New Laws and Legal Decisions

2010- 2011

I. Legislation

A. Drugs

1. **Drug Court SB400**- Drug Court judge must later sentence

a) All offenders in a post adjudicatory drug court program who are charged with a violation of probation or violation of community control shall have those charges heard by the judge presiding over the post adjudicatory drug court program.

b) Expands post adjudicatory treatment based drug court programs as a sentencing option by increasing the total number of sentencing points an offender may have accumulated and still qualify for the program from 52 to 60, and by providing that an offender who violates probation or community control for any reason may be admitted to the program.

c) EFFECTIVE DATE: July 1, 2011.

2. Includes certain additional hallucinogenic substances in Schedule one (July 1, 2011)

B. Evidence HB 0251 "**Walk in Their Shoes Act"**

1. 404(2) amended

2. Permits admission of evidence of defendant's commission of other crimes, wrongs, or acts of sexual nature in criminal case in which defendant is charged with crime of sexual nature

3. Revises offenses considered "child molestation"

4. Requires additional court cost in cases of certain criminal offenses to be deposited into Rape Crisis Program Trust Fund

5. prohibits controlling or intentionally viewing any photograph, motion picture, exhibition, show, image, data, computer depiction, representation, or other presentation that includes sexual conduct by child;

C. SB 234 - **Firearms**: provides exception for violation of open carrying of firearm: It is not a violation of this section for a person licensed to carry a concealed firearm as provided in s. 790.06(1), an is lawfully carrying a firearm in a concealed manner, 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. EFFECTIVE DATE: June 17, 2011.

D. Sentencing

1. Provides exception & penalties, & conforms provisions of offense severity ranking chart of Criminal Punishment Code.

2. Effective Date: July 1, 2011

II. Pretrial

A. **Initial Appearance**- Trial Court must give defendants at least brief opportunity to be heard on bond issues, even if would be better served at later time. Greenwood v. State 51 So.3d 1278, 36 Fla. L. Weekly D256, Fla.App. 2 Dist., February 02, 2011 (NO. 2D10-4143)

B. Constitutional Issues

1. **First Amendment** – not excessive entanglement for state to prosecute priest of grand theft (and opinion managed to cite a case name "pagan"). Guinan v. State 4D09-1261 (7/13/11)

2. Second Amendment

a) The second amendment protecting the right to keep and bear arms for self-defense is applicable to the states. The right to self-defense is fundamental and deeply rooted. McDonald v. City of Chicago __ U.S. __, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

b) PFACF- F.S. 790.23(1)(a) does not violate 2nd amendment even considering recent 2nd amendment decisions by the US Supreme Court in McDonald. Joshua Epps v. State 55 So.3d 710, 36 Fla. L. Weekly D475, Fla.App. 1 Dist., March 02, 2011 (NO. 1D10-1263)

3. Fourth Amendment

a) Knock and talk- or entry on Defendant's property

(1) Entry of suburban or rural acreage surrounded by a six-foot chain link fence, unlocked gate at driveway, lacking "no trespass" signs, for knock and talk was citizen encounter and although may have been trespass violation no showing that violated justified expectation of privacy. Nieminski v. State 60 So.3d 521, 36 Fla. L. Weekly D903, Fla.App. 2 Dist., April 29, 2011 (NO. 2D10-1087)

(2) When police had trespassed onto the defendant's property, that the police had no warrant, the subsequent consent was invalid. Defendant had taken great measures to ensure his privacy; the house was surrounded by barriers obstructing a view of the property. This enclosed area constitutes curtilage that falls under the same constitutional protections as the residence it surrounds. The momentary opening of the gate for the defendant to leave was not an open invitation to the public, or by extension to the police, to enter. Certainly, a policeman may enter the curtilage surrounding a home in the same way as a salesman or visitor could. This case is also distinguishable from the "knock and talk" cases Fernandez v. State, --- So.3d ----, 2011 WL 2497217, 36 Fla. L. Weekly D1274, Fla.App. 3 Dist., June 15, 2011 (NO. 3D10-567)

(3) Screened in Lanai on back of house is either part of house or cartilage and within 4th amendment protections. LEO is authorized to go where public would be expected without violation. This includes knocking on front door. U.S. v. Hill, ___ F. Supp 2nd 2011 WL 2222141 (MD. Fla 6/8/11)

(4) LEO observed pedestrian violation and stopped defendant at time he reached his front porch. LEO smelled marijuana and searched. Front porch is not equivalent to inside house and stop and search proper. State v. Hill 54 So 3d 530 5th DCA 2011

(5) Trial court did not err in finding that state did not sustain its burden to show valid consent as exception to home warrant when officers surrounded house and defendant's consent was mere acquiesces to authority. State v. Ojeda, --- So.3d ----, 2010 WL 4226705, 35 Fla. L. Weekly D2377, Fla.App. 3 Dist., October 27, 2010 (NO. 3D08-1079, 3D08-1077) not released for publication.

b) Dog Sniffs

(1) Dog "sniff test" performed outside of house requires probable cause. Jardines v. State --- So.3d ----, 2011 WL 1405080, 36 Fla. L. Weekly S147, Fla., April 14, 2011 (NO. SC08-2101)

(2) State may establish probable cause to search interior of vehicle based on drug-detection dog's alert on vehicle's exterior by demonstrating that officer had reasonable basis for believing the dog to be reliable based on totality of circumstances -- To meet its burden of establishing that officer had reasonable basis for believing dog to be reliable

in order to establish probable cause, state must present training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle -- Evidence that dog has been trained and certified to detect narcotics, standing alone, is not sufficient to establish dog's reliability for purposes of determining probable cause -- In instant case, state did not meet burden of demonstrating that officer had reasonable basis for believing that dog was reliable at time of search and, thus, that dog's alert indicated fair probability that drugs would be found in vehicle Harris v. State --- So.3d ----, 2011 WL 1496470, 36 Fla. L. Weekly S163a 4/21/11 (SC08-1871)

(3) Narcotics detection dog's alert to presence of drugs in defendant's car was sufficiently reliable to establish probable cause for search. Frost v. State, 53 So 3d 1119 (4th DCA 1/26/ 2011) notes waiting on Harris

c) Exigency

(1) Warrantless entry to apartment allowed to prevent the destruction of evidence is allowed when police do not create exigency through 4th amendment violation. Kentucky v. King, 563 U.S. ___, 131 S. Ct. 1849 (2011)

(2) Not enough for search of bedroom Willis v. State 1D10-4154 5/18/11

d) Vehicle search

(1) Search of bag in car proper when reasonable when officer reasonable belief that relevant evidence of mortgage fraud. Patricia Grant v. State 43 So.3d 864, 35 Fla. L. Weekly D1980, Fla.App. 5 Dist., September 03, 2010 (NO. 5D08-1711, 5D08-2278)Geisha Morris v. State 5D08-2278 8/30/10

(2) Search incident proper when smelled marijuana and therefore reasonable belief that evidence of crime. State v. Williams, 43 So.3d 145, 35 Fla. L. Weekly D1935, Fla.App. 3 Dist., August 25, 2010 (NO. 3D09-2427)

(3) No standing to contest search of stolen vehicle. State v. Gentry, 57 So.3d 245, 36 Fla. L. Weekly D534, Fla.App. 5 Dist., March 11, 2011 (NO. 5D10-2250)

e) Warrant

(1) Exclusionary rule based on Florida Statute of knock and announce rather than 4th amendment (since Hudson v. Michigan, 547 US 586 2006 required court to recede from remedy) proper. State v. Cable 51 So.3d 434, 35 Fla. L. Weekly S705, Fla., December 09, 2010 (NO. SC09-1684)

(2) Trial Court erred in suppression

(a) Affidavit had pc to believe that Defendant (including intricacies of IP addresses) used file sharing program to access prepubescent females engaging in sexual conduct. Enough for warrant to search home. State v. Wesley Dean Williams 46 So.3d 1149, 35 Fla. L. Weekly D2440, Fla.App. 1 Dist., November 02, 2010 (NO. 1D10-2954)

(b) ion scan of defendant driver vehicle interior authorized to determine whether additional testing for presence of drugs would link defendant to charges of unauthorized acting as money transmitter and money laundering. Great deference not de novo proper for reviewing magistrate decision. PC included defendant behaved erratically during traffic stop that narcotics dog alerted during an air sniff and a controlled box test, and that over $80,000 in currency was discovered in a plastic bag hidden in rear of vehicle. State v. Exantus 59 So 3d 359 2nd DCA 4/29/10

(c) Utility company found tap for unmetered electricity enough for pc for grow hosue. Even if LEO acts deceptively court required to excise erroneous material and determine if remaining information constitutes pc. State v. Delrio 56 So.3d 848, 36 Fla. L. Weekly D271, Fla.App. 2 Dist., February 04, 2011 (NO. 2D10-182)

(d) Although Magistrate finding PC was a close call, the good faith exception should apply when LEO relying on warrant. State v. Rushing, --- So.3d ----, 2011 WL 2581777, 36 Fla. L. Weekly D1430, Fla.App. 5 Dist., July 01, 2011 (NO. 5D10-2985) NOT FINAL

(e) When law enforcement omitted facts specifics of computer not maliciously, trial court should not have granted suppression unless factual inclusion would have resulted in different warrant which is

not true in this case. State v. Chiquet 2D10-3420 6/22/11

(3) Great discussion of "curtilage" within meaning of warrant- In this case fact that car partially on driveway of target search is not enough when outside fence on city street. Wheeler v. State --- So.3d ----, 2011 WL 2268952, 36 Fla. L. Weekly D1239, Fla.App. 5 Dist., June 10, 2011 (NO. 5D10-1994)

(4) For blood in DUI not proper because affidavit had misdemeanor but warrant could be if properly state felony. Does not violate implied consent or right to privacy either. Good faith prevents exclusion in this case. State v. Geiss 5D10-3292 5/27/11

f) Probable cause

(1) Yes

(a) LEO 1 observed D brief contact, limited eye contact, look up and down street, exchange paper currency for item in had with three different people. Officer 2, upon stopping car, saw defendant reach toward center console and then down to floor. Officer asked if contraband – Defendant replied "out of game" and lifted shirt. Asked if in shoes, defendant appeared hesitant and attempted to conceal item in shoe. State v. Hankerson ___ So. 3d ___, 2011 WL 1496482 Fla. 2011 (SC10-1074) 4/21/11

(b) Witness saw navy blue or black car parked near house, man walked away, gunshots heard, and car sped away. D was stalking boyfriend who drove

black car and was pulled over 5 miles from house within 30 minutes driving black car. State v. Cuomo 43 So.3d 838, 35 Fla. L. Weekly D1949, Fla.App. 1 Dist., August 31, 2010 (NO. 1D09-5537)

(c) Stop for jaywalking valid and subsequent search valid. State v. Nichols 52 So.3d 793, 36 Fla. L. Weekly D62, Fla.App. 5 Dist., December 30, 2010 (NO. 5D10-1266)

(d) Trial Court did not err in factually finding road was open to public and therefore Officer's stop of Defendant for DWLS valid. Mattingly v. State 41 So.3d 1020, 35 Fla. L. Weekly D1774, Fla.App. 5 Dist., August 06, 2010 (NO. 5D09-2572)

(2) No

(a) Search incident to unlawful arrest and no exception to exclusionary rule. Faith v. State 45 So.3d 932, 35 Fla. L. Weekly D2258, Fla.App. 1 Dist., October 13, 2010 (NO. 1D09-4364)

(b) No PC for arrest based on L &P. Officer saw D between a screen door and front door looking at LEO and then drove away. Stopped immediately and upon questioning said friend lived there. Ferguson v. State 39 So.3d 551, 35 Fla. L. Weekly D1612, Fla.App. 2 Dist., July 21, 2010 (NO. 2D09-276, 2D09-326)

g) Reasonable Suspicion

(1) State or Agent- Trial court erred granting suppression when it was driver, not LEO who asked for the drugs.

Deputy did not ask driver to ask passenger. State v. C.D.M 50 So.3d 659, 35 Fla. L. Weekly D2581, Fla.App. 2 Dist., November 24, 2010 (NO. 2D09-4236)

(2) law enforcement officers did not exceed the scope of an investigative stop of defendant by handcuffing him, conducting a pat down search, and holding him for approximately 30 minutes until victims were transported for show-up identifications, and items seized from defendant's pockets during the pat down search were admissible under the inevitable-discovery doctrine. Fernandez v. State, 57 So.3d 915, Fla.App. 3 Dist., March 23, 2011 (NO. 3D09-1215, 3D09-3446)

(3) Yes

(a) defendant was walking down the middle of the street in an area known for narcotics sales, defendant became suspiciously defensive when confronted about walking in the middle of the street, officer observed gun-shaped bulge in defendant's pocket, and defendant fled before officers made any show of authority that would trigger a Fourth Amendment seizure. US v. Jordan 635 F.3d 1181, 22 Fla. L. Weekly Fed. C 1900, C.A.11 (Ga.), March 16, 2011 (NO. 10-11534)

(b) Anonymous tip about white males trying car doors at 3:00 am in neighborhood. Officer arrived and saw Defendant, a while male, walking and carrying a personal safe. State v. Quinn 41 So.3d 1011, 35 Fla. L. Weekly D1773, Fla.App. 5 Dist., August 06, 2010 (NO. 5D09-1197)

(c) Citizen informant alleging gun with corroborating information after police stop sufficient for pat down. Hadley v. State, 43 So.3d 113, 35 Fla. L. Weekly D1884, Fla.App. 3 Dist., August 18, 2010 (NO. 3D08-1857)

(d) Shaken girl approached and pointed at Defendant claiming he had gun. Officer conducted patdown and found fun. D.P v State 3D10-1139 7/5/11

(4) No

(a) Passenger in car lawfully stopped. Driver left. Passenger in another jurisdiction when officer's arrived passenger fled. T.T.N. v. State 40 So.3d 897, 35 Fla. L. Weekly D1653, 35 Fla. L. Weekly D1798, Fla.App. 2 Dist., July 23, 2010 (NO. 2D09-856)

(b) Anonymous tip dark haired 6 foot tall man wearing flannel trying to open car doors. Officers stopped Defendant, who claimed coming from a friend's house, after step from between vehicles. Similarity of description with location not enough. Simms v. State 51 So.3d 1264, 36 Fla. L. Weekly D206, Fla.App. 2 Dist., January 28, 2011 (NO. 2D09-3971)

(c) Defendant's refusal to keep his hands out of pockets insufficient to justify pat down. Subsequent discovery of firearm and drugs should be suppressed. Dawson v. State 58 So.3d 419, 36 Fla. L. Weekly D804, Fla.App. 2 Dist., April 15, 2011 (NO. 2D09-5868)

h) Consent- act of placing her hands on roof of vehicle while vehicle's driver was being arrested for drinking and driving did not by itself evince consent to search of her person. E.J., a child v. State 4D09-736 8/4/10

i) Plants discovered during valid "protective sweep" pursuant to Maryland v. Buie, 494 U.S 325, 110 S Ct 1093, 108 L.Ed. 2d 275 (1990). David L McKibben v. State 46 So.3d 1224, 35 Fla. L. Weekly D2527, Fla.App. 1 Dist., November 17, 2010 (NO. 1D10-1011)

j) Cell phone

(1) No reason to believe cell phone had evidence for arrested crime yet search is still permitted pursuant to States v. Robinson, 414 U.S. 218 1973) which allows LEO to inspect any item found on arrestees person. question certified. Smallwood v. State 61 So 3d 448 (1st DCA 4/29/11)

(2) Wall paper depicted sexual performance of a child. Court equated to digital container and allowed search although not related to warrant. Fawdry v. State --- So.3d ----, 2011 WL 1815328, 36 Fla. L. Weekly D1037, Fla.App. 1 Dist., May 13, 2011 (NO. 1D10-0896)NOT FINAL

k) Inventory

(1) Proper inventory search when part of impoundment of vehicle conducted according to standardized procedures– State v. Townsend 40 So.3d 103, 35 Fla. L. Weekly D1589, Fla.App. 2 Dist., July 16, 2010 (NO. 2D09-4102)

(2) To be legal under the Fourth Amendment, an inventory search had to be conducted according to standardized

criteria. Although the deputy testified that it was standard sheriff's office policy to conduct an inventory search whenever a vehicle was towed, he also testified that there were no standardized criteria for performing such a search. Additionally, the State did not present any evidence that it was standard policy to open closed containers found during the search, such as the pill bottle in defendant's truck where the drugs were found. Barth Kilburn v. State 54 So.3d 625, 36 Fla. L. Weekly D394, Fla.App. 1 Dist., February 22, 2011 (NO. 1D10-3614)

l) Plain view- Officer did not have probable cause to believe that multi-colored pipe partially protruding from juvenile's bag was contraband, and thus pipe was not subject to seizure under plain view doctrine; the pipe could have been a tobacco pipe or other lawful object, officer did not observe any suspicious activity or behavior prior to seizing the pipe, there was no evidence that juvenile was at a location known for drug activity, officer was not at the location due to a tip regarding drug activity but rather to retrieve a missing juvenile, there was no evidence juvenile appeared under the influence of marijuana, and there was no evidence officer saw marijuana residue in the pipe M.L. v. State47 So.3d 911, 35 Fla. L. Weekly D2456, Fla.App. 3 Dist., November 03, 2010 (NO. 3D10-305)

m) Exclusionary Rule- Good faith

(1) Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. Davis v. US, 564 U. S. ___ (2011) 6/16/11.

(2) Items from car improperly excluded when officers had good faith basis under well-settled case law. Defendant was handcuffed and in patrol car when officers search car incident. State v. Harris 58 So.3d 408, 36 Fla. L. Weekly D794, Fla.App. 1 Dist., April 14, 2011 (NO. 1D09-4520)Yet review granted Harris v. State, 61 So.3d 410 (Fla. May 24, 2011)

(3) Warrant issued to search premises where defendant drove car onto. Vehicle search was invalid pursuant to US. Search preceded case and therefore good faith exception. Howard v. State, 59 So.3d 229, 36 Fla. L. Weekly D635, Fla.App. 2 Dist., March 25, 2011 (NO. 2D09-1632)

4. Fifth Amendment- Double Jeopardy

a) Does not violate

(1) Convictions for grand theft and robbery with a firearm does not violate double jeopardy because not contained in same statute as degree variants and each contain an element the other does not (amount of property and force respectively). Strict Blockburger test to be followed rather than primary evil . Watch using Supreme Court opinions predating 2009 when analysis changed. McKinney v State, --- So.3d ----, 2011 WL 2375217, 36 Fla. L. Weekly S270, Fla., June 16, 2011 (NO. SC10-140) not yet released for publication

(2) Restitution ordered for one victim reserving amount for other victims 6 months later ordered. Speer v. State, 51 So 3d 602 (5th DCA 2011)

(3) Three counts failure to register- continuing offense but also every time period required to register constitutes new

offense. Bostic v. State, 60 So.3d 535, 36 Fla. L. Weekly D919, Fla.App. 1 Dist., May 02, 2011 (NO. 1D09-1390)

(4) Fleeing and attempting to elude causing death and 3rd Degree murder. Each required a different element, not found in the same statute, and not lesser included. McKinney v. State, 51 So.3d 645, 63 Fla. L. Weekly D165, Fla.App. 1 Dist., January 24, 2011 (NO. 1D09-6322)

(5) Selling cocaine within 1000 feet of a school and possession with intent to sell within 1000 feet under same statute section. Thomas v. State, 61 So.3d 1157, 36 Fla. L. Weekly D786, Fla.App. 1 Dist., April 14, 2011 (NO. 1D09-0572)

b) Violates

(1) Burglary with battery or assault and battery- Young v State, 43 So.3d 876, 35 Fla. L. Weekly D1984, Fla.App. 5 Dist., September 03, 2010 (NO. 5D09-631)

(2) PFACF and poss of ammunition contained within Haskins v. State, 43 So.3d 876, 35 Fla. L. Weekly D1986, Fla.App. 5 Dist., September 03, 2010 (NO. 5D09-1418)

(3) Armed burglaries with possession of destructive devise when no special verdict that making rather than possessing. Reeves v. State, 57 So.3d 874, 36 Fla. L. Weekly D418, Fla.App. 5 Dist., February 25, 2011 (NO. 5D08-3943)

(4) DSP and petit theft improper. State charged Appellant with one count of felony petit theft and one count of dealing in stolen property. Lutz v. State, 60 So.3d 500, 36 Fla. L. Weekly D861, Fla.App. 1 Dist., April 21, 2011 (NO. 1D09-6587)

(5) Driving while license revoked as habitual and no valid drivers license Dees v. State, 54 So.3d 644, 36 Fla. L. Weekly D475, Fla.App. 1 Dist., March 02, 2011 (NO. 1D09-5638)

(6) Armed carjacking and robbery with a deadly weapon Hanfield v. State, 40 So.3d 905, 35 Fla. L. Weekly D1692, Fla.App. 4 Dist., July 28, 2010 (NO. 4D08-4072)

(7) Possession of firearm by convicted felon and possession of firearm by violent career criminal. Mathis v. State, 53 So.3d 1089, 36 Fla. L. Weekly D87, Fla.App. 1 Dist., January 06, 2011 (NO. 1D08-2593)

(8) Two counts for improper exhibition when more than one "victim" but one incident. Roberts v. State, 47 So.3d 380, 35 Fla. L. Weekly D2521, Fla.App. 2 Dist., November 17, 2010 (NO. 2D09-3036)

(9) Organized fraud and theft.

(a) Cardonne v. State 61 So.3d 1291, 36 Fla. L. Weekly D1170, Fla.App. 3 Dist., June 01, 2011 (NO. 3D09-2224)

(b) Henry v. State, 2D10-1976 6/29/11

(10) Possession of child pornography -- Where convictions and sentences for eight counts were based on possession of a single video depicting multiple children, defendant should have been convicted and sentenced on only one count because section 827.071(5) designates "each such...motion picture" or "presentation" as the unit of prosecution, rather than the number of children depicted in a single video 36 Fla. L. Weekly D1503a

(11) Two convictions for leaving scene of accident with injuries when only one accident Haag v. State 2D09-5934 7/15/11

(12) One death/ one homicide

(a) Leaving scene with death and vehicular homicide. Colon v. State, 53 So.3d 376, 36 Fla. L. Weekly D205, Fla.App. 5 Dist., January 28, 2011 (NO. 5D09-3131)

(b) 2nd degree murder and vehicular homicide when one victim…. One death one homicide conviction. Hicks v. State, 41 So.3d 327, 35 Fla. L. Weekly D1590, Fla.App. 2 Dist., July 16, 2010 (NO. 2D09-2549)

(c) 3rd Degree murder and vehicular homicide. State v. Merrix, 42 So.3d 934, 35 Fla. L. Weekly D1939, Fla.App. 2 Dist., August 27, 2010 (NO. 2D09-5171, 2D09-5483)

(d) Vehicular homicide, dui manslaughter, and leaving scene with death. Ivey v. State, 47 So.3d 908, 36 Fla. L. Weekly D226, Fla.App. 3 Dist., October 29, 2010 (NO. 3D08-1640)

(e) No discernible temporal break and same victim-Sex Battery and attempted sex battery on helpless victim. Trial Testimony and conduct for charge one episode. Partch v. State, 43 So.3d 758, 35 Fla. L. Weekly D1603, Fla.App. 1 Dist., July 20, 2010 (NO. 1D09-1894)

(13) Resentence to additional jail time

(a) Greenwich v. State, 51 So.3d 609, 36 Fla. L. Weekly D110, Fla.App. 5 Dist., January 11, 2011 (NO. 5D10-430)

(b) Hicks v. State, 41 So.3d 327, 35 Fla. L. Weekly D1590, Fla.App. 2 Dist., July 16, 2010 (NO. 2D09-2549)

(c) Said 9.2 years instead of agreed 10 years and failed to state the mandatory fine, resentence violated. Charles v. State, 59 So.3d 291, 36 Fla. L. Weekly D779, Fla.App. 3 Dist., April 13, 2011 (NO. 3D08-198)

(d) Reimpose more severe VCC after vacated it for HVFO violates Mumford v. State, --- So.3d ----, 2011 WL 2496471, 36 Fla. L. Weekly D1282, Fla.App. 3 Dist., June 15, 2011 (NO. 3D10-2621) not published.

5. Fifth Amendment and Miranda

a) Custody

(1) Not custody- Where officers followed sixteen-year-old defendant after he left home and started to school, officers stopped defendant and asked him for identification, officers asked defendant, with defendant standing outside police car and not in handcuffs, whether he was willing to come and talk further about investigation, defendant said "no problem," officers frisked defendant outside police car for officer safety, and officers drove defendant to police station while he sat in front seat of police car and was not handcuffed, trial court did not err in denying motion to

suppress sworn statement defendant gave after being given Miranda rights, upon finding that first encounter with police was consensual, that defendant accompanied officers voluntarily, and that frisk for officer safety was voluntary -- Reasonable person in defendant's position would not have believed that functionally he was under arrest and not free to go before giving confession Ladson v. State, --- So.3d ---, 2011 WL 2028627, 36 Fla. L. Weekly D946, Fla.App. 3 Dist., May 04, 2011 (NO. 3D09-452)

(2) Not custody based on Ramirez when in home and mom was present and did not object to LEO presence or questioning son. Fact that LEO may have lacked candor not supported by evidence nor sole dispositive factor. State v. Perez, 58 So.3d 309, 36 Fla. L. Weekly D494, Fla.App. 5 Dist., March 04, 2011 (NO. 5D10-1299)

(3) Custody exist

(a) Age is factor in determining whether a reasonable person in same situation would feel about his freedom to leave. This case 13 year old was removed from classroom by uniformed police officer (SRO) and escorted to a closed door conference room and questioned for at least 30 minutes. No Miranda, no parent, not informed could leave Supreme court says custodial interrogation can encourage some to give false confessions and therefore Miranda important. Dissent says opinion shifts Miranda custody decision from a standard reasonable person standard into individualized decision. J.D.B. v North Carolina J.D.B. v. North

Carolina (June 16, 2011), 564 U.S. ——, Slip Opinion Docket number 09-11121 6/16/11.5-4 decision to reverse

(b) Traffic stop after officer confronted with being involved in drug transaction and officer in possession of driver's license and registration. Reasonable person would have believed freedom curtailed equivalent with actual arrest. Trial court should have suppressed statement in violation of Miranda. Noto v. State, 42 So 3d 814 (4th DCA 7/7/10)

(c) Defendant was improperly subjected to custodial interrogation without Miranda warnings. He was not told he was free to leave, and he was confronted with evidence of a crime, and he was thus in custody. Once the deputy located marijuana in the car, the deputy confronted the driver and defendant and told them that they would both be arrested if someone did not own up to possessing the drugs. At that point that defendant stated that the drugs belonged to him and that he would "take the rap." The facts further established that defendant was subjected to interrogation because the deputy's comment was likely to elicit an incriminating response. England v. State 46 So.3d 127, 35 Fla. L. Weekly D2302, Fla.App. 2 Dist., October 20, 2010 (NO. 2D09-2778)

b) Powell follow up- sufficiency of warnings

(1) After due consideration of US supreme Court opinion, the Miranda warning given adequately advised defendant of rights under both Florida and US constitution. The warnings did not specifically state that had a right to have an attorney present during questioning. Law enforcement said right to an attorney "prior to" questioning and followed with catch all "can exercise rights at any time". No basis for determining that Florida has different warnings required then 5th amendment. (4-2 decision) State v. Powell --- So.3d ----, 2011 WL 2374612, 36 Fla. L. Weekly S264, Fla., June 16, 2011 (NO. SC07-2295)

(2) Although Miranda warnings that have a right to lawyer being present "prior to" law enforcement questioning rather than explicit "and during" not clearest conveyance of Miranda warnings, it is sufficient under both 5th amendment and Florida constitution.

(3) Powell Miranda issue in creole and English-. Warnings sufficient after analysis of US Supreme Court reasoning. State v. Junior Joseph 51 So.3d 497, 35 Fla. L. Weekly D2663, Fla.App. 5 Dist., December 03, 2010 (NO. 5D09-1356)

(4) Conveyed meaning of Miranda and sufficient. State v. Coleman --- So.3d ----, 2011 WL 2650847, Fla.App. 5 Dist., July 08, 2011 (NO. 5D09-4142)

c) Waiver

(1) Not voluntary, knowing and intelligent and thus violated Miranda, 5th amendment of US and Florida

constitution when police delayed administering warnings and obtained inculpatory admissions. When finally administered Miranda midstream minimized significance of warning and continued prior interrogation. Defendant in this case asked detective if they could go somewhere and talk- detective suggested sheriff's office. Four hours of questions over twelve hours with breaks and mostly conversational though confronted with discrepancies. Defendant gave inculpatory statement and then Miranda subsequently waived and admitted to crime and other crimes later shown he did not commit. Supreme Court used Ramirez factors. When detectives confronted with inculpatory evidence changed from questioning to obtaining confession. No longer given breaks and lasted 4 hours straight. "Courts must remain vigilant regarding whether a defendant was given an actual choice in order to guard against the potential danger of violating a defendant's constitutional right against self-incrimination. Ensuring that police do not use intimidation, coercion, or deception in obtaining a waiver also helps to protect the integrity of the truth-seeking process, including guarding against the danger of false confessions" Ross v. State, 45 So.3d 403, 35 Fla. L. Weekly S295, Fla., May 27, 2010 (NO. SC07-2368)

(2) Defendant was read and affirmatively waived his Miranda rights before he was taken into custody and again before he was interviewed at the police station. He eventually confessed to the crime. The appellate court held that defendant's statement during the interview did not clearly indicate that he wanted counsel present at that time or that he would not answer any further questions without

counsel. At most, his statement was a conditional request for counsel because he prefaced the statement with "if I'm being held and I'm being charged with something." The detective made a good-faith effort to answer the question and apparently did so to defendant's satisfaction because he agreed to continue the interview. Thus, the trial court properly denied the motion to suppress the confession. Spivey v. State 45 So.3d 51, 35 Fla. L. Weekly D2004, Fla.App. 1 Dist., September 07, 2010 (NO. 1D09-3691)

(3) Defendant uttering his displeasure on not having a lawyer does not invalidate statements- defendant was not entitled to have a lawyer immediately available before police questioning could begin, and, thus, his inculpatory statements while he was indicating his willingness to speak without counsel were properly admitted. San Martin v. State, 59 So.3d 1171, 36 Fla. L. Weekly D555, Fla.App. 3 Dist., March 16, 2011 (NO. 3D09-628)

d) After invocation

(1) Rather than facilitating or awaiting an opportunity for defendant to consult with counsel, police reinitiated interrogation. No evidence initiated by defendant. Should have been suppressed under Edwards v. Arizona 451 U.S. 4777 (1981) Wilder v. State 40 So.3d 804, 35 Fla. L. Weekly D1523, Fla.App. 1 Dist., July 07, 2010 (NO. 1D08-5030)

(2) Error to deny motion to suppress custodial statement defendant gave to police after defendant had unequivocally invoked right to counsel by stating, “I want to talk to a lawyer” -- Post-invocation statements made by defendant

cannot be used to determine whether defendant's request for attorney was equivocal Defendant did not subsequently waive privilege against self-incrimination and right to counsel where defendant did not reinitiate further exchanges with law enforcement; instead, interrogating officer continued to question defendant without pause and subtly undermined request for lawyer in various ways. Moss v. State, 60 So.3d 540, 36 Fla. L. Weekly D940, Fla.App. 4 Dist., May 04, 2011 (NO. 4D09-4254)

(3) Error to deny motion to suppress defendant's confession where defendant unequivocally indicated his desire to have an attorney present during questioning and, a scant forty minutes later, officer initiated conversation in which he expressly asked whether defendant would be willing to "reconsider" and speak with a detective at the station and officer exerted further pressure by stating, "We'd appreciate it" when defendant began to vacillate and by telling defendant the truth would come out after authorities interviewed the child victim -- Tactic employed by officer amounted to interrogation and rendered defendant's subsequent waiver of his right to counsel involuntary. O'Brien v. State, 56 So 2d 884 1st DCA 3/16/11

(4) Defendant's statement indicating that he did not want to discuss the case was unequivocal, the detectives were required to terminate the interrogation. Further, even if the statement could have been construed as an equivocal request to remain silent, because defendant had not yet waived his Miranda rights, the detectives were required to clarify his intent before proceeding further with the interrogation. Miles v. State 60 So.3d 447, 36 Fla. L.

Weekly D620, Fla.App. 1 Dist., March 23, 2011 (NO. 1D09-6475)

(5) officer's asking defendant, after he clearly invoked his right to counsel, whether he wanted to talk to police about the double murder was likely to elicit an incriminating response and, thus, constituted interrogation; any waiver of defendant's Miranda rights was invalid because it was based upon police-initiated interrogation after defendant had invoked his right to counsel. Black v. State 59 So.3d 340, 36 Fla. L. Weekly D882, Fla.App. 4 Dist., April 27, 2011 (NO. 4D09-1052)

e) Officer's act of telling juvenile why he was arrested and showing him plastic bag of cocaine did not constitute interrogation after juvenile's invocation of Miranda rights. J.Q. v. State, 41 So.3d 991, 35 Fla. L. Weekly D1746, Fla.App. 3 Dist., August 04, 2010 (NO. 3D09-2237)

f) No error in admitted defendant's statement that did not have "any more crack cocaine on him" when questioned by police officers after they saw him spit out several pieces of a partly-chewed substance which the officers recognized from their experience to be crack cocaine. Statements made by defendant were properly admitted under the private safety exception or rescue doctrine. The circumstances satisfied the three-part Riddle test: the need for information was urgent; there was a possibility of rescuing a person whose life may have been in danger; and the rescue of defendant appeared to be the primary purpose and motivation of the interrogator. The testimony showed that there was an objectively reasonable concern for defendant's life because defendant was observed chewing several pieces of crack cocaine

and it was unknown if or how much he had swallowed. It was obvious to all of the officers on the scene that it posed a serious danger to defendant's health. Smith v. State, 46 So.3d 608, 35 Fla. L. Weekly D2053, Fla.App. 1 Dist., September 13, 2010 (NO. 1D09-1960)

6. Sixth Amendment (Crawford handled under evidence section)

a) Defendant entitled to counsel after indictment even when incarcerated in another state. Indictment marks the formal beginning and thus critical stage. James v. State 58 So.3d 891, 36 Fla. L. Weekly D393, Fla.App. 1 Dist., February 22, 2011 (NO. 1D10-5558)

b) It is a violation of 6th amendment for jail informant (as agent) to get inculpatory defendant statements and prosecutorial misconduct to mislead court on facts for 6th amendment argument. Johnson v. State, 44 So.3d 51, 35 Fla. L. Weekly S43, Fla., January 14, 2010 (NO. SC08-1213)

C. Statutory Grounds for Suppression

1. Exclusionary rule based on Florida Statute of knock and announce rather than 4th amendment (since Hudson v. Michigan, 547 US 586 2006 required court to recede from remedy) proper. State v. Cable 51 So.3d 434, 35 Fla. L. Weekly S705, Fla., December 09, 2010 (NO. SC09-1684)

2. Error to deny motion to suppress evidence seized based on incriminating statements made by defendant, who was in his home, during telephone conversation with codefendant, who was in police interview room equipped with recording equipment sensitive enough to record both ends of a telephone conversation -- In light of officers' knowledge that interview room recording equipment was on and was sensitive enough to intercept the other end of a phone conversation, officers intentionally intercepted defendant's oral communication to codefendant within

meaning of statute prohibiting interception of wire, oral, or electronic communications -- Defendant had reasonable expectation of privacy in phone conversation where he was home during conversation, did not direct his communications to multiple people, and did not know that codefendant was sitting in an interview room at the time of the conversation. Hentz v. State, --- So.3d ----, 2011 WL 2200628, 36 Fla. L. Weekly D1211, Fla.App. 4 Dist., June 08, 2011 (NO. 4D08-5160) Not published.

3. Implied consent not sole method to introduce blood test. Where defendant voluntarily consents to blood draw in situation where implied consent not implicated and draw performed in reasonable manner. No basis for suppression. State v. Murray, 51 So 3d 593 (5DCA 2011)

4. Pharmacy Records/ medical records.

a) Trial Court erred suppressing pharmacy records obtained without warrant. Section 395 does not apply. Fl. Stat 893 does not require subpoena, warrant or prior patient notice. No violation of privacy under Fl. Constitution. State v. Tamulonis 39 So.3d 524, 35 Fla. L. Weekly D1535, Fla.App. 2 Dist., July 09, 2010 (NO. 2D09-4081)

b) Pharmacy records properly allowed however physician affidavits and lists of Defendants prescriptions may be medial records under Fl. Stat 456.057(6) should be evaluated. Lamb v. State 55 So.3d 751, 36 Fla. L. Weekly D594, Fla.App. 2 Dist., March 18, 2011 (NO. 2D09-5130)

c) Patient contracts were medical records and suppression is proper when detective failed to obtain subpoena in violation of Fl. Statute. In addition, pharmacy records should not be suppressed because authorized under Fl. Stat 893.07 and does not violate

constitution (1st, 2nd 4th all agree) State v. Sun ___ So. 3d ____ 2011 WL 2135646 6/1/11

D. Motions

1. Speedy Trial

a) 3.191 to allow speedy trial to be extended when chief judge suspends by administrative order as provided in Florida Rule of Judicial Administration 2.205(a)(2)(B)(iv),

b) Speedy Trial case where defendant plead to dealing in stolen property and firearm charge and later, well past speedy deadlines, charged with burglary where firearm was stolen. Court said not same criminal episode and therefore Trial court erred when discharged defendant. State v. Banks 50 So.3d 730, 35 Fla. L. Weekly D2855, Fla.App. 5 Dist., December 17, 2010 (NO. 5D09-1826)

c) Trial Court should not have granted continuance and discharge based on State filing 140th day following arrest and delayed discovery. The recapture period had not yet expired and discharge as a sanction not warranted. Defense had enough to file motion to suppress and knew most the witnesses. State v. Valdez, 44 So.3d 184, 35 Fla. L. Weekly D2037, Fla.App. 2 Dist., September 10, 2010 (NO. 2D09-1145)

2. Continuance wrongly attributed to defendant when continued to assert Crawford issue and Court wanted pretrial motion on the business record admissibility. Self v. State, 55 So.3d 677, 36 Fla. L. Weekly D419, Fla.App. 5 Dist., February 25, 2011 (NO. 5D10-2813)

3. Change of venue- not abuse of discretion to deny change of venue. Although pretrial publicity in this case, fact alone will not require change of venue but depend on the extent and nature and difficulty encountered in actual selection. "We must rely on our justice system and those that toil within it to ensure the protection of our constitutional guarantees" Hooks v. State --- So.3d ----, 2011 WL

2555387, 36 Fla. L. Weekly D1382, Fla.App. 4 Dist., June 29, 2011 (NO. 4D08-4729)

4. Consolidate

   a) Improper consolidation when two criminal episodes separated by a few hours and couple blocks but no further sufficient link between the crimes. Hart v. State --- So.3d ----, 2011 WL 1815144, 36 Fla. L. Weekly D1033, Fla.App. 1 Dist., May 13, 2011 (NO. 1D09-2300, 1D09-2302) Not final

5. Bond-

   a) 1.6 million dollar bond equivalent to denial and improper without state request of pretrial detention. Leighton, v. State, 55 So.3d 675, 36 Fla. L. Weekly D419, Fla.App. 5 Dist., February 23, 2011 (NO. 5D10-3013)

6. Dismiss

   a) Brady- Improper to dismiss when court found state unintentionally lost audio which defendant claimed exculpatory. Defense did not show bad faith or materiality. State v. Buitrago 39 So.3d 540, 35 Fla. L. Weekly D1591, Fla.App. 2 Dist., July 16, 2010 (NO. 2D09-1730)

   b) c4 Court improperly dismissed trafficking charge, when informant stated bought from Defendant Search warrant found plenty cocaine some in open and codefendant claimed bag of drugs were his. State v. Cadore, 59 So.3d 1200, 36 Fla. L. Weekly D876, Fla.App. 2 Dist., April 27, 2011 (NO. 2D10-1052)

   c) Interstate detainer act

      (1) Good discussion of act. Parks v. State 5D09-848 8/30/10

d) Jurisdiction

(1) Illegal deportation, perhaps even accomplished by kidnapping, does not divest Court of jurisdiction. Serrano v. State --- So.3d ----, 2011 WL 904071, 36 Fla. L. Weekly S108, Fla., March 17, 2011 (NO. SC07-1434)

e) Amending RWOV charge to leaving the scene after statute of limitations, substantially broadens or amends the original charge and therefore the rule that subsequently-filed criminal information will not be subject to the statute of limitations when they are shown to be connected with and in continuation of a prosecution timely begun does not apply. Harper v. State, 43 So.3d 174, 35 Fla. L. Weekly D2009, Fla.App. 3 Dist., September 08, 2010 (NO. 3D08-2890)

f) Stand your Ground

(1) When Defendant files a motion to dismiss pursuant to 766.032, trial court should decide the factual question and if defense shows immunity applies by preponderance of the evidence. Not pursuant to 3.190 (c)(4) but 3.190(b) Florida Supreme Court Dennis v. State, 51 So 3d 456 (Fla. 2010)

(2) Can not deny motion because factual issues in dispute. Cruz v. State 54 So.3d 1067, 36 Fla. L. Weekly D410, Fla.App. 4 Dist., February 23, 2011 (NO. 4D09-3595)

(3) Defense has burden, State does not have to prove immunity not warranted. John Gray v. State 42 So.3d 341, 35 Fla. L. Weekly D1890, Fla.App. 5 Dist., August 20, 2010 (NO. 5D09-2060)

(4) Defendant has right to pretrial hearing on immunity, not merely affirmative defense. Rashad Stewart Martinez v.

State 44 So.3d 1219, 35 Fla. L. Weekly D2175, Fla.App. 1 Dist., September 30, 2010 (NO. 1D10-3974)

III. Plea

A. Immigration consequences- Kentucky v. Padilla, 130 S. Ct 1473 (2010)---Florida follow up

1. Whether trial court cures defense attorney mandatory deportation advise

a) Cures

(1) Flores v. State, 57 So 3d 218, (Fla 4th DCA July 14, 2010),

(2) Santiago v. State, --- So.3d ----, 2011 WL 2581787, 36 Fla. L. Weekly D1426, Fla.App. 5 Dist., July 01, 2011 (NO. 5D11-428)

(3) Castano v. state, --- So.3d ----, 2011 WL 2415796, 36 Fla. L. Weekly D1285, Fla.App. 5 Dist., June 17, 2011 (NO. 5D10-2032)

b) Does not

(1) Hernandez v. State, 61 So.3d 1144, 36 Fla. L. Weekly D713 (Fla.App. 3 Dist. Apr 06, 2011) (NO. 3D10-2462), rehearing and rehearing en banc denied (Jun 17, 2011)

2. Defense burden to prove that court did not properly advise. State v. Avila, 43 So.3d 936, 35 Fla. L. Weekly D2058, Fla.App. 3 Dist., September 15, 2010 (NO. 3D09-1431)

B. Judge required to permit plea withdraw after initiated plea discussions, not all negotiations were on record, Court later imposed life (rather than 25 years).. Ha v.

State, 56 So.3d 834, 36 Fla. L. Weekly D220, Fla.App. 1 Dist., January 28, 2011 (NO. 1D09-6597)

C. Plea offer

1. State's agreement to consider defendant's counteroffer of a 364-day jail term as a probation revocation sentence did not constitute an acceptance of an offer nor otherwise prevent trial court from imposing sentence of 33.675 months in prison; State never extended a plea offer of 364 days to defendant, rather it was defense counsel who requested an offer of 364 days, and State only agreed to consider defendant's request and never responded. Daniels v State, 45 So.3d 922, 35 Fla. L. Weekly D2219, Fla.App. 3 Dist., October 06, 2010 (NO. 3D09-1454)

IV. Trial

A. Judges role- judge departed from appearance of neutrality and became an active participant when questioning juvenile regarding possession of cocaine. R.O. v. State, 46 So.3d 124, 35 Fla. L. Weekly D2320, Fla.App. 3 Dist., October 20, 2010 (NO. 3D09-2168)

B. Juror

1. General

a) Court erred in not replacing juror with an alternate after juror disclosed she had taken a forensic course from the detective and defense requested her replacement. The ASA had questioned about forensic knowledge and DNA. Dery v. State, --- So.3d ----, 2010 WL 2836123, 2nd DCA 7/21/10. Not final/ Not published.

b) Trial Court should have granted mistrial after alternate present during deliberations. Tello-Lugo v. State, 47 So.3d 968, 35 Fla. L. Weekly D2581, Fla.App. 2 Dist., November 24, 2010 (NO. 2D09-4770)

c) Trial Court should have struck entire panel after person on venire said knew defendant because her former job as a correctional officer. Turner v. State, 51 So.3d 542, 35 Fla. L. Weekly D2863, Fla.App. 5 Dist., December 17, 2010 (NO. 5D09-4541)

d) Foreperson committed misconduct by using his smartphone to look up the word "prudent" and sharing his recollection of the definition with other jurors. Prejudice presumed in juror misconduct unless opposing party can demonstrate did not affect verdict. Tapanes v. State, 43 So.3d 159, 35 Fla. L. Weekly D2031, Fla.App. 4 Dist., September 08, 2010 (NO. 4D08-3176)

2. Challenges

a) Trial Court should have granted Cause Challenge

(1) Defendant not testifying

(a) Questioned why Defendant would not want to testify and why they would not want to speak the truth. Caldwell IV, v State 50 So.3d 1234, 36 Fla. L. Weekly D115, Fla.App. 2 Dist., January 14, 2011 (NO. 2D09-1734)

(b) Juror said if state presented credible evidence and defendant did not testify he would be inclined to convict. McKay v. State, 61 So.3d 1178, 36 Fla. L. Weekly D849, Fla.App. 3 Dist., April 20, 2011 (NO. 3D09-3380)

(c) Three jurors admitted would influence decision. Sweeting v. State 46 So.3d 1217, 35 Fla. L. Weekly

D2487, Fla.App. 4 Dist., November 10, 2010 (NO. 4D08-2703)

(2) Jurors 3 children worked for LE. Equivocal as to whether could be fair final answer might give more credibility to LEO Freeman v. State, 50 So.3d 1163, 35 Fla. L. Weekly D2748, Fla.App. 2 Dist., December 10, 2010 (NO. 2D09-2952)

(3) Sex case juror stated that she worked for four-and-a-half years in a youth shelter where she was involved with children who were victims of sex abuse. Defense counsel asked for a cause challenge "regarding whether [the juror] is not sure if she is fair and impartial regarding the sex cases and what has gone on in her personal life." Reyes v. State, 56 So.3d 814, 36 Fla. L. Weekly D209, Fla.App. 2 Dist., January 28, 2011 (NO. 2D09-3714)

(4) Potential juror said there were no circumstances under which it would be appropriate for a man to strike a woman in battery case. Ranglin v. State 55 So.3d 744, 36 Fla. L. Weekly D561, Fla.App. 4 Dist., March 16, 2011 (NO. 4D09-4243)

b) Melbourne Challenge

(1) Incorrect procedure

(a) Surname alone does not establish that challenged juror is a member of a suspect class and thus should not trigger an inquiry as to whether the strike was exercised for a discriminatory reason. Love the language…without requiring a threshold determination that a juror is a member of a suspect

class has the potential "to undermine the very purpose for the protections required to prevent invidious discrimination" Smith v. State, 59 So.3d 1107, 36 Fla. L. Weekly S99, 36 Fla. L. Weekly S161, Fla., March 17, 2011 (NO. SC09-386)

(b) Judge's improper procedure determining if pattern of gender based strikes when defense requested gender neutral reason required reversal. Claimed that the State was discriminatorily removing men from the panel, and requested a gender-neutral reason for the strike. This objection was sufficient for the trial court to require the State to provide a gender-neutral reason for the strike. Sabine v. State, 58 So.3d 943, 36 Fla. L. Weekly D874, Fla.App. 2 Dist., April 27, 2011 (NO. 2D04-5378)

(2) Genuine

(a) Court of appeals should have given deference to State appellate court's decision denying Batson claim that prosecutor exercised peremptory challenges to exclude black prospective jurors on basis of their race. The prosecutor offered a race-neutral explanation for striking each juror: Juror S had stated that from the ages of 16 to 30 years old, he was frequently stopped by California police officers because—in his view—of his race and age. As the prosecutor put it, "Whether or not he still harbors any animosity is not something I wanted to roll the dice with. Juror J was a social worker.

Felkner v. Jackson, 131 S.Ct. 1305, 179 L.Ed.2d 374, 79 USLW 3532, 79 USLW 3536, 11 Cal. Daily Op. Serv. 3375, 2011 Daily Journal D.A.R. 4071, 22 Fla. L. Weekly Fed. S 873, U.S., March 21, 2011 (NO. 10-797)

(b) race neutral reason for peremptorily striking African–American prospective juror, who had nodded her head and might have spoken to another venire member, was not pretextual. 41 So.3d 307, 35 Fla. L. Weekly D1504, Fla.App. 4 Dist., July 07, 2010 (NO. 4D08-3010)

(c) The trial court improperly denied her peremptory challenge of a prospective juror based on a finding that the reasons for the strike were not genuine. There is nothing in the record to suggest that defense counsel's concededly race-neutral reasons for striking the prospective juror were not genuine. As such, the absence of record support for the trial court's "genuineness" finding requires reversal. Senatus v. State, 40 So.3d 878, 35 Fla. L. Weekly D1637, Fla.App. 3 Dist., July 21, 2010 (NO. 3D09-1823)

(d) Trial court erred in disallowing peremptory challenge. The prosecutor's simple declaration that the 'state is requesting a neutral reason' after the strike was attempted was, without more, insufficient to trigger an inquiry. The proper means of testing the peremptory challenge would have been to object, to show that the venire member is a member of a

distinct racial group and then to request that the court ask a reason for the strike. Peremptory challenges are presumed to be exercised in a nondiscriminatory manner. Furthermore, throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination Garcia v. State, --- So.3d ----, 2010 WL 4103207, 35 Fla. L. Weekly D2328, Fla.App. 3 Dist., October 20, 2010 (NO. 3D09-1544)

(e) Trial court had sufficient showing of genuineness for allowing state's challenge, Alonzo v. State, 46 So.3d 1081, 35 Fla. L. Weekly D2393, Fla.App. 3 Dist., October 27, 2010 (NO. 3D08-2014)

(3) Disallowing strike upheld as not genuine

(a) Trial court did not err denying defendant's peremptory challenges to a prospective woman juror. Question for the court when evaluating an objection to a peremptory challenge of a juror is not whether the reason given for the strike is reasonable, but whether it is genuine; reasonableness is, however, pertinent to that assessment. The circumstances, including defense counsel's initial comment that he did not have a gender-neutral reason for the strike, together with the trial court's assessment of defense counsel's credibility, tended to support the denial of the challenge. Reason was family in LEO yet other seated jurors had LEO in family. Hayes v. State, 45 So.3d 99, 35 Fla. L.

Weekly D2137, Fla.App. 1 Dist., September 23, 2010 (NO. 1D08-4011) Review granted Hayes v. State, 58 So.3d 260 (Fla. Mar 16, 2011) (Table, text in WESTLAW, NO. SC10-2104)

C. Shackled

1. Defendant was not gagged, his arms and legs were shackled to such an extent that standby counsel had to turn the pages of the jury instructions so that he could participate in the jury charge conference. Nor could he stand at the podium to address witnesses, the jury in closing, or the court when necessary. Defendant was uncooperative with jail personnel, but once in the courtroom he was not unruly, threatening, or violent, and none of his actions had been disruptive of the proceedings in the courtroom or its security. Defendant's conviction was reversed. Smith v. State 41 So.3d 1081, 35 Fla. L. Weekly D1845, Fla.App. 2 Dist., August 13, 2010 (NO. 2D08-5660)

D. Amended Information

1. Appellant alleges the trial court erred in allowing the State to amend his charging information following the close of the State's case. Court agreed and reversed. An amendment to the information that substantively alters the elements of the crime charged is per se prejudicial. Wright v. State, 41 So 3d 924 (1st DCA 2010)

E. Evidence

1. Trial Court did not abuse discretion by allowing the State to introduce photos that appealed to the jury's sympathy; second, not permitting the sur-rebuttal of a key witness; and third, failing to grant a mistrial after questions which Roman maintains improperly shifted the burden of proof. Roman v. State, 40 So.3d 876, 35 Fla. L. Weekly D1634, Fla.App. 3 Dist., July 21, 2010 (NO. 3D08-3252)

2. Corpus delecti

a) Corpus only requires proof that someone violated statute before proving who and therefore when a vehicle had been occupied by three people, all who had been driving and showing signs of

impairment, car caused serious bodily injury after ran red light corpus sufficient and court erred excluding statements. State v. Walton, 42 So.3d 902, 35 Fla. L. Weekly D1895, Fla.App. 2 Dist., August 20, 2010 (NO. 2D09-750)

3. Rule of completeness 90.108

a) Improper to exclude exculpatory portion when admitting inculpatory portion. Metz v. State, 59 So.3d 1225, 36 Fla. L. Weekly D1008, Fla.App. 4 Dist., May 11, 2011 (NO. 4D09-3551)

b) Not error to refuse to include entirety of Defendant's statement which contained self-serving, non-exculpatory hearsay and statements concerning the victim's prior sexual conduct Pulcini v. State, 41 So.3d 338, 35 Fla. L. Weekly D1620, Fla.App. 4 Dist., July 21, 2010 (NO. 4D08-2885)

4. Authentication

a) Business records not authenticated and therefore improper basis for conviction. Armstrong v. State, 42 So.3d 315, 35 Fla. L. Weekly D1801, Fla.App. 2 Dist., August 11, 2010 (NO. 2D09-1033)

b) Victim's bank statements not properly authenticated and not admissible at restitution hearing. McKown v. State, 46 So.3d 174, 35 Fla. L. Weekly D2367, Fla.App. 4 Dist., October 27, 2010 (NO. 4D09-3772)

c) Store manager for wireless telephone company was qualified to lay the foundation for admission into evidence as business records, at trial on charges including murder and arson, of defendant's wireless telephone records, even though manager was not individually responsible for maintaining the records; manager was

trained in the procedures for maintaining business and billing records, and manager testified that company maintained its records on a regular basis, in the ordinary course of business, and as telephone calls traveled throughout its network. Cooper v. State, 45 So.3d 490, 35 Fla. L. Weekly D2029, Fla.App. 4 Dist., September 08, 2010 (NO. 4D08-1375) distinguished by Lewis v. Sun Time Corp., 47 So.3d 872, 35 Fla. L. Weekly D2316 (Fla.App. 3 Dist. Oct 20, 2010) (NO. 3D09-746), rehearing and rehearing en banc denied (Dec 06, 2010)

d) The images and text messages were found on the defendant's cellular telephone, seized pursuant to a search of the defendant's home through a warrant shortly after the alleged incident. This fact, testified by the State's forensics expert, is sufficient to authenticate these exhibits. State v. Lumarque, 44 So.3d 171, 35 Fla. L. Weekly D1908, Fla.App. 3 Dist., August 25, 2010 (NO. 3D09-2781)

5. Relevance

a) The trial court erred by allowing a Florida Highway Patrol trooper to testify about the general behavior patterns of drug traffickers and the admission of that testimony was not harmless. The trooper's explanation that drug traffickers often used third-party car rentals plainly and impermissibly suggested to the jury that defendant was a drug trafficker and that inference was both prejudicial and misleading. Austin v. State, 44 So.3d 1260, 35 Fla. L. Weekly D2205, Fla.App. 1 Dist., October 06, 2010 (NO. 1D09-1276)

b) Improper testimony of unrelated gun required reversal. Downs v. State 4D10-220 7/13/11

6. 90.403

a) Probative value of interrogating officer's assertion regarding baby's cause of death, which was published to jury, was not outweighed by its prejudicial effect in prosecution for child abuse; facts regarding cause of death came into evidence through other witnesses in trial who were subject to cross examination, and defendant made no equivocal responses to officer's questions about alcohol given to baby that jury might have misconstrued. Derival v. State, 58 So.3d 357, 36 Fla. L. Weekly D723, Fla.App. 4 Dist., April 06, 2011 (NO. 4D08-4074)

b) Trial court committed reversible error in admitting Victim's suicide attempts. Johnson v. State, 40 So.3d 883, 35 Fla. L. Weekly D1628, Fla.App. 4 Dist., July 21, 2010 (NO. 4D08-3482)

c) Probative value of evidence that defendant sexually assaulted his younger sister twenty years earlier was relevant and not unduly prejudicial in sex battery and attempted sex battery. Delatorre v. State, 45 So.3d 817, 35 Fla. L. Weekly D1807, Fla.App. 3 Dist., August 11, 2010 (NO. 3D09-1104)

d) Trial court could not exclude from evidence, at defendant's retrial on murder charge, the testimony of defendant's former girlfriend at the first trial, despite contention that the testimony would only have confused the jury because it contradicted other evidence; testimony was highly relevant to defendant's claim of self-defense. Johnson v. State, 47 So.3d 941, 35 Fla. L. Weekly D2554, Fla.App. 3 Dist., November 17, 2010 (NO. 3D09-1752)

7. Other crimes- 90.404

a) Code- Amendment to 90.404(2)(b)(2) (SC10-190). Legislative change, to the extent procedural, adopted.

b) Relevance or inextricably intertwined

(1) Evidence that defendant gave a false name to trooper who stopped him for a traffic infraction was relevant to disprove the defense of necessity invoked by defendant. Mickell v. State, 41 So.3d 960, 35 Fla. L. Weekly D1693, Fla.App. 4 Dist., July 28, 2010 (NO. 4D08-3606)

(2) Rifle was inextricably intertwined with charged crimes of cocaine trafficking and money laundering, and thus photograph of the rifle was admissible; testimony regarding the hidden rifle, the money and cocaine provided critical context to the jury's understanding of the crimes charged, and the photograph served to provide a tangible example to the jury of the acts that comprised a single criminal episode. Monestime v. State, 41 So.3d 1110, 35 Fla. L. Weekly D1888, Fla.App. 3 Dist., August 18, 2010 (NO. 3D09-232)

(3) Fact that car was reported stolen 3 months before this fleeing and attempting to elude not inextricably intertwined. Why the LEO pursued not relevant. Dortch v. State 1D2121 6/20/11

c) Williams

(1) Improper to admit

(a) Evidence of second robbery did not qualify as Williams and also became a feature of the trial requiring reversal. Cannon v. State, 51 So.3d 1261, 36 Fla. L. Weekly D169, Fla.App. 1 Dist., January 24, 2011 (NO. 1D09-5947)

(b) The trial court erred when it admitted collateral crimes evidence of an uncharged robbery allegedly committed by defendant the same day as the

charged robbery; the evidence was insufficient to establish the uncharged robbery was similar enough to the charged robbery to establish relevance, and there was nothing so unique about the similarities between the charged and the uncharged offenses so that it was reasonable to conclude that the same person committed both offenses Carbonell v. State, 47 So.3d 944, 35 Fla. L. Weekly D2555, Fla.App. 3 Dist., November 17, 2010 (NO. 3D09-1580)

(c) that Williams rule evidence consisting of testimony of another alleged victim was not sufficiently similar to facts alleged in instant case; admission of Williams rule evidence absent sufficient points of similarity between the collateral act and the charged crime was not harmless error Pulcini v. State, 41 So.3d 338, 35 Fla. L. Weekly D1620, Fla.App. 4 Dist., July 21, 2010 (NO. 4D08-2885)

(d) Trial court reversibly erred allowing two prior sale of cocaine incidents into evidence. It was not sufficiently similar and therefore not relevant to this sale of cocaine to the same CI. Wilbur v. State, 5D09-4225, 7/1/11

(2) Admissible

(a) Prior incident with victim and defendant of domestic violence was admissible to prove motive, intent and the absence of mistake or accident second-degree murder with a deadly weapon. Aguiluz v. State, 43 So.3d 800, 35 Fla. L. Weekly

D1886, Fla.App. 3 Dist., August 18, 2010 (NO. 3D07-3191)

(b) trial court incorrectly excluded Williams rule in sex battery case when court found crimes to be "strikingly similar" but not relevant for motive, identity, etc. Williams should be allowed to corroborate in molestation. State v. Tameris, 54 So.3d 619, 36 Fla. L. Weekly D384, Fla.App. 5 Dist., February 18, 2011 (NO. 5D10-3754)

8. Privilege

a) Defendant's statements, made after arrest on unrelated charges and made to Jehovah 's Witness's elders who were visiting were not privileged pursuant to 90.505. If elders were clergy, defendant's statements were not made for purpose of seeking spiritual counsel or advice. Elliott v. State, 49 So.3d 795, 35 Fla. L. Weekly D2434, Fla.App. 1 Dist., October 29, 2010 (NO. 1D09-2615)

9. Opinion testimony

a) Fingerprint expert erroneously allowed to testify that another examiner verified results. Potts v. State, 57 So 3d 292, 4th DCA 2011

b) Trial court's error in permitting an officer to testify that it was common for street-level narcotics dealers to hand out contact information to potential buyers was not harmless in a conviction for possession of cocaine with intent to sell Petion v. State, 50 So.3d 1203, 36 Fla. L. Weekly D10, Fla.App. 4 Dist., December 22, 2010 (NO. 4D06-3888)

c) General behavior patterns of drug traffickers improper. Austin v. State, 44 So.3d 1260, 35 Fla. L. Weekly D2205, Fla.App. 1 Dist., October 06, 2010 (NO. 1D09-1276)

d) Admission of lay witness's testimony concerning the direction of a palm print that was recovered from scene of burglary was not fundamental error. White v. State, 40 So.3d 879, 35 Fla. L. Weekly D1638, Fla.App. 3 Dist., July 21, 2010 (NO. 3D09-2592)

10. Impeachment 90-610

a) Trial court properly excluded evidence that victim previously accused uncle of similar Sex battery. Panoja v. State, 59 So.3d 1092, 36 Fla. L. Weekly S91, Fla., March 03, 2011 (NO. SC08-1879)

b) Defendant did not open door to prior DUI conviction when testified regarding reason for refusal of breath test. If slightly cracked door, trial court should have excluded based on 90.403. Hayward v. State, 59 So.3d 303, 36 Fla. L. Weekly D829, Fla.App. 2 Dist., April 20, 2011 (NO. 2D09-5198)

c) Trial Court erred in allowing state to impeach defense witness as to witness's felony record and question about specific convictions rather than simply allowing certified copies of convictions pursuant to 90.510(1). Stallworth v. State, 53 So.3d 1163, 36 Fla. L. Weekly D278, Fla.App. 1 Dist., February 07, 2011 (NO. 1D09-5943)

d) In order for MySpace to be admitted, have to show first relevant to impeachment. Not properly preserved in this case. Green v, State, 56 So.3d 134, 36 Fla. L. Weekly D533, Fla.App. 5 Dist., March 11, 2011 (NO. 5D10-278)

e) Proper to impeach with extrinsic evidence of prior inconsistent statement even when witness states does not remember making the prior inconsistent statement (contrast when presently does not remember answer therefore previous statement not inconsistent) Rodriguez v. State 4D09-566 7/13/2011

f) Court improperly excluded impeachment evidence of excessive force and internal affairs complaint in resisting and battery of law enforcement case. B.M. v State 3D10-2676 7/6/11

11. 6th amendment

a) Limitation of defense cross exam of state witness about her failure to appear at a court ordered deposition violated 6th amendment. . Holley v. State, 48 So.3d 916, 35 Fla. L. Weekly D2560, Fla.App. 4 Dist., November 17, 2010 (NO. 4D09-1834)

b) Crawford

(1) The victim's identification and description of the shooter and the location of the shooting were not testimonial statements here, because they had a "primary purpose . . . to enable police assistance to meet an ongoing emergency," Davis v. Washington, 547 U. S. 813, 822; thus, their admission at Bryant's trial did not violate the Confrontation Clause. Michigan v. Bryant, 562 U.S. ___ 2/28/11 No 09-150

(2) The Sixth Amendment's Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. The accused's right is to be confronted with the analyst who performed the test and made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. Bullcoming v. New Mexico, 564 U. S. ___ (2011) R078; No. 09-10876; 6/23/11.

12. Hearsay

a) Constitutes hearsay

(1) Defendant's Brothers head nod as an affirmative response to father's question was hearsay required reversal. Pierre-Charles v. State, So.3d ----, 2011 WL 1376969, 36 Fla. L. Weekly D764, Fla.App. 2 Dist., April 13, 2011 (NO. 2D09-2263)

(2) GPS data clearly hearsay because it because it purports to show Appellant's locations, and it is being offered for the truth of the matter asserted, i.e., to prove that Appellant was in the locations away from his residence reflected in the GPS data. Business record exceptions can apply. Ruise v. State, 43 So.3d 885, 35 Fla. L. Weekly D2003, Fla.App. 1 Dist., September 07, 2010 (NO. 1D09-5520)

(3) Contents of BOLO English v. Stat, 43 So.3d 871, 35 Fla. L. Weekly D1991, Fla.App. 5 Dist., September 03, 2010 (NO. 5D09-2961)

(4) Even when actual statement not repeated – when witness testifies that as a result of the "tip" he pulled the driver's license and created a lineup – impermissible hearsay and requires reversal in this identification case. Where "the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated Diaz v. State --- So.3d --

--, 2011 WL 2268948, 36 Fla. L. Weekly D1242, Fla.App. 5 Dist., June 10, 2011 (NO. 5D10-1407)

(5) Defendant's statement that acquaintance admitted to killing victim not properly offered for state of mind. Rodriguez v. State, 43 So.3d 90, 35 Fla. L. Weekly D1733, Fla.App. 4 Dist., August 04, 2010 (NO. 4D08-1661)

(6) Car stolen 3 months before chase hearsay and leo state of mind is not relevant. Dortch v. State 1D2121 6/20/11

b) Not hearsay

(1) State of mind- victim's e-mail messages to defendant were not hearsay offered to establish effect messages had on defendant. Eugene v. State, 53 So.3d 1104, 36 Fla. L. Weekly D176, Fla.App. 4 Dist., January 26, 2011 (NO. 4D07-246)

c) Exceptions

(1) Excited utterance

(a) Victim's statement to police what defendant told her not excited utterance because sufficient time had passed to allow the victim to reflect on what had transpired; upon her release, the victim went to a neighbor's house, used the phone, called a cab, and was driven to the police station to retrieve her car, she had been at the police station being attended to by paramedics for ten to fifteen minutes before the officer spoke with her, her statement was made in a narrative form,. Bienaime v. State, 45 So.3d 804, 35 Fla. L. Weekly D1508, Fla.App. 4 Dist., July 07, 2010 (NO. 4D08-2058)

(b) Victim's telephone call to police to report assault was admissible under excited utterance exception to hearsay rule in prosecution for sexual battery and sexual activity with a minor; victim, a 17-year-old girl who was raped for 30 to 45 minutes, spoke to her mother roughly five minutes after assailant left, mother convinced victim to then call 911, and although victim may have had opportunity to engage in reflective thought, record did not clearly refute contention that victim spoke to 911 operator under stress of excitement caused by her rape. Aiken v. State, 44 So.3d 152, 35 Fla. L. Weekly D1836, Fla.App. 4 Dist., August 11, 2010 (NO. 4D09-1224) review granted Akien v. State, 56 So.3d 765 (Fla. Mar 04, 2011)

(2) Statement against penal interest

(a) Testimony recounting another individual's declaration against penal interest should have been allowed in evidence under 90.804(2)(c). That individual's unavailability was not at issue since he had died by the time of trial. His confession to theft was, moreover, was plainly against his penal interest. That declaration against penal interest was consistent with both defendant's general version of events and much of the other evidence presented at trial. Dewolfe v. State, --- So.3d ----, 2011 WL 1938187, 36 Fla. L. Weekly D1106, Fla.App. 1 Dist., May 23, 2011 (NO. 1D10-5187)

(3) Prior consistent- 90.801(2)(b)

(a) Codefendant to rebut argument of recent fabrication due to plea negotiation with state proper. Rodriguez v. State, 48 So.3d 916, 35 Fla. L. Weekly D2560, Fla.App. 4 Dist., November 17, 2010 (NO. 4D09-1834)

(b) Trial court erred by admitting victims prior statement when that consistent statement was made after motive to fabricate. The window of admissibility presupposes that the statement must have been made "prior to the existence of a fact said to indicate bias, interest, corruption, or other motive to falsify. Ortuno v. State, 54 So.3d 1086, 36 Fla. L. Weekly D471, Fla.App. 1 Dist., March 02, 2011 (NO. 1D09-5902)

(4) Prior inconsistent

(a) Molestation defendant was not entitled to ask victim's mother in the defense case regarding child's alleged recantation of allegations against defendant, as the question called for hearsay and when the child victim was on the stand, the defense did not ask the victim about the alleged recantation, and thus failed to lay the proper foundation for impeachment by inconsistent statements. Barnett v. State, 45 So.3d 963, 35 Fla. L. Weekly D2269, Fla.App. 3 Dist., October 13, 2010 (NO. 3D08-1893)

(5) Business records- business records from wholesaler for defendant's pharmacy were not admissible under business records hearsay exception, without a custodian of the

records or other qualified person testifying as to the accuracy of the records and required reversal. Osagie v. State 58 So.3d 307, 36 Fla. L. Weekly D486, Fla.App. 3 Dist., March 02, 2011 (NO. 3D09-2017)

(6) Former Testimony

(a) Trial court improperly excluded codefendant's former bond hearing testimony exonerating defendant. Codefendant unavailable because invoked 5th amendment and state had an opportunity to cross at bond hearing. Roussonicolos v. State 59 So 3d 238, 4th DCa 2011

F. Mistrial

1. No error in denying when victim used "mug shot" without objection and trial judge gave curative on subsequent use. Rodriguez v. State, 48 So.3d 916, 35 Fla. L. Weekly D2560, Fla.App. 4 Dist., November 17, 2010 (NO. 4D09-1834)

2. Impermissible comment on Defendants right to remain silent requires mistrial. Mack v. State, 58 So.3d 354, 36 Fla. L. Weekly D682, Fla.App. 1 Dist., March 31, 2011 (NO. 1D09-4869)

G. Discovery violations

1. discovery violation?

a) State disclosed defense made statement but not content of it. Hicks v. State. 45 So.3d 518, 35 Fla. L. Weekly D2118, Fla.App. 4 Dist., September 22, 2010 (NO. 4D08-2505)

b) Discovery violation when state did not disclose rebuttal witness to disprove alibi with defendant's statement. State disclosed

defense made statement but not content of it. Hicks v. State. 45 So.3d 518, 35 Fla. L. Weekly D2118, Fla.App. 4 Dist., September 22, 2010 (NO. 4D08-2505)

c) 3.220 does not require state to disclose to defendant and oral, unrecorded witness statement if statement does not material change a prior recorded statement previously provided to defendant. State v McFadden SC09-1755 10/7/10.

2. Richardson

a) Trial court reversibly erred when it allowed the State to impeach him with a previously undisclosed statement without first conducting a Richardson hearing to determine if a discovery violation had occurred and, if so, whether he was prejudiced. Ibarra v. State, 56 So.3d 70, 36 Fla. L. Weekly D423, Fla.App. 2 Dist., February 25, 2011 (NO. 2D08-3955)

3. Exclusion

a) Trial court improperly excluded proffered defense alibi witness based on untimely disclosure. Exclusion without Richardson inquiry improper and too severe. Sanchez –Andujar v. State, 60 So.3d 480, 36 Fla. L. Weekly D808, Fla.App. 1 Dist., April 15, 2011 (NO. 1D10-1031)

b) Defense failure to list two alibi witnesses required Richardson not exclusion. Martin v. State, 41 So.3d 1100, 35 Fla. L. Weekly D1876, Fla.App. 4 Dist., August 18, 2010 (NO. 4D08-5164)

c) Error to exclude defense witness on ground that defendant failed to give state notice of intent to claim an alibi where witness was not presenting an "alibi" as contemplated by applicable rule, but rather a general denial of criminality and testimony that

defendant simply was not present at crime scene -- Error to prohibit defendant from testifying on his own behalf that he was not at parents' house when police allegedly observed him exit residence, approach garbage can, and put into trash can what turned out to be Ziploc bag containing cannabis -- Defendant may testify to his own activities without filing notice of alibi if he intends to be sole alibi witness -- Moreover, defendant was not presenting "alibi" as contemplated by rule where he was only testifying that he was not at scene of crime -- Error was compounded where prosecutor emphasized during closing argument that defendant took the stand but "didn't say anything" Robinson v. State, 57 So.3d 278, 36 Fla. L. Weekly D655, Fla.App. 4 Dist., March 30, 2011 (NO. 4D09-817)

H. JOA

1. Self defense- Defendant stabbed his victim in a hotel room defendant had rented, but claimed that he did so in self-defense. After a sexual encounter involving defendant, the victim, and two other people, the victim left the hotel room, then returned, looking for lost wallets. Of the four people directly involved, only the victim testified that he was not angry upon his return to the hotel. The other three testified that the victim was angry and forced entry into the room, and the victim admitted that he became angry upon finding the wallets outside of the room. Defendant testified that the victim attacked a third party in the room, and that he acted in self-defense and in defense of the third person. The third person's testimony corroborated this. The appellate court found that defendant presented a prima facie self-defense case. Defendant had a right to be in the room, which qualified as a dwelling or residence under 776.013, presumption applied to defendant. The State's only rebuttal testimony corroborated that the victim was the aggressor and failed to rebut this presumption. The State failed to overcome the theory of self-defense.

Stieh v. State, --- So.3d ----, 2011 WL 309433, 36 Fla. L. Weekly D254, 36 Fla. L. Weekly D709, Fla.App. 2 Dist., April 01, 2011 (NO. 2D09-3158)

I. Improper argument

1. Florida Supreme Court gives reminder on many types of prosecutorial misconduct, including commenting on Defendant's silence and improper bolstering of witness., but none merits reversal .Serrano v. State, --- So.3d ----, 2011 WL 904071, 36 Fla. L. Weekly S108, Fla., March 17, 2011 (NO. SC07-1434) Rehearing denied 6/13/11.

2. Violation of 6th amendment by having jail informant be agent to get inculpatory defendant statements prosecutor misconduct by purposely misleading court on facts for 6th amendment argument. Johnson v. State, 44 So.3d 51, 35 Fla. L. Weekly S43, Fla., January 14, 2010 (NO. SC08-1213)

3. Improper bolstering when prosecutor, during closing argument, referred to the testimony of the deputy who lifted the fingerprints and stated that deputy was an expert and was very credible. Jones v. State, 54 So.3d 1085, 36 Fla. L. Weekly D446, Fla.App. 4 Dist., March 02, 2011 (NO. 4D09-5134).

4. Prosecutor's improper comments in closing argument "The only true and just verdict is to say [to defendant], you got away with it for a couple of months, but not anymore. You will not do this to anyone else" was improper required reversal. Barrios v. State, 50 So.3d 708, 35 Fla. L. Weekly D2837, Fla.App. 4 Dist., December 15, 2010 (NO. 4D08-4409)

5. State's closing argument improperly appealed to the jury for sympathy for the victim; State's closing argument statement warning jury of being manipulated by defense counsel was improper; prosecutor's closing argument statement that she had "interviewed" defendant's boyfriend

improperly bolstered the witness's credibility; and cumulative effect Wicklow v. State, 43 So.3d 85, 35 Fla. L. Weekly D1734, Fla.App. 4 Dist., August 04, 2010 (NO. 4D08-4250).

6. Prosecutor's repeated statements in closing argument informing the jury there was no defense to defendant's possession of the pills. Because the defense constituted defendant's only defense and there was substantial, albeit conflicting, evidence concerning the defense along with the egregiously incorrect argument from the prosecutor, fundamental error had occurred. Mccoy v. State, 56 So.3d 37, 35 Fla. L. Weekly D2876, Fla.App. 1 Dist., December 21, 2010 (NO. 1D09-5819)

7. Prosecutor made an unsubstantiated statement referring to other crimes committed by Ford. Specifically, in attempting to explain a six-month delay between the time of the controlled buy and the date that Ford was arrested, the prosecutor stated, "And the reason why he wasn't arrested for sometime after, you heard [one of the law enforcement officers] say they were doing a federal investigation to try to get him on other things and they decided to make this a state case. Upon objection, Trial court, who said to "rely on own memory" of what testimony provided, was reversed. Ford v. State, 50 So.3d 799, 36 Fla. L. Weekly D114, Fla.App. 2 Dist., January 14, 2011 (NO. 2D09-4978)

8. State's rebuttal closing argument, inferring that defendant was trying to conceal drugs before police stopped him based on facts not in evidence, was reversible error Watson v. State, 50 So.3d 685, 35 Fla. L. Weekly D2717, Fla.App. 3 Dist., December 08, 2010 (NO. 3D09-1660)

J. Jury instructions

1. Do not disturb – Error for Court to tell jury, prior to deliberations that cannot have testimony or instructions read back.Johnson v. State 53 So 3d 1003 (Fla. October 7, 2010)

2. Manslaughter

a) 2nd degree murder reversed because flawed Montgomery instruction given for manslaughter.

(1) Riesel v. State 1D09-3177.

(2) Williams v. State, 1D09-6007

(3) Noack v. State, 1D10-244 5/13/11

(4) Walker v. State, 2D08-6049 10/27/10

(5) \Davis v. State, Davis v. State, 61 So.3d 1228, 36 Fla. L. Weekly D1090, Fla.App. 3 Dist., May 18, 2011 (NO. 3D09-2505)

(6) White v. State 4D08-2469 8-25-10

(7) Kenner v. State, 48 So 3d 117 (5th DCA 11/12/10)

b) Not fundamental error when

(1) convicted of 2nd as charged rather than convicted of a lessor of 1st degree. Royner v. State, 1d09-2744 7/7/10.

(2) jury instructed on manslaughter by intentional act and culpable negligence.

(a) Barros-Dias v. State 2D08-1074 7/28/10

(b) Moore v. State, 57 So.3d 240, 36 Fla. L. Weekly D512, Fla.App. 3 Dist., March 09, 2011 (NO. 3D09-958)

(c) Herring v. State, 1d09-2981

(d) Conviction of second degree murder-manslaughter by act not fundamental when manslaughter culpable negligence also given. Paul v. State 5D09-2449 5/13/11

c) Failing to give complete instruction and ignoring completely the manslaughter by act and not instructing was error. Bradshaw v. State, 61 So.3d 1266, 36 Fla. L. Weekly D1124, Fla.App. 3 Dist., May 25, 2011 (NO. 3D09-3115)

3. Attempted Manslaughter- Grey area

a) flawed instruction (intent to kill) required reversal

(1) Bailey v. State, 1d09-6346 1/28/11

(2) Anderson v. State, 1D09-411 3/31/11

(3) Herring v. State, 1D09-0585

(4) Houston v. State, 2d09-3546

(5) Gonzalez v. State, 2D08-5944 7/2/10

(6) When conviction for att 2nd degree and does not support culpable negligence. Haygood v. State 2D09-4769 2/4/11

(7) Bass v. State, 45 So.3d 970, 35 Fla. L. Weekly D2269, Fla.App. 3 Dist., October 13, 2010 (NO. 3D08-1229

b) Instruction intent to kill not confusing and not fundamental requiring reversal.

(1) Williams v. State 40 So 3d 72 (4th DCA 7/7/10) review granted Williams v. State 2011 WL 2577536 (6/7/11)

(2) "act intended to cause the death of" Fenster v. State, 4D07-1983, 5-18-11

c) Instruction for manslaughter not flawed where included language that attempted manslaughter does not require proof of an intent to kill. The attempted manslaughter instruction given by the trial court was thus consistent with the 2008 amendment to the standard jury instruction on manslaughter by intentional act Morgan v. State 4D08-2983 8/11/10.

d) No fundamental error when instructing on attempted voluntary manslaughter without stating any intent.

(1) Griffin v. State, 41 So 2d 927 1st DCA 2010

(2) Harris v. State, 42 So.3d 863, 35 Fla. L. Weekly D1844, Fla.App. 1 Dist., August 12, 2010 (NO. 1D09-1807)

4. Standard instructions

a) Trial Court not limited to written instructions but can clarify law by brief accurate answer. McGirth v. State 48 So.3d 777, 35 Fla. L. Weekly S651, Fla., November 10, 2010 (NO. SC08-976)

b) Yet, expanding fear element in response to jurors question about Aggravated assault is fundamental error. Zama v. State, 54 So.3d 1075, 36 Fla. L. Weekly D442, Fla.App. 4 Dist., March 02, 2011 (NO. 4D09-1324)

c) Trial court did not abuse its discretion in declining to instruct jury that "transmission" meant both sending and receiving an image or information. King v. State, 59 So.3d 272, 36 Fla. L. Weekly D776, Fla.App. 4 Dist., April 13, 2011 (NO. 4D09-2337)

5. No evidence supporting and therefore improper to give standard

a) principle instruction when no evidence that the defendant had a conscious intent that the crime be committed and did some act or said some word which was intended to and in fact did incite a third party to commit the crime with which the defendant is charged. Hanks v. State, 43 So.3d 917, 35 Fla. L. Weekly D2032, Fla.App. 2 Dist., September 10, 2010 (NO. 2D09-3476)

b) Recently stolen property in grand theft case when evidence did not support -required reversal. Ward v. State, 40 So.3d 854, 35 Fla. L. Weekly D1556, Fla.App. 4 Dist., July 14, 2010 (NO. 4D08-4220)

6. Incorrect instruction

a) Self Defense

(1) Injury

(a) Standard instruction "with injury" when no injury occurred fundamental error. Bassallo v. State, 46 So.3d 1205, 35 Fla. L. Weekly D2487, Fla.App. 4 Dist., November 10, 2010 (NO. 4D08-5068)

(b) that giving of standard self-defense instruction, stating that it was a defense to the offense charged if the "injury" to victim resulted from the justifiable use of force, was fundamental, reversible error in charges of BLEO, RWOV, depriving of communication and dwls. Brown v. State, 59 So.3d 1217, 36 Fla. L. Weekly D935, Fla.App. 4 Dist., May 04, 2011 (NO. 4D09-1328)

(2) When instructing jury on the aggravated battery prong of the self-defense instruction, the trial court should have omitted reference to any burden of proof, instead simply instructing on the requisite elements, and inclusion of the phrase "beyond a reasonable doubt" in the jury instruction placed the burden upon manslaughter defendant to prove self-defense, depriving him of a fair trial. Montijo v State, 61 So.3d 424, 36 Fla. L. Weekly D796, Fla.App. 5 Dist., April 15, 2011 (NO. 5D09-3434)

b) trial court erred in instructing the jury on attempted where the evidence established and supported a verdict of guilt for the completed offense of sexual battery Ramirez-Canales v. State, 46 So.3d 1234, 35 Fla. L. Weekly D2559, Fla.App. 4 Dist., November 17, 2010 (NO. 4D09-615)

c) Aggravated Child Abuse- Judge improperly deviated from standard and defined incorrectly defined "maliciously" reducing

state's burden. Kennedy v. State, 59 So.3d 376, 36 Fla. L. Weekly D930, Fla.App. 4 Dist., May 04, 2011 (NO. 4D07-4715)

d) The information alleged that defendant unlawfully had in his care, custody, possession, or control, a concealed weapon. The weapon at issue was a box cutter. The trial court instructed the jury that the offense had two elements: (1) that defendant was a convicted felon, and (2) that after the conviction he knowingly had in his care, custody, possession, or control a concealed weapon. However, statute criminalizes "carry," not possess, a concealed weapon as a felon. The jury instructions thus described the wrong elements and effectively allowed a conviction for a nonexistent crime. A felon could have legally carried a box cutter in a concealed pocket if he was carrying the box cutter for a legitimate work purpose and was not hiding it with the intent to use it, if necessary, as a weapon. It was up to the jury to determine that defendant knowingly carried the box cutter as a concealed weapon, and the jury instructions simply did not give them the guidance they needed to make that determination. This error was not harmless. The conviction and sentence for felonious "possession" of a concealed weapon was reversed. Williams v. State, 48 So.3d 192, 35 Fla. L. Weekly D2611, Fla.App. 2 Dist., December 01, 2010 (NO. 2D09-3709)

7. Failure to instruct

a) Prescription valid defense

(1) Trial court erred in failing to instruct the jury on the prescription defense. This error was compounded by the prosecutor's repeated statements in closing argument informing the jury there was no defense to defendant's possession of the pills. Because the defense constituted

defendant's only defense and there was substantial, albeit conflicting, evidence concerning the defense along with the egregiously incorrect argument from the prosecutor, fundamental error had occurred. Mccoy v. State, 56 So.3d 37, 35 Fla. L. Weekly D2876, Fla.App. 1 Dist., December 21, 2010 (NO. 1D09-5819)

(2) Even if not requested may be fundamental especially when prosecutor argues possession is sufficient to convict. Glovasz v. State, 60 So.3d 423, 36 Fla. L. Weekly D472, Fla.App. 1 Dist., March 02, 2011 (NO. 1D09-1204)

b) jury that it could return guilty verdicts on dealing in stolen property or grand theft, but not both, was fundamental error and could not be cured by striking grand theft charge and sentencing defendant only on stolen property counts. Kiss v. State, 42 So.3d 810, 35 Fla. L. Weekly D1506, Fla.App. 4 Dist., July 07, 2010 (NO. 4D08-5057). 1st Disagrees Blackmon v. State, 58 So 3d 343 (1s DCA 2011) citing to Ridley v. Stat, 407 So 2d 1000 (5th DCA)

c) Requested

(1) Robbery by sudden snatching in strong arm robbery case when information had all the elements of both charges. Clark v. State, 43 So.3d 814, 35 Fla. L. Weekly D1911, Fla.App. 1 Dist., August 25, 2010 (NO. 1D09-5739)

(2) Jury returned verdict on requested lesser of RWOV then, upon request, judge granted JOA saying evidence did not meet statute. Argument waived upon request of lesser. State v. Garner,, 54 So.3d 1046, 36 Fla. L. Weekly D352, Fla.App. 2 Dist., February 16, 2011 (NO. 2D10-582)

(3) Trespass in burglary of dwelling case when information alleged elements and some evidence adduced at trial for those elements. McKiver v. State, 55 So.3d 646, 36 Fla. L. Weekly D333, Fla.App. 1 Dist., February 11, 2011 (NO. 1D10-128)

(4) Improper exhibition in case of aggravated assault with deadly weapon Michaud v State, 47 So.3d 374, 35 Fla. L. Weekly D2508, Fla.App. 5 Dist., November 12, 2010 (NO. 5D10-118)

(5) Refusal to obey law enforcement in fleeing and attempting to elude- willfully and "with knowledge" interchangeable in these charges. Koch v. State, 39 So.3d 464, 35 Fla. L. Weekly S1483, Fla.App. 2 Dist., July 07, 2010 (NO. 2D09-1030)

(6) Not error to refuse battery on lewd molestation because charge did not include against will. Barnett v. State, 45 So.3d 963, 35 Fla. L. Weekly D2269, Fla.App. 3 Dist., October 13, 2010 (NO. 3D08-1893)

8. Changing instruction

a) Trial court's changing of instruction on elements of charged offense following closing arguments was per se reversible error. O'Keefe v. State 47 So.3d 937, 35 Fla. L. Weekly D2539, Fla.App. 4 Dist., November 17, 2010 (NO. 4D09-1414)

9. Aggravated battery as alternative proof when only one charged in information, and special jury finding found uncharged version fundamental error. Cant assume as in Weaver that improper instruction had no effect on juries decision.

a) Jaimes v. State, 51 So.3d 445, 35 Fla. L. Weekly S710, Fla., December 09, 2010 (NO. SC09-1694)

b) Reddick v. State, 56 So.3d 132, 36 Fla. L. Weekly D532, Fla.App. 5 Dist., March 11, 2011 (NO. 5D09-4503)

V. Sentencing

A. Death penalty – Constitutional Violations Ring et al

1. Evans v. McNeil

B. Cruel and Unusual – 8th amendment violations

1. Juvenile who did not commit homicide sentence vacated. Manuel v. State, 48 So.3d 94, 35 Fla. L. Weekly D2417, Fla.App. 2 Dist., October 29, 2010 (NO. 2D08-3494)

2. Sex battery sentence reversed pursuant to Graham. Rioux v. State, 48 So.3d 1029, 35 Fla. L. Weekly D2701, Fla.App. 2 Dist., December 08, 2010 (NO. 2D09-5330)

3. 16 year old robbery and armed carjacking and vop with new robbery reversed. Lavricck v. State, 45 So.3d 893, 35 Fla. L. Weekly D2063, Fla.App. 3 Dist., September 15, 2010 (NO. 3D09-881)

4. Attempted murder sentence of natural life for 13 year old. Manuel v. State, 48 So.3d 94, 35 Fla. L. Weekly D2417, Fla.App. 2 Dist., October 29, 2010 (NO. 2D08-3494)

C. Illegal sentencing

1. Trial courts are not permitted to impose illegal sentences, even pursuant to a negotiated plea agreement. This one exceeded statutory maximum. Costin v. State, 46 So.3d 96, 35 Fla. L. Weekly D2207, Fla.App. 1 Dist., October 06, 2010 (NO. 1D09-2723).

2. Defendant cannot waive time served as part of plea negotiation when the waiver results in incarceration exceeding statutory maximums. McLeod v. State, 58 So 3d. 931 (5DCA 2011)

D. Improper conditions

1. Trial court cannot preempt DOC statutory right to recommend early termination by imposing Probation condition of "no early termination" Harris v. State, --- So.3d ----, 2011 WL 2650869, Fla.App. 5 Dist., July 08, 2011 (NO. 5D10-316)

2. Sex offender conditions not sufficiently related to this burglary with assault conviction. Arias v. State --- So.3d ----, 2011 WL 2493653, 36 Fla. L. Weekly D1357, Fla.App. 5 Dist., June 24, 2011 (NO. 5D09-2046)

E. Improper

1. Improper to consider continued protests of innocence.

a) Colon v. State 53 So.3d 376, 36 Fla. L. Weekly D205, Fla.App. 5 Dist., January 28, 2011 (NO. 5D09-3131)

b) Mentor v. State, 44 So.3d 195, 35 Fla. L. Weekly D2061, Fla.App. 3 Dist., September 15, 2010 (NO. 3D08-3092)

c) Smith v. State, 2D10-10 6/10/11

2. Vindictive sentencing

a) The remarks made by the trial court judge during plea negotiations raised a presumption of vindictive sentencing and a constitutional due process violation of his right to trial. The appellate court found that the trial court judge did advocate a plea by warning defendant of the potential consequences of proceeding to trial. The trial court judge's remarks also evidenced a departure from the role of impartial arbiter by endorsing the strength of the State's case and telling defendant that he would "rue the day" he decided to exercise his constitutional right to a trial. The trial court judge actively advocated for defendant to enter an open plea and then observed in rather ominous terms that he would regret not doing so. Further, the record disclosed no facts sufficient to dispel the presumption and appearance that defendant received lengthier sentences because he exercised his right to trial. The sentences were reversed and the case was remanded for resentencing before a different judge. Zeigler v. State, 60 So.3d 578, 36 Fla. L. Weekly D1029, Fla.App. 2 Dist., May 13, 2011 (NO. 2D09-2548)

b) Trial court's imposition of life sentence after defendant rejected plea offer that would have required him to waive the right to appeal amounted to vindictive sentencing. Fudge v. State, 45 So.3d 982, 35 Fla. L. Weekly D2322, Fla.App. 3 Dist., October 20, 2010 (NO. 3D09-1471)

c) Court initiated plea discussions offering the defendant the bottom of the guidelines but promising harsher if convicted of VOP Vardman v. State 4D08-2603 6/29/11

3. Failure to appear

a) Trial court improperly found that defendant's failure to surrender was willful based solely on the time of his arrest and the location of the arrest and thus imposing max rather than original sentence error. Fulton v. State, --- So.3d ----, 2011 WL 1137295, 36 Fla. L. Weekly D673, Fla.App. 3 Dist., March 30, 2011 (NO. 3D09-1693) not published.

B) Trial Court erred in doubling sentence after defendant failed to appear. Can not vacate sentence and impose a greater sentence after final judgment and sentence, it violates double jeopardy. Odol v. State, 1D10-5373 6/2/11

4. Trial Court lacked discretion to modify the sentence previously imposed pursuant to the plea agreement. State v. Howell, 59 So.3d 301, 36 Fla. L. Weekly D800, Fla.App. 5 Dist., April 15, 2011 (NO. 5D10-1516)

F. Youthful offender

1. Statute at time of offense controls, Urban v. State, 46 So.3d 1113, 35 Fla. L. Weekly D2416, Fla.App. 5 Dist., October 29, 2010 (NO. 5D09-1022)

2. Attempted 1st Degree murder with firearm life felony and therefore not eligible for youthful offender sentence. State v. Malone, 50 So.3d 60, 35 Fla. L. Weekly D2700, Fla.App. 2 Dist., December 08, 2010 (NO. 2D09-5470)

3. Conviction on new substantive offense was not necessary to bypass six-year sentencing cap provided by youthful offender statute , evidence

was sufficient to establish that defendant committed new drug offense in violation of probation. Flores v. State, 46 So.3d 102, 35 Fla. L. Weekly D2209, Fla.App. 3 Dist., October 06, 2010 (NO. 3D09-1543) disagrees with 4th DCA and review granted Flores v. State, 58 So.3d 260 (Fla. Mar 14, 2011)

G. Minimum Mandatory

1. 10/20/life

a) Required jury finding of "Great bodily harm" for 25 year minimum mandatory rather than "permanent disability or disfigurement". Johnson v. State, 53 So.3d 360, 36 Fla. L. Weekly D155, Fla.App. 5 Dist., January 21, 2011 (NO. 5D09-2789)

b) Error to impose mandatory 20 for discharge when not plead in information. Davis v. State, 46 So.3d 1232, 35 Fla. L. Weekly D2529, Fla.App. 1 Dist., November 17, 2010 (NO. 1D09-2207)

c) Consecutive 20 year mandatory proper based on separate victims in discharge of firearm. Scott v. State, 42 So.3d 923, 35 Fla. L. Weekly D1940, Fla.App. 2 Dist., August 27, 2010 (NO. 2D08-2945)

d) Consecutive improper for assault on 2 separate victims out of one incident. Lanham v. State 60 So.3d 532, 36 Fla. L. Weekly D909, Fla.App. 1 Dist., April 29, 2011 (NO. 1D09-5299)

e) Must have some proof that DEFENDANT ACTUALLY DISCHARGED in order to impose 20. Sims v. State, 44 So.3d 1222, 35 Fla. L. Weekly D2182, Fla.App. 5 Dist., October 01, 2010 (NO. 5D09-1602)

f) Does not apply to shooting into a dwelling. Grable v. State, 37 So.3d 989, 35 Fla. L. Weekly D1460, Fla.App. 2 Dist., July 02, 2010 (NO. 2D09-163)

g) Evidence of Defendant actually discharged firearm possessed for 20 to be proper. Hallman v. State, 41 So.3d 1060, 35 Fla. L. Weekly D1813, Fla.App. 3 Dist., August 11, 2010 (NO. 3D07-2974)

h) Imposing consecutive minimum mandatory sentences under 775.087 (2) is improper when single criminal episode unless discharge of firearm and multiple injuries. Swanigan v. State, 57 So.3d 989, 36 Fla. L. Weekly D704, Fla.App. 5 Dist., April 01, 2011 (NO. 5D09-1203)

2. Mandatory provisions lifted in 10/20/life control over more general provisions of statutory maximums and therefore for Attempted 2nd degree murder with proper jury findings- minimum is 25 years and max is life (not 30 years).

a) Mendenhall v. State, 48 So.3d 740, 35 Fla. L. Weekly S631, Fla., October 28, 2010 (NO. SC09-400)

b) Acknowledged in Dean v. State, 58 So.3d 322, 36 Fla. L. Weekly D601, Fla.App. 1 Dist., March 22, 2011 (NO. 1D10-0230)

c) Shooting into dwelling max was 15 but acknowledged conflict with Menden hall as district case. Likely this is no longer correct law. Grable v. State, 37 So.3d 989, 35 Fla. L. Weekly D1460, Fla.App. 2 Dist., July 02, 2010 (NO. 2D09-163)

3. Term "victimized," in provision of Dangerous Sexual Felony Offender Act requiring a 25-year mandatory minimum sentence for an offender convicted of an enumerated offense who victimized more than one person

during the criminal episode, was not unconstitutionally vague, despite contention that it could apply whenever an offender committed an unrelated misdemeanor in addition to an enumerated offense; definitions section for the statutory chapter defined a "victim" as the object of a sexual offense. Wright v. State, --- So.3d ----, 2011 WL 2498677, 36 Fla. L. Weekly D1284, Fla.App. 3 Dist., June 15, 2011 (NO. 3D09-2995) Not reported

H. Downward departure

1. When court fails to give written valid reasons, on remand can still depart if give written, valid reasons. Jackson v. State, --- So.3d ----, 2011 WL 536429, 36 Fla. L. Weekly S81, Fla., February 17, 2011 (NO. SC09-2383)

2. Fact that plea resulted from an uncoerced plea bargain was not valid reason for downward departure where state was not involved in plea and objected to downward departure -- Fact that defendant paid court-ordered restitution for cases in which he was serving probation was not valid reason for downward departure -- Fact that need for restitution outweighed need for prison was not valid reason for downward departure where there was no evidence regarding victims' need for restitution -- Defendant's cooperation with state and federal authorities was not valid reason for downward departure where cooperation predated commission of offenses defendant was facing at time of his plea -- Defendant's remorse was not valid reason for downward departure where there was no showing that defendant's offenses were committed in unsophisticated manner or were isolated incidents -- Weakness of state's evidence was not valid reason for downward departure State v. Pita 54 So.3d 557, 36 Fla. L. Weekly D230, Fla.App. 3 Dist., February 02, 2011 (NO. 3D09-3267)

3. Improper downward departure on isolated (prior unrelated record) , unsophisticated, with remorse (actively involved in robbery/ chose

location, knocked and pushed into apartment, struck another, fled of foot from officer and struggled with arresting officer); age (21 and no evidence of mental defect- age and immaturity not enough), and disproportionate to co-conspirator (different crime conviction and different prior record) State v. Leverett, 44 So.3d 634, 35 Fla. L. Weekly D1853, Fla.App. 5 Dist., August 13, 2010 (NO. 5D09-2920)

4. Improper downward based on restitution need and unsophisticated when record failed to support –"victim" was tax collector with no testimony of pressing need in restitution, clearly not unsophisticated based on 22 month period, over $100,000 in theft. State v. Adikson, 56 So.3d 880, 36 Fla. L. Weekly D579, Fla.App. 1 Dist., March 16, 2011 (NO. 1D10-890)

5. Though lowest permissible exceeded statutory max, no basis to depart downward without prosecutor agreement. State v. Hall 47 So.3d 361, 35 Fla. L. Weekly D2463, Fla.App. 2 Dist., November 05, 2010 (NO. 2D09-5599)

6. Family situation and need for support not valid basis for legal departure. Campbell v. State, 48 So.3d 201, 35 Fla. L. Weekly D2613, Fla.App. 2 Dist., December 01, 2010 (NO. 2D09-708)

7. Trial court was incorrect that every dui per se unsophisticated and therefore did not properly consider whether reason for departure isolated, unsophisticated with remorse) in this DUI manslaughter case. Kezal v. State, 42 So.3d 252, 35 Fla. L. Weekly D1537, Fla.App. 2 Dist., July 09, 2010 (NO. 2D09-1010)

8. Defense psychologist report insufficient to establish a need for specialized treatment that could not be provided in DOC. State v. Ford, 48 So.3d 948, 35 Fla. L. Weekly D2641, Fla.App. 3 Dist., December 01, 2010 (NO. 3D09-1659)

9. Lack of criminal record not a valid basis. State v. Davis, -- So.3d ----, 2011 WL 2415851, 36 Fla. L. Weekly D1287, Fla.App. 5 Dist., June 17, 2011 (NO. 5D10-3433)

10. within court's discretion when testimony showed mental condition, amenable to treatment and not available in prison. State v Hunter 4D09-2533 7/6/11

I. Enhancement

1. HVFO only requires one qualifying prior (separate from and prior to) felony is required for an HVFO adjudication. Ponton v. State, --- So.3d ---, 2011 WL 2566381, Fla., June 30, 2011 (NO. SC09-1554). Not final

2. PRR-

a) shooting into an occupied vehicle qualifies for PRR catch all because necessarily requires force or violence against individual. Contrast with dwelling/ or building which may not be occupied. Conflict with 1st DCA Crapps v. State, Paul v. State 968 So 2d 627 (1st DCA 2007). 59 So.3d 193, 36 Fla. L. Weekly D564, Fla.App. 4 Dist., March 16, 2011 (NO. 4D09-2255)

b) 1st DCA says Burglary with assault does not qualify for PRR State v. Hackley, --- So.3d ----, 2010 WL 4273625 (Fla.App. 1 Dist.), 35 Fla. L. Weekly D2436 conflict with 5th DCA in Shaw and review granted by Fl. Sup Ct (reasoning is to avoid absurdity of burglary with assault qualifying for PRR but not Burglary with battery)

3. VCC

a) Robbery by sudden snatching does not qualify as a prior "enumerated felony" for purposes of violent career criminal

sentencing. Dixon v. State, 41 So.3d 990, 35 Fla. L. Weekly D1732, Fla.App. 4 Dist., August 04, 2010 (NO. 4D08-3652)

b) trial court did not find that a violent career criminal sentence was not necessary for the protection of the public, therefore defendant was properly sentenced to life in prison pursuant to 774.084(4)(d)1 Pryor v. State, 48 So.3d 159, 35 Fla. L. Weekly D2570, Fla.App. 1 Dist., November 22, 2010 (NO. 1D09-3208) 1st Disagrees Moore v. State, 57 So.3d 240, 36 Fla. L. Weekly D512 (Fla.App. 3 Dist. Mar 09, 2011) (NO. 3D09-958)

4. Reclassification based on firearm is not permitted when a defendant is convicted of aggravated battery where it is not clear whether the defendant was found guilty based on a finding that he caused great bodily harm or that he used a deadly weapon. Brady v. State, --- So.3d ----, 2011 WL 2731213, Fla.App. 5 Dist., July 15, 2011 (NO. 5D10-3991)

5. During resentencing must consider apprendi and blakely even if original J &S was before apprendi and blakely. State v Fleming, 61 So.3d 399, 36 Fla. L. Weekly S50, 36 Fla. L. Weekly S198, Fla., February 03, 2011 (NO. SC06-1173)

J. Miscellaneous sentencing

1. Coterminous sentencing allowed for all matters before one sentencing judge, just not permissible for different jurisdictions, Cottengim v. State, 44 So.3d 209, 35 Fla. L. Weekly D2087, Fla.App. 5 Dist., September 17, 2010 (NO. 5D09-325)

2. Scoresheet error can be raised for first time on VOP or 3.800(b). Tasker v. State, 48 So.3d 798, 35 Fla. L. Weekly S658, Fla., November 10, 2010 (NO. SC09-1281)

3. Trial court sentenced prison even though scored 14 points, justified under 775.082 (10) by correctly interpreting "could present a danger to the public" to be broader than physical violence or injury in this theft case. McCloud v. State, 55 So.3d 643, 36 Fla. L. Weekly D313, Fla.App. 5 Dist., February 11, 2011 (NO. 5D10-2216)

4. error to deny defense opportunity to present relevant evidence. In this case, Defendant wanted to show videotape of original accident to successor judge to rebut ASA statement that D lacked remorse. Goldberg v. State, --- So.3d ----, 2011 WL 2555706, 36 Fla. L. Weekly D1401, Fla.App. 3 Dist., June 29, 2011 (NO. 3D10-815) not published

5. Apprendi/ Blakely apply when resentencing

6. Must renew offer of counsel at sentencing. Hayes v. State 5D10-1406 6/17/11

K. Restitution

1. Ability of victims to collect in civil is not valid basis for denying restitution. State v. Cohn, 51 So.3d 610, 36 Fla. L. Weekly D96, Fla.App. 3 Dist., January 12, 2011 (NO. 3D09-822)

L. oral/ written

1. Oral pronouncement controls- even if judge accidently states the sentence as 12 months when agreement is 27 months. Duncan v. State, 59 So.3d 1197, 36 Fla. L. Weekly D855, Fla.App. 5 Dist., April 21, 2011 (NO. 5D10-1215)

VI. Crimes

A. Battery

1. Aggravated battery- insufficient evidence that plastic fork constituted deadly weapon. J.L. v. State, 60 So.3d 462, 36 Fla. L. Weekly D918, Fla.App. 1 Dist., May 02, 2011 (NO. 1D10-6031)

2. predicate for felony battery

a) lewd and Lascivious Aldacosta v. State, 41 So.3d 1096, 35 Fla. L. Weekly D1861, Fla.App. 2 Dist., August 18, 2010 (NO. 2D09-2797)

b) battery on law enforcement officer valid predicate Knowles v. State, 4D09-4629 7/13/11

B. Burglary

1. Burglary charge of remaining in for forcible felony required state to prove that invited or licensed to enter, otherwise JOA. Harris v. State, 48 So.3d 922, 35 Fla. L. Weekly D2562, Fla.App. 5 Dist., November 19, 2010 (NO. 5D09-2042)

2. Armed burglary Adequately charged when information references burglary and states language for discharging firearm. Duarte v. State 59 So.3d 313, 36 Fla. L. Weekly D838, Fla.App. 3 Dist., April 20, 2011 (NO. 3D09-1437)

3. Proof of inhabitable required for dwelling?

a) No, interior renovations made temporarily uninhabitable- Michael v. State, 51 So.3d 574, 36 Fla. L. Weekly D19, Fla.App. 5 Dist., December 23, 2010 (NO. 5D09-300)

b) Yes- Munoz, 937 so 2d 686 2nd DCA 2006

c) Perhaps- 1st DCA cites to Munoz trial court properly denied acquittal proof that entered cartilage enclosed to remove

aluminum siding off house, enough evidence to be jury question of whether sufficient enclosure and whether suitable for lodging. Jacobs v. State, 41 So.3d 1004, 35 Fla. L. Weekly D1755, Fla.App. 1 Dist., August 05, 2010 (NO. 1D09-1992)

4. State must prove enclosure in order to proof cartilage for burglary of a dwelling. J.L. v. State, 57 So.3d 924, 36 Fla. L. Weekly D626, Fla.App. 5 Dist., March 25, 2011 (NO. 5D10-1907)

C. Child abuse

1. Merger doctrine

a) When child victim died as the result of a single blow from appellant, separate offense of aggravated child abuse is not proper and therefore could not logically serve as underlying felony in felony murder charge. Certified question. --- So.3d ----, 2010 WL 3464410, 35 Fla. L. Weekly D1993, Fla.App. 1 Dist., September 07, 2010 (NO. 1D08-6058) FSCt granted review State v. Sturdivant, 47 So.3d 1290 (Fla. Oct 15, 2010)

b) Does not apply with aggravated child abuse and murder-especially in this case which seems like more than one blow. Lim v. State, 50 So.3d 34, 35 Fla. L. Weekly D2526, Fla.App. 1 Dist., November 17, 2010 (NO. 1D09-5780)

c) Child abuse not a single act and therefore Merger does not apply. Rosa v. State, 58 So.3d 900, 36 Fla. L. Weekly D482, Fla.App. 2 Dist., March 02, 2011 (NO. 2D08-4061)

2. Mental injury

a) States failure to present actual evidence of mental injury does not preclude conviction for child abuse. Burrows v. State, --- So.3d

----, 2011 WL 2498113, 36 Fla. L. Weekly D1277, Fla.App. 3 Dist., June 15, 2011 (NO. 3D10-37) not published

b) Where defendant became intoxicated and started a domestic altercation and boy was shaken-up and frightened by his father's behavior that evening. But the State presented no evidence that the incident resulted in an impairment of the boy's ability to function within the normal range of performance and behavior, insufficient evidence. Burke v. State, 48 So.3d 943, 35 Fla. L. Weekly D2610, Fla.App. 2 Dist., December 01, 2010 (NO. 2D08-6329)

3. Defendant's conduct in repeatedly striking his seven-year-old son on back and arms with belt containing some type of metal circles or studs because child refused to finish homework could not be likened to typical spanking or other form of reasonable corporal punishment and therefore Court properly denied JOA. Chisolm v. State, 58 So.3d 304, 36 Fla. L. Weekly D436, Fla.App. 1 Dist., February 28, 2011 (NO. 1D09-4302)

D. Computers and movies

1. Destruction of data not proven when employer could retrieve employee deleted files from hard drive, trial court properly acquitted. State v. Fagg, 41 So.3d 394, 35 Fla. L. Weekly D1706, Fla.App. 1 Dist., July 30, 2010 (NO. 1D09-5011)

2. Use of child within sexual performance does not require audience. Bishop v., State, 46 So.3d 75, 35 Fla. L. Weekly D2039, Fla.App. 5 Dist., September 10, 2010 (NO. 5D08-3684)

E. Criminal mischief- felony requires actual proof for damage over $1000 as essential element – no “life experience” exception. Marrero v. State, --- So.3d ----, 2011 WL 1675227, 36 Fla. L. Weekly S199, Fla., May 05, 2011 (NO. SC09-2390) not yet final or published

F. Exploitation of elderly person or disabled adult requires proof of deception or intimidation. Guarscio v. State 2D08-5000 6/10/11

G. Sexual intercourse with HIV requires penile/ vaginal penetration in this statutory interpretation case. L.A.P. v. State 2D09-5823 (

H. Direct criminal Contempt

1. Error to find direct criminal contempt for invocation of 5th amendment rights, without prosecution agreement for immunity. Jones v. State, 54 So.3d 589, 36 Fla. L. Weekly D349, Fla.App. 4 Dist., February 16, 2011 (NO. 4D11-102)

2. When member of public taken into custody for courtroom disturbance trial judge required to determine indigency and appoint counsel, Rule 3.830 is not exception to 3.111(b) crimes requiring counsel. In addition, must strictly comply with requirements of 3.830. Al-Hakim v. State, 53 So.3d 1171, 36 Fla. L. Weekly D295, Fla.App. 2 Dist., February 09, 2011 (NO. 2D09-3911)

I. DWLS

1. All prior suspensions had to be financial to qualify for habitual exemption and reclassified as a misdemeanor. In this case, defendant's one dui suspension made her ineligible Wyrick v. State, 50 So.3d 674, 35 Fla. L. Weekly D2666, Fla.App. 5 Dist., December 03, 2010 (NO. 5D10-367)

2. Mailing notice sufficient circumstantial evidence on knowledge and therefore sufficient for vop. Anderson v. State, 48 So.3d 1015, 35 Fla. L. Weekly D2668, Fla.App. 5 Dist., December 03, 2010 (NO. 5D09-4267) conflict with Brown v. State, 764 So 2d 741 (4th DCA 2000) Review Granted by Fl. Sup ct. Anderson v. State, 58 So.3d 260 (Fla. Mar 15, 2011) (Table, text in WESTLAW, NO. SC11-3)

3. Can't qualify as habitual based on out of state record b/c driver's record not kept by fl highway safety and motor vehicles in the statutory definition. Neary v. State, --- So.3d ----, 2011 WL 2415776, 36 Fla. L. Weekly D1293, Fla.App. 5 Dist., June 17, 2011 (NO. 5D09-1144)

J. Escape- Could not prove lawful custody required for escape when officer exceeded authority outside of jurisdiction. Moncrieffe v. State, 55 So.3d 736, 36 Fla. L. Weekly D565, Fla.App. 4 Dist., March 16, 2011 (NO. 4D08-904)

K. Failure to redeliver – unconstitutional impairment of contract- as applied when defendant stopped making payments because lessor failed to repair sofa damaged by delivery

L. Kidnapping-

1. A lot of Faison action- review before JOA

2. Kidnapping is a specific intent crime. When state fails to show that Defendant knew toddler was in car seat while committing crime of grand theft and burglary, Trial Court erred in not granting acquittal. Faison's 3 part test was intended to narrow the class of forcible felons who could be convicted of kidnapping. It was not intended for expanding or substitution elements of the crime. Delgado v. State, --- So.3d ----, 2011 WL 2060061, 36 Fla. L. Weekly S220, Fla., May 26, 2011 (NO. SC09-2030)

3. Act of taking child to more secluded area without force enough for kidnapping.. Bishop v., State, 46 So.3d 75, 35 Fla. L. Weekly D2039, Fla.App. 5 Dist., September 10, 2010 (NO. 5D08-3684)

M. Leaving scene of accident with injury

1. "the [S]tate need only prove the actual existence of the accident and the victim's injury, the defendant's admitted knowledge that both occurred, and the admitted fact that he did not remain at the scene"). Woskowsicz v.

State, 40 So.3d 877, 35 Fla. L. Weekly D1634, Fla.App. 3 Dist., July 21, 2010 (NO. 3D08-3317)

N. Manslaughter- open house party and violation of statute can provide basis for manslaughter when teens allowed to drink in home and later leaves driving resulting in death. Santarrelli v. State --- So.3d ----, 2011 WL 2268959, 36 Fla. L. Weekly D1243, Fla.App. 5 Dist., June 10, 2011 (NO. 5D10-2607)

O. Possession of weapon on school property

1. Lawful purpose exception for charge of possession of weapon on school property does not apply when weapon was securely encased in conveyance but defendant on probation and therefore there was no lawful purpose Belcher v. State, 45 So.3d 538, 35 Fla. L. Weekly D2241, Fla.App. 5 Dist., October 08, 2010 (NO. 5D09-3070)

2. Defendant did not violate statute by entering school grounds with unloaded holstered firearm in bag in trunk of vehicle -- Although statute that prohibits possession of firearms on school property, except firearm which is securely encased and not readily accessible in vehicle, allows school board to adopt policy that waives the exception "for purposes of student and campus parking privileges," defendant who entered school property that was subject to such waiver as a visitor for the sole purpose of picking up his daughter, not as student or person subject to campus parking privileges, was not in violation of statute -- Further, reading statute prohibiting possession of firearms on school property in unison with statute authorizing possession of firearms in private conveyances, defendant who could otherwise lawfully possess firearm could lawfully enter school property with securely encased and not readily accessible firearm in vehicle

3. Registration still required under the Florida career offender registration act even if homeless. State v. Cutwright, 41 So.3d 389, 35 Fla. L. Weekly D1708, Fla.App. 1 Dist., July 30, 2010 (NO. 1D09-5792)

P. Sexual Battery

1. Vagina defined as entire vulva area. Conflict with Richards v. State, 738 So 2d 415 (2nd DCA 1999). Palumbo v. State, 52 So.3d 834, 36 Fla. L. Weekly D199, Fla.App. 5 Dist., January 28, 2011 (NO. 5D08-1275)

2. Sex battery on mentally defective person sufficiently shown by victim's phraseology, psychologist, and mom's testimony and is not equivalent to competence to testify (certifying conflict with 1st in Mathis). Procedure sua sponte dismissal after jury verdict, incorrect. State v. Dudley, --- So.3d ----, 2011 WL 2581772, 36 Fla. L. Weekly D1431, Fla.App. 5 Dist., July 01, 2011 (NO. 5D10-2863)

3. Enough of a jury issue when victim testifies to 'pain' to go to jury on penetration Hammonds v. State 61 So.3d 1281, 36 Fla. L. Weekly D1135, Fla.App. 5 Dist., May 27, 2011 (NO. 5D10-1161)

Q. Trafficking

Proof of quantity essential element and in this case wherein Defendant believed drugs sold at $30,000, box carried 2-3 feet in height, jailhouse confession was that intended to sell 10 kilograms of false cocaine all together insufficient to prove that defendant had sufficient intent to commit trafficking- not enough proof of quantity. Hernandez v. State,

R. VOP

1. To sustain money violations must show ability. PO hearsay testimony alone could not sustain allegation that moved without permission. Rentz v. State, --- So.3d ----, 2011 WL 2581768, 36 Fla. L. Weekly D1430, Fla.App. 5 Dist., July 01, 2011 (NO. 5D10-1306)

VII. Miscellaneous issues

A. 3.800/ 3.850

1. Challenges to credit-for-time-served provisions of plea agreements are not cognizable under rule 3.800(a) because those challenges present factual questions that cannot be resolved on the basis of court records Johnson v. State, 60 So.3d 1045, 36 Fla. L. Weekly S171, Fla., April 21, 2011 (NO. SC08-418, SC08-1489)

2. Distinction between 3800 and 3850. This request to allow additional jail credit properly denied because motion does not affirmatively state that court records demonstrate on their face entitlement to relief. Mere conclusory statements not enough. Orta v. State, 41 So.3d 1092, 35 Fla. L. Weekly D1852, Fla.App. 5 Dist., August 13, 2010 (NO. 5D10-2063)

3. Trial court has jurisdiction to consider incorrect HFO after 60 days pursuant to 3.800(b Mapp v. State) --- So.3d ----, 2011 WL 2472994, 36 Fla. L. Weekly S290, Fla., June 23, 2011 (NO. SC09-1838) Not yet published

4. Court should allow withdrawal of plea when counsel misadvises as to maximum prison exposure. Horn v. State, 57 So.3d 984, 36 Fla. L. Weekly D698, Fla.App. 5 Dist., April 01, 2011 (NO. 5D10-887)

B. 3.850 and 3.851 modified 6/23/11

C. Defendant presence- Non-English speaking Defendant not "present" when interpreter not present. Benitez v. State, 5 7 So.3d 939, 36 Fla. L. Weekly D667, Fla.App. 3 Dist., March 30, 2011 (NO. 3D09-2428)

D. Forfeiture proceeding- no right to counsel but exclusionary rule applies. Plaisted v. State, 46 So.3d 148, 35 Fla. L. Weekly D2333, Fla.App. 5 Dist., October 22, 2010 (NO. 5D09-2871)

E. Error to deny motion to return property without evidentiary hearing- Shade v. State, 55 So.3d 722, 36 Fla. L. Weekly D494, Fla.App. 5 Dist., March 04, 2011 (NO. 5D10-1981)

F. Public defender's excessive caseload prevented him from diligently and competently representing defendant was insufficient to establish a conflict of interest. STATE V. BOWENs, 39 So.3d 479, 35 Fla. L. Weekly D1475, Fla.App. 3 Dist., July 07, 2010 (NO. 3D09-3023)

G. Error to deny state's motion for continuance on a restitution hearing when State established requirements (party due diligence, favorable testimony, witness willing and available to testify, continuance would not cause material prejudice). State v. A.D.C. 59 So.3d 1209, 36 Fla. L. Weekly D901, Fla.App. 5 Dist., April 29, 2011 (NO. 5D10-1993)

Jenifer Davis is a Circuit Judge in the Ninth Judicial Circuit who spends far too much of her leisure time reading court opinions and creating outlines. She currently presides in Domestic Relations where she quests to determine true value of property. She has presided in Criminal, Juvenile Dependency, Injunctions, and Delinquency Courts. Prior to being a judge, she worked as an Assistant Public Defender in Orlando and Gainesville. In those positions she developed and participated in training programs. During her time as a Criminal Defense Attorney, she tried cases at all levels and became Board Certified in Criminal Trials.

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