Criminal Procedure

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Criminal Procedure: 1997 Survey of Florida Law

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I. INTRODUCTION

This article surveys significant developments in the area of criminal procedure between June 1, 1996, and June 1, 1997. The primary focus of this branch of criminal procedure is on the interpretation of the Fourth, Fifth, and Sixth Amendments, more specifically cases involving the substantive areas of search and seizure and confessions. To do so effectively, the authors have selected notable cases from the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the various Florida courts. This article seeks to clarify established principles, indicate continuing trends, and signify a new emphasis or direction without discussing the application of settled or fairly standard fact situations. The author's purpose is to provide the reader with insight into recent changes on the federal and state level, and the case law's general legal impact on criminal practitioners and citizens in the State of Florida.

II. WARRANTLESS SEARCHES

A.  *Pretextual Police Conduct*

Between June 1, 1996, and June 1, 1997, the United States Supreme Court issued a number of significant decisions involving investigatory and
pretexctual traffic stops. Arguably, the most controversial decision of the
survey period was *Whren v. United States*¹ which addressed the Fourth
Amendment’s concern of “reasonableness” when law enforcement officials
conduct traffic stops.² In *Whren*, the Court held that the temporary detention
of a motorist is reasonable where an officer has probable cause to believe a
motorist has violated a traffic law, even if a reasonable police officer would
not have detained the driver for such a violation.³ The facts of *Whren*
involve police officers who stopped petitioner Brown’s vehicle in a “high
drug area” after Brown was driving at an “unreasonable” speed and failed to
properly signal. Upon approaching the vehicle, the officers observed the
passenger, petitioner Whren, handling plastic bags of what appeared to be
crack cocaine. Petitioners were arrested, and quantities of several types of
illegal drugs were retrieved.⁴ Prior to trial on federal drug charges,
petitioners moved to suppress the evidence alleging the stop was pretextual
and was not justified by either a reasonable suspicion or probable cause to
believe the men were engaged in illegal activity. The motion to suppress
was denied and the Maryland Court of Special Appeals affirmed.⁵

Justice Scalia, writing for the majority in *Whren*, dismissed the
petitioner’s argument that a subjective “reasonable officer” standard should
have been used based upon the Supreme Court’s previous disapproval of
police attempts to use valid bases of action against citizens for other
investigative purposes.⁶ Generally, the decision to stop an automobile is
reasonable if probable cause exists that there has been a traffic violation,
reiterating the traditional common law rule justifying search and
seizures.⁷ More significantly, the Supreme Court rejected any inquiries into
the subjective state of mind of the individual police officer, stating that
“[s]ubjective intentions play no role in ordinary, probable-cause Fourth
Amendment analysis[,]” foreclosing any argument that the ulterior motives

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2. *Id.* at 1772.
3. *Id.*
4. *Id.*
5. *Id.*
the Court stated that “an inventory search must not be a ruse for a general rummaging in order
367, 372 (1987) (approving an inventory search where there had been no evidence of
improper police procedure or bad faith). An inventory search is the search of property
lawfully seized and detained in order to ensure that it is harmless, to secure valuable items
(such as might be kept in a towed car), and to protect against false claims of loss or damage.
of individual police officers could invalidate justifiable police conduct. Furthermore, the Supreme Court refused to apply a detailed balancing analysis by stating such inquiries are necessary only in cases involving searches or seizures conducted in a manner unusually harmful to the individual. Accordingly, although a routine traffic stop by plain clothes officers based on probable cause may generate "concern" or "fright," the existence of probable cause to believe that a law has been broken outweighs the private interest in avoiding police conduct. Historically, the standard in the Eleventh Circuit Court of Appeals for determining if a traffic stop was "pretextual" has been whether "a reasonable officer would have made the seizure in the absence of illegitimate motivation." Nevertheless, the Eleventh Circuit appears to have embraced Whren, thereby strengthening pretextual police conduct without reducing the incentive of officers who act upon ulterior motives to investigate into other matters.

In United States v. Holloman, the court found that the seizure of Holloman’s vehicle after a traffic stop comported with the Fourth Amendment, notwithstanding the officer’s subjective desire to intercept narcotics. Holloman refused to have his truck searched after police officers, working with a drug interdiction unit, stopped his vehicle for failing to have an illuminated license tag. However, using a canine who alerted

8. Id. at 1774.
9. Petitioners argued that a balancing test should be used to weigh the governmental and individual interests implicated in a traffic stop. Petitioners claim such balancing does not permit investigation of traffic violations by plain clothes officers in unmarked cars since it minimally advances the government’s interest in traffic safety and unduly burdens the motorist by creating "substantial anxiety." Id. at 1776. See Delaware v. Prouse, 440 U.S. 648, 657 (1979). The Court in Whren distinguished itself from Prouse and the use of a balancing analysis because the latter was based on a random traffic stop to check a motorist’s license and vehicle registration, a claim that involved police intrusion without the probable cause that is its traditional justification. Whren, 116 S. Ct. at 1776.
13. 113 F.3d 192 (11th Cir. 1997).
14. Id. at 196. See Riley v. Alabama, 104 F.3d 1247, 1250 (11th Cir. 1997) (stopping of vehicle was justified where automobile was traveling over 60 miles an hour in a residential neighborhood, and passenger was throwing paraphernalia out of the window).
15. Holloman, 113 F.3d at 193. Section 316.221(2) of the Florida Statutes “requires a tail lamp or separate lamp to illuminate the rear registration plate and render it clearly legible from a distance of 50 feet to the rear.” Id. at 193 n.1 (citing Fla. Stat. § 316.221(2) (1996)).
the presence of narcotics on the passenger side of the vehicle, officers discovered 694 grams of crack cocaine. Neither the nature of the minor traffic infraction nor the use of a canine to establish probable cause were viewed by the Eleventh Circuit as significant differentiating elements. The court in Holloman also concluded that the facts were identically indistinguishable from the Supreme Court’s decision in Whren. In both cases, the police officers had probable cause to believe a traffic violation had occurred, conducted constitutionally valid seizures of the narcotics of each petitioner, and were appropriately decided by their respective courts who did not analyze the officer’s subjective motivation to conduct the traffic stop.

The Whren decision will likely have a significant impact on pretextual stops in the State of Florida. In State v. Holland, the First District Court of Appeal noted that the Whren Court unequivocally rejected the reasonable officer test set forth by the Supreme Court of Florida in State v. Daniel. Consequently, the First District Court of Appeal certified a question to the Supreme Court of Florida to determine the actual scope of Whren. The Holland court, applying the reasonable officer test, held that

16. Holloman, 113 F.3d at 194.
17. Id. See United States v. Griffin, 109 F.3d 706 (11th Cir. 1997). Defendants were pulled over for driving 65 miles an hour on the interstate. Id. at 707. After the stop for the traffic violation, the officers conducted a canine sniff of the vehicle and found marijuana on the front seat. Id. Although the arresting officer testified that the speed defendants were traveling was not unreasonable, the court followed Whren by finding probable cause based upon the traffic violation. Id. at 707–08.
20. Id. at 1042 (rejecting State v. Daniel, 665 So. 2d 1040, 1046 ( Fla. 1995)). The Supreme Court of Florida held that “a stop is permissible if effected by specialized officers properly acting within the scope of their usual duties and practices.” Daniel, 665 So. 2d at 1046. The Daniel court expressly rejected both the so-called “subjective test,” which ‘attempts to inquire into the actual subjective reasons why the officer made the stop,”’ and the “objective test,” now adopted by the United States Supreme Court in Whren. Holland, 680 So. 2d at 1045 (quoting State v. Daniel, 665 So. 2d 1040, 1041 ( Fla. 1995)). Daniel described the objective approach as a “could arrest approach,” dismissing such an examination because the test “would authorize stops for the subject infractions, however unrelated those infractions may be to the true motive for the stop.” Id. (quoting State v. Daniel, 665 So. 2d 1040, 1042 ( Fla. 1995)).
21. The question, as originally certified asked:

WHETHER WHREN V. UNITED STATES, --- U.S. ---, 116 S. Ct. 1769, 135
L. Ed. 2d 89 (1996), OVERRULES STATE V. DANIEL, 665 So. 2d 1040,
detaining the appellant driver for questioning on drug charges after being stopped for traveling seventy miles an hour was permissible. 22 Judge Van Nortwick, in his reluctant concurrence, recognized the flaws with a purely objective test later adopted by Whren, specifically its inherent failure to address the problems that sometimes will arise with specialized officers. 23 For this reason, the trial court found a lack of credible evidence to support a finding that narcotics officers would, under their usual practice, make a traffic stop absent an invalid motive. 24 In this particular case, they did not even issue a traffic citation after the stop. One judge stated: "Well, I think that's all a fraud... they sit here and testify—they got smirks on their faces when they are testifying... They know what they are doing. You know what they are doing. I know what they are doing..." 25

Courts in a number of jurisdictions have attempted to find a solution to the problem of pretextual traffic stops without focusing upon the subjective, ulterior motivations of police officers. 26 One attempt to limit the authority of officers to order passengers out of a lawfully stopped vehicle was reversed by the United States Supreme Court in Maryland v. Wilson. 27 In Wilson, the Supreme Court held that "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop." 28 A Maryland state trooper stopped the speeding car in which appellant Wilson was a passenger. Upon noticing his apparent nervousness, the officer ordered Wilson out of the car. When Wilson exited the vehicle, a quantity of cocaine fell to the ground and he was arrested for possession of cocaine. 29 The Maryland Court of Special Appeals affirmed the lower court's decision, holding that the rule of Pennsylvania v. Mimms, 30 that an officer may order the driver of a lawfully stopped car to exit his vehicle, does not apply for passengers. 31

The Supreme Court reversed, holding that a police officer making a traffic stop may require passengers to get out of the car pending a

1046 (Fla. 1995), AND WHETHER THE PRESENT SUPPRESSION ORDER SHOULD BE REVERSED.

Holland, 680 So. 2d at 1044.
22. Id.
23. Id. at 1045 (Van Nortwick, J., concurring).
24. Id. at 1046.
25. Holland, 680 So. 2d at 1046.
28. Id. at 886.
29. Id.
31. Wilson, 117 S. Ct. at 883.
Chief Justice Rehnquist, who wrote the decision, explained the Court's decision in *Mimms* which stated that the "touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" Using the statistical figures of the danger of traffic stops for police officers, particularly when there is more than one occupant, the additional intrusion on a passenger already in a stopped vehicle is minimal. The result of the ensuing balancing test, between the public interest in protecting law enforcement officers and an individual's rights against intrusion, signifies a more expansive role for police officers during traffic stops and sets a precedent that, at the very least as common motorists, may further erode personal civil liberties.

B. Constitutionality of Roadblocks

The legality of roadblocks once again posed significant dilemmas for law enforcement officials in the State of Florida. The general standard requires a written set of guidelines to be issued before a roadblock can be set up. Because roadblocks involve seizures without any articulable suspicion of illegal activity, they should be based on the following considerations: "(1) specific evidence of an existing violation; (2) a showing that reasonable legislative or administrative inspection standards are met; or (3) a showing that officers carry out the search pursuant to a plan embodying specific neutral criteria which limit the conduct of the individual officers."

In *Campbell v. State*, a decisive statement was made requiring detailed written guidelines issued to officers that set forth governing procedures for individual roadblocks. The Supreme Court of Florida noted that "[t]he
requirement of written guidelines is not merely a formality... [but rather a
method] to ensure that the police do not act with unbridled discretion in
exercising the power to stop and restrain citizens.\textsuperscript{40} In \textit{Campbell}, a
roadblock to check motorists for traffic and safety violations was set up by
the Jacksonville Sheriff’s Office in response to residents’ complaints about
speeding and an accident that had occurred the previous weekend.\textsuperscript{41} Officers
prepared a written deployment strategy to stop motorists for a traffic safety
check on Mandarin Road and gave oral instructions to the other law
enforcement participants regarding procedural issues for the roadblock.
Nevertheless, the limited written instructions were deemed insufficient since
the operational order failed to contain guidelines restricting the discretion of
the officers who took part in the road block.\textsuperscript{42} The Supreme Court of Florida
has made it emphatically clear that substituting general operating procedure
contained in a standard operational order will not replace the requirement of
detailed written guidelines for individual roadblocks.\textsuperscript{43}

C. Consent to Search

An attempt to limit what police may do after a stop by scrutinizing
when an officer has consent to search was rebuffed by the United States
Supreme Court.\textsuperscript{44} The Supreme Court categorically rejected the bright line
prerequisite for consensual interrogation requiring that an officer clearly
state when a citizen validly detained for a traffic offense is “legally free to
go.”\textsuperscript{45} Officer Newsome stopped petitioner Robinette for speeding. Neither
at the time of the stop nor prior to the search of Robinette’s vehicle did the

\textsuperscript{40.} \textit{Id.}
\textsuperscript{41.} \textit{Id.} at 1169.
\textsuperscript{42.} \textit{Id.} at 1171.
\textsuperscript{43.} \textit{Campbell}, 679 So. 2d at 1171.
disavowed any “litmus-paper test” or single “sentence or... paragraph... rule...” in
recognition of the “endless variations in the facts and circumstances” implicating the Fourth
Supreme Court of Florida adopted a per se rule that questioning aboard a bus always
constitutes a seizure, the United States Supreme Court reversed, reiterating that the proper
inquiry necessitates a consideration of the totality of the circumstances. \textit{Id.} at 439.

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officer have any basis for believing that there were drugs in the car. After ordering Robinette out of the car, issuing a warning, and returning his driver's license, the officer took no further action related to the speeding violation. He did, however, ask if Robinette had any weapons or illegal contraband in his car. Thereafter, he obtained petitioner's consent to search and found a small amount of narcotics.46

Recognizing knowledge of the right to refuse as one factor for effective consent, the court declined to confine valid consent to the limit of that one factor.47 The test for a valid consent to search is that the consent be voluntary, and voluntariness is a question of fact to be determined from "all the circumstances surrounding the encounter."48 In another decision authored by Chief Justice Rehnquist, the Supreme Court noted that while it would be impractical to impose detailed warning requirements for consent searches, it would be equally unrealistic to require police officers to always inform detainees that they are free to go in order for a consensual search to be deemed voluntary.49 Justice Stevens, in his dissent, recognized the severe limitations upon states to limit the action of its police officers.50 No federal rule exists precluding a state from requiring its police officers to explain to individuals detained at valid traffic stops when they may leave.51 Since the Constitution neither mandates nor prohibits the issuance of such warnings during traffic stops, such a practice should be decided by lawmakers in each state.52

*United States v. Butler*53 further limited the defense of involuntary consent to search, even in the face of a significant police presence.54 The standard to be applied is "whether the police conduct would have communicated to a reasonable person that the person was not free to decline

47. *Id.* at 421.
51. *Id.* at 427 (Stevens, J., dissenting). Justice Stevens denotes the obvious, that most motorists have no interest in prolonging the delay occasioned by a valid traffic stop and maintain an interest in preserving the privacy of their vehicles and possessions from others. *Id.* at 425. However, the fact that Robinette's arresting officer successfully used a similar method of obtaining consent to search roughly 786 times in one year, indicates that motorists generally respond in a manner that is contrary to their self-interest. *Id.* "Repeated decisions by ordinary citizens to surrender that interest cannot satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so." *Id.*
54. *Id.* at 1197.
the officer's request' to search.⁵⁵ Even though officers had stationed themselves around the perimeter of the house in order to prevent its occupants from leaving, the Eleventh Circuit Court of Appeals concluded that codefendant Williams consented to the search of her home by opening her door voluntarily.⁵⁶ Dismissing the ample assemblage of officers, it was sufficient that Williams was informed that she could refuse the search, signed a consent form, and was cooperative.⁵⁷

The Fifth District Court of Appeal followed the same logic when a motorist, properly stopped for speeding, was asked additional questions about his vehicle after his license was returned, including a request for his registration.⁵⁸ During the conversation, another officer observed a handgun, and a subsequent search revealed narcotics. Failing to advise a motorist that he is "free to leave" does not show that law enforcement forced the defendant to consent to a search of his vehicle or to talk to the officer.⁵⁹ The ensuing observation of a weapon within the appellant's vehicle, as appellant purported to obtain his registration, entitled the officer to arrest appellant and conduct a further search of the vehicle.⁶⁰

A warrantless search is constitutional, even if the consenting party does not have the requisite relationship to the premises that are searched.⁶¹ Hence, there is no Fourth Amendment violation if an officer has an objectively "reasonable" though mistaken, good faith belief that he has obtained valid consent to search a particular area.⁶² In United States v. Brazel,⁶³ the search of a tenant's apartment after obtaining the consent of the landlord was upheld based upon the officer's belief the premises were vacant.⁶⁴ The landlord, who rented his apartment to petitioner Brazel on a month to month basis, could not remember why he thought the apartment was vacant. Nevertheless, the officer had further evidence to believe Brazel was living with his grandmother, warranting a search of the allegedly

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55. Id. (quoting Florida v. Bostick, 501 U.S. 429, 439 (1991)).
56. Id. at 1198.
57. Id. at 1197.
59. Id. at 1091.
62. See United States v. Fernandez, 58 F.3d 593, 598 (11th Cir. 1995) (holding that where a defendant told police that a trailer belonged to his codefendant, it was reasonable for officers to believe that the codefendant had authority to consent to a search).
63. 102 F.3d 1120 (11th Cir. 1997).
64. Id. at 1148–49.
abandoned property. The court concluded that any mistake made by the detective as to whether the premises were vacant was a mistake of fact, not one of law.

Based on a distinct set of facts, the Eleventh Circuit Court of Appeals used comparable logic in United States v. Mathis. In his appeal, petitioner Mathis asserted error in the district court's admission of evidence alleged to be the product of searches of his residence on two occasions. Mathis' mother consented to the search of her home and the garage area, which she said she owned. Although the garage area actually belonged to Mathis, it was "objectively reasonable" that the searching officers believed that Mathis' mother had the authority to consent to a search of the entire premises.

D. Length of an Automobile Stop

Establishing the rule that an officer's ulterior motives cannot invalidate legally justifiable police conduct has not terminated the debate over the actual time parameters of an automobile stop. In State v. Brown, appellant Brown's vehicle was stopped for speeding. The officer reported suspicious statements made by the passengers in the vehicle; whereupon minutes later, a backup K-9 unit arrived as Brown's tag and driver's license numbers were still being run. Without completing the citation, the officer conducted a license and tag check while the canine searched around the vehicle for approximately ten minutes, eventually discovering marijuana. After the

65. Id. at 1148. See Abel v. United States, 362 U.S. 217, 241 (1960) (concluding that a tenant who abandons property loses any reasonable expectation of privacy he once had).

66. Brazel, 102 F.3d at 1149. See United States v. Elliott, 50 F.3d 180, 187 (2d Cir. 1995) (recognizing that the question of whether a given unit is unleased is one of fact, the officers' belief that an area was vacant and that the owner could consent to a search was a factual error). But see United States v. Brown, 961 F.2d 1039, 1041 (2d Cir. 1992) (holding that a warrantless entry of tenant's apartment was unconstitutional where officer made the mistaken legal conclusion that a landlord's authority to turn off electrical appliances or lights also validated the officers' search of the apartment).

67. 96 F.3d 1577 (11th Cir. 1996).

68. "Two warrantless searches of the garage were conducted that day. . . . [T]he second search revealed information that aided the officers' investigation [in obtaining] a search warrant for the garage, where they subsequently found a safe hidden by Mathis containing thousands of dollars." Id. at 1584 n.5.

69. Id. at 1584.

70. Id.

71. 691 So. 2d 637 (Fla. 5th Dist. Ct. App. 1997).

72. Id. at 637.
marijuana was secured in the trunk of the patrol car, the officer completed the citation. In reversing the trial court's motion to suppress, the court held that a traffic stop should not be considered completed until all information, if it can be obtained within a reasonable time, is returned. Therefore, it is permissible for officers to run a dog sniff until a traffic stop is entirely complete.

E. Automobile Search Warrant Exception

The so-called "automobile exception" to the Fourth Amendment search warrant requirement continued to broaden during this survey period. Generally, an automobile has been one of the last few vestiges of an individual's Fourth Amendment rights. Recent decisions, however, have put such a claim in jeopardy, making it closer to the truth to merely state that "[a] citizen does not surrender all the protections of the Fourth Amendment by entering an automobile." In Pennsylvania v. Labron, the United States Supreme Court reaffirmed the proposition that the ready mobility of a car and probable cause that it contains contraband, without more, permits a warrantless search of a vehicle. The case, decided by the Supreme Court, reversed two decisions by the Supreme Court of Pennsylvania, which ruled that warrantless searches of automobiles are limited "where 'unforeseen circumstances involving the search of an automobile [are] coupled with the presence of probable cause.'" In Commonwealth v. Labron, the police observed respondent Labron and others engaging in a series of drug transactions on a street in Philadelphia. The police arrested the suspects, searched the trunk of a car in which the drugs had been stored, and found bags containing cocaine. In Commonwealth v. Kilgore, an undercover informant agreed to buy drugs

73. Id. at 638.
74. Id.
75. Id.
79. Id. at 2487.
81. Labron, 669 A.2d at 918.
82. Id.
83. Id.
84. 677 A.2d at 311.
from respondent Randy Lee Kilgore's accomplice, Kelly Jo Kilgore. To obtain the drugs, Kelly Jo drove from the parking lot where the deal was made, to a farmhouse where she met with Randy Kilgore, and obtained the narcotics. After the drugs were delivered and the Kilgores were arrested, police searched both the farmhouse and Randy Kilgore's pickup truck, discovering cocaine on the floor of the truck which was parked in the driveway of the farmhouse. In each case, the court upheld the respondent's motion to suppress, concluding that although probable cause existed, no exigent circumstances justified the failure to obtain a warrant.

The Supreme Court concluded that the state court's analysis of the automobile exception to the Fourth Amendment's warrant requirement was flawed, as an automobile's "ready mobility" is an exigency sufficient to excuse failure to obtain a search warrant once probable cause is clear. Consequently, without acknowledging the residential location of the car in Kilgore or the actual mobility of either vehicle, the Supreme Court noted that probable cause and exigent circumstances existed because both respondents were involved in illegal drug activity. With apparent unbridled acceptance, the Supreme Court acknowledged that there have been recent cases that have continued to reduce the expectation of privacy in an automobile, further justifying their position. Justice Stevens, in his dissenting opinion, recognized the debilitation of individual citizen's rights as motorists, and suggested the effect is not only on the individual but on the state, noting the Supreme Court's "lack of respect" for the Pennsylvania Supreme Court and the "sophistication of its state search and seizure law." As a result, Justice Stevens suggests that the Supreme Court's edict will make it harder for states who expressly indicate their intent to extend the protection of their constitution beyond those means available in the Constitution.

The issue of whether probable cause and exigent circumstances existed to justify a warrantless search of an automobile was addressed in United States v. Brazel. In Brazel, prior to the search of the car in question,

85. Id.
86. Id. at 312.
87. Id. at 313. See also Labron, 669 A.2d at 918.
89. Id.
90. Id.
91. Id. at 2492 (Stevens, J., dissenting).
92. Id.
93. 102 F.3d 1120, 1129 (11th Cir. 1997). A federal grand jury indictment handed down drug trafficking indictments against 32 people including petitioner Jefferson. Id. at
detectives were aware that the true purchaser of the vehicle had a minimal income. Petitioner Jefferson had been seen driving the same car in the vicinity where officers were investigating a drug ring. Although cocaine was never observed in the car by detectives, straight single-edged razor blades were seen. The razor blades were similar to those previously found with cocaine residue on them after a search of a garage outside the address which surveillance photos showed Jefferson frequented.

Taking into account the totality of the circumstances at the time the search was conducted, the court in Brazel determined that there was probable cause to believe the car contained some evidence of drug trafficking activities. The Eleventh Circuit also found that the potential mobility of the car satisfied the exigency requirement. Petitioner Jefferson was in custody at the time of the search, and a second set of car keys was discovered in his girlfriend’s possession at the private residence where the car was parked. However, the court in Brazel ruled that the inherent potential for mobility created an exigency justifying the warrantless search, especially when other codefendants were not yet in custody, and there was presumably a chance that a person might remove incriminating evidence from the car. As a result, Jefferson’s motion to suppress evidence from the car was denied. Consequently, Jefferson was convicted of conspiracy to distribute cocaine and sentenced to life in prison.

An additional noteworthy decision clarified the rule that grants officers the right to search the passenger compartment of an automobile, incident to a lawful custodial arrest of the vehicle’s occupants. In State v. Johnson, the record revealed that upon being approached by police officers, the passengers of the vehicle exited and began to walk away. After discovering marijuana on one of the men, officers searched the passenger compartment of the petitioner’s car. The Johnson case establishes that the occupants of an automobile may not avoid the consequences of a vehicle search by stepping outside as officers approach when a subsequent legal arrest is made.

1129. Jefferson, along with seven other defendants, was convicted of conspiracy to distribute cocaine with each defendant receiving at least one life sentence. Id.
94. Id. at 1146–47.
95. Id. at 1147.
96. Brazel, 102 F.3d at 1147.
97. Id.
98. Id. at 1129.
100. Id. at 880.
101. Id. at 881–82.
102. Id. at 881.
F. Warrantless Search of Property

During this survey period, in a case of first impression, the constitutionality of the Florida Forfeiture Act was challenged. The Florida Contraband Forfeiture Act authorizes law enforcement agencies to seize vehicles of any kind used to "facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." "Contraband article," includes "[a]ny controlled substance," including cocaine and its derivatives in the statute's list of controlled substances. Thus, the Forfeiture Act clearly authorizes law enforcement officials to seize any type of vehicle used to facilitate the distribution of cocaine. The Forfeiture Act sets forth the procedure to be used in seizing personal property, with the only significant pre-seizure requirement being notice of the right to a subsequent hearing. Furthermore, there is no requirement to obtain a warrant or court order before seizing a vehicle.

105. FLA. STAT. § 932.701(2)(a)(1); see also FLA. STAT. § 893.03(2)(a) (1995).
106. White, 680 So. 2d at 552.
107. The procedure to be followed is set out in the Florida Statutes:

FLA. STAT. § 932.703(2)(a).

A postseizure adversarial preliminary hearing may be requested within 15 days after receipt of this notice and the hearing must be set and noticed by the seizing agency and held by the court within 10 days of receipt of the hearing request or as soon as practicable thereafter. At the hearing, the court must determine whether probable cause existed for the seizure.

White, 680 So. 2d at 552 (citation omitted).

108. Id.

109. See State v. Pomerance, 434 So. 2d 329, 330 (Fla. 2d Dist. Ct. App. 1983) (holding that the Forfeiture Act does not specifically mention the necessity of a warrant and finding no rationale for judicially engrafting onto the statute a requirement that a warrant be obtained).
In *White v. State*, the police officers seized White's automobile based on eye-witnesses and videotape, because it had been used in the delivery and sale of cocaine. The car was seized without a warrant after a routine inventory search produced two pieces of crack cocaine in the ashtray. The petitioner was charged with possession of a controlled substance and convicted.

At trial, the petitioner argued that the warrantless seizure of a motor vehicle violates constitutional prohibitions against illegal search and seizure. However, "neither the Florida nor United States Supreme Court has addressed whether the Fourth Amendment requires law enforcement officers to obtain a warrant prior to seizing a vehicle under the Florida Forfeiture Act or similar statute." Nevertheless, the Florida Forfeiture Act is substantively similar to the Federal Forfeiture Act and the Uniform Controlled Substances Act.

Although the federal circuits are split in their analysis of this issue, the majority of the circuits that have considered this question have held that a warrantless search of a vehicle under the Federal Forfeiture Act does not violate the Fourth Amendment, and evidence obtained in subsequent inventory searches is admissible in a criminal prosecution. The First District Court of Appeal joined the majority of federal circuits by holding that a warrantless search of a motor vehicle based on probable cause that the

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110. 680 So. 2d 550 (Fla. 1st Dist. Ct. App. 1996), rev. granted, 687 So. 2d 1308 (Fla. 1997).
111. *Id.* at 551.
112. *Id.* at 551–52.
113. *Id.* at 553.
114. *Id.* Because of the significance of this issue and the fact that it is a case of first impression, the court certified the following question:

> WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE INADMISSIBLE IN A CRIMINAL PROSECUTION.

*White*, 680 So. 2d at 555.
116. *See* United States v. Decker, 19 F.3d 287, 287 (6th Cir. 1994); United States v. Pace, 898 F.2d 1218, 1241 (7th Cir. 1990); United States v. Valdes, 876 F.2d 1554, 1560 (11th Cir. 1989); United States v. One 1978 Mercedes Benz, Four-Door Sedan, 711 F.2d 1297, 1302 (5th Cir. 1983); United States v. Kemp, 690 F.2d 397, 402 (4th Cir. 1982); United States v. Bush, 647 F.2d 357, 368 (3d Cir. 1981). *But see* United States v. Dixon, 1 F.3d 1080, 1084 (10th Cir. 1993); United States v. Lasanta, 978 F.2d 1300, 1305 (2d Cir. 1992); United States v. Linn, 880 F.2d 209, 214 (9th Cir. 1989).
vehicle was used in violation of the Forfeiture Act does not violate the Fourth Amendment prohibition against unreasonable searches and seizures.\textsuperscript{117} The court, affirming the conviction of White, reasoned that if police officers with probable cause can arrest drug traffickers without a warrant, they should be equally able to seize "the vehicle the trafficker has been using to transport his drugs."\textsuperscript{118} Since the expectation of privacy with respect to one's automobile has gradually declined under the "automobile exception," a motor vehicle may be seized for the same reasons under the Forfeiture Act without a prior warrant absent exigent circumstances other than the characteristics inherent in a motor vehicle.\textsuperscript{119}

It should be noted, however, that Judge Wolf admonished the majority for upholding the search and permitting property to be seized merely upon probable cause.\textsuperscript{120} By applying this concept, the warrant requirements for the seizure of a vehicle will be crippled.\textsuperscript{121} Moreover, it mistakenly suggests that the forfeiture statute authorizes the seizures of property absent exigent circumstances, trivializing the exigent circumstances exception to the warrant requirement.\textsuperscript{122}

G. \textit{Use of Informants to Establish Probable Cause}

The continued problems with the use of informants to establish probable cause during the past survey year beleaguered the Eleventh Circuit Court of Appeals, which intertwined varied legal standards to find common ground for such elicited information. For example, in \textit{Ortega v. Christian},\textsuperscript{123} the court concluded that an informant's tip lacked the essential elements to constitute probable cause to believe appellant Ortega participated in a robbery, thereby validating his false arrest claim.\textsuperscript{124}

In \textit{Ortega}, a confidential informant told the Metro-Dade Police Department that an organized group, of which he was a member, committed the robbery. The informant provided the address of the alleged robber's residence and proceeded with officers to that address. The informant identified Ortega who vehemently proclaimed his innocence and requested an opportunity to prove a case of mistaken identity. Officers refused to

\begin{itemize}
\item \textsuperscript{117} \textit{White}, 680 So. 2d at 553.
\item \textsuperscript{118} \textit{Id.} at 554 (quoting United States v. Valdes, 876 F.2d 1554, 1559–60 (11th. Cir. 1989)).
\item \textsuperscript{119} \textit{Id.} at 554–55 (citing California v. Carney, 471 U.S. 386, 390 (1985)).
\item \textsuperscript{120} \textit{Id.} at 559 (Wolf, J., concurring in part and dissenting in part).
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{White}, 680 So. 2d at 559.
\item \textsuperscript{123} 85 F.3d 1521 (11th Cir. 1996).
\item \textsuperscript{124} \textit{Id.} at 1525.
\end{itemize}
comply with Ortega’s request and failed to make any inquiries into the claims of innocence, denying the opportunity for Ortega to appear in a line-up or photo spread. Despite the fact that Ortega was never identified by the victim as the perpetrator of the robbery, petitioner was incarcerated for five months without bond.\textsuperscript{125}

In determining whether an informant’s tip rises to the level of probable cause, the totality of the circumstances must be assessed.\textsuperscript{126} Relevant factors include the “informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge.’\textsuperscript{127} In addition, the corroboration of the details of an informant’s tip through independent police work adds significant value to the probable cause analysis.\textsuperscript{128} In reversing the dismissal of Ortega’s false arrest claim against the officer, the Eleventh Circuit strictly examined additional factors that demonstrated that the informant’s information had not given the arresting officer probable cause to believe Ortega had participated in a robbery.\textsuperscript{129} There must be evidence in the complaint that demonstrates a past history between the informant and the arresting officer.\textsuperscript{130} Furthermore, “an informant’s tip that is bolstered [through] the fact that it is based on his own personal observation rather than hearsay.”\textsuperscript{131} Finally, making statements “against one’s penal interests without more will not raise an informant’s tip to the level of probable cause required under the Fourth Amendment.”\textsuperscript{132}

In contrast, the Eleventh Circuit in \textit{United States v. Talley}\textsuperscript{133} relied exclusively on whether the information provided by the confidential informant, when combined with the government’s independent corroboration, gave rise to probable cause.\textsuperscript{134} Without reference to the relationship between the informant and the officers or the informant’s personal knowledge of the petitioner, the court affirmed Talley’s conviction of aiding and abetting another in possession with the intent to distribute crack cocaine.\textsuperscript{135} The accurate information provided by the informant

\begin{footnotes}
\footnote{125. Id. at 1524.}
\footnote{126. Id. at 1525.}
\footnote{128. Ortega, 85 F.3d at 1525 (citing United States v. Gonzalez, 969 F.2d 999, 1003 (11th Cir. 1992)).}
\footnote{129. Id. at 1525.}
\footnote{130. Id.}
\footnote{131. Id. (citing United States v. Reyes, 792 F.2d 536, 539 (5th Cir. 1986)).}
\footnote{132. Id.}
\footnote{133. 108 F.3d 277 (11th Cir. 1997).}
\footnote{134. Id. at 281.}
\footnote{135. Id. at 282.}
\end{footnotes}
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included the location and description of petitioner's vehicle and a report that Talley possessed cocaine. This was corroborated by officers who noticed a visible bulge in Talley's pants, thus providing sufficient probable cause to search the codefendant's car for contraband.

The scope of an informant's information used to establish probable cause to justify a search warrant was enlarged further in United States v. Butler. The standard set forth in Butler asks whether there is a "fair probability that contraband or evidence of a crime will be found." One informant stated that appellant Campbell kept cocaine in his garage at his residence for the past two years, yet the affidavit did not state the basis for this information. However, other informants told of purchases they had made from Campbell at his home. Finally, based upon the appellant's employment status, he was found to have a substantial amount of unexplained wealth. Based on these facts, and applying the "fair probability" standard, the issuance of the warrant was deemed appropriate since the affidavit supported allegations that appellant was involved in the drug trade.

H. Warrantless Use of Thermal Image Detectors

The utilization of advanced technology by law enforcement officials to help combat crime continues to raise interesting questions regarding whether the use of a particular technology in a given situation violates a person's expectation of privacy. One technological advance that has raised frequent debate is the use of thermal or infrared image devices to gather information of possible criminal activity. Without directly answering the constitutionality of its use, the Fifth District Court of Appeal in State v. Siegel, affirmatively recognized the information from thermal infrared detectors to support the issuance of a search warrant.

136. Id. at 281.
137. Id.
138. 102 F.3d 1191 (11th Cir 1997).
139. Id. at 1198 (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).
140. Id.
141. Id.
143. Id. at 866.
144. 679 So. 2d 1201 (Fla. 5th Dist. Ct. App. 1996).
145. Id. at 1204. No Florida court has expressly ruled on the constitutionality of using such thermal or infrared imaging devices, although the issue has been raised in many other jurisdictions. Id. at 1204 n.3. Generally, the discussion is based upon an individual's
In *Siegel*, investigators received an anonymous tip that Siegel desired to establish an indoor marijuana-growing operation with the use of a trailer. They discovered that Siegel had rented a trailer and was generating inordinately high electric bills for particular months. With the use of infrared detectors, officers from the Aviation Division of the Sheriff’s Office conducted a flight over the rented trailer. The equipment allows its operator to see a depiction of heat escaping into the environment from an area or structure. The results from the flight revealed a large amount of heat escaping from Siegel’s trailer. Since weather conditions did not warrant such heat usage, the large amount of heat may have come from high intensity lights, commonly used in indoor marijuana-growing operations. Another thermal imager, used at ground level to detect differences in temperature, revealed excessively high levels of heat being emitted into the environment from the trailer.

After a warrant was executed and the marijuana-growing operation was discovered, the trial court granted Siegel’s motion to suppress the seized evidence concluding that law enforcement officers were on a "'fishing expedition'" specifically prohibited by the Fourth Amendment. In reversing the ruling of the lower court and following the lead of the majority of federal district courts of appeals, *Siegel* clearly recognized the use of thermal image devices. The court held that although no single shred of evidence may be conclusive, the various pieces of information created a fair probability that marijuana would be found in the trailer.

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146. *Siegel*, 679 So. 2d at 1202–03.
147. *Id.* at 1203.
148. *Id.*
149. *Id.* at 1204.
150. *Id.* at 1205.

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expectation of privacy, requiring a warrant if an individual has evidenced a subjective actual expectation of privacy and if that expectation is one that society is prepared to acknowledge as reasonable. See *Katz v. United States*, 389 U.S. 347, 351–52 (1967). The weight of authority is that the use of thermal or infrared image devices does not require a warrant. *Butler*, 102 F.3d at 1204 n.3. See *United States v. Robinson*, 62 F.3d 1325, 1328–31 (11th Cir. 1995); *United States v. Ishmael*, 48 F.3d 850, 857 (5th Cir. 1995); *United States v. Zimmer*, 14 F.3d 286, 288 (6th Cir. 1994). Only a minority of courts have held that such activities may amount to searches under the Fourth Amendment. *Butler*, 102 F.3d at 1204 n.3. See *United States v. Field*, 855 F. Supp. 1518, 1518–19 (W.D. Wis. 1994); *State v. Young*, 867 P.2d 593, 604 (Wash. 1994).
III. MINIMALLY INTRUSIVE SEARCHES AND SEIZURES

A. Reasonable Suspicion—Grounds for a Terry Stop

The controlling factors surrounding what constitutes reasonable suspicion to warrant a Terry stop continue to be debated in the State of Florida and the Eleventh Circuit Court of Appeals, culminating in several noteworthy decisions during the past year. Generally, however, the issue continues to remain the one area of criminal procedure that the courts in this survey give great scrutiny and analysis, particularly since it is the first stage of infringement upon an individual's liberty.

By virtue of the fact that reasonable suspicion is a less demanding standard than probable cause, the license to use anonymous tips to establish reasonable suspicion has been abused yet unrebutted by the Eleventh Circuit Court of Appeals. In Riley v. Montgomery, the Eleventh Circuit held that reasonable suspicion existed justifying an automobile stop and subsequent pat-down searches of the vehicle's passengers. In Riley, an anonymous tipster had indicated that Riley was transporting cocaine. In fact, Riley was seen entering a vehicle matching the informant's description. Another tip, corroborating this information, gave the license plate number of the vehicle Riley was driving. The court found the anonymous tip, corroborated by the other informant and independent police work, to show a "greater indicia of reliability" for the officers to have "reasonable suspicion" to make a stop. Despite the dismissal of Riley's earlier indictment for possession of cocaine and an investigation into the Montgomery Police Department Narcotics and Intelligence Unit, the court expressed absolute faith in the reliability of these anonymous tips. The court unabashedly accepted the fact that the investigation uncovered evidence of extensive abuse involving the existence of a fund used to pay confidential informants for tips, including falsifying.

151. Terry v. Ohio, 392 U.S. 1 (1968). As a result of Terry, police may conduct a wide array of searches and seizures on a basis of reasonable suspicion, a significantly lesser standard than probable cause, for the purpose of concluding whether a crime has been or is about to be committed and if the suspect is the person who committed or is planning the offense. See Joshua Dressler, Understanding Criminal Procedure 185 (1991).

152. 104 F.3d 1247 (11th Cir. 1997). The plaintiff Riley brought civil rights and malicious prosecution actions against the City of Montgomery and the relevant police officers involved in his arrest. The Eleventh Circuit, dismissing the actions, found that Riley failed to provide sufficient evidence to demonstrate misconduct on behalf of the arresting police officers. Id. at 1251–52.

153. Id. at 1251.

154. Id. at 1252.

155. Id.
the identity of informants and smuggling money by recording transfers of payments to informants who did not exist.\(^{156}\)

The skepticism of anonymous tips to establish reasonable suspicion has resulted in more careful and thorough examinations by Florida courts during this survey period. In contrast to the Eleventh Circuit's reasoning in \textit{Riley}, who briefly examined the role of an informant, the Third District Court of Appeal meticulously analyzed both the content of the information possessed by police and its degree of reliability when deciding whether the facts from an anonymous 911 emergency call constituted reasonable suspicion.\(^{157}\)

In \textit{State v. Gonzalez},\(^{158}\) a citizen made a 911 emergency call to report that two men were removing what appeared to be appliances from a neighborhood house into a white van at approximately 3:00 a.m.\(^{159}\) The caller gave the dispatcher the address in an area which had continual problems with theft of air conditioners and other appliances. Furthermore, earlier investigations had also focused on locating a suspicious white van. Officers who received the message encountered the van and discovered numerous air condition units after appellants consented to a vehicle search. The Third District Court of Appeal thoroughly assessed the anonymous tips and how they related to the relevant facts, yet nevertheless recognized that although it was "theoretically possible that this was the owner's 3:00 a.m. moving party, common experience teaches that the probabilities were otherwise and a stop for investigation was reasonable in the circumstances."\(^{160}\) In its detailed decision the court acknowledged that the process to determine reasonable suspicion is one of "probability" not "hard certainties."\(^{161}\) The court in \textit{Gonzalez} concluded that "[w]hen the 'whole picture' is considered, there was more than enough reasonable suspicion to support the investigatory stop."\(^{162}\)

Therefore, in the State of Florida, courts have generally maintained strict standards in what constitutes reasonable, articulable suspicion, an area where an individual's civil liberties have not rapidly eroded:

\begin{quote}
[An officer may temporarily detain an individual for investigative questioning if the officer has a reasonable suspicion based on articulable facts that the individual is committing, has committed, or is about to commit a crime. In determining whether an officer
\end{quote}

\begin{itemize}
\item 156. \textit{Riley}, 104 F.3d at 1250.
\item 158. \textit{Id.} at 1168.
\item 159. \textit{Id.} at 1169.
\item 160. \textit{Id.} at 1171.
\item 161. \textit{Id.} at 1170 (citing United States v. Sokolow, 490 U.S. 1, 7 (1989)).
\item 162. \textit{Gonzalez}, 682 So. 2d at 1172.
\end{itemize}
possesses a founded suspicion of criminal activity to justify an investigatory stop, the totality of the circumstances must be taken into account.163

In considering the totality of the circumstances, the court may look at: "[T]he time of day, the day of the week, the location, the physical appearance and behavior of the suspect, the appearance and manner of operation of any vehicle involved or anything incongruous or unusual in the situation as interpreted in light of the officer's knowledge." 164

The scrutiny by which the courts of Florida analyze reasonable suspicion is exemplified in Welch v. State.165 In Welch, the Second District Court of Appeal narrowly tailored the meaning of the phrase "anything incongruous or unusual," as perceived by law enforcement.166 Welch was sitting on a bicycle with a very small plastic baggie in his hand, when two officers in a patrol car approached him from behind. As soon as Welch saw the officers, he shoved the baggie down his pants motivating one officer to grab the appellant by his trousers and causing rock cocaine to fall to the ground.167 The court held that neither the mere sight of Welch sitting on a bicycle with a baggie in a high crime location, nor the subsequent concealment thereof, established a legitimate suspicion to seize or detain Welch.168 Although the officers could have properly engaged in a police-citizen encounter with Welch, they acted prematurely in actually seizing him.169

Other cases where officers lack reasonable suspicion involve activities that may be equally attributable to legal activity as to illegal activity.170 In Bowen v. State,171 an officer patrolling a parking lot of a motel where prior criminal activity had taken place approached a vehicle with persons who were allegedly acting nervous and attempting "to tuck something away."172 The officer ordered the occupants out of the car whereupon petitioner Bowen dropped a straw with white powder, later identified as cocaine. The

164. Id. (quoting State v. Stevens, 354 So. 2d 1244, 1247 (Fla. 4th Dist. Ct. App. 1978)).
165. 689 So. 2d 1240 (Fla. 2d Dist. Ct. App. 1997).
166. Id. at 1241.
167. Id.
168. Id.
169. Id.
171. Id. at 942.
172. Id. at 943.
fact that the officer could not see clearly into the car or that the occupants could have been engaging in criminal activity is insufficient to establish reasonable suspicion.173 Once again, a Florida court emphasizes that an officer's fear does not justify ordering an occupant out of a vehicle that is not legally stopped.174 This would open the door for police officers to order persons "out of their automobiles under almost any circumstances."175

Several Florida district courts of appeal have decidedly contrasting analyses in applying furtive movements to constitute reasonable suspicion. For example, in Jenkins v. State,176 the officer's knowledge of burglaries in the area, coupled with Jenkins' furtive movements with objects consistent with the type of products recently stolen from a Radio Shack, justified an investigatory stop.177 In stark contrast, in J.B. v. State,178 the court held that the appellant's quick movement to conceal something as an officer approached "did not create a founded suspicion of criminal activity justifying an investigative stop."179 In a high crime area, an officer who observes someone make a furtive movement may have his "suspicions aroused," but is prohibited from legally detaining the person for further investigation.180

The distinction between "stop then drop" and "drop then stop" was at issue in State v. Woods.181 Woods, who was sitting on a chair, got up and walked away when officers approached. An officer followed him and yelled for him to stop at which time Woods turned and dropped two bags of cocaine and a handgun onto the ground.182 The Fourth District Court of Appeal held that the trial court erred in its finding that the stop preceded the drop and reversed the lower court's order granting the appellant's motion to suppress.183 An unlawful seizure does not take place when a person fails to stop when requested to do so.184 An unlawful seizure occurs "only if the person either willingly obeys or is physically forced to obey the police

173. Id. at 944.
174. Id.
175. Bowen, 685 So. 2d at 944 (quoting Popple v. State, 626 So. 2d 185, 187 n.1 (Fla. 1993)).
176. 685 So. 2d 918 (Fla. 1st Dist. Ct. App. 1996).
177. Id. at 921.
179. Id. at 1297.
180. Id.
182. Id. at 631.
183. Id.
184. Id.
Therefore, it is not considered an unlawful seizure when the person "drop then stops," even if the drop occurs after an order to stop.\textsuperscript{186} Evidence that justifies "[a] valid stop does not necessarily mean that there can be a valid frisk."\textsuperscript{187} The First District Court of Appeal found it unnecessary to decide whether there was a basis for reasonable suspicion that a person was engaged in criminal activity because probable cause is the essential requirement.\textsuperscript{188} As both Florida Statutes\textsuperscript{189} and case law indicate, an officer must have probable cause to believe a suspect is armed before the officer can conduct a pat-down search or frisk of a suspect to ascertain the presence of a weapon.\textsuperscript{190}

In \textit{Stalling v. State},\textsuperscript{191} the appellant was a passenger in an automobile stopped for a traffic infraction.\textsuperscript{192} The vehicle was rented and neither the driver nor appellant were authorized as drivers on the rental agreement. The officer told Stalling that he and the driver would be driven to a telephone where they could arrange for transportation. Prior to permitting Stalling to enter the police car, the officer patted him down discovering three packages of crack cocaine.\textsuperscript{193}

It is undisputed that the officer did not have a warrant to conduct the pat-down search of the appellant. When no warrant has been secured, the rule is that the search or seizure is per se unreasonable.

\begin{itemize}
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Woods}, 680 So. 2d at 631.
\item \textsuperscript{188} \textit{Id.} at 845.
\item \textsuperscript{189} \textsuperscript{189} Section 901.151(5) of the Florida Statutes states:
Whenever any law enforcement officer authorized to detain temporarily any person under the provisions of subsection (2) has probable cause to believe that any person whom he has temporarily detained, or is about to detain temporarily, is armed with a dangerous weapon and therefore offers a threat to the safety of the officer or any other person, he may search such person so temporarily detained only to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon. If such a search discloses such a weapon or any evidence of a criminal offense it may be seized.
\item \textsuperscript{190} \textit{See} \textit{Shaw v. State}, 611 So. 2d 552, 554 (Fla. 1st Dist. Ct. App. 1992).
\item \textsuperscript{191} 678 So. 2d 843 (Fla. 1st Dist. Ct. App. 1996).
\item \textsuperscript{192} \textit{Id.} at 844.
\item \textsuperscript{193} \textit{Id.}
\end{itemize}
unless it falls within one of the well established exceptions to the warrant requirement. 194

Although Terry created the right of a law enforcement officer to conduct a pat-down search "to find weapons that he reasonably believes or suspects are then in possession of the person whom he has stopped," 195 there is still no blanket exception for an officer's "routine" pat-down of a detainee prior to placing him in a police cruiser. 196 As a result, the First District Court of Appeal concluded that the trial court erred in denying the appellant's motion to suppress and Stalling's conviction was reversed for a lack of probable cause. 197

In Turner v. State, 198 the Fifth District Court of Appeal reaffirmed that an inchoate and unparticularized suspicion or hunch alone will not warrant an investigatory search. 199 In Turner, officers were dispatched to investigate a report that people were arguing over drugs. When they arrived, there was no argument and no drugs were visible. Nevertheless, Turner and his friends were approached by police officers and immediately patted down. At the officer's request, Turner consented to be searched again and three wrapped pieces of crack cocaine items were removed from his pocket.

The court held that in order to seize Turner's person and to pat him down for weapons, the officers needed a well-founded suspicion that Turner was involved in criminal activity. 200 The law enforcement officer must be able to articulate the reasons for his suspicion. 201 Prior criminal activity at the same location and an officer's hunch are insufficient evidence to warrant an investigatory search. 202 The court determined that when the officers initially patted down Turner, they seized his person. 203 After illegal police conduct, a consent to search is presumptively tainted and is deemed involuntary absent clear and convincing evidence sufficient to minimize the taint of prior illegal action by law enforcement officials. 204 Consequently,

194. Id. (citing Jones v. State, 648 So. 2d 669, 674 (Fla. 1994), cert. denied, 575 U.S. 1147 (1995)).
196. Id.
197. Id. at 846.
198. 674 So. 2d 896 (Fla. 5th Dist. Ct. App. 1996).
199. Id. at 897.
200. Id.
201. Id.
202. Id. See also Smith v. State, 637 So. 2d 343, 344 (Fla. 2d Dist. Ct. App. 1994).
203. Turner, 674 So. 2d at 897.
204. Id. at 898.
the court ruled that Turner's consent to search was tainted, reversing the trial
court's denial of the appellant's motion to suppress.\textsuperscript{205}

B. Consensual Encounters v. Investigatory Detentions

Perhaps the most divisive issue that has surrounded the Florida district
courts of appeal during the past survey year involves the point when a
consensual encounter becomes an investigatory stop. The underlying theme
in these cases involves requests by officers, to those being questioned, to
remove their hands from their pockets.

In \textit{State v. Baldwin},\textsuperscript{206} the Fifth District Court of Appeal applied an
objective test\textsuperscript{207} to determine whether a reasonable person would have
thought they were free to leave during an interaction with law enforcement
officials.

\textquote{[The] factors that might indicate a seizure, even where the
individual did not attempt to leave, include the threatening
presence of several officers, the display of a weapon by an officer,
some physical touching of the person of the citizen, or the use of
language of tone of voice indicating that compliance with the
officer's request might be compelled.}\textsuperscript{208}

The subjective intentions of the detainee are immaterial when examining
whether a Fourth Amendment violation has occurred.\textsuperscript{210}

\begin{thebibliography}{9}
\bibitem{205} Id.
\bibitem{206} 686 So. 2d 682 (Fla. 1st Dist. Ct. App. 1996). The undisputed facts are that
Baldwin was sitting on a front cement stoop with another gentlemen when they were
approached by police officers. \textit{Id.} at 683. Baldwin was asked to remove his hands from his
pockets and complied, but he returned them back to his pockets after numerous requests not to
do so. The last time Baldwin pulled his hands out of his pockets, he threw a paper bag on the
ground which contained cocaine. \textit{Id.} The court remanded the case back to the trial court to
apply an objective test, i.e., whether a reasonable person would have thought they were free to
leave when the officer asked Baldwin to remove his hands from his pockets. \textit{Id.} at 687.
\bibitem{207} \textit{See} United States v. Mendenhall, 446 U.S. 544, 554 (1980); State v. M.J., 685 So.
2d 1350, 1352 (Fla. 2d Dist. Ct. App. 1996) (holding that defendant's spontaneous and
voluntary offer to allow the officer to check him extended from the initial consensual
encounter and pat-down to the officer's later act of reaching into defendant's pocket and
withdrawing a crack pipe).
\bibitem{208} Baldwin, 686 So. 2d at 686.
\bibitem{209} \textit{Id.} at 685 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).
\bibitem{210} \textit{Id.} at 686.
\end{thebibliography}
In State v. Woodard,211 two police officers entered an apartment building looking for a person with multiple outstanding warrants.212 The officers knocked on the door and questioned Woodard and the other occupants about their presence in the building, asked for the names of the men, and checked them for outstanding warrants. At no time was Woodard ordered to remain or otherwise told that he was not free to leave. Prior to the radio response on the warrant checks, Woodard reached into his pockets. When the officer asked him to remove his hands from his pants, Woodard discarded a clear plastic bag from his pocket proving to be cocaine.213 The court held that the investigating officer’s request to have Woodard remove his hands from his pockets, “when made to ensure an officer’s safety, does not elevate a consensual encounter to a detention.”214

The Second District Court of Appeal distinguished Woodard from their previous decision in Mayhue v. State,215 where the court had ruled that an investigatory detention resulted when an officer ordered the detainee to open his clenched fist.216 The court reasoned that, unlike the palm of a hand, “a pocket has the capacity to conceal a lethal weapon.”217 However, such a distinction may be misguided since a razor blade, knife, or small firearm may be concealed in a closed fist.218

Acknowledging there is no litmus test for distinguishing a consensual encounter from a seizure, the Fifth District Court of Appeal did differentiate between “an order” and “a request” from a police officer.219 In State v. Johnson,220 officers approached the appellants, Johnson and Ryan, who had just exited their vehicle.221 During the encounter, the law enforcement official requested that Ryan remove his hands from his pocket because the officer felt uncomfortable. Ryan proceeded to empty his pockets revealing a small amount of cannabis. Based on the facts, the court noted that it is difficult to imagine how such an inquiry could intimidate Ryan into emptying his pockets from the unintrusive officer’s statement: “Would you mind removing your hands from your pockets while we talk?”222 A request

211. 681 So. 2d 733 (Fla. 2d Dist. Ct. App. 1996).
212. Id. at 734–35.
213. Id.
214. Id. at 735 (citations omitted).
216. Woodard, 681 So. 2d at 735 n.1.
217. Id.
218. Id. at 736 (Parker, J., concurring).
220. Id. at 880.
221. Id. at 881.
222. Id. at 882.
to exit a vehicle might cause a reasonable person to conclude that he is not free to leave; however, the same may not be said of a request to remove one’s hands from their pockets.\footnote{Sale and Seitles: Criminal Procedure, Published by NSUWorks, 1997}

The dissent argued that the distinction between “request” and “order” is not determinative.\footnote{Johnson, 696 So. 2d at 883 (Thompson, J., dissenting).} Whether the officer’s directive is characterized as a request or an order, if a person submits by removing his or her hands from their pocket, the consensual encounter becomes a seizure.\footnote{Id.} To Judge Thompson, the question is not one of choice: Either follow the directive of the officer or disobey the officer and suffer dire consequences.\footnote{Johnson, 696 So. 2d at 884.} Although mindful of the officer’s need to be careful of citizens who may be armed, “an officer’s concern for his safety is not a basis to violate a citizen’s Fourth Amendment rights.”\footnote{Id.}

In light of the recent United States Supreme Court decision in Maryland v. Wilson,\footnote{Id. at 883.} the concern for officer safety has widened the parameters of consensual encounters.\footnote{117 S. Ct. 882 (1997).} In King v. State,\footnote{Id. at 862 (quoting Maryland v. Wilson, 117 S. Ct. 882, 885 (1997)).} decided a few months after the notable decision by the highest court, the Second District Court of Appeal reiterated that the reasonableness of an officer’s request during a consensual encounter “‘depends on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.’”\footnote{Id. at 862 (quoting Maryland v. Wilson, 117 S. Ct. 882, 885 (1997)).} In King, an officer approached King who was standing in the

\begin{itemize}
\item 223. Id.
\item 224. Johnson, 696 So. 2d at 883 (Thompson, J., dissenting).
\item 225. The dissent cites a number of decisions that suggest how divided the courts in Florida are over this issue. Id. at 883. See Gipson v. State, 667 So. 2d 418, 420 (Fla. 5th Dist. Ct. App. 1996) (ruling that a person stopped by police on the street who is ordered to remove his hands from his pocket evolves from a consensual encounter into a seizure); Doney v. State, 648 So. 2d 799, 801 (Fla. 4th Dist. Ct. App. 1994) (finding that compliance with officer’s request that appellant spit out contents of his mouth was acquiescence to authority rather than consent); Palmer v. State, 625 So. 2d 1303, 1304 (Fla. 1st Dist. Ct. App. 1993) (holding that abandonment of a razor blade was a product of an illegal stop and thus involuntary because seizure occurred when officer told defendant to take his hands out of his pockets); Harrison v. State, 627 So. 2d 583, 584 (Fla. 5th Dist. Ct. App. 1993) (concluding that once an officer orders a person to remove his or her hand from a pocket, the consensual encounter becomes a seizure). But see Sander v. State, 595 So. 2d 1099, 1100 (Fla. 2d Dist. Ct. App. 1992) (determining it was not improper for officer to ask defendant to remove hands from his pockets).
\item 226. Johnson, 696 So. 2d at 884.
\item 227. Id.
\item 228. 117 S. Ct. 882 (1997).
\item 229. Id. at 885. The Court held that an officer making a traffic stop may order passengers to get out of the vehicle pending the completion of the stop. Id.
\item 230. 696 So. 2d 860 (Fla. 2d Dist. Ct. App. 1997).
\item 231. Id. at 862 (quoting Maryland v. Wilson, 117 S. Ct. 882, 885 (1997)).
\end{itemize}
middle of the road apparently dazed. The officer attempted to speak with King to see if he needed assistance. King did not respond and placed his hands in his pockets. The officer told the appellant to remove his hands, and King complied by placing his hands behind his back. The officer, concerned for his own safety, grabbed King and placed him against the patrol car. As he did, he observed a crack pipe protruding from King’s pants. 232

Accordingly, the court held that when an officer makes a reasonable request to an individual to remove his hands from his pockets and the person refuses to comply, “the individual’s right to personal security free from arbitrary interference is outweighed by the public interest in officer safety.” 233 Law enforcement officials should not have to expose themselves to potential dangers each time they have to investigate a situation. 234 The Second District Court of Appeal appears to have overstepped the boundaries of what constitutes a consensual encounter by adding that permissible actions by police officers include “physically” taking whatever reasonable actions are necessary to “thwart any threatening actions by the person encountered so as to dispel any reasonable fear of harm.” 235 The repercussions of Maryland v. Wilson 236 have already demonstrated their impact on Florida courts, not only broadening the standard of what constitutes a consensual encounter, but redefining its boundaries to include officers’ requests made in the interest of safety.

C. Length of an Investigatory Detention

The issue regarding at what point a prolonged detention becomes an arrest was decided by the Third District Court of Appeal. 237 The Third District Court of Appeal ruled in Saturnino-Boudet v. State, 238 that the detention of appellant Boudet for thirty to forty minutes awaiting the arrival of a canine unit was “nothing more than a Terry stop 239 utilized to dispel the police officer’s reasonable suspicion that Boudet was involved in the sale of illegal narcotics.” 240 Boudet arrived at the home of William Daniels, where police detectives were conducting a narcotics investigation. The detectives approached Boudet who voluntarily exited his car, leaving the driver’s side

232. Id. at 861.
233. Id. at 862.
234. King, 696 So. 2d at 862.
235. Id.
238. Id. at 188.
240. Saturnino-Boudet, 682 So. 2d at 192.
door open. Boudet produced identification upon request but refused to consent to have his vehicle searched, whereupon detectives visually observed alleged drug paraphernalia located on the front passenger’s side in his car. Boudet was detained in the Daniels’ residence until the arrival of the narcotics sniff dog who alerted the presence of cocaine. The appellant unsuccessfully moved to suppress the cocaine in the court below and appealed on the grounds that he was effectively arrested without probable cause when police ordered him into the house.241

Courts continue to acknowledge the difficulty in distinguishing “between an investigative detention and a de facto arrest.”242 The standard set forth in determining reasonableness to make such a detention is whether law enforcement authorities “diligently pursued a means of investigation that was likely to conform or dispel their suspicions quickly.”243 The detention should “last no longer than is necessary to effectuate the purpose of the stop.”244 However, since Boudet was never physically removed from the scene245 nor detained for an unreasonable time,246 the court disagreed with the petitioner’s argument that he was de facto arrested without probable cause.247 Under the circumstances, Boudet was not detained longer than necessary for officers to dispel their reasonable suspicion that the petitioner was involved in illegal narcotics activity.248

241. Id. at 190.
242. Id. at 192.
243. Id. (quoting United States v. Sharpe, 470 U.S. 675, 685 (1985)).
244. Id. (quoting Sharpe, 470 U.S. at 684).
246. See Cresswell v. State, 564 So. 2d 480, 481 (Fla. 1990) (approving detention for 45 minutes while awaiting canine unit is reasonable); State v. Nugent, 504 So. 2d 47, 48 (Fla. 4th Dist. Ct. App. 1987) (holding 30 minute delay did not transform Terry stop into an arrest); Finney v. State, 420 So. 2d 639, 643 (Fla. 3d Dist. Ct. App. 1982) (finding officers justified in detaining defendant for approximately 90 minutes).
247. Saturnino-Boudet, 682 So. 2d at 193.
248. Id.
IV. SEARCH WARRANTS

A. Sufficiency of Description

During this survey period, the Supreme Court of Florida and at least one district court of appeal made it clear that warrants without sufficient description and specificity will result in suppression of evidence.249 In Green v. State,250 the Supreme Court of Florida addressed the recurring problem of how specific a search warrant must be in describing the items to be seized under the authority of that warrant.251 The court adopted the rule that "when the purpose of the search is to find specific property, the warrant should particularly describe this property in order to preclude the possibility of the police seizing any other" items.252

Petitioner Green, who was convicted of murder and sentenced to death, challenged the admission of the clothes he was wearing on the night of the murder, which were seized pursuant to a search warrant.253 Eyewitnesses identified Green as the shooter and described to police that Green was wearing a black pinstriped suit, a white shirt, and a brown trench coat. However, the search warrant authorized the police to search for the clothes that Green was wearing on the evening the weapon was used, and other evidence relating to the murder.254 Although the police officers who executed the warrant had information not contained in the warrant, the court found it irrelevant in its analysis, and it was not scrutinized.255 The search must be based on the language of the warrant alone.256 As a result, it was not possible for an officer to decide with reasonable clarity which articles of clothing the officer was empowered to seize.257 The court concluded that because of the search warrant's broad description of the items to be seized, the "fruit of [the] search must be suppressed."258 In considering the use of the good faith exception,259 Green held that the facial invalidity of the

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250. Green, 688 So. 2d at 301.
251. Id. at 306.
252. Id.
253. Id. at 305.
254. Id. at 306.
255. Green, 688 So. 2d at 306.
256. Id.
257. Id.
258. Id.
warrant impedes the application of this exception since no officer could reasonably presume the warrant to be valid.\textsuperscript{260} When there are omissions in an affidavit that may actually defeat a warrant, the test is to "consider the affidavit as though it included the omitted information in determining whether the warrant is based on probable cause."\textsuperscript{261} In \textit{Buggs v. State},\textsuperscript{262} the affidavit submitted on behalf of the search warrant described in detail the physical characteristics of Buggs, including his pattern of speech.\textsuperscript{263} Yet the petitioner argued that the affidavit lacked sufficient evidence that should have defeated the warrant.\textsuperscript{264} The Fifth District Court of Appeal applied the aforementioned test concluding that even if the affidavit had mentioned that no fingerprints were found and that other suspects were in the same area the night of the murder, the affidavit still would have stated probable cause to justify the warrant.\textsuperscript{265}

B. \textit{Detention of Property}

Authorizing the seizure of property through civil forfeiture was grounds to address the threshold procedural requirements mandated under the Fifth Amendment Due Process Clause.\textsuperscript{266} Applying the policy to the seizure of real property, the Eleventh Circuit Court of Appeals held that the government must provide notice and a hearing prior to executing an arrest warrant issued against real property.\textsuperscript{267}

In \textit{United States v. 408 Peyton Road},\textsuperscript{268} the government secured ex parte warrants authorizing the seizure of appellant Richardson’s properties.\textsuperscript{269} The warrant maintained that Richardson had financed the acquisition and development of the properties through drug trafficking activities, citing the fact that the appellant’s reported income was insufficient to sustain real estate activities of this kind. Furthermore, Richardson had allegedly engaged in a series of suspect financial transactions. The government executed the warrant to arrest and take into custody Richardson’s properties, whereupon copies of the federal arrest warrants were posted at each of the appellant’s properties. The facts establish that the government neither posted warning

\textsuperscript{260}. \textit{Green}, 688 So. 2d at 306.
\textsuperscript{261}. \textit{Buggs v. State}, 693 So. 2d 57, 59 (Fla. 5th Dist. Ct. App. 1997).
\textsuperscript{262}. \textit{Id.} at 57.
\textsuperscript{263}. \textit{Id.} at 58.
\textsuperscript{264}. \textit{Id.}
\textsuperscript{265}. \textit{Id.} at 59.
\textsuperscript{266}. \textit{United States v. 408 Peyton Rd.}, 112 F.3d 1106, 1108 (11th Cir. 1997).
\textsuperscript{267}. \textit{Id.} at 1109.
\textsuperscript{268}. \textit{Id.} at 1106.
\textsuperscript{269}. \textit{Id.} at 1108.
signs on the properties nor changed the locks. Richardson challenged the government’s failure to provide a pre-seizure notice and hearing, depriving him of property without due process of law.\textsuperscript{270}

In \textit{408 Peyton Road}, the court analyzed “whether the Fifth Amendment Due Process Clause prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard.”\textsuperscript{271} To consider whether a hearing was required, the Eleventh Circuit applied a three part inquiry requiring the consideration of: 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and 3) the Government’s interest, including the administrative burden that additional requirements would impose.\textsuperscript{272}

The Eleventh Circuit Court of Appeals had applied this balancing test in a factually similar setting, holding “that the lack of notice and a hearing prior to issuance of the warrants seizing [a person’s] properties rendered the warrants ‘invalid and unconstitutional.’”\textsuperscript{273} However, unlike the seizure in that case,\textsuperscript{274} the government in \textit{408 Peyton Road} elected not to evict the residents, post warning signs, or change the locks on the property, concluding that it never “seized”\textsuperscript{275} the property because it refrained from

\textsuperscript{270.} Id.

\textsuperscript{271.} \textit{408 Peyton Rd.}, 112 F.3d at 1108. \textit{See} United States v. James Daniel Good Real Property, 510 U.S. 43 (1993). “As a general matter, the government must provide notice and a hearing prior to depriving an individual of property.” Id. at 48. The United States Constitution “tolerates exceptions to that general rule only in ‘extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.’” Id. at 53.


\textsuperscript{273.} United States v. 2751 Peyton Woods Trail, 66 F.3d 1164, 1167 (11th Cir. 1995) (quoting United States v. One Parcel of Real Property, Located at 9638 Chicago Heights, St. Louis, Mo, 27 F.3d 327, 300 (8th Cir. 1994)).

\textsuperscript{274.} Id. at 1164.

\textsuperscript{275.} \textit{408 Peyton Rd.}, 112 F.3d at 1109–10. The Supreme Court in \textit{Good} has never explicitly defined the term “seizure,” however, the government suggested that physical control is an essential element of seizure because the facts in \textit{Good} involved some level of physical intrusion. \textit{See Good}, 510 U.S. at 49. Contrary to this assertion, the Supreme Court never indicated that the exercise of physical control should be regarded as a constitutionally cognizable seizure. In fact, the term seizure was applied more broadly to refer to governmental action that deprived claimant Good of significant property interests. \textit{See} United States v. Jacobson, 466 U.S. 109, 113 (1984) (holding that a seizure of property occurs when there is some meaningful interference with an individual’s possessory interests in that
asserting physical control over it. 276 While 408 Peyton Road did not involve a physically intrusive seizure, the court nevertheless assessed whether the magnitude of the private interests required pre-deprivation notice and a hearing by applying the Mathews inquiry. 277

Applying the first Mathews factor, the mere execution of the arrest warrant implicated "private interests" 278 protected by the Due Process Clause because it bestowed upon the government important rights of ownership. 279 The fact that the seizures were not physically intrusive was not dispositive, the court holding that "cognizable seizure of real property need not involve physical intrusion." 280 An analysis of the second factor led the Eleventh Circuit to conclude that "the practice of an ex parte seizure creates an unacceptable risk of error, offer[ing] little or no protection for innocent owners." 281 A breakdown of the final component of the analysis suggested that no pressing need for prompt governmental action justified ex parte seizure of real property in the civil forfeiture context. The court reasoned that "the Government could secure its legitimate interest without seizing the subject property." 282 Therefore, the government deprived Richardson of due process when it seized 408 Peyton Road, notwithstanding the decision not to assert physical control over it.

C. Knock and Announce Principle

In the case of Richards v. Wisconsin, 284 the Supreme Court revisited their previous decision which ruled that the Fourth Amendment incorporates

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276. 408 Peyton Rd., 112 F.3d at 1110.
278. 408 Peyton Rd., 112 F.3d at 1109 (citing Mathews, 424 U.S. at 335).
279. 408 Peyton Rd., 112 F.3d at 1110.
280. Id. at 1111.
281. Id. See United States v. James Daniel Good Real Property, 510 U.S. 43, 55 (1993). As Justice Frankfurter observed, "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Id. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring).
282. 408 Peyton Rd., 112 F.3d at 1112. The government may prevent the sale of the property by "filing a notice of lis pendens" as authorized by state law when advised of the forfeiture proceedings. Id. "If an owner seems likely to destroy his property when advised of the forfeiture action, the government may obtain an ex parte restraining order." Id. Finally, the government may prevent further illegal activity with proper search and arrest warrants. Id.
283. Id. at 1114.
284. 117 S. Ct. 1416 (1997).
the common law requirement that police knock and announce their identity before attempting forcible entry at a person's dwelling. Although the Supreme Court explicitly stated in a prior decision that there does not have to be an announcement before every entry, Richards narrowed such an assertion by emphatically holding that there would be no blanket exceptions to the knock and announce requirement for felony drug investigations.

Prior to the Richards decision, "the Supreme Court of Wisconsin concluded that police officers are never required to knock and announce their presence when executing a search warrant in a felony drug investigation." Exigent circumstances justifying a no-knock entry are always present in felony drug cases because there is an "extremely high risk of serious if not deadly injury to the police" and the potential for destruction of narcotics evidence. In addition, the Supreme Court of Wisconsin reasoned that the violation of privacy that occurs when officers with a search warrant forcibly enter without first announcing their presence is minimal.

Conceding that the requirement to knock and announce may give way under dangerous circumstances or where narcotics evidence is likely to be destroyed, the Supreme Court noted this would not remove each court's responsibility to make a reasonableness inquiry into a police decision not to knock and announce. It is the role of individual courts to strike the appropriate balance between the legitimate concerns for police officers' security and the interests of society in the protection of the privacy interests of citizens. The Supreme Court of Wisconsin explained that the circumstances that necessitate this exception are created by the realities of today's drug culture. The blanket exception for felony drug cases is reasonable because of the "violent and dangerous form of commerce and the destruction of drugs," Richards, 117 S. Ct. at 1420 (quoting Oral Argument of Appellee at 26).

286. Wilson, 514 U.S. at 934.
287. Richards, 117 S. Ct. at 1417.
288. Id. at 1418. Police officers in Madison, Wisconsin obtained a warrant to search Richards' hotel room for drugs and related paraphernalia. The search warrant was a culmination of an investigation that had uncovered substantial evidence that the appellant was one of several individuals dealing drugs out of hotel rooms in Madison. Police requested a warrant that would have given advance authorization for a "no-knock" entry into the hotel room, but the magistrate deleted this portion from the warrant. Officers knocked on the door, Richards cracked it open and subsequently slammed the door closed, whereupon officers forcibly entered discovering cocaine and money. Id. at 1418–19.
289. The Supreme Court of Wisconsin explained that the circumstances that necessitate this exception are created by the realities of today's drug culture. State v. Richards, 549 N.W.2d 218, 221 (Wis. 1996), aff'd, 117 S. Ct. 1416 (1997). The blanket exception for felony drug cases is reasonable because of the "violent and dangerous form of commerce and the destruction of drugs." Richards, 117 S. Ct. at 1420 (quoting Oral Argument of Appellee at 26).
290. Richards, 549 N.W.2d at 219.
291. Id. at 226.
292. Richards, 117 S. Ct. at 1421.
safety while executing search warrants and the individual privacy interests that are invaded by no-knock entries.\textsuperscript{293} 

The Supreme Court refused to create exceptions to the knock and announce principle based on the culture surrounding a general category of criminal behavior.\textsuperscript{294} The first problem with an exception is it tends to overgeneralize, particularly when assuming that all felony drug investigations present an inherent danger to police officers or the evidence sought.\textsuperscript{295} A second difficulty with permitting any categorical exception to the knock and announce principle is that the reasons for creating the exception can easily be manipulated to apply to other situations.\textsuperscript{296} If per se exceptions were allowed for each category where potential danger existed, the knock and announce element of the Fourth Amendment would be rendered meaningless.\textsuperscript{297} The Supreme Court concluded that a no-knock entry may be justified under unique circumstances where law enforcement has a reasonable suspicion that knocking and announcing their presence would be dangerous or futile, or that it would inhibit the effective investigation of criminal activity.\textsuperscript{298} 

V. ADMINISTRATIVE SEARCHES

A. Searches of Public School Students

In a highly controversial case surrounding the strip searches of eight-year-old female students, the Eleventh Circuit Court of Appeals addressed the reasonableness of warrantless searches in public schools and the granting of qualified immunity for school officials who conduct them.\textsuperscript{299} In Jenkins v. Talladega City Board of Education,\textsuperscript{300} the Eleventh Circuit held that the law

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{293} Id. at 1420.
\item\textsuperscript{294} Id. at 1421.
\item\textsuperscript{295} While drug investigations may cause substantial risks, not every felony drug investigation will pose the same degree of uncertainty. For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and, thus, will be unlikely to threaten officers or destroy evidence. Alternatively, the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy. Id.
\item\textsuperscript{296} Id.
\item\textsuperscript{297} Richards, 117 S. Ct. at 1421.
\item\textsuperscript{298} Id.
\item\textsuperscript{299} Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997).
\item\textsuperscript{300} Id. at 821. One of Jenkins' and McKenzie's classmates informed their teacher that seven dollars was missing from her purse. The teacher took the eight-year-old girls and another male student into the hallway and questioned them about the money, at which time
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\end{footnotesize}
pertaining to applying the Fourth Amendment to the search of students at school had not been solidly developed to place educators on notice that their conduct was constitutionally impermissible. Consequently, the three school faculty members who oversaw or conducted the search were granted qualified immunity.

In the absence of "detailed guidance" by the United States Supreme Court, Jenkins found that the specific application of the factors established to define the parameters of reasonable school searches was notably deficient. The broadly worded phrases of the United States Supreme Court failed to address the most essential questions of "whether the search of a boy or girl is more or less reasonable, and at what age... and what constitutes an infraction great enough to warrant a constitutionally reasonable search or, conversely, minor enough such that a search of property or person would be characterized as unreasonable." The Eleventh Circuit noted that "school officials cannot be required to construe general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority." It is apparent that the Supreme Court did not intend to clearly establish how the Fourth Amendment right they mutually accused the other of theft. The teacher instructed the students to remove their shoes. When these efforts failed to reveal the alleged stolen money, a school counselor ordered the girls into the bathroom to undress. Having again failed to recover the missing money, the school principal had the girls escorted back to the restroom and required them to once again remove their clothes in an effort to locate the seven dollars. Id. at 822–23.

301. Id. at 828.

302. Id. Qualified immunity protects government officials from liability unless they violate laws or constitutional rights that a "reasonable" person would have been aware of. Jenkins, 115 F.3d at 823.

303. Id. at 825. See New Jersey v. T.L.O, 469 U.S. 325 (1985). The Supreme Court held that public school teachers and administrators may search students without a warrant if two conditions are met. First, they possess reasonable suspicion that the search will result in evidence that "the student has violated or is violating either the law or the rules of the school;" and second, once initiated, the search is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." T.L.O., 469 U.S. at 342. However, Jenkins severely criticized the fact that there is no illustration, indication, or hint as to how the enumerated factors might come into play when other concrete circumstances are faced by school personnel. Jenkins, 115 F.3d at 825. This issue did not go unnoticed by several justices who criticized the "reasonableness" test as ambiguous and that it would fail to provide school officials with a systematic way to predict when their conduct might violate the law. Id. at 827 n.7. Justice Stevens admonished the majority arguing that this standard would likely "spawn increased litigation and greater uncertainty among teacher and administrators." T.L.O., 469 U.S. at 365 (Brennan, J., concurring).

304. Jenkins, 115 F.3d at 825.

305. Id. at 826.

306. Id. at 827.
would apply to the wide variety of school settings, justifying qualified immunity for those school officials who could not have known that their conduct violated the students' constitutional rights.\footnote{307}

The most disturbing commentary from \textit{Jenkins} involves the scope of the search itself, which was not at issue in the decision. With respect to the extent of the search, it is apparent that having the girls remove their clothing was deemed reasonably related to the objective of uncovering the stolen seven dollars.\footnote{308} The stealing of this amount of money should not be trivialized and was considered by school officials to be a matter of serious concern.\footnote{309} Citing the fact that female teachers conducted the strip search on the eight-year-old girls, the court denounced the fact that the searches were excessively intrusive, comparing it to the "common experience" of teachers who assist students of that age in the bathroom after an accidental wetting.\footnote{310}

Despite the age of the young girls and the successive encroachment on their physical privacy, \textit{Jenkins} noted that it would not be apparent to a reasonable school official that the challenged searches "were 'excessively intrusive in light of the age and sex of the student[s] and the nature of the infraction.'"\footnote{311}

Undoubtedly, challenges to the intrusiveness of public school searches will surface in upcoming survey periods. However, in light of \textit{Jenkins}, it is unclear what the Eleventh Circuit would find intrusive to a student's rightful expectation of privacy. Considering a significant number of school searches involve much greater dangers than the loss of seven dollars, strip searches may soon become one of "common experience" in our public schools.

Several noteworthy decisions in Florida have followed the lead of the Eleventh Circuit Court of Appeals, though with less widespread dissension, by promoting the legal equivalent of "safety-first" in public schools. The Florida district courts of appeal have tackled the continued debate over random, suspicionless searches in public schools, and who is authorized to administer them. In \textit{State v. J.A.},\footnote{312} the Dade County School Board employed an independent security company to conduct searches with metal detecting wands at randomly chosen secondary schools in response to a growing presence of firearms in public schools.\footnote{313} The court acknowledged that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"\footnote{314} Balancing the students' privacy interest against the

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  \item \footnote{307} Id. at 828.
  \item \footnote{308} Id. at 827 n.5.
  \item \footnote{309} Jenkins, 115 F.3d at 827 n.5.
  \item \footnote{310} Id.
  \item \footnote{311} Id. \textit{See} New Jersey v. T.L.O, 469 U.S. 325, 342 (1985).
  \item \footnote{312} 679 So. 2d 316 (Fla. 3d Dist. Ct. App. 1996).
  \item \footnote{313} Id. at 318.
  \item \footnote{314} Id. at 319 (quoting Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 652 (1995)).
\end{itemize}
Necessity of the search, the Third District Court of Appeal ruled that authorizing random, suspicionless weapons searches of high school students was reasonable and constitutional. With regard to a reasonable expectation of privacy, "students within the school environment have a lesser expectation of privacy than members of the population generally." In weighing the character of intrusion, the Third District Court of Appeal found that a metal detector search, and the specific guidelines required to carry it out, provide for a search that involves minimal intrusion.

Finally, the court cited the rising incidences of violence in Dade County schools, denoting the nature and immediacy of the governmental concern which is enough to warrant random suspicionless searches. The unsettled question over who may conduct a school search upon a student alleged to be carrying a weapon was answered by J.A.R. v. State. In J.A.R., a newly appointed assistant principal called upon the assistance of a police officer assigned to the school to investigate a student who was allegedly carrying a gun. The student was questioned and a pat-down search was performed by the officer who discovered a firearm in the boy's waistband.

Under these circumstances, a school official or a police officer needs only reasonable suspicion to conduct an inquiry in the nature of a Terry stop. In terms of the actual search, "[i]t would be foolhardy and dangerous" for a teacher or administrator, untrained in firearms, to conduct a weapons search without the presence of an officer. Therefore, the Second District Court of Appeal held that if a school official has a reasonable suspicion that a student is in possession of a dangerous weapon, "that official may request any police officer to perform the pat-down search for weapons without fear that the involvement of the police will somehow violate the student's Fourth Amendment rights or require probable cause for

315. Id. at 320.
318. The court acknowledged that in recent years drug use and violent crimes in schools has severely worsened. Id. The immediacy of a school board's concern for a student's safety, and the safety of all school personnel is well justified. "The logical way to keep weapons out of school is to let the students know that they may be searched for weapons and that possession of weapons in a public high school is not permissible and will be seriously sanctioned." Id. (emphasis omitted).
319. Id.
320. 689 So. 2d 1242, 1243 (Fla. 2d Dist. Ct. App. 1997).
321. Id. at 1243.
322. Id. at 1244. See Terry v. Ohio, 392 U.S. 1 (1968).
323. J.A.R., 689 So. 2d at 1244.
such a search.\footnote{Id. (emphasis omitted).} Without distinguishing between public law enforcement and officers who are employed by the school, the decision undoubtedly raises constitutional concerns by authorizing any police officer to conduct a search on reasonable suspicion alone.\footnote{See People v. Dilworth, 661 N.E.2d 310, 317 (Ill. 1996), \textit{cert. denied}, 116 S. Ct. 1692 (1996). Where school officials initiate the search, or police involvement is minimal, most courts apply the reasonable suspicion test. The same is true in cases involving school police or liaison officers acting on their own authority. However, where outside police officers initiate a search, or where school officials act at the direction of law enforcement agencies, the probable cause standard is usually applied. \textit{Id.} \textit{See also} M.J. v. State, 399 So. 2d 996, 998 (Fla. 1st Dist. Ct. App. 1981) (holding that where a law enforcement officer directs, participates, or acquiesces in a search conducted by school officials, the officer must have probable cause for that search).}

However, the Third District Court of Appeal makes clear the distinction between a school police officer and an outside police officer who conducts a search.\footnote{State v. D.S., 685 So. 2d 41, 43 (Fla. 3d Dist. Ct. App. 1996).} A search conducted by a school police officer only requires reasonable suspicion in order to legally support the search.\footnote{Id. at 43.} On the other hand, a search conducted by an outside police officer, who is employed by a governmental entity unrelated to the school district or its employees, usually requires probable cause.\footnote{Id.}

B. International Border Searches

Persons may be stopped at an international border, where they and their belongings may be searched without a warrant and even without any suspicion of wrongdoing.\footnote{Joshua Dressler, \textit{Understanding Criminal Procedure} 211 (1991).} Although an airport with incoming international flights has long been considered the functional equivalent of a border, neither Florida courts nor the United States Supreme Court has directly answered the question of whether an airport with departing flights also constitutes a border.\footnote{See State v. Codner, 696 So. 2d 806, 807-08 (Fla. 2d Dist. Ct. App. 1997).} Several federal circuit courts have held that an airport with departing, as opposed to arriving, international flights meets the border requirement.

\footnote{See United States v. Oriakhi, 57 F.3d 1290, 1296 n.3 (4th Cir. 1995). The "long-standing right of the sovereign" that underlies the traditional rationale for the border search exception is implicated to a substantial degree where the international borders of the United States are penetrated by large sums of undeclared currency departing this country. \textit{Id.} at 1296.}
In *State v. Codner*, following the logic of the other federal circuit courts, the Second District Court of Appeal held that a person "departing" the country may be the subject of a "border search" for United States currency and monetary instruments without the necessity of probable cause. In *Codner*, the appellant attempted to board a flight to Jamaica at Tampa International Airport, but was detained by customs officials after a search of his bag revealed he was carrying more than $11,000 in United States currency. Personal papers, including a storage lease agreement, were also confiscated from appellant's wallet during a search for additional American currency.

Notwithstanding the fact that an airport with departing flights may constitute a border, the trial court found that the customs officers exceeded the permissive scope of their warrantless search when they retrieved papers from the appellant's wallet, looked them over, photocopied them, and delivered the copies to the Hillsborough County Sheriff's Office. The Second District Court of Appeal dismissed this argument as one "without merit." The court determined the search of the appellant's wallet was a routine border search as opposed to a nonroutine border search. Moreover, there is no more logical location to look for currency other than in someone's wallet. The fact that the wallet contained a storage lease agreement, where the unit was later found to be full of contraband, does not violate any principles of a routine border search.

C. Drug Testing

The controversial issue of drug testing for public employees reached the United States Supreme Court during this survey year. The Supreme Court, in *Chandler v. Miller*, held that the State of Georgia's requirement that

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332. 696 So. 2d 806 (Fla. 2d Dist. Ct. App. 1997).
333. Id. at 808.
334. 31 U.S.C. § 5316 (1986) states in part that "a person... shall file a report under subsection (b) of this section when the person,... knowingly-(1)... is about to transport,... monetary instruments of more than $10,000 at one time-(A) from a place in the United States to or through a place outside the United States..." Id.
335. *Codner*, 696 So. 2d at 810.
336. Id. at 809.
337. Id. at 810.
338. Id. At least one court has specifically written that the search of a person's suitcase, purse, wallet, and overcoat at the border is simply not "sufficiently intrusive to be considered nonroutine." *See* United States v. Johnson, 991 F.2d 1287, 1291–92 (7th Cir. 1993).
339. *Codner*, 696 So. 2d at 810.
candidates for state office pass a drug test did not fit within the category of constitutionally permissible suspicionless searches.\textsuperscript{341}

The Georgia statute requires candidates for designated office to certify that they have taken a urinalysis within thirty days prior to qualifying for nomination or election, and that the test result be negative.\textsuperscript{342} It was uncontested by the petitioners that this prerequisite for office, imposed by Georgia law, effects a search within the meaning of the Fourth Amendment.\textsuperscript{343} Nevertheless, utilizing a balancing test, the Eleventh Circuit Court of Appeals affirmed the decision of the District Court reasoning that the drug testing program was not inconsistent with the Fourth Amendment inasmuch as the statute served "special needs," interests other than the ordinary needs of law enforcement.\textsuperscript{344}

The Supreme Court declared that to examine "special needs," concerns other than crime detection, a specific inquiry must take place examining "the competing private and public interests."\textsuperscript{345} The petitioners contended that this standard was faithfully satisfied because drug use is incompatible with holding high state office, since it would systematically undermine the function and purpose of the office, including jeopardizing law enforcement antidrug efforts.\textsuperscript{346} However, the Court found the petitioners' argument failed to present any indication of a concrete danger demanding departure from the Fourth Amendment's bar against search and seizure absent individualized suspicion.\textsuperscript{347} Moreover, failing to establish the "special needs" factor, petitioners offered no explanation why ordinary law enforcement methods were not appropriate to apprehend drug-addicted state officials, particularly in light of the public lifestyles of elected officials.\textsuperscript{348}

\begin{enumerate}
\item \textsuperscript{341} Id. at 1296.
\item \textsuperscript{342} Id. at 1298--99.
\item \textsuperscript{343} Id. at 1299.
\item \textsuperscript{344} Id.
\item \textsuperscript{345} Chandler, 117 S. Ct. at 1297. See Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 671 (1995) (upholding a random drug testing program for high school students engaged in interscholastic athletic competitions); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989) (sustaining a United States Customs Service program that made drug tests a condition of promotion of transfer to positions directly involving drug interdiction or requiring the employee to carry a firearm).
\item \textsuperscript{346} Chandler, 117 S. Ct. at 1303.
\item \textsuperscript{347} Id. at 1300--01. In writing for the majority, Justice Ginsburg noted that nothing in the record revealed the hazards of drug abuse affecting state elected officials. Id. at 1303. In fact, the counsel for the respondents directly acknowledged at oral argument that there was no evidence of a drug problem in Georgia with representatives in state office. Id.
\item \textsuperscript{348} Id. at 1304.
\end{enumerate}
The Supreme Court clearly enunciated that if the risk to public safety is “substantial and real,” then “blanket suspicionless searches” may be justified as “reasonable.” Nevertheless, a drug testing requirement where public officials do not perform dangerous tasks, nor are immediately involved in drug interdiction efforts, is precluded by the Fourth Amendment which “shields society” from state efforts that “diminishes personal privacy” for symbolic purposes.

VI. CONFESSIONS

A. Equivocal References to Counsel

One of the most significant developments during this survey period involves whether police officers are required to make clarifying statements when a suspect makes an equivocal invocation of his Miranda rights after having validly waived them. Prior to the recent decision by the United States Supreme Court in Davis v. United States, a person undergoing custodial interrogation could indicate in any manner and at any time his wish to remain silent, at which point the interrogation had to cease. However, in light of the decision in Davis, a defendant must articulate his desire for counsel with sufficient clarity so that a reasonable officer under the circumstances would understand the statement to be one requesting an attorney. In United States v. Mikell, the Eleventh Circuit further narrowed the Davis decision by determining that an ambiguous or equivocal statement by a suspect does not obligate an officer to clarify the suspect’s intent, and the interrogation may proceed. The court in Mikell eliminated the significance between a suspect’s equivocal and unequivocal refusal to answer questions, allowing officers to continue questioning until the suspect clearly requests that the questioning cease.

Notwithstanding the Supreme Court decision, the majority of the courts in Florida, until the end of this survey year, repeatedly adhered to the principle that even an equivocal request to invoke the right to counsel asserts

350. Id.
353. Davis, 512 U.S. at 459.
354. 102 F.3d 470 (11th Cir. 1996).
355. Id. at 476. See Coleman v. Singletary, 30 F.3d 1420, 1424 (11th Cir. 1994).
356. Mikell, 102 F.3d at 477.
the constitutional right to counsel. If questioning did continue, it was allowed only to “clarify” any assertion made by a suspect.

Recently, in State v. Owen, the Supreme Court of Florida held that in light of the decision in Davis, the duty to clarify a suspect’s intent upon an equivocal invocation of counsel is no longer good law. This same rule should apply to a suspect’s ambiguous or equivocal references to the right to cut off questioning as to the right to counsel. As affirmed by the Eleventh Circuit Court of Appeals this year, “a suspect must articulate his desire to end questioning with sufficient clarity so that a reasonable police officer would understand the statement to be an assertion of the right to remain silent.” Consequently, it is indisputable that Florida’s Constitution no longer places greater restrictions on law enforcement than those mandated under federal law when a suspect makes an equivocal statement to remain silent.

The decision in Owen was based on the practical dilemma that requires questioning to cease if a suspect makes a statement that might be a request for an attorney. Without mentioning the pragmatic benefits of such a clarifying policy, the court noted the result is a judgment call for law enforcement with the threat of suppression if they guess wrong. Therefore, to force a police officer to clarify whether an equivocal statement is an assertion of a person’s Miranda rights “places too great an impediment upon society’s interest in thwarting crime.”

357. The Supreme Court of Florida remarked that to be admissible, confessions must satisfy both the state and federal constitutions. Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992). If a suspect indicates in any manner that he does not want to be interrogated, questioning must not begin, or, if it has already begun, must immediately stop. Id. at 966. See Weber v. State, 691 So. 2d 55, 55–56 (Fla. 4th Dist. Ct. App. 1997) (holding that response by defendant that “he could not afford an attorney” invoked the defendant’s right to counsel requiring officers to clarify his assertion before interrogation could continue); Almeida v. State, 687 So. 2d 37, 39 (Fla. 4th Dist. Ct. App. 1997) (concluding that defendant who asked what was the purpose of having an attorney made an equivocal invocation of his right to counsel). But see State v. Moya, 684 So. 2d 279, 280–81 (Fla. 5th Dist. Ct. App. 1996) (ruling that defendant who proceeded with questioning after stating that he did not know if he wanted to talk did not violate Miranda nor the Florida Constitution).

358. See Weber, 691 So. 2d at 56.
359. 696 So. 2d 715 (Fla. 1997).
360. Id. at 718.
361. Id.
363. Owen, 696 So. 2d at 720.
364. Id. at 719.
365. Id.
A number of justices challenged whether the majority’s decision reflects the best interests of the diverse community for which it speaks. Justice Shaw, in his concurring opinion, emphasized that the new “clearly invoke” standard must take into account the population of Florida, which is home to a large number of immigrants. Many Floridians have little formal schooling or speak minimal English and “have emigrated from societies where the rules governing citizen/police encounters are vastly different . . . ” Justice Shaw found it simply unrealistic to expect every person in the State of Florida to invoke his or her constitutional rights with equal precision; therefore, courts should use a “reasonable person” standard when determining whether a person clearly invoked the right to terminate questioning.

Chief Justice Kogan, in his dissenting opinion, asserted that “the ‘clarification’ approach offers the best balance between effective law enforcement and the rights of the accused.” Chief Justice Kogan agreed with Justice Shaw’s assessment that requiring an officer to determine whether a suspect has “clearly” invoked his or her Miranda rights without compelling further “questioning is not an easy task in light of [Florida’s] unique demographic and geographic makeup.” As a result of the sufficient language and cultural barriers that faces many residents of Florida, “only the ‘clarification’ approach will adequately protect the rights of all suspects . . . while . . . maintaining an effective system of law enforcement.”

B. Invoking Fifth Amendment Right to Counsel Prior to Interrogation

The recent division in the Florida courts over when a person in custody effectively invokes his or her Fifth Amendment right to counsel has
been answered by the Supreme Court of Florida in a 4–3 decision. In *Sapp v. State*, the court affirmed the decision of the First District Court of Appeal and held that a suspect may not invoke his right to counsel for custodial interrogation before it is imminent.

Although there are no Supreme Court decisions addressing whether an individual may effectively invoke the Fifth Amendment right to counsel prior to custodial interrogation, the Supreme Court noted they have never held that a person can invoke his *Miranda* rights “anticipatorily, in a context other than ‘custodial interrogation.” Even though an asserted *Miranda* right to counsel is effective to future custodial interrogation, and may be waived only if the same individual reinitiates conduct with police, it does not necessarily mean that it may be initiated outside the context of custodial interrogation. The underlying premise of *Miranda* was to protect the Fifth Amendment right against self-incrimination, not when a suspect is taken into custody, but rather where a suspect is subjected to interrogation. *Sapp* hypothesizes that even if a rule allowed one to invoke the right to counsel

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373. The question, as originally certified asked:

WHETHER AN ACCUSED IN CUSTODY EFFECTIVELY INVOKES HIS [OR HER] FIFTH AMENDMENT RIGHT TO COUNSEL UNDER [MIRANDA v. ARIZONA, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966),] WHEN, EVEN THOUGH INTERROGATION IS NOT IMMINENT, HE [OR SHE] SIGNS A CLAIM OF RIGHTS FORM AT OR SHORTLY BEFORE A FIRST APPEARANCE HEARING, SPECIFICALLY CLAIMING A FIFTH AMENDMENT RIGHT TO COUNSEL?

*Sapp v. State*, 690 So. 2d 581, 583 (Fla. 1997).

374. *Id.* at 581.

375. *Id.* at 586. In *Sapp*, the petitioner was arrested for robbery. He was advised of his *Miranda* rights, waived them, and agreed to speak to the police. Subsequently, Sapp was brought to a holding cell where he was advised by an attorney from the public defender’s office to sign a copy of a “claim of rights form,” with which he complied. *Id.* at 583. A week later, while Sapp remained in jail, an officer initiated an interrogation with him about another robbery and murder. Before being questioned, Sapp was advised of his *Miranda* rights, and he waived them in writing without requesting an attorney. The trial court denied the motion to suppress the statements and Sapp was convicted of attempted armed robbery and first degree felony murder. *Id.*

376. “Clearly, if Sapp had invoked his *Miranda* right to counsel during custodial interrogation on the unrelated robbery charge, police would not have been permitted to approach him later for questioning on that robbery and murder charge.” *Sapp*, 690 So. 2d at 584 n.5.


378. *Id.* at 182 n.3.

379. *Sapp*, 690 So. 2d at 585.
before interrogation was imminent, it would not provide protection against involuntary confessions and would actually hamper the ability of police to obtain voluntary confessions.\footnote{Id. at 586.} In essence, requiring a person to invoke the Fifth Amendment right to counsel either during custodial interrogation or when it is imminent represents a fair “balance between protection...from police coercion...and the State’s need to conduct criminal investigations.”\footnote{Id. at 587.}

Acknowledging the harsh blow to the Fifth and Sixth Amendments, Justice Anstead, along with three other justices in their dissenting opinion, expressed his concern that the constitutional rights an accused is informed of when arrested may not be invoked in writing in an open court.\footnote{Id. (Anstead, J., dissenting).} Under the majority’s perplexing logic, “a written directive executed upon the advice of counsel may be ignored by police even though an uncounseled oral assertion must be scrupulously honored.”\footnote{Id. at 587.} In regard to “imminent” interrogation, the dissent noted that a defendant in jail, who has already been interrogated by police, categorically establishes the “reasonableness” of a defendant’s expectation of further interrogation.\footnote{Sapp, 690 So. 2d at 589.} The dissent concluded that in yet another decision related to confessions, the Supreme Court of Florida had once again undermined a fundamental principle set forth in Miranda, applying justice fairly among every segment of the population.\footnote{Id. at 587. “If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual...cannot afford [an attorney].” Id. “The need for counsel in order to protect the privilege [against self incrimination] exists for the indigent as well as the affluent.” Id. This clearly takes advantage of those who are unable to retain counsel by discounting their prior Fifth Amendment assertion not to be interrogated without an attorney. Id. at 588. See State v. Owen, 696 So. 2d 715 (Fla. 1997). The “threshold standard of clarity” approach to confessions places a hurdle in front of those individuals who are most likely to have difficulty surmounting that hurdle and successfully invoking their rights. Sapp, 690 So. 2d at 588 (Anstead, J., dissenting).}

C. The Functional Equivalent of Interrogation

The question of whether police conduct is the functional equivalent of interrogation was decided by the Fourth District Court of Appeal. In Glover v. State,\footnote{677 So. 2d 374 (Fla. 4th Dist. Ct. App. 1996).} the court found police conduct toward appellant Glover to be
"tantamount to custodial interrogation."\textsuperscript{387} Glover was arrested without the benefit of \textit{Miranda} warnings and was placed in an interrogation room for over an hour and a half. Although he repeatedly asked why he had been arrested, the attending police officers refused to respond. Even as appellant became increasingly agitated, law enforcement officials would not inform him of the allegations that led to his arrest. As time progressed, Glover began speaking without any initiation by the officers, ultimately making statements that served to incriminate him.\textsuperscript{388}

Under \textit{Miranda}, "interrogation" refers not only to express questioning, but to those words or actions on the part of the police that the officers should recognize are "reasonably likely to elicit an incriminating response from a suspect."\textsuperscript{389} The rationale for this broader definition is to keep intact the "safeguards against self-incrimination established by \textit{Miranda} [which logically] apply to interrogation initiated by law enforcement officers after a person has been taken into custody."\textsuperscript{390} "Interrogation" ... must reflect a measure of compulsion above and beyond that inherent in custody itself."\textsuperscript{391} As a result, the \textit{Glover} court ruled that the conduct of the police officers toward the appellant was "unduly protracted and evocative" such that it became equivalent to a custodial interrogation.\textsuperscript{392}

D. \textit{Use of Pre-Miranda Silence for Impeachment Purposes}

In an important decision likely to be ultimately decided by the Supreme Court of Florida,\textsuperscript{393} \textit{Hoggins v. State}\textsuperscript{394} discussed whether pre-\textit{Miranda}
silence is permissible for impeachment purposes. In direct opposition to the ruling by the Third District Court of Appeal, the Fourth District Court of Appeal held that the use of custodial pre-Miranda silence for impeachment purposes violates the due process protections guaranteed by the Florida Constitution.

On the federal level, the United States Constitution does not prohibit the use, for impeachment purposes, of a defendant’s silence even after arrest if no Miranda warnings have been given. However, the Supreme Court has left open the possibility that states could formulate their own evidentiary rules defining when silence is viewed as more probative than prejudicial. As a result, many states have used their own evidentiary analysis to condemn the use of pre-Miranda silence impeachment. Other states have relied on their state constitutional provisions to do so. Still other states have followed the Supreme Court and approved the use of pre-Miranda silence for impeachment purposes.

The Supreme Court of Florida has recognized the right of state constitutions to place more rigorous restraints on governmental conduct than the United States Constitution imposes. In fact, the actual right to remain silent is entitled to more protection under the Florida Constitution than the

395. *Id.* at 384 n.2.
396. *See* Rodriguez v. State, 619 So. 2d 1031, 1032 (Fla. 3d Dist. Ct. App. 1993) (holding that the impeachment of defendant’s credibility with his pre-Miranda silence is proper, validating the prosecutor’s extensive commentary on the defendant’s failure to give an explanation at the scene of the robbery).
397. *Hoggins*, 689 So. 2d at 386.
399. *Id.* at 607.
400. Some states make an evidentiary determination on a case by case basis. *See* People v. DeGeorge, 541 N.E.2d 11 (N.Y. 1989); State v. Antwine, 743 S.W.2d 51 (Mo. 1987). Others have ruled that impeachment as to custodial pre-Miranda silence is inadmissible based on their rules of evidence. *See* Mallory v. State, 409 S.E.2d 839 (Ga. 1991). In addition, there are states that have precluded impeachment as to pre-Miranda silence on both evidentiary and constitutional grounds. *See* Coleman v. State, 895 P.2d 653 (Nev. 1995).
United States Constitution. Furthermore, by prohibiting impeachment of a testifying defendant with custodial silence, all defendants are treated the same regardless of when *Miranda* warnings are administered. The *Hoggins* court also appropriately expressed its concern that a rule allowing impeachment as to pre-*Miranda* silence, but not as to post-*Miranda* silence, may result in police unnecessarily postponing the giving of the warnings, so that silence can be effectively used as impeachment if the defendant testifies.

E. Voluntary Confessions

It is well established that where two defendants are tried together, the admission of the codefendant's confession without the other defendant taking the stand violates defendant's rights under the Sixth Amendment Confrontation Clause. In *United States v. Chirinos*, the Eleventh Circuit Court of Appeals utilized an exception in upholding the admission of a codefendant's confession against three other appellants in the case. The exception to the Confrontation Clause rule entitles the admission of a nontestifying codefendant's confession with a proper limiting instruction if the court revises the confession to "eliminate any reference to the defendant." However, during closing argument in the *Chirinos* trial, the prosecutor asked the jury to carefully consider the voluntary confessions of two codefendants and the testimony of one of the appellants.

The Eleventh Circuit found the prosecutorial comments highly suggestive and at the very least, implied the involvement of the appellants.

403. See *Lee v. State*, 422 So. 2d 928, 930 (Fla. 3d Dist. Ct. App. 1982). See also *Willinsky v. State*, 360 So. 2d 760, 762 (Fla. 1978) (concluding that impeachment by disclosure of the legitimate exercise of the right to silence is a denial of due process regardless at what stage the accused was silent so long as it is protected at that stage); *Webb v. State*, 347 So. 2d 1054 (Fla. 4th Dist. Ct. App. 1977).


405. *Id.* at 386.


407. *United States v. Chirinos*, 112 F.3d 1089 (11th Cir. 1997). The Bureau of Alcohol Tobacco and Firearms ("ATF") conducted a sting operation against five members of the Vargas group who planned to steal 300 kilograms of cocaine from an arriving shipment. *Id.* at 1093. The men in the group were arrested at the Opa Locka West airstrip where two of the men approached the fictitious bags of cocaine located on the runway. Upon arrest, two of the men waived their *Miranda* rights and told the ATF of their plan to steal the cocaine. *Id.* at 1093–94.

408. *Id.* at 1100.

409. *Id.*

410. *Chirinos*, 112 F.3d at 1100.
Nevertheless, the court determined that the prosecutor did not argue to the jury that it could consider the post-arrest statements of two of the members of the Vargas group, since it merely served the purpose of corroborating the appellant’s testimony.\textsuperscript{411} In an apparent stretch of logic, based on the principle that incriminating evidence such as post-arrest confessions differs in a practical effect from evidence requiring linkage, the codefendant’s statements linked with the testimony of the appellant did not constitute improper argument.\textsuperscript{412}

Another case in which the appellant challenged the admission of a codefendant's confession in violation of the Confrontation Clause reached a similar conclusion. In \textit{Farina v. State},\textsuperscript{413} the Supreme Court of Florida held that a codefendant's taped conversations had sufficient "indicia of reliability" and were properly admitted.\textsuperscript{414}

When a statement against one’s own interest also incriminates another criminal defendant and is admitted during their joint trial such statements are “presumptively suspect” and must be subjected to the scrutiny of cross-examination.\textsuperscript{415} Even if such statements are properly admitted against the hearsay exception,\textsuperscript{416} they are likely to raise problems with the Confrontation Clause which does not permit a nontestifying codefendant’s confession to incriminate a defendant.\textsuperscript{417}

However, this does not mean that such statements are always inadmissible. The presumption of unreliability may be rebuffed where there is a showing of trustworthiness that the statements have an "indicia of reliability."\textsuperscript{418} \textit{Farina} determined that since the recorded statements between

\begin{itemize}
  \item \textsuperscript{411} \textit{Id.}
  \item \textsuperscript{412} \textit{Id.}
  \item \textsuperscript{413} 679 So. 2d 1151 (Fla. 1996).
  \item \textsuperscript{414} \textit{Id.} at 1157.
  \item \textsuperscript{415} \textit{See} Lee v. Illinois, 476 U.S. 530, 541 (1986).
  \item \textsuperscript{416} Section 90.804(2)(c) of the \textit{Florida Statutes} creates an exception to the hearsay rule for statements against interest if that person is unavailable to testify. The statements must meet the following criteria:
    \begin{quote}
      A statement which, at the time of its making, was so far contrary to the declarant’s pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant’s position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.
    \end{quote}
  \item \textsuperscript{418} \textit{Id.} at 193–94.
\end{itemize}
the two brothers took place in the back seat of a police car, and each was present to confront the other throughout the conversations detailing the crime, the taped conversations were reliable and had a sufficient "indicia of reliability" to be admissible against petitioner Farina.\footnote{Farina v. State, 679 So. 2d 1151, 1157 (Fla. 1996).}

In \textit{Davis v. State},\footnote{698 So. 2d 1182 (Fla. 1997).} the Supreme Court of Florida confronted the issue of whether successive \textit{Miranda} warnings are a prerequisite for persons in custody who reinitiate contact with law enforcement officials.\footnote{\textit{Id.} at 1189.} While in a holding cell, Davis had requested to be allowed to contact his mother to retain an attorney for him. Subsequent to his request but before his mother was contacted, Davis was approached by an officer who expressed disappointment in him. Davis, who still had not been given \textit{Miranda} warnings, then voluntarily confessed to murdering an eleven-year-old girl and thereafter gave a taped interview during which he was fully informed of his \textit{Miranda} rights. One week later, without the advice of counsel or formal \textit{Miranda} warnings, Davis gave a second taped confession to the police.\footnote{\textit{Id.} at 1186.} The Supreme Court of Florida concluded that Davis' untaped confession should have been suppressed.\footnote{\textit{Id.} at 1189.} However, each of Davis' taped confessions, including the one given a week later without a fresh set of \textit{Miranda} warnings, were deemed admissible and admitted without error.\footnote{\textit{Id.}}

Dealing a serious blow to the proponents of \textit{Miranda}, Davis moved away from its mechanical application and set forth a contemporary test for admissibility of statements made in subsequent or successive custodial interrogations: "Whether the statements were given voluntarily."\footnote{\textit{Davis}, 698 So. 2d at 1189.} The court noted that such an inquiry must consider the totality of the circumstances.\footnote{\textit{Id.}} The \textit{Davis} court, in upholding the admissibility of both taped confessions,\footnote{\textit{Id.}} emphatically rejected the notion that a complete readvisement of \textit{Miranda} warnings is necessary each time an accused undergoes additional custodial interrogation.\footnote{\textit{Id.}} The Supreme Court of Florida concluded that the fact that Davis initiated the contact that led to his

\begin{itemize}
\item \footnote{\textit{Davis}, 698 So. 2d at 1189.}
\item \footnote{\textit{Id.}}
\item The untaped confession to the police officer was inadmissible because no formal \textit{Miranda} warnings were given. The confession was found to be harmless beyond a reasonable doubt and did not affect the defendants conviction for murder. \textit{Id.}
\item \footnote{\textit{Id.}}
\end{itemize}
second taped confession and that he was apprised of his right to counsel satisfied the underlying concerns of *Miranda.*

In the well-publicized case of *Rolling v. State,* involving the murder of five Florida college students, the court scrutinized the role of law enforcement officers in determining whether a confession was obtained in violation of the defendant’s Sixth Amendment right to counsel. The court acknowledged that statements “deliberately elicited” from a defendant after the right to counsel has been invoked and in the absence of a valid waiver are inadmissible. Nevertheless, the court was not willing to exclude incriminatory statements by the defendant merely because the statements were made after judicial proceedings had been initiated. “Rather, law enforcement officials must do something that infringes upon the defendant’s Sixth Amendment right.”

The Supreme Court of Florida’s standard for such a determination rests on whether the confessions were obtained through the active or passive efforts of law enforcement. In essence, if a defendant’s statement has not been a product of a strategy “deliberately designed to elicit an incriminating statement” then the person’s right to counsel has not been violated.

In *Meyers v. State,* the Supreme Court of Florida answered questions regarding the admissibility of a voluntary confession where circumstantial evidence is the basis for a conviction. Meyers, who voluntarily made statements to inmates with whom he was incarcerated, established the details of his attempted sexual battery and murder of a fourteen-year-old girl. Although the victim’s body was never recovered, Meyers had physical injuries consistent with a violent confrontation and bore marks on his side that resembled the shoes the victim was wearing at the time she disappeared.

429. *Id.*
430. 695 So. 2d 278 (Fla. 1997).
431. *Id.* at 289–92.
433. *Rolling,* 695 So. 2d at 290.
434. *Id.*
435. *Id.* at 291. Rolling made statements to police officials through another inmate. Each contact with the authorities was actively made by either the appellant or his fellow inmate. Therefore, statements to a fellow inmate and to investigators were not the result of Sixth Amendment violations. *Id.* See *Sikes v. State,* 313 So. 2d 436, 437 (Fla. 2d Dist. Ct. App. 1975) (holding that voluntary statements to prison authorities by an incarcerated defendant are not subject to the *Massiah* rule).
436. *Rolling,* 695 So. 2d at 291.
438. *Id.* at *1–2.
439. *Id.* at *1.
In order to prove corpus delicti in a homicide case, the state must establish: "(1) the fact of death; (2) the criminal agency of another person as the cause thereof; and (3) the identity of the deceased person." To admit a defendant's confessions, corpus delicti may be proved either by direct or circumstantial evidence that tends to show that a crime was committed, however, proof beyond a reasonable doubt is not mandatory.

As a result of these statements, the sufficient circumstantial evidence presented by the State proved the corpus delicti of the homicide and permitted the admission of Meyer's confessions to former cellmates. The Supreme Court of Florida ruled that the circumstantial evidence introduced by the State was sufficient to prove corpus delicti such that defendant's inculpatory statements were admissible.

XII. CONCLUSION

During the survey period, the United States Supreme Court, the Eleventh Circuit Court of Appeals, and several Florida courts have demonstrated their attempt to fairly balance the competing interests between the interests of law enforcement and an individual's concern for privacy. Without drawing sweeping conclusions, and recognizing the numerous exceptions, these courts have progressed toward providing greater authority to law enforcement officials. The path in this direction does not appear to be shifting and will likely result in future decisions in which the safeguarding of citizens' rights is subordinated to enhance the powers of those who serve to protect us.

440. Id.
441. Id. at *2.
443. Id. at *2. The phrase "corpus delicti" refers to proof independent of a confession that the crime charged was in fact committed. See Bassett v. State, 449 So. 2d 803, 807 (Fla. 1984). Since the girl's body was never found, the court relied heavily on the confession Meyers made to a cellmate about the murder. According to the cellmate's testimony, the victim apparently violently resisted the sexual advances of the appellant. Eventually, Meyers killed the girl by cutting her throat and disposed of the body in the woods, piling chunks of concrete on top of her body so she could not be found. Meyers, 1997 WL 109219, at *2.