprocal recognition of license suspensions by member states. FWC will soon develop rules to implement the compact and to determine which violations from other states will be recognized in Florida.

### A. APPLICABLE STATUTES

#### 16 U.S.C.A. § 701: Game and Wild Birds; Preservation

##### Sec. 2. Definitions.

"Take" means take as defined in 50 C.F.R. 10.12, and includes both "intentional" and "unintentional" take.

"*Intentional take*" means take that is the purpose of the activity in question.

"*Unintentional take*" means take that results from, but is not the purpose of, the activity in question.

"*Migratory Bird*" means: (below are a few examples)

Accentor	Catbird	Hawaii Duck	Cuckoo
Black-Hawk	Magpie	Redhead	Rudy Duck
Bunting	Mallard		

*\*\*For a full list refer to 50 C.F.R. 10.13*

#### 16 U.S.C.A. § 703: Taking, killing, or possessing migratory birds unlawful

- Possession of Migratory Birds is a Strict Liability Crime:
- **U.S. v. Morgan**, 311 F.3d 611 (C.A. 5 La. 2002). Evidence that agent from state department of wildlife and fisheries discovered eight ducks in hunter's pirogue, which exceeded the daily bag limit by two, was sufficient to support hunter's conviction for possessing migratory game birds exceeding the daily bag limit in violation of the Migratory Bird Treaty Act (MBTA) as the offense is a strict liability offense, despite hunter's assertion that he did not intend to violate the bag limit and that his dog had picked up birds that had drifted from other hunters.
- **U.S. v. Corrow**, 119 F.3d 796 (C.A.10 N.M. 1997). Misdemeanor violations of Migratory Bird Treaty Act (MBTA) section prohibiting possession of protected bird feathers are strict liability crimes, so no showing of specific intent or guilty knowledge is necessary.

#### 16 U.S.C.A. § 704: Determination as to when and how migratory birds may be taken, killed, or possessed

\*Please Note: As of Aug. 1, 2011 there is proposed legislation pending as to the above.

#### 16 U.S.C.A. § 707: Violations and penalties; forfeitures

\*Please Note: As of Aug. 1, 2011 there is proposed legislation pending as to the above.

### B. ENHANCED PENALTIES

**Recreational violations are placed in 4 levels:**

**Level One Violations** are all non-criminal infractions. The fine for a first violation is \$50 (plus the cost of the license or permit). For violations involving licenses or permits, the fine increases to \$100 (plus the cost of the license or permit) if the violator has committed the same Level One violation within the preceding 36 months. For violations that don't involve licenses or permits, the fine increases to \$100 (without the cost of the license) if the violator has committed the same Level One violation within the preceding 36 months.

**Level Two Violations** are second degree misdemeanors for the first violation. A person who commits a Level Two violation within 3 years after a previous conviction for a Level Two or higher violation commits a first degree misdemeanor with a minimum mandatory fine of \$250. A person who commits a Level Two violation within 5 years after two previous convictions for a Level Two or higher violation, commits a first degree misdemeanor with a minimum mandatory fine of \$500 and a suspension of any recreational license or permit issued under s. 372.57 for 1 year. A person who commits a Level Two violation within 10 years after three previous convictions for a Level Two or higher violation commits a first degree misdemeanor with a minimum mandatory fine of \$750 and a suspension of any recreational license or permit issued under s. 372.57 for 3 years, following the date of the violation.

**Level Three Violations** are all first degree misdemeanors. A person who commits a Level Three violation within 10 years after a previous conviction for a Level Three or higher violation commits a first degree misdemeanor with a minimum mandatory fine of \$750 and a suspension of any recreational license or permit issued under s. 372.57 for 3 years, following the date of the violation. If a person takes game, freshwater fish, saltwater fish or fur-bearing animals while their required license is suspended or revoked, the violator shall receive a mandatory fine of \$1,000 and a license suspension for 5 years, following the date of the violation.

**Level Four Violations** are all **third degree felonies**.

**C. RECLASSIFICATION OF OFFENSES**

*Crawfish* are now called spiny lobster. Violations relating to special recreational licenses for spiny lobster are reduced from a second degree misdemeanor to a civil infraction. Violations of freshwater fish size limits and slot limits have been increased from a civil infraction to a second degree misdemeanor.

Violating rules or orders of the Commission prohibiting the sale of saltwater fish increased from a second degree misdemeanor to a first degree misdemeanor.

The additional penalty provisions for major violations under F.S. 379.407(2) apply to commercial harvesters and wholesale and retail dealers. Any other person who commits a major violation under this subsection commits a level three violation.

The additional penalties for major violations involving certain finfish under 379.407(4) apply to commercial harvesters. Any other person who commits a major violation under this subsection, commits a level three violation.

Increases the penalty for F.S. 379.404(6), dealing with entering upon private property/shining a light/intent to take deer, from a second degree misdemeanor to a Level Three Violation.

Any resident who holds a valid commercial fresh water fishing license issued under F.S. 379.363(1)(a) does not have to purchase a recreational freshwater fishing license or permit. Makes it a Level Three violation to take game, freshwater fish, saltwater fish, or fur-bearing animals while a required license is suspended or revoked. There is a minimum mandatory fine of \$1,000 and a 5 year license suspension for this offense.

#### **D. EXAMPLES OF NEW LEVEL VIOLATIONS**

##### **Level 1:**

CLASSIFICATION OF WILDLIFE; SEIZURE OF CAPTIVE WILDLIFE-379.303

REQUIRED CLOTHING FOR PERSON HUNTING DEER- 379.3003

DRIVING METAL OBJECT INTO TREE OR HUNTING FROM TREE WHICH A METAL OBJECT HAS BEEN DRIVEN PROHIBITED- 68A-15.004(5B)

##### **Level 2:**

GENERAL METHODS OF TAKING GAME-PROHIBITED- 68A-12.002

TAKING TURKEY W/IN 100 YDS OF FEEDING STATION WHEN FEED IS PRESENT- 68A-12.002(8B)

POSS. OF UNDERSIZED SPONGE- 379.0725

ILLEGAL USE OF NETS- 379.2422

##### **Level 3:**

POSSESSION OF CERTAIN LICENSED TRAPS PROHIBITED- LESS THAN THREE TRAPS-379.402(2)(a)

##### **Level 4:**

POSSESSION OF CERTAIN LICENSED TRAPS PROHIBITED-THREE OR MORE TRAPS- 379.402(2)(b)

MOLESTING BLUE CRAB TRAPS/LINES/BUOYS- 379.366(1)

SPINY LOBSTER REGULATION – 379.367(4)(a)

THEFT OF STONE CRAB TRAP CONTENTS- 68B-13.011(3)

#### **E. PLEAS**

Generally, first time offenders who do not have any priors are eligible to be placed in the Pre-Trial Diversion program. However, each case is different and this will be dependent upon the facts and circumstances of the particular case. Many of the cases that you will encounter include but are not limited to undersized fish, over the bag limit, fishing out of season and possession of migratory birds. Most pleas will include a donation to the Denise Moon Fund, fine (as provided for above) and forfeiture of certain items where appropriate. Both Advocate and Court Options offer a Florida Fish and Wildlife Course which is designed for individuals charged with boating, fishing and wildlife offenses. This course is often an appropriate condition to include as part of a plea. In some instances, community service and a suspension or revocation of a hunting or fishing license may also be an appropriate condition. Some items that are normally forfeited are nets, bird and fish traps, spears, and potentially vessels. These cases must be taken to an Assistant Chief for a plea.



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## **PART 3: DIRECT FILES, REFILES, BIND-UPS, & ARREST WARRANTS**

## DIRECT FILES, REFILES, BIND-UPS, & ARREST WARRANTS

### I. DIRECT FILES

#### A. WHAT IS A DIRECT FILE?

A direct file is when the State brings charges against a defendant for a crime he has already committed. These cases usually come to our attention because an officer or victim will come by the office to give sworn testimony. For example, DUI officers are trained in cases involving accidents where blood is obtained to refrain from issuing a criminal citation until the blood results come back because the speedy trial clock may run prior to the results being obtained.

#### B. SPEEDY CONSIDERATIONS

The speedy trial period begins when a defendant is taken “into custody”. **A defendant is taken “into custody” under F.R.C.P. 3.191(d) when the person is (1) arrested as a result of the conduct or criminal episode that gave rise to the crime charged OR (2) served with a notice to appear in lieu of physical arrest.** If the defendant was taken “into custody” then the time begins ticking and the State must charge him and bring him to trial within 90 days if the charge is a misdemeanor or 175 days if the charge is a felony unless the defense waives such a right. **ASAs whose direct files may have speedy issues must bring them to the attention of a Chief immediately.**

#### C. STATUTE OF LIMITATIONS

Please keep in mind that pursuant to Fla. Stat. 775.15, prosecution must be “commenced” (filed and served) within 1 year for 2<sup>nd</sup> degree Misdemeanors and 2 years for 1<sup>st</sup> degree misdemeanors. “Commenced” means that an information is filed and the capias, summons or other process is executed without unreasonable delay. “Executed” means service on the defendant. So, even if you do not have a speedy trial clock ticking, there is always the SOL clock that is ticking and we do not want to lose the case because we failed to file it with that period or we were unable to refile because we filed the original charge so far into the period.

Sometimes, judges will try to dismiss a case because the State has attempted and failed service multiple times and the SOL has run. This is incorrect. State v. Fields, 505 So.2d 1336 (Fla. 1987) stands for the proposition that a case has commenced when an information is filed and attempts are made at service as long as there is no unreasonable delay. Although the court does not necessarily answer what an unreasonable delay is, it does say the present delay was unreasonable because the warrant was served 3 years and 7 months after it was issued (7 months outside the SOL) and the State knew where the Defendant was living and made zero attempts and service.

#### D. DISCO DUTY

Every Friday from 7:30 A.M. to 5:00 P.M., three (3) or more ASAs are assigned to Disco Duty where they remain back in the office and conduct pre-file conferences (PFC’s). The purpose of a PFC is to determine if a crime has been committed. The standard for filing a **misdemeanor** is **“good faith basis.”** The standard for filing **felony** charges is also a **“good faith basis”** but requires an additional certification that **he or she has received testimony under oath from the material witness or witnesses for the offense. Rule 3.140(g)**

Keep this distinction in mind when you are working up your direct file for filing. Usually you will have a single PFC in the file when you are first assigned the case. Many times this PFC is

sufficient enough to file charges. However, if there are still issues with the case (i.e. wheel or theory of blood draw), you can simply call the officer and get clarification instead of setting up a new PFC because **SWORN TESTIMONY IS NOT NECESSARY**.

However, it is important to remember that once charges are formally filed the speedy trial clock starts. Accordingly, if the SOL permits, it is better to fully work up your cases before filing charges.

#### **E. FILING YOUR DIRECT FILE**

Once you have determined that your direct file is ready for filing, complete a packet for filing which includes the following documents:

(1)Coversheet – Located in the Forms drive under Charge Forms and then Information Coversheet. Date on top right corner is the date you complete the form NOT the Date of incident. List all charges on the left and their corresponding citation numbers (if it's a traffic offence) on the right. The Extradition Code is FLA Only for misdemeanors and put yes for personal service. Ask an Assistant Chief whether your Defendant should be arrested. If the Assistant Chief decides the Defendant should be arrested, you will have to draft an Affidavit in Support of an Arrest Warrant and an Arrest Warrant Checklist.

(2)Charge Forms – Located in the Forms drive under Charge Form and then Charge Form. Each and every charge needs a charge form, even infractions. Date on these forms is the date of incident. Sign and date bottom of each form. If you don't see a Charge Form for your respective charge, contact ASA Brent Capley. He will draft the Charge Form. **YOU ARE NOT TO DRAFT YOUR OWN CHARGE FORMS.**

(3)Citations – All traffic offenses need citations. Indeed, citations are the charging document in traffic cases. Some direct files will already have completed ones in the file, otherwise contact Jennifer Green on the Fifth Floor. She can get a blank citation book for you.

(4)Witness List – Using a blank word document, list all the officers with their corresponding department and badge number. All civilians should include a complete address where they can be subpoenaed. Rule 3.220 tells you what categories should be designated into. This designation needs to be beside the witnesses. For example:

1A. Ofc. John Smith  
Miami Dade Police Department 30-0000

(5)At the Assistant Chief's discretion, an affidavit in support of arrest and the arrest warrant checklist may be completed if an arrest is warranted.

Once this is complete, bring the packet to the Assistant Chief for approval. Once it is approved, the file with the packet attached to the front goes to Jennifer Green (5<sup>th</sup> Floor). The file then gets sent to Case Processing where an information is created. **If you need a direct file quickly, you must speak to an Assistant Chief ASAP.**

#### **F. SERVICE**

Once the State files an information, a summons is generated through the court. The sheriff's office then serves the defendant with a copy of the information and the summons. If service fails the first time, the second attempt of service is executed through SAO Investigations, located in Graham. As soon as the ASA has one verified return of service that is unserved, the ASA must promptly prepare Arrest Warrant paperwork.

## **II. REFILES**

### **A. WHAT IS A REFILE AND WHEN SHOULD I DO IT?**

A refile is a case that has for some reason or another been nolle prossed and now the office has decided to bring the charges against the defendant again. The following cases lay out when the State can refile.

Where charges against accused are dismissed for any reason, the State can refile the same charges at any time unless prevented from doing so by (1) constitutional prohibition against double jeopardy, (2) doctrine of res judicata, (3) statute of limitations, or (4) dismissal of first case with prejudice. *State v. Bacon*, 385 So.2d 1160 (Fla. 2d DCA 1980). **Factors to consider:**

- (1) Statute of Limitations
- (2) Speedies Waived
- (3) Demand Filed?
- (4) Type of case; Is there a victim?
- (5) Can we serve defendant again?
- (6) Strength of case

### **B. HOW DO YOU REFILE?**

The ASA should already have an idea based on the factors listed above of what cases on their trial docket are going to be refiled should they have to nolle prosequere.

Following a nolle prosequere in which the State wishes to refile, you must prepare a new information with the Defendant's refiled address and bring it, along with a refile coversheet (this is the same as the direct file coversheet) to an Assistant Chief for approval.

## **III. BIND-UPS**

If upon review of a case you realize that it is actually a felony, bring the case to an Assistant Chief and the Chief of County Court to obtain bind up approval. If you are told to bind up the case, then you need to obtain sworn testimony as to the elements of the charge in order to bind up the case. **Rule 3.140(g)**

### **A. PROCEDURES**

- (1) Run the case on CJIS/TRFA to make sure that no NOE has been filed, speedies are waived, and there is no active demand for a speedy trial.
- (2) Conduct Pre File Conferences of any necessary witnesses
- (3) Order any evidence that you become aware of during the PFC
- (4) When you think the case is ready to be bound up take it to the appropriate Assistant Chief for review.
- (5) If approved, then prepare the necessary bind up paperwork package for Case Processing.
  - (a) County Court Coversheet (located at forms/charge forms/coversheet)
  - (b) Charges Forms for each charge (located at forms/charge forms/charge form)
  - (c) Citations if any
  - (d) Felony Discovery Exhibit (remember to categorize the witnesses)
  - (e) Attach sworn testimony (write work product at top)
  - (f) Charge Disposition Form (located under forms/information/charge disposition)
  - (g) Memo to felony ASA with reason why case is being bound up

- (6) When complete and approved by an Assistant Chief, take the file with the paperwork to Jennifer Green (5th Floor). She will send the file over to case processing and they will prepare the information for you.
- (7) If you need the bind up rushed, let an Assistant Chief know ASAP.
- (8) Sign the information created by Case Processing and have it notarized. They will email you when it is ready for pickup.
- (9) If the case is not on calendar, then request JA to set the case for report re: bind up.
- (10) File the felony information in open court. The clerk will stamp it.
- (11) Return your stamped felony information to case processing and keep a record for yourself.
- (12) Wait one week and run the Defendant in CJIS to see if a Felony case number was generated.
- (13) Once a felony case number has been generated, ask the JA to calendar the case once again.
- (14) Announce a Nolle Prose on the misdemeanor charge in open court. Without a Nolle Prose, the county court will retain jurisdiction on the misdemeanor charge and the speedy clock keeps running. See State v. Hernandez, 985 So.2d 1115 (Fla. 3d DCA 2008).

## **B. SPEEDY TRIAL PERIOD**

The State has 90 days in which to bring the defendant to trial in misdemeanors and 175 days for felonies. If a misdemeanor is consolidated with a felony, the speedy date for both is 175 days. The question becomes, when is the State precluded under Speedy Trial rules from binding up or refilling charges as a felony.

Grosser v. State, 24 So. 3d 718 (Fla. 4th DCA 2009). Here, the Fourth District dealt with “bind-ups.” Specifically, the Court held that when the State decides to bind up a misdemeanor to a felony it must do so before the 90 day speedy trial period elapses (unless there has already been a waiver of speedy trial) or all associated misdemeanors will be barred by the speedy trial rule.

State v. Nelson, 26 So.3d 570 (Fla. 2010). Defendant’s request for continuance before filing notice of expiration of speedy trial period, but after expiration of speedy trial period, resulted in waiver of defendant’s right to speedy trial on all charges arising from same criminal incident.

Bonilla v. State, 62 So.3d 1233 (5th DCA 2011). Court held that felony charge of DUI causing serious bodily injury was subject to speedy trial time limits for felonies, even though State had nolle prosecuted misdemeanor charge that arose out of same accident and filed felony information after expiration of shorter speedy trial time limit for misdemeanor. In footnote, Court indicated that result would have been different if case involved Felony DUI (based on prior convictions) because a conviction of felony DUI is obtained by proving a misdemeanor DUI conviction on the present charge and as well as proof of three or more prior DUI convictions. See State v. Woodruff, 676 So.2d 975 (Fla. 1996)

State v. Clifton, 905 So.2d 172 (5<sup>th</sup> DCA 2005). The State is not allowed to amend an information adding charges after the speedy trial period has expired.



#### IV. ARREST WARRANTS

Generally, when cases are direct filed or refiled, we do not ask for the defendant to be arrested; rather we afford the defendant the opportunity of being personally served first. If personal service fails, we must first investigate why it failed. Pull the return of service in order to determine if the address was incorrect and can easily be corrected. Traffic returns of service are in SPIRIT, misdemeanor crimes will be in the court file with the clerk of courts. If we cannot correct the problem, then we should file an arrest warrant (three attempts to serve are necessary per office policy).

Under **901.02**, an arrest warrant may be issued when:

- (1) There is a reasonable belief that the person complained against has committed an offense within the trial court's jurisdiction AND
- (2) A Complaint has been filed charging that person with the commission of a misdemeanor only AND
- (3) The summons issued to the defendant has been returned unserved.

#### **Completing the Arrest Warrant Paperwork:**

##### Requirements

- (1) **Coversheet "Warrant Only"** (Forms/chargeforms/coversheet)
- (2) **Arrest Warrant Checklist** (Get from Assistant Chief)
- (3) **Affidavit in Support of Arrest Warrant** (Created on a Word document alleging PC for the crime alleged and when service failed)(Ask Assistant Chief for sample)
- (4) **Verified Returns of Service (at least three)** (Pull from SPIRIT or get from the Clerk's Office)
- (5) **Arrest Warrant Form** (has biographical information on Defendant)
- (6) **Copy of Information or charge forms and Citations**

Bonel v. State, 651 So.2d 774 (3d DCA 1995). In case of a pre-arrest delay, the State must show the reasonableness of the delay and that it was diligent in its efforts to serve the arrest warrant in order to bring the defendant before the court within the statutory limit. In this case the court held that the delay was unreasonable because the State was aware of the Defendants whereabouts because the defendant was incarcerated in a state institution, yet did not serve the warrant until two months after it had been issued, after the SOL had expired, and presented no explanation for the delay.



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## **PART 4:**

# **CRIMINAL TRAFFIC OFFENSES**

## **GENERAL TRAFFIC PRINCIPLES**

### **A. CHARGING DOCUMENT**

**Fla. Tr. R. 6.165(a)** specifically permits the State to prosecute based on the uniform traffic citation (i.e., traffic ticket) as provided for in **Fla. Stat. § 316.650**.

“However, if the prosecution is by affidavit, information or indictment, a uniform traffic citation shall be prepared by the arresting officer at the direction of the prosecution or, in the absence of the arresting officer, by the prosecutor and submitted to the department.” **See also Fla. Tr. R. 6.040(b). Therefore, it is necessary to ensure a uniform traffic citation accompanies any and all criminal traffic charges.**

The traffic citation is the charging document. If the case is bound down from Circuit Court, direct filed (i.e., where there is no arrest), or transferred from Juvenile court, there is an information filed and citations are issued for numbering purposes only.

**Fla. Tr. Ct. R. 6.165(b)** provides that “the court may allow the prosecutor to amend in open court a traffic citation alleging a criminal traffic offense to state a different traffic offense. The arresting officer does not need to issue a new traffic citation. The court shall grant additional time to the defendant for the purpose of preparing a defense if the amendment has prejudiced the defendant.” **This permits amending charges in SPIRIT while in open court.**

### **B. FIVE DAY RULE**

**State v. Hancock, 529 So.2d 1200 (Fla. 5th DCA 1988)** – The requirement in **Fla. Stat. § 316.650(3)** that a traffic citation be filed with the clerk of the court within 5 days after issuance is not jurisdictional. Defendant’s failure to raise such issue prior to or at arraignment waives any objection. **Fla. Stat. § 932.65** provides that failure to timely file a citation is official misconduct subject to disciplinary proceedings, which indicates a legislative intent that a violation of the section is not to be considered jurisdictional. In other words, the failure to file a traffic citation within 5 days after issuance to the defendant does not cause the court to lose jurisdiction. **Loper v. State, 840 So.2d 1139 (Fla. 1st DCA 2003).**

Furthermore, there is no prejudice to the defense. Only the State is prejudiced from the delay in filing a traffic citation as speedy trial commences when the citation is issued, regardless of when it is filed with the clerk.

If a Defendant moves to dismiss the case because the officer did not file the citation within 5 days, the State must argue both the purpose of the 5-day rule as stated above and the lack of prejudice to the defense

### **C. DOUBLE JEOPARDY**

There is no double jeopardy problem so long as each crime contains at least one element which the other does not. **U.S. v. Dixon, 113 S. Ct. 2849 (1993); Blockburger v. U.S., 284 U.S. 299, 52 S. Ct. 180 (1932).**

**Prior Guilty on Traffic Infractions** – Prosecution for DUI is not barred by a prior guilty plea to a traffic infraction arising out of the same incident. **State v. Mathews, 654 So.2d 291 (Fla. 3d DCA 1995).**

**DUI/Marijuana** – DUI and possession of marijuana each contain an element the other does not. Thus, prosecution for both charges is not precluded on double jeopardy grounds. State v. Gonzalez, 3 FLW Supp. 210a (Fla. 11th Cir. 1995).

**DUI/DWLS** – The offenses of DWLS and DUI each contain an element the other does not. Double Jeopardy does not bar prosecution for DUI after a conviction for DWLS. Lazaro v. State, 2 FLW 185 (Fla. 11th. Cir. 1995).

**DUI/Fleeing and Eluding** – Prosecution for DUI after defendant entered pleas of guilty to charges of Fleeing a Police Officer and DWLS was not barred by double jeopardy. State v. Gregory, 648 So.2d 1220 (Fla. 2d DCA 1995).

**DUI/Leaving the Scene of an Accident** – When the DUI charge is lodged after the Defendant fled from the accident scene, they are two separate offense and not barred by double jeopardy. State v. Freire, 3 Fla. L. Weekly Supp. 540a (Fla. 11<sup>th</sup> Cir. 1995).

**Reckless Driving/Aggravated Assault** – The offenses of Reckless Driving and Aggravated Assault each contain an element that the other does not. Thus, the State can proceed on the Aggravated Assault charge arising out of the same conduct which the defendant plead guilty to on a reckless driving charge. State v. Godwin, 632 So.2d 228 (Fla. 2d DCA 1994).

Neither pleading to an accompanying traffic infraction nor having one's driver's license administratively suspended for DUBAL bars prosecution of DUI. State v. Henn, 662 So.2d 1391 (Fla. 4th DCA 1995). State v. Murray, 644 So.2d 533 (Fla. 4th DCA 1994). See also, Davidson v. Mackinnon, 656 So.2d 223 (Fla. 5th DCA 1995); State v. Blankenship, 642 So.2d 675 (Fla. 4<sup>th</sup> DCA 1994).

**However**, do not offer defendant a plea to simple DUI if there is a **felony DUI with serious bodily injury**. It will preclude a felony trial, because DUI is a lesser included offense.

#### **D. SPEEDY TRIAL**

"A defendant shall be 'taken into custody' for the purpose of **Rule 3.191** when the defendant is arrested, or when a traffic citation, notice to appear, summons, information, or indictment is served on the defendant in lieu of arrest." **Fla. Tr. Ct. R. 6.160.**

#### **Issuance of a Citation Without Arrest Does Not Start the Speedy Trial Period**

Ayres v. State, 898 So. 2d 1154 (Fla. 5th DCA 2005) holding that a DUI citation issued on the date of incident to the defendant when the defendant was not arrested did not begin the speedy trial period because it stated that future court appearance was "TBA" or "to be announced" and did not state the date and time of a court appearance or require the defendant to respond in any way, therefore, the citation was not issued "in lieu of arrest," which in turn means defendant was not "taken into custody" – the Fifth DCA examined both Criminal Rule 3.191 and Traffic Rule 6.160

State v. Coughlin, 871 So. 2d 935 (Fla. 5th DCA 2004) holding that a citation - the case does not specify, but it suggests it is a DUI citation - that was mailed to the defendant did not commence the speedy trial period because it did not contain a requirement that the defendant respond in any way as it read only that defendant was "to be notified" – thus defendant was not "taken into custody" for speedy trial purposes.

Fothergill v. State, 754 So. 2d 174 (Fla. 5th DCA 2000) holding that serving a citation for felony LSA with injuries, six days after the date of incident, did not commence the speedy trial period

because the citation read only "summons to be sent" and did not require that the defendant respond in anyway.

### **Discharge**

Discharge under the speedy trial rule bars the prosecution of all other crimes that were or might have been charged as a result of the same conduct or criminal episode as a lesser degree or lesser included offense. **Fla. R. Crim. P. 3.191(n)**.

However, speedy trial discharge of simple DUI does not bar prosecution of DUI with serious bodily injury. **State v. Woodruff, 676 So.2d 975 (Fla. 1996)**. See also **Nesworthy v. State, 648 So.2d 259 (Fla. 5th DCA 1994)** upholding a conviction of DUI with serious bodily injury that was tried within the felony speedy trial time even though the misdemeanor DUI speedy trial time had previously run.

Speedy Trial discharge does not trigger double jeopardy because the defendant has not actually been put in jeopardy. See **State v. Woodruff, 676 So.2d 975 (Fla. 1996)**. For double jeopardy to attach, the jury must have been impaneled and sworn in by the court, or, in a non-jury proceeding, the first witness must be sworn.

However, the principal of estoppel will bar prosecution for the same offenses from which the defendant has previously been discharged. See **Woodruff**. Accordingly, the speedy trial discharge of misdemeanor DUI does bar the prosecution of felony third DUI, even though felony DUI is a greater offense and requires proof of the additional element of the existence of three or more prior misdemeanor DUI convictions. "[T]he unique requirement of section **316.193(2)(b)** that there be a conviction of the current DUI misdemeanor in order to establish the crime of DUI after three previous DUI convictions" renders it impossible to prove the felony DUI. **State v. Woodruff, 676 So.2d 975 (Fla. 1996)**. See also, discussion under Bind-ups, citing to **State v. Lovelace, 906 So.2d 1258 (Fla. 4th DCA 2005)** and **State v. Jackson, 784 So.2d 1229 (Fla. 1st DCA 2001)**.

Therefore, when a misdemeanor DUI has been filed and the State "binds-up" the DUI to a felony because the Defendant has three or more prior DUI convictions, the prosecutor must either "Nolle Prose" the misdemeanor DUI or consolidate the misdemeanor into the Felony to avoid discharge based upon a speedy trial violation. **Hernandez v. State, 985 So.2d 1115 (Fla. 3rd DCA 2008)**

## **E. STATUTE OF LIMITATIONS**

**First Degree Misdemeanor – 2 Year Statute of Limitations.** See Fla. Stat. §775.15(2)(c).

- E.g., DUI w/ Property Damage Personal Injury. See Fla. Stat. § 316.193 (3)(ABC)1 and Fla. Stat. § 775.15 (2)(c).

**Second Degree Misdemeanor – 1 Year Statute of Limitations.** See Fla. Stat. §775.15(2)(d).

- First, second and third DUIs charged as misdemeanors have no designation by statute as first or second degree misdemeanors. Therefore, these offenses are misdemeanors of the second degree according to Fla. Stat. § 775.081(2): "[a]ny crime declared by statute to be a misdemeanor without specification of degree is of the second degree."

**Civil Infraction – 1 Year Statute of Limitations.** See Fla. Stat. § 775.15(2)(d).

## **F. FELONY TRAFFIC OFFENSES**

**DUI** – with death, serious bodily injury, or if Defendant has two or more prior convictions

**DWLS** – If 1) serious bodily injury or death or 2) driving on certain types of suspensions:

- Driving While License Suspended with Serious Bodily Injury. Fla. Stat. § 322.34(6)(b)
- Driving on an HTO (Habitual Traffic Offender) revocation. Fla. Stat. § 322.34(5)

- Driving with two prior DWLS convictions. **Fla. Stat. § 322.34(2)(c)**
- Driving on a permanent DUI revocation. **Fla. Stat. § 322.341**

**Fleeing or Eluding a Police Officer, Fla. Stat. 316.1935**

**Leaving the Scene of an Accident w/ Injury or Death** – If defendant leaves the scene of an accident knowing there is any injury. **Fla. Stat. § 316.027(1)(A); Fla. Stat. § 316.027(1)(B).**

**No Valid Driver's License With Death** – If defendant drives without a valid license in a careless and negligent manner resulting in death of another person. **Fla. Stat. § 322.34(6)(a).**

**Reckless Driving with Death is Vehicular Homicide.** If Reckless Driving results in serious bodily injury, the defendant has violated **Fla. Stat. § 316.192(3)(c)(2).**

### **Felony May Be Adjudicated as a Misdemeanor**

**Toledo v. State, 580 So.2d 335 (Fla. 3d DCA 1991)** – Defendant had three prior DUI convictions and moved to dismiss fourth DUI on the ground that the county court did not have jurisdiction over a felony charge. The appellate court held that the prosecutor had the discretion to choose to prosecute the misdemeanor instead of the felony violation. Once the prosecutor made that decision, county court properly exercised jurisdiction over the case.

## **G. JUVENILES**

In 1981, the law was changed to delete all references to juvenile traffic offenses in the juvenile court jurisdiction section. **See Laws of Florida, Ch. 81-218, section 2 and section 17; Ch. 81-259, section 31.**

“A court which has jurisdiction over traffic violations shall have original jurisdiction in the case of a minor who is alleged to have committed a violation of law or of a county or municipal ordinance pertaining to the operation of a motor vehicle; however, any traffic offense that is punishable by law as a felony shall be under the jurisdiction of the circuit court.” (i.e. all juvenile misdemeanor traffic offense are prosecuted in County Court and cannot be transferred to the Juvenile Circuit division) **Fla. Stat. § 316.635(1).**

However, there are additional sanctions that a court may impose on a minor convicted of any violation of Chapter 316. **Fla. Stat. § 316.655(5)(a).**

**J.R.S. v. State, 483 So.2d 834 (Fla. 2d DCA 1986)** – The court held that a court can either impose the alternative sanctions under the prior version of **Fla. Stat. § 316.655** or order a prison sentence in county jail for up to one year upon a conviction of misdemeanor fleeing a police officer.

**There are no bench warrants for juveniles.** If a juvenile defendant does not appear for a court date, a judge cannot issue a bench warrant, but may suspend the driver's license.

## **H. WITHHOLD OF ADJUDICATION**

A withhold of adjudication is not a conviction for **Fla. Stat. § 322.27** purposes (i.e., points on license after conviction).

Pursuant to Florida Law, a plea of a withhold of adjudication without probation is a **legally cognizable resolution and not grounds for appeal.**

**However,** a withhold may be considered by the DHSMV as a “conviction” for purposes of an administrative Habitual Traffic Offender (HTO) suspension. Also, in **Raulerson v. State**, the Supreme Court of Florida held that a withhold is a “conviction” for purposes of charging the defendant with the felony charge for a third or subsequent conviction for DWLS. **763 So.2d 285**

(Fla. 2000) (adopting the rationale of the Court in State v. Keirn, 720 So.2d 1085 (Fla. 4<sup>th</sup> DCA 1988)). The court reasoned that the term “conviction” as used in the statute does not require an adjudication of defendant’s guilt. “The focus of this definition is whether an offense was committed and not on the judicial decision of whether to impose or withhold adjudication.” See Id.

A withhold on a criminal charge can also be **sealed** by leave of Court under certain circumstances, if the State has no objection.

## **I. RESTITUTION**

Restitution cannot be ordered by the court unless there is a **nexus** between the crime and the accident. **The correct test for restitution is whether “but for” the criminal episode, the damages would have been incurred by the victim.**

**However**, the defendant can consent to pay restitution as part of a plea agreement. Wiesman v. State, 681 So.2d 1189 (Fla. 2d DCA 1996).

**For criminal traffic offenses like NVDL, DWLS, and LSA, there is no nexus between the crime and the accident.**

### **DWLS**

In a DWLS case, after a finding of guilt by the trial court or jury, the court may not impose restitution. The courts have concluded that the fact the defendant’s license was suspended was not causally connected to the crash.

The suspension of the license is an existing circumstance rather than the cause of the accident. See Schuette v. State, 822 So.2d 1275 (Fla. 2002); Cheek v. State, 700 So.2d 731 (Fla. 5<sup>th</sup> DCA 1997).

- According to Schuette, 822 So.2d at 1284, restitution requires a causal relationship between the criminal offense of DWLS and the accident resulting in damage or loss. Failure to carry the burden of proving causal relationship between offense of driving and suspended license and automobile accident, precludes the defendant from being ordered to pay restitution. No such relationship exists with DWLS. However, where the suspension is based on an accumulation of too many points for poor driving, there may be more evidence of a causal relationship. Id. at 1283 (fn 9).

### **LSA**

The victim cannot recover “damages arising out of the accident that would have occurred with or without the [defendant] committing the offense of leaving the scene of the accident.” State v. Williams, 520 So.2d 276 (Fla. 1988).

- However, the court may be able to impose restitution when the damage resulted directly from the actions of the defendant.

Durrett v. State, 530 So. 2d 483, 484 (1st DCA 1988). “Unlike *Williams*, the record in the instant case is clear that the six-car accident causing extensive property damage and personal injuries resulted from the high speed chase initiated by the defendant. Moreover, as above noted, the defendant was actually convicted of, not only the leaving the scene offense, but also reckless driving and attempting to elude a police officer. We are of the view that the necessary causal relationship required by Section 775.089(1)(a), Florida Statutes (1985), is satisfied.”

Triplett v. State, 709 So.2d 107 (Fla. 5<sup>th</sup> DCA 1998) – Court erred in imposing restitution on defendant who pled to LSA. The court held that the criminal episode in this case, the LSA, did not

commence until the defendant elected to leave the scene once he became aware that personal injury had occurred in the collision. However, the court did note that “if there was any evidence in this record that the victim’s injuries or damages **were exacerbated by the lack of immediate assistance** due to Triplett’s criminal violation of LSA, there might be an argument for restitution to that extent.”

**G.H. v. State, 414 So.2d 1135 (Fla. 1st DCA 1982)** – restitution allowable based on **plea agreement** on leaving the scene of accident charge where agreement includes State’s abandonment of criminal mischief charge.

**Ferris v. State, 558 So.2d 179 (Fla. 2d DCA 1990)** – Restitution on LSA affirmed when defendant consented to pay restitution **as part of a plea** in order to get less jail.

**Longshore v. State, 655 So.2d 1139 (Fla. 5<sup>th</sup> DCA 1995)** – Court held that regardless of the fact that defendant caused accident which preceded the LSA, court could not impose restitution on LSA charge.

#### **Jurisdiction for Court Ordered Restitution**

On a misdemeanor, the court has five years of jurisdiction over the restitution order. **Fla. Stat. § 775.089(3)(a)**. But remember, if you had the court reserve jurisdiction on restitution, you only have 60 days to enter the order. Restitution is reserved for the victim only (in some cases, the victim’s insurance company or health care provider). **Watson v. State, 579 So.2d 900 (Fla. 4<sup>th</sup> DCA 1991)**; **Gladfelter v. State, 618 So.2d 1364 (Fla. 1993)**.

#### **Restitution for Medical Bills**

Admissible as nonhearsay evidence. Here, the Court acknowledged that hearsay is generally inadmissible to prove the amount of restitution. However, the court found that medical bills introduced through the victim was nonhearsay because the bills constituted part of a contract that created a specific debt for a specific amount. The court stated: “A witness’ testimony that she received a medical bill and either made payment, or did not challenge it, is testimony concerning offer and acceptance, the words of a contract. Words of a contract, often characterized as verbal acts, are nonhearsay because they have independent legal significance - the law attaches duties and liabilities to their utterance.” **A.J. v. State, 677 So.2d 935, 937 (Fla. 4<sup>th</sup> DCA 1996)**

- Under **A.J. v. State**, in a restitution hearing, the argument regarding medical bills as nonhearsay evidence may be extended to numerous other areas to allow the State to introduce other nonhearsay evidence, i.e., mechanic bills for auto repair, attorney’s fees, rental car bills that have been paid for etc.



**NO VALID DRIVER'S LICENSE**

§322.03, Fla. Stat.

**A. ELEMENTS**

To prove the crime of No Valid Driver's License, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) drove a motor vehicle upon a highway in this state.
2. At the time, [he] [she] did not have a valid driver's license recognized by the Department of Highway Safety and Motor Vehicles of the State of Florida.

**B. PENALTIES**

**Second Degree Misdemeanor** – 60 days in jail/\$500 fine max. **Fla. Stat. 775.082(4)(b), 775.083(1)(e).**

## NO VALID DRIVER'S LICENSE PREDICATE QUESTIONS

### POLICE OFFICER

1. Please state your name and spell your last name for the record.
2. Are you employed?
3. What is your occupation?
4. How long have you been so employed?
5. Please inform the jury of your training and experience in law enforcement.
6. I would now like to call your attention to an incident that occurred on \_\_\_\_\_ (date) at around \_\_\_\_\_ (time).
7. Do you remember that day?
8. What were your duties on that date?
9. On that day did you come into contact with someone who later became known to you as \_\_\_\_\_ (Defendant's name)?
10. Do you see that person in the courtroom today?
11. Can you please point him/her out by an article of clothing?

**Your Honor, let the record reflect that the Witness has correctly identified the Defendant.**

12. How did you first come into contact with the Defendant?
13. Did you see the Defendant driving the car?
  - **If no one saw the Defendant driving, use circumstantial evidence to prove the driving.**
  - Did the Defendant have the keys to the car?
  - Did the Defendant exert any ownership over the vehicle?
  - Was the car registered to the Defendant?
  - What led you to believe the Defendant was driving a car?
14. On what street, if any, was the Defendant driving the car?
15. Did the traffic stop occur in Miami-Dade County, Florida?
16. After your initial contact with the Defendant, what happened next?
17. Did you at any time request the Defendant to produce his/her driver's license/permit?
18. Did the D produce a driver's license/permit?
19. Did he explain why he did not have a driver's license? [**Make sure there are no Miranda Issues**]
20. What was the name on the ID Card?
  - Or: what was the name given by the defendant?
21. DOB?

22. Address?

23. Height?

24. Weight?

25. Eye color?

26. After taking down this information what did you do next?

- Response: I asked the station to run the Driver's traffic record and it came up as none found.

**Pre-mark all exhibits. If Defendant has no traffic printout, go to the Clerk's office and get a certified "no driving record found" printout. This is admissible as a record that the Defendant has no driving history with the State of Florida.**

**For the record, I am showing the defense counsel State's \_\_\_\_\_ (i.e. 1-A) marked for identification purposes only.**

**I am now showing it to the witness.**

27. Officer, do you recognize State's \_\_\_\_ (i.e 1-A) for identification purposes?

28. What is it?

- Response: Defendant's driving record
- **Pre-try your officer to ensure that they are able to read and interpret the traffic printout.**

29. How do you recognize it as such?

30. What is the name listed on the driving record?

31. What is the DOB listed on the driving record?

32. What is the address listed on the driving record?

33. What type of document is the Defendant's driving record?

- Response: It is a document under seal
- **Pre-try your officer to ensure that he/she knows that the traffic printout is a document under seal.**

34. What agency is this document from?

**Your honor, I move State's Exhibit \_\_\_\_\_ (i.e. 1-A) for Identification to be admitted into evidence.**

35. Did the defendant have a license at the time of the stop?

36. How do you know?

37. Is it legal to drive in the State of Florida without a driver's license?

**DRIVING WHILE LICENSE SUSPENDED, REVOKED, OR CANCELLED WITH  
KNOWLEDGE**

§ 322.34(2), Fla. Stat.

**A. ELEMENTS**

To prove the crime of Driving While [License] [Driving Privilege] is [Suspended] [Revoked] [Cancelled], the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) **drove a motor vehicle upon a highway in this state.**
2. **At the time, [[his] [her]] [[license] [driving privilege]] was [suspended] [revoked] [cancelled].**
3. **At the time (defendant) drove a motor vehicle upon a highway in this state, (defendant) knew that [[his] [her]] [[license] [driving privilege]] was [suspended] [revoked] [cancelled]].**

**Whether (defendant) knew of the [suspension] [revocation] [cancellation] is a question to be determined by you from the evidence.**

**B. PENALTIES**

**Fla. Stat. § 322.34(2)(a) is a Second Degree Misdemeanor**

**Fla. Stat. § 322.34(2)(b) is a First Degree Misdemeanor**

**C. DEFINITIONS**

**Drive** – to **operate** or be in **actual physical control** of a motor vehicle in any place open to the general public for purposes of vehicular traffic. **Fla. Stat. § 322.01(15).**

**Motor vehicle** – any self-propelled vehicle, including a motor vehicle combination, not operated upon rails or guideway, excluding vehicles moved solely by human power, motorized wheelchairs, and motorized bicycles as defined in **Fla. Stat. §316.003. See Fla. Stat. §322.01(27).**

**Moped is a Motor Vehicle** – **See Soto v. State, 711 So.2d 1275 (Fla. 4<sup>th</sup> DCA 1998)** (a moped is a vehicle and requires a license); **Jones v. State, 721 So.2d 320 (Fla. 2<sup>d</sup> DCA 1998)** (a moped is a motor vehicle for DWLS); **State v. Meister, 849 So.2d 1127 (Fla. 4<sup>th</sup> DCA 2003)** (a person on a moped can be guilty of DWLS. The statute is meant to include mopeds as motor vehicles.)

**All-Terrain Vehicle is a Motor Vehicle** – **Hinson v. State, 710 So.2d 678 (Fla. 1<sup>st</sup> DCA 1998)** (three-wheeled All-Terrain Vehicle is a motor vehicle for purposes of DWLS statute because it does not qualify under any of the designated exceptions)

**“Goped” is a Motor Vehicle** – **See State v. Riley, 698 So.2d 374 (Fla. 2<sup>nd</sup> DCA 1997)** (a “goped” is within the definition of motor vehicle in **322.01(26)** and **316.003(21)**)

**Motorized Bicycle** – “. . . is a vehicle propelled by a combination of human power and an electrical helper motor capable of propelling the vehicle at a speed of not more than 20 MPH . . .” **See Fla. Stat. 316.003(2).**

**Street or highway** – The entire width between the boundary lines of a way or place if any part of that way or place is open to public use for purposes of vehicular traffic. **See Fla. Stat. §322.01(38).**

**Parking Lot is a Street/Highway** –A parking area that is open to public use is considered a street or highway for DWLS purposes even if the area is not owned or maintained by government. State v. Lopez, 633 So.2d 1150 (Fla. 5th DCA 1994). See also Lomanek v. Florida, 2 FLW Supp. 192a (Fla. 19th Cir. Ct. 1994); State v. Berkshire, 42 Fla. Supp. 2d 83 (Fla. 15th Cir. Ct. 1990).

**Revocation** – The termination of the licensee’s privilege to drive, *i.e.*, HTO 1yr, 3yr, 5yr or Permanent Revocation.. See Fla. Stat. §322.01(35).

**Suspension** – The temporary withdrawal of a licensee’s privilege to drive a motor vehicle, *i.e.* DUI, DWLS, FTA, Failure to pay, DUBAL, Refusal to Submit, and any adjudication under Fla. Stat. § 812.014 or § 812.015 for Theft. See Fla. Stat. § 322.01(36).

#### **D. CASE LAW**

##### **GENERALLY**

##### **The Difference between F.S. §322.34(1) & §322.34(2)**

**Fla. Stat. § 322.34(1)**, the **infraction**, provides that “anyone whose driving privilege has been canceled, suspended, or revoked” who is not a Habitual Traffic Offender, who drives is guilty of a moving violation. **There is no knowledge requirement for the infraction.**

**Fla. Stat. § 322.34(2)**, the **misdemeanor**, now requires that the person whose license is canceled, revoked, or suspended drive “**knowing of such cancellation, suspension, or revocation.**”

- As of 1997, DWLS has a **knowledge** element. Notice on the traffic printout alone will not meet this element. The notice date can be found on the traffic print-out just to the right of the suspension. A date will appear and this date is the date notification was sent to the Defendant of the suspension.
- Pursuant to this subsection, the **element of knowledge can be satisfied if:**
  - the person has been **previously cited** with **Fla. Stat. § 322.34(1)**, the infraction; or
  - the person **admits to knowledge** of the cancellation, suspension, or revocation; or
  - the person **received notice** as provided in **Fla. Stat. § 322.34(4)**.

**Fla. Stat. § 322.34(4)** provides for “any judgment or order rendered by a court or adjudicatory body (such as the DHSMV) or any uniform traffic citation that cancels suspends, or revokes a person’s driving privilege.”

- Suspensions related to criminal convictions are rendered through a judgment or court order.
- DUI citations provide notice of a DUBAL suspension after a 10-day period from the date of incident.

**Fla. Stat. § 322.34(3)** does allow the court to consider other evidence than previously mentioned to show that the person had knowledge.

**Fla. Stat. § 322.34(5)**, is a **felony**, relating to someone who drives while having a **Habitual Traffic Offender suspension**.

##### **Right to Prove DWLS Prior to Trial**

Trial court may not dismiss criminal charge of DWLS at arraignment, without giving the State the opportunity to show and prove its case. State v. Roque, 13 Fla. L. Weekly Supp. 34a (11th

**Cir. October 14, 2005).** Therefore, it is an abuse of discretion for the court to dismiss a charge after merely reviewing a citation, arrest affidavit, or traffic printout at arraignment.

#### **Driver's License Not Required**

Defendant may be charged with DWLS even where a license has never been issued by the DMV. **Carrol v. State, 761 So.2d 417 (Fla. 2d DCA 2000).** In Carrol, the court reasoned that under Chapter 322, the legislature has specifically used the terms “driving privilege” and “driver’s license,” thus reasoning that the legislative intent is to apply the laws specifically to all who enjoy the privilege of driving, and not merely those who have obtained a driver’s license.

#### **Reasonable Suspicion Required**

State cannot proceed on a DWLS charge if the initial traffic stop was not supported by reasonable suspicion. **See State v. Perkins, 760 So.2d 85 (Fla. 2000).**

#### **DWLS WITH A PRIOR CONVICTION, F. S. § 322.34(2)(B)**

##### **The Prior Conviction Must Be Alleged in the Charging Instrument**

Any factor that elevates the degree or level of a criminal offense must be alleged in the charging instrument. **See State v. Haddix, 668 So.2d 1064 (Fla. 4<sup>th</sup> DCA 1996).** The fact of a Defendant’s prior conviction for DWLS elevates the current charge of DWLS from a second degree misdemeanor to a first degree misdemeanor. Therefore, if the Defendant is initially issued a citation for **322.34(2)** or **322.34(2)(a)**, and the prosecutor later learns of the Defendant’s prior conviction for DWLS, the current citation must be amended to **322.34(2)(b)** or the State must file an information which alleges the prior conviction under **322.34(2)(b)**.

**Certified Convictions** are necessary to prove an essential element if proceeding with DWLS as a First Degree Misdemeanor. **See Garcia v. State, 800 So.2d 725 (Fla. 2d DCA 2001).** **See also State v. Pelicane, 729 So.2d 534 (Fla. 3d DCA 1999)** (holding convictions in Felony “Fourth” DUI must be proven beyond a reasonable doubt and driving record along with clerk docket is not sufficient to prove conviction). **See also Sylvester v. State, 770 So.2d 249 (Fla. 5<sup>th</sup> DCA 2000)** (holding traffic printout alone is not sufficient to prove prior convictions.) Thus, you will need to pull the defendant’s certified convictions from the clerk’s office prior to trial. The court eventually receded from Sylvester in allowing the State to introduce other identifying information to tie a defendant to his driving record in order to prove the prior convictions. **See Arthur v. State, 818 So.2d 589 (Fla. 5<sup>th</sup> DCA 2002).**

Beware of relying on convictions prior to Oct. 1, 1997. **Thompson v. State, 887 So.2d 1260 (Fla. 2004).** Knowledge was not a necessary element prior to this date. Therefore, prior convictions that did not require knowledge could not be used under the amended statute (requiring knowledge) to enhance charge to a felony DWLS.

In prosecuting a **habitual traffic offender** for driving with a revoked license, the state only needs to show that the license has been revoked and does not have to list the underlying offenses that led to the revocation. **See Arthur v. State, 818 So.2d 589 (Fla. 5<sup>th</sup> DCA 2002); but see Kallelis v. State**, 909 So.2d 544 (Fla. 4<sup>th</sup> DCA 2005).

#### **Bifurcated Jury Trial**

When a Defendant goes to a jury trial on a charge of **Fla. Stat. § 322.34(2)(b)**, the trial must be conducted in two stages:

1. The State must first prove the elements of the underlying offense of DWLS to the jury as discussed in the preceding pages.

2. If the jury returns a verdict of guilty on the underlying charge of DWLS, the State must then prove the Defendant's prior conviction for DWLS beyond a reasonable doubt **to the same jury panel** that found the Defendant guilty.

In the second stage of the bifurcated jury trial, the State may only submit the Defendant's certified conviction(s) for the prior DWLS and a properly redacted version of the Defendant's traffic printout. The State may not develop the underlying facts of the prior DWLS conviction(s) unless the Defendant contests the validity of such conviction(s). If the Defendant stipulates to the prior conviction, that element of the case is proved, the State and the Court must accept the stipulation and the second stage of the trial must not be conducted. Finally, a Defendant may not collaterally attack the conviction(s) presented in the second stage of the bifurcated trial. See State v. Harbaugh, 754 So.2d 691 (Fla. 2000).

#### **When A Withhold of Adjudication is a "Conviction"**

Raulerson v. State, 763 So.2d 285 (Fla. 2000); State v. Keirn, 720 So.2d 1085 (Fla. 4<sup>th</sup> DCA 1998) – A withhold of adjudication is a "conviction" for purposes of charging the defendant with the felony charge for a third or subsequent conviction for DWLS. "Conviction" as used in statute does not require an adjudication of defendant's guilt. The 4th DCA noted in Keirn that: "The focus of this definition is whether an offense was committed and not on the judicial decision of whether to impose or withhold adjudication." Accordingly, it follows that a withhold of adjudication for a prior DWLS may also be used to charge a defendant with **322.34(2)(b)**, the First Degree Misdemeanor.

- **Practice Tip:** It is advisable to inform the defendant if a plea will habitualize him.

#### **Revocations Effective Until Driver Re-instates License**

State v. Green, 747 So. 2d 1007 ( 3<sup>rd</sup> DCA 2000) When a Defendant's license is revoked, his driving privileges are terminated, not temporarily withdrawn for the five-year period. "When the five-year revocation period expired, the defendant's driver's license did not magically reappear. Although he was eligible to get his license restored, he needed to take affirmative steps to get his driving privileges reinstated." Because the Defendant never sought reinstatement of his driving privileges, his license remained revoked even past the expiration of the five-year period.

- **Practice Tip:** A license remains suspended, canceled or revoked even if the chronological time frame of suspension, cancellation or revocation has expired unless the defendant **affirmatively** petitions DHSMV for reinstatement of his license, pays the appropriate reinstatement fee, and such reinstatement is granted. Always check the date of the citation and the date of the end of the suspension or revocation. In many cases, a defendant simply needs to reinstate his license. However, his license is still considered suspended.

#### **KNOWLEDGE VS. NOTICE**

##### **Rebuttable Presumption of Knowledge**

The knowledge element language in **Fla. Stat. § 322.34(2)**, the misdemeanor, was changed July 1, 1998, to include "[t]here shall be a rebuttable presumption that the knowledge requirement is satisfied if a judgment order as provided in subsection (4) appears in the department's records for any case except for one involving a suspension by the department for failure to pay a traffic fine or for a financial responsibility violation." This means a court revocation or an administrative suspension for anything **other than FTP or FR** entered on the driver's license transcript alone should be sufficient to prove knowledge. In other words, the State cannot prove knowledge if the suspension is because of a financial responsibility or failure to pay. See Brown v. State, 764 So.2d 741 (Fla. 4<sup>th</sup> DCA 2000). There must be another method for the state to prove knowledge (such as the defendant's statement or prior convictions for

Driving While License Suspended), as the “notice given” reflected on the traffic printout is not sufficient by itself to prove knowledge in Failure to Pay or Financial Responsibility cases.

The State still enters the defendant’s **driving license transcript**, but that alone may not carry the burden of proving knowledge.

1. Admit the defendant’s priors for DWLS. Leave all entries regarding prior offenses of DWLS on the driver’s license transcript. Since “knowledge” and not just “notice” is one of the elements of the offense, the State should be allowed to introduce all evidence of defendant’s knowledge as the State has the burden to prove beyond a reasonable doubt that the defendant knew his license was suspended. If the defense objects, let the defense stipulate to “knowledge,” and the State will redact the previous charges of DWLS from the printout. Also, admit certified copies of defendant’s prior convictions if available.
2. Have the court take judicial notice of the court files on which the court revoked the defendant’s driving privilege (i.e., DUI cases, marijuana cases, etc.) **so as to prove the defendant was on notice of the suspension, which is sufficient under 322.34(4)**. However, beware that the Court may not take judicial notice of an element of the State’s case, such as a prior conviction (especially because in Dade County there are seldom fingerprint cards in the court file).
  - Pursuant to **Fla. Stat. § 90.202(1) and § 90.203**, the Court **shall take compulsory judicial notice** of the court file provided the State files its request for such notice **10 or more days prior to trial** and provides notice of this request to defense counsel. Also, the contents of the court file must accurately portray the fact to be noticed.
  - At the close of the State’s case, the court may take judicial notice of the contents of the court file and submit the contents to the jury.
    - However, there is no unfair surprise permitted. **Milton v. State, 429 So.2d 804 (Fla. 4th DCA 1983)**. After the jury was sworn, the prosecutor orally requested the court to take judicial notice of a previous court file. Neither the court file nor a written request for judicial notice had been provided to defense counsel in discovery. The 4th DCA held that the trial court’s taking judicial notice pursuant to the prosecutor’s request constituted a discovery violation and “unfair surprise.” While acknowledging that a court may take judicial notice without a written request, the court held that in this case, the defendant was not accorded a reasonable opportunity to be heard prior to the determination of the propriety of taking judicial notice of particular matters.
    - **Huff v. State, 495 So.2d 145 (Fla. 1986)** – Where defendant was granted a new trial, it was improper to take judicial notice of evidence produced at first trial.
  - If the defendant has a DUI suspension or revocation, call the **arresting officer and breath officer from Defendant’s prior DUI case[s]** as witnesses in your DWLS case.
    - The arresting officer for Defendant’s prior DUI will have given the Defendant a citation which informed the Defendant his license was suspended either for refusing to blow or for blowing over the legal limit. If your arresting officer from the prior DUI is unavailable, as explained earlier, have the court take judicial notice of the court file for the prior DUI which will include the **citation for the prior DUI itself**.
    - In the prior DUI case, the breath officer read the defendant the Implied Consent law after the Defendant was arrested for DUI. Introduce the Breath Card and the Implied Consent law Form into evidence.

**Notice of cancellation, suspension, or revocation was given to defendant**



**Manner** – Notice is given by personal delivery or by deposit in the U.S. Mail in an envelope, first class, postage prepaid, addressed to the licensee at his last known mailing address furnished to the department. See Fla. Stat. § 322.251(1).

**Effect of Mailing** – Such mailing by the department constitutes notification and any failure by the person to receive the mailed order will not affect or stay the effective date or term of the cancellation, suspension or revocation. See Fla. Stat. § 322.251(1).

State does not have to prove that the defendant received actual notice. See Arthur v. State, 818 So.2d 589 (5th DCA 2002) (fn. 5). However, it is important to note this is an HTO case, where knowledge is already presumed as it is a suspension ordered by the DMV (i.e. adjudicatory body). Thus, if you are proceeding under FTP or FR suspensions, there must be another method for you to prove knowledge (such as defendant’s statement), since the “notice given” on the TPO will not be sufficient to prove knowledge in FTP or FR cases.

**Notice is an essential element of DWLS** – Mitchell v. State, 704 So.2d 1155 (Fla. 4<sup>th</sup> DCA 1998). Failure of trial judge to instruct jury on essential and material element of notice on the charge of DWLS required reversal of judgment of conviction and sentence.

**Change of Address is no defense for not having notice** – All licensed drivers who change their mailing address must, **within 10 calendar days**, either obtain a replacement license or request in writing a change-of-address sticker. See Fla. Stat. §322.19(2). Thus, the defendant is legally precluded from claiming he did not receive notice because he changed his residence.

**Effective Date of Suspension** – The suspension is complete upon expiration of twenty days after deposit in the U.S. Mail. See Fla. Stat. § 322.251(3); Vara v. State, 2 FLW Supp. 191c (Fla. 19 Cir. Ct. 1992).

**Effective Date of Refusal or DUBAL Suspension** – A law enforcement officer or correctional officer shall take the driver’s license of a person who refuses to submit to a lawful breath, blood or urine test, or who drove with an unlawful breath or blood alcohol level. The officer shall serve the person with notice of license suspension and issue the person a 10-day temporary permit if the person is otherwise eligible to drive. See Fla. Stat. § 322.2615.

- **Fla. Stat. § 322.341** provides that driving while having a license suspended or revoked due to a DUI permanent revocation is a felony.
- **Fla. Stat. § 322.26(1)(a)** and **Fla. Stat. § 322.28(3)** provides that persons whose license is suspended because of a DUI manslaughter or a DUI permanent revocation are not eligible for a hardship license.
- **Fla. Stat. § 322.283(1)** now provides that when the court revokes a defendant’s license as a result of the offense and orders the defendant to serve jail time, the “period of suspension or revocation shall commence upon the defendant’s release from incarceration.

An entry in a driver’s record that the notice required by **Fla. Stat. § 322.251** was given shall constitute sufficient evidence that such notice was given. See Fla. Stat. § 322.201. Sorrell v. State, 855 So.2d 1253 (Fla. 4<sup>th</sup> DCA 2003) (Defendant was on trial for driving while his license was permanently revoked. The State introduced a copy of his driving record, which showed the nature of the revocation and the fact that notice was sent. It was not necessary for the State to prove the underlying convictions that gave rise to the revocation.) Also see State v. James, 928 So.2d 1269 (Fla. 2d DCA 2006). Importantly, notice on the TPO is sufficient so long as it does not apply to an FTP or FR suspension.

However, where State fails to introduce traffic printout into evidence, and instead requests that the court take judicial notice of it, State fails to establish necessary element of revocation (or suspension). **Kirschner v. State, 915 So.2d 624 (2d DCA 2005)**. Therefore, in addition to asking the court to take judicial notice of the defendant's traffic printout, you must make it relevant to the defendant on trial and subsequently move the traffic printout into evidence.

## **DEFENSES**

### **Improper Revocation**

An allegedly "improper" revocation is **not** a defense to the charge of DWLS. **Rafine v. State, 1 So.3d 1251 (4<sup>th</sup> DCA 2009)** ("Assuming for the sake of argument that his license should not have been revoked ... Appellant should have challenged his revocation and had his license re-instated before getting behind the wheel.").

### **Necessity Defense**

The defense of necessity applies to traffic offenses including DWLS. However, there must be sufficient evidence to warrant such an instruction before the instruction is given.

"The essential elements of the defense of necessity are:

- (1) that the defendant reasonably believed that his action was necessary to avoid an imminent threat of death or serious bodily injury to himself or others,
- (2) that the defendant did not intentionally or recklessly place himself in a situation in which it would be probable that he would be forced to choose the criminal conduct,
- (3) that there existed no other adequate means to avoid the threatened harm except the criminal conduct,
- (4) that the harm sought to be avoided was more egregious than the criminal conduct perpetrated to avoid it, and
- (5) that the defendant ceased the criminal conduct as soon as the necessity or apparent necessity for it ended."

**Franco v. State, 7 FLW Supp. 654a (Fla. 11<sup>th</sup> Cir. App. 1999) (citing Hill v. State, 688 So.2d 901, 905 n. 4 (Fla. 1996)).**

The 11<sup>th</sup> Circuit refused to expand the necessity defense "to one that encompasses an imminent threat to property." **See Franco**. The Court explicitly rejected the holding of the 15<sup>th</sup> Circuit in **Newsome v. State, 1 FLW Supp. 6a (Fla. 15<sup>th</sup> 1992)**.

**Umana v. State, 11 Fla. L. Weekly Supp. 875b (11<sup>th</sup> Cir. Ct. 2004)** – No "scintilla" of evidence to support necessity instruction upon officer testimony where officers did not testify as to defendant's reasonable belief that driving was necessary to avoid death or serious bodily injury. Nor was there testimony as to why defendant chose to drive that night. Defendant's statement (which came in through officer testimony) that passenger was not in any condition to drive was not enough. However, instruction was permissible where only evidence supporting necessity defense was of Defendant himself, stating that passenger was in no condition to drive so defendant took the keys and drove. Instruction was proper regardless of how weak or improbable his testimony was.

**Linnehan v. State, 454 So.2d 625, 626 (Fla. 2d DCA 1984)** – Defendants must have reasonably believed that their action was necessary to avoid an imminent threatened harm, that there are no other adequate means except those which were employed to avoid the threatened harm, and that a direct causal relationship may be reasonably anticipated between the action taken and the avoidance of the harm.

**Bozeman v. State, 714 So.2d 570 (Fla. 1<sup>st</sup> DCA 1998)** – court’s refusal to give requested instruction on defense of necessity was error.

### **Introduction of a Traffic Printout into Evidence**

**Relevance** – Does the biographical data (e.g., name, date of birth, address, etc.) on the printout match the information provided by the defendant to the officer at the scene?

### **Authenticity**

- **Clerk of the Court Printout** – The complete driving record of any individual duly certified by machine imprint of the clerk of a court shall be received as evidence in all courts of this state without further authentication, provided the same is otherwise admissible in evidence. **See Fla. Stat. § 322.201. Lingo v. State, 2 FLW Supp. 360a (Fla. 11th Cir. App. 1994)** (holding that a computer printout from DHSMV is admissible into evidence, without further authentication, as an exception to the hearsay rule).
- **Computer Terminal** – The court can receive into evidence information obtained from a computer terminal electronically connected to the computer data center of the department. **See Fla. Stat. § 322.201.**

### **Hearsay – Public Records Exception, Fla. Stat. § 90.803(8)**

- record or data compilation
- of public offices or agencies
- setting forth matters observed pursuant to a duty as to matters which there is a duty to report

Self-authenticating driving record is not testimonial hearsay. **Card v. State, 927 So.2d 200 (Fla. 5th DCA 2006).** **See also Sproule v. State, 927 So.2d 46 (Fla. 4th DCA 2006)** (holding the traffic printout is a public record under seal and is non-testimonial in nature). A person’s driving record is not testimonial in nature as it is “not accusatory and does not describe specific criminal wrongdoing of the defendant.” **Card, 927 So.2d at 203.** Rather driving records are “kept for public benefit and are not kept solely for trial purposes.” **Id.** Instead of describing specific criminal wrongdoing, it merely represents the results of a public records search. **Id.**

Furthermore, **F.S. 322.202(1)** evidences the legislature’s intent to keep printouts for mere record-keeping purposes and not solely for trial. Specifically, the legislature has found “that the divisions are not adjuncts of any law enforcement agency in that employees have no stake in particular prosecutions.” Moreover, “errors in records maintained by the divisions are not within the collective knowledge of any law enforcement agency.”

### **Redaction**

**Reese v. State, 2 FLW Supp. 553e (Fla. 19th Cir. Ct. 1994)** – When driving was the only contested issue at DWLS trial, the court found it was reversible error to introduce evidence of entire history of 19 different indefinite suspensions on the defendant’s driving record. So if the defense stipulates to “notice,” the State will redact the printout to reflect only one open suspension and not all open suspensions.

- However, if notice or suspension will be contested by the defendant at trial, the § **90.403** objection to multiple suspensions should be overcome because the State has the burden to prove beyond a reasonable doubt that the license was suspended and that notice was sent to the defendant.

- Similarly, for offenses occurring after October 1, 1997 (when knowledge became an element), you should argue to leave all entries regarding prior offenses of DWLS on the transcript, unless the defense will stipulate to knowledge.

**Pino v. State, 3 FLW Supp. 324a (Fla. 11th Cir. Ct. App. 1995)**—Failure to sever DWLS and DUI charges is not reversible error as long as the driving record is redacted to eliminate all information regarding defendant’s prior suspensions except the suspension(s) at issue.

- The court factually distinguished **Ortega v. State, 1 FLW Supp. 559b, (Fla. 11th Cir. Ct. App. 1993)** because the driving record presented in the **Ortega** case had information on prior license suspensions even though the reasons for those suspensions had been eliminated. **See also, Martinez v. State, 6 Fla.L.Weekly Supp. 396a (Fla. 11<sup>th</sup> Cir. Ct. App. February 26, 1999)** (no error in refusing to sever DWLS if printout is properly redacted).

## DRIVING WHILE LICENSE SUSPENDED PREDICATE QUESTIONS

### POLICE OFFICER/NON-ACCIDENT CASE

1. Please state your name and spell your last name for the record.
2. Are you employed?
3. What is your occupation?
4. How long have you been so employed?
5. Please tell the jury about your law enforcement training and experience, including any specific experience with traffic stops.
6. I would now like to call your attention to an incident that occurred on \_\_\_\_\_ (date) around \_\_\_\_\_ (time).
7. Do you remember that day?
8. What were your duties on that date?
9. On that day did you come into contact with someone who later became known to you as \_\_\_\_\_ (Defendant's name)?
10. Do you see that person in the courtroom today?
11. Can you please point him/her out by an article of clothing?

**Your Honor, let the record reflect that the Witness has correctly identified the Defendant.**

12. How did you first come into contact with the Defendant?
13. Did you see the Defendant driving or in actual physical control of a vehicle?

**If no one saw the Defendant driving or you cannot establish APC, use circumstantial evidence to prove Defendant was driving.**

- What led you to believe the Defendant was driving the car?
  - Did the Defendant have the keys on his person?
  - Did the seat adjustments fit someone of the Defendant's build?
  - Did the Defendant exert any ownership over the car?
  - Did the Defendant exhibit injuries consistent with driving?
  - Was the automobile registered in the Defendant's name?
14. On what street, if any, was the Defendant driving the car?
  15. Did the traffic stop occur in Miami-Dade County, Florida?
  16. After your initial contact with the Defendant, what happened next?
- If officer does not remember information, refresh his recollection. Ask if there is anything that can refresh his or her recollection. Ask him/her to look over the A-form/citation and to let you know when he/she is ready to continue with the testimony.**
17. Did you at any time request the Defendant to produce his/her driver's license?
  18. Did the Defendant produce a driver's license?

- What was the name on the DL?
- DOB?
- Address?
- Height?
- Weight?
- Eye color?

19. What did you do next?

- Response: I asked the station to run the Driver's License and it came up suspended
- Defense: Objection, hearsay
  - Under § 90.803(8), a traffic printout is an exception to hearsay as a public records exception because it is 1) a record or data compilation 2) of public offices or agencies 3) setting forth matters observed pursuant to a duty imposed by law 4) as to matters which there is a duty to report

**Pre-mark all exhibits. You may have to redact the traffic printout.**

**For the record, I am showing the defense counsel State's \_\_\_\_\_ (i.e. 1-A) marked for identification purposes only. I am now showing it to the witness.**

20. Officer, do you recognize State's \_\_\_\_ (i.e 1-A) for identification purposes?

21. What is it?

- Response: Defendant's traffic printout
- **Pre-try your officer to ensure that they are able to read and interpret the traffic printout.**

22. How do you recognize it as such?

23. What is the name listed on the driving record?

24. What is the DOB listed on the driving record?

25. What is the address listed on the driving record?

26. What type of document is the defendant's driving record printed on?

- Response: It is a document under seal.
- **Pre-try your officer to ensure that he/she knows that the traffic printout is a document under seal.**

27. What agency is this document from?

**Your honor, I move State's Exhibit \_\_\_\_\_ (i.e. 1-A) for Identification to be admitted into evidence.**

28. Was the Defendant's driver's license suspended at the time of the stop?

29. How many open suspensions did the Defendant have?

30. Did the Defendant receive notice of his driver's license suspensions?

31. On what dates?

**Request permission to publish.**

**LEAVING THE SCENE OF A CRASH INVOLVING ONLY DAMAGE TO AN  
ATTENDED VEHICLE OR ATTENDED PROPERTY**

§ 316.061(1), Fla. Stat.

**A. ELEMENTS**

To prove the crime of Leaving the Scene of a Crash Involving Only Damage to an Attended Vehicle or Attended Property, the State must prove the following four elements beyond a reasonable doubt:

1. (Defendant) was the driver of a vehicle involved in a crash.
2. The crash resulted only in damage to a vehicle or other property.
3. The [vehicle] [other property] was [driven] [attended] by [a person] [(name of person)]
4. (Defendant) failed to stop at the scene of the crash or as close to the crash as possible and remain there until [he] [she] had given “identifying information” to the [driver or occupant of the damaged vehicle] [person attending the damaged vehicle or property] [and to any police officer at the scene of the crash or who is investigating the crash].

If the State proves that the defendant failed to give any part of the “identifying information,” the State satisfies this element of the offense.

“Identifying information” means the name, address, vehicle registration number, and if available and requested, the exhibition of the defendant’s license or permit to drive.

**Unattended property:** The driver of any vehicle which collides with, or is involved in a crash with, any vehicle or other property which is unattended, resulting in any damage to the other vehicle or property, must immediately stop and must then and there either (1) locate and notify the operator or owner of the vehicle or other property of the driver's name and address and the registration number of the vehicle he or she is driving, or (2) attach securely in a conspicuous place in or on the vehicle or other property a written notice giving the driver's name and address and the registration number of the vehicle he or she is driving. The driver must, in either circumstance, without unnecessary delay, notify the nearest office of a duly authorized police authority. **Fla. Stat. § 316.063(1).**

**B. PENALTIES**

Pursuant to section § 316.061(1), it is a second-degree misdemeanor to leave the scene of a crash resulting in damage to a vehicle or other property. There is no statute that makes it a criminal offense to leave the scene of a crash when there is no resulting death, injury, or damage to a vehicle or other property. **J.J. v. State, 842 So. 2d 266 (2d DCA 2003).**

- **Practice Tip:** The citation or A-Form often charges the Defendant under **Fla. Stat. § 316.061(1)**, even though the crash report indicates some injury to the victim as well as property damage. **Be sure to check the injury level on the crash report and call your victim and officer to find out the extent of the injuries.** Leaving the Scene of a Crash Involving Injury is a Third Degree Felony. **Fla. Stat. §316.027(1).**

**C. CASE LAW**

**LSA is a Continuing Offense**

**State v. Englehardt, 465 So.2d 1366 (Fla. 5th DCA 1985)** – Officer who investigated scene of accident within his jurisdiction and who goes outside his jurisdiction to make arrest for LSA is justified because the officer was in fresh pursuit of a suspect. **See Fla. Stat. § 901.25 and Fla. Stat. § 316.645.** When the officer caught up with the defendant, the officer could make a valid misdemeanor arrest since he witnessed a misdemeanor in his presence because LSA is a continuing offense.

### **Witnesses Obligations**

**S.G.K. v. State, 657 So. 2d 1246, 1248 (1st DCA 1995)** – Nevertheless, neither statute requires witnesses to the accident to stay at the scene or report to investigating officers. §§ **316.061, 316.062, 316.066(3)(a)**. Even the trooper admitted he did not think it a “crime to be a witness to an accident and not come forward.

### **Accident Report Privilege**

The accident report privilege does not apply to LSA cases. **See Cummings v. State, 780 So.2d 149 (2d DCA 2001).**

### **Double Jeopardy**

Courts have held that multiple convictions for LSA where the defendant only leaves the scene of one accident, regardless of the number of people or vehicles involved, violate double jeopardy. The remedy is not to remand for new trial, but to vacate all convictions except for one.

**Yeve v. State, 37 So. 3d 324, 326 (4th DCA 2010)** – Defendant’s multiple convictions of leaving the scene of an accident violates the prohibition against double jeopardy. **See Hardy v. State, 705 So.2d 979, 981 (4th DCA 1998)** (“in this case ‘there was but one scene of the accident and one failure to stop’; thus, there was but one offense”); **Hoag v. State, 511 So.2d 401, 402 (5th DCA 1987)** (“[T]he failure of Hoag to stop at the scene of his accident constituted but one offense although that accident resulted in injuries to four persons and the death of a fifth. Hoag’s five convictions of the same statutory offense as to the same factual event violated Hoag’s double jeopardy rights.”).

**Waldeckler v. State, 707 So.2d 777 (2d DCA 1998)** – Court vacated one of defendant’s two convictions for LSA because defendant failed to stop at only one accident resulting in injury or death, even though more than one person was injured.

**Hardy v. State, 705 So.2d 979 (4th DCA 1998)** –The defendant was charged with both LSA involving death and LSA involving injury. The court held that counts were different degrees of the same crime. Convictions on both counts violated double jeopardy even where there were multiple victims. The court held that “[t]he proper remedy is to vacate the conviction for the lesser offense while affirming the conviction for the greater one.” **See also Papageorge v. State, 710 So.2d 53 (4th DCA 1998).**

### **Identity Issues**

According to the Florida Standard Jury Instructions, the State, along with proving the elements of the offense, must also prove that:

- The crimes with which the Defendant is charged were, in fact, committed and,
- The Defendant is, in fact, the person who committed the crimes.

**Because you need to prove not only that an LSA was committed, but also that the Defendant committed it, you need both the police officer and the victim of the LSA to prove an LSA. Not calling both will result in a Judgment of Acquittal.**

**Thomas v. State, 494 So. 2d 248, 252 (4th DCA 1986)** – In **Thomas**, defendant asked for the following instruction: “[t]he State of Florida must prove beyond a reasonable doubt, that the crimes charged in this case were actually committed. But more than that, the State of Florida must also prove beyond a reasonable doubt, that [sic] the Defendant, CURTIS THOMAS, committed the crimes. If you are not convinced beyond a reasonable doubt that it was the Defendant, CURTIS THOMAS, who committed the crimes, you must find him not guilty.” The Fourth held that the lower court did not err in not giving that instruction and just giving a standard instruction because it “did not add anything.”



## LEAVING THE SCENE OF AN ACCIDENT PREDICATE QUESTIONS

### POLICE OFFICER

1. Please state your name and spell your last name for the record.
2. Are you employed?
3. What is your occupation?
4. How long have you been so employed?
5. Please tell the jury about your training and experience in law enforcement, and specifically in the area of traffic stops and accident investigations?
6. I would now like to call your attention to an incident that occurred on \_\_\_\_\_ (date) at around \_\_\_\_\_ (time)
7. Do you remember that day?
8. What were your duties on that date?
9. On that day did you come into contact with someone who later became known to
10. you as \_\_\_\_\_ (D's name)?
11. Do you see that person in the courtroom today?
12. Please point him/her out by an article of clothing.

### **Your Honor, let the record reflect the Witness has correctly identified the Defendant.**

13. How did you first come into contact with the Defendant?
  - If officer found defendant later as a result of the investigation:
14. What evidence did you gather at the scene which led you to find the defendant?
  - E.g., plate number written by victim, automobile damage that reflected a particular vehicle
15. Was the D driving a car? If yes:
  - What led you to believe the Defendant was driving the car?
  - If no one saw Defendant driving, use circumstantial evidence to prove the driving
16. How do you know the Defendant was driving the car?
  - If there are hearsay statements of other parties in the accident report
  - Defense: Objection, hearsay
  - Response: Exception to Hearsay – LSA not protected by Accident Report Privilege
17. On what street, if any, was the Defendant driving?
18. Did the incident occur in Miami-Dade County, Florida?
19. Did Defendant get into a car accident?

20. Please describe the damage caused in this accident.

- Personal injury
- Property damage

21. Did the Defendant stop at the scene of the accident?

22. How do you know?

23. Did the Defendant give any of his information to the victim at the scene of the accident?

24. Did the Defendant give any of his information to a police officer at the scene of the accident?

- If yes:
  - I now want you to go through the information provided by the defendant
  - Did he give his name?
  - Address?
  - Registration number of vehicle?
  - Driver's License number or Driving permit number?
  - Was any of the information later found to be false?
- **Only ask if it was**

25. Who did you cite with causing the accident? **[Make sure you know this information]**

26. Why?

### **CIVILIAN WITNESS**

1. Please introduce yourself to the jury.

2. How are you currently employed?

3. I would now like to call your attention to an incident that occurred on \_\_\_\_\_ (date) at around \_\_\_\_\_ (time).

4. Do you remember that day?

5. What were you doing on that date?

6. On that day did you come into contact with someone who later became known to you as \_\_\_\_\_ (Defendant's name)?

- **Pre-try and make sure civilian knows Defendant's name**

7. Do you see that person in the courtroom today?

8. Please point him/her out by an article of clothing.

**Your Honor, let the record reflect the Witness has correctly identified the Defendant.**

9. Please explain to the jury how you came into contact with the Defendant.

10. How did the accident happen?

11. Where did the accident happen?
12. What did you do when the accident happened?
13. What did the Defendant do when the accident happened?
14. Please describe the damage caused in this accident.
15. personal injury
16. property damage
17. Did the Defendant stop to assess the damage?
18. Did the Defendant stop to see if anyone was hurt?
19. Did the Defendant at any point stop to exchange information?
20. Did he make any statements to you?

## **RECKLESS DRIVING**

§ 316.192(1)(a) and (1)(b), Fla. Stat.

### **A. ELEMENTS**

**To prove the crime of Reckless Driving, the State must prove the following beyond a reasonable doubt:**

*Give if §316.192(1)(a), Fla. Stat. is charged.*

(Defendant) **drove a vehicle in Florida with a willful or wanton disregard for the safety of persons or property.**

*Give if §316.192(1)(b), Fla. Stat. is charged.*

(Defendant), **while driving a motor vehicle, fled from a law enforcement officer.**

### **B. PENALTIES**

**First Offense** – Maximum Jail 90 days. Maximum Fine \$500. Minimum Fine \$25.

**Second Offense** – Maximum Jail 6 months. Maximum Fine \$1000. Minimum Fine \$50.

#### **Reckless Driving with Injury or Property Damage**

**316.192(3)(c)(1)** – First Degree Misdemeanor

**316.192(3)(c)(2)** – Third Degree Felony when the injury involves serious bodily injury.

#### **Probation for Reckless Driving**

Where a defendant obtains his first conviction for RD with a maximum jail sentence of 90 days, the probationary term cannot exceed 90 days. **Whitehead v. State, 685 So.2d 894 (Fla. 5th DCA 1996).**

Defendants found guilty of misdemeanors and placed on probation shall be under supervision not to exceed six months unless otherwise specified by the Court. However, in relation to any offense other than a felony in which the use of alcohol is a significant factor, the period of probation may be up to one year. **See Fla. Stat. § 948.15(1).**

**Practice Tip:** Fla. Stat. § 948.15 can apply to Reckless Driving, despite the fact that a first offense is not expressly declared a "misdemeanor". Fla. Stat. §775.081(2) states that "[a] misdemeanor is of the particular degree designated by statute. Any crime declared by statute to be a misdemeanor without specification of degree is of the second degree." Reckless Driving is a criminal traffic offense without specification of degree; therefore, for our purposes, it is a misdemeanor of the 2nd degree. **See Courtright v. Adkins, 49 Fla. Supp. 2d 176 (Fla. 18th Cir. Ct. App. 1991)** (characterizing DUI, Fla. Stat. § 316.193, which for a first offense is also not explicitly declared a misdemeanor, as a 2<sup>nd</sup> degree misdemeanor). **Therefore, to use this provision to place a defendant on probation for more than 90 days, the court must orally pronounce that alcohol was a significant factor.**

### **C. CASE LAW**

#### **Speeding**

**Woods v. Paradis, 380 F. Supp 2d 1316 (11<sup>th</sup> Cir. S.D. Fla. 2005)**

Def. was driving approximately 80-85 miles per hour in a 40-45 mile per hour zone; speeding through a residential and construction area; and ran a possibly red or yellow light. Court found PC for reckless driving.

**Copertino v. State, 726 So.2d 330 (4<sup>th</sup> DCA 1999)**

The Defendant drove 90.41 mph on a major thoroughfare near a residential area, late in the evening, long after sunset, in a compact car filled with 9 persons, 7 of whom were crammed in the back seat without seat belts. The driver was young and inexperienced. “Driving this fast under these circumstances so logically evinces to us the required reckless disregard for human life or the consequences on the safety of his passengers contemplated by the statute that we frankly cannot see the plausibility of arguing otherwise.”

- Defendant was charged in this case with manslaughter by culpable negligence under **Fla. Stat. 782.07**, however, the State’s burden in a prosecution for manslaughter by culpable negligence is substantially **greater** than the burden for reckless driving. In other words, if the driver’s conduct met the standard for culpable negligence, it surpassed the standard for reckless driving. **See Preston v. State, 56 So.2d 543, 544 (Fla. 1952); Behn v. State, 621 So.2d 534, 536 (1<sup>st</sup> DCA 1993).**

**State v. Knight, 622 So. 2d 188, 190 (1<sup>st</sup> DCA 1993)** – Speed alone is insufficient to constitute evidence of reckless driving.

**Lewek v. State, 702 So.2d 527 (4<sup>th</sup> DCA 1997)** – Defendant driving 15 mph above the speed limit, ran a red light, had shallow tire tread, a missing lug nut, and overly dark window tinting that covered too much of the front windshield. Under the totality of these circumstances, the defendant’s driving constituted reckless driving “because it should have been reasonably foreseeable to him that death or great bodily harm was likely to result by driving under these circumstances.”

**Miller v. State, 636 So.2d 144 (1<sup>st</sup> DCA 1994)** – Defendant driving 55 mph in 35 mph zone while in control of his vehicle enough to slow down at an intersection, in light to moderate traffic, could not be convicted of reckless driving. State must present evidence of willful or wanton disregard for safety of persons or property.

**State v. Orozco, 607 So.2d 464 (3<sup>d</sup> DCA 1992)** – Reckless driving made out by abrupt U-turn, car “kicking up dirt” at speeds exceeding 80 mph in a residential community.

**Gasset v. State, 490 So.2d 97 (3<sup>d</sup> DCA 1986)** – The court held that an erratic turn, 80 MPH speeding, and high-speed chase could amount to reckless driving.

**Savoia v. State, 389 So.2d 294 (Fla. 3<sup>d</sup> DCA 1980)** – Speed of 90 mph on wet road, plus evidence of drinking, amounts to reckless driving (in a vehicular homicide case).

**Martinez v. State, 692 So.2d 199 (3<sup>rd</sup> DCA 1997)** – Some alcohol consumption and speed and passing vehicle while crossing double yellow line is sufficient for Reckless Driving.

**State v. Eggleston, 5 FLW Supp 562a (Broward April 6, 1998)** – speeding and running a stop sign was held to be sufficient to uphold a conviction for reckless driving.

**Impairment is Relevant to a Reckless Driving Charge**

**State v. Norstrom, 613 So.2d 437 (Fla. 1993)** – “Evidence that Norstrom had consumed alcoholic beverages on the night of the incident is relevant to the prosecution’s charge of reckless driving.”

**State v. Garces, 5 FLW Supp. 776b (11<sup>th</sup> Cir., June 1998)** – Alcohol is a factor not to be suppressed.

**Martinez v. State, 692 So.2d 199 (3d DCA 1997)** – The defendant, in a prosecution for Vehicular Homicide, of which evidence of Reckless Driving is essential, objected to the introduction of his .03 breath alcohol reading. The Third DCA held that evidence of alcohol consumption is a factor that trial court is entitled to consider in a RD/Vehicular Homicide prosecution. **See also W.E.B. v. State, 553 So.2d 323 (1st DCA 1989); Savoia v. State, 389 So.2d 294 (3d DCA 1980).**

### **Judgment of Acquittal and Reckless Driving**

Whether someone was driving recklessly is fact specific inquiry that should be turned over to the jury. As such, judgments of acquittal on charges of Reckless Driving should be denied. **See D.E. v. State, 904 So. 2d 558, 563 (5th DCA 2005).** “Where there is room for a difference of opinion between reasonable men as to the proof of facts from which an ultimate fact is sought to be established, or where there is room for such differences as the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding, as it is their conclusion, in such case, that should prevail and not primarily the views of the judge.”

- Note that D.E. involved vehicular homicide – not reckless driving – but that Defendant was found guilty because he “knowingly drove the car without adult supervision in violation of state law, and knowingly traveled at a dangerously high speed around a dangerous curve in the road near a school in the dark through an area that was familiar to him, and that was likely to become congested.”

### **Robinson Motions to Dismiss and the State’s Response**

**Robinson v. State, 113 Fla. 854 (Fla. 1934)** – Court held charging document was “vague and indefinite” where it did not “apprise the defendant of the act or conduct for which he is being prosecuted.” Rather the charging document charged a mere conclusion that the defendant drove “in a careless and reckless manner.” Thus, the court reasoned it was “impossible for defendant to know what act or circumstance constituted the alleged infraction of the law.”

However, in **State v. Asbell, 15 Fla. L. Weekly Supp. 208 (Fla. 6<sup>th</sup> Cir. Ct. Oct. 8, 2007)**, a three-judge circuit court appellate panel ruled that a UTC charging merely careless driving with a crash causing \$500.00 damages without injury was sufficient. The court concluded that the seventy year old decision in Robinson came “long before the present UTC notification procedure” was established in the Uniform Disposition of Traffic Infractions Act. Additionally, the court observed that the Supreme Court reached a different conclusion about 45 years after Robinson in **McCreary v. State**, where the Court held that an information charging “that the defendant, on or about June 26, 1977, while operating his vehicle in a reckless manner likely to cause death or great bodily harm to another, did kill one James Sanders in Bay County, Florida is legally sufficient to inform the defendant of the nature of the accusation against which he must defend.” **371 So. 2d 1024, 1028 (Fla. 1979).**

- **Practice Tip:** Defense attorneys often refer to a “Robinson Motion” on Reckless Driving cases where the citation merely states “Reckless Driving” or “Defendant drove with ‘willful/wanton disregard...’” without giving any specifics. The defense moves to dismiss the charge at arraignment. Dismissal, however, is not the proper remedy. The Defendant should file a motion for Bill of Particulars or the State should simply file an information.

**State v. Arsenault, 39 Fla. Supp. 2d 9 (Fla. 11th Cir. Ct. 1990)** – Even though charging document may have been insufficient, dismissal is not required. The court should require the State to provide a statement of particulars or allow the State to amend the charging document.

**State v. Eggleston, 5 FLW Supp. 562a (Fla. Broward Cty. Ct. 1998)** – Information which provided that defendant had operated a vehicle “in willful and wanton disregard for the safety of

persons or property by driving at a high rate of speed and passing two stop signs” survived motion to dismiss. The court held that the charging document was facially sufficient. The court stated since reckless driving is not dependent on which persons or property were endangered, “it is ‘unnecessary to allege its description with [more] particularity.’” Any ambiguity or deficiency in the language of the information could be cured by the defendant by filing a motion for a bill of particulars or by seeking a deposition of the officer.

**Stops Based on Reckless Driving that an Officer Did Not Observe**

**Navarette v. California, 134 S. Ct. 1683 (2014)** – This case is the first time that the United States Supreme Court considered the lawfulness of an investigative detention based on an “anonymous tip” of erratic or drunk driving. The anonymous tipster in **Navarette** reported that a particular truck had run her vehicle off the roadway; she also provided the location of the incident and the direction of travel of the suspect truck. In an opinion authored by Justice Thomas, five members of the Court concluded that based on the totality of the circumstances, the officer had reasonable suspicion to conduct a stop, even though the officer did not personally observe the alleged reckless driving prior to the stop.

**Reckless Driving Is a Lesser-Included Offense of Vehicular Homicide**

**Chikitus v. Shands, 373 So.2d 904 (Fla. 1979)** – Conviction for Reckless Driving bars the prosecution for vehicular homicide on double jeopardy even though reckless driving is a continuing offense.

### RECKLESS DRIVING PREDICATE QUESTIONS

1. Please state your name and spell your last name for the record.
2. Are you employed?
3. What is your occupation?
4. How long have you been so employed?
5. Please tell the jury your training and experience in law enforcement.
6. I would now like to call your attention to an incident that occurred on \_\_\_\_\_ (date) at around \_\_\_\_\_ (time).
7. Do you remember that day?
8. What were your duties on that date?
9. On that day did you come into contact with someone who later became known to you as \_\_\_\_\_ (Defendant's name)?
10. Do you see that person in the courtroom today?
11. Can you please point him/her out by an article of clothing?

**Your Honor, let the record reflect that the Witness has correctly identified the Defendant.**

12. How did you first come into contact with the D?
13. What did you observe?
14. Please describe your observations.
15. How fast was the D driving his/her car?
16. Were there any pedestrians walking on the street?
17. How many?
18. Were there other cars driving on the street/highway?
19. How many?
20. Was the D swerving around other cars?
21. Was he driving down the road within the lines?
22. Was the defendant breaking? Erratic? Tailgating?
23. What was unusual about his driving?
24. Did he commit any traffic infractions?
25. How was the defendant's driving different from that of mere speeding?
26. What led you to believe the D was driving on this day?
  - This question is asked only if there is an actual physical control (identity) issue in the case (i.e. passenger of the car claims to have been the driver of the car).
  - If there is no wheel witness, use circumstantial evidence to prove the driving:
    - Did you observe the Defendant behind the wheel?



- How far were you from the Defendant's car?
  - Did you have a clear view?
  - Was there anything obstructing your view?
27. On what street did you observe the Defendant driving the car?
  28. Is this street located in Miami-Dade County, Florida?
  29. Did you at any time give the Defendant a citation?
  30. What did you cite the D with?
  31. Why did you cite the D with this charge?
  32. Would you say that the D acted with the safety of others in mind?

#### **D. SPEEDING PREDICATE QUESTIONS**

1. Please state and spell your name for the record.
2. Are you employed?
3. What is your occupation?
4. How long have you been so employed?
5. Please tell the jury your training and experience in law enforcement, and specifically regarding traffic stops.
6. I would now like to call your attention to an incident that occurred on \_\_\_\_\_ (date) at around \_\_\_\_\_ (time).
7. Do you remember that day?
8. What were your duties on that date?
9. On that day did you come into contact with someone who later became known to you as \_\_\_\_\_ (Defendant's name)?
10. Do you see that person in the courtroom today?
11. Can you please point him/her out by an article of clothing?

**Your Honor, let the record reflect that the Witness has correctly identified the Defendant.**

12. How did you first come into contact with the Defendant?
13. What did you observe?
14. What was the speed rate of the car?
15. How do you know that was the speed rate?
  - If police officer used a radar:
    - On what date were the calibrations of your radar tested?
    - Do you keep radar logs?
    - Why?

- What were the results of the test?
- If police-officer pace-clocked the car:
  - What was the distance between your car and the Defendant's car while you were driving?
  - How many car lengths were you from the Defendant?
  - How long did you maintain this distance?
  - Have you received any training in how to measure speed rates?
  - What was your speed rate during this time?
  - Has your car's speedometer been calibrated recently?
- If police officer measures speed rate by a visual estimate:
  - Have you received any training for this type of speed measure?
  - Please explain your training.
  - How did you estimate the speed?
  - What was the speed rate?
  - Was there any confirmation?

## **RACING ON A HIGHWAY**

§ 316.191(3)(a), Fla. Stat.

### **A. ELEMENTS**

**To prove the crime of Racing on a Highway, the State must prove the following element beyond a reasonable doubt:**

*Give a, b, c, or d as applicable.*

(Defendant)

**a. drove a motor vehicle in**

**b. [participated] [coordinated] [ facilitated][collected monies] at any location for**

**c. knowingly rode as a passenger in**

**d. purposefully caused moving traffic to slow or stop for**

**[a race] [a drag race or acceleration contest] [a speed competition or contest] [a test of physical endurance] [an exhibition of speed or acceleration] [ an attempt to make a speed record] on a [highway] [ roadway] [parking lot].**

### **B. PENALTIES**

**Fine – Maximum \$1000. Minimum \$500.**

**License Suspension** – 1 year license suspended. This does not pertain to withholds of adjudications; only convictions. **Fla. Stat. § 316.191(2)(a).**

**Ranking for Repeat Offender** – It is also a first degree misdemeanor when the defendant is charged again within 5 years of first conviction.

- Penalties for second conviction within 5 years - Maximum fine - \$1,000. Minimum Fine - \$ 500.
- Minimum License suspension 2 years. **Fla. Stat. § 316.191(2)(b).**

### **Other Conditions May Be Imposed**

The court may enter an order of impoundment or immobilization as a condition of incarceration or probation. **Fla. Stat. § 316.191(5).**

- Motor vehicle may be impounded by LEO for 10 business days. **Fla. Stat. § 316.191(3)(a).**
- Any motor vehicle used in violation of subsection (2) by any person within 5 years after the date of a prior conviction of that person for a violation under subsection (2) may be seized and forfeited as provided by the Florida Contraband Forfeiture Act. This subsection shall only be applicable if the owner of the motor vehicle is the person charged with violation of subsection (2). **Fla. Stat. § 316.191(4).**

### **C. CASELAW**

#### **Certified Conflict between the First and Fourth DCAs**

**State v. Wells, 965 So. 2d 844 (4th DCA 2007)** – The Fourth DCA ruled that the language in the racing statute, specifically the “outgain and outdistance” language, without any mention about competition, was unconstitutionally vague. The court found that the statute’s language did not put citizens on notice of what was criminal activity. As such, the court found the racing statute unconstitutional for vagueness.

**Reaves v. State, 979 So.2d 1066 (1st DCA 2008)** – The First DCA ruled that the racing statute was constitutional. Using the **Wells** decision as a discussion point, the court found that a statute must be read as a whole. It found that the Fourth DCA only read a small section of the statute to find that 316.191 was vague. But the First DCA found that the statute “expressly prohibited

conduct of engaging in high speed drag race on public road against another vehicle, and statute could not be applied unless vehicles were competing with each other.” Therefore, the Court held that the statute did not encompass legal maneuvers. As such, it found the statute was not vague and certified conflict to the Florida Supreme Court.

### **Motions to Dismiss on Racing Cases**

We can proceed with these cases because the First and Fourth DCAs have certified a conflict. Until the Florida Supreme Court decides the issue, we can prosecute these cases under Reaves. See Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (holding “[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.” Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts).

- **Practice Tip:** If a defense attorney files a motion to dismiss based on Wells, a demurrer discussing Reaves should be filed. This should be enough for the court to deny the motion to dismiss.

## **SECOND OR SUBSEQUENT REFUSAL**

§316.1939, Fla. Stat.

### **A. ELEMENTS**

**To prove the crime of Refusal to Submit to Testing, the State must prove the following six elements beyond a reasonable doubt:**

*Give 1a and/or 1b as applicable.*

- 1. A law enforcement officer had probable cause to believe (defendant) [drove] [was in actual physical control of ] a motor vehicle in this state while**
  - a. Under the influence of [an alcoholic beverage] [(a chemical substance listed in 877.111 Fla. Stat.)] [(a controlled substance listed in Chapter 893)] to the extent (Defendant's) normal faculties were impaired.**
  - b. [his] [her] [breath] [blood] alcohol level was .08 or higher.**

*Give 2a in cases where defendant was arrested. Give 2b in cases where the defendant appeared for treatment at a hospital, clinic, or other medical facility and the administration of a breath or urine test was impractical or impossible.*

- 2. a. The law enforcement officer lawfully arrested (defendant) for Driving Under the Influence.**  
**b. The law enforcement officer requested a blood test.**
- 3. (Defendant) was informed that if [he] [she] refused to submit to a [chemical] [physical] test of [his] [her] [breath] [blood] [urine], [his] [her] privilege to operate a motor vehicle would be suspended for a period of one year, or, in the case of a second or subsequent refusal, for a period of 18 months.**
- 4. (Defendant) was informed that it is a misdemeanor to refuse to submit to a lawful test of [his] [her] [breath] [blood] [urine], if [his] [her] driving privilege had been previously suspended for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine].**
- 5. (Defendant), after being so informed, refused to submit to a [chemical] [physical] test of [his] [her] [breath] [blood] [urine] when requested to do so by a [law enforcement officer] [correctional officer].**
- 6. (Defendant's) driving privilege had been previously suspended for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine].**

*Inference.*

**You are permitted to conclude that (defendant's) driving privilege had been previously suspended for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine] if a record from the Department of Highway Safety and Motor Vehicles shows such a suspension.**

### **B. PENALTIES**

**A second or subsequent refusal is a First Degree Misdemeanor.**

### **C. CASE LAW**

Pursuant to 316.1939(3), the driver's printout creates a rebuttable presumption of proof the defendant previously refused a breath, urine, or blood test.

- State conceded that entry on certified driving record, "BAL unknown" was insufficient to prove a prior refusal. **Folden v. State, 16 So. 3d 849 (Fla. 5th DCA 2009).**

**State v. Huizenga, 13 Fla. L. Weekly Supp. 601a (17<sup>th</sup> Circuit Broward County March 27, 2006) – Refusal to submit to testing under section 316.1939 is not a specific intent crime. Defense of advice of counsel is not available.**

**Sanzeri v. State, 13 Fla.L. Weekly Supp. 564a (17<sup>th</sup> Circuit Broward County March 14, 2006)** Statute punishing subsequent refusals to submit to breath test with enhanced penalty does not violate ex post facto provisions of state constitution, as statute punishes current conduct, not past offense because “[a] new law punishing subsequent refusals with an enhanced penalty does not violate *ex post facto* provisions[,] as it is the current conduct that is being punished, not the past offense.” **See also Briganti v. State, 13 Fla. L. Weekly Supp. 450b (17<sup>th</sup> Circuit Broward County February 7, 2006).**

In the context of a second or subsequent refusal, **Rafine** is helpful when the Judge in the prior DUI suppressed the refusal. Florida Statute 316.1939 makes it illegal for a Defendant to refuse to submit to a breath sample **when his license had been previously suspended** for failure to submit a breath/urine/or blood sample. Therefore, any suppression of Defendant’s prior refusal would be irrelevant. **See Rafine v. State, 1 So.3d 1251 (4<sup>th</sup> DCA 2009)** (“Assuming for the sake of argument that his license should not have been revoked ... Appellant should have challenged his revocation and had his license re-instated before getting behind the wheel.”); **see also Sorrell v. State, 855 So.2d 1253, 1255 n. 4 (Fla. 4<sup>th</sup> DCA 2003)** (explaining that “the proper remedy for a person who feels that his or her license was improperly revoked is to have the record corrected ‘not to ignore the revocation and continue to drive’”).

## **VIOLATION OF DRIVER'S LICENSE RESTRICTION**

§322.16, Fla. Stat.

### **A. ELEMENTS**

**To prove the crime of Operating a Motor Vehicle in Violation of the Restrictions Imposed in a Restricted License, the State must prove the following four elements beyond a reasonable doubt:**

- 1. (Defendant) drove a motor vehicle upon a highway in this state.**
- 2. The license was restricted by the Department of Highway Safety and Motor Vehicles of this State.**
- 3. The restriction was noted upon the license.**
- 4. The defendant operated the motor vehicle in violation of the restriction.**

### **B. PENALTIES**

#### **Infractions**

Under §322.16(6), a violation of a subsection of 322.16, other than a violation of subsection (1)(c), is an infraction. Subsection (2) makes it illegal for an "E" class driver under 17 years of age to drive alone between 11 P.M. and 6 A.M., unless driving directly to or from work. During these hours, the driver must be accompanied by a valid driver over 21. Subsection (3) has the same restrictions as subsection (2) for 17-year-old "E" class drivers, except the time frame is from 1 A.M. to 5 A.M.

- **Practice Tip:** Violation of either of these subsections of the VDLR statute is an infraction and should be transferred to the infraction calendar, including any accidents. However, other license violations are criminal in nature and will be prosecuted as such. **See below.**

If an officer charges a violator under Fla. Stat. §322.16 for a violation of a Learner's License, the charge should be amended to violation of learner's driver's license, **Fla. Stat. § 322.1615**, and transferred to the infractions calendar (even an accident case). When a driver is driving on a Learner's License, he/she must be accompanied by a valid driver over the age of 21, and that person must be in the front passenger seat. The learner's driver can only drive during daylight hours and then up to 10 P.M. after 3 months following issuance of the E-L license.

#### **Violations of 322.16(1)(c) are a Second Degree Misdemeanor**

These include Defendants driving on licenses that have been restricted by the DHSMV because they received a hardship license after a DUI or DUBAL suspension. Two common examples of such a restriction is a license for **employment purposes** or **business purposes**.

"A driving privilege restricted to **employment purposes** only" means a driving privilege that is limited to driving to and from work and any necessary on-the-job driving required by an employer or occupation.

"A driving privilege restricted to **business purposes** only" means a driving privilege that is limited to any driving **necessary to maintain livelihood**, including driving to and from work, necessary on-the-job driving, driving for educational purposes, and driving for church and for medical purposes.

- **Practice Tip:** the "Business Purposes" restriction encompasses a great deal more than the "Employment Purposes" restriction. **See e.g. Allart v. State**, 9 F.L.W. Supp 499c (6<sup>th</sup> Cir Pinellas County June 27, 2001) (driving to McDonalds is a business purpose because food is a basic necessity).



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**PART 5: DRIVING UNDER  
THE INFLUENCE OF  
ALCOHOL OR DRUGS  
DUI - FLA. STAT. § 316.193**



## **INTRODUCTION TO THE DUI INVESTIGATION**

### **I. ELEMENTS & DEFINITIONS**

#### **A. GENERALLY – DUAL THEORIES OF PROSECUTION**

- 1. driving or in actual physical control of a vehicle within this state;**
- 2. while under the influence of alcohol or a chemical or controlled substance;**
- 3. to the extent that his normal faculties were impaired**

**OR**

- 4. with a blood alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood or a breath alcohol level of .08 or more grams of alcohol per 210 liters of breath**

#### **B. ACTUAL PHYSICAL CONTROL**

Actual Physical Control (APC) “means the defendant must be physically in or on the vehicle and have the capability to operate the vehicle, regardless of whether or not he is actually operating the vehicle at the time.” **Fl. St. Jury Inst.**

#### **C. VEHICLE**

- Vehicle is any device, in, upon, or by which any person or property is, or may be, transported or drawn upon a highway except devices used exclusively upon stationary rails or tracks. **See Fla. Stat. § 316.003(75).**
- A **bicycle** is a “vehicle” for purposes of the DUI statute. **See State v. Howard, 510 So.2d 612 (Fla. 3d DCA 1987).**

#### **D. WITHIN THIS STATE**

The DUI statute is intended to encompass all lands within the state, including private property. **Zink v. State, 448 So.2d 1196 (Fla. 1st DCA 1984)**(the Defendant observed doing “donuts” on private property. Officer stopped Defendant, conducted investigation and arrested Defendant for DUI. The court held that “[t]he phrase ‘within this state’ is not ambiguous and very lucidly indicates the Legislature’s intent to encompass all lands in the state.”)

**State v. Mabry, 5 FLW Supp. 264 (Miami-Dade County Court 1998)**, Defendant observed driving in the parking lot of a mall. Security guard for mall and defendant were involved in traffic accident. Defendant was charged with DUI. The court denied Defendant’s motion to dismiss for lack of jurisdiction holding that the DUI statute referring to “driving or in actual physical control of a vehicle within this state” includes private property.

**State v. Aquino, 5 FLW Supp. 557 (Hillsborough County Ct. 1998)**: Stop on defendant’s driveway was proper.

#### **E. UNDER THE INFLUENCE & NORMAL FACULTIES IMPAIRED**

Any amount of alcohol may cause a defendant to be under the influence and affect his normal faculties. Normal Faculties include, but are not limited to, the ability to see, hear, walk, talk, judge distances, drive an automobile, make judgments, act in emergencies, and, in general, normally perform the many mental and physical acts of daily life. **See Fla. Stat. § 316.1934(1).**

There is no statute or jury instruction that defines impaired. Black's Law Dictionary defines impair as "to weaken, to lessen in power, diminish, or relax, or otherwise effect in an injurious manner." See **Fla. Stat. § 316.1934(1)** (statute requires impairment of faculties or "to the extent that the person is deprived of full possession of normal faculties."

#### **F. BREATH ALCOHOL LEVEL - .08**

- .08 or more grams of alcohol per 210 liters of breath. Breath alcohol was added to the statute in 1991; it previously only allowed for the measurement of one's blood alcohol level. In 1996, the statute was amended to clearly reflect and state that breath was to be measured in weight volume (grams per 210 liters), not in units (as in "percent"). **See State v. Brigham, 694 So.2d 793 (Fla. 2d DCA 1997).**
- This has been the legal limit in Florida since January 1, 1994. Prior to that time, 0.10 was the legal limit. Note that the legal limit is the same for blood and/or breath. **Fla. Stat. § 316.193(1)(b) & (c)**

#### **G. VERDICT UNANIMITY**

The jurors need not be unanimous in deciding which theory of DUI the defendant is guilty under. Three jurors could find the defendant guilty of DUBAL and not of being Impaired, and the other three jurors could find the defendant guilty of driving while Impaired, but not DUBAL. This is a legal verdict. **See Euceda v. State, 711 So.2d 122 (Fla. 3d DCA 1998).**

### **II. IMPLIED CONSENT - F. S. § 316.1932**

By operating a motor vehicle in the state of Florida, a motorist is deemed to have given his consent to submit to an approved chemical test or physical test for the purpose of determining the alcoholic content of his breath, if the person is lawfully arrested for any offense allegedly committed while the person was driving or in actual physical control of a motor vehicle while under the influence. The implied consent law requires that any chemical or physical test be incidental to a lawful arrest and at the request of a law enforcement officer who has **reasonable cause** to believe that the defendant was under the influence of alcohol, or a controlled substance, or a chemical substance. The implied consent scheme dictates that a blood, breath, or urine test may be requested. However, the right test must be requested. What does that mean? If a defendant is under the influence of alcohol. A defendant could read all the types of tests (breath, blood, urine) on a standard Implied Consent form. However, after reading a legally accurate rendition of the implied consent warnings a defendant must be asked to take the appropriate test under the facts of your particular case. If an officer **ultimately requests** that the wrong test be taken and a subject refuses. That refusal will be suppressed.

However, mere verbatim reading of the form will not lead to refusal being suppressed. **See DHSMV v. Freeman, 3D11-07 (Fla. 3d DCA 2001)** (holding that Nader will be followed until the Florida Supreme Court resolves the conflict).

**DHSMV v. Nader, 4 So.3d 705 (Fla. 2d DCA 2009)**, held that the fact that the officer provides the driver with additional alternative tests that may be more invasive but more accurate does NOT negate the fact that the officer required the defendant to take the required test. The license suspension for the refusal was therefore valid.

### **III. PENALTIES**

#### **A. CLASSIFICATION OF OFFENSE**

- 1. 1st, 2nd & 3rd outside of 10 years** – Misdemeanor with specified penalties.
- 2. DUI with Property Damage** - First Degree Misdemeanor.  
See F.S. 316.193(3)(A)(B)(C)1
- 3. 3rd DUI within 10 Years & Subsequent Offenses** – This offense may be charged as a 3<sup>rd</sup> Degree Felony or Misdemeanor
- 4. DUI with Serious Bodily Injury** - Third Degree Felony
- 5. DUI Manslaughter** – Second Degree Felony

#### **B. MANDATORY ADJUDICATION FLA. STAT. § 316.656(1)**

**“No court may suspend, defer, or withhold adjudication** of guilt or imposition of sentence for any” DUI. **Fla. Stat. § 316.656(1). See State v. Rowell, 669 So.2d 1089 (Fla. 2d DCA 1996)** (holding that trial court’s decision to withhold adjudication of guilt on defendant’s offense of driving under the influence constituted an illegal sentence. Objection from state is not necessary to preserve for appellate review an illegal sentence.)

#### **C. FINES**

##### **1. MANDATORY FINES**

- 1<sup>st</sup> – not less than \$500 or more than \$1000
- 1<sup>st</sup> enhanced (reading of .15 or minor in car) – not less than \$1000 or more than \$2000
- 2<sup>nd</sup> – not less than \$1000 or more than \$2000
- 2<sup>nd</sup> enhanced – not less than \$2000 or more than \$4000
- 3<sup>rd</sup> outside 10 – not less than \$2000 or more than \$5000

##### **2. CONVERTING ALL OR PART OF MANDATORY FINE INTO COMMUNITY SERVICE HOURS**

- If the court finds that the defendant is financially unable to pay for all or part of the fine, the court may order that the defendant provide additional public service or community work hours, instead of paying the part of the fine the defendant is unable to pay.
- The court shall consider the unpaid portion of the fine and the reasonable value of additional service.
- However, the court may not allow credit against the fine for less than the federal minimum hourly wage at the time of sentencing.

#### **D. DRIVER’S LICENSE SUSPENSION OR REVOCATION**

##### **1. Administrative Suspension – Section 322.2615(1)(a)**

- When a defendant refuses to submit to a breath test or blows over a .08, their license is suspended for a specified period of time (refusal – 1 year and .08 – 6 months). However, they simultaneously receive a temporary permit to drive giving them a certain amount of time to request a hearing and contest the administrative suspension of their license. This temporary permit is valid for **only 10 DAYS**.

## 2. Sentence Suspension or Revocation

The mandatory driver's license revocations for DUIs are set forth in **F.S. § 322.28**:

- a. **1<sup>st</sup>** - mandatory minimum **180 days**, but no more than 1 year.
- b. **2<sup>nd</sup> within 5 years** - mandatory minimum of **5 years**.
- c. **3<sup>rd</sup> within 10 years** - mandatory minimum of **10 years**.
- d. **4<sup>th</sup>** - mandatory **permanent** revocation.
- e. **2<sup>nd</sup> outside of 5 and 3<sup>rd</sup> outside of 10** – when the time period is not specified, the minimum mandatory suspension of 6 months and maximum suspension of 12 months.
- f. **F.S. Section 316.655**
  - While mandatory minimum license revocations are imposed for most DUI convictions under F.S. § 322.28, **the statute limits the maximum period of license suspension only for a first DUI**. Therefore, for a multiple DUI offender, pursuant to 316.193, the court may impose a longer suspension than the minimum proscribed. See *Stoletz v. State*, 875 So.2d 572 (Fla. 2004)
  - In addition, the *Stoletz* court indicated the court may impose under **F.S. § 316.655** the court **any revocation period** it deems appropriate. Under **§ 316.655(2)**, regardless of the time frame of the DUI offenses, the judge may revoke a defendant's license for any period, provided the judge **specifically states on the record** the case meets the criteria set forth in the statute.
  - This statute requires that the suspension is warranted by **“the totality of the circumstances”** and **“the need to provide for the maximum safety for all persons who travel on or who otherwise are affected by the use of the highways of the state.”** The statute also requires the judge must consider a number of other factors, including, but not limited to **the extent and nature of the driver's violation and the extent of any death, injury, or property damage resulting from the violation**.

## g. Nunc Pro Tunc (Now for Then)

- If the defense or the court attempts to have the sentencing suspension or revocation date back to any date other than the date of sentencing, the state must object because this is an illegal sentence. In addition, DHSMV does not have to honor this agreement so it must not be promised or negotiated as part of a plea. See *Dept. Of Highway Safety and Motor Vehicles v. Brandenburg*, 891 So.2d 1071 (Fla. 5<sup>th</sup> DCA 2004)(the court also found the administrative suspension does not violate double jeopardy principles).

## E. PROBATION & DUI SCHOOL

- Pursuant to Section **316.193(5)**, the court **must** place a DUI offender on **monthly probation** and **must require completion of DUI school**. Pursuant to **316.193(6)(a)**, a **1<sup>st</sup>** DUI offender may be placed on probation for up to one year.

- However, the statute does not specifically state a minimum time period a defendant must be placed on probation, therefore, the court may terminate the probation early if the offender completes the DUI school and treatment if proscribed. If the court terminates probation unsuccessfully because the defendant did not complete the DUI school requirements, this is an illegal sentence and should be over the State's objection.
- A defendant is not entitled to credit time served for probationary rehabilitation programs, including halfway houses. See Tal – Mason v. State, 515 So.2d 738 (Fla. 1987). However, § 316.193(6)(k) gives the court discretion to allow a defendant to serve all or a portion of his imprisonment in a residential treatment program.

#### F. COMMUNITY SERVICE HOURS

- Pursuant to Section 316.193(6)(a), community service hours are part of a minimum mandatory sentence for a 1<sup>st</sup> DUI. The defendant must do a minimum of fifty **(50) hours of public community service**.
- However, the court may impose an additional fine of \$10 per hour in lieu of community service hours if the court finds completion of community service hours would be an undue hardship for defendant as a result of:
  1. residence or location of defendant at the time the community service is required; or
  2. employment obligations
- State v. McLeod, 25 FLW Supp. 2d 131 (Fla. 13th Cir. Ct. 1987) - Trial court waived community service hours on DUI conviction because the defendant was old and sick. The appellate court held that the trial court erred because the court was bound by the mandatory minimum set out by statute.

#### G. VEHICLE IMPOUNDMENT

- Pursuant to 316.193(6), the court must, **as a condition of probation but not concurrent with imprisonment**, impose a mandatory vehicle impoundment or immobilization on the vehicle that **(1) defendant was driving on the date of incident; or (2) any vehicle registered to at the time of sentencing** as specified:
  - a. 1<sup>st</sup>, 2<sup>nd</sup> outside of 5, & 3<sup>rd</sup> outside of 10 – 10 days
  - b. 2<sup>nd</sup> within 5 years – 30 days
  - c. 3<sup>rd</sup> with 10 or subsequent – 90 days
- The impoundment order may be dismissed pursuant to 316.193(e),(f),(g), or (h). The most common grounds for dismissal is if it would be an undue hardship for the family of the defendant.

## H. IGNITION INTERLOCK DEVICE

- Pursuant to **316.193(3)**, the court must order an ignition interlock device on a 2nd DUI offender for at least 1 year and a 3<sup>rd</sup> DUI offender for at least 2 years.
- In addition, pursuant to **316.193(4)(c)**, if the defendant provides a sample of .15 or higher or is accompanied by a minor in the vehicle, the court must order the ignition interlock device for at least 6 months for a first offense and at least 2 years for a second offense.

## I. INCARCERATION

Pursuant to **316.193(2), (4) & (6)**, DUI offenders must serve jail time as specified:

- a. **1st** – no minimum but 6 months maximum
- b. **1st enhanced (above .15 or minor in vehicle)** – no minimum but up to 9 months
- c. **2nd within 5 years** – 10 days minimum and 9 months maximum
- d. **2nd within 5 years enhanced** – 10 days minimum and 364 days maximum
- e. **2nd outside 5 years** – no minimum but 9 months maximum
- f. **2nd outside 5 years enhanced** – no minimum but up to 364 days
- g. **3rd within 10 or subsequent** – 30 days minimum and 364 days maximum

The statute also specifies that at least 48 hours of confinement must be consecutive.

- **Fernandez v. State, 627 So.2d 1 (Fla. 3d DCA 1993)** - A defendant is not entitled to credit for time served for pretrial house arrest. House arrest does not impose on the defendant restraints which are so onerous as to be equivalent to incarceration in the county jail.
- **State v. Goodman, 7 FLW Supp 97a (15<sup>th</sup> Jud. Cir Palm Beach County 1999)** - House arrest as part of a plea to DUI is an illegal sentence and may not be imposed. Finding that a sentence for 90 days House Arrest is not sufficient for the thirty day minimum jail requirement for a 3rd DUI.
- While house arrest, nor a pretrial drug program, will satisfy the jail sanction, pursuant to **§ 316.193(6)(k)** the court has discretion at sentencing to allow a defendant to serve all or a portion of his imprisonment in a residential treatment program.

## J. ENHANCED PENALTIES FOR .15 OR MINOR

State must allege in the charging document the existence of a blood or breath alcohol level of .15 or above, or the accompaniment of a minor in the vehicle, before defendant can receive the enhanced penalty based on one of those conditions under **F.S. §316.193(4)**. The enhanced penalties applies to the fine, imprisonment, and the ignition interlock device.

**Practice Tip: For enhancements, file the information alleging .15 or minor.**

## K. MULTIPLE COUNTS OF DUI

**Melbourne v. State, 679 So.2d 759 (Fla. 1996)** - Defendant caused the death of two persons and injury of a third person for which she was convicted of two counts of DUI manslaughter and one count of DUI with serious bodily injury. Court held that multiple convictions from a single violation of the DUI statute **where there are multiple victims** does not violate the double jeopardy statute.

Consecutive county jail sentences for misdemeanors which total more than one year are permitted. **Goodloe v. State, 661 So.2d 820 (Fla. 1995)**. **See also, Armstrong v. State, 656 So.2d 455 (Fla. 1995)**.

**Hertzschuch v. State, 687 So.2d 52 (Fla. 3d DCA 1997)** - Prosecution for four counts of DUI property damage, Fla. Stat. § 316.193(3), not barred by double jeopardy where defendant damaged four vehicles parked in the street in one continuous driving episode. **See also, Deviney v. State, 579 So.2d 373 (Fla. 4th DCA 1991)**.

## L. INVOLUNTARY INTOXICATION AS A DEFENSE TO DUI

**Carter v. State, 710 So. 2d 110 (Fla. 4th DCA 1998)**—In *Carter*, the court ruled that an involuntary intoxication instruction is appropriate in a DUI case where there is evidence that the Defendant unknowingly took the wrong medicine through the fault of another person. The Court set out the following pre-requisites to an instruction: **(1) the Defendant unknowingly ingested a substance which caused him to become impaired and (2) drove without the knowledge that he was or would become impaired while driving.**

**Devers-Lopez v. State, 710 So. 2d 720 (Fla. 4th DCA 1998)** - Following the *Carter* decision, the Fourth District reversed a conviction for a defendant who claimed she accidentally took her husband's prescribed sleeping medication, Halcion, believing it to be her prescribed medication, Valium. The Court concluded an involuntary intoxication instruction was warranted because a party is entitled to have the jury instructed upon the law which applies to his theory of the case if there is **any competent evidence** adduced that could support a verdict in his favor.

## IV. PRIOR CONVICTIONS

### A. The Charging Document does NOT have to allege Prior Convictions

- In misdemeanor DUI prosecutions, prior DUI convictions do not need to be plead in the charging document. **State v. Haddix, 668 So.2d 1064 (Fla. 4th DCA 1996)**.
- However, in the case of a felony DUI charge in which "the existence of prior DUI convictions is an essential element" of the charge, the priors must be noticed in the charging document and proven beyond a reasonable doubt in order to comply with due process of law. **State v. Rodriguez, 575 So.2d 1262 (Fla. 1991)**.
- **State v. Kelly, 999 So. 2d 1029 (Fla. 2008)**- when the State wants to use a prior uncounseled misdemeanor conviction to increase the imprisonment penalty, i.e., misdemeanor DUI to felony DUI, and the defendant challenges the prior conviction, the defendant must first file an affidavit stating that: 1) the offense involved was punishable by imprisonment (not that there was imprisonment, only that there could have been

unless the judge timely certified under rule 3.111(b)(1) that the defendant would not be imprisoned), 2) the defendant was indigent and entitled to court appointed counsel, 3) counsel was not appointed; and 4) the right to counsel was not waived. The burden then shifts to the State to prove that counsel was provided or that the right to counsel was validly waived. If the State fails to carry its burden, then the uncounseled conviction cannot be used to enhance the incarcerated portion of a sentence, *however, they can be used by the State to seek enhanced penalties or fines.*

## B. Proving Prior Convictions

- If the defendant chooses to remain silent as to his prior convictions for other criminal traffic offenses, the State has to prove if any prior convictions exist. **Florida Traffic Court Rule 6.180.**
- **Fla. Stat § 316.193(12)** – As of **July 1, 2004**, the records of the DHSMV (i.e. traffic printout) are *prima facie* evidence sufficient to establish prior convictions of DUI. This section creates a **rebuttable presumption**. If evidence is produced to rebut this presumption, the State must enter the certified conviction and sentence into evidence.
- **Lingo v. State, 2 FLW Supp. 360 (Fla. 11th Cir. App. 1994)** - A computer printout from the Department of Highway Safety and Motor Vehicles is admissible into evidence, without further authentication, as an exception to the hearsay rule.
- **Sproule v. State, 927 So.2d 46 (Fla. 4th DCA 2006)** – Defendant’s driving record was not testimonial in nature, and thus, defendant did not have a Sixth Amendment right to confront and cross-examine witness concerning compilation of that record, in prosecution for habitual driving while license revoked. Certified copy of defendant’s driving record was properly admitted in prosecution for habitual driving while license revoked under public records and reports exception to hearsay rule.
- **Fender v. State, 780 So.2d 516 (Fla. 4th DCA 2007)**- On rehearing, the DCA held that records of DHSMV showing that defendant had three prior DUI convictions created rebuttable presumption as to fact of three prior convictions.
- If the presumption is rebutted, and the court requires certified copies of the convictions or other evidence, the State can request the additional time specifically allowed by **Traffic Court Rule 6.180(b)** to determine if any prior convictions exist.

If a defendant objects, the court cannot rely on a rap sheet to determine defendant’s prior convictions. Manuel Alcantara v. State, \_\_ So. 2d \_\_\_, 35 FLW D1580a, (Fla. 5<sup>th</sup> DCA 2010).

When a defendant disputes a prior offense, the sentencing court must either require the State to produce corroborating evidence of the offense or not consider the offense. In the present case, the State failed to introduce a certified copy of the Rhode Island conviction or other evidence sufficient to meet its burden. See, e.g., Bodie v. State, 983 So.2d 1196 (Fla. 2d DCA 2008) (State must present sufficient evidence, such as fingerprints or photograph, to establish that defendant is, in fact, person referenced in computer records); see also Moore v. State, 944 So.2d 1063 (Fla. 4th DCA 2006) (trial court can rely upon certified copies of convictions and original court records but State cannot simply refer to evidence introduced in separate sentencing proceeding).

## C. Out of State Convictions



- For the purposes of mandatory sentencing, the court must accept as prior convictions any previous out of state convictions for "driving under the influence, driving while intoxicated, driving with an unlawful blood alcohol level, or any other similar alcohol-related or drug-related traffic offense." **Fla. Stat. § 316.193(6)(k).**
- **McAdam v. State, 648 So.2d 1244 (Fla. 2d DCA 1995)**—The Court of Appeal recognized that "it is clear that the Legislature intends this statute to include a wide range of foreign offenses as prior offenses." The District Court of Appeal agreed with the circuit court and county court, that a conviction in Colorado for "driving while impaired, even if it is based on a blood alcohol level greater than .05% and less than .10%, is sufficiently similar to a section 316.193 conviction to allow its use as a prior conviction."
- **Buchbaum v. DHSMV, 1 FLW Supp. 122 (Fla. 13th Cir. 1991)** - The county judge ultimately makes the determination as to whether an out of state conviction qualifies as a previous conviction under Florida law.
- **Dawson v. DHSMV, 19 So.3d 1001 (4<sup>th</sup> DCA 2009)**- New York Conviction for DWAI is sufficient as a qualifying offense for sentencing and to revoke a FL DL.
- **DUI [Prior Convictions]**- Defendant received probation for a prior uncounseled DUI. The judge had given her one day credit for the time she spent in jail from arrest to the entry of her plea. This did not make it an incarcerative sentence. It could still be used as the basis for a felony DUI based on prior convictions. **Comeaux v. State**, 33 FLW D1807a, 5<sup>th</sup> DCA.
- **DUI [Felony] [ Prior Convictions]**- Prior uncounseled convictions may be considered for the purposes of felony DUI if the defendant did not actually receive a sentence of incarceration or face a possible sentence exceeding six months. The fact that the defendant spent 48 hours in jail after arrest before entering a plea in a prior case does not mean that incarceration was imposed in that case. **State v. Brown**, 33 FLW D2632a, 4<sup>th</sup> DCA.
- **DUI [Sentencing] [Prior Convictions]**- A prior uncounseled conviction cannot be used to enhance a DUI to a felony if the defendant received incarceration in the previous case. A "time served" sentence is not considered an imposition of incarceration. **State v. Dunning**, 33 FLW D2801a, 2d DCA.

## **THE DUI INVESTIGATION**

### **I. STOP MOTIONS**

#### **A. STOP MOTIONS GENERALLY**

- A significant number of the motions argued in DUI cases focus on "the stop." The fundamental question in a "stop motion" is: Was the police officer's action in stopping this Defendant constitutionally valid - was the stop justified? If not, in most DUI cases, all evidence will be suppressed and the case can no longer be proven absent a reversal on appeal of the trial court's findings.
- Always remember, it is important to remain prepared as, "a trial judge's ruling on a motion to suppress is clothed with a presumption of correctness, and the ruling should not be disturbed on appeal absent an abuse of discretion." **Fitzpatrick v. State, 900 So.2d 495 (Fla. 2005)**. Therefore, proper preparation of the facts, witness testimony, and case law is imperative before arguing any motion.
- In preparing to meet defense attacks on the validity of a stop, the following two broad issues must be considered, and presentation of testimony and argument must center on these concepts:
  - a. The court must accept the uncontroverted factual testimony of the State's witnesses, assuming it is credible and not impossible.
  - b. The prosecutor must consider:
    - i. Is this contact a "stop" in the constitutional sense, such that the State must justify it?

Note: (The State has the burden of proving the validity of any constitutional issues and must be the party to present the evidence for a stop motion).
    - ii. If so, what is the legal theory on which it will be justified?

#### **B. CREDIBLE TESTIMONY AND HEARSAY**

**State v. Fernandez, 526 So. 2d 192 (Fla. 3d DCA 1988)**—"A Court must accept evidence which, like the material testimony of the police officers, is neither impeached, discredited, controverted, contradictory within itself, or physically impossible." **Id.** at 193. Unless one of the above-mentioned conditions exists, it is an abuse of discretion for the Court to make factual findings contrary to the officer's testimony.

#### **C. TYPES OF ENCOUNTERS**

1. There are essentially **THREE LEVELS of police-citizen encounters, with various sub-categories, that will be explored throughout this section:**
  - **Consensual Encounters**—Involves only minimal police contact. The citizen may either voluntarily comply with the officer's requests or choose to ignore them. Because the citizen is free to leave during a consensual encounter, constitutional safeguards are not invoked.

- **Investigatory Stops**—The police officer may reasonably detain a citizen temporarily if the officer has reasonable, well-founded, articulable suspicion that a person has committed, is committing, or is about to commit a crime.
- **Arrest**—Probable cause that a crime has been or is being committed.

## 2. Standards of Proof

- **Reasonable Person Standard**

A person is seized if, under the circumstances, a **reasonable person** would conclude that he or she is not free to end the encounter and depart. Jacobson v. State, 476 So. 2d 1282 (Fla. 1985) (citing U.S. v. Mendenhall, 446 U.S. 544 (1970) and Florida v. Royer, 460 U.S. 491, 506 (1983)).

Citizen encounter turns into “investigatory stop where officer shows authority in manner that restrains individual freedom of movement, such that a reasonable would feel compelled to comply. Oslin v. State, 912 So.2d 672 (Fla. 5th DCA 2005). Also see: Ripley v. State, 898 So.2d 1078 (Fla. 4th DCA 2005); ; .

This is an **objective** test, and does not depend on whether the particular suspect perceived that he was being ordered to restrict his movement. Rather, it depends on whether the officer’s words and actions would have conveyed restricted movement to a reasonable person who was **innocent of any crime**. California v. Hodari, 499 U.S. 621, 113 (1991); Login v. State, 394 So. 2d 183 (Fla. 3d DCA 1981).

- **Totality of Circumstances**

“[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all of the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officer’s request or otherwise terminate the encounter.” Florida v. Bostick, 501 U.S. at 439 (1991); Voorhees v. State, 699 So. 2d 602 (Fla. 1997).

State v. R.H., 900 So.2d 689 (Fla. 4th DCA 2005) (whether reasonable person feels free to disregard officer should depend on totality of circumstances.) Also see Woods v. State, 890 So.2d 559 (Fla. 5th DCA 2005). Miller v. State, 865 So.2d 584 (Fla. 5th DCA 2004).

## II. JUSTIFICATIONS FOR A STOP

### A. CONSENSUAL ENCOUNTERS

#### 1. General Considerations

- **No Fourth Amendment Protection Invoked**

A consensual encounter is not considered a stop or seizure for Fourth Amendment purposes. An officer does not need reasonable suspicion to approach individuals to ask questions. There is no need for constitutional safeguards because these encounters involve minimal police contact and the individual is free to leave. The citizen can **voluntarily** comply or ignore the officer’s requests. In these cases, the officer is usually acting out of concern for the safety of citizens. U.S. v. Mendenhall, 446 U.S. 544 (1970).

Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. U.S. v. Drayton, 536 U.S. 194 (2002).

## 2. Cannot Have Show of Authority

- **No Restraint on Citizen's Freedom**—Officer cannot hinder or restrict the person's freedom to leave or freedom to refuse to answer to inquiries. Popple v. State, 626 So. 2d 185 (Fla. 1993) (finding that officer's direction for occupant of legally parked car to exit his car constituted a "seizure" of occupant, requiring the officer have reasonable suspicion to detain occupant; officer's actions constituted show of authority); Harrelson v. State, 662 So. 2d 400 (Fla. 1st DCA 1995).
- **Requests Cannot be Commands or Orders**—Officer's inquiries should be phrased as requests not commands or orders. State v. Johnson, 696 So. 2d. 880 (Fla. 5th DCA 1997). (Finding an officer's request for defendant to remove hands from pockets to be consensual encounter); State v. Baldwin, 686 So. 2d 682 (Fla. 1st DCA 1996); Zukor v. State, 488 So. 2d 601 (Fla. 3d DCA 1986) (plain clothes officer's encounter with defendant in train station wherein officer asked few questions and used dog to sniff bag deemed a consensual encounter) Language should not indicate that the defendant could not have walked away. State v. Starke, 574 So.2d 1214 (Fla. 2d DCA 1991) (officers initial contact with defendant was consensual and not a "stop" where, when officer initially asked defendant who she was and why she was in the area (known crack house nearby), he did not use language that might have indicated that defendant could not walk away and officer's action and demeanor were not intimidating). **BUT SEE** (Cf. Hernandez v. State, 666 So.2d 208 (Fla. 2d DCA 1995) (holding that officer's statement to defendant, "Well, hang it up [referring to a pay phone]," coupled with the defendant having just seen the officers arrest his friend, amounted to an investigatory stop requiring reasonable suspicion). Jeralds v. State, 664 So.2d 56 (Fla. 5th DCA 1995) (officer's initial questioning constituted a consensual encounter; however, officer's statement, "I need to make sure you don't have any kind of contraband or anything illegal on you." indicated that the defendant was not free to refuse the officer's request). **See also**, Williams v. State, 694 So.2d 878 (Fla. 2d DCA 1997) (finding that encounter became a seizure, and no longer consensual, "at the point that the officer requested that Williams pull his waistband forward"). Also see Fla. Stat. § 901.151(2) which codifies this case law.

### HOWEVER,

- **Mere questioning**—Mere questioning without a show of authority constitutes a consensual encounter. State v. Boone, 613 So.2d 560 (Fla. 2d DCA 1993) (officer's actions in asking defendant what was in his hand behind his back deemed consensual encounter). **BUT SEE** Raysor v. State, 795 So.2d 1071 (Fla. 4th DCA 2001) (officer's reading of *Miranda* warnings converts consensual encounter into a seizure).
- **Need Not Expressly Inform**— There is **no requirement** that the officer expressly tell the person that he is free to decline to cooperate. United States v. Mendenhall,

**446 U.S. 544 (1970); State v. Livingston, 681 So. 2d 762 (Fla. 2d DCA 1996); State v. Simons, 549 So. 2d 785 (Fla. 2d DCA 1989).**

- **Officer Intent not Determinative** — An officer’s use of “investigation” to describe what he thought he was doing in the encounter or to describe the encounter does not transform a consensual encounter into something more. What is determinative are the facts and surrounding circumstances and whether they show a use of force, etc. **Blake v. State, 939 So.2d 192 (Fla. 5th DCA 2006).**
- **Request to search**—Under **Florida v. Bostick, 501 U.S. at 439 (1991)**, an officer may **request** that a subject submit to a search without turning the encounter into a seizure - it would still be a consensual encounter, so long as the officer does not convey the message that compliance with the request is required. **See Johnson, 696 So.2d 880 (Fla. 5<sup>th</sup> DCA 1997).**
- **Asking for ID**—Asking subject for ID or driver license, and then using it to run a check on the subject, still amounts only to a consensual encounter. **State v. Chang, 668 So.2d 207 (Fla. 1st DCA 1996). See also State v. Barnett, 572 So.2d 1033 (Fla. 2d DCA 1991) (cited in State v. R.R., 697 So.2d. 181 (Fla. 3d DCA 1997); Watson v. State, 689 So.2d 1090 (Fla. 5th DCA 1997).**
- **Mere Conversations**—Officer was on foot patrol near a hotel in a known high crime and drug area when he saw defendant, whom he recognized to be a cocaine user. Officer approached defendant and asked him if he had any weapons or drugs, or stolen TV's or anything like that. Defendant responded, “no I don't, go ahead and search me,” spreading his legs and arms without being asked. The officer found crack cocaine on defendant. (Another officer was near this officer, on the porch, but not with him.) Court distinguished a simple question about criminal activity from more intrusive types of questions (which were not present in this case) which were so coercive as to make a reasonable person believe he or she must comply. **State v. Ferrell, 705 So.2d 1051 (Fla. 1st DCA 1998). See also State v. Livingston, 681 So.2d 762 (Fla. 2d DCA 1996)** (Officer asked defendant “you aren't selling dope, are you”, to which defendant responded that he wasn't and that what he had was “these and they're not real”, handing the officer a tube, which was later determined to be cocaine); **State v. Collins, 661 So.2d 962 (Fla. 5th DCA 1995)** (Officer engaged in casual conversation with defendant and asked him if he had any guns, knives or drugs on him, and asked if he could search defendant, to which defendant consented); **Jones v. State, 658 So.2d 178 (Fla. 1st DCA 1995)** (Officer asked whether defendant had any weapons, to which defendant responded he did not, and then officer asked defendant whether he could search him, to which defendant replied, “Yeah, I ain't got nothin’.”) **J.C.W. v. State, 545 So.2d 306 (Fla. 1st DCA 1989)** (Officer asked defendant her name, age and address, then told her why she was being questioned [the mule idea] and asked her if it would be okay to search her for illegal narcotics, to which she consented.)

### 3. Surrounding Circumstances

- **Display Weapon, Touch, or Other Intimidation (Not OK)**—Officer should not display a weapon, touch the defendant without consent or intimidate the defendant in any way. State v. Wilson, 566 So. 2d 585 (Fla. 2d DCA 1990).
- **Uniformed Officer (OK)**—The fact that an officer identifies himself as a police officer, or that the officer is wearing a uniform, without more, does not convert the encounter into a seizure. Florida v. Royer, 460 U.S. 491 (1983); State v. Davis, 543 So. 2d 375 (Fla. 3d DCA 1989) (“the fact that the request is made by a uniformed police officer is not deemed to carry with it such coercion as would render an otherwise voluntary encounter involuntary”).
- **Badges and Gun Showing (OK)**—Merely walking up to defendant, dressed with badges and gun showing is not a sign of authority. State v. R.R., 697 So.2d 181 (Fla. 3rd DCA 1997).

*BUT SEE: J.C. v. State*, 15 So.3d 870 (Fla. 2nd DCA 2009)--Officers wearing tactical vests and badges, pulled over their vehicles, exited and approached bicyclist indicating "Hey, I've got to talk to you for a minute, Hang on," constituted an investigatory stop of Defendant.

- **Use of Air Horn/Flashlight and Command to Halt (Not OK)**—When officer used spotlight on defendant, defendant turned toward light, saw officer, and turned away. Officer's use of air horn combined with jumping out of patrol car and hailing two men was equivalent of an officer yelling, "Halt!" thereby turning encounter into illegal seizure where no reasonable suspicion of illegal activity existed. Oslin v. State, 912 So.2d 672 (Fla. 5th DCA 2005). See also Williams v. State, 874 So.2d 45 (Fla. 4th DCA 2004) (where officer shines flashlight on defendant's face, approaching with hand on his weapon, and directs defendant to stand.)

### 4. Examples of “Consensual Encounters”

- **Golphin v. State, 945 So.2d 1174 (Fla. 2006):**  
Officer approached a group of men talking on the street without lights or sirens and without blocking their way. Everyone left when the officer arrived except for the defendant, who remained to speak with the officer. Defendant voluntarily provided his ID and the officer conducted a warrant check while speaking with the defendant. Court found that officer's use of ID to check for outstanding warrants was a consensual encounter since defendant was free to leave with others but remained to talk to officer, he voluntarily gave ID to officer, and officer talked with defendant while conducting the warrant check.
- **State v. Saturnino-Boudet, 682 So.2d 188 (Fla. 3d DCA 1996):** Officers approached individual as he was standing at his mailbox, identified themselves as police officers and informed him that they were conducting a narcotics investigation. Detectives then obtained verbal consent to a search of his residence. At some point during the search, one detective exited residence to place some items into his vehicle. While outside, defendant Boudet drove up and stopped in front of the home. Detective asked Boudet whether he could assist Boudet with anything. Boudet

inquired whether other individual was home. Detective responded affirmatively and Boudet parked his car. Detective then identified himself as a police officer conducting a narcotics investigation. Detective asked Boudet for identification, who voluntarily exited his vehicle and produced a driver's license. In the meantime, the detective inside the home had heard from the individual inside that Boudet was his drug supplier. Ct. found initial encounter with the police to be nothing more than a consensual encounter. Boudet, without question, was free to leave at that time.

- **State v. Wimbush, 668 So.2d 280 (Fla. 2d DCA 1996):** Officer pulls car alongside defendant's vehicle, parked on access road. Officer approached car, looked inside and saw a substance appearing to be powdered cocaine under defendant's nose. Ct. held this was consensual encounter; upon observing the powder, officer had reasonable suspicion to detain defendant.
- **State v. Chang, 668 So.2d 207 (Fla. 1st DCA 1996):** Officer approached defendant and two other males who were standing in front of a vacant house, which had been very active in drug trafficking. The officer asked for the defendant's driver's license to check for warrants and returned the driver's license. The court held that this was a consensual encounter.
- **State v. Collins, 661 So.2d 962 (Fla. 5th DCA 1995):** Officers see defendant sitting in his car, parked in a public lot, with dome light on and "fidgeting" with his hands. As officers approach, defendant exits his car and tries to lock it. The officers ask defendant if they can talk to him; defendant walks towards officers, agrees to speak with them, then walks with one of the officers to the rear of his car. The court found this to be a valid "street encounter".
- **State v. Mitchell, 638 So.2d 1015 (Fla. 2d DCA 1994):** Officer approached defendant sitting in a parked car at a closed gas station and asked the defendant what he was doing and requested identification. Officer testified defendant was free to leave and there was no evidence that defendant ever sought to leave or refused to communicate with officer. Officer ran a computer check and discovered defendant had outstanding warrant. The court found a valid consensual encounter because there was no restraint on defendant's freedom of movement.
- **State v. Christman, 838 So.2d 1189 (Fla. 2d DCA 2003):** Where officer saw defendant drive into a gas station at 5 a.m. Defendant's car had an unfamiliar transporter tag. The officer began to question defendant and, after observing an odor of alcohol and defendant's bloodshot and glassy eyes, asked to see his license. From the original consensual encounter, the deputy gathered sufficient information to arrest the defendant based on violation of his license restrictions. The search that followed was incident to the arrest.
- **State v. Carley, 633 So.2d 533 (Fla. 2d DCA 1994):** Officer approached defendant who had just exited a rental van. Officer said, "I just need to speak with you in reference to this van," and asks for the defendant's driver's license and rental papers. The court held that this was a consensual encounter and not a stop. Gun found in plain view not suppressed even though there was no reasonable suspicion for the officer to approach and talk to the defendant.
- **State v. Barnett, 572 So. 2d 1033 (Fla. 2d DCA):** Officers stopped vehicle, looking for another individual whom they determined was not in the car. Officer

could ask driver for driver license and "vehicular papers" without invoking the Fourth Amendment, since the encounter would still be "consensual."

- **State v. Hughes, 562 So.2d 795 (Fla. 1st DCA 1990):** Officer pulls patrol car behind the defendant's occupied vehicle which was legally parked in a known drug area of Jacksonville. Officer noticed that the defendant and other occupant appeared very nervous when they noticed the officer. With his headlights on, officer walks alongside their car and shines his flashlight into it to observe crack cocaine. Officer's actions did not amount to a stop.
- **State v. Raker, 883 So.2d 887 (Fla. 1st DCA 2004):** Officer in marked patrol car noticed vehicle stopped behind the jail at 10:40 p.m., in an area not designated for parking. When patrol car approached vehicle, driver turned on lights and proceeded toward the patrol car. While defendant was stopped at stop sign, officer pulled patrol car next to the driver's window and said "hello," introduced herself, and asked "How are you?" Without her asking for it, the driver simply handed the officer an I.D. card. She asked the defendant what he was doing and he responded that he was turning around. She then asked if he had a driver's license and he responded that it had been suspended. Officer then noticed that a child in the vehicle was crying. Officer approached in an effort to calm the child. Officer smelled marijuana. She then searched the vehicle and found cocaine and marijuana. Court said this was to be consensual encounter and that no "seizure" occurred at least until the point when the driver told the deputy that his license was suspended, at which point there was PC for arrest and search incident to arrest could follow.
- **G.M. v. State, 19 So.3d 973 (Fla. 2009)--**Officer's activating of emergency lights of unmarked car when driving into park and stopping behind parked car in which juvenile was sitting, for purposes of investigating juvenile and companions based on reports of drug-related activity was NOT a seizure, because juvenile was unaware emergency lights were on.

## 5. Examples of "Non-Consensual Encounters"

- **Popple v. State, 626 So.2d 185 (Fla. 1993):** Officer investigating abandoned stolen car sees defendant sitting in legally parked car four blocks away in a desolate, high crime area. Officer wants to talk to defendant to see if defendant knew anything about stolen car or if he had car trouble. Officer parks patrol car behind defendant's car and approaches vehicle. Defendant reacts nervously and reaches under car seat. Officer fears for safety so directs defendant to exit vehicle. Whether request or an order, officer's direction for defendant to exit the vehicle constituted a show of authority which restrained defendant's freedom of movement because a reasonable person under the circumstances would believe that he should comply. Without reasonable suspicion of a traffic infraction or a crime, the fruits of the illegal stop were suppressed. The Court left open the possibility that officers in some situations would be justified in ordering a person out of a vehicle even in the absence of reasonable suspicion. **See also J.N. v. State, 778 So. 2d. 440 (Fla. 3<sup>rd</sup> DCA 2001)** (where *three* uniformed officers who were in marked squad cars pulled up *along either side of* defendant who was then *told to stop* and asked his name and address.)
- **Harrelson v. State, 662 So. 2d 400 (Fla. 1<sup>st</sup> DCA 1995):** At 1:08 a.m., Trooper observed vehicle parked in a driveway with interior lights on and defendant sitting behind wheel. The car was parked in an area with many home robberies. Trooper parked his car *directly behind* defendant's car, approached the defendant and saw



him with keys in ignition, listening to the radio. Upon speaking with the defendant, the Trooper suspected DUI, and requested that he perform roadsides. The court found since the defendant's car was parked in a driveway, rather than on a public thoroughfare, the Trooper's act of parking behind the defendant's car restricted his freedom to leave, citing Popple. Therefore, this case was distinguishable from Hughes, and the encounter amounted to an investigatory stop. **See also Blake v. State, 939 So.2d 192 (Fla. 5th DCA 2006).** Officer pulled behind defendant's vehicle in private driveway, restricting defendant's freedom to leave. **L.J.S. v. State, 905 So.2d 222 (Fla. 2d DCA 2005).**

- **J.C. v. State, 15 So.3d 870 (Fla. 2nd DCA 2009)**--Officers wearing tactical vests and badges, pulled over their vehicles, exited and approached bicyclist indicating "Hey, I've got to talk to you for a minute, Hang on," constituted an investigatory stop of Defendant.
- **Danielewicz v. State, 730 So. 2d 363 (Fla. 2d DCA 1999)**: Defendant was asleep behind the wheel in her legally parked car with the engine running, air conditioner and lights on. No infraction was observed. The Second District Court of Appeal held that the stop became an investigatory stop, rather than a consensual encounter, because the officer repeatedly (5X) asked the defendant to exit the car. The Court further found that the officer did not have a well-founded suspicion of criminal activity, to justify an investigative stop. While the officer suspected that the defendant was inebriated, he also stated that people sleep in their cars for innocent reasons. More importantly, the officer did not testify that he was concerned for the defendant's **safety** or **personal health**. Because the defendant's actions could be easily interpreted as innocent conduct, the Court suppressed the stop. See "Community Caretaker" section.
- **Practice Tip**—This stop could be legally justified if the prosecutor elicited the proper answers based on the very same facts based on officer acting as "community caretaker." For instance, had the officer been asked, he may have testified that he was concerned for the defendant's safety knowing that the defendant was asleep in her car parked just outside a bar/restaurant that was still opened for business, with her engine running and lights on. Without that, however, the stop still would have been valid had the officer not turned the consensual encounter into an investigatory stop by repeatedly asking the Defendant to exit her vehicle, which constituted a show of authority. **See, e.g. State v. Hazel, 6 Fla. L. Weekly Supp. 204 (20<sup>th</sup> Cir. Ct. App. 1998)** (Officer made no display of authority Defendant, could not have perceived any such display since the defendant was unconscious). The officer should have either asked questions of the Defendant while she was seated in the car until he accumulated reasonable suspicion, or entered the bar and asked if the employees could have identified the Defendant as a bar patron. Lastly, the prosecutor should have argued that the facts of the case required the officer to investigate further, creating a *permissive encounter*.

## 6. Questions Prosecutors Should Ask Officer (prior to motion)

- Were requests made or was defendant ordered to act?
- What was the tone of officer's requests?
- How many officers were present?
- Did officer touch defendant in any way?
- Did officer park patrol car behind defendant in manner that might restrict defendant's freedom to leave?
- Was gun holstered or out?
- Did officer touch, intimidate, or coerce defendant in any way?
- Can officer articulate reasonable suspicion of criminal behavior in the alternative?

## B. PERMISSIVE ENCOUNTERS/COMMUNITY CARETAKER

### 1. Generally

- As we have seen in the section regarding consensual encounters, Florida Courts have recognized that law enforcement officers can indeed initiate contact with citizens without creating a stop and seizure situation, particularly when the contact evokes a voluntary response on the part of the citizen. However, in a permissive encounter, the citizen is not necessarily responding voluntarily. As the following cases illustrate, courts have deemed encounters "consensual" where the officer initiates contact because of a duty to investigate, often because of a concern for the health and welfare of the driver or other citizens.
- **Practice Tip:** When pre-trying your officer, it is imperative that you get as much information and facts as possible to support the officer's genuine concern for the welfare of others.
- **Three General Concepts Behind Community Caretakers:**

#### a. Emergency Aid Doctrine

The emergency aid doctrine is remarkably similar to the exigent circumstances exception to the Fourth Amendment's warrant requirement. Although both exceptions involve situations in which officers must act immediately, they have distinctly different purposes. Reasons *other than* the detection or investigation of crime *are the sole concern of police* utilizing the emergency aid doctrine. This is why officers investigating a crime must justify their actions with the "exigent circumstances" exception rather than the "emergency aid doctrine."

**Mincey v. Arizona, 437 U.S. 385 (1978):** The Supreme Court recognized an exception to the warrant requirement for emergencies. The court based the exception on the premise that officers should be able to act without a warrant when they reasonably believe someone needs immediate attention. The Court recognized officers may act [making warrantless entries] when they reasonably believe someone is in need of "immediate aid." Quoting **Wayne v. United States, 318 F.2d 205, 212 (C.A.D.C. 1963)**, the Mincey Court noted, "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."

**Brigham City, Utah v. Stuart, 547 U.S. 398 (2006):** Officers were plainly reasonable in investigating further where they could hear an altercation occurring and people yelling “stop” and “get off me.” Officers then observe juvenile break free from several adults and then strike one of the adults in the face causing injury. Supreme Court held Fourth Amendment does not require for officers to witness someone be rendered “unconscious” or “semi-unconscious” or worse before entering.)

**b. Automobile Impoundment/Inventory Doctrine**

In **Cady v. Dombrowski, 413 U.S. 433 (1973)** and **South Dakota v. Opperman, 428 U.S. 364 (1976)**, the Supreme Court recognized the Impoundment/Inventory exception to the Fourth Amendment’s warrant requirement using the community caretaker function. Although neither **Cady** nor **Opperman** specifically involved the validity of the initial impoundment, the Court in both cases validated the impoundments to protect the public from hazards and interrupted traffic. The community caretaker function justifies the substantial intrusion of an inventory search of an impounded vehicle. **See Cady**, in which an unsecured impoundment area necessitated an inventory search of a car impounded after an accident. **Opperman** cemented the exception by specifically outlining the caretaker purposes supporting standard inventory searches.

**c. “Public Servant” Exception**

The U.S. Supreme Court acknowledged the most commonly recognized form of the community caretaker function—the **public servant exception**. **Cady, 413 U.S. 433, 441 (1973)**. The Court emphasized that local police officers have frequent non-criminal, non-investigatory contact with automobiles. The **Cady** Court decided that initial encounters in those circumstances where police are responding to a concern, independent of seeking to implement the defendant in a crime, satisfy the Fourth Amendment’s reasonableness standard because they lack an investigatory purpose. The doctrine supports relatively minor or regular interactions with police: approaching parked cars when the driver appears incapacitated or sick or the car is functioning improperly. Also see other courts on this subject. **State v Pinkham, 565 A.2d 318, 319 (Me. 1989)** (using “public servant” label for functions of police aside from emergency and automobile impoundment or inventory functions).

**2. Duty to Investigate for Safety of Others (General Facts)**

- **Cady v. Dombrowski, 413 U.S. 433 (1973)**—Because of the extensive regulation of motor vehicle and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, **the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office**. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, **but many more will not be of that nature**. Local police officer frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as **community caretaker functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute**.

- **Lightbourne v. State, 438 So. 2d 380 (Fla. 1983)**—Officer, investigating a report of a suspicious car in the area, approached a “parked car, asked defendant a few simple questions as to the reason for his presence there, his current address, and then ran a routine check on defendant’s car and identification.” (the defendant voluntarily turned over his driver’s license) Since it was **in response to a citizen’s call that the defendant may be in need of assistance**, the officer was not acting on his own “hunch” and did not need reasonable suspicion. “Once on the scene, the officer acted prudently for the protection of the safety of the concerned citizen and his neighbors in the community when he proceeded to check out the defendant’s car and identification.” **Id. at 388**. “We further hold that such contact as evidenced by those facts did not constitute a stop or seizure of the defendant under Terry principles”. **Id. at 389**. An officer may have a duty to investigate some circumstances even though the officer may lack reasonable suspicion. **See also Johnson v. State**, 785 So.2d 1224 (Fla. 4<sup>th</sup> DCA 2001).
- **Scott v. State, 629 So. 2d 238 (Fla. 3d DCA 1993)**—Stop of defendant without reasonable suspicion was not barred by the Fourth Amendment where stop was part of practice of stopping **all** persons in immediate vicinity of a known crime. Stop of defendant was valid even though he was dressed differently than the descriptions of persons involved in the crime. “By virtue of the exigency of fleeing, perhaps dangerous, suspects, we think the stop of all persons found on a likely access route to [or from] the scene of the crime was reasonable, both in its purpose and in the manner it was conducted.” **Id. at 240**.
- **State v. Conyer, 6 Fla. L. Weekly Supp. 161 (17<sup>th</sup> Cir. Ct. App. 1998)**—Officer observed defendant’s car parked on side of road next to the guardrail, with the lights on and engine running. The officer was concerned, based on the position of the defendant’s car, that it might have collided with the guard rail. The court held that at the very least, the officer **had the duty to stop and investigate** whether the defendant had been involved in an accident, or whether he was ill or otherwise in need of assistance. Furthermore, the court held that the officer was justified in ordering the defendant out of the car based on his well-founded suspicion that he had been driving under the influence, **or to check on his health and well-being**.

### 3. Duty to Investigate Person Asleep at the Wheel

- **State v. Baez, 894 So.2d 115 (Fla.2004)**: No stop or seizure occurred where a police officer found Baez slumped over the wheel of his vehicle in a location where he should not normally have been, a dimly lit warehouse area at night. Baez got out of his car voluntarily after the officer had knocked on his window and asked if he was all right. After exiting his car, the officer asked for Baez’s license and ran a check on it, at which point it was discovered that there was an outstanding warrant for his arrest. The Court held “that Baez was not unreasonably detained while the officer ran a warrants check on Baez’s driver’s license.”
- **State v. Perez; 12 Fla. L. Weekly Supp. 35a, (11th Jud. Cir. October 5, 2004)**: Officer at gas station observed vehicle sitting at pump longer than others. He approached to see if driver was ok and saw driver slumped over wheel with engine running. Officer was concerned driver might be on medication, diabetic who passed out or in need of assistance. Officer knocked 3 or 4x without response. When he knocked louder, driver lifted his head and simultaneously hit the accelerator hard,

without car in gear and not moving. Officer's concern was raised due to location of vehicle [near pump] and thus opened door to see if driver was okay or on medication. When defendant turned towards officer there was smell of alcohol. Perez was disoriented with slurred speech, and could not stand by himself. Ct. citing, ***Cady v. Dombrowski*, 413 U.S. 433 (1973)**, held officer acted in accordance with the **emergency aid exception**. (The court specifically distinguished ***Danielowitz***. See below.)

- ***State v. Torcios*, 15 Fla. L. Weekly Supp. 323a (11th Jud. Cir. February 14, 2008)**: Officer finds defendant passed out in a car at 2am. The car is on a right hand lane of street, but not legally parked as there are no meters. Car is on and lights are on. Doors of car are locked. Officer testifies he is concerned for person's safety. Officer attempts to wake the defendant for several minutes. After 3-4 minutes, defendant opens eyes and looks at officer but does not do anything else. Officer asks defendant to step out of car. He does, officer sees signs of impairment. Citing, ***State v. Perez*** (see above), trial court rules that the act of asking defendant out of car was outside scope of the emergency. 11<sup>th</sup> Circuit found that trial courts suppression of stop in error. Court found that defendant's act of opening his eyes and turning his head were not enough to indicate to officer that need for aid was over. Since doors were locked, it was reasonable for officer to request defendant step out of car.
- **But see *Danielewicz v. State*, 730 So. 2d 363 (Fla. 2d DCA 1999)**: Defendant was asleep behind the wheel in her legally parked car with the engine running, air conditioner and lights on. No infraction observed. The 2nd DCA held stop became an investigatory stop, rather than a consensual encounter, because officer asked the defendant to exit the car and asked him to remove his hands from his pockets. Officer did not have a well-founded suspicion of criminal activity to justify an investigative stop. [NOTE: the officer did not testify that he was concerned for the defendant's **safety** or **personal health**, nor did he testify that he suspected the defendant was inebriated.] Because the defendant's actions could be easily interpreted as **innocent conduct**, the Court suppressed the stop. **TIP**: *This is why proper testimony is imperative in such a case.*
- ***State v. Wenners*, 12 Fla. L. Weekly Supp. 722a (15th Jud. Cir. Ct. App. May 16, 2005)**— Defendant was stopped at green light and his vehicle sat idle through an entire traffic light cycle. Thereafter, the officer pulled next to vehicle and observed Defendant asleep, with her head down on her wrist. When light turned green for a second time, another vehicle came up from behind Defendant's vehicle, which still did not move. Officer then pulled behind vehicle and activated her lights. The officer approached vehicle, which was still in the roadway and knocked on driver side window. When defendant failed to respond, Officer knocked a second time and defendant awoke with a blank stare. Observing defendant's foot on the brake pedal while vehicle was still in drive mode, Officer opened car door and requested that Defendant put vehicle in park. Upon opening door, Officer noted odor of alcohol emanating from the vehicle. When Defendant failed to respond to officer's request within a few seconds, Officer Prendergast reached into the car, put it in park, and turned off ignition. Based on officer's concern for public safety, stop was justified.
- ***Keyser v. State*, 11 Fla. L. Weekly Supp. 10a (15th Jud. Cir. Ct. App. October 28, 2003)**—Officer observed defendant asleep inside vehicle parked partially on grass and partially on road. Motor was running and lights were on. Vehicle was

facing busy roadway. Officer knocked on window number of times before defendant eventually woke up. When defendant rolled down window, officer asked him to shut off his engine. Instead, defendant began reaching for different knobs in vehicle (air conditioner and radio). Officer reached through window, turned off vehicle, and kept keys. He noted smell of alcohol coming from inside and asked defendant to step out. Court found that these events were nearly concurrent / “roughly simultaneous” and officer’s precautions did not *cause* him to smell the alcohol or request defendant out of the vehicle. Court found officer’s actions to be minimal intrusion. Here, the officer’s reason for reaching through the window to turn off the vehicle and keep keys was his fear that defendant would drive off in direction of busy roadway. Officer was not trying to gather more evidence to develop reasonable suspicion. [Court also found there was more than ample evidence that officer had reasonable suspicion to ask defendant to step out of vehicle.]

#### 4. Duty to Investigate ERRATIC DRIVING or UNUSUAL DRIVING PATTERN

- Cases involving **unusual driving patterns** also refer, by implication, to a permissive encounter theory. See **Bailey v. State**, 319 So.2d 22 (Fla. 1975), and **Brown v. State**, 595 So.2d 270 (Fla. 2d DCA 1992). While these opinions do not directly refer to an officer’s **duty** to stop a motorist, they do justify stops in which the officer, concerned for motorists’ safety, pull cars over to see what may be wrong with the drivers. This is also referred to as the “**Community Caretaker Function**.”
  - Naturally, cases involving unusual driving patterns should also be read with “**Reasonable Suspicion of DUI**” cases. Moreover, where defendant is **Failing to Maintain Single Lane** or committing another infraction, proceed with “**Reasonable Suspicion of Traffic Infraction**” under Whren.
- “Driving behavior need not reach the level of a traffic violation in order to justify a DUI stop ... [A] legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence ...” **DHSMV v. DeShong**, 603 So. 2d 1349, 1350 (Fla. 2d DCA 1992); See also, State v. Padilla, 4 Fla. L. Weekly Supp. 866 (Fla. Dade County Ct. 1997); see also, State v. Rodriguez, 18 Fla. L. Weekly Supp. 940a (Fla. Miami-Dade County Ct. 2011).
- **Bailey v. State**, 319 So. 2d 22 (Fla. 1975)—The Florida Supreme Court held that although no vehicular regulation was being violated, the officer was justified in stopping the vehicle to determine the reason for its unusual operation where the vehicle was proceeding at only 45 mph and weaving within its lane. The court recognized that “because of the dangers inherent to our modern vehicular mode of life, there may be justification for the stopping of a vehicle by a patrolman to determine the reason for its unusual operation.” Consequently, the Court held that the officer was justified in stopping the defendant’s car.
- **DHSMV v. DeShong**, 603 So. 2d 1349 (Fla. 2d DCA 1992)—The Second DCA found an investigatory stop valid where the officer observed defendant’s car driving “erratically,” slowing from 55 m.p.h. to 30 m.p.h. and then accelerating again, while apparently using the lane markers to position his vehicle. The officer testified he stopped the vehicle because he found driving behavior “erratic” and was concerned that either the driver was impaired or that the vehicle was malfunctioning. Court noted other “courts of this state have recognized that a legitimate concern for the

safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations *less suspicious* than that required for *other types* of criminal behavior.”

- **Brown v. State, 595 So. 2d 270 (Fla. 2d DCA 1992)**— Officer observes the defendant driving in an erratic fashion (i.e., weaving within its lane) and speeding up and slowing down for no apparent reason on several occasions. Officer testifies that he stopped the car to ensure driver was not impaired by lack of sleep or under influence of alcohol or drugs. The Court held that defendant’s unusual driving pattern justified the stop.
- **State v. Flint, 17 Fla. L. Weekly Supp. 489a (Fla. 18<sup>th</sup> Cir. Brevard Cty. Ct. 2010)**--Officer had reasonable suspicion for stop where officer observed defendant weaving within lane and repeatedly crossing over lane markers and fog line, braking several times and driving 15 mph under speed limit. Defendant did not affect any other traffic.
- **Ndow v. State, 864 So.2d 1248 (Fla. 5<sup>th</sup> DCA 2004)**—Here, the Court held that the driving pattern was sufficiently unusual to give rise to reasonable suspicion of DUI to justify a stop. Specifically, the car had a green light at an intersection but sat through the light’s entire cycle. Then the car slowed down in an apparent effort not to pass the police vehicle. Finally, after officer turned into a motel in an attempt to let the car pass, the officer observed upon exiting the motel that the car had pulled over to the side of road and the occupants were trading places. The Court rejected the Defendant’s argument that there had to be an “objective driving pattern,” such as continuous weaving, tires striking a raised curb, etc. that would lead to a reasonable suspicion of driving while impaired.
- **State v. Rodriguez, 904 So.2d 594 (Fla. 5<sup>th</sup> DCA 2005)**: Officer saw defendant “blow” out of a driveway or past a stop sign near a bar at an excessive speed, continue to drive down the wrong side of road across a double yellow center line (even though no other vehicles were affected), and then take a wide swing into driveway of an apartment complex. The trial court accepted defense’s arguments that none of these actions *individually* constituted a traffic infraction and that collectively these actions did not amount to unusual driving. The Fifth DCA disagreed stating, “[t]he defense counsel’s deconstruction of Rodriguez’ driving pattern may have been appropriate before a judge hearing civil traffic infractions; however, that is not the issue in a motion to suppress.” The Court found that officer would have been derelict in his duties if he did not stop the defendant because there was objective evidence to believe both that defendant violated several Florida traffic statutes and that driving pattern was sufficiently unusual to justify stop.
- **DHSMV v. Kurdziel, 908 So.2d 607 (Fla. 2d DCA 2005)**: A police officer observed a driver “swerving in and out of his lane of travel” and stopped driver based on concern that driver may have been “impaired, ill or have a mechanical problem.” The administrative hearing officer accepted the police officer’s testimony and sustained the driver’s license suspension. The circuit court rejected the findings and found the stop to be invalid. However, the Second DCA ruled that circuit court improperly reweighed evidence in rejecting hearing officer’s findings. Accordingly, the Court reinstated license suspension.

- In **State v. Austen**, 3 Fla. L. Weekly Supp. 353 (Fla. Sarasota Cty. Ct. 1994), the court “concludes that the law in Florida may support a stop even where no wrongdoing is asserted.” **Id.** at 355. The court cited language and facts from **Bailey**, 319 So.2d 22 (Fla. 1975), **Esteen**, 503 So.2d 356 (Fla. 5th DCA 1987) and **Brown**, 595 So.2d 270 (Fla. 2d DCA 1992). In footnote 4 of **Austen**, the Court discusses what it calls the “community caretaker function,” quoting from **Cady v. Dombrowski**, 413 U.S. 433 (1973): Given the Florida courts’ attention to unusual driving activity under **Bailey** and its progeny, it would appear that a concern for traffic safety is not distinguishable from the growing body of national case law which supports a stop for the purpose of **community-caretaker functions**. The State has cited several Florida cases which have considered the community-caretaker functions announced in **Cady v. Dombrowski**; **Cobb v. State**, 378 So. 2d 82 (Fla. 3d DCA, 1980) and **Lovett v. State**, 403 So. 2d 1079 (Fla. 1st DCA 1981). Though the issues in those cases are distinguishable from those here, it is clear that the Florida courts were favorably disposed to applying the community caretaker function as a legal basis for Fourth Amendment events. **Austen** at 356.
- **State v. Johnston**, 13 Fla. L. Weekly Supp. 442a (15th Jud. Cir. Ct. App. February 24, 2006)—Defendant made wide u-turn, crossing four lanes of traffic and almost hitting the sidewalk curb. He then crossed back over two lanes of traffic and drifted to the left about one-third of the way. Officer suspected defendant may have been impaired. Stop was valid.
- **State v. Smith**, 3 Fla. L Weekly Supp. 655b (Fla. 6th Cir. Ct. App., 1996)—Officer observed defendant’s car cross the center line and the right-hand “fog line”, twice each, in one half mile. The officer also testified that that he had a founded suspicion that the defendant moved his car from his lane of travel without first ascertaining that such movement could be made with safety to the general motoring, cycling, and pedestrian public. Besides justifying the stop on the basis of reasonable suspicion for a traffic infraction (improper lane change), the court stated that **any reasonable police officer would have stopped a driver under such circumstances**. Thus, the court refers implicitly to an officer’s **duty** to stop.
- **State v. Echevarry**, 4 Fla. L. Weekly Supp. 615c, 616 (Fla. Palm Bch. Cty. 1997)—There the court observed that “[a]lthough there was some disagreement as to whether [the officer] ... suspected that defendant might have been DUI or just sick, such a distinction is of no consequence.” The court cited to **State v. Carrillo**, 506 So. 2d 495 (Fla. 5th DCA 1987), and **Bailey** in holding that the stop was valid whether it was based on a belief of an impaired driver, or just concern for that driver’s situation.
- **State v. Mandel**, 5 Fla. L. Weekly Supp. 95a (Fla. Palm Bch Cty. Ct. 1997)—Officer observed defendant driving below and above posted speed limit, jerking his vehicle to right on three occasions to avoid hitting left curb of road, and hesitating for ten seconds before proceeding after traffic light turned green. The court held that this was both an unusual driving pattern and that the officer had reasonable suspicion of DUI.
- **Donaldson v. State**, 803 So.2d 856 (Fla. 4th DCA 2002)—Stop suppressed. Defendant was stopped after an officer saw him pull out of a hotel parking lot at 2:00 am with tires squealing. The officer testified he thought the defendant was



either impaired or fleeing the scene of a crime. The officer felt the defendant committed an improper start. The Officer however conceded that he did not know if the vehicle was parked before it left the parking lot. The court also rejected the Deshong argument saying that isolated squealing did not rise to the level of “erratic driving” over a period of time. There were no other cars on the road that would have been endangered by the squealing.

- **Finizio v. State, 800 So.2d 347 (Fla. 4th DCA 2001)**—Defendant hit the curb with the front and back tires, speeding up and then abruptly stopping in quick succession. Under the circumstances, an extended observation was neither possible nor necessary, even though no vehicular regulation was being violated. Stop upheld.
- **State v. Williams, 14 FLW Supp. 300b (Marion County December 28, 2006)** – Where officer observed defendant weaving numerous times within lane, there was sufficient basis to stop vehicle to determine well-being of defendant irrespective of fact that no law violation had yet occurred at time of stop.
- **State v. Carney, 14 FLW Supp. 287a (Hillsborough County, December 7, 2006)** – Where deputy observed defendant weaving within lane for over one mile, stop was legal.
- **State v. Kristofer Odegard, 17 Fla. L. Weekly Supp. 462a (Fla 2<sup>nd</sup> Cir. Leon Cty. Ct. 2010)**-Officer’s activation of emergency blue lights to pull over Defendant who was driving with two flat tires did not constitute investigatory stop requiring RS of criminal activity. Stop was upheld.
- **Nicholas v. State, 857 So.2d 980 (Fla. 4th DCA 2003)**—Here, the Court acknowledged the general principal that a police officer can stop a driver based on a founded suspicion that the driver is ill, tired, or under the influence; however, the Court found that the observations by the officer of the Defendant’s driving did not rise to this level. Specifically, the only alleged improper or unusual driving that the officer saw was the defendant’s making a left hand turn from the right hand lane without signaling. The officer admitted that no other vehicles were affected. Since this did not constitute a traffic violation per se, and since it did not amount to “erratic driving,” the Court found the stop to be improper.

## **5. Pat-Downs Justified After Permissive Encounter**

- Officer had no reasonable suspicion of criminal behavior, but approached defendant to ask a few simple questions (after being called to area by “concerned citizen” sitting in a “suspicious car.” Officer did not conduct pat-down until observing defendant making furtive movements with a nervous appearance. Court held officer had reasonable ground to believe defendant was armed and dangerous. **Lightbourne v. State, 438 So.2d 380 (Fla. 1983).**
- Officer had consensual encounter with defendant and saw that defendant began shaking violently, which officer found to be unusual. Defendant appeared to be nervous and had a bulge in his front pocket which appeared to “fill most of his pocket.” Defendant kept reaching for the bulge, at which time officer terminated the conversation and directed defendant to assume a pat down position, as officer

was concerned that defendant might have a weapon in his pocket. **Johnson v. State**, 785 So.2d 1224 (Fla. 4th DCA 2001).

### C. INVESTIGATORY STOPS

#### 1. Reasonable Suspicion Required During a Stop or Seizure

A stop or seizure does not occur until a person is physically subdued by the police or submits to an officer's show of authority. **California v. Hodari**, 499 U.S. 621 (1991); **Perez v. State**, 620 So. 2d 1256 (Fla. 1993).

#### 2. Reasonable Suspicion / Probable Cause the Defendant Committed a TRAFFIC INFRACTION

##### **WHREN**

- **“Pretextual Stop” is no longer a valid defense motion in the context of a traffic stop.** When an officer stops a motorist on the stated basis of an observed traffic infraction, the officer's subjective intent is irrelevant. **Whren v. U.S.**, 517 U.S. 806 (1996).
- **The Whren Test: Whether the Officer Had Probable Cause To Suspect a Traffic Violation.** In a unanimous opinion, the **Whren** Court expressly rejected the “reasonable officer” test. Instead, the Courts now need only ask whether an officer had “probable cause” that a violation occurred, using an **OBJECTIVE STANDARD**. Furthermore, a violation need not actually occur, you only need to show that the officer had probable cause to **believe** a violation occurred. A seizure - the traffic stop - on this basis is per se reasonable. In other words, the correct question is “Could the officer have legally stopped the defendant for the stated reason?” Each officer, therefore, is charged with knowledge of the statutory elements of the traffic laws. Thus, even though an officer thinks he sees a violation, if the officer's interpretation of the law is mistaken, the stop is invalid. **Doctor v. State**, 596 So. 2d 442, 447 (Fla. 1992). In contrast, under **State v. Cobbs**, 411 So. 2d 212 (Fla. 3d DCA 1982), an officer may be factually mistaken, yet stop will still be valid. The only argument to be made regarding an officer's motivation for the stop must be limited to the allegation that a citizen's Equal Protection rights have been violated.
- **Is the Standard Reasonable Suspicion or Probable Cause?** The U.S. Supreme Court decision in **Whren** makes it unclear whether reasonable suspicion is, indeed, the standard for traffic stops based on non-criminal traffic infractions. The **Whren** Court used the term “**probable cause**” throughout its discussion of stops based on traffic violations. Similarly, in **Holland v. State**, *supra*, the Florida Supreme Court adopted the principles enunciated in **Whren**, and tacitly adopted the use of the probable cause standard. Likewise, the Third District Court of Appeal, in **State v. Hernandez**, 718 So. 2d 833 (Fla. 3d DCA 1998), used the probable cause standard for determining whether a vehicle was lawfully stopped and detained. **Hernandez at D1383**. In contrast, in **Eady**, a case which pre-dates **Whren**, the Court used a reasonable suspicion of an infraction standard, and indicated that the stop does not have to be justified by proof beyond a reasonable doubt **nor even probable cause** to believe that a traffic offense has been committed. **Id. at 97**. Whether the standard is termed “reasonable suspicion” or “probable cause” is of relatively minor significance, given that an officer will be observing the completed violation itself.

In Whren, the Court quoted from Delaware v. Prouse, 440 U.S. 648, 654-655 (1979): “[T]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations . . . which afford the (necessary) ‘quantum of individualized suspicion’ . . .” Whren at 817-818.

- State v. Frierson, 926 So.2d 1139 (Fla. 2006) - Only founded suspicion of a traffic infraction is needed to justify a stop.

### 3. Specific Infractions - Under Whren

- **Unlawful Speeding**
  - a. State v. Eady, 538 So. 2d 96 (Fla. 3d DCA 1989)—Officer was justified in stopping the defendant where officer observed the defendant’s car proceeding “at a high rate of speed,” and heard tires screeching and a sound “like a passing gear kicking in.” The stop was valid even though the officer intended only to warn the defendant since the officer could **not be sure** that the defendant was speeding. “There is no question that **neither proof beyond a reasonable doubt so as to justify a conviction nor probable cause to believe that a traffic offense has been committed is required to support a police stop** on that basis.” Id. at 97. “Instead, only a simple “founded” or “reasonable” suspicion of a violation based on the officer’s visual or aural perception is necessary.” Id.
  - b. State v. Joy, 637 So.2d 946 (Fla. 3d DCA 1994)— Officer observed a truck which appeared to be travelling at a high rate of speed cross the intersection in front of him. Officer heard the truck's engine “revving,” as well as a “whoosh” sound and saw flying dust. Officer also had to accelerate to an unusually high rate of speed to catch up with the truck, after which point Officer pace-clocked the defendant’s car with his speedometer. The officer did not use a radar gun. The speedometer in the officer’s car was not calibrated; however, the Court held that the officer’s **visual and aural perceptions were sufficient** to justify reasonable suspicion that the defendant was speeding. Srebnick v. State, 33 Fla. L. Weekly Supp. 2d 132 (Fla. 11th Cir. Ct. App. 1989), cited in Sullivan v. State, 3 Fla. L. Weekly Supp. 581a (Fla. 19th Cir. Ct. App. 1995).
  - c. With regard to testimony as to a defendant’s actual speed, radar evidence is inadmissible unless the State lays a sufficient predicate under **Fla. Stat. § 316.1906(2)**. However, “an officer may stop a vehicle suspected of speeding based on the officer's visual and aural perceptions.” State v. Joy, 637 So.2d 946 (Fla. 3d DCA 1994). **Practice Tip:** This case should be useful in trial where you have an attached speeding ticket. For the purpose of a stop motion, under Joy, an officer’s personal observation is **certainly** enough.
  - d. State v. Kinnane, 689 So. 2d 1088 (Fla. 2d DCA 1996)—Under Whren, stop of car for speeding was valid despite the officer's alternative reason for the stop.
  - e. Martinez v. State, 692 So. 2d 199 (Fla. 3d DCA 1997): **Lay Estimate of Speed**—Estimates of speed may be admitted into evidence as proper opinion testimony of lay witness where the witnesses were "licensed drivers with several years of driving experience and both estimated defendant's speed at 70 MPH as he passed them."

- f. **Chetek v. State, 17 Fla. L. Weekly Supp. 95a (Fla. 17<sup>th</sup> Cir. Ct. App. 2009)**—No error in determining that officer had probable cause to stop defendant for speeding where officer testified that his attention was drawn to defendant's vehicle because of its speed and sound of its tires going through turn and that he subsequently observed defendant's vehicle speeding. No merit to argument that officer lacked probable cause to stop defendant for speeding because accuracy of officer's speedometer was not adequately established where issue is not whether state established that defendant was actually speeding but whether it established that officer had probable cause to believe he was speeding.
- **Excessive Noise**  
**State v. Cobbs, 411 So. 2d 212 (Fla. 3d DCA 1982)**—Even without any sound measuring equipment, an officer can rely on his own visual and aural perceptions to develop reasonable suspicion that a motorcycle has a defective or loud muffler. A lawful stop will not be invalidated merely because it turns out that senses of police officer deceived him. “The law does not require that every police officer have . . . a breathalyzer, a radar gun, or a decibel counter to verify what he smells or sees or hears.”
  - **Expired Tag/ Tag Not Assigned/ Temp Tags**
    - a. **State v. Stachell, 681 So. 2d 802 (Fla. 2d DCA 1996)**—The officers were clearly authorized to stop Stachell's vehicle since his tag had expired even though the officers had formed an intent to conduct a field interview of the occupants based on their suspicion of drug activity before they noticed the expired tag. Re-enforces the objective standard.
    - b. **Alteration of Expired Tag (Criminal Offense)—State v. Castaneda, 3 Fla. L. Weekly Supp. 709b (11<sup>th</sup> Cir. Ct. April 05, 1996)**—Using an objective standard, any reasonable officer would have stopped vehicle where a check on the license tag showed it had expired. In actuality, the officer's suspicions had been aroused when vehicle in residential area at 2:00 a.m. left upon officer's arrival. Officer's subjective belief was not relevant as an expired tag of over eight months is an arrestable offense, justifying the stop.
    - c. **State v. Corvin, 677 So. 2d 947 (Fla. 2d DCA 1996)**—Here the court validated the stop of a vehicle on the basis of probable cause that the defendant was driving the car without tag validation sticker. The factual basis of the stop was that the officer **believed** that the defendant had no validation sticker because of the license plate's bent condition. Again, this belief was sufficient for probable cause.
    - d. **Ellis v. State, 31 Fla. L. Weekly D1734a (2d Cir. Ct. June 28, 2006)**—Officer ran a computer check on defendant's tag as he was driving. Record came back “no record found.” This was sufficient grounds to stop the car to determine exactly what was going on with the tag. Court cited to **Wardlow, 528 U.S. 119 (2000)**, an ambiguity was created which officer needed to resolve.
    - e. **Phillips v. State, 531 So.2d 1044 (Fla. 4th DCA 1988)**—Officer does *not* have probable cause to make a *misdemeanor arrest* in his presence for tag not assigned unless the officer witnessed the defendant transferring the tag from one

vehicle to another. **Practice Tip:** Distinguish Phillips: (1) PC to arrest is quite different than reasonable suspicion for a stop. See State v. Dyson, 42 Fla. Supp. 2d 53 (11th Cir. 1990) (Stop based on tag not assigned valid); and (2) defendant with a tag on a different vehicle is also committing several other infractions. Fla. Stat. § 316.605 Improper Licensing of Vehicles - must have license plate assigned to it from the state attached to the rear of vehicle.

f. State v. Deslandes, 13 Fla. L. Weekly Supp. 562c (17th Cir. Ct., March 14, 2006)—Defendant stopped for improperly displayed tag; permanent tag was inside of rear window in violation of § 316.605, requiring permanent tag be “securely fastened to the vehicle outside the main body of the vehicle.” No other traffic infractions were observed. Circuit court found stop to be valid.

g. Diaz v. State, 850 So.2d 435 (Fla. 2003)—Officer could not read **temp tag** in rear window. Upon approach, however, officer determined tag was valid. The Florida Supreme Court said that such a stop was “barely justifiable.” Unlike the statute for permanent tags, which requires said tags to be “plainly visible and legible at all times 100 feet from the rear or front,” the legislature has not mandated a distance at which temporary tags must be fully legible (only that such tags “be clearly visible from the rear of the vehicle”). Also, the temporary tag statute (§ 320.131) does not specifically require the *expiration date* be legible. Under such circumstances, the Court held that once an approaching officer determines the tag is valid, the only allowable contact with vehicle’s driver would be to explain the reason for the initial stop. Because officer went further than this and obtained information from the driver which ultimately led to the charge of Felony DWLS, Court upheld suppression of evidence.

h. State v. Rivers, 861 So.2d 1208 (Fla. 2d DCA 2003):

Officer could not see the tag at all because it was hanging from the window. Upon approaching the vehicle, officer determined that the tag was valid. The officer walked up to the driver intending to tell her the reason for the stop (and to ask her to tape the tag onto the window so that it was visible from outside the car). However, upon seeing the driver, the officer immediately recognized her and knew that she had an outstanding warrant. He arrested her on the warrant and discovered evidence that became the subject of a motion to suppress. The Court upheld the denial of the suppression motion. The Court stated that the officer’s initial contact with the driver was permissible under *Diaz* and that the continued detention was not based on the temp tag but on “independent knowledge of the outstanding warrant.”

- **Obscured Tag**

State v. Casey, 17 Fla. L. Weekly Supp. 288b (Fla. 7<sup>th</sup> Judicial Circuit 2009)—No PC for stop for obscured vehicle tag where view of the tag was obstructed by properly affixed trailer hitch. There was no defacement, grease, or mutilation of the tag, and it was in excellent shape.

- **Inoperative Tag Light**

State v. Girard, 694 So.2d 131 (Fla. 5th DCA 1997)—Police officers had probable cause to detain motorist whose tag light was inoperative and did not comply with traffic laws and, thus, officers’ stop of motorist was valid, even if reasonable officer would not have detained motorist for such violation

- **Failure to signal turn**

- a. **State v. Riley, 638 So. 2d 507 (Fla. 1994)**—**Fla. Stat. § 316.155** requires a driver of a vehicle making a turn to use the turn signal only if another vehicle may be affected by the turn. Stop of vehicle for failure to use turn signal was not justified because no other vehicle was affected by turn.
- b. **Mcbride v. State, 17 Fla. L. Weekly Supp. 238b, (Fla. 5<sup>th</sup> Jud. Cir. Ct. App. 2010)** -- Where officer and defendant testified that no other traffic was affected by defendant's failure to signal left turn as he exited motel parking lot, there was no probable cause for stop.

**NOTE—Practice Tip to Overcome Riley:**

- i. Elicit testimony that the defendant did not/could not know that no one is affected, because he did not look before turning. **See State v. Smith, 3 Fla. L. Weekly Supp. 655b (Fla. 6th Cir. Ct. App. 1996)**, discussed below.
- ii. If appropriate, elicit testimony that your officer thought defendant's turn signal wasn't working. In **Scott v. State, 710 So. 2d 1378 (Fla. 5th DCA 1998)**, the court held a stop was valid where the officer testified he stopped the defendant because he observed the defendant's car's turn signal fail to flash. Here, the officer was not citing the defendant pursuant to Fla. Stat. 316.155, but rather he was investigating the car's defective equipment (**316.610 (1)**).

- **Improper Backing**

**Nelson v. State, 922 So.2d 447 (Fla. 2d DCA 2006)**—Stop was invalid where Officer observed vehicle with two men inside, parked with the brake light on, but not moving. When vehicle finally began to move back, the officer stopped suddenly and activated his emergency lights. Because defendant had backed up his car only two feet and stopped immediately when the officer's lights came on, the Court found defendant had properly "yield[ed] to" officer who was not forced out of his path in the alley, nor was he required to swerve to avoid Mr. Nelson's vehicle. Thus, there was no violation of § 316.1985(1).

- **Driving on Wrong Side of Road**

**DHSMV v. Jones, 935 So. 2d 532 (Fla. 3d DCA 2006)**— Third DCA applied the **objective test** when trooper thought defendant had failed to maintain single lane. The court found that the defendant actually violated § 316.081 by driving into a lane designated for oncoming traffic for no apparent reason. (According to trooper, driver traveled "left of the center [of the roadway] onto the southbound lane.") This statute requires only that "a vehicle shall be driven upon the right half of the roadway" except when passing another vehicle, when avoiding an obstruction, when the roadway is divided into three lanes, or when the roadway is designated for one-way traffic. This provided probable cause for the stop.

- **Failure to Maintain a Single Lane**

- a. **IMPORTANT NOTE**—This material presented under this section must be read and analyzed *in conjunction with* the material presented under “**Erratic or Unusual Driving**,” as well as “**Reasonable Suspicion of DUI**.”

In most cases where Officer observes a driver failing to maintain a single lane, the Officer will likely also have an independent reasonable suspicion that the driver is DUI or that she was concerned with the driver being ill or tired or otherwise in need of assistance. Speak to the officer in each case and determine whether she believed, based on her training and experience and the observed driving pattern, that the driver may have been ill, tired, or DUI. If the Officer has an independent reasonable suspicion of DUI, then the question of whether the driver actually committed the infraction of FTMSL becomes immaterial.

- b. **Defense Argument**—The stop is not valid because it was allegedly based on failure to maintain a single lane, and no other vehicles were *affected/endangered*. As authority for this argument, defendants will rely on Crooks v. State, 710 So. 2d 1041 (Fla. 2d DCA 1998); Jordon v. State, 831 So.2d 1241 (Fla. 5th DCA 2002).
- c. The Third DCA, however, has settled this issue:

DHSMV v. Jones, 935 So. 2d 532 (Fla. 3d DCA 2006)— **There is no requirement that operation of a vehicle create a risk to others to support a valid stop for failure to maintain a single lane.** Trooper noticed a white pick up having difficulty remaining in the northbound lane. Over the next mile, Trooper saw the pick-up "travel across the broken yellow line into the [oncoming] southbound lane," and then swerve back into the northbound lane to negotiate a curve. The trooper saw the pick-up continue to swerve and again travel "left of the center [of the roadway] onto the southbound lane." Based on these observations, Jones was stopped. The circuit court concluded that FTMSL standing alone did not establish probable cause to support a traffic stop under § 316.089 and that absent evidence that crossing the centerline created "even the slightest risk" to others. Deciding the defendant also committed another infraction, the court noted **that failure to maintain a single lane alone, can under appropriate circumstances, establish probable cause.** Citing Roberts v. State, 732 So. 2d 1127, 1128 (Fla. 4th DCA 1999) (weaving several times within a single lane held sufficient to justify a stop where there was no evidence to show endangerment to others and where no traffic violation had occurred); *see also* Ndow v. State, 864 So.2d 1248, 1250 (Fla. 5th DCA 2004) ("If a police officer observes a motor vehicle operating in an unusual manner, there may be justification for a stop even when there is no violation of vehicular regulations and no citation is issued."). **And there is no requirement that operation of a vehicle create a risk to others to support a valid stop for failure to maintain a single lane.** *See* Yanes v. State, 877 So.2d 25, 26-7 (Fla. 5th DCA 2004) (finding PC to support stop and concluding that where an officer observes a driver cross white line on the right side of the road 3x "there was evidence that [driver] deviated from his lane by more than what was practicable. To do so is a violation of the statute, irrespective of whether anyone is endangered"); *see also* Bailey v. State, 319 So.2d 22, 26 (Fla.1975) (observing that "[b]ecause of the dangers inherent to our modern vehicular mode of life, there may be justification for stopping a vehicle by a patrolman to determine the reason for its unusual operation").

**d. Defense Cases**

- i. **Crooks v. State, 710 So. 2d 1041 (Fla. 2d DCA 1998)**—Officer observed the defendant drive his car over the right-hand lane on the edge of the right lane of northbound traffic on three occasions into the emergency lane. The court held that **Fla. Stat. § 316.089** is similar to **Section 316.155**, failure to use turn signal, “in that a violation does not occur in isolation, but requires evidence that the driver’s conduct created a reasonable safety concern.”
- ii. **Jordon v. State, 831 So.2d 1241 (Fla. 5th DCA 2002)**—**Fifth DCA held that in their case** the record was “insufficient to establish that his vehicular movements, as testified to by the arresting officer, created any danger to himself or other traffic. Indeed, the testimony of the officer clearly established that other vehicles, including his own, were not in danger by Jordan's driving.” Moreover, there was no testimony that Jordan was intoxicated or otherwise impaired, nor was there any evidence of an erratic driving pattern. The court noted, “the applicable statute in this case recognizes that it is not practicable, perhaps not even possible, for a motorist to maintain a single lane at all times and that the crucial concern is safety rather than precision.” *Also see* **Williamson v. DHSMV, 933 So. 2d 665 (Fla. 1st DCA 2006)** (distinguished Crooks and Jordan as if to validate their holdings: because evidence in those cases showed defendants who were changing lanes or crossing over lane lines did not endanger other vehicles, the state failed to establish that the drivers had not first determined they could safely make such movements).
- iii. **State v. Giachinta, 3 Fla. L. Weekly Supp. 700a (Fla. 17th Cty. Ct. 1996)**, and **State v. Gonzalez, 3 Fla. L. Weekly Supp. 701b (Fla. 17th Cty. Ct. 1996)**: In each of these cases, officer testifies that his “sole basis” for stopping the defendant was for violating Florida Statute **316.089** (or Failure to Maintain a Single Lane). Since there was testimony that no other traffic was affected by the movement outside of one lane, and since **316.089** states that vehicles may move out of a lane when it is safe to do so, “there was no violation of **§316.089**” justifying the stop.
- iv. **State v. Alford, 2 Fla. L. Weekly Supp. 483a (Fla. 17th Cty. Ct. 1994)**: Officer testifies that defendant’s car was weaving and it crossed the centerline while the officer traveled behind the defendant for one mile. The Court viewed the videotape and determined that the defendant’s car did not weave nor did it cross the centerline. Thus, the officer did not have reasonable suspicion to conduct a traffic stop for failure to maintain a single lane. The Court goes on to suggest that there can be no violation of **316.089(1)** unless the violation is coupled with the fact that the driver has not first ascertained that changing lanes can be done without endangering any other traffic.
- v. **State v. Goodkin, 15 Fla. L. Weekly Supp. 656a (11th Jud. Cir., Miami Dade County, March 23, 2008)**: Officer observed defendant driving in the center lane. She was swerving in her lane. The tires of her car never touched the lane markers on either side. Neither vehicles nor pedestrians had to take evasive action to avoid her. Officer testified that in addition to being



concerned for defendant's safety due to her erratic driving, he stopped her for failing to maintain single lane. Court found that defendant's actions did not constitute failing to maintain a single lane because she never crossed the lane markers into another lane. She was in the same lane the entire time.

**NOTE:** The court never addressed the community caretaker/Bailey argument. If you have a similar driving situation, elicit testimony relating to community caretaker to overcome argument based on this case.

**e. State's Response and Cases**

**i. The Third DCA has settled the question. See DHSMV v. Jones, 2006 WL 1479640 (Fla. 3d DCA May 31, 2006).**

**ii. Distinguishing Crooks and Jordan:**

- The defense will argue that other traffic *need be affected*. THAT IS NOT THE LANGUAGE USED IN THE CASE. The standard in the case is that the driver's conduct must create a *reasonable safety concern*. What is a "reasonable safety concern?"
- The Crooks and Jordan courts also had a lack of sufficient evidence in the record:

**aa.** In Crooks, there was no record to establish how far into the other lane defendant actually drove on any of the three occasions.

**bb.** There was no objective evidence suggesting defendant failed to ascertain his movements could be made with safety (i.e. no testimony that officer didn't see defendant look into his mirrors or whether he looked backwards to see if other vehicles were around.) In fact, in Jordan, the court especially noted that "the testimony of the officer clearly established that other vehicles, including his own, were not in danger."

**cc.** There was no indication in Crooks or Jordan that the officer suspected driver was impaired or intoxicated.

**dd. Pretextual Stop** –In Crooks, there is an indication that the defendant was of a minority class, perhaps suggesting that perhaps the basis for the stop was in fact pretextual. Distinguish your case where no such testimony or evidence exists!

**f. Case Law Favorable to the State**

**i. DHSMV v. Jones, 2006 WL 1479640 (Fla. 3d DCA 2006)—See above.**

**ii. State v. Jackson, 15 Fla. L. Weekly Supp. 586b (17th Jud. Cir. Broward County, March 10, 2008):** Officer observed defendant's car move from far right lane to far left lane while using the wrong turn signal to indicate the lane change. He also observed the defendant drift in and out of lanes without continuously having the turn signal on. Court found

these actions were enough to constitute failure to maintain single lane and officer had reasonable suspicion to conduct a stop.

- iii. **State v. Lundelius, 15 Fla. L. Weekly Supp. 289a (18th Jud. Cir., Brevard County, January 17, 2008):** Officer observed defendant weaving within his lane. The tires of the car were crossing over the lane markers and officer observed the defendant arguing with the passengers in his car. The defense argued the stop should be suppressed under Crooks and Jordan. Court found that given the erratic driving pattern, the officer had reasonable suspicion to conduct a stop even though there was a possible explanation for the pattern (arguing with passengers). The totality of the circumstances indicated that defendant could also be impaired.
- iv. **Yanes v. State, 877 So.2nd 25 (Fla. 5<sup>th</sup> DCA 2004)**—LEO’s observations provided reasonable suspicion sufficient to justify stop where vehicle crossed the line three times in space of one mile and no traffic was effected. Stop valid because LEO thought the defendant was impaired based on the driving pattern.
- v. **State v. Cray, 6 Fla. L. Weekly Supp. 314c (11th Cir. Ct. App. March 12, 1999)**—In Cray, the 11th Circuit, acting in its **appellate capacity**, found stop valid where officer observed vehicle weaving and traveling at a speed lower than posted speed limit. The vehicle was also seen crossing the painted centerline dividing the street. The appellate court (finding both cases had similar facts) cited to **State v. Padilla’s** (Miami-Dade Cty), reasoning that “traffic laws are enacted to protect the public from the lethal dangers presented by vehicular traffic. Therefore, requiring that other traffic be endangered by the failure to maintain a single lane is unreasonable because requiring an accident, a fatality, or a near-accident, is inconsistent with the purpose of having traffic laws.” Moreover, the Cray court distinguished Crooks in that the officer in Cray testified that on two occasions the left tires of the vehicle crossed painted line causing the car to move forward in the wrong lane of traffic, making it “evident that the officer saw this defendant outside of his practicable lane.”
- vi. **State v. Padilla, 4 Fla. L. Weekly Supp. 866 (Fla. Dade Cty. 1997)**—**No other traffic need be affected**—The court held that a driver violates § 316.089 even if no other traffic is affected, when it **weaves** from lane to lane (as distinguished from when it **changes** lanes, which a driver may do as long as he has determined that it can be done safely, i.e. without affecting other vehicles). Thus, the court addresses the policy arguments outlined below. **Most importantly, the court clarifies that the same "driving pattern" which constitutes "failure to maintain a single lane" will usually amount to reasonable suspicion.**
- vii. **State v. Simmons, 5 Fla. L. Weekly Supp. 273 (Fla. 15<sup>th</sup> Jud. Cir. App. 1997)**—**No other vehicles need be endangered.** The court noted the plain meaning of Fla. Stat. § 316.089 only creates two requirements, “... (1) stay with your lane at all times and (2) if you intend to change lanes, make sure it is safe. **Any other interpretation**

of this language is sure misplaced.” Id. at 273. The court was not persuaded that the language in State v. Riley had any bearing on interpreting the failure to maintain a single lane statute. The court did find the logic in State v. Padilla.

viii. State v. Smith, 3 Fla. L. Weekly Supp. 655 (Fla. 6th Cir. Ct. App. 1996)—**No vehicles need to be endangered**—There can be a valid stop based on a violation of Fla. Stat. § 316.089(1), even where no other vehicle is endangered by the defendant’s failure to stay in his lane. The officer witnessed a violation even where no other car is endangered, as long as the officer reasonably suspects that defendant did not first determine the other lane was clear. The court stated that “[a]ny responsible police officer would have stopped a driver under such circumstances.” Id. at 656.

ix. State v. Briggs, 5 Fla. L. Weekly Supp. 32 (Fla. Broward Cty. Ct. 1997)—**No other traffic need be affected**—Officer testified that she observed the defendant swerving within his lane. She then observed the defendant cross over into the lane to the left of his and swerve back. In finding that no other traffic need be affected, the court reasoned “[I]t is an unreasonable interpretation of this State’s traffic code to make our citizens wait for a driver to strike another driver, pedestrian, animal or inanimate object or cause another driver to avoid a collision before a violation for erratic driving is committed.” Id. at 33. The court further held that “[t]here are always drivers affected—**most notably of whom include the Defendant himself.**” Id. at 33. The court further noted that there was “a very good probability” that the Defendant did not ascertain that his swerving could be made with safety, without affecting other traffic.

x. State v. Francisco Gonzalez-Oliva, FLW Supp. \_\_\_\_ Fla. 11<sup>th</sup> Cir. Ct. App. 2010) (Opinion filed July 22, 2010). Found the trial court misapplied the law when it held that there was a requirement that traffic had to be adversely affected before an officer could stop the Defendant. Officer testified that the Defendant drifted over the dashed lines four or five times and two vehicles backed away from the truck. Trial court initially found the lane deviations were minor.

#### g. How to Argue a Crooks Motion

- i. **Pre-try Officer:** Determine whether he had PC of infraction, was concerned for safety of driver, and/or was suspicious of DUI/Reckless Driving.
- ii. **Infractions:** Whether or not other traffic was affected, did officer observed an infraction?
- iii. Argue that the **driver** himself was affected by his driving pattern, or argue that actual **officer** was affected by the driver failing to maintain single lane. (i.e. officer had to apply breaks, slow down, take evasive action, etc.)

- iv. Cite case law indicating other traffic need not be affected. **DHSMV v. Jones.**
- v. It would violate public policy to accept the Defendant's interpretation of the FTMSL statute. The legislative intent of the traffic laws is to protect the public. Consistent with that endeavor is the requirement, in **Fla. Stat. § 316.089(1)**, that the vehicle shall not be moved from such lane "until the driver has first ascertained that such movement can be with safety." Clearly, this is meant to force drivers to check other lanes before they change lanes intentionally. However, this is totally distinct from the situation where drivers cannot maintain their lanes. To require that other traffic be affected would be equivalent to requiring that officers wait to effectuate a stop until other drivers are placed at risk. Public policy dictates that the officer should not have to wait until there is a collision in order to make a stop. See **Padilla.**
- vi. **Unusual Driving:** Argue that officer observed an "unusual driving pattern" as in **Bailey.**
- vii. **RS of DUI:** Reasonable suspicion is based on an officer's observations. The circumstances are interpreted in light of the officer's knowledge and experience. **Smith v. State, 592 So. 2d 1206 (Fla. 2d DCA 1992).**

- **Obstruction of Highway**
  - a. **Covington v. State, 728 So. 2d. 1195 ( Fla. 4<sup>th</sup> DCA 1999)**—Defendant’s car was stopped in the middle of the roadway in high crime area, straddling both lanes, blocking traffic, with the driver’s door open. The Defendant, with one foot on the roadway, was talking to a known narcotics dealer, who was standing four or five feet from the Defendant. Stop of the Defendant was valid. “Whether the arresting officer would have enforced the traffic law absent potentially drug related activity is immaterial to the validity of the stop [as] the arresting officer had probable cause to believe that a traffic violation had occurred.
  - b. **State v. Constant, 2 Fla. L. Weekly Supp. 407 (Fla. 11th Cir. Ct. App. 1994)**—Defendant’s action in leaving his vehicle unattended under traffic light in middle of intersection while he conversed nearby with two known prostitutes sufficient to justify officer charging defendant with obstruction of public streets, highways and roads. Officer testified that other cars had to slow down and go around defendant’s car parked in the intersection.
  - c. **Dick v. State, 1 Fla. L. Weekly Supp. 428 (Fla. 11th Cir. Ct. App. 1993)**—Defendant lawfully parks his car on shoulder of Biscayne Boulevard in order to talk to two known prostitutes. The officers did not hear the conversation but had a hunch that the defendant was a “john”. The defendant’s motion to suppress was granted because the officers were relying on mere suspicion.
- **Lack of Safety Mirrors**  
**Veltri v. State, 17 Fla. L. Weekly Supp. 435b (Fla. 17<sup>th</sup> Cir. Ct. App. 2009)**-- Stop for having only passenger side rear view mirror was not lawful because statute requires only one rear view mirror
- **No Safety Belt**
  - a. **Manners v. State, 2 Fla. L. Weekly Supp. 197 (Fla. 19th Cir. Ct. App. 1994)**—An officer cannot stop a vehicle for violation of the seat belt law. **Fla. Stat. § 316.614(9)** states that enforcement shall be accomplished only as a secondary action (i.e., when there is some other reason for the stop).
  - b. **NOTE—Fla. Stat. § 316.613** requiring a child restraint for children 5 years old and younger can be grounds for a valid traffic stop.
- **Running a Stop Sign**  
**Holland v. State, 696 So. 2d 757 (Fla. 1997)**—Citing to **Whren** in applying the "objective test" as to whether the officers stopped the car based on "probable cause" for a traffic-law violation, the court stated that "the vehicle failed to stop at a stop sign, a direct violation of Florida's traffic law.
- **Inoperable Brake Lights / Cracked Reflectors**
  - a. **State v. Perez-Garcia, 917 So.2d 894 (Fla. 3d DCA 2005)**—Stop valid where vehicle had inoperative left-rear brake light, even though it had two other functioning brake lights, in compliance with § 316.222(1). Court found that the left rear brake light is statutorily required. Moreover, it noted that “with the assistance from our sister courts” they concluded that a “vehicle traveling on the

highway with an inoperable brake light is a vehicle in an ‘unsafe condition’” in violation of § 316.610.

**NOTE:** This case is now on remand to the Third DCA to decide the case based on the Florida Supreme Court’s decision Hilton v. State (see below – Unsafe Equipment). The 3<sup>rd</sup> DCA remanded the case to trial court in consideration of Hilton.

**BUT SEE:**

- b. **State v. Burger, 921 So.2d 847 (Fla. 2d DCA 2006)**—Vehicle was stopped because “traditional” brake lights were not working. The other one did, as did the third light (located high in center of the car). Second DCA held that under the “plain meaning” of statutory construction of §316.222(1), only two lamps must be functioning properly. The court reasoned that the statute did not require the operable lights be parallel to each other, merely that they be in the rear of the vehicle. Interestingly, this is same court in Hilton, 901 So.2d 155 [re: **cracked windshield**], but it never addressed “proper repair” possibility, nor did it address the “unsafe condition” as did the Third DCA in Perez-Garcia.

Interestingly, the court did not make reference of its own decision in State v. Snead, 707 So.2d 769 (Fla. 2d DCA 1998), where Officer observed the taillight and brake light on the driver’s side to be inoperable. He cited defendant for “improper unsafe equipment.” Following Holland, the court said “no further inquiry into the officer’s motivation for the stop is relevant under the objective test.” Notably, there were two rear lights that were inoperable in this case.

- c. **Doctor v. State, 596 So.2d 442 (Fla. 1992)**. Invalid stop where reason for stop was crack in innermost lens of taillight. The defect was a crack in the reflector or lens cover designed to merely reflect light, not the actual cover designed to cover an actual lighting apparatus.
- d. **Harris v. State, 14 FLW Supp. 845b (13th Judicial Circuit (appellate) April 16, 2007)** – Where broken tail light cover on defendant’s vehicle was emitting more than insubstantial amount of white light, officer had reasonable cause to believe vehicle was unsafe, and stop was legal. “Although he admitted all three rear lights were operational , in his opinion, emission of the white light from the left tail light was a safety hazard. cf. State v. Burger, 921 So.2d 847 (Fla. 2d DCA 2006) . Corporal Leistl had reasonable cause to believe that Appellant’s vehicle was unsafe based on emission of white light that indicates reverse mode.”
- e. **State v. Burke, 902 So.2d 955 (Fla. 4th DCA 2005)**— In Burke, there was also an issue of a cracked windshield. As far as the taillight was concerned (no third light involved), the court held that although there was a crack in the red lens, emitting white light, the red lens still partially covered the taillight. The stop was invalid under Frierson v. State, 851 So.2d 293 (Fla. 4th DCA 2003), **quashed on other grounds** Frierson, 926 So.2d 1139 (Fla. 2006). (Importantly, the Florida Supreme Court reviewed the decision for other reasons, but declined to answer the validity of this kind of stop. **See** Frierson, 926 So.2d 1139 (Fla. 2006).

- f. **State v. Schuk, 913 So.2d 69 (Fla. 4th DCA 2005)**—This case also involved a cracked taillight where no third taillight was involved. However, the court distinguished **Doctor**, **Frierson**, and **Burke** and noted that in those cases the stop was based on a mere crack. In Schuk’s case, the officer observed a hole, “the size of a fist” in the lens cover, covered by red tape. There was white light emitting from the light. The court reasoned these facts provided the officer with reasonable suspicion that the vehicle was not in compliance with § 316.221(1) and also justified a stop for unsafe equipment under § 316.610(1) and (2). Interestingly, the Court quoted from and agreed with the language in **Hilton, 901 So.2d 155 (Fla. 2d DCA 2005)**, *supra*, that an equipment violation can constitute a basis for a stop even if the equipment violation does not create an unduly hazardous operating condition.
- g. **State v. Prange, 5 Fla. L. Weekly Supp. 138 (Fla. 9<sup>th</sup> Jud. Cir. App. 1997)**—Corporal testified that he could see a bright spot on the ground in front of the car caused by the passenger headlight pointing toward the ground. He cited the defendant for unsafe equipment, pursuant to **Fla. Stat. § 316.610(1)**. Because the officer observed that the headlights “were not in proper repair,” (emphasis added), the court held that the officer had authority under **Fla. Stat. § 316.610** to stop the vehicle “for an appropriate inspection.”
- **Unsafe Equipment: Cracked Windshield (Certified Conflict Between DCA’s)**
  - a. **Hilton v. State, 961 So.2d 284 (Fla. 2007)**. Court found that in order to cite someone for a cracked windshield, the officer must find that the crack renders the vehicle in such an unsafe condition as to endanger person or property. The standard the Court used was whether a reasonable officer would have believed the crack constituted a safety hazard. This case resolved all prior DCA conflicts on this issue.
  - b. **State v. Burke, 902 So.2d 955 (Fla. 4th DCA 2005)**. Court found that a stop was invalid where state failed to show crack actually created a safety problem.
- **Careless Driving/Driver(s) Involved in a Collision**  
**State v. Labrum, 4 Fla. L. Weekly Supp. 560 (Fla. Hillsborough Cty. Ct. 1996)**—Officer has the “right and duty” to investigate what he believed to be a motor vehicle collision. The court found that under the Careless Driving and Improper Backing statutes, as well as under Florida’s statutory duty to report traffic collisions, the officer could approach the driver of a car which he had observed backing up and moving forward just prior to a collision which the officer thought he heard but did not see.

## 5. Reasonable Suspicion the Defendant Committed a Crime

- **Fla. Stat. § 901.151. Stop and Frisk Law**
  - a. This section may be known and cited as the “Florida Stop and Frisk Law.”
  - b. Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, he may temporarily

detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding his presence abroad which led the officer to believe that he had committed, was committing, or was about to commit a criminal offense.

- i. Officer may stop a vehicle if she has reasonable or founded suspicion that person has committed, is committing, or is about to commit a crime. **Saturnino-Boudet v. State, 682 So.2d 188 (Fla. 3d DCA 1996)**. A founded suspicion is one which has some factual foundation in the circumstances observed by the officer when those circumstances are interpreted in light of the officer's knowledge. A mere suspicion will not suffice. **Smith v. State, 592 So. 2d 1206 (Fla. 2d DCA 1992)**.
  - ii. **NOTE**: To be justified under **Fla. Stat. § 901.151**, a vehicle stop (or other form of temporary detention) must be based on reasonable suspicion of a crime. **See, e.g. Cuva v. State, 687 So. 2d 274 (Fla. 5th DCA 1997)**. (Holding invalid defendant's temporary detention based on the officer's belief that the defendant, in violation of a municipal ordinance **which was non-criminal in nature**, was in downtown Orlando after midnight).
  - iii. Of course, an officer may validly conduct a vehicle stop based on "something less" than reasonable suspicion of a crime where officer has probable cause that a traffic infraction has occurred. **See, e.g. Whren; Holland**. Again, even if the officer witnesses a driving pattern that does not rise to the level of a traffic infraction or criminal conduct, the stop may nonetheless be valid. **See, e.g. Bailey**.
- c. No person shall be temporarily detained under the provisions of subsection (2) longer than is reasonably necessary to affect the purposes of that subsection. Such temporary detention shall not extend beyond the place where it was first affected or the immediate vicinity thereof.

#### **When is Terry Detention Elevated to Custody?**

**Saturnino-Boudet v. State, 682 So.2d 188 (Fla. 3d DCA 1996)**—Held that police had detained defendant no longer than reasonably necessary under the circumstances for them to dispel their founded suspicion that Boudet was involved in illegal narcotics activity. Defendant remained at the scene at all times during this investigation and was never transported away by the police. Thus, court reasoned there was no de facto arrest. Importantly, the court noted an officer may detain the individual even at gunpoint and/or by handcuffs for the officer's safety without converting the Terry stop into a formal arrest.

**State v. Barcenas, 559 So.2d 70 (Fla. 3d DCA 1989)**—"The fact that stop was accomplished by multiple officers or with guns drawn does not convert an investigatory stop into an arrest."

- d. If at any time after the onset of the temporary detention authorized by subsection (2), probable cause for arrest of person shall appear, the person shall be arrested. If, after an inquiry into the circumstances which prompted the temporary detention, no probable cause for the arrest of the person shall appear, he shall be released.



- e. Whenever any law enforcement officer authorized to detain temporarily any person under the provisions of subsection (2) has probable cause to believe that any person whom the officer has temporarily detained, or is about to detain temporarily, is armed with a dangerous weapon and therefore offers a threat to the safety of the officer or any other person, the officer may search such person so temporarily detained only to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon. If such a search discloses such a weapon or any evidence of a criminal offense it may be seized.

**Arizona v. Johnson, 129 S.Ct 781 (2009)**- In traffic-stop setting, condition of lawful investigatory stop is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into vehicular violation; police need not have, in addition, cause to believe any occupant of vehicle is involved in criminal activity.

- f. No evidence seized by a law enforcement officer in any search under this section shall be admissible against any person in any court of this state or political subdivision thereof unless the search which disclosed its existence was authorized by and conducted in compliance with the provisions of subsections (2)-(5). **Fla. Stat. § 901.151.**

- **Suspicious Activity**

Merely walking in vicinity of possible crime in a business/warehouse area where it was not common to see pedestrians walking, especially at 3:00 a.m. **A.H. v. State, 693 So.2d 89 (Fla. 3d DCA 1997)** (*citing Jordon v. State, 544 So.2d 1073 (Fla. 2d DCA 1989)*) (walking in “general vicinity” of “high crime area” does not support reasonable suspicion).

- **Reasonable Suspicion Gained from BOLO/ Anonymous Tip / Citizen Informant**

- a. **BOLO**

An anonymous or citizen tip will often initiate a dispatch, or “BOLO” (Be On the Look Out) causing police officers to search for a subject matching a particular description. As all other investigatory stops, the officer must have a reasonable, well-founded, articulable suspicion that subject of BOLO has committed, is committing, or is about to commit a crime. “To determine whether information is sufficient to support a reasonable suspicion, the Court must assess the totality of the circumstances known to the law enforcement officer and determine whether an experienced LEO could draw inferences and make deductions that would raise a suspicion that the individual being stopped was engaged in wrongdoing.” **Tamer v. State, 484 So.2d 583 (Fla. 1986)**, (911/Exigent Circumstances); **State v. Hunter, 615 So.2d 727, 730 (Fla. 5th DCA 1993)**; **J.C. v. State, 616 So.2d 1183 (Fla. 3d DCA 1993)** (holding that courts are to look to the information given in the tip and the surrounding circumstances).

**Test for Reasonable Suspicion Based on a BOLO—Hunter v. State, 660 So.2d 244 (Fla. 1995)**—When an officer stops a vehicle based on a BOLO radio transmission, the following factors are relevant in determining if the officer had reasonable suspicion to justify the stop:

- i. The length of time and distance from the offense.
- ii. The route of flight.
- iii. Specificity of the description of the vehicle and its occupants.
- iv. The source of the BOLO information.

**b. BOLO's RELIABILITY**

**i. CITIZEN INFORMANTS are Presumed Reliable**

**State v. Maynard, 783 So.2d 226 (Fla. 2001)**—Tips coming from a citizen informant are at the “high end of the tip-reliability scale” and require less independent corroboration than do anonymous tips. **Id. quoting State v. Talbott, 425 So.2d 600, 602 n.1 (Fla. 4th DCA 1982).**

In **Maynard**, informant was not only “readily ascertainable” as she offered a description of suspect, informing police she was the suspect’s mother, and provided that address from which suspect to the police, but was also “citizen informant.” There was *no indication the caller was motivated by any reason other than a concern for the safety of her son and others.*

**State v. Evans, 692 So.2d 216 (Fla. 4th DCA 1997).** NOTE: The holding in this case was upheld in **State v. Maynard, supra**. The Court upheld the stop based upon a tip from a McDonald’s employee who reported seeing a patron at the drive-through appearing to be drunk. The description included a description of defendant’s physical condition, his vehicle and tag number. Despite the fact that the state and defense classified the tipster as “anonymous,” the Fourth DCA found “anonymous tip” was the improper legal standard. Instead, and the tipster was classified as that of a “citizen informant.” As such, the tip was “**presumed in the law to be reliable, needing little, if any, corroboration** before it can justify an investigatory stop.” Less independent corroboration is necessary because the citizen informant is “**motivated not by pecuniary gain, but by the desire to further justice.**” **Evans**, at 219. See also, **State v. Maynard, 783 So.2d at 230**; **State v. Dukenik, 5 FLW Supp. (Palm Beach Cty. Ct. 1998)**; **Ross v. State, 5 FLW Supp. 9 (Fla. 13<sup>th</sup> Jud. Cir. 1997)** (manager at a Krystal’s restaurant = citizen informant); **Joseph v. State, 5 FLW Supp. (Fla. 4<sup>th</sup> Jud. Cir. 1997)** (taxi driver = citizen informant and not anonymous informant); **Collard v. DHSMV, 5 FLW Supp. 749 (Fla. 9<sup>th</sup> Jud. Cir. 1997)** (anonymous citizen who jumped out of a vehicle and told officer he was the victim of a hit and run = reliable informant).

**ii. Actual Knowledge of Informants Identity Not Determinative of their Categorization as Citizen Informants**

Defense attorneys will often make the argument that if the informants actual identity is not known, the informant is automatically an anonymous tipster since their identity is not “readily available.” However, depending on the facts of your case, this is not necessarily the case. (See also the section iii on “Identity” below).

- **Carattini v. State, 774 So. 2d 927 (Fla. 5th DCA 2001)**; **Milbin v. State, 792 So.2d 1272 (Fla. 4th DCA 2001)**; **State v. Manuel,**

**796 So.2d 602 (Fla. 5th DCA 201).** In each case, a citizen provided face-to-face contact with a police officer about a crime, but police were unable to, or failed to get, the informant's name. The courts found the tipsters to be "citizen informants" rather than anonymous tipsters. The informants gave face to face information to the officers. While their names were never found out by the officer, the officers had the opportunity to see their demeanor to ascertain the tips' reliability. Furthermore, the face to face contact meant the informants were readily available in the moment for the officers to ascertain their identities. As such, they were readily ascertainable at the time the tips were given and, thus, no corroboration was needed to validate stops.

**But see State v. Rewis, 722 So. 2d 863 (Fla. 5th DCA 1998)**—Where truck driver pulled up to several troopers and at rest stop and told them he had seen white Firebird weaving and driving erratically and that the driver may be impaired. The truck driver gave the Firebird's tag number, but left without giving his name. Truck driver did not qualify as citizen informant and subsequent stop of Firebird was unlawful.

**State v. Reyes, 680 So.2d 1092 (Fla. 3d DCA 1996)**— **Corroboration of Criminal Activity Not Required.** The Court held that the police officer had reasonable suspicion in making the investigatory stop of a vehicle matching the description of a vehicle broadcast in a BOLO minutes before. The victim complained that three males in a dark sedan had brandished baseball bats and a gun at him. The vehicle was stopped three or four blocks north of the incident. Upholding the stop, the Court spoke of the "**presumed reliability**" of a citizen/victim's tip. Further, the court detailed the following three-part test in analyzing citizen-tips and resulting BOLO's:

- aa.** The source and presumed reliability of the information provided
- bb.** Whether the stopped vehicle matches the description in the BOLO (as to vehicle and occupants); and
- cc.** The consistency of the stop with regard to time and place of the reported offense.

The court makes no mention of any requirement that the officers witness or "corroborate" the criminal activity reported by the citizen tipster. See also, State v. J.L., 689 So.2d 1116 (Fla. 3d DCA 1997). This case has been overruled. An anonymous tip was not enough to justify a Terry Stop unless the police observed suspicious or illegal conduct. See also, Pierre-Louis v. State, 682 So.2d 669 (Fla. DCA 4th 1996).

**iii. IDENTITY NEED NOT BE KNOWN, BUT ONLY READILY ASCERTAINABLE –Reliable**

**State v. Maynard, 783 So2d 226 (Fla. 2001)**—Informant was "readily ascertainable" as she offered a description of suspect, informing police she

was the suspect's mother. Moreover, the caller had said the suspect had recently left an address, and provided that address to the police. Although unclear if caller gave her actual name, the fact that she disclosed her address made her "easily ascertainable." **Note:** The court also found the facts sufficient to qualify mother as a "citizen informant as well. See also Carrattini and Maynard , section ii above.

**Aguilar v. State**, 700 So.2d 58 (4<sup>th</sup> DCA 1997)—The Court properly classified a teenage boy as a citizen informant despite the fact that the officers did not know the boy's name. His identity was readily discoverable because the officers recognized him as a resident of the area. Once classified as a citizen informant, the Court denied the motion to suppress where the boy approached officers reporting that he saw a man with a gun in a trailer park washroom. He then saw the man put the gun in his pocket and enter a convenience store on the park property. As the Defendant left the store, the boy identified the Defendant. After a pat-down, the Defendant was arrested for carrying a concealed weapon.

**State v. Gonzalez**, 682 So.2d 1168 (Fla. 3d DCA 1996)—Officers, after receiving a dispatch regarding two persons loading up a white van with property from a nearby house at 3:00 a.m., stopped a white van which was traveling in a direction away from the area described in the initial citizen call. The stop was minutes after the call and dispatch. Looking at the "whole picture," the officer's personal knowledge of numerous home invasions in that area involving a white van, the short length of time between the dispatch, the stop, and the citizen-caller, a neighbor, actually describing *as she witnessed* the white van leaving her neighbor's driveway, the court upheld the stop. **Reliability Factor:** All that was mentioned in terms of officers' corroboration of criminal activity was a brief reference to the property items being visible through the van's rear window.

**State v. Clark**, 721 So.2d 1202 (Fla. 3d DCA 1998)—A victim reported a burglary in progress at his home. As a result, a BOLO was issued for a stocky black man wearing a long sleeved sweatshirt in the area. Within ten minutes of the BOLO, police stopped the Defendant five blocks from the location of the burglary. The Defendant is a stocky black man who, at the time he was stopped, was wearing a short-sleeved t-shirt with lettering on it. At the suppression hearing, the Detective testified, that in his experience, burglars usually strip off an article of clothing once they have been seen. The Court found that the identified caller, the **victim**, was a citizen informant rather than an anonymous tipster, and as such, there was no need for the information to be independently verified.

#### **iv. ANONYMOUS TIPSTERS are Less Reliable Requiring Corroboration**

In comparison with tips from citizen informants, **anonymous tips are considered to be at the low end of the reliability scale**, because without corroboration, it rarely demonstrates the informant's basis of knowledge or veracity. **State v. Evans**, 620 So.2d 802 (Fla. 2d DCA 1993).

**Florida v. J.L.**, 529 U.S 266 (U.S. 2000)—An anonymous called to "911" reported "a young black male, wearing a plaid shirt, was standing at a bus

stop carrying a gun.” Officer responded to the bus stop to find three black males, one of whom was wearing a plaid shirt. The officers made no independent observation of criminal activity when they arrived at the bus stop. The officers frisked the male with the plaid shirt, who was 16 at the time, and discovered a gun. Held: The information from the anonymous tip, standing alone, was not sufficient to conduct a Terry stop of the defendant. Since the tip provided no predictive information, the police officer had no way to test the unknown informant’s credibility. Moreover, the tip must not only be reliable in “its tendency to identify a determinate person, it must also be reliable in its assertion of illegality.” **See Id.**

**L.M. v. State, 694 So. 2d 118 (Fla. 3d DCA 1997)**—The Court held that an anonymous tip indicating that two black youths were burglarizing a car in a church parking lot. Upon their arrival, the officers observed the youths dressed similarly to the description given. The Court suppressed the evidence finding that without corroboration other than the dress of the youths and the location, the tip was not sufficiently reliable.

**State v. Ramos and Brana, 755 So.2d 836 (Fla. 5<sup>th</sup> DCA 2000)**—Officer who arrived at scene of robbery / shooting after suspects fled received information from two civilian witnesses who reported a detailed description of the defendants’ car, including the license tag number. The officer saw the victim of the shooting on the scene. The defendants’ car was stopped shortly thereafter based on the description given by the witnesses. The officer never obtained the names of the witnesses. However, the court, applying the analysis suggested in Justice Kennedy’s concurring opinion in **Florida v. J.L.**, found these witnesses sufficiently reliable because they were “face to face” with the police officer when they reported the criminal activity and description of the defendants’ car. Furthermore, since the officer saw the results of the criminal conduct with his own eyes, he had no reason to doubt the veracity of the witness accounts. Held: The officer had reasonable suspicion to stop the defendants’ car based on his own observations of the results of the criminal conduct and based on the witnesses’ detailed description of the defendants’ vehicle.

**State v. D.D.D., 908 So.2d 1180 (Fla. 2d DCA 2005)**— Officer received information from police dispatch that an eleven- to twelve-year-old boy wearing dark pants and a light shirt, was seen in a certain area in possession of a handgun. Officer arrived within two minutes of dispatch and saw D.D.D., who matched the description, walking along the shoulder of the road. When he saw the officer, D.D.D. dropped a heavy, silver object behind a tree and began to walk away from the officer. Court found this to be sufficient corroboration. Court noted that anonymous tips referring to activity occurring at the time the tip is made, providing only “ ‘innocent details of identification’ ” are generally considered to be **less reliable** and **require some corroboration** to provide the foundation for reasonable suspicion to stop. Citing to **J.L. v. State, 727 So.2d 204, 206 (Fla.1999)**. (quoting **Butts v. State, 644 So.2d 605, 606 (Fla. 1st DCA 1994)**).

**Williams v. State, 721 So.2d 1192 (Fla. 1<sup>st</sup> DCA 1998)**—The Court suppressed the evidence obtained as the result of a stop made pursuant to a BOLO from an anonymous caller who described a maroon Ford with an

intoxicated driver who “was driving from house to house.” After arriving in the area within five minutes of the tip, the officer immediately spotted a maroon Ford. However, the officer witnessed **no criminal activity** or any traffic infractions. “Unlike information from citizen informants which is presumed reliable, information provided anonymously must first be independently corroborated.”

As noted above in **Aguilar v. State**, an otherwise anonymous tip will be the valid basis for a stop, even without corroboration, where the identity of the tipster, although unknown at the time of the stop, is readily discoverable. In contrast, where the identity is not readily discoverable, the anonymous tip will require corroboration to establish reasonable suspicion that a crime has occurred. For instance, in **State v. Rewis, 23 Fla. L. Weekly D2548 (Fla. 5<sup>th</sup> DCA 1998)**, the Court suppressed the evidence because the deputies had no way to corroborate the information from the anonymous tipster. The tip came from a passing truck driver who stopped at a rest area to inform deputies that a Firebird was weaving all over the road and that he felt the driver was impaired. He gave the deputies the tag number of the Firebird and drove off. As he was leaving, the deputies saw the Firebird and flagged it down. The deputies testified that they saw nothing illegal or improper about the operation of the vehicle and that they stopped solely on the basis of driver’s tip. The Court classified the tipster as anonymous, pointing out that his identity was unknown, that there were no means of locating him because the deputies failed to record his tag number, and that his motives were unknown. Thus, there was no reasonable suspicion to justify the stop.

**c. Contents of the BOLO as Hearsay**

- i. The BOLO/citizen tip itself appears to be hearsay and will often be inadmissible. **See Burney v. State, 579 So.2d 746 (Fla. 4<sup>th</sup> DCA 1991); J.G. v. State, 544 So.2d 317 (Fla. 3d DCA 1989)**. Therefore, you must try to fit the BOLO/tip into one of the **hearsay exceptions**. **Fla. Evid. Code § 90.803**.

- ii. **Course of Conduct**

**The general rule:** Officer can testify that *he did something as a result of a statement made to him*, but he cannot testify as to the contents of that statement. **Conley v. State, 620 So.2d 180 (Fla. 1993); Mense v. State, 570 So.2d 1390 (Fla. 3d DCA 1990)**.

**But see, Hulzberg v. State, 523 So.2d 699 (Fla. 4<sup>th</sup> DCA 1988)**. **Police dispatcher’s statements admissible where not offered for the truth of the matter asserted.** Officer was involved in a chase with defendant. After defendant’s apprehension, the officer ran a check on the defendant’s vehicle and tags. The officer testified that the police dispatcher advised him that the vehicle’s registration tag had been reported stolen. Since the defendant was not charged with the actual theft of the tag, but with battery on a law enforcement officer, driving with a revoked or suspended license, and having improper plates attached to the car, the court held that the statement

was not offered to prove the truth of the matter asserted. Therefore, the statement made by the dispatcher was not hearsay.

**iii. Spontaneous Statement—Fla. Evid. Code § 90.803(1)**

Pursuant to **Florida Evidence Code § 90.803(1)**, the exception requires “substantial contemporaneity between the event and the out of court statement.”

**iv. Excited Utterance—Fla. Evid. Code § 90.803(2)**

**U.S. v. Boyd**, 620 F.2d 129 (6<sup>th</sup> Cir.), *cert. Denied*, 449 U.S. 855 (1980)—If the necessary foundation for the exception is laid, the witness need not be identified.—**NOTE**—Hearsay is admissible at a motion, e.g. **Lara v. State**, 464 So.2d 1173 (Fla. 1985); see also, **U.S. v. Matlock**, 415 U.S. 164 (1974). Therefore, the contents of the BOLO/tip come in during the motion to suppress the stop for lack of reasonable suspicion, a corpus motion and a motion to suppress for lack of probable cause.

- **Reasonable Suspicion Gained from Another Officer’s Observations**
  - a. Case law has interpreted **Fla. Stat. §901.18** to allow an officer to stop a vehicle if another officer has provided the necessary information to the first officer.
  - b. **McClendon v. State**, 440 So.2d 52 (Fla. 1st DCA 1983)—While writing a ticket for a stopped vehicle, officer A witnesses defendant’s motorcycle run a red light. Officer A reaches Officer B by radio and tells him to stop defendant’s motorcycle. Officer B’s stop of motorcycle is valid even though Officer B did not witness any misdemeanor or non-criminal infraction in his presence.
  - c. **NOTE—Fla. Stat. § 901.18** and the case law interpreting the “**Fellow Officer Rule**” are discussed more fully as an exception to the presence requirement in Misdemeanor Arrests. See section titled “**DUI Arrest.**”

**Reasonable Suspicion of DUI**

- a. **State v. Duggins**, 691 So.2d 566 (Fla. 2d DCA 1997)—Officer stopped the defendant, whom he observed "swerving in and out of the southbound lane of a lightly traveled side street." The court conclusively stated that the defendant was "properly stopped, and subsequently arrested, for DUI."
- b. **State v. Neumann**, 567 So.2d 950 (Fla. 4th DCA 1990)—Officer stops defendant for suspected DUI after watching him cross the centerline at least three times. Officer testified that he suspected the Defendant might be intoxicated. The court upheld the stop.
- c. **Roberts v. State**, 732 So. 2d 1127 (Fla. 4th DCA 1999)—At approximately 2:00 a.m., a deputy observed the Defendant’s car weave from side to side, crossing over the left and right lane lines several times. The officer then turned on his car video camera to record the driving pattern. At the suppression hearing, the judge found that the video showed the Defendant was weaving significantly within the lane but did not show her cross over the lane lines as the

deputy testified. The Fourth District Court of Appeal reversed the suppression of the evidence holding that even in the absence of a traffic violation, an officer may stop a driver's vehicle when the officer has a reasonable suspicion that the driver is under the influence.

- d. **Carrillo v. State, 506 So. 2d 495 (Fla. 5th DCA 1987)**—At 2:00 a.m., officer observed defendant's car travel from the extreme right-hand side of the road to the extreme left-hand side of the lane. The tires touched the lane boundaries, but did not leave the lane. This weaving pattern occurred more than 5 times in one-quarter of a mile. Based on the driving, the officer had reasonable cause to believe the defendant was DUI and could stop the car.
- e. **State v. Slattery, 6 Fla. L. Weekly Supp 400 (11<sup>th</sup> Cir. Ct. App., 1999)**—Officer testified he observed half of defendant's vehicle swerve from the outside eastbound lane into the inside eastbound lane twice over a five or six block distance. Defendant jerked his car back into the proper lane on each occasion. Officer testified that based on this driving pattern, he suspected the defendant may be DUI. The Trial Court held that there was no violation of **Fla. Stat. § 316.089** because no other traffic was affected. The Court also held that there was insufficient evidence to justify the officer's suspicion that defendant was DUI. The Circuit Court, in its appellate capacity, reversed Judge Emas and found that "[w]hile the officer's experience certainly gives him better insight into driving patterns of intoxicated persons than the average citizen, it is hard to imagine that a lay person would observe the defendant's actions and not question whether he was 'drunk.' In short, the evidence clearly establishes probable cause for the officer to suspect or believe that the Defendant may be intoxicated." Under those circumstances, the Court opined, the officer may very well have been "derelict in his duties" had he chosen to wait to take action. Finding probable cause for DUI, the Circuit Court did not address the State's alternative theory for the stop, Failure to Maintain a Single Lane.
- f. **State v. Johnston, 13 Fla. L. Weekly Supp. 442 (Palm Bch Cty Ct. February, 24, 2006)**—Defendant made wide U-turn, crossing over 4 lanes of traffic and almost struck sidewalk curb. Deputy suspected driver may be impaired and stopped vehicle. Court found the "erratic driving" observed, along with belief of impairment, justified impairment. Court cited to **State v. Spanierman, 267 So.2d 102, 103 (Fla. 2d 1972)**.
- g. **Colisimo v. DHSMV, 11 Fla. L. Weekly Supp. 771b, (7th Jud. Cir. App. February 17, 2004)**—Officer observed defendant traveling on his motorcycle in the right lane making a very wide turn in which he proceeded into the left-hand lane. The officer then followed defendant and witnessed him pulled into the far-left lane and subsequently go into the center lane. Defendant drifted from side to side about four times. Officer paced defendant traveling thirty mph in a fifty mph zone who was impeding traffic. As they passed under the I-95 overpass defendant crossed the centerline by a foot, and then drifted to the right side of roadway. Court held this was reasonable suspicion of DUI.
- h. **Lorenzo v. DHSMV, 11 Fla. L. Weekly Supp. 518a (9th Jud. Cir. App. March 4, 2004)**—Officer observed vehicle nearly hit the right curb on three separate occasions. During his initial contact with the vehicle, Officer checked tag number on the vehicle and discovered that it was an unassigned tag. Officer



then observed the vehicle enter a hotel parking lot and drive for approximately five hundred feet in the wrong direction. At that point, Officer Harrison activated his emergency blue-red lights and conducted a traffic stop. Court held this “atypical behavior” warranted officer’s reasonable suspicion defendant might be DUI.

- i. **Sasser v. State, 6 Fla. L. Weekly Supp. 193a (9th Jud. Cir. App. January 19, 1999)**—Officer observed Defendant’s car pull out from the Brass Rail Saloon at 1:00 a.m. about eight or nine car lengths ahead of him and turn east on Hwy. 50. Officer saw Defendant “drift” over into the westbound turn lane near a Subway restaurant such that his tires crossed the line into the westbound lane. The “drift” occurred fifty to seventy-five yards before the entrance to Subway. Light to moderate westbound traffic was coming toward Defendant, and he “made an erratic move and jerked the car back over into his lane.” Nevertheless, traffic was otherwise unaffected by the “drift.” Court cited to cases regarding “erratic driving” and found reasonable suspicion of DUI
- j. **State v. Shell, 44 Fla. Supp. 2d 46 (Fla. 5th Cir. Ct. App. 1990)**—Trooper observed defendant’s car in a weaving pattern for one-quarter of a mile. Car was not driven normally since it came very close to a concrete median. The Trooper testified that, at that time of night just after the bars have closed, one out of seven people on the road are under the influence. Although the Trooper could not cite the defendant for any traffic infraction, the Trooper did have reasonable suspicion to believe that the defendant was DUI.
- k. **Verrochi v. State, 6 Fla. L. Weekly Supp. 453 (Fla. 9th Cir. Ct. App. 1999)**—Officer’s carcam video showed that the Defendant’s car straddled the lane line and then returned to its lane. The Defendant’s car then began to weave within its own lane and slightly crossed over lines on both the left and right sides. After officer activated his emergency lights, the Defendant started to pull over to the side of the road, but then suddenly sped up and drove away. After the sirens were activated, the car touched the left side boundary of the right lane. No other traffic was affected. Court found that the defendant’s driving pattern presented a reasonable objective basis to believe that he was under the influence, even if his driving pattern did not constitute a violation of **Fla. Stat. § 316.089(1)**.
- l. **State v. Mandel 5 Fla. L. Weekly Supp. 95 (Palm Beach Cty. Ct. 1997)**—Officer observed defendant driving below and above posted speed limit, jerking his vehicle to right on three occasions to avoid hitting left curb of road, and hesitating for ten seconds before proceeding after traffic light turned green. Court held officer had reasonable suspicion of DUI **and** officer had witnessed an “unusual” driving pattern.
- m. **State v. Davidson, 744 So.2d 1180 (Fla. 2nd DCA 1999)**—Defendant repeatedly drifted across the line and then jerked back in the opposite direction to correct himself. He was also driving 40-50 mph in a 70 mph zone. Officer suspected DUI. Court followed **Roberts** and **DeShong**.
- n. **State v. Sweat, 4 Fla. L. Weekly Supp. 232 (Fla. Hillsborough Cty. Ct. 1996)**—Officer observed the defendant’s vehicle “having difficulty maintaining a single lane”; he saw the wheels touch the road marker and lane marker four

times in 2/10ths of a mile. The court, citing to Carillo and Bailey, found the stop to be valid based on reasonable suspicion of DUI.

- o. State v. Hoey, 4 Fla. L. Weekly Supp. 184 (Fla. Palm Bch. Cty. Ct. 1996)**—Officer observes defendant driving between two lanes of travel, “in a continuing ‘swerving’ motion.” The court held this stop, based on the officer’s suspicion of DUI, was “appropriate” in that the officer “had at least a founded suspicion that the defendant was DUI ...”.
- p. State v. Hunter, 3 Fla. L. Weekly Supp. 127 (Fla. Hillsborough Cty. Ct. 1995)**—Officer observes defendant swerve several times within his own lane. Officer had reasonable suspicion that the defendant was impaired, “i.e., that he was committing an offense.”
- q. Careaga v. State, 9 Fla. L. Weekly Supp. 168 (Miami-Dade Circuit Court, January, 2002)**—Swerving back and forth, a wide swerve from right to left within the same lane continuously for two blocks without being conscious of the officer following him, when there was no justification, supported the stop.
- r. State v. Kopec, 7 Fla. L. Weekly Supp. 480 (Palm Beach County Court, May 2, 2000) (citing Bailey v. State, 319 So.2d 22 (Fla. 1975))**—The Court held that out of concern for the motoring public, the officer can make a brief investigatory stop to determine if the driver is ill or DUI.
- s. Maxwell v. State, 17 Fla. L. Weekly Supp 239a (Fla. 6th Cir. Ct. App. 2010)**--Stop was made because the driver jerked the vehicle once and weaved twice within his lane. It was 1:30am on a Sunday and the Deputy had extensive DUI experience. When these facts are added to the day of the week, the time of the day, the deputy's experience, the stop was reasonable and consistent with the principles set forth in Taylor. Court made it clear that this decision was a "close call."

#### **DEFENSE CASES**

- a. State v. Stahr, 4 Fla. L. Weekly Supp. 225 (Fla. Clay Cty. Ct. 1996)**—Observations of the defendant's car, that defendant's right tires crossed and went into the right lane three times, and the car drifted back such that left tires touched left lane marker, **not sufficient** to justify the stop. Officer testified that he believed, based upon past experience, that the defendant’s driving pattern was indicative of an impaired driver. **NOTE**—This case is merely another non-binding opinion, holding that other vehicles must be affected for the defendant to violate **Fla. Stat. § 316.089** (Failure to Maintain a Single Lane). It is included in this section in the event the defense attempts to use it to argue "No Reasonable Suspicion for DUI". (Since the court here states merely that the officer's observations do not amount to "founded suspicion"). The cases cited by the court in stating that weaving does not constitute "founded suspicion" are all cases dealing solely with Failure to Maintain a Single Lane. Duggins, Carrillo and even Bailey, are the controlling cases regarding "founded suspicion" of DUI.
- b. State v. Hoft, 4 Fla. L. Weekly Supp. 172 (Fla. Hillsborough Cty. Ct. 1995)**—According to his report and an A-Form, officer observes defendant’s car swerve, hit the outside lane marker and almost hit the curb. The court ruled

that “the evidence did not establish that . . . (the officer) had reasonable suspicion to believe, based on specific articulable facts, that the (defendant) . . . was impaired . . .”

- c. **Jones v. State, 8 Fla. L. Weekly Supp. 689 (Miami-Dade Cir. Ct., August, 2001)**—Officer observed the defendant’s car sitting at a flashing red light for 41 seconds when there was no other traffic present. Defendant then drove normally through the intersection in a safe manner. Officer stopped defendant to investigate whether defendant was impaired. Stop was not proper.

**DEFENSE ARGUMENT:** Hitting a lane marker, swerving and almost hitting a curb do not amount to reasonable suspicion for a DUI stop. **See Hoft, 4 Fla. L. Weekly Supp. 172.**

**STATE’S RESPONSE:** Distinguish this from your case; the “evidence” which did not establish reasonable suspicion for DUI was only a police report and an A-Form (the officer failed to appear in court to testify, and the State stipulated to the arrest report). The reports “contain[ed] no indication that (the officer) ... suspected the driver was impaired, or that he stopped the vehicle because of the driver possibly being impaired.” Thus, this case does not say that swerving once within a lane is not, as a matter of law, a reasonable basis to suspect DUI. In addition, this is a non-binding Hillsborough County case.

**Practice Tip:** In conjunction with everything you would normally elicit, you need to ask the officer whether he observed anything else (or lack thereof) that could account for the defendant’s swerving. For example:

- a. Did you see defendant reach for radio or talking on cell phone?
- b. Did you see defendant drop a cigarette?
- c. Did you see defendant reach for something in the back seat, glove compartment or console?
- d. Were there any obstructions in the roadway that would cause a vehicle to swerve?
- e. Was defendant checking the rear-view and side-view mirrors for other traffic? (I.e., was Defendant unable to maintain his lane or was he intentionally trying to change lanes?)

- **Reasonable Suspicion of DWLS**

- a. **State v. Wade, 673 So. 2d 906 (Fla. 3d DCA 1996)**—Officer pulls over defendant, whom he knew from investigating him on an unrelated robbery case, for suspected DWLS. The officer testified that he had run a DL check on the defendant two weeks prior to the stop, and that he knew his DL was suspended at the time he pulled him over. The trial court ruled that the information was *per se* stale, and thus, could not provide reasonable suspicion for a stop. The Third DCA disagreed, followed **Levy** (see below), and upheld the stop.

- b. **State v. Leyva, 599 So. 2d 691 (Fla. 3d DCA 1992)**—Officer had personal knowledge that defendant had a five year suspension of his driver’s license. Since this information was five weeks old, the information was not stale. Thus, the officer had reasonable suspicion to believe the defendant was committing the crime of DWLS.
- c. **Smith v. State, 574 So. 2d 300 (Fla. 5th DCA 1991)**—Officer runs defendant’s license plate to find out that the car’s owner had no valid driver’s license. Officer’s stop of vehicle is reasonable even though car’s owner may not be the driver.
- d. **State v. Pugh, 635 So. 2d 999 (Fla. 2d DCA 1994)**—Officer had a hunch defendant would be transporting illegal drugs while driving a red Nissan. Officer had seen defendant several times before and ran a computer check to determine that defendant’s license was suspended. Upon seeing the defendant driving, the officer could stop and arrest the defendant for DWLS.
- e. **Crawford v. State, 3 Fla. L. Weekly Supp. 86 (Fla. 11th Cir. Ct. App. 1995)**—Officer runs a check on defendant’s car, and learns that it was registered to a corporation, and had been towed one month prior when its driver was arrested for DUI. The officer stopped the defendant for suspected DWLS (i.e., driving in a second month of a 6-month DUI-related suspension). The court, in suppressing the stop distinguished **Smith**: “A corporate car is not invariably always driven by one person . . . Sergeant Crowell did not learn or know of any facts that would warrant his belief that the driver of this corporate vehicle . . was one and the same person who had been arrested for DUI while driving this vehicle the prior month . . .”
- f. **State v. Charles Brent Dye III, 17 Fla. L. Weekly Supp. 480b (18<sup>th</sup> Jud. Cir. Cty. Ct. 2010)**-- Vehicle stop for license check was OK where tag check showed motorcycle was registered to person who did not have an endorsement on license where the similarity of Defendant’s name to his father the owner created confusion as to identity.

**Is there a good faith exception for erroneous information provided to police? The answer depends on the source of the erroneous information. See below:**

- a. **Arizona v. Evans, 514 U.S. 1 (1995)**—**Yes.**—Officer stopped defendant based on erroneous information retrieved from the computer system maintained by the clerk of the court. The Court applied the **Leon** “good faith exception” to situations where the officer acts on erroneous computer information provided by the clerk of the court. Since the error was the fault of a court clerk, the exclusionary rule should not apply and the stop is valid.
- b. **Shadler v. State, 761 So. 2d. 279 (Fla. 2000)**—**No.**—Officer stopped defendant based on erroneous information from DHSMV that his license was suspended. Upon search incident to arrest, the officer discovered illegal contraband in the defendant’s possession. It was later determined that the defendant’s license was not actually suspended. The Florida Supreme Court held stop was not lawful and that all evidence seized as a result of the stop must be suppressed. In holding so, the Court declared that DHSMV is a law enforcement agency. Since there is no good faith exception for reliance on erroneous information provided by law

enforcement agencies, all evidence obtained as a result of the improper stop must be suppressed. The Court distinguished this case from Arizona v. Evans because, in Arizona v. Evans, the incorrect information was provided to the police officer from a computer maintained by the clerk of the courts, which is clearly not a law enforcement agency.

- **Reasonable Suspicion of Reckless Driving**

- a. State v. Orozco, 607 So.2d 464 (Fla. 3d DCA 1992)—Defendant makes abrupt U-turn and drives through a residential community at speeds of 80 mph. Officer made a valid stop and arrest for the charge of Reckless Driving.
- b. State v. Mahoy, 575 So.2d 779 (Fla. 5th DCA 1991)—Defendant is driving at night without headlights, weaving, and leaving lane of travel. Stop justified on basis of suspected DUI, Reckless Driving or Careless Driving.

- **Reasonable Suspicion of Racing**

Sheffield v. DHSMV, 9 Fla. L. Weekly Supp. 429a (9th Jud. Cir. App. May 3, 2002)—Two vehicles, one belonging to defendant, were driving at “high rate of speed” on a public thoroughfare, passing each other several times in succession. It appeared the drivers were competing carelessly and unlawfully in a “‘drag race’ or a contest of speed” on the roadway. This was sufficient for stop.

- **Reasonable Suspicion of Trespass**

L.S. v. State, 547 So.2d 1032 (Fla. 3d DCA 1989)—At 9:45 p.m., Officer sees car parked at gas station closed for business. Officer was justified in asking driver out of the car because the officer had a reasonable suspicion that car’s occupants were trespassing on private property.

- **Reasonable Suspicion of Burglary**

- a. Harrelson v. State, 662 So.2d 400 (Fla. 1st DCA 1995)—**No reasonable suspicion**—Defendant and a passenger are seated in a car, parked in a driveway with the interior lights on. At 1:08 a.m., officer observes and approaches the car; the area was subject to “a lot of home robberies.” The court characterized the officer’s actions as an investigatory stop, and found **no reasonable suspicion** to justify it.
- b. Hepburn v. State, 3 FLW Supp. 667 (Fla. 11th Cir. Ct. App. 1996)—**no reasonable suspicion**—At 10:30 p.m., officer watches defendant drive into a building’s parking lot, turn around, and drive out. The building, which was closed at this time, had recently been burglarized more than once. After following the defendant for three blocks, the officer pulled him over. The court suppressed the stop, stating that “[m]erely driving into a parking lot open to public access, turning around and driving out again, does not constitute articulable suspicion of wrongdoing sufficient to justify an investigatory stop.”
- c. Love v. State, 706 So.2d 923 (Fla. 2d DCA 1998)—**No reasonable suspicion**—Stop not valid where officer testified that he observed defendant’s car around # a.m. driving slowly through a neighborhood in a late model Toyota. Officer testified that he suspected the defendant was “casing homes” based on

the above facts, that there had been burglaries in the area, and the car was the type commonly stolen. Court held that did not justify an investigatory stop.

- d. **Sanchez v. State, 711 So.2d 1249 (Fla. 2d DCA 1998)**—**No reasonable suspicion**—Stop not justified where officer responded to direction from fellow officer to investigate a suspicious vehicle parked behind a closed store. Making no connection between the BOLO and the defendant, the officer stopped defendant's vehicle to find out why the defendant was in the area. Officer did not observe defendant doing anything suspicious. Court held officer lacked reasonable suspicion to stop defendant. **NOTE**—The State presented no testimony regarding whether the BOLO contained a description of the "suspicious vehicle" or the driver of the vehicle.
- e. **State v. Fabyunkey, 3 FLW Supp. 174 (Fla. Hillsborough Cty. Ct. 1995)**—**No reasonable suspicion**—Stop not valid where officer saw the defendant's vehicle driving "up and down," topping periodically "in an area known to have experienced several recent car burglaries. **See also, State v. Mae, 706 So.2d 350 (Fla. 2d DCA 1998); Edwards v. State, 5 FLW Supp. 133 (Fla. 9<sup>th</sup> Jud. Cir. App. 1997).**
- **Reasonable Suspicion of Theft**  
**Lowery v. State, 4 FLW Supp. 6 (Fla. 10th Cir. Ct. App. 1996), or 527 U.S. 1030**—Officers had reasonable suspicion as to a crime having been committed, thus justifying stop, where they pulled defendant over for failing to pay a restaurant bill. The officers learned of the alleged crime from the restaurant manager.
- **Reasonable Suspicion—Possession of Illegal Drugs**
  - a. **Illinois v. Wardlow, 528 U.S. 119 (U.S. 2000)**—Officers engaged in narcotics "sweep" of neighborhood in a "high crime" area known for illegal narcotics transactions. The officers were in uniform in their marked police car. Officers saw defendant standing next to a building, holding an opaque brown bag; defendant looked in their direction, and then immediately ran away from the officers. Officers chased defendant down and discovered a handgun in the opaque bag in the course of Terry stop and pat down. Stop was justified based on the nature of the neighborhood and defendant's unprovoked flight. "The reasonable suspicion determination must be based on commonsense judgments and inferences about human behavior."
  - b. **State v. Hopkins, 661 So.2d 937 (Fla. 5th DCA 1995)**—Local SWAT team goes to drug suspect's home to arrest him on a warrant (which only specified the homeowner). This suspect fled in a truck upon seeing the deputies; soon after the homeowner fled, defendant in this case left the home's yard in a different car. Deputies knew subject of the warrant was **not** in this car, but **had** a "gut feeling" as to his possible drug possession. The court said the officer had **no reasonable suspicion** to stop the vehicle; the officers did not have any knowledge which could lead to a founded belief as to defendant's criminal activity.
  - c. **State v. Saums, 633 So.2d 538 (Fla. 2d DCA 1994)**—Officer sees car drive slowly though high drug neighborhood. Car returns and stops in middle of the street. Someone approaches vehicle and a cash transaction takes place with the driver. Based on his training and seven years of experience, the officer testifies that the observations were consistent with a drug transaction. Officer has a

reasonable suspicion that the driver is violating a criminal law and the vehicle stop is justified.

- d. **Burnett v. State, 644 So.2d 152 (Fla. 2d DCA 1994)**—Officer sees defendant parked in front of a known crack house speaking to a man outside the house. Defendant walks out of view and then returns with something in his hand. Since the officer did not witness a drug transaction or an exchange of money or packages consistent with drug activity, the officer had **no reasonable suspicion** to support a stop of the defendant's vehicle.

**Staton v. State, 576 So.2d 925 (Fla. 1st DCA 1991)**—**No reasonable suspicion** to support a stop where alleged crack dealer is observed bending over the site of a car.

- **Reasonable Suspicion—Unlawfully Concealed Firearm**  
**State v. Williams, 679 So.2d 1248 (Fla. 4th DCA 1996)**—Officer respond to a "ticket stop" reference a complaint of a person with a gun in car. Officer learns from ticket seller that a car containing three males drove up to the ticket stop and the seller saw a gun on passenger side floor of vehicle. Acting on this information (including a vehicle description, etc.), officer observes handgun in plain view on passenger floorboard of defendant's car. Court held that officer acted on a reasonable suspicion as to unlawful concealment of a firearm, since ticket seller and (eventually) the officer were able to see the gun did not preclude the officer's suspicion that it was unlawfully concealed.
- **Reasonable Suspicion—Loitering and Prowling**  
**U.S. v. Gordon, 231 F.3d 750 (11th Cir. 2000)**—Officer observed three black males with defendant standing behind vehicle in area known for drug sales and drive-by shootings, not frequented by "the average citizen." When men observed officer, their eyes lit up like "deer in headlights" and "took off." Concerned the men were loitering, the officer stopped the vehicle. After speaking with the group, post-Miranda, in an effort to dispel his belief, the officer arrested the men when they were unable to dispel his alarm. Stop was valid.

## D. ROADBLOCKS - STOPS NOT REQUIRING REASONABLE SUSPICION

### 1. Constitutionality

- A defendant who is directed into a sobriety/traffic checkpoint (a "roadblock") is "stopped" for the purposes of constitutional analysis. In most cases, these stops must be justified despite the fact that no officer observed (prior to defendant's entry into the roadblock) any criminal activity or traffic infraction. Roadblocks do not necessarily violate Fourth Amendment. **Michigan Dep't of State Police v. Sitz**, 496 U.S. 444 (1990) and **Delaware v. Prouse**, 440 U.S. 648 (1979).
- **State v. Jones**, 483 So.2d 433 (Fla. 1986), the Florida Supreme Court found roadblocks constitutional, assuming a certain standard is met. That standard focused on the presence of written roadblock guidelines and the restriction of officer discretion in stopping motorists. Jones required:
  - **Written set of guidelines**  
Written guidelines should cover in detail the procedures which field officers are to follow. They should set out with *reasonable specificity* procedures regarding selection of vehicles, detention techniques, duty assignments, and the disposition of vehicles. (Even if guidelines fail to cover each of these matters they need not necessarily fail. Rather, courts should view each set of guidelines as a whole when determining the plan's sufficiency.)
  - **Minimal discretion of field officers**
  - **Balancing Test:** degree of intrusion upon motorists balanced against State's interest in traffic safety.  
**Campbell v. State**, 679 So.2d 1168 (Fla. 1996), Florida Supreme Court reaffirmed itself. The **Campbell** court left the **Jones** framework and principals intact. Officer discretion must be minimized, not eliminated (see below); while a set of guidelines must be issued for a particular roadblock, the specificity required is only that which is reasonable.

### 2. Specific Written Guidelines are Required

**Campbell v. State**, 679 So.2d 1168 (Fla. 1996), the Fla. Sup. Court stated that **specific written guidelines**, issued for a particular roadblock, are necessary in order to validate a stop made pursuant to that roadblock. Thus, the court settled the question of whether, as the Fourth District had held, **Hartsfield v. State**, 629 So.2d 1020 (Fla. 4th DCA 1993), specific written guidelines were necessary, or whether, as in the First District's version of **Campbell**, 667 So.2d 279 (1995), a generally-issued "Operational Order", and a limited "Directed Patrol Worksheet" (together with officer's oral instructions) satisfied **Jones** written-guidelines requirement.

#### a. Guidelines must be written.

- **Fernandez v. State**, 5 Fla. L. Weekly Supp. 737a (Fla. 11th Jud. Cir. App. July 17, 1998): Written instructions were offered for approaching officer safety, observation officer, and for checkpoint contact officers. However, the officers' instructions as to the selection of vehicles by the "chute" method was oral. Ct. found this was contrary to the express dictate of **Jones**.



- **State v. Mellado, 5 Fla. L. Weekly Supp. 773a (11th Jud. Cir, Miami Dade County, June 25, 1998):** Guidelines were written for a roadblock. However, the guidelines left out the size of the chute and how many cars were to be in the chute at one time. Court found that the testimony given that there was an uncertainty of what manpower would be available at the time the guidelines were written was uncontroverted and was a plausible explanation for the omission. Furthermore, court found that the rest of the guidelines were complete and were constitutionally adequate.

**b. How specific must the guidelines be?**

In **Campbell**, the court itself noted "the problem here is that **there really was no 'set of guidelines'** as contemplated in **Jones**", **697 So.2d at 1170**. The police department issued an "operational order" that dealt with all roadblocks in general, and that merely **referred** to written guidelines, specific to a particular roadblock and intended to restrict officer discretion. The operational order did not itself restrict officer discretion. Furthermore, the "directed patrol worksheet", which was issued in advance of the particular roadblock, basically said, "Let's stop cars on Mandarin Road and monitor speed (with radar)."

**c. View Guidelines as a "Whole"**

**Campbell** reaffirmed the view expressed in **Jones** that the "courts should view each set of guidelines as a whole."

- **Jones v. State, 800 So.2d 351 (4th DCA 2001):** Guidelines failed to address which vehicles would be initially stopped, which cars would be checked for narcotics or the procedures used. The pre-roadblock, oral briefing made it clear that detection of illegal drugs was integral to roadblock, yet guidelines failed to mention presence or duties of narcotics officers.
- **Rinaldo v. State, 787 So.2d 208 (Fla. 4th DCA 2001):** Guidelines were sufficient where the written instructions focused on procedures to be followed during initial stop and detention of drivers. Instructions were clear and reasonable and did not permit for arbitrary stops or allow officers to target particular persons. Moreover, every encounter with a stopped vehicle included a request for documentation and preliminary questioning to observe for signs of impairment. Although an "ideal" set of guidelines would anticipate that a motorist might refuse to cooperate with police during a roadblock operation, a plan that does not cover such an occurrence is not per se constitutionally invalid. (Motorists are neither expected nor privileged to refuse to obey these minimal necessary and legitimate demands at a valid roadblock.)

**3. Officer Discretion**

- Officer discretion must be minimized, not eliminated. Question is whether guidelines and the plan minimize officer discretion? **See Campbell, 679 So.2d at 1170**. The goal is to ensure officers do not act with "unbridled discretion" in exercising their power to stop citizens.
- Nothing in **Jones** or **Campbell** suggests that officers cannot use their discretion; it must be limited by the guidelines, and (as a practical matter) must be based on a

cognizable concern independent from the identity, visual description, etc. of any particular vehicle.

- But see **Jones v. State, 800 So.2d 351 (4th DCA 2001)**: Roadblock was invalid where guidelines failed to address the aspect of the inspection dealing with questioning drivers about drugs. The questioning would be left “solely to the discretion of the officers on scene.”

#### **4. Must Roadblock be Publicized?**

**State v. Jones, 483 So.2d 433 (Fla. 1986)**—Court did not find it essential to have prior public dissemination of roadblock information. The Court did not intend “to discourage the police from making nonspecific announcements, if they choose to do so, concerning their intent to establish sobriety check points.” In fact, giving such information would likely reduce claims of unlawful seizure. But according to the **Jones** court, such announcements were unnecessary where police position signs and lights at the checkpoint gave approaching drivers notice of the roadblock’s purpose pursuant to a written plan.

#### **5. Preparing for Roadblock Motion**

- Always obtain a copy of the written guidelines.
- Confirm guidelines specify methods and officer duties.
- Confirm that guidelines provide for minimal officer discretion.
- Speak with the officer to confirm he was aware of his duties and that he can testify as to his minimal discretion.
- At hearing, **introduce written guidelines** into evidence.
- Importantly, do *not* elicit testimony regarding the motives of the police department to prevent criminal wrongdoing. (Rather, the purpose should be to ensure traffic safety.) See **Indianapolis v. Edmund, 531 U.S. 32 (2000)**.

## **DUI Checkpoint Questions**

1. Introduction & Background
2. DUI Checkpoints – generally
  - a. Why initiate DUI checkpoints?
  - b. What are the goals?
  - c. Who/How are the locations chosen?
3. Preparation for DUI checkpoint
  - a. Who formulates the plan?
  - b. Are there written guidelines?
    - i. Business record predicate may be needed if not stipulated to by the defense
  - c. Who works at these DUI checkpoints?
  - d. Do different officers have different tasks/duties?
    - i. Command Officer?
    - ii. Approach Safety Officer?
    - iii. Checkpoint Entrance Traffic Control Officer? ← **VERY IMPORTANT**
    - iv. Observation Officer?
    - v. Data Collection Officer?
    - vi. Lane Safety Officer?
    - vii. Checkpoint Contact Officer?
    - viii. Breath Testing Personnel?
    - ix. Vehicle Inventory Officer?
    - x. Support Personnel?
  - e. Do individual officers have a great deal of discretion? ← **VERY IMPORTANT**
  - f. Can the officers change positions/tasks?
4. Chute Method
  - a. What is Chute Method?
  - b. Who determines the length of detention of motorists?
  - c. What are the operating procedures?
  - d. How do you select vehicles?
5. Stopping Vehicles
  - a. How many vehicles are stopped?
  - b. How long are they stopped for?
  - c. When stopped, what's asked?
  - d. What are the officers looking for?

- e. Are these officers dressed in uniform or in plain clothes?
- 6. Notice to Drivers
  - a. When drivers are approaching the checkpoint, are there signs/lights posted?
  - b. Safety taken into account?
    - i. Proper lighting?
    - ii. What is the lighting like?
    - iii. Warning Lights?
  - c. Is the media notified?
    - i. Press releases?
- 7. Statistics
  - a. Collect data?
  - b. How effective are these checkpoints?
- 8. Conclusion
  - a. Do supervisory personnel formulate the plan?
  - b. Do field officers have discretion as to the selection of the vehicles?
  - c. Plan substantially restrict the discretion of field officers as to the operating procedures?

### III. JURISDICTION FOR THE STOP AND ARREST

#### A. JURISDICTION & EXCEPTIONS

##### 1. Jurisdiction in General

- A law enforcement officer's stop and arrest powers are generally limited to his or her agency's jurisdictional boundaries. **See F.S. § 316.640 subsections (2) and (3).**
- **State v. Sobrino, 587 So.2d 1347, 1348 (Fla. 3d DCA 1991)**—The court explained the rationale for suppressing evidence obtained from an extra-jurisdictional stop: “The powers wielded by police officers are vast and subject to abuse. Accordingly, such power has been restricted by strict construction, limited exceptions and harsh remedies for violations of police powers.” The court further stated that “[b]ecause abuses of police powers diminish our individual and collective civil rights, the penalty for any violation is one of the most serious . . . suppression. To find otherwise, would result in an unjustified unbridled expansion of police ‘stop’ powers.”

##### 2. Exceptions are Permissible

- Even if the stop or arrest of a defendant is beyond an officer's jurisdiction, that may not prove fatal to the case, because there are exceptions to the rule. These exceptions are most common in DUI and criminal traffic cases.
- **Exceptions include:**
  - a. **FRESH PURSUIT – § 901.25**
    - Violation observed within jurisdiction, and driver is not stopped until outside jurisdiction
  - b. **BREACH OF PEACE**
    - Driving pattern is so dangerous while outside jurisdiction that it breaches the peace.
  - c. **MUTUAL AID AGREEMENT – § 23.1225**
    - Agencies work together to utilize assistance from each other, whether or not assisting agency is actually within his jurisdiction. Officer powers are the same as they would be if within jurisdiction.

#### B. FRESH PURSUIT

##### 1. § 901.25

- Under **F.S. § 901.25**, officers are authorized to arrest a person outside his/her jurisdiction “when in fresh pursuit.” “Fresh pursuit” is defined in the statute as “the pursuit of a person who has committed a felony . . . violated a county or municipal ordinance **or Chapter 316** or has committed a misdemeanor.” Since this statute allows extra-jurisdictional **arrest** when in fresh pursuit, the *stop* preceding the arrest is certainly valid.

- **Fresh Pursuit** encompasses:
  - i. **that police act without unnecessary delay;**
  - ii. **the pursuit be continuous and uninterrupted;**
  - iii. **there be a close temporal relationship b/w commission of the offense and the commencement of the pursuit and apprehension of suspect. State v. Gelin, 844 So.2d 659 (Fla. 3d DCA 2003) (citing Porter v. State, 765 So.2d 76 (Fla. 4th DCA 2000))**

## 2. LEO Acting Outside County

- Under **F.S. § 901.25(3)**, an officer who makes an arrest outside of his actual county (not just municipality), must immediately notify the officer in charge of the jurisdiction in which the arrest was made. Both officers must then act together to take the arrested person before a judge within that county, without unnecessary delay.
  - **Why is this significant?** Some defense attorneys assert that you need an officer of the appropriate jurisdiction called into complete an investigation that occurs outside of the stop officer's jurisdiction. However, this is not the case when the fresh pursuit occurred all within the **same** county.

## 3. Fresh Pursuit Cases

- **State v. Joy, 637 So.2d 946 (Fla. 3d DCA 1994)**—**Joy** involves an officer **within his jurisdiction** who heard a truck's engine "revving" and heard it "whoosh" away. The officer accelerated at a high rate of speed to catch up to the truck and pace-clocked it above the speed limit; the officer eventually stopped the defendant outside his jurisdiction. The court stated that since the officer had developed reasonable suspicion that the defendant was speeding while he was still in his jurisdiction, the stop was valid.
- **State v. Oliveira, 1 FLW Supp. 431 (11th Cir. 1993)**—In this case, Coral Gables police officers clocked a defendant traveling in excess of the speed limit **inside the Gables' jurisdiction**. The officers pursued the defendant, but were unable to effectuate the stop until after the defendant had traveled outside the jurisdictional limits of Coral Gables. The court found that the stop was legally satisfactory because the officers were "clearly in fresh pursuit."
- **State v. Gelin, 844 So.2d 659 (Fla. 3d DCA 2003)**—Detective heard BOLO of burglary suspects having committed crime within his jurisdiction, and within minutes he saw a vehicle matching the description. Detective immediately contacted dispatch to say he was in pursuit. He maintained close pursuit of vehicle until it came to a dead end, forcing them to stop. Court found it didn't matter where detective was when he initially heard the BOLO. Court found all elements of fresh pursuit doctrine were met and held stop to be valid.
- **Porter v. State, 765 So.2d 76 (Fla. 4th DCA 2000)**—BOLO sent out for suspects of armed robbery. Officers were within jurisdiction when receiving BOLO and saw the suspect vehicle (within seven miles of the reported robbery) heading in the same

direction as had been reported. Court found the pursuit met the elements (state above) in that the officers “responded without unnecessary delay to the BOLO and, in continuous and uninterrupted fashion, sought and apprehended the occupants of the white Cadillac within a matter of minutes.” This was not a situation in which the robbery was committed in another jurisdiction, where officers took it upon themselves to make the arrest outside their jurisdiction. Nor was there an extended time lapse between the commission of the robbery, the issuance of a BOLO and the stopping of the vehicle. Stop was valid.

- **Huebner v. State, 731 So.2d 40 (Fla. 4<sup>th</sup> DCA 1999)**—An Off-Duty Officer Can Make An Arrest or Perform any Other Law Enforcement Function Outside of His Jurisdiction If Fresh Pursuit *Began Inside* The Officer’s Jurisdiction. An off-duty officer driving *in his* jurisdiction in a civilian vehicle observed a car driving in an “extremely poor manner.” He followed the vehicle through several jurisdictions, never losing sight of the car. The off-duty officer radioed another officer who eventually stopped the defendant pursuant to his communications with the off-duty officer. The court held that the off-duty officer was in “fresh pursuit” of the defendant, and because of the fellow officer rule, the second officer, who received information from the off-duty officer, had probable cause to arrest the defendant. **Citing Metropolitan Dade County v. Norton, 543 So.2d 1301 (Fla. 3d DCA 1989)** (Court held that even though Detective was off-duty, he had authority to arrest outside of his jurisdiction for misdemeanor committed in his presence) and **Fla. Stat. § 790.052 (Fla. Stat. 1995)**, the Court held that the officer’s “off-duty” status did not remove the authority to **make an arrest or to perform any other law enforcement function he could perform when on duty**. In its reliance on **Norton** and **Fla. Stat. § 790.052**, the Court found that “there is no distinction between an on-duty or an off-duty officer insofar as his or her authority to perform customary law enforcement functions.” Thus, as opposed to the breach of the peace/outside jurisdiction cases, an officer, whether on-duty or off-duty, can stop a vehicle outside of the officer’s jurisdiction and “perform any other law enforcement function he could perform when on duty” as long as the fresh pursuit began inside the officer’s jurisdiction.
- **State v. Engelhardt, 465 So.2d 1366 (Fla. 4<sup>th</sup> DCA 1985)**—The defendant was involved in a car accident but left the scene. Officers who responded to the crash site found pieces of an automobile lying on the ground and a trail of transmission fluid along the street. The officers followed this trail, and about 25 minutes later were informed of another crash. The officers figured the car in the second crash was also involved in the first, **so they left their jurisdictional boundaries** to investigate. At the scene of the second crash, the officers determined that the driver there was the one who had left the scene of the first crash. The defendant was ultimately arrested for DUI and LSA, although the crimes were not initially committed in their presence. Further, the court wrote, the officers were in fresh pursuit of the defendant since they were in the process of tracking him when they were advised of the crash beyond their jurisdictional limits. (**NOTE**—The court found that Leaving the Scene of an Accident was a continuing offense, so the misdemeanor presence requirement was satisfied. However, nothing in **901.25** requires that the offense be a “continuing offense” for fresh pursuit to apply.) (The court also notes that the observation of drunken driving is the observation of a breach of the peace.)
- **State v. Markiewicz, 5 FLW Supp. 43 (Fla. 9<sup>th</sup> Jud. Cir. App. 1996)**—The Court held the defendant’s arrest for DUI was lawful. The officers were in “fresh pursuit”

of the defendant for speeding **inside their jurisdiction**. The officers did not form probable cause for DUI until they had followed the defendant outside their jurisdiction. Following State v. Joy, *supra*, the court held that “‘fresh pursuit’ officers are authorized to arrest a driver for an offense outside their jurisdiction, even when probable cause arose after leaving their jurisdiction.” **NOTE**—Beware of defense counsel carrying the old County Court Markiewicz opinion, which was reversed.

- State v. Wolfe, 5 FLW Supp. 417 (9<sup>th</sup> Jud. Cir. App. 1998)—Officers observed defendant speeding **inside jurisdiction** but did not stop defendant until outside their jurisdiction. The officers did not activate their emergency equipment until they had observed defendant swerve on road outside the officers’ jurisdiction. The court held that “[t]he **physical act of turning on emergency lights does not have the legal significance of indicating the initiation of fresh pursuit**. Rather, the operative moment when fresh pursuit was initiated occurred when the officer formulated a reasonable suspicion of a traffic infraction based upon his observations.” (emphasis added). Therefore, since the officer had a reasonable suspicion that defendant sped inside the officer’s jurisdiction, the officers’ stop of the defendant outside their jurisdiction was legitimate under the fresh pursuit doctrine.
- T.T.N. v. State, \_\_ So.2d \_\_, 35 FLW D1653a, (Fla. 2d DCA 2010)  
City police officers made a traffic stop. The driver fled and was apprehended. Meanwhile the passengers drove the car into another jurisdiction which was the residence of the vehicle’s registered owner. Officers went into that jurisdiction where defendant was seen standing around the car. He was ultimately arrested. Evidence obtained should have been suppressed, as the officers were acting outside their jurisdiction.

## C. BREACH OF THE PEACE

### 1. Officer Acting as Private Citizen

- An officer who is outside his or her jurisdiction when first witnessing an offense (and thus not in fresh pursuit), can stop and arrest the offender to the same extent as a private citizen at common law. Thus, an officer outside jurisdiction can stop and arrest someone who:
  - a. **Commits a Felony** (Phoenix v. State, 455 So.2d 1024 (Fla. 1984)), or
  - b. **Misdemeanor**
    - 1) **occurring in their presence**; and
    - 2) which amounts to a **breach of peace**. Sturman v. Golden Beach, 355 So.2d 453, 456 (Fla. 3d DCA 1978).
- The Florida Supreme Court wrote in Phoenix v. State, that “Common sense dictates that **law enforcement officials, when they are outside their jurisdictions, should not be any less capable**, by virtue of their position, **of making a felony arrest than a private citizen**. But because there are jurisdictional limitations on law enforcement officials’ ability to make arrests, **neither should they have any greater power** of arrest outside their jurisdictions than private citizens.” 455 So.2d



**1024, 1025 (Fla. 1984).** While Phoenix speaks only of a felony, other cases make clear that an extra-jurisdictional stop/arrest is valid where the officer observes any offense amounting to a “breach of peace.”

**2. What Constitutes Breach of the Peace?**

B.A.A. v. State, 333 So.2d 552 (Fla. 3d DCA 1976), the court describes a breach of the peace as a violation of any law enacted to preserve peace and good order. Under this rule, an officer may effectuate a stop or arrest outside his or her jurisdiction so long as the offender is committing a breach of the peace.

• **Erratic Driving**

- a. State v. Gonzalez, 13 Fla. L. Weekly Supp. 685b (11th Jud. Cir. App. May 11, 2006)— West Miami PD Officer conducted a traffic stop outside his jurisdiction after observing defendant speeding and failing to stay in his lane for two blocks. In response to whether this was “breach of peace,” court responded with “an emphatic ‘yes.’” The court further noted, “[t]his court can hardly envision a situation more damaging and harmful to highway “peace” than the existence of an intoxicated driver swerving dangerously to the peril of not only himself but other innocent drivers and pedestrians.”
- b. Edwards v. State, 462 So.2d 581 (Fla. 4th DCA 1985)—This is the essential case on extra-jurisdictional stops for a breach of the peace. The defendant was driving in an erratic fashion **outside the city limits** of Okeechobee, crossing the center line three to seven times, causing oncoming drivers to go off the road to avoid a head-on collision. An **off-duty officer from Okeechobee** followed the defendant for about five miles and approached him after he stopped (he nearly hit a bridge rail). The off-duty officer detained the defendant until a highway patrolman arrived. The 4th DCA wrote that under the breach of the peace rule, the off-duty officer had the power to detain the defendant, just as a private citizen would. **“We cannot think of a more apt illustration of such breach of the individual and collective peace of the people . . . than to have a drunk driver at the wheel of a killing machine that is going all over the road and scaring oncoming drivers to death rather than killing them . . .”** The court found that the officer did not exceed the scope of his authority as a private citizen acting to stop this breach of the peace.
- c. State v. Furr, 723 So.2d 842 (Fla. 1st DCA 1998) An officer, driving **outside his jurisdiction** could lawfully stop and arrest a Defendant who was observed “driving all over the roadway” crossing the center line four or five times in the officer’s presence. The Court, in upholding the stop, found no distinction from the facts of Edwards because Furr did not force other drivers off the road nor because the driving pattern occurred on a less-traveled stretch of rural roadway. **See also, Kuse v. State, 6 Fla. L. Weekly Supp. 473 (Fla. 11<sup>th</sup> Cir. Ct. App. 1999)** (“An arresting citizen does not have to wait for an actual highway disaster or near miss before effectuating an arrest.”) **Kuse at 474.**
- d. Schwartz v. State, 45 Fla. Supp. 2d 27 (Fla. 17th Cir. Ct. App. 1990)— Hitting a barrier at a gas station (getting a flat tire), speeding and weaving, and hitting a parked car without stopping is a breach of the peace. Above driving pattern is a “prime example of a breach of the peace.”

- e. **State v. McCullough, 4 FLW Supp. 57 (Fla. Palm Beach Cty. Ct. 1996)**—**Erratic Driving, without any mention of specifics or any vehicles being endangered, is a breach of the peace.** Officer observed and followed defendant, who was driving “erratically” on I-95, at 7:15 p.m., on a Friday. Extra-jurisdictional stop was valid since the “erratic driving, indicative of the offense of DUI . . . did constitute a “Breach of the Peace as contemplated by (the **Phoenix** and **Edwards** courts).”
- **Reckless Driving**  
**State v. Ramos, 38 Fla. Supp. 2d 171 (Fla. Dade Cty. Ct. 1989)**—In **Ramos**, defendant was driving recklessly and was stopped by an officer outside his jurisdiction. **Fernandez**, **see below**, details the driving pattern: “changing lanes at a high rate of speed.” (T. T. in **Ramos**, page 10, 3 Fla. L. Weekly Supp., at 419). Court held that stop valid as this traffic violation constituted a breach of the peace because it violated a law enacted to preserve peace and good order. The court cited to an Illinois case with approval that even a traffic violation such as speeding could amount to a breach of the peace.
- **Traffic Infractions**
  - a. **Schacter v. State, 338 So.2d 269 (Fla. 3d DCA 1976)**—**Mere Traffic Infraction was NOT Breach of Peace.** **Schacter** did not uphold the extra-jurisdictional stop of a defendant who committed a traffic infraction (i.e., turning right on red without coming to a complete stop).

This case may not be fatal to the State. In this case, there is nothing to indicate that defendant’s conduct constituted breach of the peace. So long as you can lay a record that a defendant’s actions did endanger others, you should be able to get past this case.
  - b. **Pipkin v. DHSMV, 11 Fla. L. Weekly Supp. 788a (11th Jud. Cir. Ct. App. June 22, 2004)**—Failure To Maintain Single Lane is **not**, by itself, sufficient for breach of peace. **Important Note:** There are no specific facts in **Pipkin** detailing what constituted FTMSL. Distinguish your case with facts that driver was potentially endangering others.
  - c. **State v. Fernandez, 3 FLW Supp. 418 (Fla. Dade Co. Ct. 1995)**— **Driving the wrong way on a street even without on-coming traffic is a breach of the peace.** The **Fernandez** court addressed a situation similar to **Edwards** in that the defendant was driving in a clearly dangerous fashion (i.e., driving northbound in a southbound lane of traffic), but different from **Edwards** in that there was *no one else on the street* (fortunately) who had to take evasive action. The court ruled that extra-jurisdictional stop of the defendant was valid, even if no one took evasive action. “[I]t simply flies in the face of sound public policy ... to send the message to police officers outside their jurisdiction, or to private citizens, that they must stand idly by and await a head-on collision, rather than being able to avert such a disaster.” This driving pattern potentially endangered other vehicles and was a breach of the peace.

**BUT SEE**

- d. **State v. Alcorn, 12 Fla. L. Weekly Supp. 156c (Miami Dade Cty. Ct. November, 17, 2004)**—There was not sufficient evidence to determine that driving pattern exceeded more than the mere traffic infraction of FTMSL, so as

to cross the boundary into breach of the peace. Importantly, the court in Alcorn interpreted controlling case law, Pipkin v. DHSMV, 11 Fla. L. Weekly Supp. 788a (11th Cir. 2004), to read that breach of the peace involves more than simply a traffic infraction.

- **Important Note:** Pipkin does NOT specifically say that breach of the peace requires more than simply a traffic infraction. What it does say is that in that case “the driving infraction was not for anything extraordinary; he was merely cited for failure to maintain a single lane.”
- e. State v. Paris, 4 FLW Supp. 661 (Fla. Dade Cty. Ct. 1996)— **Driving Without Headlights is NOT Breach of the Peace.** The court held that Coral Gables police officers (who were actually assisting an off-duty City of Miami officer) could not lawfully stop the defendant for driving without headlights. If you are present with an extra-jurisdictional stop based on no headlights, keep in mind: a) this case is not binding, b) the decision applies “breach of the peace” without making any specific finding as to the defendant’s endangerment of other vehicles. **Practice Tip:** Elicit testimony and make argument (citing to Fernandez and Edwards) that **officers acted out of fear for the defendant’s safety as well as that of other motorists.** Have officers explain on the record why he/she felt that “no headlights” **endangered** other motorists.

3. “UNDER COLOR OF OFFICE” DOCTRINE (Exception to Breach of Peace)

- **If an officer stops or arrests a defendant as a private citizen for breach of the peace, the officer may not use his or her status as an officer to collect evidence.** This doctrine is otherwise known as the “under color of office” doctrine. It acts as a limitation on breach of the peace. In Phoenix, So.2d 1024 (Fla. 1984), the court wrote that this doctrine applies “**only to prevent law enforcement officials from using the powers of their office to observe unlawful activity or gain access to evidence not available to a private citizen.**” In other words, the mere fact that an officer observes something does not make that observation *per se* under color of office. Furthermore, an officer does not act under color of authority simply by announcing that he is an officer and displaying a badge, etc. See Id., at 2025; Edwards, at 582. In fact, the Phoenix court disapproved of such a limiting doctrine. Id.
- **Examples of LEO Acting NOT “Under Color of Office”**
  - a. **Off-duty officer, not in uniform, who identified himself as an officer and ordered defendant’s father to call the local authorities was *not* acting under color of office.** Schwartz, 45 Fla. Supp. 2d 27 (Fla. 17th Cir. Ct. App. 1990).
  - b. **Officer’s use of “blue lights” to stop defendant was not done under color of office.** “[A] finding that allowed a DUI motorist to continue on his way, in spite of the impending catastrophe, because the off-duty officer could not use his lights or emergency equipment to stop him would be a ridiculous result and contrary to public policy.”
  - c. **County Sheriff and deputy’s stop and arrest of vehicle’s occupants, effected with guns drawn and blue lights flashing, is valid.** The Court noted **approvingly** that the lower court found “the sheriff and his officers had not asserted their official position for any purpose other than to make the arrests. Phoenix, at 1024; see also, State v. Furr, 23 Fla. L. Weekly D2514 (Fla. 1<sup>st</sup> DCA 1998).

- **Examples of Evidence Collected “Under Color of Office”**  
**Field Sobriety Tests (FST’s): Evidence Collected “Under Color of Office”** In Fernandez, the court suppressed the roadside tests where it found that the defendant never would have submitted to them if the out of jurisdiction officer were *not* a police officer. 3 FLW Supp., at 419.
- **Misdemeanor - Presence Requirement**
  - a. Breach of peace must be a felony, or a misdemeanor committed **in the presence** of an officer who is stopping/detaining/arresting as a private citizen. See Schwartz and cases cited therein. In other words, an out of jurisdiction officer cannot stop a driver based on an anonymous tip as to a completed event, unless they have probable cause to believe, and do believe, that a felony has been committed. See Fajardo v. State, 3 FLW Supp. 710, 711 (Fla. 11th Cir. Ct. App. 1996).
  - b. In Fajardo, a tip as to an accident having occurred and the driver waving a wooden stick at the victim did not justify the extra-jurisdictional stop and/or arrest. The Court makes the broad statement that a private citizen (and therefore an out-of-jurisdiction officer) **cannot stop or arrest someone on the basis of reasonable suspicion.** Id.
    - i. **Defense Argument:** As a rule of law, an off-duty officer needs more than reasonable suspicion of an identifiable misdemeanor breach of the peace.
    - ii. **State’s Response:** In response to a potential motion on this basis, it is essential to clarify that the officer was saw the driving pattern concerned for the public’s well-being because of the defendant’s driving pattern. All this can possibly mean is that the officer (out of jurisdiction) must observe the offense, unless it is a felony; otherwise, the stops in Edwards and Fernandez are not valid.

#### **D. MUTUAL AID AGREEMENTS**

##### **1. § 23.1225 and § 23.127**

- A mutual aid agreement can be either: (a) a voluntary cooperation written agreement between two or more law enforcement agencies permitting voluntary cooperation and assistance of a routine law enforcement nature across jurisdictional lines; (b) a requested operational assistance written agreement between two or more law enforcement agencies for the rendering of assistance in a law enforcement emergency; or (c) a combination of the agreements described in (a) and (b). **F.S. § 23.1225(1).**
- The agreement **must specify the nature of the law enforcement assistance to be rendered**, the agency or entity that shall bear any liability arising from acts undertaken under the agreement, the procedures for requesting and for authorizing assistance, the agency or entity that has command and supervisory responsibility, a time limit for the agreement, the amount of any compensation or reimbursement to the assisting agency or entity, and any other terms and conditions necessary to give it effect. **F.S. § 23.1225(1)(b).**

- **F.S. § 23.1225** defines "law enforcement agency" (F.S. §23.1225(1)(d)), and provides that such agency may enter into a mutual aid agreement through a written contract executed by the chief executive officer of the agency who is authorized to contractually bind the agency. **F.S. § 23.1225(3).**
- According to **Atty Gen Op 2002-46**, a municipality or several municipalities may enter into a mutual aid agreement with the county and each other to authorize municipal police officers to exercise **traffic enforcement authority** and **to conduct accident investigations within the unincorporated areas of the county and within each other's jurisdictions**, where the parties set forth in the agreement the agency or entity with ultimate supervision of such law enforcement activities.
- **Any employee of any Florida law enforcement agency who renders aid outside the employee's jurisdiction but inside this state pursuant to the written agreement entered under this part has the same powers, duties, rights, privileges, and immunities as if the employee was performing duties inside the employee's jurisdiction.** Any employee rendering aid pursuant to an interstate mutual aid agreement entered under this part shall have such powers, duties, rights, privileges, and immunities as the parties agree are consistent with the laws of the jurisdictions involved and with the purposes for which such agreement was entered. **F.S. § 23.127(1).**

#### 1. Introduce Mutual Aid Agreement into Evidence

- **State v. Walkin, 802 So.2d 1169, 1171 (Fla. 3d DCA 2001)**—Detective from another jurisdiction was authorized to act within city, where he was investigating felony that occurred within his own jurisdiction, properly notified city upon his receipt of tip that vehicle used in that felony was parked within city, and informed city of his intent to set up surveillance. Detective acted pursuant to mutual aid agreement introduced into evidence, where officer had “[c]oncurrent law jurisdiction in and throughout the territorial limits of the municipalities represented by the undersigned agency heads and Miami-Dade County, Florida, ... for arrests, made pursuant to the laws of arrest, of persons identified as a result of investigations of any offense constituting a felony.”
- **McCabe v. DHSMV, 9 Fla. L. Weekly Supp. 6a (7th Jud. Cir. App. Oct. 29, 2001)**—New Smyrna Beach Police arrested defendant while working in Holly Hill, apparently in conjunction with a mutual aid agreement entered between the municipalities. The officer was clearly outside the geographical boundaries within which he enjoyed jurisdiction absent a mutual aid agreement. If there was a mutual aid agreement in effect at the time of the arrest, and if it had been introduced into evidence, then the out of town officer would have had the authority to make a lawful arrest. Absent such evidence, the officer could not make a valid arrest. Unfortunately, no evidence existed from which the hearing officer could have even inferred the existence of a mutual aid agreement.
  - **TIP:** This means you **ALWAYS introduce your mutual aid agreement into evidence** during a motion hearing. Moreover, make sure you introduce the *correct agreement* in affect at the time of the stop. At the *bare minimum*, make sure you elicit testimony as to its existence so there is some evidence the court can rely on.

### **3. Failure to File Mutual Aid Agreement with FDLE Not Fatal**

Pursuant to §23.1225(4), a copy of the mutual aid agreement must be filed with the FDLE within 14 days after it is signed. However, failure to do so does not render the agreement legally deficient. Rather, this requirement is directory, not jurisdictional. **State v. Scott, 4 Fla. L. Weekly Supp. 47a (Pinellas Cty. Ct. March 26, 1996)**. Specifically, the procedural requirement was “intended to permit FDLE to oversee law enforcement efforts on a statewide basis, but it clearly does not constitute a basis for dismissing these cases. There is absolutely no prejudice to these Defendants from the failure of the agencies to file the agreement timely; time requirement does not provide a time frame within which some action could be taken to ensure or protect any right of any Defendant, nor does it protect any constitutional or procedural right of a Defendant. **State v. Caldwell, 7 Fla. L. Weekly Supp. 140a (Palm Beach Cty. Ct. November 15, 1999)**).

**NOTE:** Copies of current mutual aid agreements can be found by contacting Carolina Gonzalez.

## **ACTUAL PHYSICAL CONTROL & CORPUS DELECTI**

### **I. ACTUAL PHYSICAL CONTROL (APC)**

#### **A. DEFINITION**

Actual Physical Control means the defendant must be physically in or on the vehicle and have the capability to operate the vehicle, regardless of whether he is actually operating the vehicle at the time. Fl. St. Jury Inst.

#### **B. CASE LAW**

**Griffen v. State, 457 So.2d 1070 (Fla. 2d DCA 1984):** Defendant in driver's seat of a car which was stationary in a traffic lane facing in a direction opposite to traffic flow, lights on, foot brake apparently depressed. Break light on is "circumstantial evidence that [defendant] was, in fact, exercising control over the vehicle."

**Fieselman v. State, 537 So.2d 603 (Fla. 3d DCA 1988):** Defendant found lying down asleep in front seat of automobile parked in parking lot with lights on. A "reasonable inference can be drawn that Fieselman, while intoxicated, placed the keys in the ignition and thus was at least at that moment in actual physical control of the vehicle while intoxicated."

**Mitchell v. State, 538 So.2d 106 (Fla. 4th DCA 1989):** Defendant found slumped over steering wheel of automobile parked in parking lot with engine off and keys in the ignition. Evidence is sufficient for a jury to infer that the defendant was in actual physical control of the vehicle.

**Mack v. State, 33 Fla. Supp. 2d 153 (Fla. 17th Cir. Ct. 1989):** Defendant behind the steering wheel of vehicle parked in the middle of an exit ramp. The keys were not in the ignition but were found somewhere in the passenger compartment. "Although the keys were not found either in the [defendant's] manual possession or ignition, they were found in the vehicle. As such, they were in the [defendant's] constructive possession and 'a legitimate inference [can] be drawn that [the defendant] could have, at any time, started the automobile and driven away.'"

**Baltrus v. State, 571 So.2d 75 (Fla. 4th DCA 1990):** The defendant was found passed out, slumped over the steering wheel of a car parked in a restaurant parking lot, with the keys to the car in his hand. The court held that these facts do not, as a matter of law, preclude a finding that the defendant was in actual physical control of the car.

**Clements v. State, 49 Fla. Supp. 2d 69 (Fla. 17th Cir. Ct. 1991):** Defendant seated in driver's seat of car which is sticking out one and one half feet into a major highway. The fact that the ignition key was in the defendant's pocket does not lead to the conclusion that the defendant was not in actual physical control of the vehicle.

**DHSMV v. Prue, 701 So.2d. 637 (Fla. 2nd DCA 1997):** Competent evidence supported finding that Defendant was in actual physical control of vehicle where arrest occurred on highway with no one but Defendant present, Defendant was passed out and under the influence of alcohol, and Defendant was the only one in the vehicle and the keys to the vehicle were either in the ignition or near enough for Defendant to use them to start the vehicle and drive away.

**State v. Poix, 8 Fla. L. Weekly Supp. 654a (15<sup>th</sup> Circuit Palm Beach County June 28, 2001):** Defendant sitting in car in own driveway with motor running. Jury could find defendant guilty for being in actual physical control of vehicle notwithstanding defense arguments that legislature never intended for someone to get DUI conviction for sitting in car in own driveway, that facts were consistent with defendant wanting to talk to girlfriend without disturbing others in home by sitting in car with air conditioning running without any plan to drive, and that state was seeking to punish defendant for something he might do in the future. Courts are without power to diverge from clear legislative intent to keep impaired people from ever getting behind wheel of car.

**Clifford v. State, 15 Fla. L. Weekly Supp. 206a (Pinellas County December 19, 2007):** Defendant was involved in a single car crash. The car was found in a grassy area that was wet due to recent rain. Defendant was not on the scene when officers arrived. Witnesses said the driver had run away from the scene. The officer ran the tag on the car and found the owner's listed address was only a few blocks away from the accident scene. Officer went to defendant's home and observed him in wet clothes and with grass stains on his pants. Officer also observed indicia of impairment. Court found that the address listed on the tag registration and the wet clothes and grass stains on the pants was enough circumstantial evidence of APC.

**Montanez v. State, 1 So 3d 1174 (5th DCA 2009) -** Circumstantial evidence was sufficient to prove the corpus delicti of driving under the influence (DUI) offense of which defendant was convicted; driver's side door of crashed vehicle was open, defendant was stumbling down sidewalk half a block away with car keys in hand, defendant smelled of alcohol and deployed air bag, and defendant was the only person in the vicinity of the crash.

### C. VEHICLE OPERABILITY

- ELEMENT

**Jones v. State, 510 So.2d 1147 (Fla. 1st DCA 1987):** The Court held that the State need not prove, as part of the element of actual physical control, that a vehicle is capable of immediate self-powered mobility (i.e. operable). However, the defendant may raise the fact of inoperability as one factor for the jury to consider when deciding whether a person was in actual physical control of a vehicle. A person cannot be convicted of DUI when the vehicle was inoperable, the defendant did not operate the vehicle prior to its becoming inoperable, and the vehicle's mechanical problems were such that it could not have been operated under any reasonable circumstances.

**State v. Benyei, 508 So.2d 1258 (Fla. 5th DCA 1987):** The Court held that although the defendant's automobile may have been inoperable at the time the officer arrived at the scene, the evidence was sufficient for the jury to find that the defendant was DUI when her car went off the road into a median.

**State v. Boynton, 556 So.2d 428 (Fla. 4th DCA 1989):** Even though the vehicle may be inoperable, DUI conviction possible when there is circumstantial evidence of prior driving. The court upheld a DUI conviction because there was substantial evidence to show that defendant had driven vehicle while intoxicated before it became inoperable.

**Ditch v. State, 43 Fla. Supp. 2d 44 (Fla. 19th Cir. Ct. 1990):** Where car is factually operable although incapable of immediate mobility, DUI conviction possible.



Defendant crashes van into railroad tie wall. Witnesses do not see the crash, but see defendant sitting behind the wheel of van with engine running, making attempts to put the van in reverse in order to back the van off the wall. Despite the fact that the vehicle was incapable of immediate mobility, the vehicle was operable and the defendant could be found guilty of DUI under an APC theory. This also shows circumstantial evidence that the defendant was driving.

- **JURY INSTRUCTION**

If the defense raises the issue operability, the defense is entitled to the following standard jury instruction:

It is a defense to the charge of driving or being in actual physical control of the vehicle while under the influence if at the time of the alleged offense the vehicle was inoperable. However, it is not a defense if, while impaired, the defendant drove or was in actual physical control of the vehicle before it became inoperable. ...

## **II. CORPUS DELICTI**

*Corpus delicti* is a Latin phrase literally meaning ‘the body of the crime’ and the phrase is generally used in legal writings to mean the elements legally necessary to show that a crime has been committed. The *corpus delicti* may be proved by circumstantial evidence.

### **A. STATE’S BURDEN**

The phrase “*corpus delicti*” refers to proof independent of a confession that the crime charged was in fact committed. **Bassett v. State**, 449 So.2d 803, 807 (Fla. 1984).

"The judicial quest for truth requires that no person be convicted out of derangement, mistake or official fabrication." **State v. Allen**, 335 So.2d 823, 825 (Fla. 1976). "A person's confession to a crime is not sufficient evidence of a criminal act where no independent direct or circumstantial evidence exists to substantiate the occurrence of the crime." *Id.* There must be independent proof the crime before a confession may be relied upon as substantive evidence. The State may establish the elements of a crime with direct or circumstantial evidence. *Id.*

**State’s Burden:** The State **need not prove corpus beyond a reasonable doubt** prior to the admission of the confession. *Id.* "The State has a burden to bring forth 'substantial evidence' tending to show the commission of the charged crime. This standard does not require the proof to be uncontradicted or overwhelming, but it must at least show the existence of each element of the crime." *Id.* See also, *Hamilton v. State*, 703 So 2d 1038 (Fla. 1997) (holding “to admit a defendant’s confession, the state must prove the *corpus delicti* either by direct or circumstantial evidence. . . . It is enough if the evidence tends to show that the crime was committed; proof beyond a reasonable doubt is not mandatory. . . . To support a conviction, however, the *corpus delicti* must be established beyond a reasonable doubt. “ (citations omitted)).

In determining whether or not the State has met its burden of establishing corpus, the court should **consider the evidence in a light most favorable to the State**. See *Drysdale v. State*, 325 So.2d 80(Fla. 4th DCA 1976).

### **B. CASE LAW – CORPUS DELICTI SATISFIED**

**Syverud v. State**, 987 So.2d 1250 (5th DCA 2008): Sufficient evidence that defendant was driving vehicle that caused multi-car accident established the *corpus delicti* of the crimes of driving under the influence (DUI) manslaughter and DUI with serious bodily injury, and thus defendant's incriminating statements made at accident scene were admissible at his trial on the charges; crash occurred on the only direct route to defendant's home from place he was seen earlier in the day, nine minutes after such place closed, vehicle that caused crash was owned by defendant's wife, defendant walked away from accident scene, rather than driving a different vehicle, and there was no evidence anyone but defendant was in vehicle before crash.

**Montanez v. State**, 1 So 3d 1174 (5th DCA 2009): Circumstantial evidence was sufficient to prove the *corpus delicti* of driving under the influence (DUI) offense of which defendant was convicted; driver's side door of crashed vehicle was open, defendant was stumbling down sidewalk half a block away with car keys in hand, defendant smelled of alcohol and deployed air bag, and defendant was the only person in the vicinity of the crash.

**State v. Allen**, 335 So.2d 823 (Fla. 1976): The defendant was charged with two counts of manslaughter. The State failed to introduce any direct evidence that he was the driver other than the defendant's confession. However, the State introduced testimony that the defendant was seen entering the driver's side of his car within five to ten minutes of the accident that took the victim's life. The victim's body was found several feet from the demolished automobile under circumstances from which the investigators could reasonably conclude that the victim occupied the passenger's side of the car. The defendant was found at the crash site hanging out of the passenger's side of the vehicle, with his feet on the driver's side. The defendant owned the car and had been seen driving the car with the victim in the passenger seat earlier that day. The Court found that the State introduced adequate circumstantial evidence that the defendant was driving and admitted the confession.

**State v. Kester**, 612 So.2d 584 (Fla. 3d DCA 1992): The defendant was charged with DUI. The officer testified that when he arrived at the scene, three bystanders told him that the defendant's car, through no fault of his own, had struck the victim on his bicycle. However, all three witnesses refused to testify or give their names. The officer observed the defendant's parked car on the roadside. He saw the child's damaged bike lying nearby. The defendant was standing outside of his car. There were no passengers. Blue paint, the same color as the bike, was on the side of the defendant's car. The officer observed the defendant's bloodshot eyes and the scent of alcohol on his breath. The Court found that such was sufficient to establish corpus.

**Burks v. State**, 613 So.2d 441 (Fla. 1993): The defendant was charged with DUI manslaughter. The officer testified that he found a tractor-trailer blocking both lanes of the road when he arrived. A motorcycle was lying in the roadway, and the body of the motorcyclist was lying near the truck. The officer testified that the defendant's supervisor asked the officer if the defendant "could drive his vehicle away and continue on his run." The defendant was impaired. The Court found that such facts were sufficient to establish corpus.

**Gardner v. State**, 43 Fla. Supp. 2d 1 (Fla. 13th Cir. Ct. 1990): The defendant was charged with DUI. The officer testified that when he arrived on the scene, he observed that an automobile had struck a light pole. The defendant and a friend were standing next to the wrecked car. All of the damage to the car was on the driver's side. The defendant had sustained injuries to the left side of her body. The friend was not injured. The officer testified that the defendant owned the car. The defendant smelled of alcohol, was flushed,

disarrayed and had trouble forming words. The court held that such evidence was sufficient to establish corpus.

**Cross v. State**, 47 Fla. Supp. 2d 30 (Fla. 13th Cir. Ct. 1991): The defendant was charged with DUI. When the officer arrived on the scene, he observed the defendant and a civilian witness. The defendant confessed to being the driver. The defendant was impaired. The officer asked her to do some field sobriety tests and explained their purpose. The defendant agreed to perform them. Additionally, the officer testified that when he got inside the car to move it, he had to move the seat back and that the witness, who claimed to be the driver at trial, was at least his height or taller. The Court held that such was sufficient to establish corpus.

**State v. MACIEJEWSKI**, 17 Fla. L. Weekly Supp. 623b (17<sup>th</sup> Jud. Cir. Ct. App. 2010)-- Single car crash+Defendant leaning into the running car through driver's side open door+fumbling through a purse+ tag registered to Defendant+ slurred speech, flushed face, red glassy eyes, and an odor of alcohol = corpus

### C. CASE LAW - NO CORPUS DELICTI

**State v. Colorado**, 890 So.2d 468 (Fla. 2d DCA 2004): This case reinforces the notion that there must be sufficient evidence of the criminal agency of another *and* the type of harm contemplated in the charged offense (i.e. the "corpus delicti") independent of the defendant's admission before evidence of that admission can be introduced at trial.

This case arose out of single car crash in which one of the occupants was killed. The defendant, who admitted to being the driver, was ultimately charged with DUI Manslaughter, Vehicular Homicide, and NVDL Causing Death. The Defense moved to exclude the defendant's admission on corpus delicti grounds. Specifically, there were no witnesses who could identify Colorado as the driver of the vehicle in which the other occupant was killed, the vehicle was not registered in Colorado's name, and no evidence (other than Colorado's admission) that placed Colorado behind the wheel.

The State argued that the facts showed that "someone" was speeding and "someone" died as a result of the accident; therefore it established a corpus delicti for a crime similar to that contemplated by the charging document. The State also argued that because both the defendant and the deceased victim had an unlawful blood alcohol level, then the evidence showed either that Colorado committed DUI Manslaughter or that the deceased victim had committed DUI with personal injury. However, there was no evidence before the trial court that Colorado was injured in the accident. The trial court granted the defense's motion and the Second District Court of Appeal affirmed.

The Court surveyed and applied the relevant corpus delicti cases. The Court first quoted the following passage from *State v. Allen*, 335 So.2d 823 (Fla 1976):

To establish the corpus delicti, the State "must show that a harm has been suffered of the type contemplated by the charges (for example, a death in the case of a murder charge or a loss of property in the case of a theft charge), and that such harm was incurred due to the criminal agency of another."

The Court then specifically distinguished *Allen* as well as *Burks v. State*, 613 So2d 441 (Fla 1993), in which there was circumstantial evidence of a defendant's driving. The Court also noted that unlike the situation in *Anderson v. State*, 467 So.2d 781

(Fla. 3d DCA 1985), here there was insufficient evidence of the post – accident locations of the occupants to establish the positions of those occupants at the time of the crash.

Finally, the Court rejected the State’s “novel suggestion that the commission of a crime could be shown by substituting the victims because there is no record evidence that Colorado suffered personal injuries so as to establish a corpus delicti for DUI with personal injuries. Furthermore, ‘the fact of death’ is a basic element of the corpus delicti for homicide cases.” As the Court explained, the fact that both men were intoxicated shows only the criminal agency prong of the corpus delicti but not the prong which requires a showing of the type of harm contemplated by the charges.

**Esler v. State**, 915 So.2d 637 (Fla. 2d DCA 2005): Here, as in *State v. Hepburn*, 460 So.2d 422 (Fla. 5<sup>th</sup> DCA 1984), it was determined that the State had met the corpus delicti requirements for the offense of Leaving the Scene of an Accident Involving Injury, but had not met the corpus delicti requirements for the offense of DUI (Causing Serious Injury). This is because although there was evidence that a victim was struck by an automobile which fled the scene (thus proving the corpus delicti for the LSA charge), there was no evidence (outside of the Defendant’s statement) which placed the Defendant behind the wheel of the vehicle at the time of driving (thus failing to prove the corpus delicti for the DUI charge).

**Skinner v. State**, 31 So.3d 940 (1<sup>st</sup> DCA 2010)--Officer responds to crash and finds two persons standing outside one of the vehicles involved in crash. Defendant has strong odor of alcohol on his breath, bloodshot eyes, slurred speech, slow to respond to questioning. Court held that reasonable suspicion of DUI includes RS that Defendant was driving or in APC of a motor vehicle which was not found in in this case. Court granted motion to suppress. BUT: court criticized poor elicitation of testimony by SAO. Hinted that more specific and sufficient facts in the record could have supported a finding.

#### **D. STATEMENTS OF OTHERS INDICATING DEFENDANT WAS THE DRIVER.**

**Burks v. State**, 613 So.2d 441 (Fla. 1993), seems to suggest that statements made to the investigating officer by persons other than the defendant can be used in order to prove *corpus delicti*. **See also, Perez v. State**, 6 Fla.L.Weekly Supp. 365 (Fla. 11<sup>th</sup> Cir Dade County 1999).

#### **E. CIRCUMSTANTIAL EVIDENCE OF DRIVING**

Below are some facts to illicit in a “corpus motion” to establish substantial evidence tending to show the defendant was DUI.

- The title and registration of car was in defendant's name.
- The insurance in car was under defendant's name.
- The driver's seat was adjusted for a person with defendant's height.
- The keys from the vehicle contained ID of defendant or house keys.
- The only open door was the driver's side door.
- There were no other people in or around the vehicle besides the defendant.
- Mirrors adjusted along with driver’s seat for defendant’s height.
- The defendant touched the vehicle.
- The defendant was on the driver's side of the vehicle.
- Defendant exerted ownership or control over the car by leaning into driver’s side to get belonging or move things in vehicle
- Defendant was standing by car at a crash scene shortly after crash.
- Defendant took FST's and Breath test without denying driving.
- Defendant exerted ownership or control over the car by arranging tow
- Defendant locks the car and secured his property.
- Defendant immediately located registration and insurance in the car.
- Defendant used the glove compartment
- Defendant had the car keys in his hand when the officer approached.
- Defendant was just involved in a car crash.
- Defendant's injuries were consistent with the driver side of the vehicle.
- Defendant was the only person around in a one car crash.
- The officer/witness was at the scene seconds after the crash and the defendant was in a location consistent with that of the driver.

#### **F. RES GESTAE (SPONTANEOUS STATEMENT)**

The general rule is that statements of a defendant that are uttered spontaneously and contemporaneously with the main event may be considered in determining whether the elements of *corpus delicti* are proved sufficiently as such statements are part of the *res gestae*. See State v. Snowden, 345 So.2d 856, 859 (Fla. 1st DCA 1977). The *res gestae* includes all acts and statements that occur contemporaneously with the "main occurrence" and serve to illustrate its character. In Snowden, the Court held that the defendant's statement to a neighbor, after returning from a drive, that she had thrown her two month old baby up in the air, dropped her, and determined that she was dead, and the defendant's statement three days later that she had cut up the baby and thrown it in the bay, were admissible as part of the *res gestae* to establish the corpus delicti of the crime. See also, Knight v. State, 402 So 2d 435 (Fla. 3<sup>rd</sup> DCA 1981); State v. Adams, 683 So 2d 517 (Fla. 2d DCA 1996)

## ROADSIDE INVESTIGATION

### I. INVESTIGATORY DETENTION

#### A. SEARCH AND SEIZURE WHEN STOPPED

##### 1. Automobile Exception to the Search Warrant Requirement

Wyoming v. Houghton, 526 US 295 (1999) held that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search, and this rule applies to all containers within a car, without qualification as to ownership and without a showing of individualized probable cause for each container.

##### 2. Inevitable Discovery and Plain View

“Inevitable discovery rule” is an exception to “fruit of the poisonous tree” doctrine, and under exception, evidence obtained as result of unconstitutional police procedures may still be admissible if it is shown that evidence would ultimately have been discovered by legal means.

In Nix v. Williams, 467 U.S. 431 (1984), the Supreme Court defined what inevitable discovery was and what burden of proof the State had to overcome in order to prove the evidence was properly obtained through that means. The Court found that *evidence obtained though inevitable discovery is evidence that would have ultimately been discovered by legal means even if at the time it was obtained as the result of unconstitutional police procedure*. In order for that evidence to be admissible, the State must establish by a **preponderance of the evidence** that the police ultimately would have discovered the evidence despite improper police conduct by “means of normal investigatory measures that inevitably would have been set in motion as a matter of routine police procedure.”

In Keyser v. State, 11 Fla. L. Weekly Supp. 10a (Fla. 15<sup>th</sup> Cir. Ct. App. 2003), Where officer observed vehicle parked partly on grass and partially in road, facing busy roadway; observed defendant asleep inside with motor running and lights on; and observed defendant fumbling for different knobs in the vehicle after officer woke him and asked him to shut off his engine, officer acted reasonably in reaching through window, turning off vehicle, and retrieving ignition keys -- Trial court properly found that there was reasonable suspicion to ask defendant to step out of vehicle based on officer's observations and odor of alcohol emanating from vehicle, which officer detected as he was turning off engine -- Under circumstances, it was immaterial whether reaching through window, turning off car, and keeping keys constituted a seizure because officer would have inevitably developed reasonable suspicion soon thereafter sufficient to ask defendant to get out of his vehicle. *Also see*, State v. Duggins, 691 So.2d 566 (Fla. 2d DCA 1997); Rosales v. State, 878 So.2d 497 (Fla. 3d DCA 2004).

In Coombs v State, 12 Fla. L. Weekly Supp. 1138a (17<sup>th</sup> Cir. Ct. App. 2005), No error in denial of motion to suppress where officer observed defendant's vehicle parked with engine running and windows tinted so dark as to exclude visual observation of interior, officer parked patrol vehicle behind defendant's vehicle so as to block movement, defendant who was seated with another person in rear of vehicle opened door in response to officer's knock on window, and officer observed bag of cannabis in plain view on seat

when defendant stepped out of vehicle to retrieve requested license and registration -- Officer was permitted to follow standard procedure to determine if traffic infraction of leaving vehicle unattended with engine running had occurred, request for license and registration did not trigger Fourth Amendment protections, and detainment prior to observation of cannabis in plain view was not unreasonably long

3. **Analysis of nature and length of initial traffic stop – a traffic stop shall not last any longer than is reasonably necessary to write and issue a citation absent some other legal basis for the detention. See, State v. Moore, 791 So. 2d 1246, 1249 (Fla. 1st DCA 2001).**

*Also, see Sanchez v. State, 28 Fla. L. Weekly D1239b (Fla. 4<sup>th</sup> DCA 2003), where the court held that the officer did not detain defendant longer than necessary for purpose of waiting for other law enforcement officers to arrive when Canine officer testified that only five to ten minutes elapsed between vehicle stop and canine officer's arrival, and officer who stopped vehicle testified that during interim, officer had obtained defendant's license and registration, run a check on these items, noticed that license was restricted to business purposes, and questioned defendant regarding his destination -- Officer also testified that he was still writing citation when canine officer arrived*

**Whitfield v. State, 33 So. 3d 787 (5th DCA 2010)**--Once vehicle is lawfully stopped, cop may conduct an investigation "reasonably related in scope to the circumstances that justified the traffic stop." This includes asking driver for DL, insurance, registration, and running a computer check for a stolen car or warrants. However, absent an articulable suspicion of criminal activity, the time an officer takes to issue citation should last no longer than is necessary to make any required license or registration checks and to write the citation. Court found a 30 minute delay in the arrival of a drug dog was impermissible.

#### 4. Open Container Statute & Evidence

**Florida Statute 316.1936(2)(a) and (b):** It is a nonmoving traffic violation to possess an open container of an alcoholic beverage or consume an alcoholic beverage while in a vehicle (includes passengers) open to the public, whether it is in operation or parked/stopped on a road.

Evidence of an open container is admissible in a DUI case regardless of whether the defendant was cited with the infraction because it is relevant. *Relevant evidence* is "evidence tending to prove or disprove a material fact." The following circumstances increase the probative value of the evidence:

- Container is open
- Container is cold
- Container is close to driver
- Any circumstantial evidence that defendant drank from the container

*See, LaRocca v. State, 43 Fla. Supp. 2d 107 (Fla. 17<sup>th</sup> Cir Ct App 1990).* (Alcohol not tested: La Rocca also held that the fact that the liquid was not tested for the presence of alcohol goes to the weight, not the admissibility of the evidence of an open container in a DUI case. Additionally, note that any lay witness can testify that there was a cup containing liquid that emitted an odor of an alcoholic beverage. *Destruction of evidence:* La Rocca also denied suppression based on the argument that it was destroyed. Absent

the defense showing bad faith on the police agency's part, the fact that evidence was destroyed should not prevent its admissibility.)

## **B. ORDERING OCCUPANT(S) OUT OF VEHICLE**

### **1. Traffic Stops**

Police officers who had probable cause for lawful stop and detention of vehicle, based on traffic violation, were lawfully entitled to order both driver and passenger of vehicle to exit vehicle without violating Fourth Amendment prohibition against unreasonable seizures. State v. Hernandez, 718 So. 2d 833 (Fla. 3d DCA 1998); Maryland v. Wilson, 519 US 408 (1997).

Officer may order defendant out of car until completion of the stop because intrusion is de minimus in light of the concern for officer safety. In DN v State, 805 So. 2d 63 (Fla. 3rd DCA 2002), where an officer legally stopped defendant for running a red light, ordered defendant out of the car and to place his hands where the officer could see them, did not trigger 4<sup>th</sup> amendment because intrusion was minimal and it ensured the officer's immediate safety. See Pennsylvania v. Mims, 434 U.S. 106 (1977).

*But also see*, State v. Dulian 13 Fla.. L. Weekly Supp. 331b (17<sup>th</sup> Cir. Ct. App. 2006) where Officer does not make any observations of impairment until after defendant is ordered out of vehicle and speeding ticket was issued; the detention of the Appellee exceeded the time necessary to write the citation for speeding without having probable cause or a reasonable suspicion that Appellee was driving under the influence and therefore the evidence was appropriately suppressed.

### **2. Consensual Encounters**

For officers to order an occupant to get out of a car in a consensual encounter situation, one of two things must exist:

a) Reasonable Suspicion of Criminal Activity

OR

b) Articulated, Specific Safety Concern

In Delorenzo v. State, 921 So.2d 873 (Fla 4<sup>th</sup> DCA 2006), Officer did not have articulable suspicion of criminal activity when directing defendant to remove hand from pocket and step out of car so as to support investigatory stop; officer saw defendant with his eyes closed in car running with all of its lights off in shopping center parking lot, officer awakened defendant by knocking on window, when he saw officer, defendant put his hand in his pocket, at point that defendant complied with request that he remove his hand from his pocket, officer had no reasonable basis to fear for his safety as he did not see bulge in defendant's pocket and saw no threatening gesture, and he had no reasonable suspicion that defendant was ill or under influence of alcohol or controlled substance.

See State v. Torcios, 15 Fla. L. Weekly Supp. 323a (11th Jud. Cir., Miami Dade County, February 14, 2008) (page 318 of this manual)

## **C. ORDERING OCCUPANT(S) TO REMAIN IN THE VEHICLE**



**1. Driver**

In **Borski v. State**, 712 So.2d 787 (Fla. 4<sup>th</sup> DCA 1998), Police officer, after lawfully stopping defendant's vehicle and conducting a field sobriety test, could lawfully order defendant to return to his vehicle for the remainder of the traffic stop.

**2. Passenger**

In **Wilson v. State**, 734 So. 2d 1107 (Fla. 4<sup>th</sup> DCA 1999) held that Police officer conducting a lawful traffic stop in parking lot of bar known for rowdy patrons could not order passenger, who had left the stopped vehicle to go into bar, to return to and remain in the vehicle until completion of the stop, where officer did not have an articulable founded suspicion of criminal activity or a reasonable belief that the passenger posed a threat to the safety of the officer, himself, or others, although officer expressed generalized safety concern because of location of traffic stop.

**Standing of Passenger**: Although generally, mere passenger of vehicle lacks standing to contest search of vehicle which has been lawfully stopped, passenger does have standing in one of two situations:

(1) where the vehicle was unlawfully stopped **OR**

(2) where the passenger establishes a legitimate expectation of privacy in the area searched by demonstrating, for example, an ownership interest or other lawful proprietary interest in the area searched.

See **Brendlin v. California**, 127 S.Ct. 2400 (2007); **State v. Hernandez**, 718 So.2d 833 (Fla. 3d DCA 1998); **G.D. v. State**, 760 So.2d 252 (Fla. 3d DCA 2000).

## **II. SEARCH INCIDENT TO ARREST**

### **A. JUSTIFICATIONS**

**1. Officer Safety: There is a need to disarm the suspect in order to take him into custody.**

**2. Preservation of Evidence / Collection of Evidence**

**United States v. Thornton** 541 U.S. 615 (2004) : Once a police officer makes a lawful custodial arrest of an automobile's occupant, the Fourth Amendment allows the officer to search the vehicle's passenger compartment as a contemporaneous incident of arrest, even when an officer does not make contact until the person arrested has already left the vehicle; An arrestee is not less likely to attempt to lunge for a weapon *or to destroy evidence if he is outside of, but still in control of, the vehicle.*

In Justice Scalia's concurring opinion, he found that the search is "justifiable, . . .not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested." In **Arizona v. Gant**, 129 S.Ct. 1710 (2009), Scalia's concurrence in *Thornton* became part of the majority opinion in *Gant*. Citing Justice Scalia's concurrence, the court in *Gant* held that a law enforcement officer may search a vehicle incident to a lawful arrest if search a "it is reasonable to believe the vehicle contains evidence of the offense of arrest."

### **B. SCOPE OF SEARCH**

### 1. Passenger Compartment and All Containers Inside

**New York v. Belton**, 453 U.S. 454 (1981) where the court held that where an officer makes a lawful custodial arrest of an occupant of an automobile, they may search the passenger compartment and any containers therein as a contemporaneous incident to the arrest.

**Thomas v. State**, 761 So. 2d 1010 (Fla. 1999), Defendant who drove into driveway of residence in which police were making arrests for narcotics offenses, exited vehicle, and was approached by officer at rear of vehicle challenged officer's subsequent search of vehicle. The bright-line rule set forth in U.S. Supreme Court's decision in **New York v. Belton**, that when officer makes lawful custodial arrest of occupant of automobile he may, as contemporaneous incident of that arrest, search passenger compartment of automobile, does not apply when first contact between officer and defendant occurred after defendant had exited vehicle.

**Belton** is limited to situations where law enforcement officer initiates contact with the defendant either by actually confronting the defendant or by signaling confrontation with the defendant, and the officer subsequently arrests defendant, regardless of whether defendant has been removed from or has exited the automobile -- Where defendant in instant case did not exit vehicle upon direction of law enforcement officer, **Belton** does not apply, and trial court must determine whether factors in **Chimel v. California** relating to officer safety or preservation of evidence justify search of vehicle.

In **Arizona v. Gant**, 129 S.Ct. 1710 (2009), the U.S Supreme Court limited the bright-line rule established in **Belton** and held that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it **is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest**. Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket and a firearm in the passenger compartment. Because Gant was already secured when the search was conducted, the Supreme Court believed that the rationale of an officer safety search as set forth in **Chimel** did not apply. Further, law enforcement officers may now only search a vehicle incident to arrest if "it is reasonable to believe the vehicle contains evidence of the offense of arrest." Because Grant was arrest for DWLS, a search of the vehicle would yield no evidence of the crime. Therefore, the search exceeded the permissible boundaries of the Constitution.

**Practice Pointer:** *In the DUI context, a search of the vehicle may yield evidence of the offense. Drugs, Paraphernalia, or bottles of alcohol are all evidence that the Arrestee had consumed alcohol or controlled substances and may be impaired*

### 2. Officer Safety & Evidence in Lunge Area

In **Chimel v. California**, 395 U.S. 752 (1969), where the defendant was arrested at his home, the court limited the scope of the search incident to arrest to (a) ***the person arrested***, in order to remove any weapons and to seize evidence on arrestee's person, and (b) ***the area into which arrestee might reach in order to grab*** weapon or evidentiary items. However, the Court limited the scope of the search with regards to automobiles in **Arizona v. Gant** (see *supra*).

## III. FIELD SOBRIETY EXERCISES (a.k.a. FSEs)

## A. REASONABLE SUSPICION TO CONDUCT ROADSIDES

### 1. Reasonable Suspicion Standard

Reasonable suspicion or Founded Suspicion is something less than probable cause, but more than an inchoate and unparticularized suspicion or hunch.

An officer's request that a suspect perform roadside exercises is justified under the 4<sup>th</sup> Amendment when an officer has **reasonable suspicion** that a crime is being committed. See State v. Guthrie, 662 So.2d 404 (Fla. 1st DCA 1995) (holding that the standard for compelling FSEs is reasonable suspicion); State v. Rodway 4 FLW Supp. 600 (15th Cir. 1997) (holding that the standard to compel FSE's is reasonable suspicion.); State v. Terhune, 4 FLW Supp. 367 (Fla. 9th Cir. 1996) (stating that reasonable suspicion, not probable cause, is the standard required for LEO's to request a driver to perform FSTS).

### 2. Examples of Reasonable Suspicion

- Traffic Violation + Flushed face + Bloodshot eyes + Furtive Movements = Reasonable Suspicion Mendez v. State 678 So.2d 388 (Fla. 4<sup>th</sup> DCA 1996).
- Speeding + Bloodshot eyes + Odor of Alcohol = Reasonable Suspicion State v. Hancock, 13 Fla. L. Weekly Supp. 224a (6<sup>th</sup> Cir. Ct. App. 2005).
- Running red + Odor of Alcohol + Bloodshot/glassy eyes = Reasonable Suspicion. State v. Kleinman, 12 Fla. L. Weekly Supp. 838a (17<sup>th</sup> Cir. Ct. App. 2005).
- Speeding + Odor + Bloodshot Eyes = Reasonable Suspicion. Origi v. State 912 So.2d 69 (Fla. 4<sup>th</sup> DCA 2005); see also State v. Castaneda 2011 WL 2462767, \_\_\_ So. 3d \_\_\_ (Fla. 4th DCA 2011).
- Weaving Pattern + Odor of Alcohol = Reasonable Suspicion. State v. Liefert, 247 So.2d 18 (Fla. 2<sup>nd</sup> DCA 1971)
- Accident + Odor + Slurred Speech = Reasonable Suspicion. State v. Cino, 931 So 2d 164 (Fla. 5<sup>th</sup> DCA 2006).
- Swerving out of lane + Flushed Face + Bloodshot, Watery Eyes + Odor + Slurred Speech = Reasonable Suspicion. State v. Higgins, 13 Fla. L. Weekly Supp. 548a (11th Jud. Cir., Miami Dade County, April 11, 2006).
- No headlights + Hit a curb + Bloodshot Eyes + Slurred Speech + Watery Eyes + Odor of Alcohol = Reasonable Suspicion. State v. Beloff, 16 Fla. L. Weekly Supp. 148c (17<sup>th</sup> Jud. Cir. Broward).
- Defendant who was speeding at 4am, odor, blood shot, prelim HGN showed jerking and bouncing gave sufficient RS for further FSEs. State v. Amegrane, \_\_\_ So.2d \_\_\_ 35 FLW D1148 (2<sup>nd</sup> DCA 2010)

### 3. Examples of No Reasonable Suspicion

- Expired tag + odor of alcohol + red, watery eyes + flushed face ≠ Reasonable Suspicion. State v. Bertoni, 13 Fla. L. Weekly Supp. 568b (17<sup>th</sup> Cir Ct App 2006).

- Odor + Bloodshot eyes + Sway ≠ Reasonable Suspicion. **State v. Saint Lubin**, 11 Fla. L. Weekly Supp. 1050a (17<sup>th</sup> Cir Ct App 2004).
- Mere odor of alcohol on breath of unconscious driver where it was determined that driver did not contribute to the cause of the accident with serious injuries ≠ Reasonable Suspicion. **State v. Kliphouse** 771 So 2d 16 (Fla. 4<sup>th</sup> DCA 2000).

## B. DEFENDANT'S STATEMENTS AT ROADSIDE

### 1. *Miranda* Generally

See **Traylor v. State**, 596 So.2d 957 (Fla. 1992) where the Florida Supreme Court links *Miranda* to the Self-Incrimination Clause of Florida's Constitution.

To ensure voluntariness of confessions, self-incrimination clause under State Constitution requires that prior to ***custodial interrogation*** suspects must be told they have a right to remain silent, that anything they say will be used against them in court, that they have right to lawyer's help including right to consult before interrogation and have lawyer present during interrogation, and that if they cannot pay for lawyer one will be appointed to help them.

State constitutional restrictions upon self-incrimination apply to statements obtained while in custody and through interrogation, and ***do not apply to volunteered statement*** initiated by suspects ***or statements that are obtained in noncustodial setting*** or through means other than interrogation.

A person is in "**custody**," for purposes of state constitutional restrictions upon self-incrimination, if ***reasonable person placed in same position would believe that his or her freedom of action was curtailed to degree associated with actual arrest.***

"**Interrogation**" takes place, for purposes of state constitutional self-incrimination clause restrictions on interrogation, when person is subjected to ***express questions, or other words or actions, by state agent, that reasonable person would conclude are designed to lead to an incriminating response.***

### 2. Roadside Questioning ≠ Custodial Interrogation

*Miranda* is not triggered until the defendant's statements are in response to **custodial interrogation**.

Whether *Miranda* warnings are required prior to administration of roadside sobriety tests for an "in custody" motorist depends on whether test is designed to elicit testimonial or nontestimonial response. **State v. Whelan**, 728 So.2d 807 (Fla. 3<sup>rd</sup> DCA 1999).

- ***Non-Testimonial***: Tests of physical coordination generates nontestimonial responses and is not protected by Fifth Amendment
- ***Testimonial***: Counting, or reciting alphabet calls for testimonial evidence for Fifth Amendment purposes and requires *Miranda* warnings (if and only if the defendant is in custody).

See, **Berkemer v. McCarty**, 468 US 420 (1984), where the court held that a routine traffic stop is not considered “custodial interrogation” unless or until a suspect’s freedom of action is curtailed to a degree associated with formal arrest. The Supreme Court recognized that few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so and as such the stop is considered a seizure; however, they declined to extend *Miranda* to such routine traffic stops because they found them often to be brief, temporary, and public.

Also see, **State v. Horrell**, 11 Fla. L. Weekly Supp. 87a (9<sup>th</sup> Cir. Ct. App. 2003) Error to suppress evidence of breath test results and performance of field sobriety exercises on ground that defendant had not been advised of his *Miranda* rights where, although defendant was in custodial situation at time of exercises and test, *Miranda* warnings were not required because exercises were designed to elicit non-testimonial responses from defendant.

### 3. Determining if the Defendant is “In Custody”

#### a. Roadside

**State v. Burns**, 661 So. 2d 842 (Fla. 5<sup>th</sup> DCA 1995). (driver who was stopped for failing to maintain single lane was not entitled to *Miranda* warnings before beginning field sobriety tests where he was asked to exit his vehicle and exhibited signs of intoxication; driver failed to show he was subjected to any restraints comparable to those found in a formal arrest)

**State v. Poster**, 29 Fla. L. Weekly D2368 (Fla. 2<sup>nd</sup> DCA 2004) (*Miranda* not required where defendant was not ordered to exit vehicle, he initiated casual conversation with officer, officer’s tone of voice was not confrontational, and he did not brandish firearm)

**State v. Dykes**, 816 So. 2d 179 (Fla. 1<sup>st</sup> DCA 2002) (motorist not subjected to custodial interrogation when he was pulled over in routine traffic stop and questioned by one officer while another was writing citation for minor traffic violation). See also **State v. Orcino**, 7 Fla. L. Weekly Supp. 144b (17<sup>th</sup> Jud. Cir., Broward County, November 9, 1999).

**Johnson v. State**, 800 So. 2d 275 (Fla. 1<sup>st</sup> DCA 2001) (mere detention does not activate duty of officer to give *Miranda* warning)

**State v. Alvarez**, 776 So. 2d 1060 (Fla. 3<sup>rd</sup> DCA 2001) (defendant not in custody for *Miranda* purposes after being stopped for speeding and was asked to perform field sobriety exercises requiring verbal response based upon officer’s suspicion that he was DUI).

**State v. Morgan**, 9 Fla. L. Weekly Supp. 206a (Fla. 9<sup>th</sup> Cir. Ct. App. 2001) (defendant not in custody for *Miranda* purposes when officer asked her to perform field sobriety exercises).

**State v. Fanning**, 11 Fla. L. Weekly Supp. 1085c (Hillsborough County 2002) Where defendant was questioned briefly and separately by two officers investigating defendant for public urination and DUI, and there was no use of handcuffs or other restraint, no showing of physical force or physical touching of suspect, no indication of threatening presence of several officers, no use of language or tone indicating

compliance might be compelled, and no transportation to another location, *Miranda* warnings were not required because defendant's statements to officers occurred while he was not in custody, but merely detained pursuant to lawful traffic stop -- Motion to suppress denied

**b. Defendant Transported for Roadsides**

See, **State v. Tharp**, 13 Fla. L. Weekly Supp. 56b (Fla 13<sup>th</sup> Cir. Ct. 2005), Where defendant was transported to a different location in the back of patrol vehicle and was informed by officer that he did not intend to allow him to drive, the Defendant was now detained within the meaning of §901.151 (reasonable inquiry to confirm or deny PC for arrest), Fla. Stat. However, the use of handcuffs during such a detention does not transform a detention to a *de facto* arrest. See **Reynolds v. State**, 592 So.2d 1082 (Fla. 1992). It follows then, that moving the Defendant detainee from one location to another for safety concerns did not, without more, render the detention an arrest requiring probable cause.

In **State v. Evans**, 692 So2d 305 (Fla. 4<sup>th</sup> DCA 1997), the defendant was found to be “in custody” where he had been told not to leave the area, he was transported to a nearby gas station, he was told that they were conducting a DUI investigation, and asked him questions, such as whether he had had anything to drink, whether he had been injured, etc., as well as administering roadside testing to him. (**NOTE**: This was an accident case where they focused on accident report privilege and may be distinguishable on that fact).

*State v. McCoy*, 16 Fla. L. Weekly Supp. 450b (Fla 13<sup>th</sup> Cir Ct. 2009), Defendant was transported to another location because conditions were insufficient to perform field sobriety exercises. The law enforcement officer testified that the lighting conditions were inadequate, he had safety concerns about the location and the defendant was not handcuffed when in the back of the patrol vehicle. The court held that under these circumstances, the officer was justified in transporting the defendant to another locations and had not placed him under “de facto arrest.” Therefore, the protections afforded by *Miranda* did not apply.

**c. Defendant Handcuffed and/or held at Gunpoint**

**Saturnino-Boudet v. State**, 682 So2d 188 (Fla. 3d DCA 1996) (An officer may detain an individual at gunpoint and/or by handcuffs for the *officer's safety* without converting the Terry stop into a formal arrest).

**State v. Whelan**, 728 So. 2d 807 (Fla. 3d DCA 1999) (State conceded that defendant was in custody for *Miranda* purposes where he was handcuffed).

Defense attorneys often cite **Allred v. State**, 622 So.2d 984 (Fla. 1993), but Allred dealt with *post-arrest alphabet recitation* obtained without Mirandizing the defendant. Here in Dade County, roadsides are conducted at the scene prior to the arrest and therefore Allred does not apply. The alphabet recitation is not used in the standardized FSEs performed in Florida today. Remind the court of this distinction.

**d. Reading *Miranda* at scene does not trigger custody**

Officer's view that there is PC for arrest does not trigger custody unless this view is communicated to the defendant. Initial determination of whether individual was in custody, for purposes of *Miranda*, depends on objective circumstances of the interrogation, not on subjective views harbored by either interrogating officers or person being questioned. **Stansbury v. California**, 511 US 318 (1994).

The reading of Miranda warnings during the consensual encounter do not “per se” create a seizure in the context of the Fourth Amendment. Nor does the read of the Miranda warnings create an automatic seizure of the Defendant. **Caldwell v. State**, 41 So.3d 188 (Fla. 2010).

The reading of Miranda warnings during a consensual encounter do not “per se” create a seizure in the context of the Fourth Amendment. Nor does the reading of the Miranda warnings create an automatic seizure of the Defendant. **Caldwell v. State**, So.2d , SC08-1519 (Fla. 2010)

#### 4. Post-Arrest Pre-Miranda Statements and Admissibility

**Spontaneous Statements** – Admissible because they are not in response to Interrogation or its functional equivalent.

**Booking Procedure Responses** – Admissible as to the manner of speech (i.e. slurred), but not for its content if suspect answers incorrectly or can’t answer because he is so inebriated. See **State v. Burns**, 661 So. 2d at 842 (Fla. 5th DCA 1995).

Also see, **Pennsylvania v. Muniz**, 496 US 582 (1990) (audible remarks made by suspect in driving under influence case while attempting to perform sobriety tests and in dialogue leading up to his refusal to take breathalyzer test were admissible even though he had not been given his *Miranda* warnings; police officers' statements to suspect consisted of carefully scripted instructions as to how tests were to be performed and were not likely to be perceived as calling for any verbal response, and remarks made by suspect were consequently “voluntary.”)

#### 5. Accident Report Privilege – See Section IV.

### C. REFUSAL OF ROADSIDE EXERCISES

#### 1. No Constitutional Right to Refuse

A person suspected of drunk driving has no constitutional right to refuse. **South Dakota v. Neville**, 459 US 553 (1983). For this reason, unlike exercising ones right to remain silent, if you refuse, the refusal can be held against you and have adverse consequences.

Although there is no “right” and technically roadsides can lawfully be compelled, practically speaking, it is impractical if not impossible to physically compel a suspect to participate in roadsides. Therefore suspects are given a choice, participate in roadsides or suffer the consequences.

**State v. Whelan**, 728 So.2d 807 (Fla. 3<sup>rd</sup> DCA 1999). Roadsides are admissible where defendant consented to perform them despite officer not advising defendant that there was a choice.

#### 2. Refusal is Admissible as Evidence

A refusal to participate in roadside exercises is probative of the issue of consciousness of guilt and is *admissible* at trial *unless* defendant’s refusal was *compelled* or the suspect was misled to believe it was *free of adverse consequences* even if the defendant is not informed that a refusal would be used against him. **State v. Taylor**, 648 So2d 701 (Fla. 1995).

**State v. Burns**, 661 So.2d 842 (Fla. 5<sup>th</sup> DCA 1995) Defendant refused to perform *post arrest* field sobriety exercises. Relying on *Taylor*, the 5<sup>th</sup> DCA found that “nothing ... requires a different result in a post arrest circumstance.”

See **State v. Gschwendther**, 13 Fla. L. Weekly Supp. 334b (Fla 17<sup>th</sup> Cir. Ct. App. 2005) Defendant's refusal to submit to field sobriety exercises was not compelled where defendant was given choice to submit to exercises or refuse -- Although defendant was not advised that refusal could be used against him in court, officer did tell defendant that refusal would mean defendant would not have opportunity to dispute officer's suspicion that he was DUI -- Use of refusal as evidence at trial did not violate defendant's constitutional rights

### 3. Safe Harbor Issues

Defense Attorneys may argue that a defendant's refusal to submit to roadside exercises is inadmissible as evidence of consciousness of guilt because the defendant had not been informed of any adverse consequences regarding his refusal.

**State v. Herring**, 501 So2d 19 (Fla. 3<sup>rd</sup> DCA 1986) Refusal inadmissible where failure to communicate the compulsory nature of the hand swab test for gunshot residue carried with it the implicit suggestion that the test was permissive and that he thus had a right to refuse.

**State v. Menna**, 846 So2d 502 (Fla. 2003) Refusal inadmissible where suspect was informed that test would be brief and noninvasive, but was not told of any adverse consequences of her refusal to take the test and was given the impression that the test was optional.

**State v. Sonsini**, 7 Fla. L. Weekly Supp. 644a (Fla. 17<sup>th</sup> Cir. Ct. App. 2000) Roadside refusal was suppressed where the testimony of Deputy Oman clearly reflects that he only asked the Defendant if he wished to submit to voluntary sobriety testing with no indication that there might be adverse consequences to Defendant's refusal.

**State v. Richards**, 9 Fla. L. Weekly Supp. 527d (Fla. 17<sup>th</sup> Cir. Ct. App. 2001) Error to grant suppression of refusal where officer asked the defendant if he would exit his vehicle and perform some voluntary roadside exercises and that defendant agreed and officer did not advise him of what would happen if he did not do them.

**NOTE:** *Sonsini* and *Richards* completely contradict one another and one may be able to distinguish *Menna* and *Herring* because they dealt with refusal to submit to hand swab tests for gunpowder residue as opposed to refusal to submit to roadside exercises. However, if the defendant was affirmatively advised by the officer that the roadside exercises were voluntary and did not warn of any adverse consequences, evidence of his refusal likely will be properly excluded.



#### 4. Misstatements of Law

**State v. Zalis**, 12 Fla. L. Weekly Supp. 884a (Palm Beach County 2005) Motion to suppress field sobriety exercises is granted where officer's advice that defendant would lose driver's license if she refused to submit to exercises was misstatement of law and unlawfully coerced defendant to submit.

**State v. Lewinson**, 6 Fla. L. Weekly Supp. 656a (Broward County 1999) Although officer has no obligation to inform suspect that roadside sobriety exercises are voluntary, if officer chooses to inform suspect of the consequences of failing to submit, he cannot improperly state the law or misinform suspect as to his rights -- In instant case, officer incorrectly advised defendant that his license would be suspended if he refused to submit to roadside sobriety exercises -- Results of sobriety exercises should be suppressed.

**State v. Shapiro**, 7 Fla. L. Weekly Supp. 149a (Broward County 1999) Officer improperly coerced defendant into performing field sobriety exercises by telling him that he was already under arrest and then telling him that he could be "unarrested" if he performed the exercises in a satisfactory manner -- Results of field sobriety exercises are suppressed

**NOTE**: If you have a case where the officer advises the defendant that should they refuse roadsides, their license will get suspended (misstatement of law), and they still refuse, that refusal should not only be admitted, but it shows a greater consciousness of guilt than the typical roadside refusal case. **See State v. Michelli**, 15 Fla. L. Weekly Supp. 616a (Volusia County) ("where Defendant refused he was not coerced, and his refusal to perform should be admissible").

#### D. VOLUNTARINESS OF ROADSIDE EXERCISES

Pursuant to **State v. Lynn**, 11 Fla. L. Weekly Supp. 798 (Fla. 17<sup>th</sup> Cir. Ct. App. 2004), several county court motions to suppress roadsides were granted because the officers did not "ask" or "request" suspects to perform roadsides, therefore they were deemed to be compelled, violating the defendant's 4<sup>th</sup> amendment rights against unlawful seizure.

Case law defines a seizure as the use by police of "physical force or show of authority and the restraint of the liberty of the citizen." **Florida v. Bostick**, 501 U.S. 429 (1991).

The State appealed these rulings, and the **Higgins** and **Gonzalez** opinions listed below are the result.

- **State v. Gonzalez**, 13 Fla. L. Weekly Supp. 685b, (Fla. 11<sup>th</sup> Cir. Ct. App. 2006) Consent to performance of field sobriety exercises is immaterial where defendant's erratic driving, admission to drug and alcohol use and physical indicia of impairment provided officers with reasonable suspicion that defendant was driving under influence -- Fourth Amendment did not require officer to warn defendant of right to refuse field sobriety exercises -- Error to suppress results of exercises.
- **State v. Higgins**, 13 Fla. L. Weekly Supp. 548a (Fla. 11<sup>th</sup> Cir. Ct. App. 2006) Where officer observed defendant swerve out of lane six times and after stop observed that defendant had odor of alcohol, slurred speech, flushed face and bloodshot eyes, officer had reasonable suspicion to administer field sobriety exercises -- Field

sobriety exercises did not constitute unlawful search and seizure -- Where defendant was stopped on public street by single officer and was not restrained or placed in custody until after field sobriety exercises, officer did not use physical force to coerce defendant into performing exercises, and defendant voluntarily performed exercises without objection, totality of circumstances indicate that there was no unlawful seizure.

**State v. Leifert**, 247 So.2d 18 (Fla. 2<sup>nd</sup> DCA 1971) held that police officer, who observed defendant drive in a weaving fashion and who noticed smell of alcohol on his breath, had sufficient cause to believe that defendant had committed a crime in operation of a motor vehicle and could ***require*** him to take part in physical sobriety test; thus, question whether officer advised defendant that he had a right to either take or refuse such test was immaterial to question concerning admissibility of conclusions or opinions of officer made as a result of such test .

**State v. Saïtes**, 11 Fla. L. Weekly Supp. 1129a (Fla. 17<sup>th</sup> Cir Ct., App. 2008).

“If an officer has sufficient cause to conduct a DUI investigation, the officer has legal authority to require or compel roadside exercises. Thus an officer cannot be required to ask for consent, nor instruct a suspect that roadside sobriety exercises are voluntary.” Finds that *State v. Lynn* is not binding and *Leifert* and *Mitchell* are controlling.

**State v. Juan Londono**, 17 Fla. L. Weekly Supp. 428c (Fla. 17<sup>th</sup> Cir. Ct. App. 2010).

Consent to perform FSEs immaterial where officer had RS Def was impaired, Error to suppress evidence of FSEs because the Officer did not indicate to the Defendant that he had a choice as to participation.

## **E. DEFENSE ARGUMENTS REGARDING ROADSIDE EXERCISES**

### **1. Roadsides are not Relevant**

**State’s Argument**: Testimony concerning performance on the psychomotor field sobriety tests is sufficiently reliable as ***lay observations*** of intoxication to be relevant in proving impairment, and the danger of unfair prejudice does not substantially outweigh their probative value so as to require its exclusion. **State v. Meador**, 674 So.2d 826 (Fla. 4<sup>th</sup> DCA 1996).

### **2. Roadsides do not test “Normal Faculties”**

**State’s Argument**: Roadside tasks require the use of divided attention skills. Divided attention skills are essential to the safe operation of a vehicle. Explain to the jury how these simple physical tasks test our everyday ability to follow instructions, walk in a straight line, balance one’s weight, estimate time, etc and that the fact that we may not do these exact exercises everyday does not obviate the fact that they test normal, simple abilities.

### **3. Referring to roadsides as “tests” and using terms like “pass” and “fail” attach too much significance**

**State’s Argument**: The language in **Meador** is dicta and is merely cautionary. (“Caution should be exercised to restrict usage of terms-such as “test,” “pass,” “fail,” or “points”-which would elevate the significance of these tests above other lay observations of intoxication.) Additionally, it is not binding.

**State v. Villalon**, 16 Fla. L. Weekly Supp. 498a (Fla 11<sup>th</sup> Cir. Ct (App) 2009), "the word 'cue' or 'cues' lends an aura of scientific validity to a non-expert's observations" and "the repeated use of such words lent an aura of scientific validity to the field sobriety tests . . ." This created a "high degree of danger that the jury attached an undue degree of significance to the results of the field sobriety exercises."

**Practice Pointer:** Pre-try your officer to use the word "indicator" when talking about the field sobriety exercises and to refrain from giving a numerical score such as "two-out-of-four" or "displayed all indicators." If the defense moves for a mistrial based upon **Meador**, ask the Judge for a curative instruction that field sobriety exercises are not scientific. *See Sate v. Villalon*

**4. State must show tests are scientifically reliable before admitting them into evidence.**

**State's Argument:** Other than HGN, **Meador** held that all other roadsides were admissible without any showing of scientific reliability because they come in as lay testimony and as such should not be treated differently than any other lay testimony.

**5. Destruction of Evidence Motions (e.g. No Video)**

**State's Argument:** The State has no obligation to videotape roadsides because the defendant does not have a constitutional right to it. However, if the policy is to videotape, then an officer cannot pick and choose when to follow the policy, *See Smiddy v. State*, 627 So.2d 1257 (Fla. 3<sup>rd</sup> DCA 1993); **State v. Moore**, 13 F.L.W. Supp 632a (16<sup>th</sup> Circuit Monroe County March 23, 2006)

- In Miami-Dade County, the only cities that uses videotapes are **Pinecrest, Doral, Miami Gardens, and FHP**. Where the policy is to videotape, as it is in Pinecrest, Doral, Miami Gardens, and FHP, make sure you are ordering the video and if you do not get it, investigate whether the defendant was videotaped or not. Certain police cars in Aventura can also be video-equipped.
- **No Video Created:** If the defendant was not videotaped, in contradiction with policy, examine reason why the officer did not videotape and use standard of *bad faith* as applied in *Arizona v. Youngblood*.
- **Video Destroyed/Not Preserved:** If a videotape at one time existed, but was destroyed, the court will likely use the following 3-prong analysis:
  - a) **Was it Brady Material?** If yes, then the court will have to give defense a remedy. If no, then the court will go to the second prong.
  - b) **Was the video potentially useful to the defense?** If no, then there is no remedy to the defense. If yes, then the court will go to the third prong.
  - c) **Was there bad faith on the part of the State?** If no, then no remedy is needed; however if the answer is yes, then the court will have to remedy the defense.

In order to qualify as *Brady* material, "the evidence must possess an exculpatory value that was apparent before it was destroyed, and must also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *See California v. Trombetta*, 467 US 479 (1984). *Also see, Arizona v. Youngblood*, 488 US 51 (1988) for analysis using second and third prong.

*See, State v. Barba*, 4 FLW Supp. 867 (Fla. 11<sup>th</sup> Cir. 1997); *Exantus v. State*, 734 So.2d 1176 (Fla. 4<sup>th</sup> DCA 1999); *State v. Thomas*, 826 So.2d 1048 (Fla. 2<sup>nd</sup> DCA 2002); *State v. Brown*, 8 FLW Supp 466 (Monroe County Court 2001); *State v. Garces*, 5 FLW Supp. 555 (Dade County Court 1998); and *State v. Dunphy*, 6 FLW Supp 297 (Palm Beach County Court 1999) for cases dealing with **Bad Faith**.

**Defendant has right to inspect videotaping equipment provided it's still in the police car.** *See, State v. Hunredmark*, 7 FLW Supp 616 (Orange County Court 2000).

*State v. Carroll*, 17 Fla. L. Weekly Supp. 210c, (Fla. 15<sup>th</sup> Jud. Cir. Cty. Ct. 2009)-- Although deputy's failure to compensate for humidity building up in patrol vehicle resulted in obscuring of video and loss of exculpatory evidence, where deputy did not violate policy and was merely neglectful, dismissal of charge is not warranted

**STATE v. GERENCSE**, 17 Fla. L. Weekly Supp. 116a, (Fla. 1<sup>st</sup>. Jud. Cir. Santa Rosa Cty. Ct., 2009) -- Where there was no policy requiring deputy to videotape arrest or breath test at jail, officer had no duty to make video recording. Further, failure to preserve any video recording would not serve as a basis for suppression where there is no showing that any recording was made, that evidence favorable to defense has been withheld by state or that failure to preserve potentially useful information was product of bad faith on part of law enforcement or state.

***BUT SEE***

**STATE v. KRNJAICH**, 17 Fla. L. Weekly Supp. 376a, (Fla. 2<sup>nd</sup> Jud. Cir. Leon Cty. Ct., 2010)—DUI charge dismissed with prejudice where Officer's pattern of selectively audiotaping defendants in DUI cases by muting of body microphone while speaking with fellow officer and turning microphone on while speaking with defendants in violation of police department's mandatory videotaping policy constitutes bad faith and violated defendant's due process rights

**State v. Davis**, 34 FLW D1215a (4th DCA 2009) - Appeal by the State of an order dismissing a felony DUI charge against defendant James Davis. The dismissal was entered as a sanction for the State's loss of the video recording of Davis's performance of roadside sobriety tests. Finding that dismissal was too harsh under the circumstances present, the 4<sup>th</sup> DCA reversed and remand for further proceedings.

**Remedy:** *State v. Davis* outlined possible remedies when a videotape is destroyed or lost. **Davis** found that exclusion of the FSEs or instructing the jury that "they may infer that the lost evidence is exculpatory" would be more appropriate than dismissal of the charges.

6. **Roadsides are Unreliable if no Strict Compliance with NHTSA Guidelines under Ohio v. Homan**, 732 NE 2d 952 (Ohio 2000). **Homan has been superseded by Statute in Ohio, which reads that FSEs are admissible even if they do not strictly comply with NHTSA.**

**State's Argument:** It goes to the credibility of the officer NOT admissibility. Florida appellate courts have characterized roadside exercises as "lay observations" and not as scientific tests (except HGN) under Meador and Williams. See also, **State v. Overton**, 8 FLW 312 (Polk County Court 2001) and **State v. Journey**, 9 FLW Supp 54 (Sarasota

County Court 2001) where they held that nothing in Florida law requires strict compliance.

**Practice Pointer:** Defense Attorneys often attempt to impeach LEOs with the NHTSA manual. Such impeachment is improper. As stated in Meador, the Officer is testify as a *lay witness*. See Gladding v. State, 10 Fla. L. Weekly Supp. 985a (“this Court finds that the *Florida Standardized Field Sobriety Testing Screening Procedures Manual* is inadmissible hearsay, and cannot be used to impeach the officer.”)

## F. HORIZONTAL GAZE NYSTAGMUS (HGN)

### 1. What do the Officer’s look for when performing HGN?

**Horizontal Gaze Nystagmus (HGN)** is the involuntary jerking of the eye as it moves out towards the side from the center. HGN is one of the 3 roadsides approved by NHTSA. Nystagmus is a natural phenomenon that everyone has, but is not normally visible to the naked eye. Alcohol, CNS depressants, Inhalants, and PCP do not cause nystagmus; however they do enhance the condition so that it becomes visible to the naked eye.

**Lack of Smooth Pursuit:** Does the eyeball fail to track or pursue the stimulus smoothly? A subject under the influence will exhibit jerking or tugging motion to the center as the eyes move from side to side, similar to windshield wipers moving across a dry windshield.

**Distinct Nystagmus at Maximum Deviation:** Does the eyeball jerk distinctly when the eye is held at maximum deviation? About 50% of the population will display slight jerking at maximum deviation.

**Onset Prior to 45 Degrees:** At what angle does the distinct jerking begin? If prior to 45 degrees, then it’s a good indicator that the defendant has a BAC of .10 percent or more, or has drugs in their system.

**Displaying 4 of 6 cues is considered below standard** (only about 2% of the population displays visible nystagmus when sober due to pathological and physiological conditions or trauma to the head).

### 2. Tharp’s Equation

A subject’s breath or blood alcohol level is approximately equivalent to **50 minus the angle of onset** of Nystagmus. The margin of error is about .02.

In Cloyd v. State, 943 So.2d 149 (3d DCA 2006) and Hughes v. State, 943 So.2d 176 (3d DCA 2006), the Third District court ruled that it was not error to admit testimony from a qualified officer as to the a breath/blood alcohol level based on Tharp’s Equation. HOWEVER, note that there was a breath reading in this case.

### 3. Admissibility

HGN is admissible if performed by a *qualified officer* because it is considered “*quasi-scientific*” evidence.

**NOTE:** Although HGN results are admissible to show impairment, *HGN alone* cannot trigger the presumption, and it cannot be used to extrapolate a breath reading using Tharp’s Equation. *See, Faires v. State*, 711 So2d 597 (Fla 3<sup>rd</sup> DCA 1998).

**Other Districts** have held HGN inadmissible without a proper scientific predicate being laid. 4<sup>th</sup> DCA in **State v. Meador**, 674 So. 2d 826 (Fla. 4<sup>th</sup> DCA 1996) held that HGN is subject to the Frye predicate [which FL no longer uses] which had not been satisfied and in **State v. Melvin**, 677 So2d 1317 (Fla 4<sup>th</sup> DCA 1996) which held that the scientific predicate had to be laid and that a qualified officer without scientific expertise could not properly lay such a predicate.

**4. Who is a Qualified Officer?**

The 3<sup>rd</sup> DCA in **Bowen**, as stated earlier, specifically rejected the notion that an officer had to be DRE trained in order to be qualified under **Williams** for HGN testimony to be admissible. The officer in Bowen was deemed qualified having only the 40 hour course and having administered the test approximately 1000 times.

In **Reyes v. State**, 10 FLW Supp. 291a (Fla. 11<sup>th</sup> Cir. Ct. App. 2003). No error in allowing arresting officer to testify regarding HGN procedure where officer had received instruction on administration of procedure but was not certified DRE and testified that he has conducted about 100 DUI stops-- Any error in admission of HGN test evidence was harmless where evidence of defendant's guilt was overwhelming.

In **State v. Varela**, 2 FLW Supp. 521a (Fla. 11<sup>th</sup> Cir Ct 1994) the court held that Officer Larricci was qualified to testify as to HGN where he had passed all the required proficiency tests. As part of the proficiency test the officer is required to demonstrate that he is able to estimate whether the subject tested is at or above the .10 limit. His accuracy is tested by a breath testing device known as the Intoxilyzer 5000. The State also established that the officer was able to explain what the test means to the jury.

**Note:** This Court also upheld the State's request to have the officer administer the HGN test to the Defendant in court in the presence of the jury to determine whether the Defendant had naturally occurring nystagmus. The Court relied on *State v. Macias*, 515 So.2d 206 (Fla. 1987) in finding that such a request is lawful and does not interfere with any rights afforded the Defendant under the United States Constitution, The Bill of Rights, or the Florida Constitution.

**5. Refusal to do HGN is Admissible**

Regardless of whether an officer is qualified to perform HGN, the refusal to do HGN is admissible under **Correnti v. State**, 5 FLW Supp. 54 (Fla. 9<sup>th</sup> Cir Ct 1997) because it goes to show "consciousness of guilt."

**6. HGN Relevant to Determine PC or Reasonable Suspicion**

**State v. Streisant**, 5 FLW Supp. 560 (Broward Cty. Ct. 1998) ("...although HGN results may not be admissible at trial per se, they are nonetheless a reasonable part of the panoply of circumstances which may be used to present the requisite founded suspicion," to further detain the defendant in a DUI investigation. The officer had demonstrated his knowledge and experience using the HGN test.)

**7. Officer Testifying as to HGN**

**Speak to your officer before he testifies!** Determine his/her understanding of HGN by asking them the following questions...

Do they know what HGN stands for?  
How many times have they done HGN on a suspect?  
What does HGN show?

What does HGN look like?  
How does HGN relate to DUI?  
Do they know of other causes of visible HGN?

**Highlight Officer Training:** Elicit testimony as to 40 hour training and focus on the labs where officers were tested using subjects of a known alcohol level. Also, elicit testimony regarding testing of non-impaired subjects.

**Demonstrate Officer's Personal Proficiency:** Ask the officer if he keeps HGN logs or if he keeps track of his accuracy on the field where the subject gives a breath sample. Some officers may be able to testify that every time they have arrested a subject where the subject exhibited HGN at the scene and they blew into the Intoxilyzer at the station, the reading came back over a .08. This kind of testimony is very compelling in a refusal case.

## **G. OPINION TESTIMONY AS TO IMPAIRMENT**

### **1. Admissibility of Opinions Fl. Stat 90.701**

Two prerequisites must be met:

- a) Witness must have firsthand knowledge through personal observations of the facts  
AND
- b) The opinion is not one that requires expert testimony.

*See, **State v. Williams**, 710 So.2d. 24 (Fla. 3<sup>rd</sup> DCA 1998)* where the court held that police officers and lay witnesses are permitted to testify as to their observations of defendant's acts, conduct, and appearance, and also to give an opinion on defendant's state of impairment based on those observations.

#### **Armstrong v. State, 17 Fla. L. Weekly Supp. 1d (Fla. 6<sup>th</sup> Cir. Ct. App. 2009)--**

Court held that it was not an abuse of discretion to allow arresting officer to testify as to his opinion that defendant was under the influence of alcohol to the extent that his normal faculties were impaired. Lay witnesses have been permitted not only to testify as to their observations of a defendant's acts, conduct, appearance and statements, but also to give opinion testimony of impairment based on their observations

**State v. Meador**, 674 So.2d 826 (Fla. 4<sup>th</sup> DCA 1996) held that police officers were entitled to testify as lay witnesses as to their observations of results of driving under the influence of alcohol (DUI) defendant's performing walk-and-turn test, one-legged stand, balance test and finger-to-nose test.

- 2. Opinion on Ultimate Issue under Fla. Stat. §90.703** states that “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.” It is only inadmissible if it not helpful to the jury and, in fact, prejudices the defendant in some way. Erhardt, Florida Evidence, section 703.1. In other words, an officer's opinion regarding the defendant being under the influence will lead to the inference that the defendant committed the crime of DUI, it does not constitute an opinion that the defendant committed the crime of DUI or is guilty of DUI.

#### IV. ACCIDENT REPORT PRIVILEGE

##### A. FLORIDA STATUTES SECTIONS -- § 316.062(1), § 316.062(3), § 316.066(1) AND §316.066(4)

###### 1. Statutory Language:

###### § 316.062 - Duty to give information and render aid

(1) The driver of any vehicle involved in a crash resulting in injury to or death of any person or damage to any vehicle or other property which is driven or attended by any person shall give his or her name, address, and the registration number of the vehicle he or she is driving, and shall upon request and if available exhibit his or her license or permit to drive, to any person injured in such crash or to the driver or occupant of or person attending any vehicle or other property damaged in the crash and shall give such information and, upon request, exhibit such license or permit to any police officer at the scene of the crash or who is investigating the crash and shall render to any person injured in the crash reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary, or if such carrying is requested by the injured person (emphasis added).

(2) In the event none of the persons specified are in condition to receive the information to which they otherwise would be entitled under subsection (1), and no police officer is present, the driver of any vehicle involved in such crash, after fulfilling all other requirements of s. 316.027 and subsection (1), insofar as possible on his or her part to be performed, shall forthwith report the crash to the nearest office of a duly authorized police authority and submit thereto the information specified in subsection (1).

(3) The statutory duty of a person to make a report or give information to a law enforcement officer making a written report relating to a crash shall not be construed as extending to information which would violate the privilege of such person against self-incrimination (emphasis added).

###### § 316.066 - Written reports of crashes

(1) The driver of a vehicle which is in any manner involved in a crash resulting in bodily injury to or death of any person or damage to any vehicle or other property in an apparent amount of at least \$500 shall, within 10 days after the crash, forward a written report of such crash to the department or traffic records center. However, when the investigating officer has made a written report of the crash pursuant to paragraph (3)(a), no written report need be forwarded to the department or traffic records center by the driver (emphasis added).

(7) Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting. No such report or statement shall be used as evidence in any trial, civil or criminal. However, subject to the applicable rules of evidence, a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the crash if that person's privilege against self-incrimination is not violated. The results of breath, urine, and blood tests administered as provided in s. 316.1932 or s. 316.1933 are not confidential and shall be admissible into evidence in accordance with the provisions of s.



316.1934(2). Crash reports made by persons involved in crashes shall not be used for commercial solicitation purposes; however, the use of a crash report for purposes of publication in a newspaper or other news periodical or a radio or television broadcast shall not be construed as "commercial purpose" (emphasis added).

## **2. Requirements of the Statutes**

- Despite the fact that the statute sections above contain no requirement that drivers provide information regarding the cause of a crash, and in fact, even seem to suggest that they are not compelled if it might incriminate them, the Florida Supreme Court construes the statutes as if they compel motorists involved in accidents to make statements regarding the accident. See State v. Marshall, 695 So.2d 686 (Fla. 1997). The purpose of the Accident Report Privilege is to protect the right against self-incrimination while requiring persons involved in accidents to make a true report so as to enable the DHSMV to facilitate ascertainment of the course of accidents. Thus, the accident report privilege comes into play when a driver of a vehicle involved in a crash makes incriminating statements to a police officer, and is charged criminally, and the state attempts to admit the statements into evidence against the defendant – A determination must be made, therefore, whether those incriminating statements are protected by the privilege as it construed by the Florida Supreme Court.
- Prior to a 1991 amendment, Fla. Stat. § 316.066(4) (1989) used to say only that: “each accident report made by a person involved in an accident and any statement made by such person to a law enforcement officer for the purpose of completing an accident report required by this section shall be without prejudice to the individual so reporting. No such report or statement shall be used as evidence in any trial, civil or criminal.”
- After the 1991 amendment, Fla. Stat. § 316.066(4) (2011) now provides, in addition to the language quoted above, that “subject to the applicable rules of evidence, a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the crash if that person’s privilege against self-incrimination is not violated.”
- In addition, the 1991 amendment added subsection (3) to Fla. Stat. § 316.062 that relates to a person’s duty to give information. The statute now states: “the statutory duty of a person to make a report or give information to a law enforcement officer making a written report relating to a crash shall not be construed as extending to information which would violate the privilege of such person against self-incrimination.” Fla. Stat. § 316.062(3) (2007).

## **B. CASE LAW AND INTERPRETATIONS OF THE STATUTES BY THE FLORIDA COURTS**

### **1. State v. Marshall**

- Pursuant to State v. Marshall, 695 So.2d 686 (Fla. 1997), affirming 695 So.2d 719 (Fla. 3d DCA 1996), most incriminating statements made without Miranda warnings in the context of an accident investigation, whether civil or criminal in nature, are inadmissible. The Florida Supreme Court has explained that the accident report privilege was created “to protect the constitutional right against self-incrimination ... while, at the same time, requiring persons involved in accidents to make a true report thereof so as to enable the Department of Public Safety ‘to facilitate the

ascertainment of the cause of accidents . . .” State v. Coffey, 212 So.2d 632 (Fla. 1968).

- In State v. Marshall, 695 So.2d 686 (Fla. 1997), the defendant was involved in a motorcycle crash. After conducting an accident investigation, the trooper told the defendant he was beginning a criminal investigation. Without advising the defendant of his Miranda rights, the trooper questioned the defendant regarding the consumption of alcohol. The defendant admitted that he had been drinking. The trial court held that the admissions made during the accident investigation were inadmissible but the admission that the defendant was drinking, which was made after the defendant was advised that a criminal investigation was underway, was admissible. The Third District Court of Appeal reversed and held that the defendant’s statements were inadmissible because they were privileged. See 695 So.2d 719 (Fla. 3d DCA 1996). The Supreme Court affirmed the Third District Court of Appeal opinion and held that the defendant’s statement regarding his alcohol consumption was inadmissible. The court quoted from Norstrom, stating:

To clarify our decision, we emphasize that the privilege granted under section 316.066 is applicable if no Miranda warnings are given. Further, if a law enforcement officer gives any indication to a defendant that he or she must respond to questions concerning the investigation of an accident, there must be an express statement by the law enforcement officer to the defendant that this is now a criminal investigation, followed immediately by Miranda warnings, before any statement by the defendant may be admitted. Marshall at 686, citing State v. Norstrom 613 So.2d 437, 490-441 (Fla. 1993).

## 2. State v. Norstrom

- Note that Norstrom (613 So.2d 437 (Fla. 1993)) interpreted the pre-1991 statute; Marshall construes the statutory privilege as amended (in 1991). The Marshall court opined that the statutory amendments in 1991 were made in response to the facts of the Norstrom case. In Norstrom, despite the fact that the police were still conducting the accident investigation and had not begun the criminal investigation, the defendant was handcuffed at the scene of the accident and taken to the police station for questioning. He was advised of his Miranda rights, waived them and made statements. The Court held that the statements were admissible because the defendant’s privilege against self-incrimination was not violated because he had been advised of his rights and he had not been told that he was compelled to provide information about the crash.
- The only way for the Third District Court of Appeal opinion language of Marshall (affirmed by the Florida Supreme Court) to square with the facts of that case is if the court is saying the concept of "custody" is altered in an accident case. In other words, the opinion itself tells us that a statement is within the privilege only if it is protected under the Fifth Amendment. Pursuant to Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984), and State v. Burns, 661 So.2d 842 (Fla. 5<sup>th</sup> DCA 1995), responses to roadside interrogation are normally not within the protection of the Fifth Amendment. Thus, Marshall must be re-defining "custody" (i.e. custodial interrogation) in accident situations. Since under Fla. Stat. § 316.062, the driver must assist an officer in completing an accident report, any "interrogation" will be seen as custodial, or coercive, interrogation.

- Therefore, Marshall means that many of the admissions a defendant makes to an officer at the accident scene will be inadmissible, unless made subsequent to Miranda warnings. Further, if a law enforcement officer gives any indication to a defendant that he or she must respond to questions concerning the investigation of an accident, there must be an express statement by the law enforcement officer to the defendant that this is now a criminal investigation, followed immediately by Miranda warnings, before any statement by the defendant may be admitted.

## C. APPLICATION OF THE PRIVILEGE

### 1. Who Is Protected and Who Is Not Protected

#### a. Other Persons Involved in the Crash (Not Protected)

The privilege does not prohibit the State from using statements made to law enforcement during the traffic investigation by persons other than defendant in its prosecution of defendant for driving under the influence of alcohol. State v. Cino, 931 So. 2d 164 (Fla. Dist. Ct. App. 5th Dist. 2006)

#### b. Drivers That Left The Scene of a Crash or Provided False Information

If a defendant is charged with Leaving the Scene of an Accident, or Giving False Information at a Crash Scene he is not entitled to the protections of the Accident Report Privilege. As previously discussed, the policy behind the privilege is to encourage truthful reporting in order to assist in traffic crash investigations. A person who flees the scene or makes a false report is clearly not participating in the spirit of the privilege and should not be afforded its protections. See Cummings v. State, 26 FLW D126a (2<sup>nd</sup> DCA Dec. 29, 2000) and State v. Hepburn, 460 So.2d 422 (Fla. 5<sup>th</sup> DCA 1984) (Both cases deal with LSA. The courts found that a failure to candidly comply with the privilege waives the privilege). Further, even if a person hasn't been formally charged with Leaving the Scene or of Giving False Information, but has committed those acts, the privilege still should not apply. See Hepburn, Id.

#### c. Witnesses To The Crash

Witnesses to the crash are not protected by the accident report privilege and what they say is admissible and can be used against the driver. Miller v. DHSMV, 9 Fla. L. Weekly Supp. 228 (Broward Circuit Court, January 31, 2002) (witness who was not involved in the crash stated that the defendant was the driver of one of the vehicles and put the defendant behind the wheel. Privilege does not apply to exclude the witnesses statements); Moore v. DHSMV, 8 Fla. L. Weekly Supp. 5 (Volusia Circuit Court, July 31, 200) (the privilege does not apply to statements of witnesses or persons who may volunteer information to the LEO about the crash).

### 2. Does The Privilege Prevent Impeachment of the Speaker

Matters protected by the accident report privilege are not admissible even for impeachment. Thomas v. Gottlieb, 520 So.2d 622, 623 (Fla. 4<sup>th</sup> DCA 1988), but see Hector v. Tucker, 432 So.2d 1352 (Fla. 5<sup>th</sup> DCA 1983) (where the dissent argued that statements protected by the accident report privilege should be admissible to impeach in light of Harris v. New York, 401 US 222 (1971)(The majority in Hector found it unnecessary to decide the issue). In Harris v. New York, the high court held that statements that violate Miranda, and are therefore inadmissible, can be used to impeach a defendant because defendants do not have the right to commit perjury. However, the Harris opinion clearly states that the defense did not claim that the statement was coerced

or involuntary. In the context of the accident report privilege, drivers involved in crashes are compelled by statute to make statements to investigating officers. Thus, the statements are not voluntary – so, in order to use statements to impeach a witness, including a passenger or a defendant, the prosecutor must obtain a finding from the court regarding the voluntariness of the statement before impeaching the witness with it. This will likely necessitate testimony regarding whether officers informed the witness that they were compelled to answer questions, and if not, whether there is any circumstantial evidence that the witness thought they were compelled to answer questions by force of statute. See also, Melendez v. State, 747 So.2d 1011 (Fla. 2nd DCA 1999)(Although not an Accident Report Privilege case, the Court held that involuntary or coerced statements may not be used to impeach a defendant who testifies inconsistently with his previous, inadmissible statements).

### **3. What is Not Protected by the Privilege**

- The privilege does not apply to statements overheard by a police officer. City of Tamarac v. Garcher, 398 So.2d 889 (Fla. 4<sup>th</sup> DCA 1981).(overruled on different grounds)
- The privilege does not apply to spontaneous statements not made for the purpose of accident investigation. Goodis v. Finkelstein, 174 So.2d 600 (Fla. 3<sup>rd</sup> DCA 1965).

## **D. STATEMENTS OF IDENTITY ARE GENERALLY PROTECTED BY THE PRIVILEGE**

### **1. Generally – Corpus Delicti**

- a. Defendant admitted to being the driver. Notwithstanding the application of the Accident Report Privilege, for this type of statement to be admissible in a criminal trial in order to prove the defendant drove (e.g., in a DUI or DWLS trial), the statement must first be supported by some independent direct or circumstantial evidence of driving so that the corpus delicti requirement is satisfied.
- b. Defense argument regarding the application of the Privilege -The defendant's un-Mirandized admission to being the driver, made in response to the investigating officer's questioning, is inadmissible. Marshall, 695 So.2d at 686. Since the defendant is compelled to assist the officer in completing an accident report, including identifying himself as the driver, this information is absolutely privileged unless the officer first reads Miranda. In addition, the Accident Report Privilege, Fla. Stat. § 316.066(4), does not specifically exclude statements of identity from the application of the privilege. The 4th DCA in State v. Evans, 692 So.2d 305 (Fla. 4th DCA 1997), stated that there is no "identity exception" to the accident report privilege." Similarly, in Velez v. State, 5 FLW Supp. 513 (Fla. 11<sup>th</sup> Jud. Cir. App 1998), the 11<sup>th</sup> Judicial Circuit, sitting in appellate capacity to review County Court order, held that where no Miranda warnings had been given at time a trooper was investigating an accident, defendant's statement that he was the driver of the vehicle was protected by the accident report privilege. The statement should have been suppressed.

## **E. STATE'S RESPONSE - WHEN THE ACCIDENT REPORT PRIVILEGE DOES NOT APPLY**

### **1. Generally**

- a. Spontaneous, voluntary statements.  
Defendant's spontaneous incriminating statements are not protected. See Perez v. State, 630 So.2d 1231 (Fla. 2<sup>nd</sup> DCA 1994); Conner v. State, 398 So.2d 983 (Fla. 1<sup>st</sup> DCA 1981); Oster v. DHSMV, 7 Fla. L. Weekly Supp. 574 (Duval Circuit Court, July 5, 2000); DesJardins v. DHSMV, 9 Fla. L. Weekly Supp. 29 (Broward Circuit Court, November 13, 2001); Gallen v. DHSMV, 9 Fla. L. Weekly Supp. 1 (Duval Circuit Court, June 5, 2001).
- b. Statements made to non-police personnel even if the statement is in response to a question (e.g., fire rescue, D.O.T. workers, etc.) - However, it should be noted that this exception is limited by the statutory language requiring, in some instances, that drivers involved in crashes, provide information to other drivers, as well as their passengers.
- c. Statements that are not "otherwise-protected by the privilege against self-incrimination." State v. Marshall, 695 So.2d 719 (Fla. 3d DCA), affirmed, 695 So.2d 686 (Fla. 1997) (i.e. non-responsive statements).
- d. Physical actions by the defendant are not protected as statements under the Accident Report Privilege. State v. Whelan, 728 So.2d 807 (Fla. 3<sup>rd</sup> DCA 1999).
- e. Statements covered by the privilege can be used to establish probable cause. State v. Walkins, 6 Fla. L. Weekly Supp. 663 (Brevard County Court, February 1, 1999) (reasoning that as the Accident Report Privilege has been held to apply to exclude the statements made during the accident investigation, the corpus delicti issue may not be raised in the case and whether the State can prove the case otherwise is an issue to be determined at trial). See also, State v. Ledegang, 6 Fla. L. Weekly Supp. 441 (Broward County Court, March 18, 1999) (holding that although the defendant's admission of driving is inadmissible at trial under the Accident Report Privilege, the defendant's admission can be used to establish probable cause).
- f. When driver left the scene of the crash or falsely reported the facts to an investigator or other driver or passenger.
- g. When the driver has been told that he is free to leave and does not have to answer questions (this is not considered a full Miranda warning) – See Vedner v. State, 849 So.2d 1207 (Fla. 5<sup>th</sup> DCA 2003). In Vedner v. State, defendant crashed into the back of Mr. Martinez' van. Defendant was thrown from the car, and his passenger and best friend died of massive head injuries. Two witnesses reported that they smelled alcohol on the defendant. Law enforcement officers spoke to defendant on three occasions prior to his being charged criminally. The first interview was conducted on the day after the accident. Before the interview started the officer read defendant his Miranda rights. Defendant reported at that time that he had come from an establishment in Orange County called the "Ale House" at about 1:30 in the morning, where he consumed two and one-half beers. He could not remember where he went next.

Five days later, defendant and his mother went to the Lake Mary Police Department to retrieve his personal property after being invited to do so by law enforcement officers. While there, he agreed to be interviewed a second time. Defendant was advised that he was not under arrest, that the officers had no intention of arresting him at that time, and that he was free to leave at any time. He was not warned of his Miranda rights again. Defendant reported that at some time between 1:30 and 4:30 a.m., he smoked marijuana with his friend. The officer testified that at the time of the second interview, he was "still investigating the accident."

The third interview took place approximately six months later. At that time, the officer again advised defendant that he was not under arrest and that he was free to go at any time. Defendant replied that he understood. He was once again not advised pursuant to Miranda. On this occasion, however, defendant asked why he was being questioned. The officer responded by saying, "This is just to conclude to the rest of this investigation." When asked during a suppression hearing if the accident investigation was still ongoing at the time of this interview, the officer replied that it was. The defendant, in response to questioning, further admitted the drug use. The officer also admitted that during this interview, he used trickery to try to obtain more information from the defendant.

The Fifth District Court of Appeal held the following:

The statements given by defendant to law enforcement officers at the initial interview were voluntarily made after he was advised of his Miranda rights and were, therefore, admissible against him.

They held that the second interview was non-custodial and voluntary. "Defendant was asked to come to the police station, and he did so voluntarily. Although he was not re-advised of his Miranda rights, defendant was told that he could leave at any time, and that he was not under arrest. He thereafter made statements that were introduced against him in the criminal trial. We have searched the record thoroughly for 'any indication' that defendant was told that he was required to answer the questions of the law enforcement officers, but find none. What is troubling, of course, is that the interview was conducted, at least in part, in connection with the accident investigation. This fact alone, however, does not under Norstrom and Marshall vitiate the admissibility of his statements." "[T]here was no indication that defendant was advised or believed that he was required to provide the information sought by the law enforcement officers, and as the interview was non-custodial and voluntary, we conclude that statements made to the officers were properly introduced into evidence at his criminal trial, despite the failure of the officers to warn [defendant] under Miranda."

The Court held, however, that the third interview was problematic. Defendant specifically inquired about the reasons for the additional questions, and he was told that it was for the accident investigation, not a criminal investigation. Thus, there was an "indication" that he was required to answer the questions, and he should have been advised under Miranda. The Court concluded that the failure to warn defendant under Miranda prior to eliciting the statements that were used against him in a criminal trial violated his right against self-incrimination.

## **THE ARREST**

### **I. PROBABLE CAUSE**

#### **A. DEFINITION**

A warrantless arrests must be made upon a showing of probable cause. *See U.S. Const. amend. IV; Article I, §§ 9, 12, Fla. Const.* Probable cause has been defined as:

The rational inference, drawn from specific and articulable facts, that reasonably warrants an intrusion due to the commission of a criminal offense. *See Terry v. Ohio*, 392 U.S. at 21-22.

Two important caveats exist. First, probable cause must be based on objective facts and circumstances, and not on personal opinions or suspicions. *See Jackson v. State*, 456 So.2d 916, 918 (Fla. 1st DCA 1984); *Brown v. State*, 330 So.2d 861 (Fla. 4th DCA 1976). Second, probable cause must exist prior to the defendant's warrantless arrest. *See D'Agostino v. State*, 310 So.2d 12 (Fla. 1975). The rights provided in the Fourth Amendment apply to protect a person inside of a motor vehicle. *See Delaware v. Prouse*, 440 U.S. 648 (1979). Thus, a law enforcement officer may arrest a person without a warrant, either immediately or in fresh pursuit, when there is probable cause to believe that a violation of Chapter 316 has been committed in his or her presence. *See Florida Statute 901.15(5)* (1994).

#### **B. OBJECTIVE STANDARD**

“The facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based.” *State v. Russell*, 659 So.2d 465, 468 (Fla. 3d DCA 1995) (quoting *Shriner v. State*, 386 So.2d 525, 528 (Fla. 1983))

The Florida Supreme Court has noted that in determining whether probable cause existed for an arrest, the sufficiency of the officer's knowledge is not to be judged by an analysis of the effect of each isolated circumstance, but rather, it is to be measured by a test of what a reasonable man would have believed had he known all of the facts known by the officer. *See State v. Outten*, 206 So.2d 392, (Fla. 1968).

“In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Illinois v. Gates*, 462 U.S. 213, 231 (1983).

- “The test for probable cause is not a subjective one, but rather objective. Police officers are not constitutional experts, nor required to use exact, precise language. The litmus test of probable cause is not now, nor has it ever been, nor should it ever be, what a police officer subjectively believes. A positive mental belief is no more binding on a Court than a negative one.” *State v. Pacheco*, 32 Fla. Supp. 2d 121 (Fla. 11th Cir. Ct. 1988).
- In addition, the 5<sup>th</sup> District observes that "it seems well settled that the officer's personal opinion as to whether probable cause exists is irrelevant." *Knox v. State*, 689 So.2d 1224, 1225 (Fla. 5th DCA 1997); see also, *State v. Brown*, 725 So.2d 441

(Fla. 5<sup>th</sup> DCA 1999) (officer's testimony that he did not subjectively feel that he had grounds to arrest the defendant is not determinative where the objective facts and circumstances were sufficient to establish probable cause)

- *State v. Rivas-Marmol*, 679 So.2d 808 (Fla. 3rd DCA 1996). Officer investigating an accident involving defendant, smelled alcohol on defendant's breath, and administered roadside sobriety tests which the defendant failed. The officer then placed the defendant in the back seat of his patrol car and advised the defendant he was being taken to the police substation. The officer then opened the back seat door (which cannot be opened from the interior) and handcuffed the defendant and took him into the DUI room where he was administered a breath test. The officer testified in a suppression hearing that he had only detained the defendant prior to the breath test and arrested him after the breath test. The court applied an objective standard and determined that this was a silent arrest and that the officer had "in fact" arrested the defendant before the breath test was administered. The test results were admissible, given that police officer administered the breath test after making a lawful arrest.

### C. CASE LAW - PROBABLE CAUSE TO ARREST

**Erratic Driving + Indicia of Impairment = PC.** *State v. McKinnon*, 15 Fla. L. Weekly Supp. 520a (18<sup>th</sup> Jud. Cir., Brevard County, February 17, 2008) (holding that when defendant ran off the road, then almost hit a stationary car, then proceeded to swerve into and stop in the turn lane and the stop officer saw indicia of impairment, there was probable cause to arrest).

**Accident + Odor + Admission = PC.** *Valentine v. DHSMV*, 15 Fla. L. Weekly Supp. 405a (5<sup>th</sup> Jud. Cir., Lake County, February 28, 2008) (finding that where defendant was involved in an accident, was observed to have an odor of alcohol, and admitted to drinking after being read Miranda, there was PC for arrest).

**Motorcycle on Side of Road + Damage to Motorcycle + Defendant Lying in the Grass + Odor of Alcohol + Bloodshot Eyes + Watery Eyes = PC.** *Department of Highway Safety and Motor Vehicles v. Silva*, 27 Fla. L. Weekly D 139 (Fla. 2d DCA Jan. 9, 2002) (holding that the facts and circumstances surrounding the incident would lead a reasonable person to believe that the defendant was driving the motorcycle next to him while impaired).

**Odor of Alcohol + Bloodshot/Watery Eyes + Accident = PC.** *Department of Highway Safety and Motor Vehicles v. Possati*, 866 So.2d 737, 741 (Fla. 3d DCA 2004) (in combination, the smell of alcohol on the defendant's breath, bloodshot/watery eyes, and that he had just crashed into a parked police car were more than sufficient to establish probable cause for a lawful DUI arrest.)

**Erratic Driving + Odor of Alcohol + Watery Eyes + Slurred Speech = PC.** *Department of Highway Safety and Motor Vehicles v. Whitley*, 846 So.2d 1163, 1166 (Fla. 5<sup>th</sup> DCA 2003) (officer observed erratic driving (defendant drove off the road), an odor of alcohol on the defendant's breath, slurred speech, watery eyes, and the defendant's admission of drinking, rose to the level of probable cause to arrest the defendant for DUI.)

**Odor of Alcohol + Unsteady Balance = PC.** *State v. Betancourt*, 29 Fla. Supp. 2d 121 (11<sup>th</sup> Cir. Ct. App. Div. 1988) (after being stopped by a state trooper, defendant stepped from his car and appeared unsteady. Trooper also smelled an odor of an alcoholic beverage



on the defendant's breath. No roadside sobriety tests were given because the trooper could not speak with the Spanish speaking defendant. The Court found that there was sufficient probable cause to arrest the defendant for DUI). But see *State v. Beach*, 4 FLW Supp. 565 (Fla. Palm Beach Cty. Ct. 1997) (defendant stopped for speeding, had strong odor of alcoholic beverage on him and only 1 of 3 roadsides indicated impairment. Officer let the defendant go, ordering him not to drive. Defendant drove again and was then arrested. Court found no PC to arrest, absent any other signs of impairment).

**Speeding, Odor of Alcohol + Admission of Drinking = PC.** *State v. Lukas*, 652 So. 2d 1177 (Fla. 2d DCA 1995) (defendant was speeding, had the smell of alcohol on his breath, and made admissions of drinking to paramedics at the scene (there was an accident, but the court did not seem to consider it in its determination that the evidence was sufficient to establish probable cause). The court found that the trial court erred in granting the defendant's sworn motion to dismiss, since the above evidence was sufficient for a prima facie case of impairment. If these facts are enough for a prima facie case (the first JOA standard at trial), it certainly follows that they are, in the Second District's opinion, enough for probable cause).

**No observed driving pattern + observation of defendant leaning on car door + odor + bloodshot eyes + slurred speech + flushed face + statements + FSTs = PC.** *State v. Thomas*, 5 FLW Supp. 333 (4<sup>th</sup> Circuit Duval Cty. Ct. January 14, 1998)

**Officer's observation of speeding and abrupt halt in middle of lane + odor + glassy, red eyes + defendant initially lying about drinking + roadside refusal = PC.** *Bush v. DHSMV*, 5 FLW Supp. 349 (6th Judicial Cir. 1998)

**Officer's observation of defendant slumped in vehicle + horn honking + blood shot eyes + odor + inability to correctly answer officer's question as to where defendant was = PC.** *State v. Macleod*, 5 FLW Supp. 554 (Miami-Dade Cty. Ct. 1998).

**Odor + Accident + Bloodshot Eyes + HGN = PC.** *State v. Tuttolomondo*, 4 FLW Supp. 478 (Fla. Volusia Cty. Ct. 1997) (Officer had PC to arrest defendant for DUI based on HGN test results, the defendant's bloodshot and watery eyes, odor of alcohol on his breath, odor of alcohol in interior of his vehicle; and accident which defendant caused).

- **NOTE** - This court specifically held that HGN can be considered for establishing PC even where an officer cannot give the scientific or medical principles involved in HGN testing. If the court is inclined to exclude HGN at trial, HGN should be considered as part of a probable cause determination. Recall that a court's determination in a probable cause motion is whether objectively the officer based the arrest decision on the requisite level of articulable observations. Whether it ultimately turns out to be admissible or not, HGN is one of those observations which formed a basis for the arrest. Meador is a case that deals with HGN's effect on a jury.

**Odor + Accident + Bloodshot Eyes = PC.** *DHSMV v. Possati*, 866 So.2d 737 (Fla. 3d DCA 2004): Smell of alcohol on driver's breath, driver's bloodshot and watery eyes, and fact that driver had just crashed his vehicle into a parked police vehicle were more than sufficient to establish probable cause for a lawful DUI arrest, **notwithstanding fact that second officer (a DUI specialist called in to conduct DUI investigation) could not recall driver's performance on field sobriety tests.**

#### **D. CASE LAW - NO PROBABLE CAUSE TO ARREST**

**Odor of Alcohol Alone ≠ PC.** State v. Kliphouse, 771 So.2d 16 (Fla. 2d DCA 2000) (In this case, witnesses at the scene of the accident reported that defendant was operating his motorcycle in a safe and normal manner for several miles before the accident and that he did not cause the accident that led to his injuries. The driver of the other vehicle was cited for violating a traffic control device and colliding with the defendant. Other than the odor of alcohol on the defendant's breath, the police officer was unable to observe anything else about the defendant's conduct or appearance that would justify a reasonable inference that his normal faculties were impaired at the time of driving or that he had an unlawful blood alcohol level.)

**Recorded Recollection Alone ≠ PC.** State v. Benedetti, 7 FLW Supp 130b (11<sup>th</sup> Circuit Miami-Dade County November 16, 1999)(The officers DUI test report used as a recorded recollection pursuant to 90.803(5) cannot by itself sustain a finding of probable cause for arrest because hearsay alone cannot be the basis for such a finding).

## **II. THE FELLOW OFFICER RULE - FLA. STAT. § 901.18**

### **A. STATUTORY LANGUAGE**

**Fla. Stat. § 901.18** allows a fellow officer to make a lawful arrest. The statute provides that:

A peace officer making a lawful arrest may command the aid of persons he deems necessary to make the arrest. A person commanded to aid shall render assistance as directed by the officer. A person commanded to aid a peace officer shall have the same authority to arrest as that peace officer.

This is known as the **fellow officer rule**, and was first adopted in Whiteley v. Warden, 401 U.S. 560 (1971). *See also*, Carroll v. State, 497 So.2d 253 (Fla. 3d DCA 1985); Winston v. State, 719 So. 2d 1018 (Fla. 3rd DCA 1998). One officer can communicate his own observations to another officer, such that this 'secondhand information' can form the probable cause basis for the second officer's warrantless arrest. Thus, § 901.18 effectively creates an exception to the misdemeanor presence requirement.

### **B. CASE LAW**

In McClendon v. State, 440 So. 2d 52 (Fla. 1st DCA 1983), the Court seemed to take a broad view of Fla. Stat. § 901.18, the codified version of the fellow officer rule. With regard to a stop, the court held that under Fla. Stat. § 901.18, the stop officer could base his stop solely on what was told to him by another officer. Applying this to the arrests, the first officer on a case need not develop and communicate PC on his own, nor does he have to be in the process of executing a lawful arrest, before the 2nd officer will have proper jurisdiction to arrest without a warrant. The first officer merely has to communicate to the second officer that he observed the subject driving or in actual physical control. The second officer may then develop PC as to "under the influence" and "impaired".

In State v. Ostrow, 579 So.2d 292 (Fla. 3d DCA 1991), the 3rd DCA cites to Fla. Stat. § 901.18 in upholding a "back-up officer's" DUI arrest. There is nothing in the opinion as to whether the first officer had PC to arrest, or was in fact in the process of making an arrest. In the absence of this information, the case, like McClendon, supports a broad interpretation of the "fellow officer rule".

In **Huebner v. State**, 731 So.2d 40 (Fla. 4th DCA 1999), the court ruled that an off-duty police officer outside his jurisdiction is an officer for purposes of the fellow officer rule, and could properly communicate his observations to another officer who, in turn, could act on the information.

In **Sawyer v. State**, 905 So.2d 232 (Fla. 2d DCA 2005), the court held the fellow officer rule does not extend to citizen informants; thus, information supplied by two citizen informants could not be imputed to officer who responded to call regarding driver's erratic behavior but did not witness any driving; accordingly, since misdemeanor was not committed in presence of officer, officer had no authority to arrest driver.

NOTE - The fellow officer rule is also applicable in the context of a patdown search. *See, Winston v. State*, 719 So. 2d 1018 (Fla. 3rd DCA 1998).

Note- BOWERS v. STATE, 23 So.3d 767 (Fla. 2DCA 2009). Supreme Court Case No. SC09-1971 (State v. Bowers). Order dated May 10, 2010. Oral argument set for August 31, 2010. Criminal law -- Driving under influence -- Search and seizure -- Vehicle -- Traffic infraction -- Circuit court sitting in its appellate capacity departed from essential requirements of law when, based on erroneous application of fellow officer rule, it reversed a county court order granting defendant's motion to suppress -- Testimony of officer who investigated DUI regarding what officer who stopped defendant told him about defendant's driving was hearsay and as such was not admissible to prove that stopping officer witnessed defendant violating a traffic law -- Fact that DUI investigator was called to scene after stop was completed did not make him a fellow officer for purposes of determining whether there was probable cause to support the traffic stop -- Conflict certified.

### C. ACCIDENT INVESTIGATIONS

**Fla. Stat. § 316.645** gives police officers arrest authority at an accident scene. The statute states:

A police officer who makes an investigation at the scene of a traffic crash may arrest any driver of a vehicle involved in the crash when, based **upon personal investigation**, the officer has reasonable and probable grounds to believe that the person has committed any offense under the provisions of this chapter or chapter 322 in connection with the crash.

The defense may argue the arrest is invalid because the fellow officer rule does not apply in accident cases. In **State v. Fonte**, 3 FLW Supp. 363 (Fla. Hillsborough Cty. Ct. 1995), two deputies, investigating what they believe to be an accident, call for a DUI backup. One of the initial officers was going to investigate the accident, while the backup processed the DUI. This backup officer did look in defendant's car, and determined that he was injured. The court here refused to allow Fla. Stat. § 316.645 and Fla. Stat. § 901.18 to 'piggy-back' on each other; a warrantless arrest could not be made by someone who did not observe the offense and did not personally investigate the accident. *See also, State v. Dunn*, 5 Fla.L.Weekly Supp. 190 (Broward County Nov. 17, 1997); *State v. Kramer*, 47 Fla.Supp. 2d 58 (17<sup>th</sup> Circuit April 11, 1991).

**The State's Response:** The 11<sup>th</sup> and the 17<sup>th</sup> Circuits have decided this issue. In **State v. Welsh**, 11 Fla. L. Weekly Supp. 1042c (Fla. 11<sup>th</sup> Cir. 2004); **Alexander v. State**, 8 Fla. L.

Weekly Supp. 610 (Fla. 17<sup>th</sup> Cir. 2001); **Mandemaker v. State**, 10 Fla. L. Weekly Supp. 688 (Fla. 17<sup>th</sup> Cir. 2003).

In **Welsh**, the court ruled that the fellow officer rule applies in combination with the “accident investigation” exception, and an officer who did not conduct any portion of the accident investigation properly relied on the accident investigation of another officer and then subsequently conducted a criminal investigation and made an arrest.

The **Mandemaker** case describes in some detail the reason why both exceptions can work together – Fla. Stat. § 316.645 merely requires *any* officer to conduct *any* investigation at the scene of the accident – this means that one officer can conduct the accident investigation and another can conduct the criminal (ex. DUI) investigation. The statute allows another exception to the misdemeanor presence requirement for warrantless arrests. Nothing in the statutes indicates that Fla. Stat. § 901.18, which effectively expands officers’ misdemeanor arrest powers, does not apply to accident cases.

Fla. Stat. § 316.645 does not have to be read as the only statute dealing with officers’ arrest powers in accident situations. In addition, the court fails to realize that this officer **did** witness the offense, recall that DUI applies to someone driving **or in actual physical control of the car**. If an officer observes the accident, Fla. Stat. § 316.645 should not be interpreted to bar the normal operation of the fellow officer rule, Fla. Stat. § 901.18. In other words, Fla. Stat. § 316.645 should act as an exception within Fla. Stat. § 901.18’s exception only where the first officer developed probable cause not from witnessing something, but from investigating an accident.

**Gerlitz v. State**, 725 So.2d 393 (Fla. 4th DCA 1998) (to establish probable cause to order a blood withdrawal, an officer may rely on information provided at the accident scene by other law enforcement agents. NOTE—In this case the fellow officer rule was applied in an accident scene to establish probable cause for a blood withdraw, not an arrest. However, argue the same standard applies for an arrest).

**State v. Hayes**, 4 FLW Supp. 276 (Fla. Palm Bch Cty. Ct. 1996). The court held that Fla. Stat. § 316.645 allowed for a valid warrantless arrest based on the officer's personal investigation of the accident even where the officer did not actually go to the accident scene itself. The officer responded to the defendant's house, where the victim had followed the defendant and subsequently called the police. The court stated that, under the circumstances, this certainly qualified as a "personal investigation" of the accident. *See also, State v. Roi*, 6 Fla.L.Weekly Supp. 359 (Fla. Broward Cty. Ct. 1999).

**Ropiza v. State**, 3 Fla. L. Weekly Supp. 697a (17<sup>th</sup> Circuit Broward County (April 26, 2006). No error in denying motion to suppress arguing that arresting deputy did not observe defendant in actual physical control of vehicle where drivers involved in accident gave firsthand account of observing defendant in actual physical control of vehicle to deputy and public service aide. The court found the fellow officer rule applies because the drivers involved in the crash were first-hand witnesses who observed the defendant in APC of his vehicle, and they spoke the arresting officer.

**State v. Felker**, 15 Fla. L. Weekly Supp. 349a (17<sup>th</sup> Jud. Cir., Broward County, January 9, 2008). The stop officer observed the defendant driving on flat, shredded tires and stopped the defendant for driving an unsafe vehicle. A DUI officer was called to the scene after the stop officer noticed indicia of impairment. The stop officer was told of the reasons for the stop by the stop officer and also saw the indicia of impairment. Court found no error in not

suppressing the stop. The DUI officer had knowledge of the stop imputed to him through the Fellow Officer Rule when the stop officer informed him of the stop. He also saw the indicia of impairment independently.

### **III. ARREST REQUIREMENTS FOR ADMISSIBILITY OF SCIENTIFIC TESTS**

#### **A. BREATH AND URINE TESTS**

A lawful arrest is required before a breath or urine test may be administered to a DUI defendant. See Section 316.1932(1)(a) and (1)(c), Florida Statutes; **State v. Mitchell**, 245 So.2d 618 (Fla. 1971); **Filmon v. State**, 336 So.2d 586 (Fla. 1976); **Cox v. State**, 473 So.2d 778 (Fla. 2nd DCA 1985).

#### **B. BLOOD TESTS**

A lawful arrest is not required before a blood test may be administered to a DUI defendant. See Section 316.1932(1)(a) and (1)(c), Florida Statutes; **State v. Mitchell**, 245 So.2d 618 (Fla. 1971); **Filmon v. State**, 336 So.2d 586 (Fla. 1976); **Cox v. State**, 473 So.2d 778 (Fla. 2nd DCA 1985); **State v. Hilton**, 498 So.2d 698 (Fla. 5th DCA 1986) (specifically rejecting the argument that Section 316.1932(1)(c) was unconstitutionally vague for allegedly failing to provide sufficient guidelines to invoke the police authority for obtaining blood samples); **Kenson v. State**, 577 So.2d 694 (Fla. 3rd DCA 1991) (re-affirming the rule that no arrest is needed in blood test cases and rejecting the argument that an arrest requirement had been implicitly recreated by certain statements in *State v. Perez*, 531 So.2d 961 (Fla. 1988)).

## **D.U.I. INVESTIGATION AT THE STATION**

### **I. FLORIDA'S BREATH TESTING PROGRAM**

#### **A. THE INTOXILYZER 8000 SERIES INSTRUMENTS**

- The Florida Department of Law Enforcement (FDLE) has specifically approved CMI's Intoxilyzer 8000 Series for evidential breath testing. **FDLE Rule 11D-8.003(2)** In addition, the FDLE Rules approve the Infrared Light Absorption Test as a method of breath testing. **FDLE Rule 11D-8.003(1)**.
- The Intoxilyzer relies on infrared light absorption. A beam of light passes through a breath sample. The wavelength of the beam is adjusted to that wavelength specifically absorbed by ethyl alcohol. Thus, the amount of light absorbed within the instrument (called a spectrophotometer) is proportional to the concentration of alcohol in the breath sample. Depending on their physical size and structure, alcohol molecules absorb light energy at specific frequencies. Using an infrared energy absorption technique, the Intoxilyzer 5000 & 8000 Series alcohol breath analysis instruments determine the alcohol concentration in a breath sample.

#### **B. MOTIONS TO COMPEL SOURCE CODES**

1. Think of the source code as the brain of the Intoxilyzer. It tells it what to do and how to run. As such, defense attorneys will often file motions to compel the Intoxilyzers' source code. It should be noted the CMI, the manufacturer of the Intoxilyzer will comply when these motions are granted but defense attorneys have to go to Kentucky to pick up the source code.
2. **DHSMV v. Berne, 49 So.3d 779 (Fla. 5th DCA 2010), cert. dismissed, 84 S.3d 257 (Fla. 2012):** Although this ruling arises from a DUI administrative suspension hearing rather than a criminal prosecution, it should effectively defeat arguments some defense attorneys have made regarding the "approval" of the Intoxilyzer 8000. It should also assist in defending against "source code" arguments. The Opinion holds that the Intoxilyzer 8000 is an approved instrument; that an "approval study" with the 8000.26 software was not required by FDLE rules; and that instead, only an "evaluation" of said software was necessary (and was properly done). The Opinion also quashes the lower court ruling from the Orange County circuit court which had specifically relied on the ruling in the *en banc* order of *State v. Atkins*, 16 Fla. L. Weekly Supp. 251a (Fla. Orange County Court June 20, 2008). *Atkins* had relied in large part on the theory that the Intoxilyzer 8000 was not an "approved" instrument as its rationale for why the source code from the Intoxilyzer 8000 was "material" and thus subject to mandatory disclosure to DUI defendants. A few other rulings from other county courts have utilized this rationale also in ordering the State to disclose the source code. It therefore appears that a major premise for *Atkins*' source code holding is no longer valid and motions to compel the source code should not be granted.

## II. IMPLIED CONSENT STATUTORY SCHEME § 316.1932

### A. DEFINITIONS

1. **Residents:** “By applying for a driver license and by accepting and using a driver license, the person holding the driver license is deemed to have expressed his consent to the provisions of this section.” **Fla. Stat. § 316.1932(1)(e)(1).**
2. **Nonresidents:** “A nonresident or any other person driving in a status exempt from the **requirements** of the driver license law, by his act of driving in such exempt status, is deemed to have expressed his consent to the provisions of this section.” **Fla. Stat. § 316.1932(1)(e)(2).**
3. **Multiple Testing:** “The administration of one type of test shall not preclude the administration of **another** type of test.” **Fla. Stat. § 316.1932(1)(a).**

### B. IMPLIED CONSENT TESTS

Pursuant to **Fla. Stat. § 316.1932(1)(a), §316.1932(1)(a)1.b., and §316.1932(1)(c)** a law enforcement officer may request a subject to take a breath, urine, or blood test. However, in order for a test result to be admissible the request must be made:

- a. incidental to a lawful arrest, and
- b. administered at the request of a law enforcement officer, and
- c. the law enforcement officer must have “*reasonable cause*” to believe a subject was driving or was in actual physical control of a motor vehicle within this state while under the influence of alcoholic beverages, controlled substances, or chemical substances.

NOTE: Can an officer ask a subject to give a breath, urine, or blood test in any case? No. An officer must request the subject to take the **legally appropriate test** for each specific case scenario.

**NOTE: When is a breath test alright to request?** A breath test is appropriate to request when reasonable cause exists that a subject is under the influence of alcohol.

**NOTE: When is a urine test alright to request?** A urine test is appropriate to request when reasonable cause exists that a subject is under the influence of chemical or controlled substances.

**NOTE: When is a blood test alright request in an implied consent context?** A blood test may only be requested when a breath or urine test is:

- impractical or impossible, and
- a defendant appears for treatment at a medical facility

### 1. LAWFUL ARREST REQUIREMENT

Under the statute governing alcohol testing for any driving offense committed while person was driving while under the influence of alcohol, “incident to a lawful arrest” means arrest must precede breath test. **DHSMV v. Whitley, 2003 WL 2002772 (5th**

DCA). In State v. Barrett, 508 So.2d 361 (5th DCA 1987), the court made pre-arrest breath tests inadmissible. The requirement that an officer advise the suspect of the consequences of a refusal goes to the very nature of the Implied Consent Law. However, keep in mind the concept of a "silent arrest". See State v. Rivas-Marmol, *supra*, where the 3d DCA found that although the arresting officer subjectively believed that no arrest occurred until after the breath test, objectively an arrest actually took place before the breath test, clearly satisfying the lawful arrest requirement. Thus, the focus necessarily must be on the lawfulness of the arrest.

DHSMV v. Hernandez, 74 So.3d 1070, 1073 (Fla. 2011). Ultimately, by a 4-3 vote, the Florida Supreme Court in *Hernandez* approved the result of the First District's decision in *Hernandez*, quashed the Second District's decision in *McLaughlin*, and held that the DHSMV cannot suspend a driver's license under section 322.2615, Florida Statutes, for refusal to submit to a breath test if the refusal is not incident to a lawful arrest.

## 2. Statutory Consent

The implied consent scheme triggers a legal concept known as statutory consent. When a citizen with a driver's license chooses to drive, that individual has agreed to provide a breath, blood, and urine sample irrespective as to what they say or do after their DUI arrest. More simply, when an officer arrests an individual for DUI and that officer has reasonable cause to believe that they are impaired by alcohol, controlled, and/or chemical substances a request for breath, urine, or blood is legally appropriate. However, from a legal perspective that individual has already consented to providing all three sample tests when he/she received their driver's license.

## 3. Suppression of Test Results When Subject Not Advised of Consequences of Refusing

It is not required for the State to show that the suspect was advised of the consequences of refusal if the defendant submits to the test. See State v. Gunn, 408 So.2d 647 (4<sup>th</sup> DCA 1982); Craft v. State, 517 So.2d 691 (Fla. 1988). If a subject refuses to provide a sample his/her driver's license privileges will be suspended for 12 months. If he/she has previously refused to provide a sample they will be suspended for 18 months.

- State v. Gunn, 408 So.2d 647 (4<sup>th</sup> DCA 1982)—“Chemical test results are admissible [at trial] where the driver does not affirmatively withdraw his consent, even though the driver is not first informed of the consequence of his refusal to submit to the test.” *Id.* at 649. However, a failure to inform a driver of the consequence of refusing to submit to testing affords the driver “an escape from suspension of driving privileges, should he, in fact, face such suspension by virtue of having refused testing.” *Id.*
- “Even though the officers did not specifically advise respondent that the test results could be used against him in court, no one would seriously contend that this failure to warn would make the test results inadmissible, had respondent chosen to submit to the test.” South Dakota v. Neville, 459 U.S. 553 (1983).
- The implied consent law does not “constitute a limitation on the admissibility of any competent evidence that would otherwise be admissible in any civil or criminal case in the absence of these statutes.” Pardo v. State, 429 So.2d 1313 (Fla. 5<sup>th</sup> DCA 1983).



4. **Failure to understand implied consent is not grounds for suppression.**

**Non-English Speaking Defendant**

- a. **State v. Rodriguez, 49 Fla. Supp. 2d 8 (Fla. 11th Cir. 1991)**—The defendant only spoke Spanish. Unfortunately, a non-Spanish speaking police officer read the defendant the implied consent law. The court held that the test results were admissible because the defendant did not affirmatively withdraw his consent to taking the test. **See also, State v. Reyes, 4 Fla. Weekly Supp. 689 (Hillsborough Circuit Court, April 29, 1997)** (Improper reading of implied consent alone is not a basis for determining that the Intoxilyzer test was involuntary or coerced, implicating the fourth amendment. The only sanction for failure to inform a person of implied consent is non-suspension of the license. The Legislature did not intend an exclusionary sanction.)
- b. **State v. Semmelrogge, 5 FLW Supp. 265 (Fla. Dade Cty Ct. 1998), aff'd 3d DCA, July 23, 1999**—Breath test conducted on Defendant is admissible even though the German speaking Defendant could not fully understand the Implied Consent Law. The court ruled that for purposes of admissibility it is not necessary that the Defendant even be informed of implied consent.
- c. **State v. Sanchez, 24 Fla. Supp. 2d 171 (Fla. 11th Cir. 1987)**—Defendant was given a Spanish form explaining his rights under the implied consent law. The defendant indicated on the form that he understood that if he refused to take the test his license would be suspended. The court held that the requirements of the statute were met and the breath test results should have been admitted into evidence. Where a breath test is conducted pursuant to a lawful arrest for DUI, the results of such test are admissible even though a driver did not understand his rights under the implied consent law or understand he had an option to refuse to take the test.
- d. **State v. Gonzalez, 10 FLW Supp. 294 (Brevard Cir. Ct. 2000)**—Defendant asserted that he did not understand implied consent due to limitations with the English language. Defendant also claimed that he did not understand the consequences for refusing the breath test and was intimidated by the officer. Court held that defendant was properly advised and there was no coercive effect.

**Intellectually Limited Defendant**

- a. **McGovern v. DHSMV, 4 FLW Supp. 206 (Sarasota Cir. Ct. 1996)**—The Court found that defendant knowingly and intelligently refused to take a breath test while he was suffering from a concussion and a broken toe which resulted from the crash.
- b. **State v. Buttner, 2 FLW Supp. 382 (Palm Beach Cty. Ct. 1994)**—A defendant's intellectual limitations does not render the breath test results nonconsensual. Failure of the defendant to understand his rights under the implied consent law does not provide a basis for suppression of the breath test results.

**5. Repeated Questioning to Unresponsive Defendant**

State v. Chiles, 4 FLW Supp. 804 (Fla. Hillsborough Cty. Ct. 1997)—Defendant was read an implied consent form and asked if he would submit to the test. The Defendant did not respond to the officer's question. The officer persisted and told him he needed to know yes or no. After observing the Defendant for twenty minutes the officer again asked the Defendant if he would blow. The Defendant finally did and claimed he only did so because he became paranoid. The Court ruled the officer's persistent questioning did not violate the defendant's rights and the reading was admissible.

**6. Driver Possesses an Out-of-State Driver's License**

State v. Semmelrogge, 5 Fla. L. Weekly Supp. 265 (Dade County Court, December 1997)—Implied Consent statute applies to person driving in Florida, regardless of where license was issued. See also, Fla. Stat. § 316.1932(1)(e)(2), and State v. Rypekemea, 5 Fla. L. Weekly Supp. 772 (Volusia County Court, June 8, 1998) (Court denied defendant's motion)

State of Florida v. Ellis, 9 Fla. L. Weekly Supp. 275 (Fla. 10th Cir. Ct. March 20, 2002)—The court affirmed the trial court's ruling suppressing the results of the breath test. Officer misrepresented to the defendant that if he refused the breath test his driving privileges in Tennessee would be suspended. The implied consent as read to the defendant tainted the defendant's consent.

**C. IF A DRIVER REFUSES TO TAKE A TEST, THE STATE NEED NOT ESTABLISH THAT AN APPROVED TEST WAS AVAILABLE.**

DSHMV v. Berry, 619 So.2d 976 (2d DCA 1993)—Department of Highway Safety and Motor Vehicles, as element of its burden in civil administrative hearing to review suspension of driving privileges following refusal to take breath, blood or urine test, has no obligation to establish that approved test was ready and available if defendant had elected to take test.

**D. OFFICER INPUT TO SUBJECTS & IMPLIED CONSENT WARNINGS**

**1. Improper Statement of Law as to Incarceration**

State v. Henry, 42 Fla. Supp. 2d 42 (Fla. 15th Cir. 1990)—Officer read defendant implied consent and then told defendant that "if the defendant refused the test he would be held in jail over the three-day holiday weekend." The court suppressed the test results because this was an "inappropriate and inaccurate statement of the law" since the defendant could have been released on bond. The court had "absolutely no problem with law enforcement officers doing everything within their lawful power to coerce defendants into taking the breath test required by the statute. In doing so however, they cannot and must not improperly state the law or fail to fully inform the defendant of his rights." Id. at 44.

**NOTE:** County Courts have interpreted the Henry decision narrowly in that trivial defects in the implied consent warnings will not result in a suppression. Trivial defects do not give rise to a threat to take illegal action amounting to a violation of U.S. Constitution, Florida Constitution, or state law. See State v. Selka, 1 FLW Supp. 119 (Fla. Palm Beach Cty. Ct. 1992).

**2. "You have no right to refuse."**

**State v. Young, 483 So.2d 31 (Fla. 5th DCA 1985)**—The officers improperly advised the defendants that they did not have a right to refuse to take the tests. The defendants introduced no evidence that they would have refused but for the officer’s statements. The court held that “the warning was not so misleading as to render the results inadmissible.” The court specifically declined to determine whether “the tests results would be inadmissible under the statute if, after an evidentiary hearing, a court determines that a defendant was, in fact, misled by the warning and thus, improperly coerced into taking a test which he might otherwise have refused.

**3. “If you pass the breath test, you will be unarrested.”**

**State v. Ganzemiller, 48 Fla. Supp. 2d 66 (Fla. 9th Cir. Ct. 1991)**—Officer read defendant Implied Consent and then told him that if he “passed the breath test, he would be unarrested.” Based on this representation, the defendant took the breath test and failed with readings of .169 and .149. The Circuit Court reversed the County Court’s order of suppression of the test results because, even though the officer misled the defendant, the defendant was not misled based on the facts of the case. “The defendant knew that if he did not pass the test, he would not be unarrested, thus he cannot claim either surprise or prejudice.”

**4. LEO unresponsive to defendant’s questions about consequences of refusal**

**State v. Wood, 2 FLW Supp. 140 (Fla. 15th Cir. App. 1994)**—Officer read defendant Implied Consent and then defendant asked “what would happen if he took the breath test and did not pass.” The officer responded untruthfully by saying, “I can’t tell what’s going to happen because I don’t know what the results will be.” Once an officer complies with the statutory requirements (i.e., telling defendant that refusal will result in license suspension), the officer is not obligated to answer any questions.

**5. Offering not to cite defendant for other offenses**

**State v. Epperson, FLW Supp. 108 (Hillsborough Cty. Ct. 1995)**—Officer’s conduct of offering not to cite defendant for other offenses if he would submit to breath test does not make breath test involuntary.

**6. Length of Driver License Suspension**

**State v. Atwood, 47 Fla. Supp. 2d 16 (Fla. 13th Cir. Ct. 1991)**—Court held that a refusal is admissible when an officer incorrectly advises the defendant of the length of the driver’s license suspension. Refusal was admissible because no safe harbor was created and the defendant had substantial motivation to take the test. **See also, State v. Shapiro, 7 Fla. L. Weekly Supp. 336 (Palm Beach County Ct., Nov. 1999)** (officer said 6 mos. Instead of 1 year - breath test not suppressed).

**7. Threat of Going to Jail if Defendant Refuses to Provide a Breath**

**State v. Daniels, 3 FLW Supp. 754 (Palm Beach Cty. Ct. 1996)**—Officer’s statement to the defendant indicating that he will go to jail if he refuses to take a breath test was not considered to be an outrageous misstatement of law requiring suppression.

**8. Whether You Blow or Not You'll be Held Until First Appearance**

State v. Wright, 5 FLW Supp. 494 (Fla. 16th 1998)—Officer's statement that the defendant will be held in jail until seen by a judge at first appearance whether or not he submitted is not coercive.

**9. Suspension Time Would be "Up to the Judge and Jury", if Defendant Took Test and Failed**

State v. Sapp, 4 FLW Supp. 336 (Palm Beach Cty. Ct. 1997)—Officer's statement was **not** so misleading as to require suppression.

**10. Refusal "May" be Used Against You**

This warning is not misleading. See Ballard v. DHSMV, 3 FLW Supp. 658 (Fla. 9th Cir. Ct. 1996); Douglas Leonardt v. DHSMV, 3 FLW Supp. 85 (Fla. 9th Cir. Ct. 1995); Leonhardt v. State, 3 FLW Supp. 85 (Fla. 9th Cir. Ct. 1995); Musial v. DHSMV, 3 FLW. 92 (Fla. 9th Cir. Ct. 1995); Applebaum v. State, 3 FLW Supp. 539 (Fla. 9th Cir. Ct. 1995); Farmer v. State, 3 FLW Supp. 139 (Fla. Cir. Ct. 1995); and State v. Knox, 3 FLW Supp. 643 (Volusia Cty. Ct. 1996).

**11. Reading Implied Consent Form Verbatim: Nader v. DHSMV,<sup>37</sup>**

Fla. L. Weekly S130a (Fla. February 23, 2010). The Florida Supreme Court held that the department may validly suspend a driver's license where a law enforcement officer requests that the driver submit to "a breath test, a blood test, OR a urine test" under circumstances in which the breath test is the only required test. In other words, the reading of the word "or" between the various tests does violate Implied Consent such that the department may not suspend the driver's license for refusing to take any test.

**12. Options Available**

State v. Melendez, 4 FLW Supp. 633 (Palm Beach Cty. Cir. Ct. 1997)—Breath technician does not have an affirmative duty to respond to defendant's question regarding what happened if defendant blew under the legal limit. See also, Sheeran v. State, 2 FLW Supp. 139 (Palm Beach Cty. Cir. 1994) (Officer does not have to inform the defendant of available options if asked by the defendant.)

**13. If you submit to breath test then you will not lose your license**

State v. Cox, 9 Fla. L. Weekly Supp. 634 (Fla. Monroe Cty. Ct. Feb. 2002)—Officer misstated implied consent law by telling defendant if he did submit to breath test he would not lose his license, it cannot be said that defendant voluntarily submitted to the test.

**III. 5TH & 6TH AMENDMENT ISSUES DURING BREATH TESTING**

**A. FIFTH AMENDMENT – SELF INCRIMINATION**

South Dakota v. Neville, 103 S. Ct. 916, 459 U.S. 553, 103 S. Ct. 916 (1983)—The Fifth Amendment does not apply to the taking of a breath (or blood or urine) test because such tests are not "testimonial" nor is the request to provide such evidence an "interrogation" within the meaning of Miranda.

## B. SIXTH AMENDMENT RIGHT TO COUNSEL DURING THE BREATH TESTING

### 1. There is no right to counsel during a breath test.

**State v. Busciglio, 976 So.2d 15 (Fla. 2d DCA 2008)** - Motorist who was arrested for driving under the influence of alcohol (DUI) did not have a right to counsel under state constitution at time he was asked to submit to a breath test, and thus the request and motorist's refusal to submit should not have been suppressed, **even though motorist's refusal because a first degree misdemeanor by virtue of his having previously had his driver's license suspended due to a refusal to take a breath test.**

**State v. Hoch, 500 So.2d 597 (Fla. 3d DCA 1986)**—A defendant has no right to counsel during breath testing. It would not be feasible to provide counsel to DUI defendants for the purpose of deciding whether to submit to a breath test because it “would create an administrative nightmare for the police.” **Id. at 603.** As a matter of policy, the Court noted that if there were a right to counsel, where there is no constitutional right of refusal, it would thwart the legislative purpose of the DUI statute which is to keep the roads safe by making sure that anyone suspected of DUI could be tested.

**State v. Nelson, 508 So.2d 48 (Fla. 4th DCA 1987)**—A person arrested for DUI does not have a right to counsel prior to submitting to a breath test.

**Traylor v. State, 596 So.2d 957 (Fla. 1992)**—The Florida Supreme Court interpreted the right to counsel under Florida's Constitution (Article I, Section 16) as attaching at an earlier point in time than the right to counsel established under the Sixth Amendment to the U.S. Constitution. Although **Traylor** never considered the DUI context in its opinion, defense attorneys tried to suggest that **Traylor** has effectively overruled **Hoch** and **Nelson**.

**Burns v. State, 661 So.2d 842 (Fla. 5th DCA 1995)**—The Court held that “administering a breathalyzer and having a defendant perform the field sobriety test on videotape are really nothing more than the collection and preservation of physical evidence, as is done in every type of case, and do not constitute a crucial confrontation requiring the presence of defense counsel.” **See also State v. Clements, 2 FLW Supp. 287 (Fla. 17th Cir. 1994); Chira v. State, 2 FLW Supp. 133 (Fla. 9th Cir. 1994)** (holding that there is no right to counsel at the time of breath testing because a **breath test is not a “crucial stage.”**)

**Langelier v. Coleman, 861 F.2d 1508, 1510 (11th Cir. 1988)**—Court held that defendant did NOT have a right to privacy to consult with a lawyer prior to taking the breath test. **Court also held that prosecutor's use of defendant's refusal to submit to a breath test did NOT violate due process.**

## C. MIRANDA ISSUES

i.

### 1. Intoxication does not prevent a free and voluntary waiver of **Miranda**

“The mere fact that a suspect was under the influence of alcohol when questioned does not render his statements inadmissible as involuntary.” **Thomas v. State, 456 So.2d 454, 458 (Fla. 1984).** “The rule of law seems to be well settled that the drunken condition of an accused when making a confession, unless such drunkenness goes to the

extent of mania, does not affect the admissibility in evidence of such confession, **but may affect its weight and credibility with the jury.**” Id. quoting Lindsey v. State, 63 So.2d 832, 833 (Fla. 1913).

## 2. Miranda Confusion

Officers are trained to read the defendant implied consent and then after the defendant refuses or blows, the officer will inform the Defendant of the Miranda warnings. Sometimes, an officer will read Miranda before reading implied consent. **Defendants who invoke Miranda and then refuse often argue that the Miranda warnings confused them into believing that he or she had a Fifth Amendment right not to blow.**

- **Example of Defendant’s Argument:** My client was read Miranda. He invoked his right to remain silent. Then, he was read implied consent. My client clearly was misled into believing he had a right to remain silent, a right to an attorney, and a right to refuse to take the breath test because he was told he had these rights before he was offered a breath test. That is why my client refused to take the breath test. Therefore, the refusal should be suppressed, and the State should not be allowed to argue my client refused because he knew he was impaired. They should not be permitted to argue consciousness of guilt.

### **State’s Response:**

**There is no constitutional or statutory problem with reading Miranda before implied consent. Kurecka v. State, 67 So. 3d 1052, 1061 (4th DCA 2010).** “Our research has not yielded any clear indication that the confusion doctrine is a recognized exclusionary rule or defense to a license suspension in Florida.”

**South Dakota v. Neville, 459 U.S. 553 (1983)**—The Supreme Court permitted the introduction of a refusal into evidence when Miranda was read prior to the implied consent warnings.

**If Miranda is read first and the defendant invokes Miranda and refuses to blow, the refusal should still be admissible because any alleged confusion goes to the weight not the admissibility of the evidence.**

**Gerard v. DHSMV, 40 Fla. Supp. 2d 41 (Fla. 15th Cir. Ct. 1989)**—In an administrative suspension case, the defendant had the “burden of showing by the greater weight of the evidence that the manner in which the rights were read lead him to his erroneous belief and refusal to submit to the test.” Id. at 43. However, this case was dealing with the issue of whether an administrative suspension should be upheld, not whether a refusal could be admissible in a criminal case.

**Kurecka v. State, 67 So. 3d 1052, 1057 (4th DCA 2010).** “Courts that have addressed the confusion doctrine have done so with mixed results from outright rejecting it to liberally applying it to excuse a defendant's refusal to submit to a breath test when law enforcement failed to affirmatively advise the driver that *Miranda* rights do not apply to the decision to take the test.” The Court in Kurecka held that “we might agree that the confusion doctrine could properly be applied in circumstances where law enforcement created a defendant's confusion about the right to counsel for breath testing, the cases before us do not present those circumstances. Here, the undisputed facts show that the defendants' confusion was not officer-induced. The arresting officers did not advise the

defendants of their *Miranda* rights before or during their reading of the implied consent law; therefore the Miranda confusion doctrine did not apply.

#### IV. ADMISSION OF THE BREATH TEST RESULTS & BURDEN OF PROOF

##### A. GENERALLY

###### 1. Three Ways to Introduce a Breath Test:

- State demonstrates actual compliance with FDLE rules.
- State demonstrates “substantial compliance” with FDLE rules.
- If State is unable to demonstrate actual or substantial compliance with the FDLE RULES – then the State can “lay” the traditional scientific predicate, as set forth in State v. Bender, 382 So.2d 697, 699 (Fla. 1980).

##### B. THE “ACTUAL COMPLIANCE” STANDARD

See State v. Donaldson, 579 So. 2d 728, 729 (Fla. 1991). “Compliance” means:

- a. that a breathalyzer test was performed in accordance with methods approved by FDLE, and (FDLE Rules are found in chapter 11-D-8 of the Florida Administrative Code).
- b. with a type of machine approved by FDLE, by a person trained and qualified to conduct it and
- c. that the machine itself has been calibrated, tested, and inspected in accordance with FDLE regulations to assure its accuracy before the results of a breathalyzer test may be introduced.

##### C. THE “SUBSTANTIAL COMPLIANCE” STANDARD

The same thing as actual compliance except the that a breathalyzer test was performed in accordance with methods approved by FDLE,

###### 1. § 316.1934(3)

Although § 316.193 of the Florida Statutes defines the crime of DUI, subsections 316.1932, 316.1933, and 316.1934, known as the Implied Consent Scheme, define the methods and techniques by which breath, blood and urine tests must be administered and when the results are admissible. In State v. Bender, 382 So.2d 697, 699 (Fla. 1980), the Florida Supreme Court announced that the dual purpose of the Implied Consent Scheme was to ensure the scientific reliability of the breath tests and to protect the health of test subjects. Prior to the Implied Consent statutes and the corresponding FDLE rules, the State was required to establish the scientific reliability of the breath test, otherwise known as the Bender predicate, for the admission of chemical test results in evidence in each case. The State is no longer required to lay this foundation so long as the chemical test to determine the alcoholic content of a person’s breath or blood was performed “**substantially** according to methods approved by FDLE and by an individual possessing a valid permit issued by the department for this purpose.”

**Fla. Stat. § 316.1934(3).** “Any insubstantial differences between approved techniques and actual testing procedures . . . in any individual case do not render the test or test

results invalid.” **Id.** Therefore, if the State follows the FDLE “checklist,” a presumption is created that the breath test evidence is admissible. **Id.**

**See State v. Rockwerk**, 2 Fla. L. Weekly Supp. 223b (Palm Beach County Ct. Mar. 4, 1994); *State v. Willis*, 1 Fla. L. Weekly Supp. 118a. (Palm Beach County Ct. April 6, 1992) (citing *State v. Hill*, 26 Fla. Supp.2d 82 (Palm Beach County Ct. 1987) (holding that the standard throughout the state regarding the substantiality of an alleged defect in a breath test turns on whether that defect raises a legitimate question regarding the authenticity or scientific reliability of the test results)); **see also State v. Donaldson**, 579 So.2d 728 (Fla. 1991) (“minor deviations in compliance with [FDLE] regulations . . . will not prohibit the test results being presented, provided that there is evidence from which the fact finder can conclude that the [test] itself remained accurate.”).

## **2. Test: Whether The Defendant is Prejudiced Because of an Existing Legitimate or Substantial Question Regarding the Scientific Reliability of the Breath Test.**

The standard for determining whether a test was administered in substantial compliance with the methods approved by FDLE is whether the defect or variance **prejudices the defendant by raising a legitimate or substantial question regarding the scientific reliability of the test results.** **State v. Giangrande**, 36 Fla. Supp. 2d 67 (Fla. 17th Cir. Ct. 1989); **State v. Conyers**, 2 FLW Supp. 439a (Dade Cty. Ct. 1994).

“Minor deviations in compliance with HRS (now FDLE) regulations, such as storage location or absolute timeliness of periodic inspection, will not prohibit the test results [from] being presented, provided that there is evidence from which the fact finder can **conclude that the machine itself remained accurate.**” **State v. Donaldson**, 579 So.2d 728, 729 (Fla. 1991).

Similarly, insubstantial differences or variation from approved techniques and actual testing procedures in any individual case do not render the test nor the test results invalid. **Ridgeway v. State**, 514 So. 2d 418 (Fla. 1<sup>st</sup> DCA 1987); **see also State v. Friedrich**, 681 So. 2d 1157 (Fla. 5<sup>th</sup> DCA 1996) (speculative and theoretical attacks will not suffice). “Since all things are possible, it would take more than mere possibilities to render the test . . . unreliable or suppressible.” **State v. Kattengell**, 7 Fla. Supp. 2d 139, 142 (Fla. 11th Cir. Ct. App. 1984).

## **D. SUBSTANTIAL COMPLIANCE - INITIAL BURDEN AT TRIAL**

### **1. Substantial Compliance with approved methods**

In order for a breath test result to be considered valid, “it must have been performed substantially in accordance with methods approved by the Department of Law Enforcement.” Fla. Stat. § 316.1934(3) (1997). **These rules are found in chapter 11-D-8 of the Florida Administrative Code.**

Thus, the State of Florida has the burden of proof in any DUI trial to establish that the breath test was administered in accordance with the FDLE rules. **State v. Bender**, 382 So.2d 697, 699 (Fla. 1980); **Robertson v. State**, 604 So.2d 783 (Fla. 1992). Specifically, the Florida Supreme Court has held that the evidence must show that the breath test itself was administered in accordance with the FDLE Rules and that the [m]achine itself has been calibrated, tested, and inspected in accordance with [FDLE] regulations to assure its accuracy before the results of a breathalyzer test may be



introduced. Evidence of the reliability of the machine can be presented by the person conducting its testing and inspection or, if records of use and periodic testing are kept in the regular course of business, by production of such records.

**State v. Donaldson, 579 So.2d 728 (Fla. 1991).** Once the State establishes that the breath test was administered in accordance with the FDLE rules, a presumption is created that the evidence is admissible. **Robertson v. State, 604 So.2d 783 (Fla. 1992).** The burden, therefore, shifts to the defense to rebut the presumption of admissibility. **State v. Bender, 382 So.2d 697, 699 (Fla. 1980); Robertson at 789, n.6 (Fla. 1992).**

## **2. Standard Predicates to Admit a Breath Test**

The standard predicate is an abbreviated traditional scientific predicate (or **Bender** predicate). At trial, the State usually satisfies this predicate through the testimony of the breath test officer and the monthly maintenance officer(s).

The breath testing officer's testimony will show that the officer followed the FDLE Rules (the "Operational Procedure" is nominated as "Form 37" and is incorporated by reference into the FDLE Rules) when he administered the breath test. **Once the breath officer shows that he complied with the FDLE Rules, his testimony will conclude without testifying to the results of the Defendant's breath test.** The reason is simple: the maintenance officer's testimony regarding the monthly inspections follows the breath test officer's testimony to complete the second prong of the substantial compliance predicate, i.e., that the monthly maintenance was also done in compliance with the FDLE Rules, **BEFORE** the breath test can come in.

During the maintenance officer's testimony, the admission of the breath card, monthly maintenance records, the FDLE annual inspection and registration certificate for the instrument is usually done. **In cases where the breath test is administered on or after July 7, 1999, certificates of assurance (COA's) will also need to be introduced into evidence.** At the conclusion of the maintenance officer's testimony, the predicate for the admission of the breath test results will be complete and, thus, the breath test evidence card will be moved into evidence. **Finally, the maintenance officer, not the BTO, will be asked to read the evidence card and testify to the results of the Defendant's breath test.**

### **a) Admission of Annual Inspection, Registration, and Certificates of Assurance (COA's)**

- i. Relevance**—The permits are those of the technician in this case and the maintenance officer for the instrument used in this case. The serial number of the instrument on the annual inspection and the registration correspond with the serial number on the instrument used to test the defendant. Further, the lot numbers of the COA's correspond to the lot numbers used by the maintenance officers for the monthly and annual inspections.
- ii. Authenticity**—The documents are true and exact copies of the originals. **See Fla. Stat. § 90.953.** The documents are self-authenticating under **Fla. Stat. § 90.902(1)(a)** because the original has a seal on it or under **Fla. Stat. § 90.902(2)** because the original purports to bear a signature of an officer or employee of the State of Florida, affixed in his official capacity.

**iii. Hearsay—Business or Public Records Exceptions—Fla. Stat. § 90.803(6) or (8).**

**Under § 90.803(6):**

- a. A memorandum, report, record or data compilation;
- b. made at or near the time;
- c. by a person who had knowledge;
- d. if kept in the course of a regularly conducted business activity;
- e. if it was the regular practice of that business activity to make such a document;
- f. all of which is shown by the testimony of a custodian or other qualified witness.

**See State v. Donaldson, 579 So.2d 728 (1991); Turk v. State, 403 So.2d 1077 (Fla. 1<sup>st</sup> DCA 1981)**

OR

**Under § 90.803(8):**

- a. A record, report or data compilation;
- b. of public offices or agencies;
- c. setting forth matters observed pursuant to duty imposed by law;
- d. as to matters which there was a duty to report.

**iv. Rationale for admitting public records—**“The exception is recognized in order to prevent the disruption that would result if every governmental official involved in making the record was called to testify as to the information therein. Because of the accuracy of public records, resulting from the duty of public officials to accurately record matters, and from the public’s scrutiny of public records, the records have sufficient guarantees of truthfulness. In addition, public officials lack any motive to falsify the entries.” **Ehrhardt, Florida Evidence, p. 643-644. (Fla. 1994).**

**v. Practice Pointer—** Annual Inspections, Registrations, and Certificates of Assurance (COA’s) do not fall under the criminal case exclusion of **Fla. Stat. § 90.803(8)** because they were not created in conjunction with a specific criminal case or inspection. FDLE annual inspections are required to be performed on every breath test instrument used to provide evidence in civil as well as criminal proceedings. The administrative suspension of a person’s driver license is in part predicated upon these FDLE annual inspections.

**b) Admission of Monthly Maintenance**

- i. **Relevance**—The serial number of the instrument on the monthly maintenance corresponds with the serial number on the instrument used to test the defendant.
- ii. **Authenticity**—The documents are true and exact copies of the originals. See **Fla. Stat. § 90.953**. The maintenance officer or custodian will be able to testify that the document is what the proponent claims it to be.
- iii. **Hearsay**—Business Records Exception—**Fla. Stat. § 90.803(6)**.
  - a. A memorandum, report, record or data compilation;
  - b. made at or near the time;
  - c. by a person who had knowledge;
  - d. if kept in the course of a regularly conducted business activity;
  - e. if it was the regular practice of that business activity to make such a document;
  - f. all of which is shown by the testimony of a custodian or other qualified witness.

**See State v. Donaldson, 579 So.2d 728 (1991); Turk v. State, 403 So.2d 1077 (Fla. 1<sup>st</sup> DCA 1981)**

- iv. The Florida Supreme Court has held that monthly maintenance documents are admissible as business records. In **State v. Donaldson**, the Court said that “evidence of the reliability of the machine can be presented by the person conducting its testing and inspection or, if records of use and periodic testing are kept in the regular course of business, by production of such records.” **579 So.2d 728, 729 (1991)**. The **Donaldson** case could be argued to admit the Annual Inspection Report as a business record as well as the Monthly Reports.

**NOTE:** To combat defense arguments that the monthly or annual maintenance documents are inadmissible under the Confrontation Clause of the Sixth Amendment to the United States Constitution, see discussions in subsections “D” and “E” below.

## E. BREATH TEST RESULT AFFIDAVIT METHOD

1. In Crawford v. Washington, the United States Supreme Court ruled that introduction into evidence of hearsay statements that are “testimonial” violate the Confrontation Clause of the Sixth Amendment and are therefore inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross examine the declarant. The Court declined to define “testimonial,” but held it applied at a minimum to “**prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.**” This decision overruled Ohio v. Roberts, 448 U.S. 56 (1980), to the extent the hearsay statements are considered “testimonial.” If the statements are considered “nontestimonial,” Roberts still controls for purposes of Confrontation Clause analysis. State v. Dedman, 102 P.3d 628 (N.M. 2004); State v. Manuel, 697 N.W. 2d 811 (WI 2005).
2. Belvin, the Breath Test Result Affidavit is “testimonial” and is therefore inadmissible pursuant to Crawford’s interpretation of the Confrontation Clause unless both the breath testing and maintenance officers are unavailable and the defense had a prior opportunity to cross examine them. State v. Belvin, 986 So.2d 516 (Fla. 2008) - Breath test affidavit prepared by non-testifying breath test technician and pertaining to technician's procedures and observations in administering test were testimonial hearsay under Crawford decision requiring prior opportunity for cross-examination of an unavailable declarant for testimonial hearsay to be admissible consistent with confrontation clause, even though breath test affidavits were statutorily listed under the public records and reports exception to hearsay rule; the technician who created the breath test affidavit did so to prove a critical element in defendant's driving under the influence (DUI) criminal prosecution, the affidavit was not created during an ongoing emergency or contemporaneously with the crime, and the affidavit was created at the request of the police for the DUI prosecution.
  - As long as both the breath testing officer and the maintenance officers are present, the Confrontation Clause under Belvin is satisfied. Once the Confrontation Clause is satisfied, the state is free to develop their own hearsay law. Crawford, 124 S.Ct. at 1374. Therefore, when both officers testify, the Confrontation Clause is satisfied, and the Affidavit is admissible as presumptive proof of a particular Defendant's breath test results pursuant to state law, specifically, State v. Irizarry and Florida Statute sections 316.1934(5) and 90.803(8).

## F. APPLICATION OF CRAWFORD TO EXCLUDE ANNUAL MAINTENANCE DOCUMENTS? NO

Pflieder v. State, 2007 WL 1062584 (Fla. App. 4 Dist) (The FDLE annual inspection report is not testimonial and is properly admissible as a business record)

## G. TRADITIONAL SCIENTIFIC PREDICATE, AKA, BENDER PREDICATE

### The Bender Predicate

As stated, when the State is unable to demonstrate actual compliance or substantial compliance, the State still has the option of “laying” a Bender predicate in order to introduce breath test results. When laying a Bender predicate the following must be established:

- a. The test was reliable
- b. The test was performed by a qualified operator with the proper equipment
- c. The meaning of the test explained through expert testimony

**State v. Bender, 382 So. 2d 697, 699 (Fla. 1980)**

It is reversible error for the court to deny the State the right to establish the traditional predicate. **State v. Mehl, 602 So. 2d 1383 (Fla. 5<sup>th</sup> DCA 1992).**

**Robertson v. State, 604 So.2d 783 (Fla. 1992); State v. Quartararo, 522 So.2d 42 (Fla. 2d DCA 1988)** (Both cases holding that the State is entitled to establish the **Bender** predicate as long as the blood test (or breath test) does not violate the core policies of the implied consent law - (1) producing scientifically reliable evidence - and- (2) posing no threat to the health of the subject.)

**NOTE: You Must Have an Expert Listed in Discovery to explain the meaning of the test results.**

Following the Florida Supreme Court's ruling in **Bender**, the Court held in **State v. Donaldson, 579 So. 2d 728 (Fla. 1991)** that, while there must be probative evidence of the three-prongs set forth in **Bender**, "[e]vidence of the reliability of the machine can be presented by the person conducting its testing and inspection or, if records of use and periodic testing are kept in the regular course of business, by production of such records."

The **Bender** predicate can be met through the testimony of the Breath Test Operator and Agency Inspector.

#### **H. DEFENSE MOTIONS**

**State v. Misterka, 3 Fla. L. Weekly Supp. 293 (Fla. Palm Beach**

**County June 14, 1995)**—The court found that the defendant's motion to suppress the breath test results based upon defects in the simulator solution was "actually a Motion in Limine as the Motion does not allege an unlawful search and seizure . . ." **Id. at 293**. As such, the Court held that the Defendant has the burden of proving his allegations, noting, however, that the State has the initial burden of proving substantial compliance at trial, unlike the burden at the motion to suppress. **Id. at 294**; **see also, State v. Phillips, 3 Fla. L. Weekly Supp. 740 (Fla. Hillsborough Cty., April 1, 1996); State v. Gerena, 4 Fla. L. Weekly Supp. 51 (Fla. Hillsborough Cty., April 8, 1996)** (Motions challenging the reliability of the breath testing procedures were motions in limine, and "the burden of proof rests with the defendants to establish entitlement to relief by a preponderance of the evidence."); **Luce v. United States, 469 U.S. 38 (1984)** (stating "we use the term ['in limine'] in a broad sense to refer to any motion whether made before the evidence is actually offered..."); **State v. Zenobia, 614 So.2d 1139 (4th DCA 1993).**

**The defendant is not presumptively entitled to an in limine hearing to determine reliability of breath test where allegation is that FDLE Rules are insufficient.**

**State v. Cutlip, 3 FLW Supp. 452 (Palm Beach Cty Ct. 1995)**—To exclude the test results pre-trial despite substantial compliance, **the defendant would have to prove that no reasonable person could conclude the results are reliable**. Here, the defendant asserted that the promulgated rules are insufficient to ensure the scientific reliability of the results. The defendant did not argue a constitutional basis to suppress the results. The Court held that the defendant was not entitled to an *in limine* hearing to determine reliability of test. The costs of the motion substantially outweighed the benefits of pre-trial determination of issue.

**State v. Friedrich, 681 So.2d 1157 (1996 )** Breath test results acquired in substantial compliance with FDLE rules are deemed to be scientifically reliable within the relevant scientific community.

A Defendant, defense lawyer, or any interested party can challenge the reliability of the FDLE rules and/or the relevant Intoxilyzer instrument in the context of an administrative hearing. **See FDLE Amin Code 11D8.016.**

### **Substantial Compliance v. Insufficiency of the Rules**

This distinction is extremely important for the simple reason that it will determine who bears the burden of proof at the pre-trial hearing. Once the State shows substantial compliance with the rules, the evidence is presumed reliable and admissible. **Robertson v. State, 604 So.2d 783 (Fla. 1992)**, and **State v. Bender, 382 So.2d 697 (Fla. 1980)**. The burden shifts to the Defendant to rebut the presumption of admissibility by showing that the results are not scientifically accurate and reliable. **Robertson at 789, n.6**. In the absence of substantial compliance, the presumption of admissibility does not apply. **Id. at 700**. Thus, when substantial compliance is lacking, the State bears the burden of showing, through the **Bender predicate**, that the breath test is scientifically reliable. In such a case, the State must establish the following: **(1) the test was reliable; (2) the test was performed by a qualified operator with the proper equipment; (3) the meaning of the test through expert testimony.**

In contrast, when the Defendant challenges the sufficiency of the FDLE rules, the Defendant bears the burden of proving that the insufficiency of the rules renders the breath test results “scientifically unsound.” **Robertson at 789, n.6**. Note that Defense attorneys try to rely on **State v. Friedrich, 681 So.2d 1157 (Fla. 5th DCA 1996)**, for the proposition that even where the issue is an alleged insufficiency of the rules, the State shoulders the burden of proving the scientific reliability. Specifically, they cite to the following language: “In all cases, the State has the burden of establishing the reliability of its testing and methods of ensuring the scientific accuracy and reliability of the breath test results.” **Id. at 1164**. However, the remainder of the Court’s opinion refers to the fact that: the Defendant alleged that the rules were insufficient; the State established that the tests were administered in substantial compliance with the rules; Defendant’s attack on the admissibility was “speculative and theoretical”; and as a result, the breath test was admitted into evidence. **Id. at 1163**. Bear in mind that even if the Defense’s interpretation of **Friedrich** was correct, it would still not be controlling case law because **Robertson** and **Bender** are opinions from the Florida Supreme Court.

## **V. FDLE ADMINISTRATIVE RULES**

### **A. GENERALLY**

The FDLE rules operate to “approve” Intoxilyzer machines for use in Florida. They also are designed to ensure the accuracy and reliability of individual breath instruments. The following steps must be taken prior to an Intoxilyzer 8000 Series instrument being used in the field:

- First, FDLE rules mandate that the Series of instrument (e.g. 5000R, 8000, etc.) be “approved” prior to any specific version of the instrument being used in the field. See 11D8.003(2) (November 2002)
- Second, FDLE rules mandate that before an instrument is used in the field, it must be registered with FDLE.

- Third, FDLE mandates that a local agency conduct a monthly maintenance inspection upon receipt of an instrument.

After these initial steps have been satisfied an instrument can operate in the field. Once in the field, a statutory presumption of impairment will be triggered based on an Intoxilyzer result, if FDLE has properly inspected and maintained each breath testing instrument to insure its accuracy. See, § 316.1932(1)(f)1; Jenkins v. State, 855 So.2d 1219 (Fla. 1<sup>st</sup> DCA 2003).

## **B. ANNUAL MAINTENANCE**

**FDLE Rule 11D-8.004** mandates that a breath test instrument be inspected by the Department (FDLE) once every calendar year (January 1 through December 31). See FDLE Form 36

## **C. MONTHLY MAINTENANCE**

**FDLE Rule 11D-8.006** requires that breath test instruments be inspected by the Agency (Police Agency) at least one each calendar month. See FDLE Form 39

### **1. The Failure to Conduct Monthly Maintenance Timely**

Ridgeway v. State, 514 So.2d 418 (Fla. 1<sup>st</sup> DCA 1987)—The defendant was arrested and tested on April 9, 1986, five days after, the maintenance technicians performed the April inspection of the instrument. The maintenance technicians failed to inspect the instrument in question during the month of May as required by the HRS rules. However, they did inspect the instrument in June. The court held that where the defendant failed to introduce any evidence regarding the "crucial significance" of the period of delay, the failure to timely inspect the instrument did not constitute a substantial deviation from the rules.

State v. Thompson, 40 Fla. Supp. 2d 10 (Fla. 15th Cir. 1990)—The breathalyzer, after it malfunctioned, was taken off-line to be checked. As a result, the maintenance technician failed to perform the monthly maintenance. The trial court found that there had not been substantial compliance with the HRS (FDLE) rules and suppressed the breath results. The 15th Circuit affirmed. However, the court made it clear that its holding was based on the presumption of correctness that cloaks the decision of the trial court and the fact that there was sufficient competent evidence in the record to support the lower court's finding. In fact, the court went so far to note that it may have independently reached a different conclusion if it reviewed the decision *de novo*, as the dissent did.

### **2. Repeating Maintenance**

FDLE Form 39 outlines the procedures for monthly inspections. It allows the officer to repeat only once any test of a particular known sample during the course of the inspection. In other words, if the officer gets to the .08 solution and the readings are outside of compliance, he can repeat the test of the .08 only once and then proceed with the rest of the test if it complies. If it does not comply, he must remove the instrument from evidentiary use and contact the department inspector. See FDLE Form 39. The officer can satisfy this requirement by calling the department inspector and explaining the problem to him. Often, the department inspector can instruct the officer how to correct the problem over the phone. With the Intoxilyzer 8000, the department inspector has the ability to log into the instrument from a remote location and run diagnostics to determine the problem, if any.

FDLE permits this procedure because, more often than not, when an instrument returns a reading that is outside of compliance, it is caused by an external factor that is not related to the instrument's calibration. For example, the simulator that introduces the known sample into the instrument could be leaking, or the known sample may have expired or gone bad. **When you see multiple inspections from the same month, it is imperative that you bring it to the attention of an assistant chief immediately. Additionally, if you see that an instrument failed a monthly inspection, look for the repeat monthly inspection. If you can't find it, contact an Assistant Chief immediately.**

**3. Failure to Properly Record the Results**

**State v. Kapoor, 36 Fla. Supp. 2d 78 (Fla. 17th Cir. 1989)**—The technician who performed the monthly maintenance test failed to enter the required percentage on the acetone test. Instead, he wrote “OK” in the blank where the percentage is normally noted. On appeal, the court held that the “insubstantial differences between the approved procedures and those implemented by the technician are in substantial compliance and do not warrant the test results to be found inadmissible.”

**4. Failure to Establish Shelf-Life for Stock Solution**

**State v. Freidrich, 681 So.2d 1157 (Fla. 5th DCA), rev. denied, 690 So.2d 1299 (Fla. 1996)**—“[T]he [defendant's] ... attempt to discredit the accuracy of the Intoxilyzer machines, and the breath test results, based on the stock solution's lack of shelf-life study and dating **is too theoretical and speculative.**” The court also stated that the defense attack on the readings, based on a theoretical variance which could possibly result in a reported reading of .082 for an “actual” BAC of .079, was too speculative to justify suppression of all readings in general.

**5. Failure of the Administrative Code Sections Setting Forth Rules for Testing Instruments Used in Conducting Breath Tests for Every Single Step**

**Wissel v. State, 691 So.2d 507 (Fla. 2nd DCA 1997)**—Appellant was arguing that no rule or regulation defined “vapor mixture” or that specifies the “procedures” on how to mix or produce a simulator vapor solution; on how to clean the glassware utilized; the type of glassware to be used; or from what source the stock solution should be obtained. The court held “that procedures that are implicit and incidental to procedures otherwise explicitly provided for in a properly adopted rule or regulation do not require further codification by a further adopted rule or regulation. In our opinion, to hold otherwise belies statutory intent and/or common sense.” “We conclude that such details of the manner of conducting the simulator tests required by **Rules 11D-8.005 and 11D-8.006** are implicit and inherent in the details of the scientific requirements specifically expressed in the rules.” **NOTE—Rule 11D-8.005**, as indicated in the above opinion, is now **11D-8.004**.

**6. FDLE and “Acetone” Testing**

**State v. Rochelle, 609 So.2d 613 (Fla. 4th DCA 1992)**--“The use of the additional test for acetone could be advantageous to the driver if he were one of the relatively few persons who produce acetone metabolically: yet [the acetone test] was superfluous to the required accuracy and reproducibility testing procedure.” **Id. at 616.**

**State v. Berger, 605 So.2d 488 (Fla. 2nd DCA 1992)**—The 2<sup>nd</sup> DCA agreed with the 4<sup>th</sup> DCA that testing of acetone and the various changes are insubstantial and do not affect the reliability of the tests. However, a distinguishing aspect was noted regarding expert testimony on the subject of acetone testing. Therefore, it seems that an expert might have to testify regarding the significance of the test for acetone.



FDLE ensures that 8000 Series instruments are properly detecting acetone pursuant mandated annual and monthly inspection protocols. **See FDLE Forms 36 & 39.** Acetone is tested for because it is the only interferent substance that could reasonably be expected to show up in a subject breath sample.

#### **D. ALCOHOL REFERENCE SOLUTIONS (ARS)**

ARS are the alcohol solutions used to conduct the monthly maintenance and annual inspections for the Intoxilyzers. ARS consists of known quantities of alcohol, .05%, .08% and .20%. ARS comes in batches called lots. Each batch of ARS is assigned a lot number by the manufacturer of the ARS. For example, a .05% solution would come out of 1 batch of ARS assigned a lot number, i.e., Lot # 99040. When the maintenance officer introduces the ARS solution into the Intoxilyzer, the solution is converted into a vapor alcohol concentration with a breath simulator (i.e., to simulate an actual breath alcohol test). The instrument then gives a simulated breath reading of the ARS solution. The reading must fall within the acceptable range. (**See FDLE rule 11D-8.002(1)** i.e., when a .05% ARS solution is used, the instrument must have a reading between .045 - .055 g/210 L).

#### **E. CERTIFICATES OF ASSURANCE (COA'S)**

##### **1. Admissibility**

Effective July 7, 1999, the State can also introduce the COA's. **FDLE Rule 11D-8.0035(2)(b)**. The rule requires the FDLE to conduct tests on Alcohol Reference Solutions (ARS) to ensure their accuracy.

The FDLE must determine the ethanol concentration of the ARS by testing at least 10 bottles of ARS per lot. Each of the 10 bottles must be tested 3 times yielding a minimum of 30 test results. The 30 test results must fall within +/- 3% of the target alcohol concentration. The COA's are documents that demonstrate that the FDLE has tested the ARS and that the ARS falls within the acceptable range as required by the rule. **Remember, you must introduce into evidence each COA that corresponds to the lot number of the ARS used in your Monthly Maintenance and Annual Inspections.** **NOTE**—the introduction into evidence of the COA is based on the State of Florida proving the case through the introduction of the maintenance documents. **If the State of Florida is proceeding using Breath Affidavit, then the COA is not necessary to prove the case.**

When the use of alcohol reference solutions came under attack, FDLE promulgated emergency rules to cover any deficiencies in the rule, real or merely alleged. Unfortunately, when these rules went into effect on July 7, 1999, FDLE did not have the resources to comply with its own rules and there were no lots of the solution that were approved under the new rules. The question then became whether there was substantial compliance with the rules. **See State v. Johnson, et. Al., 7 Fla. L. Weekly Supp. 360 (Collier County Court, December 20, 1999)** (Court found substantial compliance with the rules, even though the solutions in these cases did not fall within the plus or minus 3 percent of the target ethanol concentration, a requirement under the new rule.)

“Defendants presented no evidence to call the scientific reliability of the test results into serious question. Moreover, no Defendant showed that the tests in his or her case either did or likely could have produced a reading substantially higher than the true percentage of alcohol in the Defendant's system at the relevant time.” The Court held that “the initial burden is upon the Defendant to show with competent evidence that the state has

failed to comply with the various statutes and regulations.” “The burden then would shift to the state to present competent evidence that it was still in substantial compliance primarily by showing that any shortcomings in the various procedures did not affect the scientific validity of any of the tests. The burden would then shift to the defense to present expert testimony to the effect that the non-compliance by the state did, in fact, substantially affect the reliability of the state’s tests.” “If there were conflicting testimony between the Defendants and the state, the trial court’s findings based upon such conflicts would, in all probability, be sustained in the appellate courts.” Here, there was no conflicting evidence. There was no defense expert. **State v. Hamant, 8 Fla. L. Weekly Supp. 210 (Brevard County Court, December 8, 2000)** (State met its initial burden through the introduction of the Breath Test Results Affidavit. The Burden then shifted to the Defendant. The Defendant did not satisfy that burden).

## 2. Cases

- **DHSMV v. Russell, 793 So. 2d 1073 (Fla.App. 5th DCA 2001)**—“As part of the monthly and annual inspections of a breath test instrument, the machine must be tested with solutions of alcohol at known concentrations (reference solutions) to insure that the machine is providing accurate readings. Pursuant to **Florida Administrative Code Rule 11D-8.006(2)**, the alcohol reference solutions must be prepared by FDLE or from an FDLE approved source.” “Testimony demonstrating substantial compliance with the inspection and testing procedures required by the statutes and rules (**See 316.1932(1)(b)(2), Fla. Stat. (2000)**) is enough to establish substantial compliance under case law.” However, the Court did indicate that a defendant can cast doubt on the alcohol reference solutions or the testing procedures used on any given breath-testing machine. Failure to introduce such evidence tending to cast doubt, under the case law, indicates substantial compliance under the rules. **NOTE—Under the 2002 Florida Administrative Code Rule 11D-8.006(2) as indicated above is no longer applicable. The applicable rules regarding Alcohol Reference Solutions can be found under 11D-8.0035.**
- **DHSMV v. Mowry, 794 So.2d 657 (Fla.App. 5th DCA 2001)**—The Court stated that where the Defendant made no showing of noncompliance of the regulations, the allegations are nothing more than “speculative and theoretical.” In addition, the Court stated that “the burden fell upon the Defendant to come forward with evidence of noncompliance, much as the proponent of an affirmative defense must come forward with evidence.” However, the Court did indicate that civil nature of the administrative hearing might be distinguished from a criminal proceeding. The **Mowry** Court relied upon **State v. Friedrich, 681 So.2d 1157, 1163 (Fla. 5th DCA 1996)**.

## F. BREATH PERMITS

### 1. Possession

**Must the Intoxilyzer technician have his/her FDLE permit in their possession at the time of trial in order for the test to be admissible at trial? No.** A breath test must be administered by a person “possessing a valid permit issued by the department for this purpose.” **Fla. Stat. § 316.1934(3)**. Any technician with a valid permit is qualified to perform monthly maintenance. **FDLE Rule 11D-8.002(5) and 11D-8.006**. **See Cascante v. State, 2 Fla. L. Weekly Supp. 245 (Broward Circuit Court, March 10, 1994)** (This fact goes to the weight and not the admissibility of the evidence). Note: Under the current 2002 Florida Administrative Code Rules, 11D-8.008 governs Breath Test Operator and Agency Inspector.

**2. Requirements for obtaining a breath permit from FDLE**

- In addition to the general qualifications, the individual must successfully complete a training course of no less than 32 hours, score at least 80% on a written exam, and demonstrate proficiency in certain test procedures. **FDLE Rule 11D-8.008.**
- The permit to conduct breath tests shall be valid for 4 years. The technician no longer needs to successfully complete any refresher courses during the 4 year permit time. **FDLE Rule 11D-8.008(3).**

**3. It is sufficient for the breath technician to merely possess a permit; he need not have the actual permit at time of trial**

**Cascante v. State, 2 FLW Supp. 245 (Fla. 17th Cir. 1994)**—Officer testifies at trial that she had a valid permit. However, it had been accidentally destroyed. Failure of the technician to have her permit on her person at the time of trial goes to the weight not the admissibility of the evidence. The best evidence rule is inapplicable.

**State v. Potter, 438 So.2d 1085 (Fla. 2d DCA 1983)**—The court considered the admissibility of breath results where the technician's permit expired on March 19, 1982. The technician did not possess a valid permit when the breath test was given on July 16, 1982. He subsequently was recertified on September 28, 1982. Although he had taken a refresher course on August 18, 1981, which may have entitled him to a permit on the date the test was given, such was unclear to the court. The court held that due to the confusion and conflicts in the evidence, the State failed to carry its burden of proof.

**State v. Woldt, 19 Fla. L. Weekly Supp. 501a (Fla. 11th Cir. 2012)**. “In the instant case, Officer Silvagni testified to his extensive training and experience in conducting breath tests. Officer Silvagni is an officer with over twenty years of police experience. During the course of his career, Officer Silvagni has conducted some two-hundred and fifty (250) breath tests using the Intoxilyzer 8000 alone. That number does not include the tests conducted with the similar (and more user intensive) Intoxilyzer 5000 or any other instrument this officer has used during his career. Officer Silvagni also testified to the specific procedure used in this case, including the safety precautions taken when utilizing the instrument. Moreover, in this case, Officer Kevin Millan of the Miami Beach Police Department, an expert in Breath Testing Procedures, had the opportunity to listen to the testimony of Officer Silvagni, inspect the Breath Card generated in this case, and review the maintenance documents for this Intoxilyzer 8000. After viewing all the relevant information, Officer Millan testified, in his expert opinion, that the breath test results obtained in this case were both reliable and done in a way that protects the health of the test subjects...This is not a situation where the BTO never had a permit issued to him or the BTO's permit was not valid for any disciplinary or other reasons that raise concern over the BTO's ability to perform the test.”

#### 4. Invalid Instructor Permits

**State v. Kidder and Kincaid, 3 FLW Supp. 362 (Leon County Ct. 1995)**—Breath technician received his breath test permit by successfully completing the requirements for certification in a course taught by an instructor whose instructor's permit had expired at the time of the course. Court denied Motion to Suppress otherwise valid breath test results.

#### G. TRANSPORTING INSTRUMENT

- As of January 1, 1997, **FDLE Rule 11D-8.006(2)** states: “Whenever an agency moves a breath test instrument to a different facility, an agency inspection will be conducted prior to the instrument's removal and upon the relocation to the different facility. A mobile testing unit (Batmobile) is considered an agency facility.”
- Therefore, agency inspections are now required before and once an instrument is moved, even within an agency.

#### H. MODIFICATIONS TO THE INSTRUMENT

- Re-certification of breath testing instruments is required whenever the instrument is substantially modified. **State v. Flood, 523 So.2d 1180 (Fla. 5th DCA 1988); State v. Polak, 598 So.2d 150 (Fla. 1st DCA 1992).**
- **FDLE Rule 11D-8.003(5) (2002)** requires the manufacturer, whose instrument has been previously approved by the FDLE, to notify FDLE in writing of any change, modification, or new option to an instrument prior to adding such change, modification or option to any instrument. FDLE will then determine whether the changes or modification affects the instrument's mode of analysis and/or the analytical reliability, thus requiring a manufacturer to seek approval in accordance with the rules. In practical effect the manufacturer will not make changes to the instrument without communicating with FDLE. Below are some examples of modifications that were made to 5000 Series Instruments.
  - a. **Thermistors**--Thermistors were added to some Intoxilyzers to improve performance at ambient temperatures over eighty-five degrees. In 1993, the Eleventh Judicial Circuit (Dade County) County Court division held an *en mass* hearing, wherein all nine judges held that the addition of a thermistor is not a substantial modification. **See also State v. Balmoris, 1 FLW Supp. 367 (Dade Cty. Ct. 1993); State v. Costanza, 1 FLW Supp. 579 (Palm Beach Cty. Ct. 1993). HRS Evaluation Report of the Intoxilyzer 5000R (By Dr. Rarick, Scientific Director of the Florida Implied Consent Program).** The original Intoxilyzers were certified without the thermistor option. At some point subsequent to certification, thermistors were added to many of the instruments. CMI, the manufacturer of the instrument, studied the matter and determined that the addition of the thermistor did not compromise the integrity of the breath testing instrument. HRS nonetheless conducted its own study and found that the Intoxilyzer exceeds all blood/breath correlation standards with or without the thermistor installed. For cases denying thermistor motions see: **State v. Stoops, 1 FLW Supp. 575 (Palm Beach Cty. Ct. 1993), et al., 1 FLW 576, 579; State v. Beets et al., 2 FLW Supp. 39 (Fla. Palm Beach Cty. Ct. 1993).**

**NOTE**—The modification can only become an issue on tests performed prior to October 31, 1993, the date on which the FDLE rules took effect.

- b. **Change in E-Prom Computer Chip**—**State v. Hazard, 2 FLW Supp. 693 (Bay Cty. Ct. 1994)**—Change in E-Prom computer chip of the Intoxilyzer which results in a change in the labeling of the test results as grams of alcohol per 210 liters of breath does not violate **FDLE Rule 11D-8.003(5)** because it does not change the manner in which the instrument functions. **State v. Brigham, 694 So.2d 793 (Fla.App. 2<sup>nd</sup> DCA 1997)**—The Defendant argued the notion of “percent” language in the DUI statute was not defined in the statute. Therefore, the absence of the statutory definition required the suppression of the breath result since the Intoxilyzer 5000 breath test instrument actually measures grams of alcohol in a volume of breath. “One need not consult legislative analyses or trace the legislative history of **Section 316.193** in order to know what the Legislature intended. It quite clearly intended to make unlawful one's driving a vehicle in Florida with a ‘blood alcohol level’ of 0.08 grams of alcohol per 100 milliliters of blood or greater, or a ‘breath alcohol level’ of 0.08 grams of alcohol per 210 liters of breath or greater. The fact that the word ‘percent’ is erroneously used does not, in my opinion, render the act void or even confusing. For years, none of us was ‘confused’ until some bright soul figured out that ‘percent’ was an improper scientific term to use in this context. It does not require an inappropriate degree of legal legerdemain to substitute the term ‘expressed as’ for ‘based upon’ in **Section 316.1932(1)(b)1**, which would have the effect of defining ‘percent’ in a new, but now consistent, way, especially when one considers that the results of granting defendants’ motions, if upheld on appeal, would be to create chaos across the state and perhaps mandate an emergency session of the Legislature. I believe that this expression (‘expressed as’) is what the Legislature really intended to say, and I therefore conclude that the expression ‘X grams per 210 liters’ is the equivalent of ‘X% BAL,’ and defendants’ motions to suppress the breath test results as irrelevant (or dismiss the information as not charging a crime) should be denied.” **Id.** at 802.

**I. ALLEGED LACK OF SUBSTANTIAL COMPLIANCE REGARDING PARTICULAR SUBJECT TESTS**

**1. Failure to produce operational checklist**

**State v. Norder, 26 Fla. Supp. 2d 130 (Volusia Cty. Ct. 1988)**—The court held that the test result was admissible absent the checklist if testimony showed that the Intoxilyzer was operated pursuant to the operational procedures contained in the HRS Rules.

**Donaldson v. State, 561 So.2d 648 (Fla.App 4<sup>th</sup> DCA 1990)**—The 4<sup>th</sup> DCA did not agree with the State that the completion of the operational checklist is itself the proper foundation for admission of the test results which would require the Defendant to prove noncompliance with the maintenance provisions, rules or procedures.

**2. Failure to Maintain Running Log**

The Rules require that breath technicians only keep a log for Intoxilyzer 5000 instruments, not Intoxilyzer 8000 instruments. **FDLE Rule 11D-8.007(5)(2006)**. However, the failure of an officer to record a defendant’s breath results in the log does not raise a legitimate question regarding the accuracy and reliability of the test results. **State v. Hill, 26 Fla. Supp. 2d 82 (Palm Beach Cty. Ct. 1987)**. Consequently, a

defendant's test results are admissible even though a testing officer forgets to record them in the log.

### 3. Excessive Time Between Breath Tests

**FDLE Rule 11D-8.002(12)** requires that a minimum of two samples be collected within fifteen minutes of each other in order for a result to be considered valid.

**State v. Reynolds, 4 FLW Supp. 175 (Palm Beach Cty. Ct. June 19, 1996)**—In this case, two of the three readings were within the 15 minute time period, but the highest reading was taken within a 36 minute time period. The Court found that a 36 minute time lapse was not in compliance with the rules, but the State could introduce the highest reading in court if the State could establish the test's scientific reliability under **State v. Bender, 382 So.2d 697 (Fla. 1980)**. The two lower readings were admissible.

**Nelson v. State, 2 FLW Supp. 48 (Fla. 13th Cir. 1993)**—Under the old HRS Rule that required two samples within five minutes of each other, the court held that samples collected within six minutes of each other were admissible. “The one to two minute deviation of which Nelson complains would not impede the purpose of the statutes and rules relating to breath tests (i.e., to ensure reliable scientific evidence and to protect the health of persons being tested).

### 4. Instrument “Errors”

#### a. Volume Not Met (“VNM”)

1. The Intoxilyzer measures deep lung air to ensure accurate breath alcohol level.
2. In order to ensure that a deep lung air sample is obtained, the Intoxilyzer 8000 requires at least 1.1 liters of breath.
3. If less than 1.1 liters are provided, the instrument returns a Volume Not Met message.

When a subject does not provide 1.1 liters of breath, the operator should have the defendant provide more samples until the operator receives two valid samples within 15 minutes of each other as the rules require.

- Defense attorneys will argue that where one of the breath samples on the affidavit is a low sample volume, then the entire breath test should be excluded despite two valid readings.
- This argument should be rejected. A VNM reading has nothing to do with the instrument and everything to do with the manner in which the subject is blowing into it. A VNM “error” does not suggest any problem with the analytical capabilities of the instrument itself. Instead, it is the defendant who is not providing an adequate breath sample.

#### b. Purge Fail/Ambient Fail

Before and after a sample is introduced into the instrument's sample chamber, the instrument purges the chamber by taking in “ambient” (surrounding) air from the room that it is in. The instrument then evaluates this air to make sure the sample chamber is purged of alcohol.

- Purge Fail – the instrument will return this error when there is **more** than .019g/210L of alcohol in the sample chamber directly AFTER a control test or subject sample.
- Ambient Fail – the instrument will return this error when there is **more** than .019g/210L of alcohol in the sample chamber directly BEFORE a control test or subject sample.
- When an instrument returns one of these errors, the test will be aborted and the officer should attempt another test.

When an instrument evaluates the ambient air and detects .019g/210L of alcohol or less, it will reset its “zero” to that amount. However, this will actually LOWER the defendant’s breath reading and the reading of any control test that the instrument performs. The instrument will subtract this amount from the actual subject sample reading or from the control test reading.

#### c. Slope Not Met

The Intoxilyzer 8000 is designed to test deep lung air. There are a number of “checks” to make sure that the instrument is measuring “lung” alcohol and not “mouth” alcohol. One check is the 20 minute observation period. Another is the rule requiring .02 compliance between two valid readings. **Evaluating the slope of the reading is another check to ensure mouth alcohol is not present.** In this case, the defendant’s breath alcohol level will increase exponentially and then quickly decrease and drop off.

- **Defense Argument:** Having a “slope not met” error during the first test invalidates subsequent tests because the instrument isn’t working.
- **State Response:** There is nothing wrong with the instrument. It simply means that something in the defendant’s sample caused a sudden drop in the alcohol level. The instrument is working as it should.

#### d. Slope Not Level

“Deep Lung Air” is a relative term. In other words, a 300 pound linebacker has a different lung capacity than a 95 pound jockey. While the instrument requires 1.1 liters of breath to ensure it is getting deep lung air, 1.1 liters may not be “deep lung air” for people with larger lung capacity. Another way that the instrument ensures it is getting “deep lung air” is by requiring a plateau in the slope it detects. If the subject’s breath alcohol level does not plateau off, then a “slope not level” error will appear.

#### e. Radio Frequency Interference (“RFI”)

This “error” will appear on a Breath Test Affidavit if the instrument detects radio waves in the near vicinity. RFI is not an error at all, but rather, a safeguard to ensure that radio waves (coming from police radios, cell phones, etc.) are not interfering with the instrument. As mentioned above, the RFI circuitry is not the only safeguard for the defendant; the breath results must still be within 15 minutes of each other and within a .020 compliance.

## **J. INSTRUMENT SECURITY**

### **1. FDLE Rule 11D-8.007(1)**

- **FDLE Rule 11D-8.007(1)** states that “breath test instruments shall only be accessible to those issued a valid permit by the Department, and such other persons who are authorized by the permit holder. Such authorized access shall only be allowed in the presence of a permit holder. This section is meant to apply only to instruments located within agencies and is not meant to prohibit agencies from sending an instrument away to a manufacturer authorized repair facility or utilizing the instrument for training programs.”
- **State v. Kattengell, 7 Fla. Supp. 2d 139 (Fla. 11th Cir. Ct. App. Div. 1984)**— Unless there is a showing that the Intoxilyzer was tampered with, mere “possibility that some unauthorized person could have access” to the instrument does not render the test results unreliable or suppressible.

## **K. TYPOGRAPHICAL ERROR IN THE RULES**

- What is the effect of a typographical error in the Implied Consent Rules? **See Armstrong v. City of Edgewater, 157 So.2d 422 (Fla. 1963)** (When the addition of a word in a statute is necessary to prevent an Act from being absurd and in order to conform the statute to the obvious intent of Legislature, words which were clearly omitted through some clerical or scrivener’s misprision may be added by court); **City of Opa-locka v. Trustees of the Plumbing Industry Promotion Fund, 198 So.2d 29 (Fla. 3d DCA 1966)** (Where text of act reflects clear legislative intent, such intent may be effectuated by supplying word inadvertently omitted and correcting clerical error); and **Curry v. Department of Corrections, 423 So.2d 584 (Fla. 1st DCA 1982)** (Where the Legislature has made a mistake in a reference in a statute to another statute and real intent of the Legislature is manifest and would be defeated by adherence to terms of the mistaken reference, a court may disregard the mistaken reference or read it as corrected in order to give effect to intent of the Legislature).

## **L. FDLE RULES - PROPERLY PROMULGATED**

### **1. The Void for Vagueness Doctrine is Inapplicable**

- The doctrine generally applies to penal rather than regulatory statutes. The purpose of the doctrine is to ensure that people can readily understand what conduct is prohibited and how the prohibition will be enforced. **State v. Rochelle, 609 So.2d 613 (Fla. 4th DCA November 18, 1992)** (**affirmed** and **adopted Carino v. State, 635 So.2d 9 (Fla. 1994)** (**citing Kolendor v. Larson, 461 U.S. 352 (1983)**)).

### **2. The Rules are Sufficient even if the Void for Vagueness Doctrine was Applicable**

- **The FDLE rules are not void for vagueness insofar as they designate which instruments may be used and incorporate forms detailing what maintenance procedures must be followed** (the terms “accuracy” and “reliability” are thereby defined by the forms used in the breath testing/maintenance procedures).



- a. The Rules designate the approved breath testing instruments. Under Subsection 1, the rule specifically lists the Intoxilyzer 5000R.
- b. The Rules specifically incorporate the forms used for the registration and annual inspection of breath testing instruments.
- c. The Rules specifically incorporate forms that delineate the monthly maintenance procedures that must be followed.
- d. The Rules specifically incorporate the checklist that must be used each time a breath test is done.
- e. The Rules provide a specific procedure for ensuring the qualification of breath test operators.
  - i. The Rules require each applicant to complete a 40 hour course and achieve at least an 80% score on a written final exam, and demonstrate proficiency in certain test procedures.
  - ii. The Rules require that permits be renewed every 2 years.
  - iii. The Rules specify the required qualifications for instructors.
- **See also State v. Berger, 605 So.2d 488 (Fla. 2d DCA, August 26, 1992)** (affirmed and adopted by **Veilleux v. State, 626 So.2d 210 (Fla. 1993)**)—In **Berger**, the Second District specifically held, “we conclude, as did the fourth district and Pinellas County Judge David A. Demers, that the entire administrative scheme sufficiently ensures the reliability of results even though it does not set forth specific standards with reference to monthly and annual inspections.” **Accord State v. Rochelle, 609 So.2d 613 (Fla. 4th DCA, November 18, 1992)** (affirmed and adopted **Carino v. State, 635 So.2d 9 (Fla. 1994)**)).

### 3. HRS/FDLE Regulation of Breath Testing is not an Unlawful Delegation of Legislative Power.

- The Florida Legislature has delegated the authority to promulgate rules regarding the “techniques or methods” for breath testing as well as the authority to “ascertain the qualifications and competence of individuals to conduct such analyses . . .” **Fla. Stat. § 316.1932(2) and 316.1934(3)**. The delegation of legislative power to FDLE was challenged unsuccessfully in **State v. Bender, 382 So.2d 697 (Fla. 1980)**. Writing for the **Bender** majority, Justice Overton wrote, “We expressly reject the holding of the trial court that these statutory sections constitute an unlawful delegation of legislative power.” **Id. at 700**. The Court cited two particular reasons for its decision.
  - a. The authority to test for BAC existed prior to the implied consent statutes - the Legislature merely assigned to the agencies the responsibility of establishing proper testing procedures.
  - b. It would be impractical for the Legislature to fully supervise the administration of blood tests since such supervision would require constant legislative hearings to develop the necessary expertise. **Id.**

IF YOU FIND A DEFENSE MOTION CHALLENGING THE FDLE RULES AND REGULATIONS OR THE RELIABILITY OF THE INTOXILYZER SEE AN ASSISTANT CHIEF IMMEDIATELY.

## **M. STATE'S DISCOVERY OBLIGATIONS: INTOXILYZER DOCUMENTS**

### **1. Background**

Prior to February 27, 2004, maintenance documents, operator's manuals, and schematics of the Intoxilyzer were not discoverable unless the State was planning to introduce these items at trial. The argument was that the State could introduce the Breath Affidavit to show substantial compliance with the FDLE rules without further proof of the maintenance of the Intoxilyzer.. **Fla. Stat. § 316.1934(5)**. **See also State v. Irizarry, 698 So.2d 912 (Fla. 4<sup>th</sup> DCA 1997)**. Furthermore, Intoxilyzer Maintenance Documents are public record and can be readily obtained via a public records request under **Fla. Stat § 119** through the police agency. The February 27, 2004, 5<sup>th</sup> District Decision of **State v. Muldowny** changed the State's discovery obligation with regard to Intoxilyzer maintenance manuals, operator's manuals, and schematics.

### **2. State v. Muldowny, 871 So.2d 911 (Fla. 5<sup>th</sup> DCA 2004)**

#### **A. Production of Documents After Muldowny**

After Muldowny, all maintenance manuals, operating manuals, and schematics that FDLE possessed for the 5000R Series instruments were deemed discoverable and made available for viewing by the defense on a compact disc ("CD").

Whenever a defendant made a motion to compel under Muldowny the response was that we will provide a copy of the CD to the defense. Each CD needed to be labeled as being "State Property" and the defense lawyers getting these CD's must have consented that the copyrighted material within the CD was not to be disseminated and reviewed except for the limited purpose of the particular case they were working on.

**Was the State required under Muldowny to provide the Operating Manual, Maintenance Manual, and Schematics For Each Individual Intoxilyzer?** "NO", Individual machines do not have their own distinct versions of maintenance manuals, operators manuals, or schematics. One set of operators manuals, maintenance manuals, and schematics exist for each version of the 5000R Series instruments. However, there could be numerous versions of these sets depending on whether new manuals or schematics were created for new versions (e.g. 1984 Intoxilyzer 5000 Operator's Manual, 1989 Intoxilyzer 5000 Series Operator Manual, etc). The new versions of instruments would be created when a substantial change to instrument software or hardware was made.

#### **B. Inspecting and Photographing the Interior of the Intoxilyzer After Muldowny**

The defense bar filed motions to inspect and photograph the interior of the 5000 Series Intoxilyzers. The reason the defense asserted for needing to inspect these instruments was to determine IF the instrument is the same unmodified instrument that was approved by FDLE, when the instrument was first approved for evidentiary use. The logic of the of the defense bar was to seek to lay the ground work for filing a motion to suppress breath results based on a theory that the instrument was no longer an approved instrument. Muldowny does not mandate that such inspections occur. **NOTE:** The defense would have a burden of demonstrating some need for the inspection. In practical terms that would most likely require some showing of testing irregularities and/or issues related to repair of the instrument. In addition, the defense always has a burden of showing "materiality" pursuant F.R.C.P. 3.220(f). "Materiality" for inspection cannot be established based on the possibility that an inspection might result is relevant information.

### **4. The Florida Legislature Responds to Muldowny**

### **What Does “Full Information” Mean?**

The legislature reacted to the State v. Muldowny, 871 So.2d 911 (Fla. 5th DCA 2004) decision by more clearly defining the phrase “full information” within section 316.1932(1)(f)(4), Florida Statutes. Specifically, House Bill 187/Senate Bill 232 was enrolled and signed into law by the Governor on June 20, 2006. The new law went into effect October 1, 2006. This new law was authored in part to address the issue left open by Muldowny, wherein the Fifth District stated that because section 316.1932 (1)(f)(4), Florida Statutes, requires that full information be disclosed, the State of Florida had to produce documentary materials that it possessed (schematics, owner’s manuals, etc.). See Fla. H.R. Comm. on Transp., CS for HB 187 (2006) Staff Analysis 4-5 (January 26, 2006)(“Exhibit 18”). The law now provides that “full information” be limited to include: a) the type of test administered and the procedures followed, b) the time and collection of blood or breath samples collected, c) the numerical results of the test indicating the alcohol content of the blood and breath, d) the type and status of any permit issued by the Department of Law Enforcement which was held by the person who performed the test, and e) if the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance of such instrument. See Id. This bill also clarifies that “full information” **does not** include manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the State. Additionally, full information does not include information in the possession of the manufacturer of the test instrument.

#### **4. Intoxilyzer 8000 Series, State v. Muldowny, & §316.1932**

##### **A. Document Requests Before October 1, 2006**

Most, if not all, breath cases new ASA’s will be dealing with relate to 8000 Series instruments. However, the background related to the 5000R Series instruments is important to understand for purposes of responding to anticipated discovery issues that will be raised by defense lawyers in regards to the 8000 Series instruments.

Until October 1, 2006, the State complied with defense requests for documents in conformity with State v. Muldowny, 871 So. 2d 911 (Fla. 5<sup>th</sup> DCA 2004). More specifically, the State provided the defense with the documentation FDLE had in its possession at the time of the May 2002 approval study (8000 Series instruments). These documents were forwarded to the defense in a compact disc (“CD”) format. The documents can only be given to the defense pursuant an agreement that the information contained within the CD will not be disseminated to other parties and will only be used for purposes of assisting a specific defendant with his/her defense

##### **B. Inspecting and Photographing the Interior of the Intoxilyzer After Muldowny**

Under Muldowny, the defense has no right to inspect and/or photograph any 8000 Series instrument. Unlike with the 5000R Series instruments, the 8000 Series instruments are brand new and physically structured in a much different manner. There is no legal or strategic reason to concede allowing defense attorneys to inspect and photograph these instruments. Further, technically these instruments are owned by local agencies. As such, proper notice should be given to these agencies so they can take a respective position on the inspection issue.

IF YOU RECEIVE A MOTION TO INSPECT AN 8000 SERIES INSTRUMENT PURSUANT F.R.C.P.3.220 AND/OR MULDOWNY BRING IT TO THE ATTENTION OF AN ASSISTANT CHIEF IMMEDIATELY

#### **N. ALTERNATIVE MEANS OF SEEKING TO COMPEL DOCUMENTS RELATED TO THE INTOXILYZER**

**1. The Uniform Material Witness Act: F.S. §942.03**

The defense may seek to compel production of various documents (e.g. operators manual, schematics, source code etc) related to the Intoxilyzer by seeking a County Court judge to issue a certificate pursuant the Uniform Material Witness Act. §942.03 CMI Inc. the manufacturer of the Intoxilyzer resides in Kentucky. When/if the defense is unable to compel production of documents directly from the State they may seek production directly from CMI via the Uniform Act. Florida and Kentucky are signatories to the Uniform Act to Secure the Attendance of Witnesses From Within or Without a State in a Criminal Proceeding. See §§ 942.01-06, Fla. Stat., and Ky. Rev. Stat. Ann. §421.230-.270. The language within the Florida and Kentucky statutory authorities is identical. The statutes themselves outline the proper procedure for a party to a criminal action to effectuate the attendance of a witness from the other state. **STATE POSITION:** These defense motions should be denied since the defense lawyers seeking to compel documents cannot establish or satisfy their burden of showing materiality. The defense on similar motions involving the 5000R Series Intoxilyzers has failed to establish “materiality” by articulating that there is a “possibility” that the sought after documents might assist them in undermining the reliability of breath results. Further, the State asserts that the Uniform Act cannot be used solely for the production of documents (e.g. schematics, owner’s manuals, source code) in a criminal discovery context. See GM v. Florida, 357 So.2d 1045 (1975).

IF YOU RECEIVE A MOTION FOR CERTIFICATION PURSUANT F.S. §942.03  
BRING IT TO THE ATTENTION OF AN ASSISTANT CHIEF IMMEDIATELY

**VI. TWENTY-MINUTE OBSERVATION PERIOD**

**A. FDLE RULE 11D-8.007(3).**

“The technician, arresting officer, or person designated by the technician “**shall reasonably insure**” that the subject has not **taken anything by mouth or has not regurgitated for at least twenty (20) minutes** before administering the test.” **FDLE Rule 11D-8.007(3).** **NOTE**—The former HRS rule which is the subject of most of the following decisions was more strict than the FDLE rule in that the **HRS Rule 10D-42.024(1)(f)** required the officer “must make certain” instead of “shall reasonably insure.”

**B. PURPOSE**

The purpose of the twenty minute observation period “is to avoid the presence of mouth alcohol which could result in false or inaccurate breath test results.” **State v. Milner, 2 FLW Supp. 171 (Bay Cty. Ct. 1993).** The 20 minute observation period is a redundant safeguard for providing valid breath readings for the following reasons:

- a.** The instrument is equipped with a **mouth alcohol detector**. Where mouth alcohol is present, the reading goes up and then drastically drops off. If mouth alcohol is present, the instrument will not display a reading but will print “Invalid Sample XXX.”
- b.** Since mouth alcohol dissipates within seconds, it is almost impossible for a defendant to provide **two samples within .02** of each other if mouth alcohol is present.

### C. SUBSTANTIAL COMPLIANCE APPLIES TO TWENTY-MINUTE OBSERVATION PERIOD

- **State v. Renaldo, 34 Fl. Supp. 2d 122 (Palm Beach Cty. Ct. 1989)**—The court held that an officer's failure to comply with the twenty-minute rule does not bar the admission of breath test results unless the defendant demonstrates that the accuracy of the instrument was affected. In reaching its ruling that an alleged 20 minute violation did not affect the scientific reliability of the test, the court relied on the State's expert who testified that the reading could not have been affected by mouth alcohol because of the mouth alcohol detector and the .02 compliance between readings. **See also, Kaiser v. State, 609 So.2d 768 (Fla. 2d DCA 1992), *infra*, citing State v. Donaldson, 579 So.2d 728 (Fla. 1991).**
- **DHSMV v. Farley, 633 So.2d 69 (Fla. 5th DCA 1994)**—In an administrative hearing, the hearing officer improperly concluded that a 17 minute observation period was not in substantial compliance with the 20 minute rule. Since **the State offered no testimony**, the State had failed to meet its burden in an administrative hearing of showing that any deviation was insubstantial.
- How to distinguish **Farley**:
  - a. There is quite a difference between the State's burden in an administrative hearing and the defendant's burden on a pre-trial motion.
  - b. According to **Farley**, the issue for an administrative judge is not only whether substantial compliance is lacking but whether the State substantially complied with the rule. The issue for a criminal judge is whether the defect or variance prejudices the defendant by raising a legitimate or substantial question regarding the authenticity or scientific reliability of the test results.
  - c. In **Farley**, there was no expert testimony to explain how a 17 minute period substantially complied with the rules. Any maintenance officer/expert will be able to testify as to the mouth alcohol detector and how it would be virtually impossible for mouth alcohol to be present if there are two readings within .02 of each other.
- **State v. Sharp, 47 Fla. Supp. 2d 84 (Fla. 7th Cir. 1989)**—The Circuit Court held that there were substantial factual findings by the trial court to support its order of suppression on the basis that an eighteen-minute observation period was a substantial violation of the rules.

### D. THE OFFICER DOES NOT HAVE TO STARE FIXEDLY AT THE DEFENDANT

#### 1. General Rule

The general rule is that officers may do paperwork and/or otherwise go about their business during the twenty-minute waiting period so long as they maintain reasonable contact with the defendant.

#### 2. Cases

**State v. Hart, 3 FLW Supp. 580 (19th Cir. Ct. 1995)**—Substantial compliance with 20 minute rule was met where defendant was continually in the presence of one of two officers during 30 minutes intervals although one officer left the room for 2 - 3 minutes and other officer continued completion of paperwork but was separated from the

defendant by a screen. Court held that failure of officer to continuously face defendant during 20-minute period goes to weight of evidence not admissibility.

**Baronet v. State, 736 P. 2d 432 (Col. 1987)**—The defendant sat in the back seat of the car for an eight minute ride to police station during the observation period. A total period of thirty-three minutes elapsed between arrest and the breath test. The court found substantial compliance.

**Kaiser v. State, 609 So.2d 768 (Fla. 2d DCA 1992)**—Although the breath test officer remained within a few feet of the defendant during the observation period, the officer did not stare fixedly at the defendant. **The issue of whether the officer could be certain that the defendant did not ingest anything or regurgitate goes to the weight of the evidence, not its admissibility.** Relying on Baronet, the court held that a technician need not stare fixedly at the defendant or otherwise maintain continuous face-to-face observation of the defendant for the entire twenty minute period to achieve substantial compliance.

**State v. Vannarath, 4 FLW Supp. 676 (Fla. Lee Cty. Ct. 1997)**—Court held that where the officer testified that he conducted the 20-minute observation period while completing the DUI Test Report and where the defendant neither burped, regurgitated, or put anything into his mouth, the 20 minute observation period was complied with.

**State v. Call, 20 Fla. Supp. 2d 21 (Fla. Sarasota Cty. Ct. 1985)**—The court refused to include the time during which the defendant was being transported in “in the back seat of a dark patrol car, separated from the arresting officer by a Plexiglas window” in the 20-minute waiting period. The Kaiser court, seemingly disapproved of this case *sub silencio* when it relied on Barone.

**Wilson v. State, 25 Fla. Supp. 2d 118 (Fla. 13th Cir. 1987)**—The defendant was observed for twenty-four minutes while he performed field sobriety tests. The court held that such observation was sufficient to insure that the defendant did not take any alcohol by mouth or regurgitate any alcohol into his mouth.

**State v. Milner, 2 Fla. L. Weekly Supp. 171 (Bay County Court 1993)**—Officer substantially complied with the 20-minute observation requirement despite the fact that he left the room for 20 seconds to get the defendant a tissue.

**State v. Maynard, 8 FLW Supp. 510 (Monroe County Court 2001)**—A portion of the 20 minute observation was conducted by the arresting officer as he drove his cruiser from the point of arrest to the Sheriff’s Office with the defendant situated in the back seat. During the transportation, the defendant’s hand were cuffed behind his back, eliminating possible ingestion of foreign object, and was situated in the back seat so that he might be viewed in the officer’s rear view mirror; and the dome light was turned on for the purpose of enhancing the officer’s view of this defendant. The Court distinguished this case from others and found substantial compliance with the rules.

**State v. Tarajano, 6 FLW Supp. 781 (Dade County Court 1999)**—The officer, who was only administering his second breath test ever, did not properly and continuously observe the defendant for 20 minutes as the officer did not understand why, or for what he was looking.

**State v. Fisher, 6 FLW Supp. 650 (Broward County Court 1999)**—Neither a period of coughing nor phlegm from the lungs equals regurgitation. Regurgitate means only bringing up something from the stomach to the mouth. Thus, there was no need to restart the twenty-minute observation period.

**State v. Abouelhosn, 7 FLW Supp. 225 (Broward County Court 1999)**—Breath test was suppressed where the defendant chewed gum during the entire 20 minute observation period.

**State v. Cala, 7 FLW Supp. 342 (Miami-Dade County Court 2000)**—Officer observed the defendant during the field sobriety exercises and during the drive to the station. There was substantial compliance with the 20-minute observation period.

**State v. Townsend, 4 FLW Supp. 486 (Palm Beach County Court 1996)**—The arresting officer did not time the observation period, instead relying on the breath technician's not calling him for the test prior to 20 minutes passing. The court found this not to be in substantial compliance with the rules.

**State v. Cantone, 4 FLW Supp. 345 (Palm Beach Circuit Court 1996)**—Defendant coughed during the 20-minute observation period. Even though a cough is not regurgitation, the motion to suppress the breath test results affirmed where State offered no testimony on the reliability or integrity of the test.

**State v. Deskins, 6 FLW Supp. 660 (Brevard County Court 1999)**—Uncontradicted testimony that officer was continuously within three feet of defendant, who was in his line of sight or in his peripheral vision and that officer had unobstructed view of defendant's mouth that was not covered or concealed established that observation was sufficient.

**State v. Lytle, 5 FLW Supp. 268 (Palm Beach County Court 1998)**—Once the defendant made the strong showing, through her testimony and the videotape, that she had regurgitated, the burden shifted to and remained with the state to show the validity of the breath test result.

**Reaves v. DHSMV, 3 FLW Supp. 535 (Volusia County Court 1995)**—Breath Test Results Affidavit sufficient to establish compliance with the 20 minute observation period requirement.

**O'Neal v. DHSMV, 8 FLW Supp. 9a (Orange Circuit Court 2000)**—Breath Test Results Affidavit and Alcohol Influence Report were enough to show compliance with the 20-minute observation period.

#### **E. CUMULATIVE OBSERVATION IS ACCEPTABLE**

**State v. Mason, 27 Fla. Supp. 2d 87 (Palm Beach Cty. Ct. 1987)**—A police officer observed the defendant from 11:20 p.m. until 11:50 p.m. He then turned the defendant over to the testing officer who observed him from 11:50 p.m. until 12:05 a.m., when he administered the breath test to the defendant. The defendant argued that the observation period violated the rules because it was not undertaken by one person. The court held that cumulative observation was sufficient to effectuate the purpose of the rule and admitted the breath results. **See also Davidson v. DHSMV, State, 4 FLW Supp. 498 (Fla. FLW Supp., 1997).** Compare Farley, 633 So.2d 69 (Fla. 5th DCA 1994) (Partial observation by an unidentified third party is not sufficient).

**F. DRINKING WATER DURING TWENTY MINUTE OBSERVATION PERIOD**

**State v. Sloan, 2 FLW Supp. 594 (Palm Beach Cty. Ct. 1995)**—The defendant drank water during the twenty-minute observation period. The court held that this was an insubstantial deviation from the rules based on the State’s expert whose un rebutted testimony was that the ingestion of water would have no effect on the breath readings.

**G. YAWNING DURING THE TWENTY-MINUTE OBSERVATION PERIOD**

**State v. Rockwerk, 2 FLW Supp. 223 (Palm Beach Cty. Ct. 1994)**—Fact that defendant covered his mouth with his hands for four seconds in order to yawn does not amount to a defect that prejudiced the defendant by raising legitimate questions regarding the scientific reliability of test results.

**Motion Tip:** Courts will often support their finding of substantial compliance on a twenty minute motion by recognizing that “there was no testimony presented that the defendant had, in fact, taken anything by mouth or regurgitated during the twenty minute period prior to the time that the Intoxilyzer test was administered to Defendant.” **State v. Elmore, 3 FLW Supp. 189 (Palm Beach Cty. Ct. 1995).**

Procedurally, the Defense has the threshold burden of alleging non-compliance with 20 minute observation with sufficient specificity. **State v. Griesse, 5 FLW Supp. 137 (Fla. 9th Cir. 1997).** Facts such as name of breath technician, length of observation, and the people present may be sufficient to overcome this burden. **Id.** But see, **State v. Lytle, 5 FLW Supp. 268 (Fla. Palm Beach Cty. Ct. 1998)** (holding that even slight indication of invalidity shifts burden to state to show validity of breath test; possibly fact specific - defendant on video seen hyperventilating and regurgitating during breath test).

**H. DENTURES**

**Schofield v. State, 867 So.2d 446 (Fla. 3d DCA 2004):** In this case, the Third District Court of Appeal aligned itself with the prevailing view from numerous jurisdictions and held that the presence of dentures in a DUI defendant’s mouth during the breath testing process does not invalidate the breath test results, so long as the test is conducted according to the governing statute and administrative rules. The Court further held that Florida law does not require the removal of denture devices nor does the law impose an obligation on the officer to even inquire about the use of dentures prior to or during administration of alcohol tests.

- The Defendant’s first breath result after the twenty minute waiting period produced a breath test card that stated “Invalid Sample – Mouth Alcohol.” The officer then asked the Defendant to rinse her mouth with water and obtained two additional breath samples which resulted in readings of .114 and .111 respectively. Defendant’s defense expert testified that the invalid mouth alcohol reading was due to the presence of alcohol and that the dentures probably caused the alcohol presence, and that the failure to remove the dental appliances before rinsing the mouth with water rendered the subsequent test results unreliable. The State’s experts could not explain how the invalid reading resulted in this case but one opined that the latter two results were valid because they followed the proper procedures.
- The Third District, upholding a circuit court order which had reversed a suppression order, held that any effect of the dentures on the breath test goes only to the weight, not the admissibility, of the test results.



## I. USE TRADITIONAL PREDICATE IF NO SUBSTANTIAL COMPLIANCE

**State v. Maharaj, 3 FLW Supp. 453 (Palm Beach Cty. Ct. 1995)**—Breath test results obtained in violation of 20 minute rule may be introduced into evidence through a traditional predicate if violation did not violate the FDLE Rule’s “core policies” of ensuring scientific reliability **Citing Robertson v. State, 604 So.2d 783 (Fla. 1992)**.

## VII. ONE BREATH READING CASES

### A. GENERAL RULE

Typically, the FDLE rules require that there be a minimum of two samples collected within 15 minutes with results within 0.020g/210L of each other. **FDLE Rule 11D-8.002(12)**. However, “in the event the person tested refuses or fails to provide the required number of valid breath samples, then this event shall constitute a refusal. Notwithstanding the foregoing sentence, the result(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level.” **FDLE Rule 11D-8.002(12)**.

### B. DOES “IF PROVED TO BE RELIABLE” MEAN THE INSTRUMENT PASSES AGENCY INSPECTION THE MONTH BEFORE AND MONTH AFTER OR DOES IT MEAN THAT THE STATE IS REQUIRED TO LAY A BENDER PREDICATE?

**State v. Schimming, 16 Fla. L. Weekly Supp. 321b (January 14, 2009)**, The issue before the Court in this instance, was whether the single breathalyzer test result obtained may be admitted into evidence”. The Honorable Judge Shelfer found that a single result obtained *may* be entered into evidence and held as follows, “Because the State provided sufficient evidence that the breathalyzer instrument used was properly registered, inspected and certified, that the instrument technician was properly trained and certified, that the officer who administered the breath test was properly trained and certified, and provided testimony explaining the meaning of the breath test result”, *Id*.

**Reed v. State, 1 FLW Supp. 320 (Fla. 8th Cir. 1993)**—The defendant was offered a breath test. He gave one sample but refused to give a second sample as required by the HRS rules. The court held that the admission of the single breath sample was not unduly prejudicial where the officer’s failure to collect the second sample was attributable to the defendant himself. The court reasoned, “it seems beyond the pale of collective legislative imagination to allow Appellant’s uncooperativeness . . . to invalidate the one sample obtained.” **Id**. (**quoting Oskins v. State, Unpublished opinion, Case No. 85-919-MM (8/13/86)**). Furthermore, the court held that a single sample is sufficient under the substantial compliance doctrine.

**Zinger v. State, 3 FLW Supp. 244 (Fla. Hillsborough Cty. Ct. 1995)**—Defendant’s refusal to provide two samples renders the test result to not be in substantial compliance with FDLE rules. Therefore, the one reading is inadmissible unless the State is able to establish a sufficient and proper predicate as to the scientific reliability of the one test result. (In this case, it did appear that the instrument was malfunctioning).

**Hall v. State, 3 FLW Supp. 144 (Fla. 11th Cir. 1995)**—Where the uncooperative defendant provided three samples, none within 0.02 of each other, the State would have to show by “independent, extrinsic evidence that the tests are reliable” in order to admit the test results.

The court required the State to lay a traditional **Bender** predicate. See State v. Bender, 382 So.2d 697, 699 (Fla. 1980).

**State v. Troiano**, 3 FLW Supp. 373 (Palm Beach Cty. Ct. 1995)—Court held that a single breath sample was not in substantial compliance with FDLE rules. The State could choose to either admit the single breath sample or argue refusal, but cannot do both.

**NOTE—Rule 11D-8.002(12)** states “In the event the person tested refuses or fails to provide the required number of valid breath samples, then this event shall constitute a refusal. Notwithstanding the foregoing sentence, the results(s) obtained, if proved to be reliable, shall be acceptable as a valid breath alcohol level.” Is this considered a refusal? The **Reed** court considered it a refusal. The **Troiano** court ruled that the State can choose to either admit the single breath sample or argue refusal, but cannot do both.

**State v. Irwin**, 4 FLW Supp. 247 (Pinellas Circuit Court 1996)—In this case, the Court simply ruled that the trial judge in the lower court could not find the single, low volume sample breath test result inadmissible as a matter of law and reversed the lower court’s ruling.

#### C. REFUSAL DURING SECOND TEST

Where the defendant refuses to provide a second sample the State will likely proceed on both a reading, as addressed above, and a refusal. The defendant’s refusal after providing one valid sample does not require an officer to re-read implied consent. See Peterson v. DHSMV, 5 FLW Supp. 9 (Fla. 13th Cir. 1997).

### VIII. RETROGRADE EXTRAPOLATION

#### A. GENERALLY

Retrograde extrapolation is a process of determining what an individual’s breath or blood alcohol level was at a time prior to the time when the breath or blood test was administered. In DUI cases with a reading, the State will know what the defendant’s breath alcohol level was at a specific time (usually sometime between 30 to 90 minutes from the time that the defendant was observed driving) based on a review of the breath test evidence card.

#### B. POST-ABSORPTION PHASE

In order to accurately use retrograde extrapolation, the defendant must be in the post-absorptive phase (i.e., BrAL is decreasing rather than increasing). It should not be used when the BrAL is increasing because the rate at which the body absorbs alcohol is variable and depends mainly on whether or not the stomach is empty or contains food. Thus, if the defendant’s BrAL is still increasing at the time of the breath test, it will be much more difficult to pinpoint the BrAL at the time of driving.

In contrast to the absorption rate, the rate at which the body eliminates alcohol is fairly constant. Because the rate of elimination is fairly constant, it is possible to determine in some cases what a person’s BrAL was at an earlier time. **In general, an individual is in the post-absorptive phase if their last drink was an hour or more before the time of driving. If this is true, it is then possible to extrapolate their BrAL at the time they were driving.**

### C. ELIMINATION

To accurately use extrapolation, one must assume that an individual was eliminating alcohol at the assigned elimination rate. The average **rate of elimination** is between 0.015 and 0.02 g/210 liters per hour.

**NOTE**—This does not mean that defense attorneys will not use retrograde extrapolation in a pre-absorptive scenario (i.e.: "My client's BAC was on the way up at the time of driving; therefore, his BAC was lower than it was when he actually blew"). Actually, that's the point -- why would they argue that their client was actually **higher** than the reported reading (at the time of driving)!!?!? Therefore, it is your job to elicit expert/rebuttal testimony, which focuses on the points made in the first two paragraphs above.

- a. Have the witness explain how speculative and variable it is to estimate backwards where the underlying assumption is that the defendant was "on the way up" when driving.
- b. Make it clear that because of the extremely variable nature of alcohol absorption, any piece of the scenario (i.e. the defendant's story), which is inaccurate, will change the result.
- c. Appeal to the common sense notion as to just what the defendant says happened - that he took 3 or 4 shots, or beers, and then "raced the alcohol home"!
- d. Similarly, use your expert/rebuttal witness to explain that alcohol impairs to a greater extent when someone is "on the way up". (**NOTE—Pre-try the witness on this point especially. This may be too broad of a statement for some expert witnesses.**)
- e. Who are the State's "Expert" witnesses for Retrograde Extrapolation?

### D. IMPORTANT INFORMATION FOR EXTRAPOLATION.

**Body Weight**—Body weight will not affect the elimination rate with the exception of very obese and emaciated individuals who are very difficult to predict.

**Time suspect stopped drinking**—This is essential information to determine if the defendant is post-absorptive. The peak BAC is achieved in five to 142 minutes (39 minutes average).

- When and what did the defendant eat last?
- Results of breath or blood test that show alcohol level at a certain point in time.
- How many drinks did the defendant claim to have?

### E. THE DEFENDANT NEEDS TO PUT INTO EVIDENCE THE TIME OF THE LAST DRINK

#### 1. Self-Serving Hearsay is inadmissible

If the time of the last drink was given to the police officer and included on the DUI test report, the **State** could admit the answer as a statement of a party opponent. **Fla. Stat. § 90.803(18)(a)**. However, if the defense tries to introduce the defendant's statement through the police officer and the State objects, it would be inadmissible as self-serving hearsay. See Fagan v. State, 425 So.2d 214 (Fla. 4th DCA 1983); Lott v. State, 695 So.2d 1239 (Fla. 1997).

#### 2. Hearsay relied upon by an expert

Often, defendants will try to avoid taking the stand by telling their expert when they stopped drinking. This is an unsworn, out of court statement not subject to cross-examination that should be inadmissible. It is error for the court to admit testimony of an expert regarding statements of witnesses who did not testify. **Maklakiewicz v. Berton, 652 So.2d 1208 (Fla. 3d DCA 1995)**. “Although an expert witness is entitled to render an opinion premised on inadmissible evidence when the facts and data are the type reasonably relied on by experts on the subject, the witness may not serve merely as a conduit for the presentation of inadmissible evidence.” **Smithson v. V.M.S. Realty, Inc., 536 So.2d 260, 261-262 (Fla. 3d DCA 1988)**. Cf, **Dobosh v. State, 684 So.2d 276 (Fla. 5<sup>th</sup> DCA 1996)** (allowing expert to consider defendant’s statements where **defendant testified at trial** how much alcohol defendant consumed—this scenario is distinguished from where the defendant attempts to introduce his statements through the expert without testifying which is impermissible).

## **IX. BREATH TEST WITHIN REASONABLE TIME OF DRIVING**

### **A. GENERALLY**

**Miller v. State, 597 So.2d 767 (Fla. 1991)**—The State may introduce the results of properly obtained blood alcohol test without the necessity of extrapolating (or relating back) the results to the time of driving, so long as the results are obtained within a reasonable time of driving. Without defining the term “reasonable time,” the Court effectively held that if the results tend to prove or disprove a material fact, i.e., if the results are relevant, and as long as the prejudicial value of the results does not outweigh their probative value, then the results will generally be admissible.

**Haas v. State, 597 So.2d 770 (Fla. 1992)**—Extrapolation of BAC results is not a prerequisite to conviction in a DUI case. The court interpreted “Florida’s statutory scheme to mean that the test results shall be prima facie evidence that the accused had the same BAC level at the time of his operation of the vehicle. Properly obtained test results which reflect a blood alcohol level of 0.10 or more, standing alone, constitute circumstantial evidence upon which the finder of fact may (but is not required to) convict the accused driver of DUI either by impairment or DUBAL. The accused is at liberty to seek to demonstrate through cross-examination or the introduction of other evidence that the test results do not accurately reflect his or her blood-alcohol level at the time the vehicle was being operated.”

### **B. EXAMPLES OF REASONABLE TIME**

- **3 hours and 55 minutes**—**State v. Banoub, 700 So.2d 44 (Fla. 2d DCA 1997)**—Because a driver’s blood alcohol level should have peaked, and be no higher four hours after being stopped than it was at the time of driving, blood alcohol test results obtained four hours after the stop are probative of blood alcohol level at time of driving, even if results cannot be extrapolated back to time of driving. In essence, the Court held that the BAC, if anything, could only be lower at the time of the test than the BAC at the time of the driving, and thus, the admission of the results could not prejudice the defendant. Although **Banoub** is a blood case, the same scientific principles apply to breath, and therefore, the same rationale should apply.
- **3 hours and 15 minutes**—**Halley v. State, 4 FLW Supp. 838 (Fla. 18<sup>th</sup> Cir. 1997)**—In a brief opinion, the **Halley** Court found 3 and ½ hours to be reasonable given the

circumstances “shown by the record”. The opinion, however, does not indicate what circumstances delayed the breath test.

- **Almost 3 hours—State v. Harding, 3 FLW Supp. 242 (Hillsborough Cty. Ct. 1995)**—The BAC test results obtained almost three hours after the accident are relevant to a material issue, more probative than unfairly prejudicial, and can be tested by cross-examination or independent evidence. “A jury will be entitled to give the evidence such weight it deems appropriate.”
- **2 ½ hours—State v. Hakes, 3 FLW Supp. 245 (Hillsborough Cty. Ct. 1995)**—Two and one-half hours is reasonable. “The delay in obtaining the evidence properly goes to the weight that the trier of fact decides to give to that evidence, after considering all the evidence.”
- **2 hours—State v. Bond, 37 Fla. Supp. 2d 72 (Fla. 11th Cir. App. 1989)**—“When testing takes place within a reasonable time after the actual driving by the defendant, the issue raised by the time lapse between the driving and the test goes to the weight of the testimony, not to its admissibility.” The Court is “not prepared to say that the two-hour time lapse present in this case falls outside the bounds of reasonableness.”
- **Tracton v. City of Miami Beach, 616 So.2d 457 (Fla. 3d DCA 1992)**—In a false arrest case, the court found reversible error for the lower court to exclude as irrelevant BAC test taken two hours after the arrest. “The fact of a delay in submitting to the test went to the weight to be given that evidence by the jury and not to its admissibility.”
- **1 hour and 20 minutes—Miller v. State, 597 So.2d 767 (Fla. 1992)**—In some circumstances, evidence of BAC “obtained a significant time after” driving “may be relevant and probative evidence.” One hour and twenty minutes is not an unreasonable lapse of time even though state’s expert testified that it was possible for BAC to be below .10 at time of driving. See also, Haas v. State, 597 So.2d 770 (Fla. 1992).

#### C. EXAMPLE OF UNREASONABLE TIME

**4 and 1/2 hours—State v. Kelley, 3 FLW Supp. 643 (Clay Cty Ct. 1996)**—Motion to Suppress breath results granted because test was not given within reasonable time where automobile accident occurred at approximately 5:42 p.m., test was not administered until 10:21 p.m., and during the interim, defendant was treated at hospital and may have been given medication. Note that this opinion pre-dates Banoub and is merely a County court opinion from another jurisdiction.

#### D. TRIAL STRATEGY

**Set up reasonable time in the direct examinations:** Ask the arresting officer to explain the reasons for any delay in getting from the scene to the police station. Also, ask the breath technician, “could you have given the defendant the breath test immediately upon arriving at the police station?” Answer - No, the rules require a twenty minute waiting period.

**Closing Argument:** Whether or not the judge will give a Miller/Haas instruction, the State should make the following arguments in closing when time is an issue in the case: Under Florida law, if the breath test was given within a reasonable time from the driving, you may infer that the BrAL results were the same at the time the defendant was driving. If the jury

finds that the breath test results accurately reflect the defendant's breath alcohol level at the time of driving, then they must find the defendant guilty of DUI.

**NOTE**—It is clearly objectionable as a **misstatement of the law** for defense counsel to suggest that the burden is on the State to show that the test results reflect the defendant's breath alcohol level at the time of driving.

#### **E. SUGGESTED JURY INSTRUCTION**

- **The State has presented evidence regarding the breath (blood) test results of the defendant. You may, but are not required to, consider this evidence as proof of defendant's breath (blood) alcohol level at the time of driving if you find the breath (blood) test was taken within a reasonable time after driving. This evidence, however, can be rebutted or contradicted by other evidence and testimony in this case. See, Miller 597 So. 2d at 770; Haas, 592 So.2d at 774.**
- **NOTE**—Don't use this instruction without carefully considering whether the defense has raised retrograde as a strong defense. Only when you feel the jury has been misled or left with uncertainty by the presentation of a retrograde defense should you ask the judge for the instruction. Otherwise, you will unnecessarily confuse the jury and possibly be reversed on appeal.

### **X. Breath Test Refusal**

#### **A. THE PRIVILEGE OF DRIVING**

Driving is a privilege; it is not a right. Consequently, a person who is requested to take a breath, urine or blood test pursuant to the implied consent statutes has **no true right to refuse**; he merely had an **option to do so**. State v. McInnis, 581 So.2d 1370, 1373 (Fla. 5th DCA 1991); State v. Hoch, 500 So.2d 597 (Fla. 3d DCA 1986); Saylor v. State, 35 Fla. Supp. 2d 64 (Fla. 5th Cir. Ct. 1987).

#### **B. ADMISSIBILITY OF THE REFUSAL**

1. **Fla. Stat. § 316.1932(1)(a)** provides that the “refusal to submit to a chemical or physical breath test or to a urine test upon the request of a law enforcement officer as provided in this section shall be admissible into evidence in any criminal proceeding.”
2. **Refusal is not compelled testimony**  
A “refusal to undergo testing following an officer's lawful request is not a product of coercion, and therefore refusal is not protected by the privilege against self-incrimination.” Langlier v. Coleman, 861 F. 2d 1508, 1510 n. 3 (Fed. 11th Cir. 1988). Accord South Dakota v. Neville, 103 S. Ct. 916 459 U.S. 553 (1983) (“police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of Miranda”). Consequently, refusals are admissible as inculpatory evidence in criminal trials. South Dakota v. Neville, 103 S. Ct. 916, 459 U.S. 553 (1983); State v. Young, 483 So.2d 31, 33 (Fla. 5th DCA 1985); State v. Whitehead, 443 So.2d 196 (Fla. 3d DCA 1983); State v. Pagach, 442 So.2d 331 (Fla. 2d DCA 1983); State v. Sowers, 442 So.2d 239 (Fla. 5th DCA 1983).
3. **Refusal is relevant to a material issue**  
A refusal to submit to a breath test is circumstantial evidence probative of the defendant's consciousness of guilt and ultimately guilt itself. See Herring v. State, 501 So.2d 19 (Fla. 3d DCA 1986). The First DCA has held that there is “significant

probative value” in a refusal to take a handwriting analysis test. Wilson v. State, 596 So.2d 775, 778 (Fla. 1st DCA 1992). See also Huggins v. State 889 So.2d 743 (Fla. 2004) (“[w]hen a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance.” Citing Straight v. State, 397 So.2d 903, 908 (Fla. 1981).

- See also Menna v. State, 846 So.2d 502 (Fla. 2003). The Supreme Court of Florida analyzed the various cases (Herring and Esperti) regarding the admissibility of a Defendant’s refusal to submit to testing. The Menna case is an essential case dealing directly with a defendant’s refusal and the admissibility of the refusal.

#### 4. The State is not required to show that the instrument was approved

The validity of the test is not relevant to the question of whether or not the refusal evinces a consciousness of guilt.

State v. Kline, 764 So.2d 716 (5th DCA, June 2000)—It is irrelevant whether the State is in actual or substantial compliance with the administrative rules governing blood tests or whether those rules are sufficient when the defendant refuses to take a blood test. The same argument can be made for breath testing. Whether the breath test is admissible in evidence i.e., whether the State is in actual or substantial compliance with the FDLE rules or whether the FDLE rules themselves are sufficient are not a prerequisite to the admissibility of a refusal to take the breath test. After the refusal is admitted into evidence, the defendant is free to argue that he refused because he did not trust the test.

Sauer v. State, 2 FLW Supp. 185 (Fla. 11th Cir. 1994)—The State is not required to establish that test offered to and refused by defendant was a statutorily approved chemical test before offering evidence of defendant’s refusal. “The defendant cannot complain as to the nature of the test he was offered after refusing to take that test.” Id.

At administrative hearings, a motorist who refuses to submit to breath test may not object to suspension of his or her license on the basis that the refused test was not approved or did not comply with administrative rules and regulations because those are matters which, although relevant to admissibility of breath test, are irrelevant where test has been refused. DHSMV v. Rikken, 654 So.2d 221 (Fla. 1st DCA 1995); Conahan v. DHSMV, 619 So.2d 988 (Fla. 5th DCA 1993); Accord, DHSMV v. Berry, 619 So.2d 976 (Fla. 2d DCA 1993). These cases should apply to DUI prosecutions as well. See State v. Orcutt, 5 FLW Supp. 549 (Fla. Escambia Cty. Ct. 1998) (holding refusal admissible despite fact test offered was not in compliance with FDLE rules), State v. Gipson, 5 FLW Supp. 87 (Fla. Leon Cty. Ct. 1996) (refusal admissible even though results would have been inadmissible), State v. Phillips 3 FLW Supp. 484 (Fla. 9th Cir. Ct. 1995). State v. Ingram, et. al, 3 FLW Supp. 185 (Fla. 11th Cir. Ct. 1994). But see State v. Kilpatrick, 4 FLW Supp. 176 (Palm Beach Cty. Ct. 1996). (In the case of a constructive refusal by feigning, State must prove it was an actual refusal and not the result of an inoperable machine).

#### 5. Failure to Read Implied Consent Warnings

South Dakota v. Neville, 103 S. Ct. 916 459 U.S. 553 (1983)—Evidence of a defendant’s refusal to submit a blood test was admissible at trial even though the State did not warn the defendant of the possible consequences of refusal because “such a failure to warn was not the sort of implicit promise to forego use of evidence that would unfairly trick [the defendant] if the evidence were later offered against him at trial.” Id.

However, **Fla. Stat. § 316.1932(1)(a)** requires that “such person shall be told that his failure to submit to any lawful test of his breath or urine, or both, will result in the suspension of his privilege to operate a motor vehicle.”

In dicta, the Third District Court of Appeal has interpreted the language of **§ 316.1932(1)(a)** to make refusals admissible “only when the person has first been told that his failure to submit to either or both tests ‘will result in the suspension of his privilege to operate a motor vehicle.’” **Herring v. State**, 501 So.2d 19, 21 n. 2 (Fla. 3d DCA 1986). See also **State v. Young**, 483 So.2d 31, 34 (Fla. 5th DCA 1985) (the old Implied Consent statute, defendant must be told that his failure to submit to such test will result in suspension of his driver license). See also **Menna v. State**, 846 So.2d 502 (Fla. 2003).

Certainly, to validate a refusal suspension at an administrative hearing, the State must introduce evidence that an officer read Implied Consent to the defendant prior to his refusal. However, in a criminal trial, as long as the defendant has some substantial motivation to take the test (using **Herring**) or ample incentive to take the test (using **State v. Taylor**, 648 So.2d 701 (Fla. 1995)) and the defendant is not led to believe that the refusal is a safe harbor, free of adverse consequences, the State should be permitted to introduce refusals even if the officers fails to read the implied consent law to the defendant.

**Menna v. State**, 846 So.2d 502 (Fla. 2003)—The detectives did not tell the defendant that her refusal to take the test could be used in court nor did they tell her that it would not be used in court. The detectives did not tell the defendant that she was required to take the test. The defendant attempted to contact her attorney but was unsuccessful. A detective testified that shortly after this conversation, the defendant refused to take the test, and visited the bathroom several times and came out drying her hands, apparently having washed them. The Court subsequently held that evidence of Defendant’s refusal to take the test was admissible at trial. Therefore, it seems that there exist a conflict between the 3<sup>rd</sup> DCA and the 5<sup>th</sup> DCA regarding the admissibility of a defendant’s refusal with mention of the consequence for such a refusal.

#### 6. Intoxilyzer Reliability

**Mahoney v. State**, 4 FLW Supp. 624 (11th Judicial Cir. Ct. 1997)—Defendant not permitted to question breath testing specialist on the reliability of the Intoxilyzer when the defendant refused the test. **NOTE**—Because of the binding nature of **Mahoney** do not allow defense counsel to argue **State v. Kilpatrick**, 4 FLW Supp. 176 (Palm Beach Cty. Ct. 1996), where court ruled that the State must prove the instrument was operational before the refusal is admitted.

**State v. Kline**, 764 So.2d 716 (5<sup>th</sup> DCA, June, 2000)—Stands for the proposition that reliability of breath or blood testing instrument is irrelevant to whether a refusal is admissible in evidence.

#### 7. Failing the Test

**Wood v. State**, 2 FLW Weekly Supp. 140 (15th Cir. Ct. 1994)—Breath technician does not have to inform the defendant of what will happen if defendant fails the test. See also, **State v. Selka**, 1 FLW Supp. 119 (Palm Beach Cty. Ct. 1994).

#### 8. Defendant’s Requests for a Particular Test



**DHSMV v. Green, 22 FLW D2678I (Fla. 2nd DCA 1997)**—It is proper for an Officer to “refuse” a Defendant where the Defendant refuses to take a particular test in favor of another. “it is the Officer who requests the test, not the driver who selects it.” **Id.**

**9. Opportunity to Challenge**

**State v. Powers, 3 Fla. Supp. 751 (Palm Beach Cty. Ct. 1996)**—Breath technician does not have to inform the defendant of the right to challenge the suspension in an administrative hearing. **See also, Chira v. State, 2 Fla. Supp. 2 (Orange Cty. Ct. 1993).**

**10. Admissibility of Pre-Miranda Statements connected with Refusal**

**“I refuse unless I have my lawyer present.”** Statement held admissible because defendant was not exercising a protected right at time he requested a lawyer. **State v. Colon, 23 Fla. Supp. 2d 65 (Palm Beach Cty. Ct. 1987).** However, since this is a County Court case, do not introduce the part of the statement requesting an attorney.

**“I refuse “because a Judge told me never to submit to anything.”** Statement admissible because defendant’s remark was not made in response to police questioning. **State v. Enos, 3 FLW Supp. 241 (Fla. Hillsborough Cty. Ct. 1995).** However, the court noted that under **South Dakota v. Neville**, the issue as to the admissibility of the words in expressing that refusal is left open.

**11. Defendant has no right to counsel when he or she is offered a breath test**

**DHSMV v. Farr, 757 So.2d 550 (Fla. 5<sup>th</sup> DCA April, 2000)**—Denial of access to a telephone to speak to an attorney by law enforcement has nothing to do with a suspension of a driver’s license under the implied consent statute. Under Florida law, a person has no right to counsel in advance of deciding whether to submit to a blood test (or breath test). **See also, State v. Burns, 661 So.2d 842 (Fla. 5<sup>th</sup> DCA 1995).**

**C. CONSTRUCTIVE REFUSALS**

If a defendant agrees to take a breath, blood, or urine test, but refuses to conduct himself in a manner that would permit an objective result, such behavior is tantamount to a refusal.

**Pivacco v. State, 46 Fla. Supp. 2d 44 (Fla. 11th Cir. Ct. App. 1991)**—A breath technician asked the defendant for a breath sample. The defendant refused, and later, having agreed to the test, “did not act in good faith nor was she fully cooperative in connection with the administration of the test.” Accordingly, the examining officer determined that the defendant “refused” the test. The State obtained an order suspending the driving privileges of the defendant and the defendant appealed. On appeal, the Eleventh Circuit affirmed the decision of the trial court and ruled that “one cannot say ‘yes’ and do ‘no’.”

**Langelier v. Coleman, 861 F. 2d 1508 (Fed. 11th Cir. 1988)**—A breath technician counted the defendant’s unwillingness to undergo a blood alcohol test before speaking with an attorney as a refusal. The U.S. Court of Appeal held that a motorist suspected of DUI has no due process, First Amendment, or privacy right to counsel before deciding whether to submit to blood alcohol tests. The court further ruled that the State’s characterization of the defendant’s request for counsel as a constructive refusal under the Florida implied consent law did not violate due process. **Accord State v. Colon, 23 Fla. Supp. 2d 65 (Palm Beach Cty. Ct. 1987).**

#### D. REFUSAL RESCISSION—ADMINISTRATIVE SUSPENSIONS

**Larmer v. DHSMV, 522 So.2d 941, 944 (Fla. 4th DCA 1988)**—If a person arrested for DUI first refuses to submit to a breath test, but later changes his mind and requests a chemical test, the subsequent consent cures the prior first refusal as long as:

- a. The request is made within a **reasonable period** of time after the first refusal
- b. while the person was **continuously in the presence** of the officers, **and**
- c. under “circumstances where **no inconvenience** would result by permitting him **immediately** thereafter to take the test that would **produce evidence** that is the object and intent of Florida’s Implied Consent Law.”

**Accord Mitchell v. State, 34 Fla. Supp. 2d 65 (Fla. 11th Cir. 1989).**

**DHSMV v. Satter, 643 So.2d 692 (Fla. 5th DCA 1994)**—Motorist’s attempted rescission of her initial refusal was equivocal. Thus, license was properly suspended for refusal.

#### E. REFUSAL RESCISSION -- TRIAL CASES

The **Larmer** and **Mitchell** holdings are inapplicable to the criminal trial. At the administrative hearing, the hearing officer must determine whether the defendant in fact refused to submit to a test. **See Fla. Stat. § 322.2615(7)(b)(3)**. In a criminal trial, the refusal is merely circumstantial evidence probative of consciousness of guilt which is admissible on the basis of relevance. The trier of fact should determine the weight that should be given a refusal followed by a rescission. Any pre-trial motion regarding the suppression of a refusal due to a rescission should be determined under **Fla. Stat. § 90.401 and § 90.403**.

#### F. TRIAL STRATEGY - REFUSAL CASES

##### 1. Move to exclude reinstatement and do not open the door to its admission

When a motorist refuses a breath test, a law enforcement officer acts on behalf of the department and suspends the person’s license for 1 year or 18 months. **Fla. Stat. § 322.2615(1)(a)**. The motorist can request an administrative review of the suspension by DHSMV. **Fla. Stat. § 322.2615(3)**. After the review, the department can sustain, amend or invalidate the suspension. **Fla. Stat. § 322.2615(7)**.

Often DUI defendants will have their refusal suspension invalidated or their license will be reinstated for business purposes. However, **Fla. Stat. § 322.2615(14)** states that “the decision of the department under this section shall not be considered in any trial for a violation of **Fla. Stat. § 316.193**.” Even without this statute, the results of an administrative hearing would have no relevance to the criminal DUI case. The DUI trial should not be side tracked on the tangential issue of why the department may have reinstated the defendant’s driver license.

The only way such evidence might be admissible is if the State opens the door to such testimony. Therefore, **do not** make the following arguments:

- a. The defendant lost his license for one year because he refused.
- b. The defendant had to go one year without driving due to his refusal.

The following arguments **do not open the door** to the administrative hearings:

- a. When faced with the decision of whether or not to blow into the Intoxilyzer, the **defendant was told** that he would lose his license for a year.
- b. Upon his refusal, the defendant **faced the possibility** of losing his license for one year.

## 2. Admit the Implied Consent Form

In a refusal case, defense attorney's often ask the jury to return a verdict of not guilty because of a lack of evidence. For this reason, the implied consent form should be admitted into evidence, as a business record, so that the jury sees exactly what the defendant was told before he refused the breath test.

The defendant was specifically told that his refusal shall be admissible into evidence in any criminal proceeding.

The defendant was specifically told that he was being offered a breath test for determining the alcohol content of his breath.

## 3. Consider whether the breath card indicating a refusal should be Admitted

Some prosecutors believe that admitting the breath card in a refusal case is needless presentation of redundant evidence. Other prosecutors find that the jury is fascinated by the breath card. If you do admit the card, make sure you make use of it (e.g., explain to the jury in closing how the defendant's BrAL would be printed on the card had he not refused.) The breath card should come into evidence as a business record.

## 4. Consider putting in some testimony regarding the Intoxilyzer

Despite Sauer, 2 FLW Supp. 185a (Fla. 11th Cir. Ct. 1994), consider eliciting some testimony from your breath technician about the basic workings of the Intoxilyzer (i.e., a subject has to blow into it for a short period of time and the instrument prints out the subject's BrAL. The instrument is accurate and reliable because it is tested on a monthly basis by the department and on an annual basis by FDLE). Remember, the average juror will have no idea what an Intoxilyzer is unless he or she has been arrested for DUI.

## 5. Closing Argument Suggestions

- If this defendant felt that he was not impaired, all he had to do was take the test when the officer said, "Here, take this and blow into it." And in one breath, he could have blown the State's case to shreds. On the contrary, he was told he had a lot to lose by not taking the test, and he still chose not to take it.
- Whenever someone accepts the privilege to drive in the State of Florida, that person signs a line on their driver license agreeing to take a breath test when arrested for DUI, and this defendant ignored that promise.

- The Intoxilyzer is specifically approved by FDLE for determining if a suspect is DUI.
- Ask the following theoretical question: “Why didn’t the defendant take the breath test? If the defendant was not impaired, why didn’t he take the breath test?”
- This type of argument is permissible. **See State v. Wilson, 596 So.2d 775, 778 n. 2 (Fla. 1st DCA 1992).**
- The jurors should use their common sense to determine why the defendant really refused.
- Argue specifically "Consciousness of Guilt" -- Defendant knew that if he'd blow, he would be over the legal limit.
- Why didn’t the defendant take the breath test? The defendant knew he was impaired, he just didn’t want you to know it.
- A refusal to submit to the breath test carries two important pieces of information:
  - a. the defendant was told his refusal would be admissible in court. He was told that you, the jury would hear about his refusal to take the breath test. I could stand up hear and talk about the defendant’s refusal all day – the defendant knew it, yet he still refused. Why? Because he knew he was impaired.
  - b. Second, the defendant was told if he refused, his license would be suspended for at least 1 year. Why did he refuse, knowing both of these important things, because he knew he was impaired, he just didn’t want you to know about it.

## 6. No Jury Instruction

**Diaz v. State 4 FLW Supp. 71 (Fla. 11th Jud. Cir. 1996)**—Appellate court determined that a special jury instruction emphasizing defendant's refusal to submit to a breath test constituted **reversible error**.

## **XI. INDEPENDENT BLOOD TEST**

### **A. DEFENDANTS DO NOT HAVE A RIGHT TO CHOOSE TYPE OF TEST**

A suspect may not choose between breath and blood tests when police ask for a sample. It is the law enforcement officer who requests the test, not the driver who selects it. Thus, even if the suspect was willing to undergo an independent blood test, he is still subject to the suspension for refusing a breath test offered by a law enforcement officer. **DHSMV v. Green, 702 So.2d 584 (Fla. 2nd DCA 1997).**

### **B. DEFENDANT MUST FIRST SUBMIT TO TEST AT DIRECTION OF THE LAW ENFORCEMENT OFFICER**

- A defendant may, at his or her own expense, have a person of his or her own choosing administer an independent test **after the defendant has submitted to a blood, breath, or urine test at the direction of the law enforcement officer.** The failure or inability to obtain an independent test does not preclude the admissibility in evidence of the State's test. **Fla. Stat. § 316.1932(1)(f)(3).**
- **See State v. Cobian, 4 FLW Supp. 740 (Dade Cty. Ct. 1997)** ("A review of the statutory language in sec. § 316.1932(1)(f)(3) contemplated that the right to an independent test is conditioned upon the defendant having submitted to the test taken at the direction of the law enforcement officer."); **State v. Swanson, 5 FLW Supp. 278 (Fla. Palm Beach Cty. Ct. 1997)** (law enforcement officials are under no obligation to take any type of action to assist a person in custody . . . until and unless the person in custody has already submitted him or herself "to the test administered at the direction of the law enforcement officer"); **Smallridge v. State, 904 So.2d 601 (Fla. 1<sup>st</sup> DCA 2005)**
- The independent blood test is meant to be administered **in addition to** a blood, breath, or urine test administered at the request of a law enforcement officer so that the suspect is able to verify or dispute the results of the law enforcement officer's test. The independent test is not meant as a substitute for a blood, breath, or urine test administered at the request of a law enforcement officer. **State v. Coviello, 4 FLW Supp. 186 (Palm Beach Cty. Ct. 1996).**

### **C. LAW ENFORCEMENT OFFICER'S DUTY TO ASSIST WITH INDEPENDENT TEST**

- The Legislature amended the statute, effective July 1, 1996, to add the following: "The law enforcement officer shall not interfere with a person's opportunity to obtain the independent test and shall provide the person with timely telephone access to secure the test, but the burden is on the person to arrange and secure the test at the person's own expense."
- This amendment was passed as a "clean up" bill in response to the Florida Supreme Court's ruling in **Unruh v. State, 669 So.2d 242 (Fla. 1996)**, which held that the State is required to take affirmative action to assist a person in obtaining an independent test. The Court had held that the Legislature intended law enforcement to provide reasonable assistance, the sufficiency of which would depend on the circumstances of each case.

- Thus, the Legislature was clarifying its true intent to require law enforcement merely to provide the defendant with a telephone and telephone book and to allow the person drawing the blood access to the defendant. See also State v. Cobian supra. Nevertheless, it is still advisable to encourage officers to assist defendants whenever possible to establish the appearance of fairness.

#### **D. LEO HAS NO DUTY TO INFORM DEFENDANT OF RIGHT**

- The law enforcement officer has no obligation to inform a defendant of the right to an independent test. See State v. Coviello, 4 FLW Supp. 186 (Palm Beach Cty. Ct. 1996); State v. Sheeran, 2 FLW Supp. 139 (Palm Beach Cty. Ct. 1994).
- **Note:** The right to an independent test is referenced in the Implied Consent form that is used in this jurisdiction, so many times Defendants are apprised of this right.
- Consequently, the admissibility of a defendant's refusal to submit to a blood, breath, or urine test administered at the request of a law enforcement officer is not effected by the officer's failure to inform the defendant of his/ her right to an independent test. State v. Swanson, 5 FLW Supp. 278 (Palm Beach Cty. Ct. 1997); State v. Cobian, 4 FLW Supp. 740 (Dade Cty. Ct. 1997); State v. Carrol, 2 FLW Supp. 139 (Osceola Cty. Ct., 1993).

#### **E. MISINFORMATION GIVEN BY LEO REGARDING INDEPENDENT TEST**

- State v. Bock, 659 So.2d 1196 (Fla. 3d DCA 1995)—Defendant's due process rights were not violated by police officer who, acting in good faith, gave defendant erroneous information that caused him to forego the independent blood test he had requested. **The test to be applied is whether or not the police officer acted in bad faith.**
- **Practice Pointer:** The defendant must request the independent test through the law enforcement officer who took the blood or urine specimen or who administered the breath test. The amended statute which describes the law enforcement officer's duty to assist specifies "[t]he law enforcement officer" who directs the administration of the State's test. Corrections has no duty to provide an independent test. The Legislature did not include "correctional officer" within this statute as it does in other statutes. See, for example Fla. Stat. § 322.2615, which directs a "law enforcement officer or correctional officer" to take the driver's license of a person who refuses to submit to a breath, blood or urine test or who is DUBAL. **Thus, Corrections has no duty to provide an independent test.**

## **XII. "GONE BUT NOT FORGOTTEN"—DEFENSE ATTACKS ON BREATH TESTS WHICH HAVE BEEN RENDERED MOOT BY CASE LAW AND/OR LEGISLATION**

### **Source Code” & State v. Muldowny**

Recently defense lawyers around the State of Florida have filed Motions to Compel the State to Produce the “Source Code” based on the reasoning outlined within State v. Muldowny and the “full information” language expressed within F.S. §316.1932(1)(f)(4). The source code is the human readable (documentary) form of the computer software within the Intoxilyzer. The source code is not in the possession of the State of Florida. It is a trade secret of CMI, Inc., the manufacturer of the 5000R and 8000 Series Intoxilyzer instruments. As of the date of this printing, all of the County Court Judges in Miami-Dade County have denied such motions. Most County Court Judges denied the motions finding that the defense was unable to establish “materiality” or “reasonable necessity” for production of the source code. See FRCP 3.220 & §F.S. 90.506 (trade secret statute). However, all judges made a determination that the State could not be compelled to turn over that which it does not have in its actual or constructive possession. FRCP 3.220(b)(1) and State v. Miranda, 777 So.2d 1173 (Fla. 3d DCA 2001). In this context, the source code in its documentary form was not in the possession of the State of Florida.

After extensive en masse proceedings in March and April of 2006 it is clear that many of the same arguments made by the defense in the 5000R Series context can easily be transferred to the newer 8000 Series instruments. The 5000R Motion to Compel the State to produce the “Source Code” has been brought throughout the State, with mixed results. The “Source Code” motion is referred to in this section for one simple reason: It is not a motion that can be dealt with unless substantial preparation is made. Therefore, if you receive the motion, orally in court, hand-delivered in court, or in the mail you are to deliver a copy to a DUI Assistant Chief with a copy of the front of the file to which it belongs. The following key words will be used in the motion or in related motions:

- ”Source Code” and/or “Program Software”
- “Lack of FDLE approval”
- Muldowny
- Due Process and “Source Code”
- F.S. §942.03 Motion for Certification
- Motion for Rule to Show Cause , FRCP 3.220, and Subpoena Duces Tecum for Production of the “Source Code”
- Motion for Rule to Show Cause on a State Witness (CMI Inc.) For Failure to Produce “Source Code”, FRCP 3.361

## **DRUG RECOGNITION EVALUATION**

### **I. THE DRUG EVALUATION AND CLASSIFICATION (DEC) PROGRAM**

The DEC program enables police officers who are certified as **Drug Recognition Experts (DREs)** to determine whether or not a subject is under the influence of alcohol and/or drugs. If a subject appears to be under the influence of drugs, DREs determine what category of drugs, by combining medical knowledge about drug pharmacokinetics with validated psychomotor tests. The drug evaluation and classification process is standardized and systematic. There are three principle components in a drugged driving prosecution:

- 1) **Drug Recognition Evaluator (DRE)** - Through a 12-step process evaluates the defendant, documents the evidence of impairment and collects the urine specimen;
- 2) **Laboratory Analysis** - Lab report confirms that defendant's body was exposed to drug(s) in the recent past; and
- 3) **Toxicological Corroboration** - Toxicologist provides expert testimony which corroborates the DRE's opinion. The toxicologist can testify as to whether or not the observations of the stop officer and the DRE are consistent with the symptomology of the drug(s) found in the urine.

#### **A. Circumstantial Evidence**

The defendant's admissions to recent drug use, and/or drugs or paraphernalia found in the car may be introduced as circumstantial evidence of recent drug use.

**State v. Lutton**, 2 FLW Supp. 572 (Palm Beach Cty. Ct. 1994): Evidence that the defendant possessed unsmoked marijuana shows that the defendant had access to the drug and is relevant in DUI trial.

**Pama v. State**, 552 So.2d 309 (2nd DCA 1989): Marijuana does not have to be tested. Testimony by LEO that drug seized is marijuana is admissible without laboratory confirmation if predicate laid that LEO has sufficient training and/or experience to identify marijuana. See also, **AA v. State**, 461 So.2d 165 (3rd DCA 1984).

**State v. Hutchins**, 636 So.2d 552 (Fla. 2d DCA 1994): Where defendant, who was intoxicated and incoherent, was taken into protective custody, and pill bottle was taken from defendant's pocket while defendant was in ambulance in order to determine what drugs defendant had taken, search was reasonable in view of potentially life threatening situations.

#### **B. Severance of Drug Charge & DUI**

If a judge attempts to sever a possession of marijuana charge or exclude mention of drugs found on the defendant in a case where drugs are likely a significant source of the impairment—object—and request that the court apply a Rule 403(b) balancing analysis.

**Gonzales v. State**, 9 So.3d 725 (4th DCA 2009)

No error to deny severance of DUI and cocaine possession where cocaine was circumstantial evidence that he was under the influence of cocaine.

*But see* The State's theory was that defendant was impaired by his use of Xanax. It was error to introduce evidence that he possessed marijuana and that there was marijuana in his system, as there was no evidence that the marijuana contributed to his impairment. Defendant was entitled to a new trial. **Estrich v. State**, 995 So.2d 613 (Fla. 4th DCA 2008).

### **II. THE 12-STEP D.R.E. PROTOCOL**



## **A. THE 12 STEP PROCESS**

### **1. BREATH ALCOHOL TEST**

An officer administers a breath test to the suspect for the purpose of determining the suspect's breath alcohol level (BrAL). Based on the suspect's BrAL, the DRE can determine whether alcohol may be a contributing cause or the sole cause of the suspect's observable impairment.

### **2. INTERVIEW OF THE ARRESTING OFFICER**

The DRE discusses the circumstances of the arrest with the arresting officer(s). The DRE asks the arresting officer(s) about the suspect's behavior, appearance, and driving pattern. The arresting officer(s) is also asked if the suspect made any statements and whether the arresting officer(s) found any other relevant evidence that narcotics were involved. Relevant evidence includes, but is not limited to, a small pipe, baggie, or any other drug paraphernalia.

### **3. PRELIMINARY EXAMINATION AND FIRST PULSE**

The DRE asks the suspect a series of standard questions relating to the suspect's health and recent ingestion of food, alcohol and drugs. The DRE makes observations regarding the suspect's attitude, coordination, speech, breath and face. The officer determines whether the suspect's pupils are equal in size and whether the suspect's eyes can track equally and follow a moving stimulus. The DRE also looks for HGN and takes the suspect's pulse for the first of three times. A major purpose of the preliminary examination is to determine whether the suspect may be suffering from an injury or other condition unrelated to drugs. If the DRE believes that this is a possibility, he must seek medical help immediately. This is called a "medical rule out." If the DRE believes that the suspect's condition is drug-related, he continues with the evaluation.

#### Normal Ranges

Pulse Rate	60 to 90 Pulsations per minute
Blood Pressure	Systolic 120 to 140 & Diastolic 70 to 90
Temperature	98.6 plus or minus 1 degree Fahrenheit

### **4. EYE EXAMINATION**

The DRE examines the suspect for HGN, VGN (Vertical Gaze Nystagmus) and a lack of convergence (LOC). Alcohol, as well as Depressants, Inhalants, and PCP --the so-called DIP drugs-- may cause HGN. The DIP drugs also cause VGN, which is the bouncing of the eye upon following a stimulus vertically. The DIP drugs, as well as Cannabis, may also cause a lack of convergence. A suspect lacks convergence if his eyes are unable to converge toward the bridge of his nose.

#### Pupil Size

Normal:	3.0 to 6.5 mm
Constricted:	below 3.0 mm
Dilated:	6.5 mm and above.

## **5. DIVIDED ATTENTION PSYCHOPHYSICAL EXERCISES**

The DRE administers four psychophysical tests.

- Romberg Balance—Valid
- Walk and Turn—Validated
- One Leg Stand—Validated
- Finger to Nose—Valid

The DRE can accurately determine whether a suspect is impaired by administering these tests. Often the DRE will see a marked difference in behavior on these exercises from the set originally administered at roadside if the defendant is coming off the drug.

## **6. VITAL SIGNS AND SECOND PULSE**

The DRE takes the suspect's blood pressure, temperature and pulse. Some drug categories may elevate the vital signs. Others may lower them. Vital signs thus provide valuable evidence of the presence and influence of a variety of drugs.

## **7. DARK ROOM EXAMINATIONS**

The DRE measures the suspect's pupil sizes under four different lighting conditions to determine whether the suspect's pupils are dilated, constricted, or normal. Some drugs increase pupil size. Others may decrease pupil size. The DRE also checks for the eyes' reaction to light. Certain drugs may slow the eyes' reaction to light. Finally, the DRE examines the suspect's nasal and oral cavities for signs of ingestion.

## **8. EXAMINATION FOR MUSCLE TONE**

The DRE examines the suspect's muscle tone. Certain categories of drugs may cause the muscles to become rigid. Other categories may cause the muscles to become very loose and flaccid.

## **9. CHECK FOR INJECTION SITES AND THIRD PULSE**

The DRE examines the suspect for injection sites. Injection sites may indicate the recent use of certain drugs. The DRE also takes the suspect's pulse for the third and final time.

## **10. SUSPECT'S STATEMENTS AND OTHER OBSERVATIONS**

The DRE reads Miranda, if he has not done so previously, and asks the suspect a series of questions. **OMIT THIS STEP IN ANY DIRECT WHERE THE DEFENDANT INVOKES.**

## **11. OPINIONS OF THE EVALUATOR**

Based on the totality of the evaluation, the DRE forms an opinion as to whether the suspect is impaired. If the DRE determines that the suspect is impaired, the DRE indicates what category or categories of drugs may have contributed to the suspect's impairment. DRE's are trained to classify drugs in one of seven categories according to shared symptomatology or effects. Drugs from each of the seven categories can affect a person's central nervous system and impair a person's normal faculties. See – Florida Drug Category Symptomology Chart.

- a. Central Nervous System (CNS) Depressants e.g.,
- b. Central Nervous System Stimulants
- c. Hallucinogens
- d. Phencyclidine (PCP) and its Analogs
- e. Narcotic Analgesics

- f. Inhalants
- g. Cannabinoids

Bear in mind that there is a great deal of difference among individual human beings and their reactions to drugs. The effects listed below are what is expected to be observed, but no one can guarantee that there will always be precisely the following responses.

## 12. TOXICOLOGICAL EXAMINATION

The DRE requests a urine sample from the suspect. The sample is sent to the toxicology lab for analysis.

### B. PREREQUISITES FOR URINE TESTING PURSUANT TO FLA. STAT. §316.1932

Pursuant to 316.1932, a urine sample shall be:

- a) Incidental to a **lawful arrest**;
- b) administered at a **detention facility** or any other facility, mobile or otherwise, which is equipped to administer such tests;
- c) at the **request of a law enforcement officer**;
- d) who has **reasonable cause** to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of controlled substances;
- e) the urine test shall be administered ... in a **reasonable manner** that will ensure the accuracy of the specimen and maintain the privacy of the individual involved.

Florida's Implied Consent law contains several provisions to ensure the accuracy and reliability of blood, breath and urine testing. **See State v. Slaney**, 653 So. 2d 422 (Fla. 3d DCA 1995).

#### 1. Lawful Arrest

Fla. Stat. §316.1932(1)(a)(1) sets forth Florida's Implied Consent Law. This section requires that the "chemical or physical breath test be **incidental to a lawful arrest**...."

Fla. Stat. § 316.1932(1)(a)(1) is the only provision that addresses urine testing methods and procedures. The statute provides, "The urine test shall be administered at a detention facility or any other facility, mobile or otherwise, which is equipped to administer such tests in a reasonable manner that will ensure the accuracy of the specimen and maintain the privacy of the individual." **NOTE:** The Legislature did not specifically or implicitly delegate any authority to FDLE to adopt rules governing urine testing. Further, the Legislature did not enact any "substantial compliance" provisions.

#### 2. Refusal of Urine Test

Fla. Stat. § 316.1932(1)(a) states that "the refusal to submit to ... a urine test upon the request of a law enforcement officer as provided in this section shall be admissible in evidence in any criminal proceeding." In addition, the defendant's license will be suspended for one (1) year for a first refusal or eighteen (18) months for a second or subsequent refusal.

### 3. Laboratory Analysis

The urine analysis results cannot produce “per se” proof of drug impairment. Urine has historical value only. A lab report reveals that the subject was exposed to a drug or drugs in the recent past which can be hours, days, or weeks, depending on the drug.

The quantitative amount in the urine does not indicate impairment, nor does it reliably indicate recency or dosage of the drug ingestion. Some drugs (including LSD, PCP, Inhalants, and some narcotic analgesics) are difficult or impossible to detect in a person’s urine. In addition, it is possible that at the point that a motorist is most impaired by a drug, the drug may not be present in the person’s urine especially if it is a drug with a fast onset of effects. Toxicology results, however, can corroborate the DRE’s opinion by confirming the presence of a particular drug that is consistent with the opinion.

## III. ADMISSIBILITY OF THE LAB ANALYSIS REPORT

### A. CONTENTS OF THE LAB REPORT

#### 1. Screening and Confirmatory Tests

The laboratory analysis report of urine specimens consists of: (1) a screening test, and (2) a confirmatory test. All specimens that test **presumptively positive** during the screening test are then analyzed using **gas chromatography/mass spectrometry**. It is considered preferable in the scientific community to have different analysts perform the two tests to promote accuracy.

#### 2. Common Drugs

The following is a list of commonly known drugs and their scientific names by which they will be listed on the lab report:

CP	=	Phencyclidine
Valium	=	Diazepam
Ruphenol	=	Zamino – Flunitrazepam
Xanax	=	Hydroxyzolam (alprazolam is a metabolite)
Marijuana	=	Carboxy (THC is a metabolite)
Cocaine	=	Cocaine
Narcotic Analgesic	=	Morphine; Codeine; Hydromorphone; Hydrocodone; Oxycodone

#### 3. D.R.E. Glossary

- **Additive Effect**—One mechanism of polydrug interaction. For a particular indicator of impairment, two drugs produce an additive effect if they both affect the indicator in the same way. For example, cocaine elevates pulse rate and PCP also elevates pulse rate. The combination of cocaine and PCP produces an additive effect on pulse rate.
- **Analgesic**—A remedy that relieves or allays pain.
- **Antagonistic Effect**—One mechanism of polydrug interaction. For a particular indicator of impairment, two drugs produced an antagonistic effect if they affect the indicator in opposite ways. For example, heroin constricts pupils while cocaine

dilates pupils. The combination of heroin and cocaine produces an antagonistic effect on pupil size. Depending on how much of each drug was taken, and on when they were taken, the suspect's pupils could be constricted, or dilated, or within the normal range of size.

- **Blood Pressure**—The force exerted by blood on the walls of the arteries. Blood pressure changes continuously, as the heart cycles between contraction and expansion
- **Bruxism**—Grinding the teeth. This behavior is often seen in persons who are under the influence of cocaine or other CNS stimulants.
- **Conjunctivitis**—An inflammation of the mucous membrane that lines the inner surface of the eyelids. Persons suffering from conjunctivitis have “pink eyes”, a condition that could be mistaken for the bloodshot eyes produced by alcohol or Cannabis.
- **Crack**—A hard chunk form of cocaine that produces a very intense, but relatively short-duration “high”. Crack is also known as rock cocaine.
- **Cyclic Behavior**—A manifestation of impairment due to certain drugs, in which the suspect alternates between periods (or cycles) of intense agitation and relative calm. Cyclic behavior, for example, sometimes will be observed in persons under the influence of PCP.
- **Diastolic**—The lowest value of blood pressure. The blood pressure reaches its diastolic value when the heart is fully expanded.
- **Hashish**—A form of cannabis produced by boiling, compressing and drying the leaves of the female marijuana plant. Hashish has a higher concentration of THC (tetrahydrocannabinol) than does the marijuana from which it is produced.
- **Hippus**—A rhythmic pulsating of the pupils of the eyes, as they dilate and constrict within fixed limits. This condition is sometimes reported in persons suffering from withdrawal from narcotic analgesics.
- **Homeostasis**—The dynamic balance, or steady state, involving levels of salts, water, sugars, and other materials in the body's fluids. The body under the influence of a drug will fight to return to or maintain homeostasis by reacting to and correcting the drug's effect on the body.
- **Horizontal Gaze Nystagmus**—A side-to-side jerking of the eyeball that occurs as the eye is turned toward the side by following a stimulus.
- **Hypertension**—Abnormally high blood pressure. Do not confuse this with hypotension.
- **Hypotension**—Abnormally low blood pressure. Do not confuse this with hypertension.

- **Ice**—A crystalline form of methamphetamine that produces a very intense and fairly long-lasting “high”.
- **Lack of Convergence**—Is the inability of a person’s eyes to converge or “cross” as the person attempts to focus on a stimulus as it is pushed slowly toward the bridge of his or her nose. Approximately 40% of the population have naturally occurring lack of convergence.
- **Metabolite**—A chemical break-down product, formed by the reaction of a drug with oxygen and/or other substances in the body
- **Miosis**—Abnormally constricted pupils.
- **Mydriasis**—Abnormally dilated pupils.
- **Negative Feedback (addiction)**—A body so accustomed to a drug that it will stop giving neurotransmitters to the brain to provide feelings of well-being; the body becomes dependent on the drug supply
- **“On the Nod”**—A state of deep relaxation, induced by impairment due to heroin or other narcotic analgesic. The suspect’s eyelids droop, and chin rests on the chest. Suspect may appear to be asleep, but can be easily aroused and will respond to questions.
- **Overlapping Effect**—One mechanism of poly drug interaction. For a particular indicator of impairment, two drugs produce an overlapping effect if one of them affects the indicator but the other doesn’t. For example, cocaine dilates pupils while alcohol doesn’t affect pupil size. The combination of cocaine and alcohol produces an overlapping effect on pupil size: the combination will cause the pupils to dilate.
- **Piloerection**—Literally, “hair standing up”, or goosebumps. This condition of the skin is often observed in persons who are under the influence of LSD.
- **Psychophysical Tests**—Methods of investigating the mental (psycho-) and physical characteristics of a persons suspected of alcohol or drug impairment. Most psychophysical tests employ the concept of divided attention to assess a suspect’s impairment.
- **Ptosis**—Droopy eyelids.
- **Pulse**—The expansion and relaxation of the walls of an artery, caused by the surging flow of blood.
- **Pulse Rate**—The number of expansions of an artery per minute.
- **Rebound Dilation**—A phenomenon that reportedly is sometimes observed when direct light is shined into the eye. The pupil may be seen to pulsate in size, growing steadily larger on the expansion fluctuations. Typically seen in someone under the influence of marijuana.

- **Sclera**—A dense white fibrous membrane that, with the cornea, forms the external covering of the eyeball (i.e., the white part of the eye). Under the influence of cannabis, the sclera often becomes red or pink in color.
- **Sphygmomanometer**—A medical instrument used to apply measured amounts of external pressure to an artery.
- **Stethoscope**—A medical instrument used, for drug evaluation and classification purposes, to listen to the sounds produced by blood passing through an artery.
- **Synesthesia**—A sensory perception disorder, in which an input via one sense is perceived by the brain as an input via another sense. Example—Each time a person hears a telephone ring, he or she “sees” a flash of blue light. Synesthesia sometimes occurs with persons under the influence of hallucinogens.
- **Systolic**—The highest value of blood pressure. The blood pressure reaches its systolic value when the heart is fully contracted, and blood is sent surging into the arteries.
- **THC (Tetrahydrocannabinol)**—The principal psychoactive ingredient in drugs belonging to the cannabis category.
- **Tolerance**—An adjustment of the drug user’s body and brain to the repeated presence of the drug. As tolerance develops, the user will experience diminishing psychoactive effects from the same dose of the drug. As a result, the user typically will steadily increase the dose he or she takes, in an effort to achieve the same psychoactive effect.
- **Tracks**—Scar tissue usually produced by repeated injection of drugs, via hypodermic needle, along a segment of vein.
- **Vertical Nystagmus**—An up-and-down jerking of the eyeball that occurs as the eyes are elevated.
- **Withdrawal**—This occurs in someone who is physically addicted to a drug when he or she is deprived of the drug. If the craving is sufficiently intense, the person may become extremely agitated, and even physically ill. Withdrawal from heroin is reported to be an especially unpleasant experience.

#### **B. CHAIN OF CUSTODY**

This process creates the potential for a chain of custody issue because more than one technician may be handling the specimen in an unsealed state. Florida does not require an absolute chain of custody to be introduced at trial. One toxicologist should be able to testify to the results of a test conducted by another toxicologist.

**Chloe v. State**, 613 So.2d 70 (Fla. 4th DCA 1993): Lab supervisor’s inability to specify with certainty which laboratory technician had performed test of blood for presence of cocaine did not affect admissibility of cocaine test where witnesses’ testimony established that test was properly administered, and defendant was given sufficient opportunity to question test results. NOTE—Chloe provides authority for the technical director of the lab to testify as to the analysis performed by another toxicologist or chemist under his supervision as long as the name of the analyst was provided in discovery.

**Peek v. State**, 395 So.2d 492 (Fla. 1980) (superseded by statute on other grounds, as noted in *Merck v. State*, 763 So.2d 295 (Fla. 2000)—Evidence is admissible without showing the full chain of custody absent defendant showing probable tampering.

**Bush v. State**, 543 So.2d 283 (Fla. 2d DCA 1983): Evidence is admissible without showing the full chain of custody even where a break in the chain leaves a period of unaccountability.

**Dodd v. State**, 537 So.2d 626 (Fla. 3d DCA 1988): Contraband weighed 249.5 grams before sealing in plastic bag and marking bag. Chemist testified that cocaine was in plastic bag with no markings on it and weighed 220 grams. Court held that there was evidence of probable tampering such that evidence of full chain of custody, including the person who transported cocaine was needed.

## C. HEARSAY EXCEPTION

### 1. Business Record

The lab report is admissible as a Business Records Exception to the hearsay rule under Fla. Stat. § 90.803(6). **See Davis v. State**, 562 So.2d 431 (Fla. 1st DCA 1990); **Hogan v. State**, 583 So.2d 426 (Fla. 1st DCA 1991); **Russell v. State**, 801 So.2d 999 (Fla. 4<sup>th</sup> DCA 2001).

### 2. Crawford Issue

However, the toxicology report is considered **testimonial evidence** under *Crawford*. Therefore, in addition to the toxicologist expert, the technician who tested the tested the sample must also testify at trial. **State v. Johnson**, 982 So.2d 672 (Fla. 2008). ***See also Melendez-Diaz v. Massachusetts***, 557 U.S. \_\_\_\_ (2009), 129 S.Ct. 2527 (2009), (The admission of the state laboratory analyst's certificates stating that material seized by police and was cocaine violated petitioner's Sixth Amendment right to confront the witnesses against him).

Often, the Defense will argue that **Melendez-Diaz** requires the State to produce the initial screener of the blood or urine. When blood or urine is received by the lab, it is given a preliminary screening by lab analysts. This screening **narrows down** the types of drugs that the lab should test for by flagging what drugs may be present in the sample. **It does not give a final result as to what is present and the State never introduces this initial screening in trial.** The lab engages in this screening process because otherwise testing would become an unmanageably expensive endeavor.

Although there is no case law exactly on point, you should argue that **Melendez-Diaz** does not require the initial screener to be present at trial **State v. Scarboro**, 18 Fla. L. Weekly Supp. 832a (18<sup>th</sup> Cir. 2009) (quoting **State v. Belvin**, 986 So.2d 516 (Fla. 2008) [33 Fla. L. Weekly S279a] (cited favorably by **Melendez-Diaz** “[where] the Florida Supreme Court ruled that the State was required to produce at a DUI trial the live testimony of the person who prepared the breath test affidavit; it recited essentially the same logic as **Melendez-Diaz**, emphasizing that the affidavit was created after the criminal event and at the request of law enforcement for sole purpose of use at the defendant's trial. *State v. Belvin*, 986 So.2d 516, 521 (Fla. 2008). No Florida court has expanded *Belvin* to apply to any other type of evidence beyond affidavits prepared after the fact for the purposes of prosecuting a particular individual. In fact, *State v. Smith*, 28



So. 3d 838 (Fla. 2010) [34 Fla. L. Weekly S681a] specifically declined to expand **Melendez-Diaz** to include everyone involved in the testing process. The Court found that the State did not have to produce at trial the biologists who actually collected DNA for sampling so long as the State produced their supervisor, who oversaw the tests and who could explain and interpret the raw data collected by the biologists. It concluded that the Confrontation Clause does not prohibit the use of raw data at trial, and requires live testimony only from the person responsible for interpretation of the data as it relates specifically to the defendant. Id. at 855”).

#### D. CASE LAW

**State v. McClain**, 525 So.2d 420 (Fla. 1988)—Test for admissibility is a § 90.403 analysis. Defendant had a blood alcohol level of .14 and a trace of cocaine. Court affirmed the exclusion of evidence of cocaine because “the prejudicial impact of such evidence substantially outweighed its relevance.” Court held, however, that it was not necessary for the toxicologist to estimate the degree of impairment caused by the existence of the drugs.

**State v. Tagner**, 673 So.2d 57 (Fla. 4th DCA 1996), rev. denied 677 So.2d 841—Defendant had a blood alcohol level of .10 and a cocaine level of .34 mg/1. The 4th District held it was error to grant motion to suppress blood samples indicating cocaine level on ground that state was unable to show specific measurable effect of cocaine on defendant because the amount of cocaine was not an “unquantifiable” trace amount. The court reversed and remanded to the trial court to determine whether or not the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

**West v. State**, 553 So.2d 254 (4th DCA 1989) (disapproved on other grounds by State v. Norstrom, 613 So.2d 437 (Fla. 1993)—Admission of trace of valium in blood in alcohol based DUI manslaughter prosecution had no probative value or relevance and was unfairly prejudicial, and thus, should have been excluded.

**State v. Weitz**, 500 So.2d 657 (1st DCA 1986) (disapproved on other grounds): Report of urinalysis showing presence of illegal drugs in urine of defendant charged with driving under the influence was admissible in driving under the influence prosecution without being linked quantitatively to impairment. Intoxilyzer results indicated defendant had a breath alcohol level of .017. Urine was taken because the low reading was inconsistent with appellee’s apparent state of impairment and the officer suspected the presence of other drugs. Urinalysis revealed an unquantified amount of methaqualone, cocaine and phenobarbital.

**Hoffman v. State**, 743 So.2d 130 (4<sup>th</sup> DCA 1999): Affirmed defendant’s VOP for DUI where there was no alcohol in defendant’s system, but a urinalysis indicated an unknown amount of 3 prescription drugs. Impairment may be established by describing a person’s demeanor and conduct rather than through the testimony of a toxicologist. Toxicologist does not have to testify as to the amount of drugs in the defendant’s system.

**Devers-Lopez v. State**, 710 So.2d 720 (Fla. 4<sup>th</sup> DCA 1998): State’s expert testified that the chemical traces found in the defendant’s urine would have no effect on her ability to drive. Since the State never charged her with DUI, the urinalysis results were irrelevant and unduly prejudicial.

**Martinez v. State**, 692 So.2d 199 (Fla. 3<sup>rd</sup> DCA 1997): In a vehicular homicide case, admission of evidence that the defendant had been drinking and taking a prescription drug

which carries a warning not to operate a motor vehicle was proper even though driver not charged with DUI.

**State v. May**, 670 So.2d 1002, (Fla. 2d DCA 1996), *rev. denied* 676 So.2d 1368 (1996): Evidence that defendant had been given a Demerol shot on the morning of the accident held admissible. There was no evidence of alcohol involvement.

## **E. TOXICOLOGY EXPERT’S EXPLANATION OF THE LAB RESULTS**

### **1. Definition of Toxicology**

Toxicology is the science of poisons and forensic toxicology is the analysis of drugs and poisons in biological materials for legal purposes. The Toxicologist identifies the known symptoms and effects that the drug produces on the human body, and explains the effect that the combination of drugs (i.e. poly drug use) can produce and the relative increase in impairment. The toxicologist can testify that this is all dependent on the time of ingestion, person’s tolerance, and dosage.

### **2. Admissibility of Urine Results**

#### **a. FDLE Rules**

There are no FDLE Rules to ensure the scientific reliability of the results. Therefore, a traditional scientific predicate (i.e. a “**Bender Predicate**”) must be established to enter the results into evidence. The State must demonstrate:

- 1) the test was performed by a qualified operator with the proper equipment;
- 2) Gas Chromatography/Mass Spectrometry, the method testing, is a reliable test;
- and
- 3) the meaning of the test results.

#### **b. Defense Arguments**

The defense may argue the urine results are unreliable because of a lack of FDLE rules. However, in **State v. Boddien**, 877 So. 2d 680 (Fla. 2004), the Supreme Court of Florida held that the clear legislative intent behind §316.1932(1)(a) maintains:

although blood and breath tests are required to be approved, urine tests are not required to be approved by FDLE rules, i.e., the FDLE is not required to promulgate rules regarding the collection, preservation, and analysis of urine samples obtained pursuant to the implied consent law; and

requiring approval for blood and breath but not urine does not violate Equal Protection.

**NOTE:** The Supreme Court’s ruling applies retroactively, as if the Second DCA’s opinion had never existed. Therefore, do not be fooled by defense arguments that a case occurring between the two decisions should be considered only under the Second DCA’s ruling.

## **BLOOD CASES**

### **I. General Blood Issues**

#### **A. DOCTOR/PATIENT PRIVILEGE**

In Florida, the doctor/patient privilege is not general. **Arias v. State, 593 So.2d 260 (Fla. 3d DCA 1992)**. Therefore the State and its agents may conduct interviews with emergency and medical personnel who saw or treated the defendant. The privilege statute only covers communications memorialized in the medical records, except that health care practitioners cannot discuss medical conditions of a patient without notice to the defendant. Hospitals and emergency personnel are not health care practitioners. A doctor can make reference to the defendant's impairment but not to his medical treatment. **State v. Zezzo, 7 FLW Supp. 539 (Fla. 20th Cir Ct App 2000)**.

#### **B. FOURTH AMENDMENT**

Prior to April 2013, it was not an unreasonable search under the 4<sup>th</sup> amendment of the United States Constitution for police to obtain a warrantless, involuntary blood sample from a defendant who is under arrest for DUI. In **Schmerber**, the Court held that an exigency to the warrant requirement existed because the body naturally metabolizes alcohol over time. **Schmerber v. California, 384 U.S. 757 (1966)**.

In April 2013, the United Supreme Court decided **Missouri v. McNeely, 133 S. Ct 1552 (2013)** and held that the dissipation of alcohol in the human body – standing alone – does not establish an exigent circumstance that justifies nonconsensual blood testing in DUI investigations. Instead, the Court held that the determination of whether an exigent circumstance exists must be done on a case-by-case basis. Therefore, in order to have a valid DUI blood draw without a warrant, there must be additional facts which made the circumstances exigent.

Also some argue that **McNeely** overruled **Schmerber**, this is untrue. In **McNeely**, the Court held that **Schmerber** fit into its totality of the circumstances argument because the case involved a defendant who has to be taken to the hospital because of the serious nature of his injuries and there was no time to secure a warrant. However the Court did note that **Schmerber** was decided almost 50 years ago and that now, with the advent of new technology, it would be easier to obtain a warrant than it was then.

So, after **McNeely**, officers can no longer automatically take blood from a suspect suspected of DUI – even if the case involves death or serious bodily injury – without a warrant or an exigency.

#### **What is the practical effect of McNeely on misdemeanor DUIs?**

Well, Florida judges are **NOT ALLOWED** to issue search warrants for misdemeanor DUI cases. So, if there is no PC for a felony DUI offense (insufficient proof that the suspect caused or contributed to the cause of death or serious bodily injury of another person or that the person committed a 4<sup>th</sup> or subsequent DUI offense) then the officer **cannot** get a search warrant for blood. As such, obtaining a blood sample by voluntary consent or – if the suspect is unconscious – implied consent is necessary.

## **Voluntary vs. Implied Consent**

**McNeely** does not address voluntary or implied consent.

Voluntary consent is different than implied consent because implied consent has consequences for refusal – a license suspension, use of the refusal against the subject in court, and, in some cases, a separate misdemeanor charge. Implied consent requires that any person who is capable of refusing, must be advised of the consequences of such a refusal. If the person is not capable of refusing (i.e. due to a lack of consciousness) then the person's consent is presumed.

Voluntary consent is a valid exception to the warrant requirement. Where the elements of an implied consent or forced blood draw are not present, but blood is requested nonetheless, it will be admissible so long as the defendant has been fully informed that implied consent law requires submission only to breath or urine and that the blood test is offered as alternative, and such consent is knowingly and voluntarily made and is not result of acquiescence to lawful authority. *See, **Chu v. State**, 521 So.2d 330 (Fla. 4th DCA 1988); also see generally, **Schneekloth v. Bustamante**, 412 US 218 (1973).* Additionally, failure to notify the defendant of the consequences of refusing to allow a blood draw does not warrant suppression of those results where the defendant is asked for a voluntary blood sample. *See **State v. Dubiel**, 32 Fla. L. Weekly D1338 (Fla.App. 4 Dist. May 23, 2007).*

### **What makes consent voluntary?**

It is the state's burden to show that any consent given was voluntary in nature. Although an officer does not have to advise that consent can be refused, it is one of the many factors the court will look at. Other factors include but are not limited to the officers tone of voice, the use of a written consent form the number of officers present when consent was requested, and whether the officer requesting consent was in uniform with a weapon. The more pressure is put on a suspect to consent, the less likely it is that a court will find consent voluntary.

### **State v. Kinnick, 16 Fla. L. Weekly Supp. 694a (18th Judicial Circuit May 12, 2009)**

Where defendant refused to submit to breath test but repeatedly indicated that he would take blood test despite being advised by arresting officer that he was not required to submit to blood draw under circumstances of stop, consent to collection and testing of blood was knowingly and voluntarily given -- Motion to suppress denied.

In **State v. Burnett**, 536 So.2d 375 (Fla. 2d DCA 1988) the court held that consent was not voluntary where it was based on the officer misinforming the defendant by reading implied consent. The substance of the warnings was that if the defendant refused to consent to the blood draw, his license would be suspended and his refusal would be used against him in court. Based upon these warnings, given both at the jail and at the hospital, the defendant consented to the blood draw.

*See also, **State v. Slaney**, 653 So.2d 422 (Fla. 3d DCA 1995)* where the 3<sup>rd</sup> DCA follows the reasoning of the court in **Burnett**. This court rejected the State's argument that pursuant to **Schmerber v. California**, 384 US 757 (1966) the blood was admissible under the 4<sup>th</sup> amendment where all they needed to show was PC for DUI and that the blood was drawn in a reasonable manner using appropriate medical techniques. Although admissible under the 4<sup>th</sup> amendment, Florida has imposed higher standards on its police officers by way of the implied consent law and therefore without a showing that the blood was obtained in compliance with this law, then it can only be admissible if it was knowingly and voluntarily given.

**State v. Heim, 11 FLW Supp. 138a (Hillsborough County 2003)** Because deputy read implied consent to defendant before requesting his voluntary consent to blood test, voluntariness of consent is analyzed under implied consent law and applicable case law -- Where deputy did not inform defendant that blood test was alternative to breath or urine test and that he did not have to provide blood sample, blood test is not admissible under voluntary consent theory.

**State v. Milledge, 12 FLW Supp. 676a (Palm Beach County 2005)** In order to establish consent, the state must show by a preponderance of the evidence that the consent was freely and voluntarily given, and not mere submission to authority. **Washington v. State, 653 So.2d 362 (Fla. 1995)**. Here, the Defendant was placed under arrest and transported to a hospital where she was told she would be giving a blood sample. She had already been improperly advised of her Miranda warnings and was not free to leave. The signed consent form did not inform her that she had the right to refuse consent and the officer never told her that blood was being taken as an alternative to breath or urine. Here, the Defendant was already under arrest, was told she would be giving blood on the ride to the hospital, and was not advised that the implied consent law only requires submission to breath or urine. Accordingly, the Court finds that the Defendant's consent was not freely and voluntarily given and under the circumstances present, constituted mere submission to authority.

**Fla. Stat. 316.1933**

Fla. Stat. 316.1933 permits involuntary blood draws when an officer has probable cause to believe that a person has caused the death or serious bodily injury of another. However, it is important to understand that this law DOES NOT override the United States Constitution or the law as interpreted by the Supreme court.

**Does McNeely apply retroactively? No. HOWEVER, PLEASE BRING ALL MOTIONS TO SUPPRESS BLOOD RESULTS TO THE ATTENTION OF AN ASSISTANT CHIEF IMMEDIATELY.**

**C. ARREST NOT REQUIRED BEFORE SEIZURE OF BLOOD**

Under Fla. Stat. 316.1932(1)(a)1, a suspect impliedly consents to the submission of a breath or urine test, *if and only if* they are under lawful arrest and an officer requests them to submit pursuant to that arrest. On the other hand, 316.1932(1)(c) and 316.1933(1)(a), authorize the taking of blood under certain conditions, **but arrest is not a condition.**

**Kenson v. State, 577 So.2d 694 (Fla. 3d DCA 1991)** (Under 316.1932(1)(c), an arrest is not a prerequisite to a request for a blood test. Appellant voluntarily consented to the procedure, and no impediment to the use of the results exists).

**State v. Hilton, 498 So.2d 698 (Fla. 5th DCA 1986)** ("We note that, unlike breath or urine tests, a blood test administered pursuant to section 316.1932(1)(c) need not be incidental to a lawful arrest.")

**D. FELLOW OFFICER**

**State v. Sams, 676 So.2d 1045 (Fla. 5th DCA 1996)** (Where one officer develops probable cause for a blood draw and directs another officer to follow defendant to hospital to get blood sample, fellow officer rule applies so that the officer requesting the blood draw does not himself have to have independently arrived at probable cause or even have had the probable cause communicated to them.)

**State v. Bowers, 37 Fla. L. Weekly S136 (Fla. 2012)** (The "fellow officer rule" does not allow an officer who does not have firsthand knowledge of the traffic stop and was not yet

involved in the investigation to testify as to hearsay regarding what the initial officer who conducted the stop told him in order to establish the validity of the initial stop; disapproving Ferrer v. State, 785 So. 2d 709).

## II. Statutory Blood Draws

### IMPLIED CONSENT BLOOD DRAW

#### 1. Statutory Authority

Under Fla. Stat. §316.1932(1)(c), “any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle deemed to have given his or her consent to submit to an approved blood test for the purpose of determining the alcoholic content of the blood or a blood test for the purpose of determining the presence of chemical substances as provided in this section if...” the following conditions are met:

- i) Officer has ***reasonable cause*** to believe the person was driving (or apc) of a vehicle while under the influence of alcoholic beverages, chemical substances, or controlled substances **AND**
- ii) The person appears for ***treatment*** at a hospital, clinic, or other medical facility **AND**
- iii) The administration of a breath **OR** urine is ***impractical or impossible*** **AND**
- iv) The test is performed in a ***reasonable manner***.

#### 2. Unconscious Individuals

If a person is ***unconscious*** or ***incapable*** of refusal by other mental or physical condition, ***such person is deemed not to have withdrawn his or her consent*** to such blood test by operating a motor vehicle within the state. See, State v. Tronolone, 532 So.2d 1127 (Fla. 3<sup>rd</sup> DCA 1988); However, if a person is capable of refusal, and does refuse, that person’s blood may not be taken by force under this statute. The refusal to submit to a blood test upon request of a law enforcement officer is admissible in evidence in any criminal proceeding. Robertson v. State, 604 So.2d 783 (Fla. 1992).

#### 3. Treatment Facility

**There is no requirement of causation between driving and appearing at a medical facility.** Prior to 1991, the statute required that the driver appear at a medical facility as a result of his involvement as a driver in a motor vehicle accident. This requirement was removed in 1991.

**A paramedic may draw blood at the scene of the car crash.** Under the statute itself, 316.1932(1) (c), the term “other medical facility” shall include an ambulance or any other medical emergency vehicle.

**A “non-transport” vehicle qualifies as “other medical facility”.** According to analysis done by the Florida Attorney General’s Office released in an advisory opinion about the definition of “other medical facilities”, because the legislature intended to extend the locations where blood could be drawn to include more on the actual scene of

the crash, even an emergency vehicle which is not designed to transport patients would qualify as “other medical facility” for purposes of the statute. See Attorney General’s Advisory Opinion Number 2006-02, January 25, 2006.

#### **4. What if defendant refuses treatment?**

**State v. Ingram, 10 Fla. L. Weekly Supp. 270a (Indian River County 2003)** At the time the officer read implied consent and the blood was drawn, the officer was operating under a good faith belief that the defendant was injured and was going to be transported to the hospital.

#### **5. Impractical or Impossible**

Obtaining breath sample was impractical and taking of blood sample to determine defendant's blood alcohol level was justified where defendant lost control of his vehicle and drove into a ditch, defendant did not appear to have visible signs of physical injury, nature of accident raises possibility that defendant suffered unobservable internal injury, defendant appeared to be significantly disoriented with possible internal injuries, and medical personnel recommended that defendant be transported to medical facility for observation. **State v. Renwick, 7 Fla. L. Weekly Supp. 406a, (Miami Dade County 2000).**

Where defendant who crashed her car into a parked vehicle was transported to hospital for treatment, officer had reasonable cause to believe defendant was DUI, administration of breath test was impossible due to lack of access to breath testing instrument at hospital, and officer did not request urine test because he was focused on alcohol, not drugs for which urine test is primarily used, officer had authority to request blood test. **Stocker v. State, 10 Fla. L. Weekly Supp. 487a (Fla. 19<sup>th</sup> Cir. Ct. App.2003).**

Where diabetic defendant suspected of DUI was transported to hospital for insulin, and breath test was impractical because defendant would be at hospital for at least several hours, blood test was properly administered to determine blood alcohol content -- Because breath and urine tests are for different purposes, only breath test, not both urine and breath tests, must be impractical or impossible for DUI suspect to be deemed to have consented to blood test. **State v. Hess, 10 Fla. L. Weekly Supp. 481a (Fla. 15<sup>th</sup> Cir. Ct. App. 2003).**

The court in **Ingram** denied motion to suppress blood where an officer did not have access to breath testing equipment at crash site and urine test was inappropriate because it would not yield quantitative analysis, officer read implied consent to defendant involved in crash while being prepared for transport to hospital by paramedics and obtained consent to blood test, but defendant refused to be transported to hospital after blood draw, test results were obtained pursuant to authority of section 316.1932(1)(c).

In **State v. Binnion, 4 FLW Supp. 235 (Hillsborough County Court 1996)**, the court held breath impractical where defendant injured his lower lip which required sutures and officer transported defendant to hospital for treatment.

In **State v. Williams III, 8 FLW Supp. 573 (Monroe County Court 2001)** the court held that the State had sufficiently shown breath test was impractical where defendant was in emergency room, immobilized while being treated, had not been discharged yet, and there was no breath testing machine at the hospital.

**6. Do both Breath and Urine have to be Impractical or Impossible?**

**Alcohol Suspected:** 316.1932(1)(c) states “a urine test is for chemical substances...” while a breath test is for the purpose of determining alcoholic content in one’s breath or blood. As many of the cases listed above indicate (Stocker and Hess), urine is not an adequate testing method for quantifying alcohol content. Only a breath or blood sample will suffice. Under these circumstances, clearly the State need only show that breath was impractical or impossible.

**Drugs Suspected:** Where drugs and only drugs are suspected, then it follows that urine and only urine need be shown as impractical or impossible. Urine is a lot easier to obtain while defendant is in the hospital as compared to a breath sample. An argument can be made that to lawfully request urine, a defendant must be under lawful arrest under 316.1932(1)(a) and pursuant to 316.1932(1)(c) only reasonable cause is required for a blood draw, therefore, urine is impossible under law under a certain set of facts which are often common in accidents because people may be transported for medical treatment before police arrive. *See generally*, State v. Serrago, 875 So.2d 815 (Fla. 2<sup>nd</sup> DCA 2004).

**7. Reading Implied Consent to Defendant Not Required**

The purpose of reading implied consent to the defendant is to inform them of the adverse consequences of their refusal to comply with what is statutorily required of them whether it be a breath, urine, or blood sample. If the defendant consents to a law enforcement officer’s request for blood, then there is no need to inform the defendant of any adverse consequences. If the defendant refuses, then clearly implied consent must be read in order to get the refusal admitted for consciousness of guilt.

The statute itself states, “A blood test may be administered whether or not the person is told that his or her failure to submit to such a blood test will result in the suspension...” **Fla. Stat. 316.1932(1)(c)**

In State v. Lambertus, 13 Fla. L. Weekly Supp. 81b (Fla. 17th Cir. Ct. App. 2005) the court held that where defendant received treatment in ambulance, and breath or urine test would have been impractical or impossible, consent to blood draw was voluntary under section 316.1932(1)(c) *even though implied consent warnings were not read*.

State v. Gun, 408 So.2d 647 (Fla. 4th DCA 1981) held that results of breathalyzer test, which defendant submitted to without objection, would not be suppressed as result of State's failure to inform driver that his failure to submit to the test would result in a suspension of his privilege to operate a motor vehicle for a period of three months.

Pardo v. State, 429 So.2d 1313 (Fla. 5th DCA 1983) held that the result of a blood alcohol test is admissible in civil and criminal proceedings quite independent of statutes governing suspension of driving privilege under implied consent law.

The defense may try to argue that State v. Slaney, 653 So.2d 422 (Fla. 3<sup>rd</sup> DCA 1995) stands for the proposition that implied consent must be read. Slaney, however, dealt with a forcible blood draw where there was no SBI or death to justify it and the defendant wanted to refuse and had a choice to refuse after having heard all the adverse



consequences pursuant to implied consent law, but the officer told him that a blood draw could be required under law, so the defendant acquiesced.

### III. Admitting the Toxicology Report into Evidence

#### A. VAMP UNAVAILABLE AT TRIAL

More often than not, the person who drew the blood, although subpoenaed, will not show up for trial. The State can still proceed with trial pursuant to **Dodge v. State, 805 So.2d 990 (Fla. 4th DCA 2001)** as long as someone testifies as to the identity and qualifications of the VAMP. In **Dodge**, the nurse's supervisor testified that the VAMP was qualified to draw blood.

**Under Fl. Stat 316.1932(1)(f)(2)(a) and 316.1933(2)(a)**, "Only a physician, certified paramedic, registered nurse, licensed practical nurse, other personnel authorized by a hospital to draw blood or duly licensed clinical laboratory director, supervisor, technologist, or technician..." are qualified..

**FDLE Permit:** Persons authorized to draw blood are not required to have a permit from FDLE because the rules blood alcohol testing only require the analyst who tests the blood to have a permit.

**Chain of Custody:** Perfect chain of custody is not required unless there is probable tampering. In a typical blood case, the State establishes chain of custody with two witnesses, the officer who sealed the blood kit and the lab director who monitors all chain of custody for the lab.

#### B. FDLE BLOOD RULES

##### 1. **State v. Miles, 775 So.2d 950 (Fla. 2000).**

###### Cases Before July 29, 2001

Florida Supreme Court held that FDLE's rule for collection of blood was inadequate to ensure preservation of the sample. The Court further held that the State was therefore unable to rely on the statutory presumptions of impairment. **State v. Miles, 775 So.2d 950 (Fla. 2000).**

In order to admit the blood results in these cases the State ***MUST*** lay a traditional scientific predicate. **Robertson v. State, 604 So.2d 783 (Fla. 1992)** requires the State to show:

- The test was reliable
- The test was performed by a qualified individual with proper equipment **AND**
- Expert testimony as to the meaning of the test.

###### Cases After July 29, 2001

FDLE revised the blood rules to address the decision in **Miles** and July 29, 2001 is the effective date of these new rules. In the abundance of caution, when possible, lay the scientific predicate anyway.

##### 2. **Instructions to the Jury**

The Florida Supreme Court in Cardenas v. State, 867 So.2d 384 (Fla. 2004) answered a certified question and also settled a separate certified conflict, both of which arose out of the aftermath of State v. Miles, 775 So.2d 950 (Fla. 2000). Miles had held that a jury should not be instructed on the presumption of impairment in blood test cases due to the Court's conclusion that the pre-July 29, 2001 version of FDLE rule 11D-8.012(3) was deficient. The Court first agreed with the lower courts on the certified question and held that an improper instruction on the presumption of impairment is not fundamental error, and, therefore, any argument relating to the improper instruction may not be raised for the first time on appeal. The Court reasoned that the presumption of impairment is actually mere surplusage or redundant since a finding of an unlawful blood alcohol level (DUBAL) moots the issue of impairment. Utilizing the same reasoning, the Court settled the certified conflict by holding that the giving of the improper presumption of impairment instruction is subject to a harmless error analysis and is not harmful per se. Moreover, the Court held that the instruction itself is harmless as long as the jury was also properly instructed on DUBAL.

In view of the above, it appears that, as the undersigned has consistently suggested, Miles generally will not ultimately harm DUI prosecutions. Additionally, any case in which the DUI offense occurred on or after July 29, 2001 (when FDLE amended the relevant rule in response to Miles) is unaffected by Miles anyway.

On the other hand, if the blood alcohol evidence could not have been introduced under the statutory presumption of impairment due to Miles and the traditional scientific predicate is not met, then reading of the presumptions to the jury is fundamental error. See also Leveritt v. State, 924 So.2d 42, (Fla. 1st DCA 2006).

### **3. Burden under Implied Consent**

Once the state shows that the person conducting blood alcohol test was licensed by the Department of Health and Rehabilitative Services and substantially complied with applicable regulations, a presumption is created that blood alcohol evidence is admissible. Defense still has opportunity to rebut presumption created by statute as, for example, by challenging Department regulations themselves as being scientifically unsound, but burden would rest on defense to prove its point. If your blood analyst is not licensed, then you have to lay a scientific predicate. State v. Robertson, 604 So.2d 783 (Fla. 1992).

### **4. Collection and Preservation of Blood Samples**

State has no duty to collect a separate vial of blood for the defense to test and it is not a violation of due process for the State's analysis of the blood to consume the entire contents of the vial. See, State v. Erwin, 686 So.2d 688 (Fla. 5th DCA 1996), also see, Houser v. State, 474 So.2d 1193 (Fla. 1995).

#### **Rule 11D-8.011 Blood Alcohol Methods**

Rule requires testing to be done in one of two methods, either using gas chromatography or alcohol dehydrogenase. The University of Miami Toxicology Lab uses *gas chromatography* which is the most accurate method of blood testing. The gas chromatograph performs a "head sample analysis" which means that the air above the blood sample is actually tested. Alcohol is volatile and becomes a gas when heated. An aliquot of the blood is inserted in a vial from which no gas can escape. The tube is heated so that the blood is activated. Vapor from the sample is divided and injected into two

columns of thinly coiled glass membrane. A carrier gas of helium constantly moves through the column to ensure that the flow of vapor sample is constant. Different alcohols arrive at different times to a detector at the end of the columns. The sample contains charged particles that register a voltage that is recorded on a graph. This graph is converted into a reading. There are two columns, and thus two readings per aliquot. Each sample is run four times.

#### **Rule 11D-8.012 Labeling and Collection**

- (1) **Cleansing:** The skin area must be cleaned with a non-alcoholic antiseptic swab. The legal blood kits contain non-alcoholic swabs. Purpose of this rule is to act as a safeguard for alcohol dehydrogenase testing, but is unnecessary for gas chromatography.
- (2) **Collection:** Blood must be collected in a glass evacuation tube that contains a) a preservative such as sodium fluoride b) an anticoagulant such as potassium oxalate or ethylenediaminetetraacetic acid. The stopper or label on the collection tube, documentation from the manufacturer or distributor, or other evidence, can establish compliance with this rule.
- (3) **Mixing:** The vial must be inverted several times to mix the blood with the preservative and the anticoagulant.
- (4) **Labeling:** Label must include the name of the person tested, date and time of collection, and initials of person collecting the sample. If the tube is not labeled, but the kit is labeled, substantial compliance is met.
- (5) **Refrigeration:** Need not be refrigerated if submitted for analysis within seven (7) days or during transportation, examination, or analysis. Blood samples must otherwise be refrigerated, except subsequent to analysis.
- (6) **Delivery & Initial Analysis:** Blood sampled must be hand delivered or mailed via priority mail, overnight delivery service, or other equivalent delivery service for initial analysis within thirty (30) days of collection. The sample must undergo an initial analysis within sixty (60) days of receipt by the facility conducting the analysis.

#### **Rule 11D-8.002(14) Form of Blood**

FDLE requires *whole blood*. Whole blood is blood in which the red cells are freely dispersed as opposed to Serum where the red cells are removed. Serum gives approximately an 18% higher reading because alcohol has an affinity to water and serum contains more water.

**Rule 11D-8.002(15) Blood Alcohol Level**

FDLE defines blood alcohol level as the percent of alcohol by the weight in a person's blood based upon grams of alcohol per 100 milliliters of blood. FDLE requires the analysis of two separate aliquots of the same blood sample. The readings cannot deviate from one another by more than .010 grams of alcohol per 100 milliliters of blood. There are actually four readings because each aliquot is tested twice. The lab report is the average of the four readings with the last two digits dropped off. Note: The lab will not accept a deviation from its standard reference of more than .001.

**Rule 11D-8.013 Alcohol Permit – Analyst**

Permits are issued by FDLE to individuals, not laboratories, but are location specific for that individual. Analysts must submit a description of the lab's testing methodology to FDLE which must be approved within thirty days. Permits are renewed annually. Permit holders must demonstrate proficiency every four months by analyzing alcohol samples sent by FDLE and then submit the results for review. FDLE tests for laboratory quality control through its quarterly proficiency testing. The lab itself does quality control before every batch of tests is run. Testimony by the analyst under the rules replaces the common law requirement of proving the testing reliability and accuracy. *All documentation regarding quality control for a specimen test is maintained and available in the "Litigation Packets" pursuant to the local administration memo governing blood and urine discovery.*

**C. DEFENSE ARGUMENTS****Running Samples in Batch Increases the Risk of Error**

State's Response: Several safeguards are used to prevent error. The vials are labeled and placed in the belt of the gas chromatograph according to a pre-typed order sequence. Two vials of the same specimen are run back to back. If there were error in the sequence, the disparity between the results would be apparent during the toxicologist's review of the analysis.

**There was no Anticoagulant in the Tube**

The legal blood kits contain gray-topped VacuTainer tubes. The gray stoppers prevent evaporation. The color, gray, signifies that it comes from the manufacturer with an anticoagulant (potassium oxalate) and a preservative (sodium fluoride). This is the white powdery substance at the bottom of the tube. The lab checks the appearance of the tubes when they arrive at the lab and record whether or not the specimen appears normal or not. If no anticoagulant were present, the blood would clot (unless subject was a hemophiliac). If the blood is liquid, you can reasonably assume that the anticoagulant was present.

**Insufficient Anticoagulant was Present and Ethyl Alcohol may have Artificially Concentrated the Serum above a Clot**

The serum is the watery part of the blood. Alcohol goes to the water, and thus, there will be higher concentrations of alcohol in the serum if there is clotting. However, two samples from a specimen tube are drawn by the Pipette. It is impossible to pull two samples from the same tiny area. Disparities between the samples would be detected by the toxicologist reviewing the analysis and a retest would be conducted.

### **Insufficient Preservative could allow Bacteria to Grow and Create Ethyl Alcohol in the Tube**

Yeast does not occur in blood. The needle and the tubes are sterilized by the manufacturer. Yeast could come from the skin, but the swab is used to sterilize the skin, and the stopper wipes the needle clean. Sodium fluoride is an enzyme inhibitor that prevents organisms from growing. In other words, if yeast did contaminate the tube, fermentation would be detectable to the naked eye, and the tube would not appear normal. Moreover, studies show that even with forced fermentation one cannot produce more than .05 alcohol concentration. This is because yeast requires sugar for fermentation.

### **Too Much Preservative can Artificially Elevate the Test Result**

FDLE's quarterly proficiency testing would reveal this phenomenon, if it did occur.

### **The Manufacturer's Expiration Date on the Tube has Passed**

The expiration date on the tube refers to the vacuum state of the tube and has nothing to do with the anticoagulant. After the expiration date, you cannot guarantee that the vacuum is still intact, but the anticoagulant is still good.

### **Improper Handling by LEO and Unspecified Time Lag**

If the specimen had denatured or the anticoagulant was not dispersed in the tube, the blood would not be liquid. The lab would have noted if the specimen did not appear normal.

### **The Pipettes, Burets, and Volumetric Flasks Used in the Testing Process are not Calibrated**

Standards are run before the specimens are analyzed to serve as tests for equipment calibration.

### **Improper Equipment Cleaning could Contaminate the Specimens with Alcohol or Other Specimens**

The pipette is equipped with two different lines. One line carries the sample; the other line carries a cleaning solution. The pipette purges itself between every sample, including between the two samples of the same specimen that are run consecutively.

### **Whole Blood Control was Expired 8 Months**

Substantial compliance met where expert testimony established that the lapsed expiration date would not affect the accuracy of the blood alcohol test results. *See, State v. Pierre*, 693 So.2d 102 (Fla. 5th DCA 1997).

## **IV. Medical Blood Draws**

### **A. HIPAA**

The **Health Insurance Portability and Accountability Act (HIPAA)** was enacted by Congress in 1996. See 42 U.S.C.A. section 210 HIPAA is organized into five Titles. Title II deals primarily with preventing health care fraud and abuse and with the reducing the costs and administrative burdens of health care by creating standardized formats for the dissemination of electronic health care information.

Subtitle F of Title II, directed the Secretary of the United States Department of Health and Human Services to submit to Congress standards protecting the privacy of health care information. In the event Congress failed to adopt such standards, the Secretary was to

promulgate regulations doing so. Congress failed to act and the Secretary promulgated several versions of rules directed toward protecting privacy of medical information.

The Rule regulating the dissemination of information to law enforcement or for use in judicial proceedings went into effect April 14, 2003. **The Rule preempts contrary state law only to the extent that the Rule provides more stringent privacy protection than does state law.** State law is not preempted if it provides more stringent protection than HIPAA and its corresponding rules.

The HIPAA rules of interest to prosecutors may be found at **45 CFR 501** and **45 CFR 512**. **In short, HIPPA protects the release of medical information. Thus, a subpoena issued by a prosecutor without the court's involvement will not require disclosure of medical information.**

## **B. HUNTER HEARINGS**

### **1. State's Burden**

**Hunter v. State, 639 So.2d 72 (Fla. 5th DCA 1994)** held that the state attorney may use an investigative subpoena to compel disclosure of a patient's medical records, but the patient must first be given notice before the subpoena is issued. If the patient objects, the state has the obligation and the burden to show the relevancy of the records requested; before the subpoena for the patient's medical records is allowed to issue. **We do not rule that a finding of relevancy is equivalent to a finding of probable cause.** In this case, the accident report, coupled with the fact that the other driver died as a result of this two car accident, makes the relevancy of the documents obvious.

"Contrary to Defendant's position, **relevancy, not probable cause**, is the only burden which the state must satisfy and the only finding which the court must make with respect to the medical records. Such a standard is sufficient to prevent the court from becoming "a rubber stamp for the state". See, **State v. Brosey, 4 FLW Supp. 219a (Fla. 12th Cir. Ct. App. 1996)**.

In order to meet its burden, the State does not necessarily need to provide live witness testimony. Hearsay evidence in the form of a probable cause affidavit along with the State's argument has been deemed enough to satisfy the requirements of the **Hunter** hearing. See **McAlevy v. State, 947 So.2d 525, (Fla. 4th DCA 2006)**.

### **2. Sanctions for State's Failure to Comply**

Florida Supreme Court in **State v. Johnson, 814 So.2d 390 (Fla. 2002)** holds that the exclusionary rule only applies where there lacks a good faith effort on the State to comply. In **Johnson**, State failed to comply with notice requirement, but made a good faith effort, and is therefore not precluded from obtaining the medical records if is subsequently complies with the statute. Similarly, State's failure to show relevancy the first time does not preclude it from again seeking the subpoena as long as there is a showing of good faith. See, **Cerroni v. State, 823 So.2d 150 (Fla. 5th DCA 2002)**. Also see, **Frank v. State, 912 So.2d 329 (Fla. 5th DCA 2005)**.

However, where an officer personally obtains a defendant's medical records without attempting to provide any type of notice, and without knowledge of the Assistant State Attorney, because he was unaware of the legal requirements which had to be fulfilled

before acquiring the records, court found that this did not constitute good faith and noted that the police are deemed to be “an arm of the State” when it comes to determining whether the State has acted in good faith. The Court then upheld the finding of a lack of good faith, in that police officers are charged with knowledge of the law. **Sneed v. State, 876 So.2d 1235 (Fla. 3d DCA 2004).**

The court in **Thomas v. State, 820 So.2d 382 (Fla. 2d DCA 2002)** held that an officer's verbal request for the nurse to tell him the blood test results did not constitute the type of governmental misconduct that would warrant exclusion of the medical records subsequently obtained through the State's subpoena issued after proper notice.

### **3. Sufficiency of Notice**

Notice is insufficient where it fails to provide essential contact information making it impossible for the defendant to properly object. *See*, **State v. Cashner, 819 So.2d 227 (Fla. 4th DCA 2002).**

Notice is insufficient where prosecutor incorrectly addressed the notice and although the State could have taken precautions -something as simple as double-checking the defendant's address, requesting confirmation he received the notice before issuing the subpoena, or simultaneously sending a copy of the notice to his attorney within enough time to allow the defendant to object-it did not. Had the State taken any of these steps, then the defendant's privacy rights would have been protected. Rather, the State's negligence cost the defendant a valuable right and the records were properly suppressed. *See*, **Klossett v. State, 763 So.2d 1159 (Fla. 4th DCA 2000).**

### **4. What if State already has legal draw blood results?**

The State having shown relevancy is not precluded from the medical records just because it already has blood results from a legal draw. *See*, **State v. Rivers, 787 So.2d 952 (Fla. 2d DCA 2001).** **And in all actuality, it is good practice to retain the medical records even in cases involving legal blood so if the legal blood is suppressed you can still enter the medical blood into evidence.**

## **C. ADMITTING THE MEDICAL REPORT INTO EVIDENCE**

### **1. Admissible under Business Record Exception**

In **Love v. Garcia, 634 So.2d 158 (Fla. 1994)** the Florida Supreme Court held that in a *personal injury* case a blood alcohol test report contained in a hospital record was sufficiently trustworthy to be admissible with no testimony other than that of the business record custodian of the hospital qualifying the report as a business record. The same theory of trustworthiness applies in Baber even though it is a criminal case.

This decision was then extended six years later to a criminal case in **Baber v. State, 775 So. 2d 258 (Fla. 2000)** where they held that “a hospital record of a blood test made for medical purposes, which is maintained by the hospital as a medical or business record, may be admitted in criminal cases pursuant to the business record exception to the hearsay rule.”

## 2. *Crawford* Effect

The Florida Supreme Court in **Baber** noted (Pre-Crawford) that admitting a medical record with just the testimony of a records custodian under the business records exception did not violate the confrontation clause because “alcohol test result being admitted in the instant case was performed by a hospital, which did not have an interest in the outcome of the future criminal case lodged against the defendant.” The analysis in Baber is cited by **Johnson v. State**, 929 So.2d 4 (Fla. 2<sup>nd</sup> DCA 2005) post-Crawford. Therefore under **Crawford**, unlike the FDLE lab report, medical blood reports can be introduced without having the blood analyst testify because it is not created in anticipation of criminal proceedings.

The results of blood tests performed for the purpose of medical treatment can be introduced as business records, as they are not testimonial and not subject to Crawford **Sellers v. State**, 973 So. 2d 543 (Fla. 1st DCA 2007)

## 3. FDLE Rules and Medical Blood

Failure of the LEO to request withdrawal of blood does not affect admissibility of a medical blood. *See*, **Lawlor v. State**, 538 So.2d 86 (Fla. 5th DCA 1989).

Blood drawn for medical treatment purposes need not comply with FDLE rules, since the taking of blood under such circumstances does not constitute a state action. A traditional scientific predicate must be laid. *See*, **State v. Lendway**, 519 So.2d 725 (Fla. 2d DCA 1988).

Whereas one is entitled to the *Presumption Jury Instruction* if the blood was drawn pursuant to FDLE rules, medical blood cases **CANNOT** and reading the *Presumption Jury Instruction* is ***Reversible Error***. **Robertson v. State**, 604 So.2d 783 (Fla. 1992). If there is sufficient evidence of actual impairment, then the giving of the Presumption may be deemed harmless error. HOWEVER, DO NOT RELY ON THIS.





## **PART 6: DAUBERT**

**DAUBERT**  
Fla. Stat. § 702

**What is the Daubert standard?**

Prior to July 2013, expert testimony in *Frye* standard. In July 2013, Florida adopted the Daubert standard as the appropriate standard for determining the admissibility of expert testimony in Florida. F.S. § 90.702 reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;**
- (2) The testimony is the product of reliable principles and methods; and**
- (3) The witness has applied the principles and methods reliably to the facts of the case.**

The Florida legislature intended the above statute, which became effective July 31, 2013, to adopt the standard for admissibility of expert testimony created by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). Besides mirroring the language of the Daubert standard, the legislature made its intention clear in the language of House Bill 7015:

(2) The courts of this state shall interpret and apply the requirements of subsection (1) and s. 90.704 in accordance with Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and subsequent Florida decisions applying or implementing *Frye* no longer apply to subsection (1) or s. 90.704. All proposed expert testimony, including pure opinion testimony as discussed in Marsh v. Valyou, 977 So. 2d 543 (Fla. 2007), is subject to subsection (1) and s. 90.704... Florida House Bill 7015.

Daubert requires a two prong analysis. First, the trial judge must determine relevance. In other words, will the expert testimony assist the jury in understanding the evidence or in determining a fact in issue? F.S. § 90.702; Daubert, 509 U.S. at 587-93. Second, the trial judge must decide whether the expert's testimony is reliable. F.S. § 90.702; Daubert, 509 U.S. at 587-93. Under Daubert, reliability is assessed by asking the following three questions: (1) Is the testimony based upon sufficient facts or data? (2) Is the testimony the result of reliable principles and methods? and (3) Has the witness applied the principles and methods reliably to the facts of the case? See F.S. § 90.702; Daubert, 509 U.S. at 587-93. The proponent, not the challenger, of the evidence bears the burden of proof. Daubert, 509 U.S. at 592 n.10; Bourjaily v. United States, 483 U.S. 171, 176 (1987); Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 418 (3d Cir. 1999).

Under Daubert, trial court judges are “gatekeepers” whose role is to ensure that expert opinion testimony is both reliable and relevant before allowing that testimony into evidence. Daubert, 509 U.S. at 579-80; Kumho Tire, 526 U.S. at 137, 141. Accordingly, it is the trial court's role to exclude testimony that is based on speculation rather than knowledge. See Daubert, 509 U.S. at 579-80; Kumho Tire, 526 U.S. at 137, 141. This judicial function is essential to the administration of justice because, as the United States

Supreme Court noted, “[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it[.]” Daubert, 509 U.S. at 595 (quoting Jack B. Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended, 138 F.R.S. 632 (1991)), and a jury is “less equipped than a judge to make [the necessary] relevance determinations[.]” Allison v. McGhan Medical Corp., 184 F.3d 1300, 1310 (11th Cir. 1999). This flexible inquiry requires only “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” Daubert, 509 U.S. at 592-93. It is not an assessment of correctness. See Id. Moreover, a trial judge’s ruling on the admissibility of testimony under Daubert will be upheld at the appellate level unless an abuse of discretion is evident. Kumho Tire, 526 U.S. at 152.

### **Bringing the Daubert objection.**

Because Daubert is an evidentiary issue, if it is not raised it is waived.

**Feliciano-Hill v. Principi, 439 F.3d 18 (1st Cir. 2006)** (holding that plaintiff’s objection to defense witness was untimely, where she waited until moments before testimony was about to begin even though she received the expert report 5 months earlier.)

**Alfred v. Caterpillar, Inc., 262 F.3d 1083 (10th Cir 2001)** (recognizing that the law does not reward ambush tactics and counsel should not “sandbag” Daubert concerns.)

**Club Car, Inc. v. Club Car (Quebec) Import, Inc., 362 F.3d 775 (11th Cir 2004)** (Daubert objection not raised before trial may be rejected as timely but nothing prohibits a Daubert motion from commencing during trial.)

### **Who bears the burden?**

The party offering the expert opinion bears the burden of showing relevance and reliability by preponderance of the evidence. **Feliciano v. City of Miami Beach, 844 F.Supp.2d 1258 (S.D. Fla. 2012); U.S. v. Kehoe, 310 F.3d 579 (8th Cir. 2002); U.S. v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004)** (holding that it does not matter whether the proponent is the plaintiff in a civil suit or the government in a criminal case, the proponent of the expert opinion testimony always bears the burden.

### **Is a Daubert hearing required?**

**Foreman v. American Road Lines, Inc., 623 F.Supp.2d 1327 (S.D. Ala. 2008)** (“It is well established that a hearing is not required every time a party invokes a *Daubert-type* objection.”)

**City of Tuscaloosa v. Harcross Chemicals, Inc. 158 F.3d 548 (11th Cir. 1998)** (*Daubert* hearings are not required by law or by rules of procedure).

**U.S. v. Jenkins, 537 F.Supp.2d 1257 (S.D. Ala. 2008)** (It is proper to adjudicate *Daubert* issues on the briefs where “it does not appear that a hearing would materially advance the Court’s understanding of these issues or that credibility-based factual determinations will be necessary to resolve the motion.”)

### **What are the Daubert reliability factors?**

In determining reliability, a court may look at a number of factors including but not limited to:

**(1) whether the theory can, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or**

**potential rate of error; (4) whether there are existing standards controlling the technique's operation; (5) whether the technique or theory is generally accepted in the scientific community.**

Daubert, 509 U.S. 579 at 593-594. However, each factor may not apply in every case involving expert testimony. Kuhmo Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999). In essence, a Daubert inquiry was intended to be a “flexible” one and the four factors were intended to be “helpful not definitive.” Id. at 151.

**(1) whether the theory can, and has been, tested**

- a. Can be tested
- b. Potential reliability based on the ability to test theory
- c. Mere assertions that a theory or technique is reliable is not acceptable
- d. Testing allows for the theory to be evaluated and its relationship established by scientific method
- e. What has the expert done to test the theory or opinion he is proposing to testify about?

**(2) whether the theory or technique has been subjected to peer review and publication**

- a. Allows for evaluation by the scientific community Not an essential factor to determine validity
- b. Theory could be too new or of limited interest to be dispositive
- c. Courts should evaluate the quality of the published articles supporting the theory
- d. Where/how/by who was it published?

**(3) whether there is a known or potential rate of error**

- a. One of the more important factors
- b. Scientific method consists of forming and testing hypotheses
- c. Relationship between phenomena Eliminates other plausible or alternative explanations Measurement uncertainty

**(4) whether there are existing standards controlling the technique's operation**

What are the standards or procedures used in testing the theory?

Were the standards written down

Written guidelines allows for duplicate testing and others to replicate the findings

The theory or technique should be applied to the facts of the case in the same manner as originally formulated

**(5) whether the technique or theory is generally accepted in the scientific community.**

Identify the *relevant* scientific community

Is the theory or technique too new or have limited application to be accepted by the majority

**SFSTs**

**Defense challenges**

1. Developed by law enforcement for law enforcement
2. Subject to major error rates
3. Other explanations may exist for certain observations
4. Percentages do not favor reliability
5. The psychophysical battery of the SFSTs lack scientific reliability
6. An officer's training and experience in the administration of SFSTs makes them an "expert"
7. **Daubert** (through **Kuhmo Tire**) applies to non-scientific expert testimony

**State's Response**

**Daubert** is not concerned with who developed the theory or technique

**Daubert** deals with **expert** testimony. **State v. Meador**, 674 So.2d 826 (4th DCA 1996). A defendant's ability to perform these simple tasks is within a juror's common experience and understanding. Jurors do not require any special expertise to interpret performance of these tasks. As such, an officer's observations should be treated no differently than the testimony of lay witnesses and Lay observations and opinions of impairment are clearly admissible. **Cannon v. State**, 107 So.2d 360 (Fla. 1926); **City of Orlando v. Newell**, 232 So.2d 413 (4th DCA 1970); **Via v. State**, 567 So.2d 543 (2nd DCA 1990).

**Drug Influence Evaluations (DIE)/ DRE**

**Defense Challenges**

DRE/DIE protocol is unreliable

**State's Response**

Florida courts have held that "the tests, signs, and symptoms of the protocol are within the common understanding of the average layman" and are not scientific in nature. **Williams v. State**, 710 So.2d 24, 28 (1998).

**U.S. v. Everett**, 972 F.Supp. 1313 (D. Nev. 1997). DRE program, with possible exception

of potential rate of error, met requirements of *Daubert* for purposes of admissibility of scientific testimony about whether driver was impaired by or under the influence of drugs

**Nebraska v. Daly, 278 Neb. 903 (Neb. 2009).** Nationally-standardized DRE protocol was sufficiently valid methodology for identifying drug intoxication to support expert's opinion testimony that defendant was under the influence of marijuana while driving. Scientific literature supported admission of DRE-based testimony and each step of protocol reflected techniques that were accepted in the medical community.

**Oregon v. Sampson, 6 P.3d. 543 (Or. App., 2000).** For purposes of determining general acceptance in the field of DRE protocol, relevant scientific community included alcohol researchers, pharmacologists, physicians, toxicologists, and vision experts. Controversy within the scientific community is not necessarily a ground for exclusion of scientific evidence.

**New Mexico v. Aleman, 194 P.3d 110 (NMCA 2008).** DRE's testimony regarding 12-step protocol utilized to determine whether defendant's ability to drive was impaired, and which drug or drugs were involved, was *not* subject to *Daubert* analysis. Many protocol steps were based solely on police officer's observations of common physical manifestations of intoxication, which symptoms were self-explanatory. **HGN test administered in course of 12-step protocol was subject to *Daubert*.**

## **HGN**

### **Defense Challenges**

HGN is subject to **Daubert** so a **Daubert** hearing is required to determine its reliability.

### **State's Response**

In **Williams**, the Third District Court of Appeals found HGN to be a reliable indicator of impairment and took "judicial notice that HGN test results are admissible into evidence once a proper foundation has been laid that the test was correctly administered by a qualified HGN" due to its reliability. **Williams v. State, 710 So.2d 24, 32 (1998).** Because a **binding court** already found HGN to be reliable, there is no reason for your judge to re-litigate the issue – see the section above entitled "Is a **Daubert** hearing required?"

**State v. Taylor, 694 A.2d 907 (Me. 1997)** (court took judicial notice of the conclusion that HGN is reliable and admissible in driving under the influence cases).

**State v. Superior Court In and For Cochise Cnty, 718 P.2d 171 (1986).** "The evidence demonstrates that the following proposition has gained general acceptance in the relevant scientific community: (1) HGN occurs in conjunction with alcohol consumption; (2) its onset and distinctness are correlated to BAC; (3) BAC in excess of .10 percent can be estimated with reasonable accuracy from the combination of the eyes' tracking ability, the angle of onset of nystagmus and the degree of nystagmus at maximum deviation; and (4) officers can be trained to observe this phenomena sufficient to estimate accurately whether BAC is above or below .10 percent."

Because, HGN has already been deemed reliable and a **Daubert** hearing is not required, the State should be admitting HGN the same way as it always has under **Williams** by eliciting from the officer who administered the HGN test exactly how the test was administered,

whether that test was administered in accordance with that officer's training, and how many times that officer has administered the HGN, as well as any other qualifications the officer may have regarding HGN, such as courses the officer may have taken.

### **The Intoxilyzer 8000**

#### **Defense Challenges**

The Intoxilyzer 8000 produces unreliable results.

Usually, the Defense will cite to an Ohio municipal court opinion entitled **State v. Chelsea Lancaster**, where the court found the Intoxilyzer 8000 breath alcohol machine to be unreliable scientific evidence — and struck evidence of the breath tests as a result.

#### **State's Response**

**Daubert** does not apply to breath testing because the Florida Legislature has specifically adopted a mechanism for ensuring reliability in breath testing. FDLE is statutorily responsible for the regulation of the operation, inspection and registration of breath test instruments. Under **FAC 11D-8.003(2)**, FDLE approves breath test methods and new instruments to ensure the accuracy and reliability of breath test results.

**Bender v. State**, 382 So.2d 697, 700 (Fla. 1980). “The legislature properly exercised its authority is assigning to these agencies the responsibility of establishing **uniform and reliable testing methods** in this scientific area, particularly under the circumstances where the tests are part of a statutory scheme which prescribes the implied consent of all drivers to take these tests and where the tests and procedures are always subject to judicial scrutiny.”

**Rutledge v. NCL (Bahamas), Ltd.**, 464 Fed.Appx. 825 (C.A.11 Fla. 2012). Alcohol breath tests have been generally recognized as reliable since at least 1973. Given the breath devices low error rates in testing and its acceptance in the scientific community as an effective alcohol tester, the court did not err in finding the device satisfies **Daubert's** reliability requirements

**U.S. v. Brannon**, 146 F.3d 1194, 1196 (9th Cir. 1998). “Twenty-five years ago breathalyzers were certified as accurate by the National Highway Traffic Safety Administration of the Department of Transportation...their methodology is well-known and unchallenged.”

***If you receive a motion challenging SFSTs, HGN, DRE protocol, or the Intoxilyzer 8000 under Daubert/F.S. 702, or you would like to challenge an expert witness under Daubert/F.S. 702, please bring it to an Assistant Chief IMMEDIATELY.***



## **PART 7: BOATING**



## **BOATING UNDER THE INFLUENCE**

Fla. Stat. §327.35

### **I. ELEMENTS**

#### **A. IMPAIRMENT THEORY**

- Defendant was operating a vessel within this state;
- While under the influence of alcoholic beverages, any chemical substance set forth in **Fla. Stat. § 877.111**, or any substance controlled under **Chapter 893**;
- When affected to the extent his/her normal faculties were impaired.

#### **B. UNLAWFUL BLOOD / BREATH ALCOHOL**

- Defendant was operating a vessel within this state
- With:
  - a **blood** alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood
  - OR
  - a **breath** alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

### **II. DEFINITIONS**

#### **A. OPERATE - FLA. STAT. § 327.02(27)**

To be **in charge of or in command of or in actual physical control** of vessel upon the waters of this state, or

To **exercise control over or to have responsibility for a vessels navigation or safety while the vessel is underway** upon the waters of this state, or

To **control or steer a vessel being towed by another vessel** upon the waters of the state.

In 2000, the Legislature amended the statute. Now, *a vessel tied to a dock or the shore is still being operated*. Even having a “designated driver” does not insulate the owner or some other person in charge or command of the vessel from also being considered an operator. The point of the legislative change was to make it clear that someone has to be in charge of the vessel, and that “someone” is considered to be an operator.

**NOTE:** The statute states “an” operator not “the” operator. Unlike a vehicle, a vessel can have several people simultaneously operating it; the duties of helmsman (the person in actual physical control at the wheel), lookout, navigator, and master may all be performed by one person or may be spread among several persons, all of whom are considered operators.

**NOTE:** If you cannot tell who is in charge, the statute presumes that the owner of the boat is in charge. If the owner is not aboard, look next to the person who rented or borrowed the

boat. If one person is giving orders and others on board are following them, that would also be evidence of who is “in charge of or in command of” the boat. Finally, do not forget that any person in actual physical control of the vessel, including but not limited to the steering wheel, the throttles, or the trim tabs, may also be considered an operator.

1. **INCAPACITY OF AN OPERATOR - F.S. § 327.34** makes it “unlawful for the owner of any vessel or any person having such control over the vessel, to authorize or knowingly permit the same to be operated by any person who by reason of physical or mental disability is incapable of operating such vessel under the prevailing circumstances. Nothing in this section shall be construed to prohibit operation of boats by paraplegics who are licensed to operate motor vehicles on the highways.” Impairment by alcohol or drugs is both a physical and mental disability within the meaning of this statute.
2. **DESIGNATED DRIVER - F.S. § 327.35(10)** says “It is the intent of the legislature to encourage boaters to have a “designated driver” who does not consume alcoholic beverages.” This means that it is not ok to turn control of the boat over to someone because they have been drinking less; “does not consume” is not the least bit ambiguous. Remember, simply having a “designated driver” does not insulate the person who put the designated driver behind the wheel from also being considered an operator.
3. **BOATING SAFETY IDENTIFICATION CARDS** – Florida has no requirement for a vessel operator’s license. What kind of training and experience is required before someone can operate a vessel? **F.S. 327.395** requires everyone who was born AFTER January 1, 1988 to possess a photo ID and a boating safety identification card to operate a vessel powered by a motor of 10 horsepower or greater. This card generally requires an 8-hour course or an equivalent. Boaters 22 years or older do not have to take a course, but they must operate the vessel in a reasonable and prudent manner and they must comply with the navigation rules. **F.S. § 327.33**

**F.S. § 327.395** If a person is born *before* January 1, 1988, they do not need a boater safety identification card to operate a vessel. If a person is born *after* January 1, 1988, they must possess a boater safety card to operate a vessel. Violation of this is a non-criminal infraction **F.S. § 327.395**.

**NOTE:** The BUI statute does not mandate a license suspension. However, if the Defendant is required to possess a boater safety card then a suspension of the safety card is appropriate.

**B. VESSEL - FLA. STAT. § 327.02(37)**

Synonymous with **boat** as referred to in §1(b), Art VII of the State Constitution and including every description of a **watercraft, barge, and airboat, other than a seaplane on the water, capable of being used as a means of transportation on the water.**

**C. WATERS OF THE STATE - FLA. STAT. § 327.02(40)**

Any navigable waters of the United States within the territorial limits of this state, and the marginal sea adjacent to this state and the high seas when navigated as a part of a journey or ride to or from the shore of this state, and all the inland lakes, rivers, and canals under the jurisdiction of this state.

For vessels stopped beyond the state’s territorial boundaries (3 nautical miles out into the Atlantic or the edge of the Gulf Stream; 9 nautical miles out into the Gulf of Mexico), look for proof that the vessel left from or was returning to Florida such as: hotel or marina receipts

or reservations; receipts for fuel, supplies, or meals; capacity of the fuel tanks, fuel remaining, the possible voyage length given the amount of fuel burned, and the possible operating range of the vessel given the amount of fuel remaining in the tanks.

### III. THE STOP

#### A. COAST GUARD STOPS

The Coast Guard does *not* need reasonable suspicion or probable cause to board a vessel. They may board at any time in order to conduct an inspection. **14 U.S.C. §89**: The Coast Guard may at any time board any vessel subject to the operation of any law of the United States. For the prevention and suppression of violations of laws of the United States, the Coast Guard may examine and search a vessel as well as use all necessary force including the arrest of persons and the seizure of vessels.

**19 U.S.C. § 1581(a)**: any customs officer may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or as he may be authorizes, within a customs enforcement area.

- **U.S. v. Villamonte-Marquez, 462 U.S. 579 (1983)**: Customs officials, acting pursuant to statute authorizing customs officers to board any vessel at any time and at any place in the United States to examine vessel's manifest and other documents, and acting without any suspicion of wrongdoing did not violate Fourth Amendment by boarding or inspection of documents of a vessel that was located in waters providing ready access to open sea.
- **Saunders v. State, 758 So.2d 724 (Fla. 2d DCA 2000)**: A Coast Guard Petty officer was authorized to board vessel in waters over which the United States had jurisdiction . . . even in the absence of reasonable suspicion of unlawful activity, and such boarding did not unreasonably intrude on vessel owners 4<sup>th</sup> Amendment rights, where inspection was essentially document check to make sure that vessel was in compliance with applicable laws and although police officer accompanied petty officer, police officer did not direct investigation or take any active part in investigation, except to make custody of vessel owner once he was arrested.

#### B. MUNICIPAL OR FLORIDA FISH AND WILDLIFE STOPS

1. **RANDOM VESSEL INSPECTIONS** - What kind of suspicion does the officer need in order to stop, inspect, board or search a vessel?

**STOPPING THE VESSEL** – Officers do not need probable cause or suspicion to stop a vessel for inspection.

- **State v. Casal, 410 So.2d 152 (Fla. 1982)** Law enforcement officers need not have probable cause to stop a vessel for the limited purpose of ensuring compliance with vessel and fishing regulations by checking for proper safety equipment, fishing permits, registration certificates, and compliance with bag limits. Random spot checks for these purposes do not seriously circumscribe the Fourth Amendment. Requiring vessels which may be carrying valuable marine life to stop for the inspection of valid permits is like requiring trucks capable of carrying agricultural products to stop at agricultural inspection stations.

- **State v. Starkey, 605 So.2d 963 (Fla. 1<sup>st</sup> DCA 1992)** Boating and fishing are highly regulated activities. There is not as great a sense of security and privacy when traveling in a vessel as when traveling in an automobile. Thus, subjecting vessels to random spot checks for fishing permits or certificates and safety equipment outweighs a person's interest in being completely free from such limited intrusion.
2. **BOARDING THE VESSEL** - May an officer board the vessel to conduct the inspection? If the boarding is to conduct a safety inspection, there must be someone on board whose safety is to be protected. "No officer shall board any vessel to make a safety or marine sanitation equipment inspection if the owner or operator is not aboard." **F.S. § 327.56**. If the owner or operator is aboard, the officer may board "with consent or when the officer has probable cause or knowledge to believe that a violation of a provision of this chapter has occurred or is occurring". **F.S. § 327.56**.
- **Sherman v. State, 419 So.2d 375 (Fla. 1<sup>st</sup> DCA 1982)**(The officer has authority to board the vessel if the operator is unable to display a certificate of registration. When the legislature used the term "probable cause" in regulatory schemes, they were recognizing a lesser standard of probable cause to search than that required in criminal cases. The search can go from a regulatory search to a criminal probable cause search when the officer inadvertently sees a violation in plain view while conducting a proper and limited stop or search);
  - **Saunders v. State, 758 So.2d 724 (Fla. 2d DCA 2000)** The U.S. Coast Guard may make suspicionless administrative boardings in U.S. waters and bring Florida law enforcement with them. The Florida officer can then make an arrest for a criminal violation without reasonable suspicion for the stop. The opinion contains a quote from the dissenting opinion in **U.S. v. Villamonte-Marquez, 462 U.S. 579**, correctly characterizing the majority court's opinion as indicating "that police on a roving random patrol may stop and board any vessel, at any time, on any [waters where they have jurisdiction] with no probable cause or reasonable suspicion to believe there has been a crime or a border crossing, and without any limits whatever on their discretion to impose this invasion of privacy."
3. **SEARCHING THE VESSEL** - After the initial stopping and boarding of the vessel for the limited purposes specified in **Chapter [327] 371**, the marine officer must have probable cause before conducting a further search.
- **State v. Casal, 410 So.2d 152 (Fla. 1982)**. **Note: F.S. § 370.021(8)** "[A] law enforcement officer of the commission who **has probable cause to believe that the vessel has been used for fishing prior to the inspection** shall have full authority to open and inspect all containers or areas where saltwater products are normally kept aboard vessels while such vessels are on the water, such as refrigerated or iced locations, coolers, fish boxes, and bait wells, but specifically excluding such containers that are located in sleeping or living areas of the vessel."
  - **Sherman v. State, 419 So.2d 375 (Fla. 1<sup>st</sup> DCA 1982)**(When the legislature used the term "probable cause" in regulatory schemes, they were recognizing a lesser standard of probable cause to search than that required in criminal cases.) **Note:** During these inspections, the officer will ask the operator to bring the officer his/her life jacket, fire extinguisher, registration, etc. The officer gets a good indication of

the operator's sobriety while watching the operator locate each item and bring it to the officer

- **State v. Taylor, 648 So.2d 701 (Fla. 1995)**. If the officer has reasonable suspicion of BUI, the officer can investigate further.
- **Rimmer v. State, 825 So.2d 304 (Fla. 2002)**. Anything in plain view is not a search.

#### **4. WHAT IF THE US COAST GUARD DETENTION WAS PASSED TO FLORIDA OFFICER?**

If a U.S. Coast Guard officer has probable cause to believe that a boater is BUI, can that officer hand that boater over to a Florida officer to make the arrest under Florida law even though the Florida officer did not see the boater operate the vessel?

**YES. F.S. § 901.15(10)** allows the Florida officer to make an arrest for a misdemeanor that was committed in the presence of a law enforcement officer of the United States Government if the Florida officer has probable cause to believe that a misdemeanor has been committed, based upon a signed affidavit provided to the Florida officer by the federal law enforcement officer.

**Note:** The U.S. Coast Guard works with state FWC officers and local officers on a regular basis and have signed memoranda of understanding with these state and local agencies to memorialize the partnerships. **See also Saunders v. State, 758 So.2d 724 (2d DCA 2000)**(The U.S. Coast Guard may make suspicionless administrative boardings in U.S. waters and bring Florida law enforcement with them. The Florida officer can then make an arrest for a criminal violation without reasonable suspicion for the stop).

### **IV. DOCKSIDE EXERCISES**

Docksides can either be conducted afloat or ashore.

#### ***Afloat Task Exercises***

- Horizontal Gaze Nystagmus
- Palm Pat
- Finger Count
- Finger to Nose
- Recite Alphabet
- Backwards Count

***Ashore Task Exercises:*** All exercises regularly conducted by police officers. Walk & Turn & OLS are mostly used.

**General Observations:** The best possible boating field sobriety test is the boating safety inspection. The officer can move the vessel operator all around the vessel by carefully choosing the order in which equipment is requested. After starting at the steering station by asking for the registration certificate, the officer can move the operator to the bow (front) by asking for equipment stored there; then to the stern (back) to check the engine compartment ventilation; then to the cabin to check for a fire extinguisher, then back to the stern to check the flame arrester; then back to the steering console to check the horn. The list of equipment

goes on and on. By the time the inspection is concluded, the officer should be easily able to articulate the signs of impairment the operator demonstrated.

**Defense Arguments concerning FSE and Dockside Exercises:** Defendants argue that balance and coordination are degraded by the stress encountered in the marine environment, thereby invalidating them for such use.

## V. ARREST AUTHORITY

### A. FLA. STAT. § 901.15(11)

A law enforcement officer may arrest a person without a warrant when the officer has determined that he or she has probable CAUSE to believe that a MISDEMEANOR has been COMMITTED based upon a signed affidavit provided to the officer by a law enforcement officer of the United States government

### B. 14 U.S.C. §143

The Coast Guard is tasked with enforcement of all applicable federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States.

### C. 14 U.S.C. §143 AND 19 U.S.C. § 1401 (I)

Coast Guard commissioned, warrant, and petty officers are deemed officers of United States Customs and when acting as such, have arrest authority *ashore*.

### D. 14 U.S.C. § 141

The Coast Guard is authorized to *assist other agencies* upon request.

## VI. PENALTIES

### A. CLASSIFICATION OF OFFENSE

- 1<sup>st</sup> & 2<sup>nd</sup> BUI = 2<sup>nd</sup> Degree Misdemeanor
- 1<sup>st</sup> or 2<sup>nd</sup> BUI w/property or personal damage = 1<sup>st</sup> Degree Misdemeanor
- 3<sup>rd</sup> BUI outside of 10 years of last conviction = 1<sup>st</sup> Degree Misdemeanor
- 3<sup>rd</sup> BUI w/in 10 years of last conviction = 3<sup>rd</sup> Degree Felony
- BUI w/Serious Injury = 3<sup>rd</sup> Degree Felony
- 4<sup>th</sup> or Subsequent BUI (regardless of the time for any prior conviction) = 3<sup>rd</sup> Degree Felony

Any prior conviction for a violation of **Fla. Stat. § 316.193** (DUI) is considered a conviction for violation of **F.S. § 327.35(6)(i)** (BUI).

**NOTE:** Although BUIs are classified as 1<sup>st</sup> and 2<sup>nd</sup> degree misdemeanors, the maximum punishment is as follows:

- **Fines:**
  - Not less than \$250 or more than \$500 for a first conviction
  - Not less than \$500 or more than \$1,000 for a first conviction
  - Not less than \$1,000 or more than \$2,500 for a third conviction outside of 10 years
  - If defendant has a .20 or higher OR has a minor in the car at the time of the offense:
    - Not less than \$500 or more than \$1,000 for a first conviction
    - Not less than \$1,000 or more than \$2,000 for a second conviction

- Not less than \$2,000 for a third or subsequent conviction
- **Imprisonment:**
  - Not more than 6 months for a first conviction
  - Not more than 9 months for a second conviction
  - Not more than 12 months for a third conviction outside of 10 years
  - If defendant has a .20 or higher OR has a minor in the car at the time of the offense:
    - Not more than 9 months for a first conviction
    - Not more than 12 months for a second conviction

**B. MANDATORY ADJUDICATION**

**Mandatory Adjudication - Fla. Stat. § 327.36** – no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation of **F.S. § 327.35**.

**C. BOAT IMPOUNDMENT –F.S. § 327.35(6)**

The court at the time of sentencing as a condition of probation *must* order the impoundment or immobilization of the vessel that was operated by or in the actual control of the defendant, or any one vehicle registered in the Defendant's name at the time of the impoundment or immobilization pursuant to **F.S. § 327.35(6)**.

**D. REFUSAL PENALTIES**

The penalty for refusal of a breath test is a **\$500 civil penalty** instead of a D6 pursuant to **F.S. § 327.35215(1)**.

If the penalty is unpaid or unchallenged in 30 days the individual is prohibited from operating the vessel. If they operate a vessel, it is a first-degree misdemeanor. **F.S. § 327.35215(4)**

**E. DRUG EVALUATION AND TREATMENT**

The offender must complete a drug evaluation and any required treatment as a condition of probation. It does not affect the offender's driver's license. **F.S. § 327.35(5)**.

**F. COMMUNITY SERVICE HOURS**

A first time offender convicted of DUI is required to perform 50 hours of community service, but is allowed to buy out of that service at the rate of ten dollars per hour. **F.S. § 316.193(6)(a)**. This buy-out provision is not available to a person convicted of BUI and the 50 hours of community service must be performed. **F.S. § 327.35(6)(a)**

## VIII. CASE LAW & STATUTES

- **Cameron v. State**, 804 So.2d 338 (Fla 4<sup>th</sup> DCA 2001): Blood draws; presumption of impairment
- **Morales v. State**, 785 So.2d 612 (Fla 3d DCA 2001): Improper charge by information
- **State v. Mehl**, 602 So.2d 1383 (Fla 5<sup>th</sup> DCA 1992): Presumption of impairment
- **State v. Floyd**, 510 So.2d 1180 (Fla 4<sup>th</sup> DCA 1987): Probable cause
- **Fla. Stat. § 327.352**: Breath, Blood, & Urine tests, refusal
- **Fla. Stat. § 327.354**: Presumption of impairment; Testing Method
- **Fla. Stat. § 90.803**: Hearsay Exceptions

## IX. DISCOVERY CHECKLIST

- \_\_\_ Information (Charging Document)
- \_\_\_ Defendant's Priors
- \_\_\_ Traffic Printout
- \_\_\_ Witness List
- \_\_\_ Victim
- \_\_\_ Investigative Reports by Agency (If more than one agency is involved, make sure to have all reports by all agencies)
- \_\_\_ Offense Incident Reports (from all agencies involved)
- \_\_\_ Afloat FSE report
- \_\_\_ Ashore FSE Report
- \_\_\_ DUI test report and all DUI paperwork regularly ordered in DUI cases
- \_\_\_ Statements of Defendant (oral or written)
- \_\_\_ Miranda Waiver (if applicable)
- \_\_\_ Photographs



## **BOATING ACCIDENTS**

Fla. Stat. 327.33(3)

### **I. DEFINITIONS**

#### **A. BOATING ACCIDENT – FLA. STAT. 327.02(3)**

A collision, accident, or casualty involving a vessel in or upon, or entering into or exiting from, the water, including capsizing, collision with another vessel or object, sinking, personal injury, death, disappearance of any person from on board under circumstances which indicate the possibility of death or injury, or property damage to any vessel or dock.

- **J.S.G., Jr. v. State, 927 So. 2d 187 (Fla. 2<sup>d</sup> DCA 2006)** Statute prohibiting reckless or careless operation of a vessel, which defines a “boating accident” as a collision, accident, or casualty involving a vessel in or upon the water, does not limit a “boating accident” to a collision between vessels.

#### **B. NAVIGATIONAL RULES – FLA. STAT. 327.02(25) AKA “RULES OF THE ROAD”**

The International Navigational Rules Act of 1977, 33 U.S.C. appendix following s. 1602, as amended, including the annexes thereto, for vessels on waters outside of established navigational lines of demarcation as specified in 33 C.F.R. part 80 or the Inland Navigational Rules Act of 1980, 33 U.S.C. ss. 2001 et seq., as amended, including the annexes thereto, for vessels on all waters not outside of such lines of demarcation.

### **II. ELEMENTS - FLA. STAT. 327.33(3)(a)**

1. Defendant, while an operator of a vessel upon the waters of this state;
2. did violate a navigational rule;
3. which resulted in a boating accident in violation of 33 U.S.C. §20\_\_ (you must properly cite a specific rule) contrary to the form of Florida Statute 327.33(3)(A).

### **III. NAVIGATIONAL RULES – 33 U.S.C. §2001, et seq.**

#### **A. IMPORTANT DEFINITIONS**

##### **RULE 3 (cited as 33 U.S.C. §2003)**

For the purpose of these Rules and this Chapter, except where the context otherwise requires:

- (a) The word “vessel” includes every description of water craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water;
- (b) The term “power-driven vessel” means any vessel propelled by machinery;
- (c) The term “sailing vessel” means any vessel under sail provided that propelling machinery, if fitted, is not being used;
- (d) The term “vessel engaged in fishing” means any vessel fishing with nets, lines, trawls, or other fishing apparatus which restricts maneuverability, but does not include a vessel fishing with trolling lines or other fishing apparatus which do not restrict maneuverability;
- (e) The word “seaplane” includes any aircraft designed to maneuver on the water;

- (f) The term “vessel not under command” means a vessel which through some exceptional circumstance is unable to maneuver as required by these Rules and is therefore unable to keep out of the way of another vessel;
- (g) The term “vessel restricted in her ability to maneuver” means a vessel which from the nature of her work is restricted in her ability to maneuver as required by these Rules and is therefore unable to keep out of the way of another vessel; vessels restricted in their ability to maneuver include, but are not limited to: (g) (continued) (i) a vessel engaged in laying, servicing, or picking up a navigation mark, submarine cable, or pipeline; (ii) a vessel engaged in dredging, surveying, or underwater operations; (iii) a vessel engaged in replenishment or transferring persons, provisions, or cargo while underway; (iv) a vessel engaged in the launching or recovery of aircraft; (v) a vessel engaged in mine clearance operations; and (vi) a vessel engaged in a towing operation such as severely restricts the towing vessel and her tow in their ability to deviate from their course.
- (h) The word “underway” means that a vessel is not at anchor, or made fast to the shore, or aground;
- (i) The words “length” and “breadth” of a vessel means her length overall and greatest breadth;
- (j) Vessels shall be deemed to be in sight of one another only when one can be observed visually from the other;
- (k) The term “restricted visibility” means any condition in which visibility is restricted by fog, mist, falling snow, heavy rainstorms, sandstorms, or any other similar causes;
- (o) “Inland Waters” means the navigable waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States and the waters of the Great Lakes on the United States side of the International Boundary;
- (p) “Inland Rules” or “Rules” mean the Inland Navigational Rules and the annexes thereto, which govern the conduct of vessels and specify the lights, shapes, and sound signals that apply on inland waters; and

## **B. GENERAL APPLICATION**

### **RULE 1 (cited as 33 U.S.C. §2001)**

These Rules apply to all vessels upon the inland waters of the United States, and to vessels of the United States on the Canadian waters of the Great Lakes to the extent that there is no conflict with Canadian law. Nothing in these Rules shall interfere with the operation of any special rules made by the Secretary of the Navy with respect to additional station or signal lights and shapes or whistle signals for ships of war and vessels proceeding under convoy, or by the Secretary with respect to additional station or signal lights and shapes for fishing vessels engaged in fishing as a fleet. These additional station or signal lights and shapes or whistle signals shall, so far as possible, be such that they cannot be mistaken for any light, shape, or signal authorized elsewhere under these Rules. Notice of such special rules shall be published in the Federal Register and, after the effective date specified in such notice, they shall have effect as if they were a part of these Rules<sup>1</sup>. Vessel traffic service regulations may be in effect in certain areas.

## **C. MOST COMMONLY CITED RULES:**

### • **RULE 2 Responsibility**

- (a) Nothing in these Rules shall exonerate any vessel, or the owner, master, or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to

any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.

- **RULE 4 Application**

Rules in this subpart apply in any condition of visibility.

- **RULE 5 Look-out**

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

- **RULE 6 Safe Speed**

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions. In determining a safe speed the following factors shall be among those taken into account: (a) By all vessels: (i) the state of visibility; (ii) the traffic density including concentration of fishing vessels or any other vessels; (iii) the maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions; (iv) at night, the presence of background light such as from shore lights or from back scatter of her own lights; (v) the state of wind, sea, and current, and the proximity of navigational hazards; (vi) the draft in relation to the available depth of water. (b) Additionally, by vessels with operational radar: (i) the characteristics, efficiency and limitations of the radar equipment; (ii) any constraints imposed by the radar range scale in use; (iii) the effect on radar detection of the sea state, weather, and other sources of interference; (iv) the possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range; (v) the number, location, and movement of vessels detected by radar; and (vi) the more exact assessment of the visibility that may be possible when radar is used to determine the range of vessels or other objects in the vicinity.

- **RULE 7 Risk of Collision**

(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist. (b) Proper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early warning of risk of collision and radar plotting or equivalent systematic observation of detected objects. (b) Assumptions shall not be made on the basis of scanty information, especially scanty radar information. (c) In determining if risk of collision exists the following considerations shall be among those taken into account: (d) such risk shall be deemed to exist if the compass bearing of an approaching vessel does not appreciably change; and (ii) such risk may sometimes exist even when an appreciable bearing change is evident, particularly when approaching a very large vessel or a tow or when approaching a vessel at close range.

- **RULE 8 Action to Avoid Collision**

(a) Any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship. (b) Any alteration of course or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course or speed should be avoided. (c) If there is sufficient sea room, alteration of course alone

may be the most effective action to avoid a close-quarters situation provided that it is made in good time, is substantial and does not result in another close-quarters situation. (d) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear. (e) If necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion. (f) (i) A vessel which, by any of these rules, is required not to impede the passage or safe passage of another vessel shall, when required by the circumstances of the case, take early action to allow sufficient sea room for the safe passage of the other vessel. (ii) A vessel required not to impede the passage or safe passage of another vessel is not relieved of this obligation if approaching the other vessel so as to involve risk of collision and shall, when taking action, have full regard to the action which may be required by the rules of this part. (iii) A vessel, the passage of which is not to be impeded remains fully obliged to comply with the rules of this part when the two vessels are approaching one another so as to involve risk of collision.

- **RULE 13 Overtaking**

(a) Notwithstanding anything contained in Rules 4 through 18, any vessel overtaking any other shall keep out of the way of the vessel being overtaken. (b) A vessel shall be deemed to be overtaking when coming up with another vessel from a direction more than 22.5 degrees abaft her beam; that is, in such a position with reference to the vessel she is overtaking, that at night she would be able to see only the stern light of that vessel but neither of her sidelights. (c) When a vessel is in any doubt as to whether she is overtaking another, she shall assume that this is the case and act accordingly. (d) Any subsequent alteration of the bearing between the two vessels shall not make the overtaking vessel a crossing vessel within the meaning of these Rules or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

- **RULE 15 Crossing Situation**

(a) When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.

- **RULE 16 Action by Give-way Vessel**

Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear.

- **RULE 17 Action by Stand-on Vessel**

(a) (i) Where one of two vessels is to keep out of the way, the other shall keep her course and speed. (ii) The latter vessel may, however, take action to avoid collision by her maneuver alone, as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action in compliance with these Rules. (b) When, from any cause, the vessel required to keep her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision. (c) A power-driven vessel which takes action in a crossing situation in accordance with subparagraph (a)(ii) of this Rule to avoid collision with another power-driven vessel shall, if the circumstances of the case admit, not alter course to port for a vessel on

her own port side. (d) This Rule does not relieve the give-way vessel of her obligation to keep out of the way.

#### **IV. BOATING ACCIDENTS OCCURRING IN FATALITIES OR SEVERE INJURY**

Please bring these to the attention of an Assistant Chief immediately.

**PRACTICE NOTE:** Florida Fish and Wildlife (FFW) investigate cases of boating accidents and are primarily the agency responsible (along with the U.S. Coast Guard) for the vast majority of boating cases. FFW generates massive reports for each incident they are involved in. Cases will always have reports, graphs, pictures and a host of valuable information. When you have a case like this, you should always set up a pre-trial conference with the FFW lead investigator, and coordinate for the personal delivery of these reports.

#### **V. DISCOVERY CHECKLIST**

- \_\_\_ Information (Charging Document)
- \_\_\_ Defendant's Priors
- \_\_\_ Traffic Printout
- \_\_\_ Witness List
- \_\_\_ Victim
- \_\_\_ Florida Boating Accident Investigation – Short Form
- \_\_\_ Florida Boating Accident Investigation – Long Form
- \_\_\_ Citations
- \_\_\_ Florida Fish and Wildlife Conservation Commission Incident Summary Report
- \_\_\_ Narrative
- \_\_\_ Statements of Witnesses (written or taped)
- \_\_\_ Statements of Defendant (oral or written)
- \_\_\_ Florida Fish and Wildlife Conservation Commission Accident Information Form (For Fatal or Severe Injury Accidents)
- \_\_\_ Autopsy Report (For Fatal Accidents)
- \_\_\_ Miranda Waiver (if applicable)
- \_\_\_ Photographs