

OSCA/OCI'S FAMILY COURT CASE LAW UPDATE

March, April, May, and June 2012

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Delinquency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

J.B.S. v. State, ___ So. 3d ___, 2012 WL 2368979 (Fla. 1st DCA 2012). TRIAL COURT DID NOT CONTRAVENE THE APPLICABLE STATUTES OR THE REQUIREMENTS OF E.A.R. V. STATE, 4 SO. 3D 614 (FLA. 2009), IN DEVIATING FROM THE DEPARTMENT OF JUVENILE JUSTICE'S (DJJ) RECOMMENDATION OF PROBATION IN THE PREDISPOSITION REPORT (PDR) AND THEN FOLLOWING THE DJJ'S SUBSEQUENT RESTRICTIVENESS LEVEL RECOMMENDATION. The juvenile pled guilty to lewd and lascivious molestation of a victim less than 12 years old, and false imprisonment of a child and in the process abusing or exploiting the child. The trial court recognized that s. 985.475, F.S. (2010), which governed juvenile sexual offenders, would apply. The trial court requested a predisposition report (pdr). In its PDR, the DJJ recommended probation and completion of a community treatment program. The trial court determined that the juvenile should be committed to residential treatment. The trial court then ordered a further multidisciplinary assessment and requested the DJJ to recommend a restrictiveness level. At a subsequent hearing, the DJJ recommended a moderate risk restrictiveness level. The trial court followed the recommendation and committed the juvenile to a moderate-risk program. On appeal, the juvenile argued that the trial court erred by committing him to a restrictiveness level different than the level recommended by the DJJ, and thus failing to comply with the requirements of E.A.R. v. State, 4 So. 3d 614 (Fla. 2009). The First District Court of Appeal noted several distinctions between this case and E.A.R. In E.A.R., the DJJ did not recommend probation, but instead, a moderate-risk residential commitment. The trial court's decision to instead commit E.A.R. to a high-risk program was the issue. Second, the PDR in E.A.R. was more comprehensive than the PDR in this case and contained a multidisciplinary assessment culminating in a recommendation of a moderate-risk residential commitment. The PDR in this case did not contain any analysis of the classification and placement process nor make a recommendation as to the classification risk for the juvenile. The First District held that E.A.R. did not apply to the initial determination made under s. 985.433(6); F.S. which gives the trial court wide discretion in determining the suitability of commitment of the child to the DJJ. Instead, E.A.R. addressed the meaning to be accorded s. 985.433(7) (b), F.S. (restrictiveness level of the commitment). In the instant case, subsection (7) (b) did not come into play because the trial court did not depart from the restrictiveness level recommended by DJJ. Thus, the trial court did not contravene the requirements of the applicable statutes or E.A.R. in deviating from the recommendation of probation in the predisposition report (PDR) and following the DJJ's subsequent recommendation that a moderate risk placement would be appropriate for the juvenile. The First District then distinguished this case from M.H. v. State, 69 So. 3d 325 (Fla. 1st DCA 2011). The First District found that in M.H. it was apparent that the DJJ's recommendation of probation was in connection with a determination of the restrictiveness level under s. 985.433(7)(b), F.S. (Therefore, when trial court rejected the recommendation for probation and

placed appellant in a moderate risk facility, E.A.R. required the trial court to engage in a well-reasoned and complete analysis of the PDR and the type of facility to which the trial court intends to send the child. Finally, the First District noted that it did not have to decide whether s. 985.433(7) (b), F.S. even applied to a proceeding under s. 985.475, F.S. because the trial court did not deviate from the restrictiveness level recommended by the DJJ. Instead, the juvenile court carefully structured the proceeding as a two-step process in compliance with ss. 985.433(6) and (7) (b). Accordingly, the trial court's commitment of the juvenile was affirmed. <http://opinions.1dca.org/written/opinions2012/06-25-2012/11-4922.pdf> (June 25, 2012).

A.P. v. State, __ So. 3d __, 2012 WL 2148151 (Fla. 1st DCA 2012). **THE TRIAL COURT ERRED IN DENYING THE JUVENILE'S MOTIONS FOR CONTINUANCE AND NEW TRIAL WHERE HIS MOTHER COULD NOT ATTEND DUE TO HER HOSPITALIZATION.** On appeal, the juvenile argued that the trial court erred in denying his motions for continuance and new trial, which were based on the inability of his mother to attend the adjudicatory hearing because of her hospitalization. The First District Court of Appeal found that the State had properly conceded error, and reversed and remanded for a new hearing. <http://opinions.1dca.org/written/opinions2012/06-14-2012/11-5899.pdf> (June 14, 2012).

T.D.B. v. State, __ So. 3d __, 2012 WL 1449260 (Fla. 1st DCA 2012). **ADJUDICATION FOR CRIMINAL MISCHIEF REVERSED WHERE THE STATE FAILED TO PRESENT EVIDENCE THAT THE JUVENILE ACTED WITH MALICE.** The juvenile appealed his adjudication for criminal mischief. The juvenile argued that the trial court erred in denying his motion for judgment of dismissal. The State alleged that the juvenile caused damage to a pool. One witness testified she saw the appellant "playing with" a weight in the pool, and she saw him drop the weight into the pool. A second witness testified that when she confronted the juvenile, he stated he caused damage to the pool by accident. The First District Court of Appeal found that the State failed to present any evidence that the juvenile acted with malice, as required by s. 806.13, F.S. (2010). Evidence that the damage resulted from the juvenile's actions alone was insufficient. Further, the State's evidence was entirely circumstantial and the State failed to present evidence that was inconsistent with the juvenile's reasonable hypothesis of innocence that he damaged the pool by accident. Accordingly, the First District reversed. <http://opinions.1dca.org/written/opinions2012/04-27-2012/11-4719.pdf> (April 27, 2012)

R.J.R. v. State, __ So. 3d __, 2012 WL 1216266 (Fla. 1st DCA 2012). **LESSER OFFENSE REVERSED WHERE DUAL CONVICTIONS WERE FOUND TO BE AN IMPERMISSIBLE VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY.** The juvenile appealed from an order finding guilt, withholding adjudication of delinquency, and sentencing her to probation on the charges of resisting an officer with violence and resisting an officer without violence. The juvenile argued that the dual convictions violated the prohibition against double jeopardy. Sheriff's deputies were conducting an investigation involving a shooting. The juvenile was believed to have information regarding the shooter's identification. The juvenile provided a name as identification; that name produced a hit for an outstanding warrant. Subsequently, the police heard the juvenile called by a different name. The police then intended to detain the juvenile to determine if she had an outstanding warrant or if she had provided a false identification. While

walking the juvenile outside, she turned and elbowed a police sergeant in his chest. The juvenile then tried to pull away when he attempted to handcuff her. Another officer assisted in detaining the juvenile and placing her in the patrol car. The juvenile continued resisting while she was escorted to the patrol car. The juvenile was charged and found guilty of resisting an officer with violence, and resisting an officer without violence. The First District Court of Appeal found that Florida courts have consistently held that a continuous resistance to an ongoing attempt to effectuate a person's arrest or detainment constitutes only one single instance of resisting an officer. Since the charges were not predicated on distinct acts that occurred within the same criminal transaction, the First District had to determine whether the charges survived the same elements test defined by s. 775.021(4) (a), F.S. Further, s. 775.021(4) (b), F.S. sets forth three exceptions to the general rule. The First District held that under either exception s. 775.021(4) (b) 2 or (b) 3, the juvenile could not be found guilty of both offenses. Therefore, the dual violations violated the prohibition against double jeopardy. The First District found that when an appellate court determines that dual convictions are impermissible, the appellate court should reverse the lesser offense conviction and affirm the greater. Accordingly, the trial court's finding of guilt and sentence on the lesser misdemeanor charge of resisting an officer without violence was reversed and the finding of guilt and sentence of probation on the charge of resisting an officer with violence was affirmed.

<http://opinions.1dca.org/written/opinions2012/04-12-2012/11-2820.pdf> (April 12, 2012).

S.C.E. v. State, __ So. 3d __, 2012 WL 1231517 (Fla. 1st DCA 2012). **THE TRIAL COURT FAILED TO COMPLY WITH THE REQUIREMENTS ENUNCIATED IN E.A.R. V. STATE, 4 SO. 3D 614 (FLA. 2009), WHEN DEVIATING FROM THE DEPARTMENT OF JUVENILE JUSTICE'S (DJJ) RECOMMENDATION OF PROBATION.** The DJJ recommended probation. The trial court committed the juvenile to a moderate-risk residential program. The juvenile appealed and argued that the trial court erred by failing to comply with the requirements enunciated in E.A.R. The First District Court of Appeal rejected the State's argument that because the DJJ's recommendation of probation differed from the recommendation set forth in the comprehensive evaluation, E.A.R. was not applicable. Although a determination that the DJJ overlooked or failed to sufficiently consider the evaluation's recommendation may be a sufficient basis for the trial court to deviate from the DJJ's recommendation, the trial court must still make the findings required by E.A.R. before deviating from that recommendation. Accordingly, the disposition order was reversed and remanded. On remand, the trial court was ordered to either amend the disposition order to include the required findings that would support a moderate-risk placement or, if such findings could not be made, enter a new order imposing the DJJ's recommendation of probation.

<http://opinions.1dca.org/written/opinions2012/04-12-2012/11-5765.pdf> (April 12, 2012)

S.D.G. v. State, __ So. 3d __, 2012 WL 676328 (Fla. 1st DCA 2012). **THE TRIAL COURT FAILED TO COMPLY WITH E.A.R. V. STATE, 4 SO. 3D 614 (FLA. 2009), WHEN DEVIATING FROM THE DEPARTMENT OF JUVENILE JUSTICE'S (DJJ) DISPOSITION RECOMMENDATION.** The Department of Juvenile Justice (DJJ) recommended probation with specific requirements. The State requested placement in a moderate-risk facility. The trial court committed the juvenile to a high-risk facility. The juvenile appealed and argued that the trial court failed to comply with E.A.R. v. State, 4 So. 3d 614 (Fla. 2009), in deviating from the recommendation of the DJJ. The

First District Court of Appeal held that the trial court failed to comply with E.A.R. The trial court failed to articulate an understanding of the various restrictiveness levels and to logically and persuasively explain why a high-risk facility was better suited to serving both the juvenile's rehabilitative needs and the safety of the public. Accordingly, the trial court's disposition order was reversed and remanded with instructions to enter an order in compliance with E.A.R. or else impose the DJJ's recommendation.

<http://opinions.1dca.org/written/opinions2012/03-02-2012/11-2969.pdf> (March 2, 2012).

Second District Court of Appeal

T.L.H. v. State, __ So. 3d __, 2012 WL 2470130 (Fla. 2d DCA 2012). JUVENILE REVOCATION PROCEEDINGS MUST BE INITIATED BY THE FILING OF A PETITION PURSUANT TO FLORIDA RULE OF JUVENILE PROCEDURE 8.120. The juvenile appealed the revocation of his juvenile probation. The juvenile was on probation for a six-month period that expired on January 20, 2011. On December 12, 2010, the child was arrested for grand theft. The arresting officer filed a complaint alleging the new delinquent act was a violation of the juvenile's probation. The juvenile was placed on detention status. Neither the Department of Juvenile Justice (DJJ) nor the State filed a petition alleging a violation of probation. On February 18, 2011, the juvenile appeared in court on the grand theft charge. The trial court discussed the claimed violation of probation. The juvenile's attorney moved to dismiss the violation of probation because the probation period had terminated, so the court could not consider the violation. The State argued that the filing of the complaint by the deputy tolled the juvenile's probationary period. The trial court denied the motion to dismiss, revoked probation, and imposed a new six-month probationary term. This appeal followed. The Second District Court of Appeal cited K.L.T. v. State, 65 So. 3d 102 (Fla. 5th DCA 2011), and held that there was no provision in either the statutes or the rules governing juvenile delinquency proceedings that allowed for tolling of probation upon the filing of an affidavit and the issuance of a warrant. Section 985.439(1) (b), F.S. provided that if the conditions of a child's probation were violated, the DJJ or the state attorney could bring the child before the court on a petition alleging a violation. The Second District noted that Florida Rule of Juvenile Procedure 8.120(a) (2) provides that a proceeding alleging a violation of probation shall be initiated by the filing of a sworn affidavit executed by the child's juvenile probation officer or other person having the actual knowledge of the facts. In the instant case, the deputy sheriff's complaint satisfied that provision. However, subsection (a)(3) provides that when revocation proceedings are sought, those proceedings must be initiated by the filing of a petition alleging violation of juvenile probation and that petition must incorporate the affidavit referred to earlier in the rule. All petitions must be signed and filed by legal counsel. Here, the complaint filed by the deputy sheriff did not satisfy these provisions. The arrest of the child, the child's detention, and the complaint filed by the deputy sheriff did not toll the child's probationary period. Therefore, the juvenile's period of probation had terminated prior to his adjudicatory hearing. Accordingly, the revocation of probation and disposition

were

reversed.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/June/June%2029,%202012/2D11-1321.pdf (June 29, 2012).

L.C.G. v. State, __ So. 3d __, 2012 WL 2160954 (Fla. 2d DCA 2012). **ORDER WITHHOLDING ADJUDICATION FOR RESISTING AN OFFICER WITHOUT VIOLENCE WAS REVERSED BECAUSE THAT CRIME IS NOT A NECESSARILY LESSER-INCLUDED OFFENSE OF AIDING ESCAPE, AND THE CHARGING DOCUMENT FAILED TO ALLEGE THE ESSENTIAL ELEMENTS OF RESISTING AN OFFICER WITHOUT VIOLENCE.** The juvenile was charged with aiding escape after allegedly failing to cooperate with police officers who were pursuing her brother. The trial court granted the juvenile's motion to dismiss the aiding escape charge, but found the juvenile guilty of resisting an officer without violence. The Second District Court of Appeal found that generally, it is a denial of due process to convict a defendant of an uncharged crime. However, an exception to the general rule is a conviction for lesser-included offenses—those which are either necessarily included because their constituent elements are included within the elements of the greater offense or whose elements are included in the accusatory pleading and sustained by the evidence. The Second District held that resisting an officer without violence is not a necessarily lesser-included offense of aiding escape and the charging document failed to allege the essential elements of resisting an officer without violence. Accordingly, the Second District reversed and remanded.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/June/June%2015,%202012/2D11-2401.pdf (June 15, 2012).

A.J. v. State, __ So. 3d __, 2012 WL 1870872 (Fla. 2d DCA 2012). **THE RESTITUTION ORDERED WAS REVERSED AND REMANDED BECAUSE JUVENILE COURT CANNOT DELEGATE THIS AUTHORITY TO A MAGISTRATE.** A delinquency petition was filed, alleging that the juvenile committed burglary of a dwelling or structure with damage in excess of \$1000, and grand theft of property worth more than \$100. The juvenile entered a no-contest plea to the lesser-included offense of second-degree felony burglary and agreed to pay restitution. In return, the State nolle prossed the grand theft charge. The juvenile was placed on probation with restitution to be determined at a later date. Several months later, a restitution hearing was conducted before a magistrate. The magistrate issued his report on September 28, 2010, and it was filed the next day. The report stated that the juvenile would have ten days in which to file exceptions to the report "in accordance with the Florida Rules of Juvenile Procedure 8.257(f)." Nevertheless, the juvenile court signed and filed its order directing restitution on September 29, 2010. The order did not refer to the magistrate's report, did not contain any factual findings, and merely directed how and when payment of the restitution should be made. Finally, as a separate ground for reversal, the juvenile contended that the State failed to prove that the victim's loss was causally connected to the burglary and, therefore, that the restitution order could not stand. The Second District Court of Appeal reversed the restitution order due to procedural irregularities.

The Second District found there was no authority that allowed the juvenile court to delegate its judicial determination of the amount of restitution to a magistrate. The Second District also noted that they were troubled by the fact that the juvenile court immediately signed and filed the restitution order without allowing the ten-day exception period to run. The Second District found that the causal relationship issue was briefly addressed at the restitution hearing and that the magistrate appeared to orally reject it; however, the magistrate's report did not contain findings on this issue. Because the juvenile court failed to include any findings in its

order, the Second District ordered the juvenile court to address this issue on remand. Accordingly, the restitution order was reversed and remanded for a restitution hearing in the juvenile court.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/May/May%2023,%202012/2D10-5162.pdf (May 23, 2012)

D.L. v. State, __ So. 3d __, 2012 WL 1698347 (Fla. 2d DCA 2012). **ADJUDICATIONS AND DISPOSITIONS IN THREE SEPARATE CASES REVERSED AND REMANDED FOR DISCHARGE.** The State conceded error in all three appellate cases. In case 2D11–29, the State originally charged the juvenile with obstructing or opposing an officer without violence and trespass. The State subsequently dismissed the trespass charge, but argued that the obstructing charge was proper because the juvenile fled from officers who could lawfully detain him based on an outstanding pickup order. Alternatively, the State argued that the obstructing charge was proper because it had proved that the officers were engaged in the execution of their legal duties when they detained the juvenile to investigate a possible trespass charge. However, on appeal, the State conceded that it could not support the detention based on the pickup order because it did not introduce the order into evidence. Further, the State conceded that it failed to present sufficient evidence to show that the officers had a reasonable suspicion that the juvenile was trespassing, and thus failed to show that the officers were engaged in the lawful execution of their duties when they detained him to investigate that charge. The Second District Court of Appeal agreed and reversed the adjudication in case 2D11–29. In case 2D11–30, the State charged the juvenile with trespass on property other than a structure or conveyance based on his presence at an apartment complex. On appeal, the State conceded that it failed to prove that the juvenile had actual notice that he was not allowed on the property, and failed to rebut the juvenile’s testimony that he had been invited onto the property by a tenant. The Second District agreed and reversed the adjudication in case 2D11–30. In case 2D11–31, the State charged the juvenile with obstructing an officer without violence based on the juvenile giving a false name during a consensual encounter. On appeal, the State conceded that such actions did not constitute obstructing an officer without violence under the circumstances. The Second District agreed and reversed the adjudication in case 2D11–31. Accordingly, all three cases were reversed and remanded for discharge.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/May/May%2016,%202012/2D11-29.pdf (May 16, 2012).

M.L.J. v. State, __ So. 3d __, 2012 WL 1649708 (Fla. 2d DCA 2012). **DELINQUENCY FINDING AFFIRMED WHERE THE APPELLATE COURT FOUND NO FUNDAMENTAL ERROR OR INEFFECTIVE ASSISTANCE OF COUNSEL.** The juvenile appealed the trial court's finding of disorderly conduct. The disorderly conduct charge arose from a schoolyard tussle. The juvenile had claimed that he acted in self-defense and that the other boy was the aggressor. The juvenile argued on appeal that fundamental error or ineffective assistance of counsel on the face of the record occurred where counsel failed to move for a judgment of dismissal based on self-defense. The Second District Court of Appeal found that the self-defense defense only applies if the defendant did not provoke the fight. However, the record reflected disputed facts as to who was the aggressor. On such disputed facts, a motion for judgment of dismissal would have failed.

Further, in her closing argument, the juvenile's counsel pleaded strenuously that the juvenile acted in self-defense. Therefore, the Second District held that there was neither fundamental error nor ineffective assistance of counsel on the face of the record and affirmed the delinquency finding. However, the Second District reversed and remanded the disposition order for the trial court to enter a separate disposition order for the disorderly conduct offense. The Second District found that Florida Rule of Juvenile Procedure 8.115(d) requires a separate disposition order for each case. The juvenile had preserved this issue by filing a motion to correct disposition error which was deemed denied when not ruled upon within thirty days by the trial court.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/May/May%2011,%202012/2D10-2310.pdf (May 11, 2012).

D.M. v. State, ___ So. 3d ___, 2012 WL 1232622 (Fla. 2d DCA 2012). **A JUVENILE WISHING TO CHALLENGE THE VOLUNTARINESS OF A PLEA AFTER DISPOSITION SHOULD FILE A PETITION FOR A WRIT OF HABEAS CORPUS IN THE CIRCUIT COURT.** Juvenile pleaded guilty to two incidents of lewd or lascivious molestation and one of harassing a witness, against the advice of counsel. A disposition hearing was held on January 5, 2010, and on that day, written disposition orders were entered. On January 15, 2010, the juvenile, through his attorney, filed motions to withdraw his guilty pleas. The motions were denied March 5, 2010. Fourteen days later, the juvenile filed a notice of appeal, challenging both the disposition of his cases and the denial of his motions to withdraw the pleas. The Second District Court of Appeal found that it could not review the disposition orders for two reasons. First, the appeal was untimely. The notice of appeal must be filed within 30 days of the rendition of the order. The juvenile rules do not authorize moving to withdraw a plea after the disposition hearing. Thus, no tolling provisions were triggered by the juvenile's motions. Second, the disposition orders were based on guilty pleas. Florida Rule of Appellate Procedure 9.145(a) provides that, "Appeal proceedings in juvenile delinquency cases shall be as in rule 9.140 except as modified by this rule." Under Florida Rule of Appellate Procedure 9.140(b) (2) (A) (ii) (c), the voluntariness of a plea may be raised on direct appeal only if preserved by a motion to withdraw the plea. Again, the juvenile rules do not authorize the filing of such a motion after the beginning of the disposition hearing. The Second District held that a juvenile wishing to challenge the voluntariness of a plea may file a petition for a writ of habeas corpus in the circuit court. Thus, instead of moving to withdraw his pleas, the juvenile could have preserved the question of whether his pleas were voluntary by filing a petition for a writ of habeas corpus. And instead of denying the juvenile's motions, the circuit court should have stricken them as unauthorized, or treated them as habeas petitions. Although the Second District had no jurisdiction to review the delinquency judgments, Florida Rule of Appellate Procedure 9.145(b) (2) confers jurisdiction to review orders entered after adjudication. The Second District reversed the denial of the unauthorized motions to withdraw the pleas and remanded with directions to strike the motions without prejudice to the juvenile petitioning for writs of habeas corpus. If the juvenile chose to file a habeas petition, the court hearing the petition should hold an evidentiary hearing to determine whether his pleas were in fact voluntary.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/April/April%2013,%202012/2D10-1401.pdf (April 13, 2012).

D.F. v. State, ___ So. 3d ___, 2012 WL 1232006 (Fla. 2d DCA 2012). **PROBATION VIOLATION REVERSED BECAUSE THE ORDER DID NOT SPECIFY A DEADLINE FOR SUBMITTING WRITTEN DOCUMENTATION.** The trial found that the juvenile violated condition nine of his probation by failing to provide written proof that he had completed his community service hours. The trial court continued the juvenile's probation and added ten additional community service hours to the probation conditions. The juvenile appealed. The Second District Court of Appeal found that condition nine required the juvenile to complete the service hours by March 31, 2010, and to provide written proof. However, condition nine did not specify a date by which the juvenile must provide the documentation. Per section 775.021(1), F.S. (2009), "the rule of lenity" provides that ambiguities "shall be construed most favorably to the accused." Consequently, the Second District could not conclude that the juvenile willfully and substantially violated condition nine. Accordingly, the probation violation finding was reversed.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/April/April%2013,%202012/2D11-13.pdf (April 13, 2012).

G.G. v. State, ___ So. 3d ___, 2012 WL 1059042 (Fla. 2d DCA 2012). **DELINQUENCY ADJUDICATIONS FOR POSSESSION OFFENSES REVERSED WHERE EVIDENCE FAILED TO ESTABLISH THE ELEMENT OF CONTROL OVER THE CONTRABAND.** The juvenile was adjudicated delinquent for possession of marijuana and paraphernalia. On appeal, the juvenile argued that the evidence was insufficient to prove his possession of the drugs or paraphernalia. The juvenile had an argument with his father and subsequently fled into a neighborhood conservation area. The father became concerned because he could not locate his son and because the weather forecast called for a frigid night. The father called the sheriff's department to search for the boy. The deputies found the juvenile after dark, asleep on the ground in an unfenced public park. He was lying near an open field and a playground, close to a wooded area. One deputy shined his flashlight on the ground and spied a black drawstring pouch approximately one foot from where the juvenile was sleeping. The bag contained marijuana and paraphernalia. No contraband was found on the juvenile's person. The State filed a petition for delinquency, claiming that the juvenile possessed the contraband discovered in the pouch. At the adjudicatory hearing the juvenile moved for a judgment of dismissal. The State maintained that the juvenile was in actual possession of the contraband because the bag was within his "ready reach." The trial court held that the juvenile was in constructive possession of the drugs and paraphernalia. The Second District Court of Appeal found that under either theory of possession, the State must prove that the accused had control of the contraband. Further, under either theory the requisite control is not established by the mere proximity to the contraband. In the instant case, the contraband was discovered outdoors, in a location open to the public, in proximity to the defendant. The only evidence offered to prove control was the juvenile's proximity to the illegal material. There was no other evidence that might have suggested that the juvenile had control of the bag or its contents. The Second District held that the evidence was insufficient to prove that the juvenile committed the possession offenses. Accordingly, the delinquency adjudications were reversed with directions to dismiss.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/March/March%2030,%202012/2D10-4195.pdf (March 30, 2012).

J.D.M. v. State, __ So. 3d __, 2012 WL 716047 (Fla. 2d DCA 2012). **DISPOSITION ORDER FOR MISDEMEANOR ADJUDICATION REVERSED BECAUSE COMMITMENT FOR AN INDEFINITE PERIOD NOT TO EXCEED THE JUVENILE'S NINETEENTH BIRTHDAY WOULD EXCEED THE TERM THAT AN ADULT COULD BE SENTENCED FOR THE SAME CRIME.** The juvenile was serving three concurrent probations for two felonies and a misdemeanor. The juvenile violated his probation by possessing marijuana and absconding from supervision. The trial court revoked the probations, committed him to the Department of Juvenile Justice (DJJ) for a term not to exceed his nineteenth birthday, and placed him in a moderate-risk program. The juvenile appealed. First, the juvenile claimed that there was insufficient evidence to revoke his probation. The Second District Court of Appeals found no merit to the insufficient evidence claim and affirmed the adjudications without further discussion. Second, the juvenile, who was 16 years old, asserted that his commitment for an indefinite period not to exceed his nineteenth birthday for the misdemeanor adjudication was an error because it would exceed the term that an adult could be sentenced for the same crime. The Second District found that s. 985.455(3), F.S. (2009), provided that any commitment to the DJJ must be for an indeterminate period of time that could not exceed the maximum statutory sentence. The trial court's disposition for the first-degree misdemeanor adjudication exceeded the maximum statutory period of one year and was therefore illegal. Finally, the juvenile asserted that the trial court erred by failing to enter a written order of revocation of probation specifying the conditions violated. The Second District agreed. Accordingly, all three adjudications of delinquency and the dispositional orders for the two felony adjudications were affirmed. The dispositional order for the misdemeanor adjudication was reversed and remanded with directions. The Second District also remanded for rendition of a written order of revocation of probation specifying the conditions violated. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/March/March%2007,%202012/2D10-5469.pdf (March 7, 2012).

Third District Court of Appeal

M.M. v. State, __ So. 3d __, 2012 WL 2012194 (Fla. 3d DCA 2012). **GRAND THEFT ADJUDICATION WAS REVERSED AND REMANDED WITH DIRECTIONS TO ENTER ADJUDICATION FOR PETIT THEFT.** On a motion for rehearing or clarification, the Third District Court of Appeal withdrew their previously-issued opinion and issued this opinion. The juvenile had appealed the trial court's finding and adjudication for grand theft and burglary. The Third District found that the State had properly conceded that the evidence was insufficient to establish that the value of the property was \$300 or more, which is the threshold amount for grand theft. Accordingly, the grand theft adjudication was reversed and remanded with directions to enter adjudication for petit theft. The Third District found no merit as to the remaining points on appeal and affirmed the trial court's findings and adjudications in all other respects. <http://www.3dca.flcourts.org/Opinions/3D11-0185.pdf> (June 6, 2012).

C.M. v. State, __ So. 3d __, 2012 WL 1934427 (Fla. 3d DCA 2012). **ADJUDICATION FOR PETIT THEFT REVERSED AND REMANDED BECAUSE THE STATE FAILED TO OVERCOME THE DEFENSE OF PAYMENT.** The juvenile appealed his adjudication for petit theft of property worth less than

\$100, and the disposition placing him on juvenile probation. The Third District Court of Appeal found that the testimony by both the State's witness (a Wal-Mart loss prevention officer) and the juvenile was identical to the extent that the juvenile actually paid for the merchandise in question. The Third District held that the State failed to overcome the defense of payment by introducing competent evidence to establish beyond a reasonable doubt that the merchandise was removed from the store premises (including the garden department) before the payment was made. Accordingly, the adjudication and disposition order was reversed and remanded. <http://www.3dca.flcourts.org/Opinions/3D11-2214.pdf> (May 30, 2012).

B.B. v. State, __ So. 3d __, 2012 WL 1520860 (Fla. 3d DCA 2012). **BATTERY ADJUDICATION REVERSED AND REMANDED BECAUSE TRIAL COURT ERRED IN PRECLUDING EVIDENCE OF MOTHER'S PRIOR VIOLENT ACTS IN SUPPORT OF JUVENILE'S DEFENSE OF SELF-DEFENSE.** The juvenile appealed from a determination of delinquency on one count of battery. The victim was the mother of the juvenile. The juvenile and mother argued, prompting juvenile to leave the home and not return until 11:30 p.m. When the juvenile returned, a verbal confrontation ensued and escalated. The mother swatted the juvenile on the head in an attempt to get her to "snap out of it." The juvenile then struck her mother with a cell phone, cutting her mother's nose, raising a number of lumps on her head, and causing a nose bleed. The mother called the police and the juvenile was arrested and charged with a single count of battery. The juvenile claimed self defense. The juvenile filed a motion in limine seeking permission to inquire into her mother's prior acts of violence, maintaining that the past acts went directly to the defense, because they reflected on the reasonableness of the juvenile's actions. The motion was denied. At the close of evidence, the juvenile again moved for dismissal, arguing that she acted in self-defense and that she had a reasonable belief that her conduct was necessary to defend herself. At a hearing for reconsideration, the defense again argued that the mother's prior acts of violence should have been admitted as relevant to the determination of whether the juvenile exercised reasonable force. The trial court adhered to its prior rulings. The Third District Court of Appeal held that evidence of mother's prior violent acts was admissible in support of the juvenile's defense of self-defense. The trial court erred in concluding that the mother's prior violent acts were not admissible when the key issue to the juvenile's defense was the reasonableness of the force used against her mother. In the instant case, the mother's prior acts were offered to illustrate the juvenile's state of mind during the altercation. There was no dispute that the mother had hit the juvenile in the face, constituting a triggering overt act. However, the juvenile was precluded from explaining that because the mother had in the past abused her, pulled her hair out by the roots, and scratched and cut her, she was fearful during the current altercation thereby justifying the amount of force used against her mother. The Third District was unable to say that the trial court's error was harmless beyond a reasonable doubt. Therefore, the order under review was reversed and remanded. <http://www.3dca.flcourts.org/Opinions/3D11-1709.pdf> (May 2, 2012).

K.J. v. State, __ So. 3d __, 2012 WL 1414331 (Fla. 3d DCA 2012). **RESTITUTION ORDER REVERSED BECAUSE TRIAL COURT ERRED IN FAILING TO GRANT A BRIEF CONTINUANCE SO THAT THE ASSISTANT PUBLIC DEFENDER ASSIGNED TO THE CASE COULD APPEAR.** The State conceded that the trial court reversibly erred in failing to grant a brief continuance so that the assistant public

defender assigned to the case could appear instead of forcing the respondent to be represented by two other assistants who were entirely unfamiliar with the case. See M.F. v. State, 920 So. 2d 1252 (Fla. 2d DCA 2006). The Third District Court of Appeal agreed and the restitution order was reversed and remanded for a new restitution hearing. <http://www.3dca.flcourts.org/Opinions/3D11-1771.pdf> (April 25, 2012).

A.L. v. State, __ So. 3d __, 2012 WL 1316545 (Fla. 3d DCA 2012). **EVIDENCE WAS INSUFFICIENT TO SUSTAIN A FINDING OF GUILT FOR LOITERING AND PROWLING.** The juvenile appealed the finding of guilt for loitering and prowling. The juvenile had filed a motion for a judgment of dismissal. The motion was denied. On appeal, the juvenile argued that the trial court erred in denying his motion for judgment of dismissal because the State failed to produce sufficient evidence that he committed the offense of loitering and prowling. The two arresting officers testified that they were patrolling the south end of Miami Beach because of an increase in the number of burglaries in that area. The officers were in plainclothes. At approximately 7:15 p.m., the officers saw the juvenile and another individual between two apartment buildings. They were pulling themselves up in order to look into the windows of the apartment buildings. The officers did not see the juvenile trying to open any window. The officers watched for about five to eight minutes, and then they approached with their firearms and badges exposed. When asked why he was looking in the windows, the juvenile responded that he was looking for a friend. The juvenile did not identify the friend or an apartment number for the friend. The officer performed a pat-down search of the juvenile, which yielded nothing. The juvenile was arrested and charged with loitering and prowling. The Third District Court of Appeal found that in order for a defendant to be found guilty of loitering and prowling, the State must prove that: (1) the defendant loitered or prowled in a place, at a time, or in a manner not usual for law-abiding individuals, and (2) such loitering and prowling were under circumstances that warranted a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. The Third District held that there was insufficient evidence to support the trial court's conclusion that the juvenile committed the offense of loitering and prowling. First, it was not unusual for a person to be in a public alleyway, between two apartment buildings, in the early evening hours on Miami Beach. Second, although the juvenile and his companion were seen looking into apartment windows, the juvenile did not possess any tools, and the police officers did not observe him trying to pry open any of the windows. Looking through windows, at this time of day and in this location, without more, is not sufficient to establish that the juvenile loitered at a time, in a place, or in a manner unusual for law-abiding individuals. Additionally, the officers were unable to point to specific facts which indicated that a breach of the peace was imminent or that the public safety was threatened. Once the juvenile recognized the police officer, he complied fully with the officer's requests and answered his questions. The fact that the officer did not believe the juvenile's explanation that he was looking for a friend is not sufficient, on its own, to justify the officer's alarm or immediate concern for the public safety. Since neither element necessary to establish a crime under s. 856.021(1), F.S. was satisfied; the Third District reversed and remanded the adjudication with directions to discharge the juvenile. <http://www.3dca.flcourts.org/Opinions/3D11-1486.pdf> (April 18, 2012).

L.G. v. State, __ So. 3d __, 2012 WL 1314563 (Fla. 3d DCA 2012). **TRIAL COURT FAILED TO CONDUCT A RICHARDSON INQUIRY UPON THE STATE'S DISCOVERY VIOLATION.** The juvenile appealed the trial court's order withholding an adjudication of delinquency for the offense of burglary to an unoccupied dwelling and grand theft. The Third District Court of Appeal reversed the trial court's order on the authority of T.J. v. State, 57 So. 3d 975 (Fla. 3d DCA 2011), and remanded for a new adjudicatory hearing, because the trial court failed to conduct a Richardson v. State, 246 So. 2d 771 (Fla. 1971), inquiry upon the State's discovery violation. <http://www.3dca.flcourts.org/Opinions/3D11-0680.pdf> (April 18, 2012).

D.S. v. State, __ So. 3d __, 2012 WL 1192030 (Fla. 3d DCA 2012). **DENIAL OF MOTION TO SUPPRESS WAS REVERSED BECAUSE OFFICER LACKED REASONABLE SUSPICION TO JUSTIFY A SEARCH.** The trial court denied a motion to suppress marijuana evidence and the juvenile appealed. The Third District Court of Appeal held that the officer lacked reasonable suspicion to justify a search of juvenile. The juvenile was being detained on suspicion of burglary. He was later arrested for loitering and prowling and for suspected marijuana. The juvenile was not under arrest at the time he was searched. The officer who did the search understood that she was merely detaining him while the other officers finished their burglary investigation. The juvenile was fully searched and not just patted down prior to placing him in her squad car to await the outcome of the investigation. The officer did not read the juvenile his Miranda rights and she did not see any bulges that might give her probable cause to search. The officer testified that she routinely searched suspects prior to placing them in her vehicle as a safety precaution. Upon fully searching the juvenile, the officer discovered a baggie of marijuana and she arrested him. The Third District found that the trial court erroneously denied the juvenile's motion to suppress. The juvenile was not under arrest at the time of the search, he was merely detained and awaiting the conclusion of the other officers' investigation into a burglary call. The search of the juvenile exceeded the officer's authority where there was no reasonable suspicion to believe the juvenile was armed and dangerous and he had not yet been arrested. Accordingly, the trial court's denial of the motion to suppress was reversed. <http://www.3dca.flcourts.org/Opinions/3D09-2558.pdf> (April 11, 2012).

T.D. v. State, __ So. 3d __, 2012 WL 1020004 (Fla. 3d DCA 2012). **THE OFFICER WAS ENGAGED IN THE LAWFUL EXECUTION OF A LEGAL DUTY WHERE THE RECORD SUPPORTED THE EXISTENCE OF PROBABLE CAUSE.** The juvenile appealed from an adjudication of delinquency for resisting an officer without violence. The Third District Court of Appeal found that to support a conviction for resisting an officer without violence under s. 843.02, F.S. the State must prove: (1) the officer was engaged in the lawful execution of a legal duty; and (2) the defendant's actions, by his words, conduct, or a combination thereof, constitute obstruction or resistance of the lawful execution of a legal duty. Further, the element of lawful execution of a legal duty is satisfied if an officer has either a founded suspicion to stop the person or probable cause to make a warrantless arrest. See M.J. v. State, 67 So. 3d 1189, 1190 (Fla. 3d DCA 2011). The Third District held that the record supported the existence of probable cause. Therefore, the officer was engaged in the lawful execution of a legal duty. Accordingly, the juvenile's adjudication for resisting an officer without violence was affirmed. <http://www.3dca.flcourts.org/Opinions/3D11-0869.pdf> (March 28, 2012).

State v. D.H., __ So. 3d __, 2012 WL 832792 (Fla. 3d DCA 2012). **DISMISSAL ON SPEEDY TRIAL GROUNDS WAS REVERSED BECAUSE THE TRIAL COURT DID NOT AFFORD THE STATE AN OPPORTUNITY TO BRING THE JUVENILE TO TRIAL WITHIN THE FIFTEEN-DAY RECAPTURE PERIOD FOLLOWING THE FILING OF THE JUVENILE'S MOTION FOR DISCHARGE.** The State appealed the dismissal of their delinquency petition on speedy trial grounds. The juvenile was arrested on August 4, 2010. The ninety-day speedy trial period expired on November 2, 2010. The court set the case for trial on November 17, 2010, sua sponte adding a fifteen-day recapture period to the speedy trial deadline. On November 8, 2010, the juvenile filed a motion to discharge. The court held a hearing on the motion on November 16, 2010. The State did not object to the lateness of the hearing, but the State argued that Florida Rule of Juvenile Procedure 8.090 (m) (3) afforded the State ten days from the date of the motion hearing, until November 26, to bring the case to trial. The court set the trial for the next day. The next morning, on November 17, the State was not ready to proceed and moved for an extension of the speedy-trial period and reconsideration of an earlier ruling in which the court charged a continuance to the State for its failure to produce a report. The court denied the State's motion and granted the motion for discharge. The State argued on appeal that the trial court erred when it dismissed the petition before the State had the opportunity to proceed to trial within the ten-day recapture period provided for in Florida Rule of Juvenile Procedure 8.090(m)(3). The Third District Court of Appeal found that Rule 8.090(m) (3) requires that a motion for discharge in a juvenile case must be heard within five days of filing. Unless the court finds that one of the reasons set forth in subdivision (d) exists, the court shall order the juvenile brought to trial within 10 days. The failure of a court to hold a hearing on the motion is harmless if the respondent is brought to trial within fifteen days from the filing of the motion for discharge. In this case, the juvenile filed his motion to discharge on November 8, 2010. The trial court was required to bring the respondent to trial no later than November 23, 2010. Thus, the trial court's November 17 dismissal was premature and did not afford the State an opportunity to bring the juvenile to trial within the fifteen-day recapture period following the filing of the juvenile's motion for discharge. Accordingly, the order of dismissal was reversed and remanded with instructions that the State had ninety days from the date of the issuance of the District Court's mandate to bring the juvenile to trial. See Florida Rule of Juvenile Procedure 8.090(j). <http://www.3dca.flcourts.org/Opinions/3D10-3157.pdf> (March 14, 2012).

C.M. v. State, __ So. 3d __, 2012 WL 832796 (Fla. 3d DCA 2012). **TRIAL COURT ERRED IN NOT GRANTING A JUDGMENT OF DISMISSAL ON POSSESSION OF DRUG PARAPHERNALIA CHARGE WHERE THE EVIDENCE FAILED TO ESTABLISH THE SUBSTANCE IN THE JUVENILE'S POSSESSION WAS MARIJUANA OR THAT THE JUVENILE USED OR INTENDED TO USE THE OBJECT TO SMOKE MARIJUANA.** A school police officer conducted a search of the juvenile's backpack at school, revealing a plastic case containing a green, leafy substance and a glass ear dropper which had been converted into a makeshift pipe and which contained a residue. The juvenile was charged with possession of marijuana and possession with intent to use drug paraphernalia. The juvenile testified that the green leafy substance was synthetic marijuana and that he used the ear dropper to smoke some of the synthetic marijuana prior to his arrest. The State failed to introduce any lab results. After a hearing, the trial court entered a judgment of dismissal on the

charge of possession of marijuana, finding that the State failed to prove that the substance was marijuana. However, the court found the juvenile guilty of the charge of possession of drug paraphernalia. The juvenile appealed. The State acknowledged that synthetic marijuana was not a “controlled substance” under Ch. 893, F.S. (2010). The Third District Court of Appeal found that s. 893.147(1)(b), F.S. (2010), provided that it was unlawful to use, or to possess with intent to use, drug paraphernalia to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. To sustain this charge, the State was required to prove that the juvenile possessed drug paraphernalia and either used it, or intended to use it, to inhale a controlled substance (in this case, marijuana). The Third District held that although the ear dropper may have qualified as “drug paraphernalia,” the evidence failed to establish that the juvenile used the ear dropper to smoke marijuana or intended to use it for that purpose. There was insufficient evidence to establish that the substance the juvenile possessed was marijuana. Further, there was an absence of any other evidence that the juvenile used or intended to use the object to smoke marijuana. Therefore, the finding of guilt for possession of drug paraphernalia was reversed and remanded with directions to enter a judgment of dismissal as to the charge of possession of drug paraphernalia.

<http://www.3dca.flcourts.org/Opinions/3D11-0181.pdf> (March 14, 2012).

Fourth District Court of Appeal

R.R. v. State, __ So. 3d __, 2012 WL 2328039 (Fla. 4th DCA 2012). **ORDER SUPPRESSING STATEMENTS AFFIRMED AND ORDER SUPPRESSING MARIJUANA REVERSED.** The State appealed from an order suppressing marijuana in the juvenile’s backpack and his statements to deputies. Two deputies in separate cars responded to an anonymous call that there was a child at a particular location with marijuana in his backpack. The juvenile's clothing, backpack, and location exactly matched the description provided by the caller. One of the deputies called the juvenile by the name provided by the caller. The juvenile responded and acknowledged that it was his name. The juvenile was patted down for weapons. He was asked if he had anything illegal in the backpack. He responded that he had some “weed.” Marijuana was found inside the juvenile’s backpack. The deputy testified that the juvenile was not free to leave and that he had probable cause to arrest the juvenile for a criminal violation of a city ordinance for being in the park after hours. The ordinance violation allowed for the possible imposition of a jail sentence. At the conclusion of the suppression hearing, the trial court granted the motion to suppress, finding that there was probable cause to detain the juvenile, the juvenile was in custody for *Miranda* purposes, and that *Miranda* warnings should have been given prior to asking the juvenile if he had anything illegal. The trial court concluded that the failure to give *Miranda* warnings rendered the consent to search involuntary. The State argued that the marijuana would have been inevitably discovered because the officers had probable cause to make an arrest for the ordinance violation. The trial court did not explicitly address the issue in its oral pronouncement or written order. The Fourth District Court of Appeal found that the trial court implicitly determined the inevitable discovery doctrine did not apply in this case when it denied the motion to suppress. The Fourth District held there was no error with the trial court's rulings concerning the suppression of the juvenile's statements, but found error with the ruling on the inevitable discovery doctrine and the suppression of the marijuana.

Under the inevitable discovery doctrine, if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the evidence will be admissible. The State must establish that the evidence would have been discovered by means of normal investigative measures that would have inevitably been set in motion as a matter of routine police procedure. In the instant case, the deputy testified that he had probable cause to arrest the juvenile for an ordinance violation and that he would have arrested the juvenile regardless of whether he consented to a search or not. The evidence supported probable cause to arrest the juvenile for the ordinance violation even prior to asking him if he had anything illegal in his possession. Therefore, the marijuana in his backpack would have inevitably been found in a search incident to arrest. Accordingly, the order suppressing statements was affirmed and the order suppressing marijuana was reversed. <http://www.4dca.org/opinions/June%202012/06-20-12/4D11-2120.op.pdf> (June 20, 2012).

J.A.B. v. State, ___ So. 3d ___, 2012 WL 2121238 (Fla. 4th DCA 2012). ONE COUNT OF BATTERY REVERSED WHERE ENTIRELY CIRCUMSTANTIAL EVIDENCE WAS NOT INCONSISTENT WITH ANY REASONABLE HYPOTHESIS OF INNOCENCE. The juvenile appealed his adjudications for two counts of battery. First, he challenged one of his two adjudications for battery, asserting that the trial court erred in denying a motion for judgment of dismissal on grounds that the circumstantial evidence was insufficient. Second, he claimed the trial court violated his Fifth Amendment right to maintain his innocence by imposing a harsher disposition as a result of his refusal to apologize at disposition. The Fourth District Court of Appeal reversed on the first issue and found the second issue had no merit. L.B., a juvenile girl, was walking home from school. The juvenile and another boy began following her. The boys tried to get her attention by calling to her. L.B. glanced back and continued walking. She then felt someone slap her butt. She saw the juvenile right behind her and the other boy two steps behind the juvenile. She asked the juvenile why he slapped her, but both boys just smiled and laughed. L.B. continued walking. Five steps later, she felt someone grab her butt. She did not see who grabbed her. She saw someone out of the corner of her eye and assumed it was the juvenile. L.B. did not turn around, but instead went straight to her house and told her parents. The juvenile was arrested for lewd and lascivious conduct and battery. The former charge was reduced to simple battery. The juvenile moved for a judgment of dismissal as to the second count of battery on the grounds that L.B. did not testify to seeing him grab her buttocks the second time. The motion was denied. On appeal, the juvenile argued that the denial was error because there was insufficient circumstantial evidence to rebut every reasonable hypothesis of innocence – that the other boy grabbed L.B. the second time. The Fourth District found that where the only proof is circumstantial, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. In the instant case, the evidence for the second battery was entirely circumstantial, as there was no direct evidence the juvenile touched L.B. the second time. L.B.'s testimony that after she was touched a second time she saw someone out of the corner of her eye and assumed it was the juvenile was not inconsistent with the theory that the other boy moved forward past the juvenile in the five steps between touches and touched L.B. the second time. Therefore, the juvenile's adjudication for one count of battery was affirmed, but was reversed on the second count of battery. <http://www.4dca.org/opinions/June%202012/06-13-12/4D11-234.op.pdf> (June 13, 2012).

K.P. v. State, __ So. 3d __, 2012 WL 2122162 (Fla. 4th DCA 2012). **CONVICTION FOR DISORDERLY CONDUCT REVERSED WHERE INCORRECT EVIDENTIARY RULINGS PREVENTED THE JUVENILE FROM INTRODUCING EXTRINSIC EVIDENCE OF A PRIOR INCONSISTENT STATEMENT.** The juvenile was convicted of disorderly conduct. The charge arose from fighting in public. The only State witness was the arresting officer. He testified that he saw the fight escalate from horseplay to punches. The juvenile testified that he did not throw any punches; the other child punched him in the back of the head; and when he turned around the officer arrested him and the other child. The juvenile's mother was called as a witness to impeach the arresting officer's testimony. The defense proffered that the mother would have testified that the officer told her that the juvenile had not been fighting. The trial court sustained the prosecutor's hearsay objection. The defense counsel then recalled the arresting officer to question him about the prior inconsistent statement he had made to the juvenile's mother. The attorney directed the officer's attention to the time when the juvenile was released to the custody of his mother. When the attorney asked the officer if he told the mother "that there was no fight," the court sustained the prosecutor's objection to leading questions. Without the ability to direct the officer's attention to a specific statement, the defense attorney was able to elicit only the officer's statement that he could not recall what he said to the juvenile's mother at the time her son was released to her custody. Having laid the foundation for introducing evidence of a prior inconsistent statement, the defense counsel sought to recall the juvenile's mother to testify about the officer's prior statement. The trial court sustained the prosecutor's objection that the witness had "already been called." The Fourth District Court of Appeal found that the trial court's evidentiary rulings were erroneous. The mother's initial testimony as to a prior inconsistent statement was not hearsay, because it was not offered to prove its truth, only to show the inconsistency for impeachment purposes. Next, even though he was unable to ask the officer about the specific statement, the defense counsel laid the proper foundation for the admission of extrinsic evidence of the prior inconsistent statement when the officer testified he could not remember what he told the juvenile's mother. Once the defense counsel had established entitlement to introduce the mother's extrinsic evidence of the prior statement under s. 90.614(2), F.S. the trial court abused its discretion in not allowing him to recall the mother. The Fourth District held that the trial court's erroneous evidentiary rulings frustrated the juvenile's ability to offer proper impeachment testimony on a crucial issue in the case—whether the officer actually observed the appellant "brawling or fighting." Since the Fourth District could not say beyond a reasonable doubt that such testimony did not affect the verdict, the conviction for disorderly conduct was reversed and the case was remanded. <http://www.4dca.org/opinions/June%202012/06-13-12/4D11-2117.op.pdf> (June 13, 2012).

S.M. v. State, __ So. 3d __, 2012 WL 1889403 (Fla. 4th DCA 2012). **SECTION 985.255(1) (H), F.S. (2011), DOES NOT PERMIT HOME DETENTION WITHOUT A QUALIFYING RISK ASSESSMENT SCORE.** The juvenile filed a petition for a writ of habeas corpus, seeking his immediate release from home detention pending a violation of probation hearing. The juvenile was arrested for a second degree felony. At a detention review hearing, the State did not have the requisite probable cause for the second degree felony but filed a petition charging the juvenile with felony battery with a prior conviction. Because she did not have a prior conviction, but only a

previous adjudication of delinquency withheld on misdemeanor battery charges, the court agreed that there was no probable cause for the felony battery, and it could not be scored on the risk assessment. All parties agreed that the score on the risk assessment instrument (RAI) should reflect zero points. Nevertheless, the State maintained that she had violated probation on the misdemeanor battery charges, and the prosecutor sought detention on the violation. The court placed the juvenile on home detention. The juvenile filed a petition for writ of habeas corpus arguing that the court could not place her in home detention without a qualifying RAI score. The Fourth District Court of Appeal found that the detention of juveniles is governed entirely by statute, and strict compliance is required. Section 985.255(1) (h), F.S. (2011), does not require mandatory home detention with electronic monitoring for all juveniles charged with violating probation. This section permits a court to continue detention required by the juvenile probation officer during intake. Section 985.255(1) (h), F.S. (2011), presupposes the existence of a qualifying RAI score before a court may continue detention. Since the juvenile's RAI score was zero, the court erred in placing her in home detention. Accordingly, the juvenile's petition was granted.

<http://www.4dca.org/opinions/May%202012/05-25-12/4D12-1751%20op.pdf> (May 25, 2012)

D.T. v. State, ___ So. 3d ___, 2012 WL 1859421 (Fla. 4th DCA 2012). **THE JUVENILE CHALLENGED HIS ADJUDICATIONS IN TWO SEPARATE CASES. IN THE FIRST CASE, THE ADJUDICATIONS FOR PROVIDING A FALSE NAME TO POLICE AND RESISTING AN OFFICER WITHOUT VIOLENCE WERE REVERSED. IN THE SECOND CASE, THE ADJUDICATION FOR RESISTING AN OFFICER WITHOUT VIOLENCE WAS AFFIRMED.** In the first case, the juvenile challenged his adjudications for providing a false name to police and resisting an officer without violence. A police officer approached and questioned four individuals at a business plaza posted with “No trespassing” and “No loitering or soliciting” signs. The businesses in the plaza were still open. The juvenile told the officer that they were “just hanging out.” The officer asked for identification and the juvenile provided what turned out to be a false name. When the officer attempted to arrest and handcuff the juvenile, he began swinging his arms to avoid being cuffed. The juvenile was charged with trespassing and providing a false name. The trial court denied the juvenile’s motion for judgment of dismissal as to both charges. The Fourth District Court of Appeal found that a lawful detention is a condition precedent to the crime of giving a false name to police. In the instant case, the false name was not provided during a lawful detention, but instead during a consensual encounter involving a potential trespass. The Fourth District found that the police were not engaged in the lawful execution of a legal duty when they attempted to arrest the juvenile. The evidence failed to establish the necessary probable cause to justify an arrest for trespassing. Accordingly, both adjudications were reversed. In the second case, the juvenile challenged his adjudication for resisting an officer without violence. An officer was patrolling in the area of the same business plaza. A pizza shop at the plaza was open at the time. The juvenile was observed, not in front of the pizza place, but on the east side of the building and “next to” the shopping plaza, where there were “no loitering” and “no trespassing” signs. The officer testified that, on two prior occasions, he observed the juvenile in that exact location and instructed him about the “no trespassing” signs. When the officer pulled into the plaza, the juvenile grabbed his backpack and began to quickly walk away. The juvenile failed to stop after the officer ordered him to stop several times. The juvenile argued that the State failed to prove

the officer was engaged in the lawful execution of a legal duty. The Fourth District found that the “reasonable suspicion” necessary to justify a detention involves less than the “probable cause” required to arrest. Reasonable suspicion of trespass must be based upon something more than the mere presence on the property or a hunch or a guess. In the instant case, it was 10:30 p.m. and the officer observed the juvenile not along the sidewalk (where the doors to the businesses were) or near the open pizza place, but on the side of the building. “No trespassing” and “no loitering” signs were posted on that side of the building. This particular area was patrolled because of a “gap” between the plaza and a neighboring apartment complex. On two prior occasions, the officer found the juvenile in that same location and warned him against trespassing on the premises. The Fourth District held that the circumstances gave rise to a reasonable suspicion of trespass so as to justify the juvenile’s detention. Thus, the officer was engaged in the lawful execution of a legal duty when he ordered the juvenile to stop, because the evidence warranted a reasonable suspicion that the juvenile was committing the offense of trespass. Accordingly, the adjudication for resisting an officer without violence was affirmed. <http://www.4dca.org/opinions/May%202012/05-23-12/4D10-2760,%204D10-2761.op.pdf> (May 23, 2012).

R.J.C. v. State, ___ So. 3d ___, 2012 WL 1316175 (Fla. 4th DCA 2012). **DENIAL OF MOTION TO SUPPRESS REVERSED BECAUSE OFFICER DID NOT HAVE REASONABLE SUSPICION TO DETAIN AND WAS NOT ENTITLED TO ALLAY HIS SAFETY CONCERNS BY ASKING THE JUVENILE TO REMOVE HIS HANDS FROM HIS POCKETS.** The juvenile pleaded no contest to possession of less than 20 grams of cannabis, reserving the right to appeal the denial of his motion to suppress evidence. A deputy was dispatched because of an anonymous report of “suspicious persons.” The anonymous caller advised only that there were “two black males in the area wearing all black.” No other details were provided. The deputy was not able to find anyone in the immediate area reported by the caller. However, while circling the area, the deputy observed two persons, who were both wearing black. When the deputy made eye contact, they immediately went into a food store “in a rush.” The deputy entered the store at a normal pace, approached the juvenile and said, “Can I talk to you for a minute?” The juvenile replied, “Yeah. What do you want?” The deputy noticed that the juvenile kept his hands in his pockets. The deputy asked the juvenile several times to remove his hands from his pockets. The deputy testified that he did this for officer safety issues. The officer conceded that he did not see any bulges from the juvenile's pants that appeared to be weapons. The deputy asked the juvenile, “What do you have in your pockets? Do you have any guns, knives, weapons; anything you [think] I need to ... know about?” Finally, the juvenile removed his hands from his pockets and a marijuana cigarette fell to the ground. The Fourth District Court of Appeal found that the juvenile was “seized” when he complied with the order to remove his hands from his pockets. The deputy's request, which was repeated several times, constituted a show of authority which would have conveyed to a reasonable person that his movement was being restricted and that he was not free to disregard the officer and go about his business. However, the officer did not have reasonable suspicion to detain the juvenile based on the anonymous tip of “suspicious” behavior and the juvenile's act of rushing into a store upon seeing the officer's patrol car. While headlong flight in a high crime area may provide an officer with a reasonable suspicion to investigate further, reasonable suspicion of criminal activity is not established simply because a

defendant leaves the scene when an officer nears. Here, it is not clear whether the juvenile's act constituted "flight" or "headlong flight," and there was no evidence that this occurred in a high crime area. Finally, the juvenile's act of keeping his hands in his pockets did not give the police officer reasonable suspicion to believe that the juvenile was involved in criminal activity. Before the officer was entitled to allay his safety concerns, he had to be presented with objective facts that would justify an investigatory Terry stop. Accordingly, the Fourth District reversed the order denying the juvenile's motion to suppress and remanded with directions to vacate the adjudication of delinquency. <http://www.4dca.org/opinions/April%202012/04-18-12/4D10-4936.op.pdf> (April 18, 2012).

K.S. v. State, __ So. 3d __, 2012 WL 1317950 (Fla. 4th DCA 2012). **OFFICERS APPROACHING VEHICLE TO ISSUE TRAFFIC VIOLATION FOR INOPERABLE TAG LIGHT WERE NOT ENTITLED TO CONDUCT PAT-DOWN SEARCH.** The juvenile plead guilty to carrying a concealed weapon, possession of less than twenty grams of cannabis, and possession of paraphernalia. The juvenile appealed the denial of her motion to suppress. She argued that law enforcement lacked reasonable suspicion for the stop and could not provide articulable facts to support probable cause for the pat-down search. An officer noticed a parked car running with the headlights on, but the tag light off, at around 1:46 a.m. The officer conducted a traffic stop. The officer saw the juvenile "in the front passenger seat rummaging through the floorboard/center console area. The officer couldn't see what the juvenile was doing and asked her to put her hands up. The juvenile was then asked to exit the vehicle. The officer conducted a pat-down search for weapons, during which an unidentifiable hard, round object was found in the juvenile's left hip area. When the officer asked the juvenile what the object was, she responded that it was her "weed grinder." The juvenile was placed into custody. The car door remained open. The juvenile's purse was in plain view on the floorboard where the juvenile had been reaching. Another officer searched the purse and found pepper spray. The juvenile was charged with a concealed weapon because it was inside the purse. The juvenile filed a motion to suppress, which was denied, and the juvenile appealed. The Fourth District Court of Appeal found that a disabled tag light is a nonmoving violation. The officer conducted a valid traffic stop. The Florida Stop and Frisk Law allows an officer to search a validly stopped individual only if the officer has probable cause to believe that the individual is armed and poses a threat to the officer or any other person. Furtive movements or evasive behavior can be considered in determining whether there is a reasonable belief that someone is armed and dangerous. Pat-down searches performed routinely or for safety purposes only and without any articulable suspicion are constitutionally impermissible. In the instant case, the responding officer observed the juvenile rummaging around the floorboard/center console. The officer asked the juvenile to put her hands up and then to exit the vehicle. There was nothing wrong with this request. However, at this point in the encounter, there was no reason to believe the juvenile was armed. Neither officer testified that they saw a bulge of any type or gave any reason to suspect the juvenile was armed. The juvenile did nothing suspicious after exiting the vehicle. It was only after the pat-down that the officer felt the object, which turn out not to be a weapon. Had the officers not found the "weed grinder" during the pat-down, the juvenile would not have been arrested, and there would have been no reason to go inside the vehicle to search her purse. Accordingly, the Fourth District reversed the denial of the juvenile's motion to suppress.

<http://www.4dca.org/opinions/April%202012/04-18-12/4D11-345.op.pdf> (April 18, 2012).

J.B. v. State, __ So. 3d __, 2012 WL 1020015 (Fla. 4th DCA 2012). **VIOLATION OF PROBATION REVERSED WHERE THE FINDING WAS BASED SOLELY ON HEARSAY.** The juvenile appealed the revocation of his probation for committing the new offense of burglary of an unoccupied dwelling and for failing to complete required community service hours. The Fourth District Court of Appeal found no merit in the juvenile's contention that the finding of a violation of probation for the burglary was based solely on hearsay. However, the Fourth District reversed the trial court's finding of a violation of probation based on the juvenile's failure to complete the required community service hours because it was based solely on hearsay. The Fourth District found that the juvenile's probation officer did not supervise the juvenile during the period of the alleged violation. His testimony was based only on his review of the juvenile's file. The State was required to move these records into evidence under the business records exception to the hearsay rule to substantiate the alleged violations. Accordingly, the Fourth District remanded for the trial court to reconsider whether it would have imposed the same sentence if faced with only the supported violation.

<http://www.4dca.org/opinions/Mar%202012/03-28-12/4D10-3029.op.pdf> (March 28, 2012).

A.W. v. State, __ So. 3d __, 2012 WL 716131 (Fla. 4th DCA 2012). **ADJUDICATION FOR RESISTING AN OFFICER WITHOUT VIOLENCE REVERSED WHERE UNCORROBORATED TIP FAILED TO PROVIDE REASONABLE SUSPICION TO DETAIN THE JUVENILE.** An officer responded to an anonymous 911 call reporting a peeping tom/prowler. At the scene, she was "flagged" by people sitting in a car, who indicated that they made the 911 call. They explained that someone looked into their window. When they looked outside they saw two males. The officer followed the 911 callers and they pointed out the juvenile as one of the two males. The officer did not obtain the 911 callers' names or addresses, did not obtain a copy of the 911 call, and did not determine whether they lived in the home where the peeping occurred. Wishing to remain anonymous, the 911 callers left the area after identifying the juvenile and could not later be located. The officer approached the juvenile, along with a second officer. She asked the juvenile for his name and address, but he refused to answer. The officer explained that she was conducting an investigation and again asked the juvenile to provide identifying information. The juvenile began to make a call on his cell phone and the officer asked him to stop. The juvenile ignored this request. The second officer reached for the juvenile's arm, which prompted the juvenile to begin "flailing" and yelling. The juvenile was handcuffed and placed in the back of a patrol car. At trial, the juvenile made a motion for judgment of dismissal as to the resisting without violence charge, arguing that the officers were not in the lawful execution of a legal duty because they lacked reasonable suspicion to detain him. The motion was denied and the juvenile appealed. The Fourth District Court of Appeal found that although the encounter began as consensual, it became an investigatory detention when the second officer grabbed the juvenile. Further, reasonable suspicion may be based on an anonymous tip, so long as it is corroborated. In the instant case, neither officer testified to observing anything that corroborated the tip from the 911 callers. Although there was some face-to-face contact with the 911 callers in this case, the Fourth District held that their information was unreliable because they were more like a truly anonymous telephone informant. Therefore, the tip from

the 911 callers did not provide the officers with reasonable suspicion to detain the juvenile and the officers were not acting in the lawful execution of a legal duty. Accordingly, the finding of guilt as to resisting an officer without violence was reversed. In addition, the Fourth District rejected the juvenile's unpreserved challenge to the adjudication of guilt for battery on a law enforcement officer. The Fourth District found that although the police were not engaged in the lawful execution of a legal duty, there was no indication that the officers were not acting in good faith. A person is not justified in the use of force to resist an arrest by a law enforcement officer, or to resist a law enforcement officer who is engaged in the execution of a legal duty, if the law enforcement officer is acting in good faith and he or she is known, or reasonably appears, to be a law enforcement officer. See s. 776.051(1), F.S. (2009).

<http://www.4dca.org/opinions/Mar%202012/03-07-12/4D10-4923.op.pdf> (March 7, 2012).

Fifth District Court of Appeal

No new opinions for this reporting period.

Dependency Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

Department of Children & Families and Guardian ad Litem Program v. D.A., ___ So. 3d ___, 37 Fla.L.Weekly D1354, 2012 WL 2019087 (Fla. 1st DCA 2012). **DENIAL TERMINATION OF PARENTAL RIGHTS REVERSED**. The First District Court of Appeal reversed an order denying termination of a father's parental rights. On appeal, the court noted that it was unclear whether the trial court had actually considered incarceration as a basis for termination of parental rights under s. 39.806(1)(d)(3) or abandonment under s. 39.806(1)(b), F.S. The trial court also made inconsistent findings regarding relative placement. The case was reversed and remanded for the trial court to address the two grounds for termination.

<http://opinions.1dca.org/written/opinions2012/06-06-2012/12-0648.pdf> (June 6, 2012).

A.H. v. Florida Dept. of Children and Family Services, ___ So. 3d ___, 2012 WL 1514435 (Fla. 1st DCA 2012). **TERMINATION OF PARENTAL RIGHTS REVERSED**. A father appealed the termination of his parental rights as to his two daughters. The mother was convicted on criminal charges for inflicting abuse on the couple's son which led to the child's death; however, the father was not home at the time the injury was inflicted. There was also no evidence that the father should have known that leaving the child with the mother would have led to the child's death. The trial court granted the termination based on five statutory grounds; however, the appellate court reversed because none of the five statutory grounds on which the trial court relied to terminate the father's parental rights were supported by competent, substantial evidence which could reasonably be found to be clear and convincing.

<http://opinions.1dca.org/written/opinions2012/05-01-2012/11-4454.pdf> (May 1, 2012).

Second District Court of Appeal

A.J.L. v. R.H. and S.P. and Department of Children and Family Services, ___ So. 3d ____, 37 Fla.L.Weekly D1304, 2012 WL 1959439 (Fla. 2d DCA 2012). **PETITION FOR WRIT OF CERTIORARI DENIED**. The Second District Court of Appeal denied a petition for a writ of certiorari in a unified dependency and paternity action. The petitioner, A.J.L., was the mother's boyfriend at the time of the child's birth and had never married the mother. He was treated as the child's biological father and the child was placed with him. However, DNA testing in a Department of Revenue paternity action excluded A.J.L. as the child's biological father. Based on a stipulation by A.J.L., DCF, and the mother at dependency mediation, A.J.L. was treated as the legal father and a final judgment of paternity was entered. Subsequently, the mother moved to set the judgment aside, claiming that S.P. was the child's biological father. The trial court ruled that because A.J.L. was not the child's biological father and was never married to the mother, he could not be declared to be the child's legal father. Subsequent DNA testing in a paternity action established a high probability that S.P. was the biological father. S.P. intervened in the dependency case and was afforded party status. The appellate court initially denied the petition for writ of certiorari by unpublished order. On rehearing, both A.J.L. and DCF argued that the writ must be granted because DCF had conceded error. But the District Court noted that the trial court's orders, while favorable to S.P. and the mother, were adverse to A.J.L. and DCF's desired outcome. Because DCF wished to support A.J.L.'s position, rather than filing a response to A.J.L.'s petition, it should have filed a motion to join as a petitioner. The court held that DCF's concession did not deprive S.P. and the mother of their right to argue in favor of the challenged orders. Because the trial court's orders did not depart from the essential requirements of the law, the petition for writ of certiorari was denied.

<http://www.2dca.org/opinions/Opinion Pages/Opinion Page 2012/June/June%2001,%202012/2D11-6258rh.pdf> (June 1, 2012).

S.T. v. Department of Children and Families, ___ So. 3d ____, 2012 WL 1698760 (Fla. 2d DCA 2012). **DEPENDENCY ORDER REVERSED**. The mother appealed an order finding her children dependent, and argued that the evidence did not support the circuit court's finding that she would fail to protect them from imminent harm caused by their father's drinking.

The appellate court reversed, holding that the Department did not present competent, substantial evidence that the children were in danger of prospective harm, abuse, or neglect from the mother nor did the facts meet the imminency requirement of s. 39.01(15)(f), F.S. The Department's evidence did not provide substantial, competent evidence that the father's alcohol consumption and the mother's consequent behavior had demonstrably affected the children or had put either or both of her children at substantial risk of imminent neglect.

<http://www.2dca.org/opinions/Opinion Pages/Opinion Page 2012/May/May%2016,%202012/2D11-4544.pdf> (May 16, 2012).

Department of Children and Family Services and Guardian Ad Litem Program v. K.D. and Z.H., ___ So. 3d ____, 2012 WL 1605425 (Fla. 2d DCA 2012). **TERMINATION OF PARENTAL RIGHTS REVERSED**. DCF filed an expedited petition to terminate the parental rights to twin boys based

on egregious conduct toward Z.C.(1) under s. 39.806(1)(f), F.S. and aggravated child abuse of Z.C.(1) under s. 39.806(1)(g). Although the trial court found that the Department established these statutory grounds by clear and convincing evidence, it declined to terminate parental rights based on its sua sponte consideration of an alternative placement in a permanent guardianship with the maternal grandparents. The trial court entered separate orders denying DCF's petition and placing the children in the permanent guardianship. The appellate court reversed the order terminating parental rights because the trial court misapplied the manifest best interests and least restrictive means tests by basing its decision not to terminate solely on the availability of the alternative placement. The appellate court reversed the order placing the children in a permanent guardianship because the trial court was precluded as a matter of law from considering this alternative placement at this stage in the proceedings.

Further, the appellate court took the opportunity in the opinion to clarify the manifest best interests and least restrictive means tests in cases that include the termination of parental rights to a child based on the abuse of a sibling.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/May/May%2009,%202012/2D10-3474.pdf (May 9, 2012).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

R.B. v. Department of Children and Families, ___ So. 3d ___, 2012 WL 2401092 (Fla. 4th DCA 2012). **TERMINATION OF PARENTAL RIGHTS AFFIRMED**. The Fourth District Court of Appeal affirmed termination of a mother's parental rights to three of her children. The trial court had ruled that the Department had proven by clear and convincing evidence that the mother continued to abuse, abandon, and neglect the children due to her failure to substantially comply with her case plan for 29 months. The court had also found that the fathers had abandoned their children. The mother argued on appeal that the trial court's manifest best interest and least restrictive means findings were not supported by competent, substantial evidence and that the termination due to failure to comply with the case plan constituted error. The District Court found that the trial court's conclusions were supported by the record, noted that it had already affirmed termination of the mother's rights to her youngest child, and affirmed the order on appeal.

<http://www.4dca.org/opinions/June%202012/06-27-12/4D12-567.op.pdf> (June 27, 2012).

L.E. v. Department of Children and Families, ___ So. 3d ___, 2012 WL 2401095 (Fla. 4th DCA 2012). **TERMINATION OF PARENTAL RIGHTS AFFIRMED**. The Fourth District Court of Appeal affirmed termination of a mother's parental rights. The Department's petition had charged that the mother abandoned her child; that the mother's continuing involvement in the parent-child relationship threatened the child's life and well-being irrespective of the provision of services; and that the mother failed to substantially comply with her case plan. When the mother failed

to appear at the advisory hearing, the trial court entered a consent to termination of parental rights under s. 39.801(3) (d), F.S. and took testimony on the child's manifest best interests. The final judgment included findings of the mother's consent to termination; that termination was in the child's manifest best interests; and that termination was the least restrictive means of protecting the child. On appeal the mother argued that the trial court erred by failing to make specific findings of fact supporting the least restrictive means and that the finding of least restrictive means was not supported by evidence. After reviewing the Supreme Court's decision in Department of Children and Family Services v. P.E., 14 So. 3d 228, 236 (Fla. 2009), the District Court agreed with the approach of the Second District Court of Appeal and found that by failing to appear at the advisory hearing, the mother gave constructive consent to the termination of parental rights. By acknowledging through constructive consent that a case plan would be futile, the mother implicitly agreed that termination of parental rights was the least restrictive means of protecting the child. The appellate court concluded that the trial court's finding of least restrictive means was supported by specific findings of fact and competent substantial evidence and affirmed the trial court.

<http://www.4dca.org/opinions/June%202012/06-27-12/4D12-864.op.pdf> (June 27, 2012).

D.B. v. Department of Children and Families, ___ So. 3d ___, 2012 WL 1934602 (Fla. 4th DCA 2012). **TERMINATION OF PARENTAL RIGHTS AFFIRMED.** The father appealed the termination of his parental rights because he was never offered a case plan, even though he requested one, and because termination was not the least restrictive method to protect the child. The trial court had found that the father's schizophrenia and lack of medication compliance affected the father's ability to parent, and that since the father did not understand his illness, the father would not comply with his treatment plan and the child would be at risk. The appellate court affirmed the trial court's ruling, and noted that the evidence clearly and convincingly showed that it would not be safe to place the child with the father, and that the evidence also established that the father was not amenable to services and that termination was the least restrictive method to protect the child from harm. The appellate court noted that there is no statutory obligation to offer a parent a case plan prior to termination of parental rights.

<http://www.4dca.org/opinions/May%202012/05-30-12/4D11-3372.op.pdf> (May 16, 2012).

Fifth District Court of Appeal

No new opinions for this reporting period.

Dissolution Case Law

Florida Supreme Court

In re: Amendments to the Florida Family Law Rules of Procedure: Form 12.996(d), ___ So. 3d ___, Case SC12-618, (Fla. 2012). **ADOPTION OF FLORIDA ADDENDUM TO INCOME WITHHOLDING ORDER TO BE USED WHEN TRIAL COURT ORDERS SUPPORT BE PAID BY INCOME DEDUCTION AND OMB FORM 0970-0154 IS USED; PURPOSE OF THE ADDENDUM IS TO ADD PROVISIONS**

REGARDING CHILD SUPPORT REQUIRED BY FLORIDA LAW. The Court adopted new form 12.996(d), Florida Addendum to Income Withholding Order, to be used whenever a trial court has ordered that support be paid by income deduction and OMB Form 0970-0154, Income Withholding for Support, has been used. The purpose of the addendum is to provide provisions required under Florida law which are not presently required on the federal form. Chief among these requirements is a schedule for the reduction and termination of child support as the obligation for each minor child ceases. The new form, effective on its adoption, June 28th, 2012, should be attached to the OMB form and filed with the clerk of the circuit court. The forms take effect June 28, 2012; there is a 60-day period to submit comments.
<http://www.floridasupremecourt.org/decisions/2012/sc12-618.pdf> (June 28, 2012).

In re: Amendments to the Florida Supreme Court Approved Family Law Forms, __So. 3d__, Case SC12-510, (Fla. 2012). **ADOPTION OF REVISIONS TO FORMS PERTAINING TO DOMESTIC AND OTHER FORMS OF PROHIBITED VIOLENCE; 60-DAY COMMENT PERIOD FROM 6/7/2012.** The Court adopted revisions to a number of family law forms pertaining to domestic and other forms of prohibited violence. The revised forms: emphasize the importance for both petitioners and respondents to appear at the final hearing; update the notices of hearing with regard to requests for accommodations by persons with disabilities; remove unnecessary or unauthorized requests for personal information; add a specific prayer for an injunction to petitions for protection which do not already contain one; update provisions pertaining to health and dental insurance; and add the central depository as an entity within the method of payment sections. The forms take effect June 7, 2012; there is a 60-day period to submit comments.
<http://www.floridasupremecourt.org/decisions/2012/sc12-510.pdf> (June 7, 2012).

In Re: Amendments to the Rules Regulating The Florida Bar (Biannual Report), __So. 3d__, (Fla. 2012.) **RULE REVISION REGARDING WHAT NONLAWYERS MAY AND MAY NOT DO WHEN ASSISTING SELF-REPRESENTED LITIGANTS COMPLETE A FORM INCLUDING CHANGES TO LANGUAGE IN THE NONLAWYER DISCLOSURE CLAUSE.** The Supreme Court adopted new rules and amended existing rules regulating the Florida Bar. Rule 10-2.2, Form Completion by a Nonlawyer, sets forth what a nonlawyer may and may not do when assisting a self-represented litigant in the completion of a form. Subsection (c) of the rule as amended identifies what information must be provided in the nonlawyer clause on such forms.
<http://www.floridasupremecourt.org/decisions/2012/sc10-1967.pdf> (April 12, 2012).

First District Court of Appeal

Debolt v. Debolt, __So. 3d__, 2012 WL 2463957 (Fla. 1st DCA 2012). **FEE ISSUE NOT RIPE FOR REVIEW; APPELLATE COURT WITHOUT JURISDICTION.** The appellate court affirmed the trial court's award of permanent periodic alimony to former wife without discussion, but concluded it was without jurisdiction to determine her entitlement to fees as that issue was not ripe for review.
<http://opinions.1dca.org/written/opinions2012/06-28-2012/11-3075.pdf> (June 28, 2012).

Overton v. Overton, __ So. 3d __, 2012 WL 2138099 (Fla. 1st DCA 2012). **SPOUSES' FINANCIAL CIRCUMSTANCES REMAIN PERTINENT WHEN A SUPPORTIVE RELATIONSHIP EXISTS; CONFLICT CERTIFIED WITH 4TH DCA.** Former husband appealed the final judgment denying his request for modification of alimony.

The trial court found that although former wife cohabited with a third party and was in a supportive relationship as defined in s. 61.14(1) (b), F.S. that relationship did not justify a reduction or termination of alimony; the appellate court reversed. Emphasizing the use of the word “may” and concluding that the statute “plainly contemplates an exercise in discretion,” the appellate court held that the “parties’ financial circumstances remain pertinent when a supportive relationship exists.” It certified conflict with French v. French, 4 So. 3d 5 (Fla. 4th DCA 2009).

<http://opinions.1dca.org/written/opinions2012/06-14-2012/11-5854.pdf> (June 14, 2012).

VanEtten v. VanEtten, __ So. 3d __, 2012 WL (Fla. 1st DCA 2012). **UNEQUAL DISTRIBUTION OF ASSETS AND LIABILITIES MUST BE JUSTIFIED.** Finding that the trial court had failed to explain its unequal distribution, the appellate court reversed the scheme of equitable distribution; it remanded for the trial court to either equally divide the marital assets and liabilities or provide findings justifying the unequal distribution. Unequal distribution is permissible if a trial court determines, after consideration of the factors in s. 61.075(1), F.S. that it is justified; the unequal distribution must be accompanied by findings explaining the decision. Maddox v. Maddox, 750 So. 2d 693 (Fla. 1st DCA 2000).

<http://opinions.1dca.org/written/opinions2012/05-24-2012/11-0893.pdf> (May 24, 2012).

Gilbert v. Cole, __ So. 3d __, 2012 WL (Fla. 1st DCA 2012). **APPELLATE COURT CONCLUDED CHILD SUPPORT WAS ALLOCATED; SPOUSE WAS ENTITLED TO REDUCTION OF SUPPORT RETROACTIVE TO EMANCIPATION; REMANDED TO TRIAL COURT FOR RECALCULATION OF ARREARAGES.** The appellate court agreed with former husband that the trial court erred in finding that the child support award was unallocated; this error resulted in an incorrect calculation of arrearages. The appellate court held that the child support created by the final judgment of dissolution was allocated—each child would receive half of the amount until that child was emancipated. Former husband was entitled to a reduction of his support obligation, retroactive to the date of the oldest child’s emancipation; accordingly, the appellate court remanded for recalculation of his arrearages consistent with its opinion.

<http://opinions.1dca.org/written/opinions2012/05-18-2012/11-5972.pdf> (May 18, 2012).

Giovanini v. Giovanini, __ So. 3d __, 2012 WL (Fla. 1st DCA 2012). **TEMPORARY FEE AWARD MUST BE BASED ON NEED OF ONE SPOUSE AND ABILITY OF OTHER TO PAY; ABSENT A STIPULATION, REASONABLENESS AND NECESSITY OF FEE MUST BE DETERMINED AT AN EVIDENTIARY HEARING.** In reversing the trial court’s award of temporary appellate attorney’s fees, the appellate court held that a fee award must be based on the need of the spouse seeking fees and the ability of the other spouse to pay. In addition, the trial court must make specific findings as to the hourly rate, the reasonableness of the hours expended, and any appropriate reduction or enhancement factors. Absent a stipulation, determination of the reasonableness and necessity of the fee at an evidentiary hearing is “a basic element of due

process.” Matlack v. Matlack, 893 So. 2d 657 (Fla. 4th DCA 2005). The appellate court held that here the trial court should not have determined the amount of the fee award after having expressly stated in a prior order that it would set the matter for hearing if it determined former wife was entitled to an award.

<http://opinions.1dca.org/written/opinions2012/05-15-2012/11-3797.pdf> (May 15, 2012).

Franks v. Franks, __ So. 3d __, 2012 WL (Fla. 1st DCA 2012). **BRIDGE-THE-GAP ALIMONY CANNOT EXCEED TWO YEARS; TRIAL COURT MAY USE DURATIONAL ALIMONY TO ASSIST SPOUSE FOR A SET PERIOD FOLLOWING MARRIAGE OF SHORT OR MODERATE DURATION; TRIAL COURT HAS DISCRETION TO ORDER SPOUSE TO MAINTAIN AN ANNUITY FOR FORMER SPOUSE UNDER SURVIVOR BENEFIT PLAN.** Bridge-the-gap alimony may not exceed the statutory limit of two years; however, a trial court may use durational alimony to provide a spouse with financial assistance for a “set period of time following a marriage of short or moderate duration.” The appellate court concluded that a remand of alimony issue to the trial court was a better course of action than deeming the award to be durational. The appellate court held that a trial court has the discretion to order a spouse to maintain an annuity for a former spouse under the Survivor Benefit Plan. Here, the trial court did not abuse its discretion in directing that former wife be named beneficiary of a military survivor benefit plan to protect her award of a portion of former husband’s retirement pay.

<http://opinions.1dca.org/written/opinions2012/05-04-2012/11-2219.pdf> (May 4, 2012).

Hentze v. Denys, __ So. 3d __, 2012 WL (Fla. 1st DCA 2012). **LAW OF THE CASE DOCTRINE APPLIES TO ISSUES DECIDED ON APPEAL; AN ARGUMENT MUST BE FIRST RAISED BELOW TO BE PRESERVED ON APPEAL; ERRORS IN FINAL ORDERS MUST BE BROUGHT TO JUDGE’S ATTENTION VIA MOTION FOR REHEARING; STANDARD OF REVIEW REGARDING IMPUTATION OF INCOME IS ABUSE OF DISCRETION; TRIAL COURT ABUSES DISCRETION IF IT FAILS TO IMPUTE INCOME AFTER FINDING UNDEREMPLOYMENT TO BE VOLUNTARY; CHILD SUPPORT TERMINATES AT EITHER AGE 18 OR HIGH SCHOOL GRADUATION.** The appellate court held that the law of the case doctrine applies to issues decided on appeal, not to trial court orders. It also held that in order for an argument to be preserved on appeal, the argument must have first been made below. Similarly, if an error appears in the final order, a party must first bring it to the trial judge’s attention by filing a motion for rehearing. An appellate court’s standard of review of a trial court’s decision regarding imputation of income is abuse of discretion; here, the appellate court concluded that the trial court had abused its discretion in failing to impute income to former wife despite having found that her underemployment was voluntary. The trial court was also found to have erred by requiring support for one of the children beyond reaching majority *and* graduating. The final order had provided that child support would cease when each child either turned 18 or graduated from high school—whichever occurred first.

<http://opinions.1dca.org/written/opinions2012/05-01-2012/11-0650.pdf> (May 1, 2012).

Walker v. Walker, __ So. 3d __, 2012 WL 1232729 (Fla. 1st DCA 2012). **TRIAL COURT MUST MAKE SPECIFIC FACTUAL FINDINGS REGARDING ACTUAL NEED FOR PERMANENT ALIMONY AND DISTRIBUTION OF MARITAL ASSETS; FINDING OF DISSIPATION REQUIRES EVIDENCE OF INTENTIONAL MISCONDUCT; ATTORNEYS’ FEES MUST OFTEN BE RECONSIDERED IN LIGHT OF**

PARTIES' CHANGED FINANCES. Former husband appealed the final judgment of dissolution of marriage; the appellate court reversed and remanded to the trial court for the correction of several errors. Because the trial court failed to make a specific factual determination with regard to former wife's actual need for permanent alimony, it was instructed on remand to either make the required findings of fact or consider another form of alimony. It was also instructed to either make specific findings to support its distribution of assets or reconsider the distribution. The appellate court concluded that the trial court erred in finding former husband had dissipated marital assets because there was no evidence of intentional misconduct in the record. The appellate court distinguished between one spouse mismanaging or squandering marital assets in a way the other spouse disapproves of from intentional dissipation or destruction of assets. Citing Segall v. Segall, 708 So. 2d 983, 989 (Fla. 4th DCA 1998), the appellate court instructed the trial court to reconsider the fee award "in light of any changes in the parties' relative financial resources following the trial court's ultimate ruling."
<http://opinions.1dca.org/written/opinions2012/04-12-2012/11-2869.pdf> (April 12, 2012).

Second District Court of Appeal

Henderson v. Lyons, __So. 3d__, 2012 WL 2470135 (Fla. 2d DCA 2012). **TRIAL COURT'S VIOLATION OF SPOUSE'S PROCEDURAL RIGHT TO DUE PROCESS RESULTS IN REVERSAL AND REMAND FOR FULL EVIDENTIARY HEARING.** Take two: the appellate court agreed with former wife that the trial court violated her right to procedural due process in awarding fees to the parenting coordinator without having allowed former wife an opportunity to complete cross-examination or present witnesses; accordingly, it reversed and remanded for a full evidentiary hearing on those fees.
<http://www.2dca.org/opinions/Opinion Pages/Opinion Page 2012/June/June%2029,%202012/2D11-1829.pdf> (June 29, 2012).

Katz v. Katz, __So. 3d__, 2012 WL 2330216 (Fla. 2d DCA 2012). **REMAND TO TRIAL COURT FOR RECONSIDERATION OF PROVISION WITHIN REHABILITATIVE ALIMONY AWARD REGARDING COSTS OF LICENSING AND MEMBERSHIP.** Former husband appealed the final judgment of dissolution of marriage. The appellate court found that there was substantial, competent evidence to support the trial court's findings as to equitable distribution and found no abuse as to equitable distribution; however, it reversed and remanded for reconsideration of the provision within the rehabilitative alimony award for costs associated with licensing and membership related to former wife's profession. The appellate court characterized the error as either a typo or an abuse of discretion; in either event, reconsideration was required.
<http://www.2dca.org/opinions/Opinion Pages/Opinion Page 2012/June/June%2020,%202012/2D10-6197.pdf> (June 20, 2012).

Mathes v. Mathes, __So. 3d__, 2012 WL 2160958 (Fla. 2d DCA 2012). **TRIAL COURT FOUND TO BE WITHOUT JURISDICTION OVER CORPORATION IN WHICH SPOUSES CO-OWNED; CORPORATION MUST BE REPRESENTED.** The appellate court reversed a final judgment in a bifurcated dissolution proceeding in which former spouses were joint owners of a Florida corporation -- she owned 51% of the stock; he owned 49%. It chastised the attorneys for their

failure to understand the difference between the couple's marital assets and those of a separate Florida corporation. This misunderstanding resulted in the dissolution transforming into an action similar to receivership and lead the appellate court to question the trial court's jurisdiction over the corporation. Holding that the final judgment was not binding on the corporation, the appellate court ordered the trial court to appoint an attorney to represent the corporation and retry the dissolution proceeding; it noted that issues regarding the corporation might need to be resolved in other legal proceedings.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/June/June%2015,%202012/2D11-298.pdf (June 15, 2012).

Tate v. Tate, __So. 3d__, 2012 WL 2160955 (Fla. 2d DCA 2012). TRIAL COURT ERRED BY REQUIRING ONE SPOUSE TO BEAR ALL EXPENSES OF BEACH RENTAL CONDO PENDING SALE; SPOUSES SHOULD SHARE INCOME AND EXPENSES WITH CREDIT TO SPOUSE PAYING MORE THAN THEIR SHARE AFTER SALE; UNDER "INVITED ERROR RULE" SPOUSE CANNOT COMPLAIN ABOUT AN ERROR OR RULING FOR WHICH HE OR SHE IS RESPONSIBLE; TRIAL COURT CANNOT EQUITABLY DISTRIBUTE THE SAME LIABILITY TWICE; TRIAL COURT ERRED IN NOT EXPLAINING WHY IT DID NOT FOLLOW ITS PRETRIAL ORDER REGARDING CREDITING MARITAL FUNDS WITHDRAWN BY SPOUSE PRIOR TO DISSOLUTION OF MARRIAGE PETITION; REMAND OF QUESTIONS REGARDING COLLEGE PREPAID PLANS NOT ADDRESSED BY EITHER SPOUSES OR TRIAL COURT. Former wife appealed the final judgment of dissolution of marriage regarding: a condo at the beach used as rental property, which had never generated a positive cash flow; the scheme of equitable distribution; prepaid college funds; and the calculation of child support. The appellate court affirmed the calculation of the child support, but reversed on the three other issues. The appellate court held that the trial court erred in requiring former wife to bear all expenses related to the condo pending its sale; the spouses should have been entitled to their share of any income less their share of expenses until its sale -- at which time the spouse having paid more than his or her proportionate share of the expenses would be entitled to a credit against their share of the net proceeds. With regard to the equitable distribution issues, the appellate court found that the trial court's treatment of the credit card debt substantially agreed with former wife's proposed final judgment; thus, to the extent the trial court erred, she invited that error. The appellate court reiterated that under the "invited error rule," a party cannot successfully complain about an error for which he or she is responsible for or a ruling he or she has invited the trial court to make. The appellate court also found that the trial court erred in crediting former wife with funds that were no longer in existence at the time of the final hearing in absence of any finding that she had intentionally dissipated them. Questions pertaining to the prepaid college plans were remanded to the trial court for resolution; the appellate court noted that the trial court's failure to address the issues was "understandable" as neither spouse had addressed them in their proposed final judgments.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/June/June%2015,%202012/2D11-1811.pdf (June 15, 2012).

Youngblood v. Youngblood, __So. 3d__, 2012 WL 2125940 (Fla. 2d DCA 2012). PARALEGAL ACTIVITIES CANNOT BE CLERICAL OR SECRETARIAL IN ORDER TO QUALIFY FOR ATTORNEY'S FEES UNDER 57.104, FLORIDA STATUTES. Former husband sought review of a trial court order,

pursuant to Florida Rules of Appellate Procedure 9.400(c). The appellate court agreed with former husband that the trial court erred on remand in awarding former wife expenses it labeled “suit money” over former husband’s objection that it was untimely; accordingly, the appellate court struck the award. Concluding that roughly one-half of the claimed paralegal time was spent on clerical or secretarial activities, the appellate court held that such activities were not proper under s. 57.104, F.S. which limits an award of attorney fees for paralegal’s contributions of “nonclerical, meaningful legal support.” The appellate court also concluded that the trial court abused its discretion by awarding an excessive fee for former wife’s appellate representation.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/June/June%2013,%202012/2D09-4648.pdf (June 13, 2012).

Henderson v. Lyons, __So. 3d__, 2012 WL 2126538 (Fla. 2d DCA 2012). **PSYCHOLOGICAL COUNSELING IS A MEDICAL EXPENSE FOR WHICH A PARENT IS RESPONSIBLE; CONTRIBUTION MAY BE REQUIRED DEPENDING ON FACTS AND CIRCUMSTANCES, AND NECESSITY AND REASONABLENESS OF FEES.** Take one: former wife appealed the order on her motion for contempt in which the trial court denied her request regarding expenses of psychological counseling for the couple’s minor children. Holding that such expenses are medical expenses that may require contribution depending on circumstances and that a parent’s responsibility for a child’s medical expenses includes those incurred for reasonable psychological care, the appellate court reversed and remanded for reconsideration of the psychological counseling expenses. Former husband should be given an opportunity to contest the necessity and reasonableness of the expenses on reconsideration.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/June/June%2013,%202012/2D11-1884.pdf (June 13, 2012).

Rowe v. Rodriguez-Schmidt, __So. 3d__, 2012 WL 2126002 (Fla. 2d DCA 2012). **TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW IN GRANTING MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM NONPARTY; ORDER TO COMPEL PRODUCTION FROM NONPARTY REVIEWABLE BY CERTIORARI BECAUSE HE OR SHE IS WITHOUT REMEDY ON APPEAL.** Former wife sought a writ of certiorari to review a trial court order granting former husband’s motion to compel discovery of financial information regarding her current husband—a nonparty. Finding that the trial court had departed from the essential requirements of the law in granting the motion, the appellate court granted certiorari. The appellate court reiterated that an order compelling production of documents by a nonparty is reviewable by certiorari because he or she is without a remedy on appeal. It concluded that a review on the merits was appropriate in this case.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/June/June%2029,%202012/2D11-1829.pdf (June 13, 2012).

Eisele v. Eisele, __So. 3d__, 2012 WL (Fla. 2d DCA 2012). **REQUIREMENT TO MAINTAIN LIFE INSURANCE TO SECURE SUPPORT IMPROPER IF NEITHER SPOUSE REQUESTS IT AND NO EVIDENCE IS PRESENTED ON ISSUE; TRIAL COURT CANNOT PROSPECTIVELY DETERMINE IF HOME-SCHOOLING IS IN CHILD’S BEST INTEREST; CAN DETERMINE NOW SINCE CHILD IS**

ALMOST SIX. Both former spouses appealed the final judgment of dissolution of their marriage; the appellate court found merit in two of former husband's challenges. The appellate court struck the requirement that each spouse maintain life insurance to secure the child support because neither spouse had requested it or given evidence; therefore, it was not shown that the requirement was proper. Citing Arthur v. Arthur, 54 So. 3d 454 (Fla. 2010), in which the Supreme Court held that a "prospective-based" analysis of a child's best interest is unsound, the appellate court held that the trial court erred in finding that the minor child could not be home-schooled by either parent, because she would not reach kindergarten age until approximately 20 months after the date of the final judgment. As that child is now almost six years old, the appellate court instructed the trial court to hold a hearing on the issue of whether she should be home-schooled by either parent. It also instructed the trial court to seal the social investigation report.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/May/May%2025,%202012/2D11-667.pdf (May 25, 2012).

Payne v. Payne, __So. 3d__, 2012 WL (Fla. 2d DCA 2012). **STARTING POINT FOR ALIMONY DETERMINATION IS NEED AND ABILITY TO PAY; TRIAL COURT IS NOT REQUIRED TO EQUALIZE SPOUSES' FINANCIAL POSITIONS; TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO AWARD ATTORNEY'S FEES IN CASES OF DISPARITY IN SPOUSES' INCOMES AND LACK OF READY ASSETS.** The appellate court affirmed the denial of former husband's request for permanent alimony, but reversed the denial of attorney's fees. The appellate court held that, "the starting point for every alimony determination is need and ability to pay." It noted that a trial court is not required to equalize the spouses' financial positions. Here, the trial court had found that former husband failed to show a need for alimony over and above his own earning capacity; its findings were supported by competent, substantial evidence. The appellate court found no abuse of discretion in the denial of alimony; however, it found that former husband was in need of funds for his attorney's fees. It noted that a trial court abuses its discretion in failing to award attorney's fees where there is a disparity between the spouses' present incomes and lack of ready assets in equitable distribution.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/May/May%2023,%202012/2D10-5715.pdf (May 23, 2012).

Johnson v. Johnson, __So. 3d__, 2012 WL (Fla. 2d DCA 2012). **DENIAL OF DUE PROCESS BY TRIAL COURT IN DISSOLUTION OF MARRIAGE AND UCCJEA PROCEEDINGS.** Former husband, an army colonel stationed in Italy and deployed to Afghanistan, appealed a trial court order which dismissed his petition to dissolve a 23-year marriage and to share in the parenting of a minor son; his parents lived in Sarasota County and he had declared Florida as his domicile and the residence of the son. Former wife, who left Italy for New York with their son during the deployment, petitioned for dissolution and custody in New York. She moved to dismiss the Florida petition for lack of jurisdiction or for forum nonconveniens. The appellate court found that the trial court had no facts upon which to base its conclusion that New York was the proper forum for the child custody determination, nor did the trial court make specific findings to support its conclusion that New York was the home state. The appellate court held that the trial court's failure to meet the statutory requirements of s. 61.511(2), F.S. denied former

husband due process; it ordered a new UCCJEA hearing be held to determine the child's home state. The appellate court held that the trial court further denied former husband due process when it dismissed his petition for dissolution without notice or an opportunity to be heard on former wife's motion to dismiss; accordingly, that dismissal was reversed and remanded for new proceedings consistent with the opinion.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/May/May%2009,%202012/2D11-1102.pdf (May 9, 2012).

Mayo v. Mayo, __ So. 3d __, 2012 WL (Fla. 2d DCA 2012). **FAILURE TO CONSIDER CHILD'S BEST INTEREST IN SETTING TIME-SHARING SCHEDULE IS REVERSIBLE ERROR.** The appellate court concluded that the trial court did not address the best interests of the child when it modified the time-sharing schedule; accordingly, it reversed and remanded for entry of an order containing a time-sharing schedule reflecting consideration of the child's best interests. Noting that the term "visitation" used by the trial court has been replaced in chapter 61 by "time-sharing" and "parenting plans," the appellate court held that regardless of terminology, s. 61.13, F.S. requires that once the trial court makes a finding that there is a substantial change in circumstances with regard to the time-sharing schedule, it must consider the best interests of the child in setting that schedule. Failure to do so is error.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/May/May%2009,%202012/2D10-2411.pdf (May 9, 2012).

Trask v. Trask, __ So. 3d __, 2012 WL 1449213 (Fla. 2d DCA 2012). **FINAL JUDGMENT REMANDED TO READ IN ACCORDANCE WITH MEDIATED SETTLEMENT AGREEMENT APPROVED BY TRIAL COURT.** Short opinion in which the appellate court affirmed the final judgment of dissolution of marriage, but remanded to the trial court for correction of the stated number of alimony payments and total amount of alimony in accordance with the mediated settlement agreement it approved.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/April/April%2027,%202012/2D11-1437.pdf (April 27, 2012).

Featherston v. Featherston, __ So. 3d __, 2012 WL 1366729 (Fla. 2d DCA 2012). **SPOUSE SHOULD NOT HAVE TO USE NONMARITAL ASSETS TO SUPPORT THEMSELVES DURING DISSOLUTION OF MARRIAGE PROCEEDINGS TO MAINTAIN STANDARD OF LIVING; TRIAL COURT ERRED IN TREATING RENTAL PROPERTIES SEPARATELY WITHOUT REGARD TO WHETHER THEIR VALUE EXCEEDED THE MORTGAGE BALANCE.** Former wife appealed the final judgment of dissolution of marriage; the appellate court affirmed with three exceptions. The appellate court held that: the trial court had abused its discretion in not awarding retroactive alimony to former wife; the trial court had erred in failing to list and distribute a maritime pension and two cars; and the trial court's instructions regarding future distribution of any proceeds from three rental properties were incomplete. With regard to the first point, the appellate court held that a spouse should not have to resort to consuming a nonmarital asset to support himself or herself during the pendency of the dissolution proceedings to maintain the standard of living enjoyed during the marriage; here there was no question that former wife had need for temporary support and former husband had the ability to pay. The appellate court held that former wife

was entitled to prejudgment interest on the award of retroactive alimony. As to the second point, the appellate court instructed the trial court on remand to value and distribute the vehicles and the pension. On the third point, the appellate court noted that although the final judgment ordered that the three rental properties be sold, it treated each rental property separately, without regard to the fact that one was worth less than the outstanding balance of the mortgage, one was worth an amount roughly equal to the mortgage, and funds gained from the remaining property might or might offset any losses in the other two sales.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/April/April%2020,%202012/2D10-5214.pdf (April 20, 2012).

Alinat v. Curtis, __So. 3d__, 2012 WL 1366732 (Fla. 2d DCA 2012). **THREE YEARS IS NOT CONSIDERED TEMPORARY UNDER RELOCATION STATUTE.** In post-dissolution relocation proceeding, the appellate court held that s. 61.13001, F.S. does not contemplate a “temporary” relocation of three years’ duration; subsection (6) (b) allows a trial court to grant a temporary relocation order “pending final hearing.” The appellate court held that in order to grant a temporary relocation, a trial court must find that there is a “likelihood” that relocation will be granted at the final hearing based upon an examination of the evidence presented at the preliminary hearing. Citing Arthur v. Arthur, 54 So. 3d 454 (Fla. 2010), in which the Supreme Court stated that a trial court is “not equipped with a crystal ball” to determine a child’s future best interests and that the final determination regarding relocation must be made at the time of the hearing, the appellate court held that here the trial court erred as a matter of law in requiring the temporary order to stay in effect while former wife and the children lived in Australia during her completion of a three-year term of employment there.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/April/April%2020,%202012/2D11-6062.pdf (April 20, 2012).

Farrell v. Farrell, __So. 3d __, 2012 WL 1232010 (Fla. 2d DCA 2012). **FAILURE TO ALLOW A PARTY TO PRESENT EVIDENCE AND BE HEARD ON ISSUES PENDING BEFORE THE COURT CONSTITUTES DENIAL OF DUE PROCESS.** Former wife appealed a post-dissolution order denying her motion for attorneys’ fees; the order was issued four days before the date to which the fee hearing was continued. Holding that a trial court’s failure to allow a party to present evidence and be heard on issues pending before the court constitutes a denial of due process, the appellate court reversed and remanded. It declined to order a new judge be assigned, noting that former wife could file a motion for recusal if based on good faith.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/April/April%2013,%202012/2D11-2359.pdf (April 13, 2012).

Warren v. Warren, __So. 3d__, 2012 WL 1193191 (Fla. 2d DCA 2012). **MODIFICATION MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.** The appellate court held that modification of child support must be supported by competent, substantial evidence in the record.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/April/April%2011,%202012/2D11-2180.pdf (April 11, 2012).

Third District Court of Appeal

De Campos v. Ferrara, __So. 2d __, 2012 WL 2012155 (Fla. 3d DCA 2012). **SECTION 61.16(1), F.S. GOVERNS ENTITLEMENT TO FEES IN ENFORCEMENT PROCEEDING IN ABSENCE OF WAIVER OF FEES IN SETTLEMENT AGREEMENT.** Former husband appealed the denial of his motion for rehearing and his fees and costs; the appellate court reversed. Contrary to the final judgment of dissolution entered seventeen years before, former wife sold the former spouses' business without telling former husband; the final judgment had directed that each spouse receive one-half of the proceeds from sale of the company. She misappropriated the proceeds and then attempted to misrepresent their amount once the sale was revealed to former husband. She contended that she had paid former husband approximately one-half of the sales of the business two years after the dissolution while transferring the company's assets to a similarly-named business which she incorporated; former husband claimed that payment was unrelated to their business. The trial court agreed with former husband that the payment was unrelated and that he was entitled to one-half of the net proceeds received from the sale; it deferred ruling as to whether he was entitled to fees and costs. The appellate court disagreed with the trial court's conclusion that the proceedings were declaratory in nature; it held that because former husband was trying to enforce the final judgment, his entitlement to fees was governed by section 61.16(1), F.S. Accordingly, it reversed and remanded to determine that issue. <http://www.3dca.flcourts.org/Opinions/3D10-3009.pdf> (June 6, 2012).

Guizzardi v. Guizzardi, __So. 3d __, 2012 WL (Fla. 3d DCA 2012). **MODIFICATION REQUIRES SUBSTANTIAL CHANGE IN CIRCUMSTANCES.** Former husband appealed a post-dissolution order granting former wife's petition to relocate the minor child to Lima, Peru; the final judgment had ordered shared parental responsibility and no relocation of the child outside Miami-Dade or Broward Counties, without consent of both parents. The appellate court found that although the trial court incorrectly applied s. 61.13001, F.S. that error did not deprive the trial court of jurisdiction to consider the relocation request. Finding itself "unable to discern" whether the change in circumstances warranted modification, the appellate court reversed and remanded for determination of that issue. <http://www.3dca.flcourts.org/Opinions/3D11-1745.pdf> (May 2, 2012).

Silverman v. Silverman, __So. 3d __, 2012 WL (Fla. 3d DCA 2012). **MODIFICATION MUST BE WARRANTED; CHANGES IN THE ECONOMY, STANDING ALONE, DO NOT SUPPORT MODIFICATION; THERE MUST BE A SHOWING THAT THE CHANGES SPECIFICALLY IMPACT THE SPOUSE REQUESTING MODIFICATION.** Both former spouses appealed the upward modification of former wife's alimony award; the appellate court reversed. The appellate court reiterated that the standard governing modification is relevant only after a showing that it is warranted in the first place; it concluded that no such showing had been made. Although the appellate court found that the trial court was correct in understanding Bedell v. Bedell, 583 So. 2d 1005 (Fla. 1991), to allow an increased cost of living over time to qualify as a "change in circumstances," it held that reduced purchasing power of the dollar, standing alone, cannot support modification. There must be an additional showing that the change in economic conditions specifically impacts the spouse claiming the change in conditions as basis for modification. The appellate

court noted reversals of upward modifications due to an absence of proof of a real change in the circumstances of the spouse, as opposed to an abstract change in the economy as a whole. The appellate court distinguished Bedell, where the increased cost of living left a spouse in dire circumstances, from appeals such as this, where a spouse may have suffered loss of components of a more lavish lifestyle due to the economy.

<http://www.3dca.flcourts.org/Opinions/3D10-2682.pdf> (May 2, 2012).

Riera v. Riera, __So. 3d__, 2012 WL 1414614 (Fla. 3d DCA 2012). **ANY DUTY PARENT HAS TO PAY COLLEGE EXPENSES FOR ADULT CHILD IS MORAL, NOT LEGAL; WHEN A PARENT OBLIGATES HIMSELF TO PAY THOSE EXPENSES PURSUANT TO AN MSA, THAT OBLIGATION IS NOT CHILD SUPPORT, BUT CONTRACTUAL AND THEREFORE NOT ENFORCEABLE BY CONTEMPT.** Former husband appealed two post-dissolution orders: one, an order enforcing a marital settlement agreement (MSA), and requiring that he reimburse former wife and make future payments for their adult son's college expenses; the other, an order finding him in contempt for willfully disregarding the enforcement order. Although the MSA provided that both spouses would share equally in the cost of the child's college education, including shared purchase of a Florida four-year pre-paid college program, it was silent as to whether the college was limited to those in Florida. Concluding that the MSA contained a latent ambiguity, the appellate court reversed and remanded the enforcement order for an evidentiary hearing on the parties' intent when they executed it. The appellate court noted that any duty a parent has to pay an adult child's college education is moral rather than legal. When a parent obligates himself or herself to pay those expenses pursuant to an MSA, that obligation is not child support, but is instead a contractual obligation arising from the MSA; therefore, contempt is not available for enforcement. The appellate court stated that even had it affirmed the enforcement order, it would have reversed the contempt order. In a concurring opinion, one judge disagreed with the majority's conclusion regarding the latent ambiguity within the MSA.

<http://www.3dca.flcourts.org/Opinions/3D10-3441.pdf> (April 25, 2012).

Rojo v. Rojo, __So. 3d__, 2012 WL 1316804 (Fla. 3d DCA 2012). **TRIAL COURT CONTEMPT ORDER SHOULD NOT BE OVERTURNED UNLESS IT COMMITTED FUNDAMENTAL ERROR; HOWEVER, IF CONTEMPT IS BASED ON PARTY'S FAILURE TO FOLLOW AN UNCLEAR ORDER, STANDARD OF REVIEW IS LEGAL ERROR.** Former wife appealed from an order finding her in contempt for failing to transfer certain properties to former husband and have their minor child travel to Mexico to be with former husband as required by the time-sharing components of the final judgment of dissolution. The appellate court held that a contempt order should not be overturned unless it is clear that the trial court committed fundamental error by either abusing its discretion or departing from essential requirements of law; however, if the contempt order is based on a party's failure to follow an order which fails to state clearly what must be done, the standard of review is legal error. In this case, the appellate court found no abuse of discretion with the finding of contempt regarding former wife's failing to transfer the properties; however, it concluded that the trial court had abused its discretion in finding her in contempt regarding the minor child's travel to Mexico under the facts.

<http://www.3dca.flcourts.org/Opinions/3D11-1537.pdf> (April 18, 2012).

Acosta v. Acosta-Renta, __ So. 3d __, 2012 WL 1192051 (Fla. 3d DCA 2012). TRIAL COURT HAS DISCRETION TO MODIFY ALIMONY RETROACTIVE TO FILING DATE OF PETITION OR ANY SUBSEQUENT DATE, BUT NOT SUBSEQUENT TO THE DATE OF ITS ORDER; TRIAL COURT ABUSES ITS DISCRETION IF IT FAILS TO USE FILING DATE AS EFFECTIVE DATE IF CIRCUMSTANCES REQUIRING MODIFICATION EXISTED ON DATE OF FILING OF PETITION FOR MODIFICATION.

Former husband appealed a trial court order on downward modification of permanent, periodic alimony and former wife's motion for contempt. The appellate court held that although the general rule is that an order granting a modification of alimony should be made retroactive to the date of the filing of the petition, it is within the trial court's discretion to modify the alimony effective any date subsequent to the filing, so long as that date is not subsequent to the date of the order. A trial court abuses its discretion, however, if it fails to grant modification retroactive to the filing date if the circumstances supporting modification existed on the date the petition was filed. Here, no evidence supported the trial court's finding that former husband, having suffered a substantial reduction to his income, had the ability to make alimony payments after the date of filing; accordingly, the appellate court reversed and remanded for a determination of what he could pay.

<http://www.3dca.flcourts.org/Opinions/3D11-0112.pdf> (April 11, 2012).

Fourth District Court of Appeal

Goldstein v. Goldstein, __ So. 3d __, 2012 WL 2400889 (Fla. 4th DCA 2012). TRIAL COURT ABUSED ITS DISCRETION IN NOT AWARDING SPOUSE AT LEAST A PORTION OF FEES AND COSTS; IT IS ERROR TO ATTRIBUTE DEPLETED MARITAL ASSETS USED FOR LIVING EXPENSES TO SPOUSE IN ABSENCE OF MISCONDUCT.

Former wife appealed an amended final judgment of dissolution of marriage on the grounds that the trial court abused its discretion in denying her request for fees and costs and failing to make findings regarding her need for alimony and former husband's ability to pay; the appellate court agreed. The appellate court concluded that although former wife received more liquid assets than former husband, the record still reflected a significant disparity in income. Former wife demonstrated a need for fees and costs and former husband had the ability to pay at least part of them. The trial court abused its discretion by not awarding her at least a portion of her fees and costs; accordingly, the appellate court remanded with instructions to make that award. Reiterating that it is error to include depleted assets in the scheme of equitable distribution in the absence of misconduct, the appellate court held that the trial court erred in attributing to former wife assets that she depleted for reasonable living expenses. In this case, there was neither a finding of such misconduct nor evidence in the record to support a finding.

<http://www.4dca.org/opinions/June%202012/06-27-12/4D10-3081.op.pdf> (June 27, 2012).

Hollingsworth v. Hollingsworth, __ So. 3d __, 2012 WL 2400855 (Fla. 4th DCA 2012). TRIAL COURT ERRED IN NOT CREDITING SPOUSE WITH PREVIOUS PAYMENTS.

Former husband raised several issues in his appeal of a final judgment of dissolution of marriage. The appellate court affirmed on all issues, with the exception of the trial court's failure to give former husband credit against the retroactive alimony award for payments previously made; accordingly, it instructed the trial court to correct its judgment and reduce the obligation.

<http://www.4dca.org/opinions/June%202012/06-27-12/4D11-2615.op.pdf> (June 27, 2012).

Culbertson v. Culbertson, __So. 3d__, 2012 WL 2328003 (Fla. 4th DCA 2012). **STANDARD OF REVIEW FOR TRIAL COURT'S DETERMINATION OF TIME-SHARING IS ABUSE OF DISCRETION; RESTRICTION OF TIME-SHARING IS DISFAVORED UNLESS IT IS NECESSARY TO PROTECT THE WELFARE OF THE CHILD.** Former wife appealed the final judgment of dissolution of marriage, arguing that the trial court erred in: awarding unsupervised and extended overnight time-sharing to former husband; failing to designate her as the parent responsible for the children's major medical decisions; and failing to make a specific finding that a home she brought into the marriage was a nonmarital asset for which former husband should execute a quitclaim deed. The appellate court affirmed on all issues; it addressed only the time-sharing issue in what it termed a very difficult case, in part due to the fragile health of one of the children. The appellate court stated that the standard of review for a trial court's determination of time-sharing is abuse of discretion; restriction of visitation is generally disfavored, unless it is necessary to protect the welfare of the child. Here, the appellate court deferred to the trial court's "superior vantage point" in determining the credibility of former husband regarding care of his daughter, found no abuse of discretion, and concluded it would not disturb the trial court's decision to award overnights to former husband. This opinion contains a dissent concluding that the trial court abused its discretion regarding the time-sharing; the dissenting judge felt that the parenting plan should be reversed because the children's best interests were not being served.

<http://www.4dca.org/opinions/June%202012/06-20-12/4D11-1658.op.dissent.pdf>
(June 20, 2012).

Simon v. Simon, __So. 3d__, 2012 WL 2327827 (Fla. 4th DCA 2012). **TRIAL COURT ERRED IN IGNORING CLEAR LANGUAGE OF SPOUSES' AGREEMENT.** The appellate court agreed with former husband that the trial court had erred by failing to enforce the spouse's amended premarital agreement with regard to certain artwork former wife removed from the marital home. The agreement provided that each spouse keep any artwork that they possessed prior to the marriage; any artwork acquired during the marriage would be divided between them as each took turns choosing piece by piece. When former wife removed all the artwork from their home in Boca, the trial court awarded the artwork in the Snowmass home to former husband and called it a wash. The appellate court found this ruling ignored the clear and unambiguous language in the agreement regarding division of the artwork and reversed.

<http://www.4dca.org/opinions/June%202012/06-20-12/4D12-558.op.pdf> (June 20, 2012).

Chovan v. Chovan, __So. 3d__, 2012 WL 2148215 (Fla. 4th DCA 2012). **INCONSISTENCIES BETWEEN AN ANNOUNCED SETTLEMENT AGREEMENT AND THE WRITTEN JUDGMENT REQUIRE CORRECTION OF THE JUDGMENT; SETTLEMENT AGREEMENTS ARE HIGHLY FAVORED IN THE LAW; A TRIAL COURT MUST IMPUTE INCOME TO A PARENT FOR PURPOSES OF CHILD SUPPORT UNLESS THE LACK OF EMPLOYMENT IS THE RESULT OF PHYSICAL INCAPACITY OR OTHER CIRCUMSTANCES BEYOND PARENT'S CONTROL.** Former husband argued that the final judgment of dissolution of marriage failed to accurately reflect the spouses' settlement agreement pronounced on the record. He also argued that the trial court erred in failing to impute income

to former wife when determining alimony and child support, distributing the proceeds from sale of the marital residence, and requiring life insurance to secure the alimony and child support obligations. The appellate court affirmed the alimony award in part, affirmed the life insurance requirement, reversed the child support and distribution of the sale proceeds, and remanded for correction of the final judgment to reflect the agreement, after concluding that it was inconsistent with the announced settlement agreement.

<http://www.4dca.org/opinions/June%202012/06-13-12/4D11-1005.op.pdf> (June 13, 2012).

Coviello v. Coviello, __So. 3d__, 2012 WL 2122177 (Fla. 4th DCA 2012). **TRIAL COURTS HAVE BROADEST DISCRETION WITH TEMPORARY RELIEF; NO ABUSE OF DISCRETION IN AWARD OF TEMPORARY ALIMONY ALTHOUGH SHORT TERM MARRIAGE MAY NOT WARRANT PERMANENT ALIMONY.** Former husband sought review of an order granting former wife temporary alimony and other relief. The appellate court held that temporary relief awards fall into an area in which a trial court has the broadest discretion. It reiterated that both the requesting spouse's need for alimony and the ability of the other spouse to pay must be supported by competent, substantial evidence. The appellate court noted that while a short term marriage might not warrant permanent alimony, there was no abuse of discretion in the trial court's award of temporary alimony under the facts.

<http://www.4dca.org/opinions/June%202012/06-13-12/4D11-1005.op.pdf> (June 13, 2012).

Vitro v. Vitro, __So. 3d__, 2012 WL 2012458 (Fla. 4th DCA 2012). **IMPUTATION OF INCOME MUST BE BASED ON COMPETENT, SUBSTANTIAL EVIDENCE; IN ABSENCE OF AGREEMENT BETWEEN SPOUSES, TRIAL COURT MUST MAKE SPECIFIC FINDINGS REGARDING MARITAL LIABILITIES; ALIMONY IS CONSIDERED PART OF A SPOUSE'S INCOME—CHILD SUPPORT IS NOT; STANDARD OF LIVING IS NOT A SUPER FACTOR, TRIAL COURT MUST CONSIDER ALL RELEVANT FACTORS INCLUDING THE SPOUSES' CURRENT FINANCIAL CONDITIONS.** Former husband appealed the final judgment of dissolution of marriage, contending that the trial court erred in its alimony award to former wife and in its scheme of equitable distribution. The appellate court affirmed in part and reversed in part; it remanded for reconsideration and clarification by the trial court. The appellate court affirmed the trial court's imputation of income to former wife because it was based on competent, substantial evidence; however, it reversed the award of retroactive alimony to former wife because it was not supported by the record. As to equitable distribution, the appellate court held that in absence of any agreement between the parties, a trial court must make specific findings with regard to marital liabilities. Issues regarding credit card debt, balances due on prepaid college accounts, and vehicles were neither agreed upon nor clear in the final judgment; the appellate court remanded for specific findings and/or clarification. The appellate court reiterated that while alimony can be considered part of a former spouse's income, a child support obligation cannot. Finding that trial court did not consider the standard of living to be a "super factor", the appellate court held that the trial court's alimony award demonstrated that it took into account all relevant factors, including the spouses' current financial circumstances. However, it noted that changes in the equitable distribution scheme might require reconsideration of alimony.

<http://www.4dca.org/opinions/June%202012/06-06-12/4D10-2189.op.pdf> (June 6, 2012).

Green v. Green, __ So. 3d __, 2012 WL 2012606 (Fla. 4th DCA 2012). **TRIAL COURT SHOULD HAVE IMPUTED INCOME TO SPOUSE; REMANDED FOR IMPUTATION AND RECALCULATION OF AMOUNT OF ALIMONY AWARD.** Former husband raised a number of issues in his appeal of a final judgment of dissolution of marriage; the appellate court affirmed in part and reversed in part. The appellate court concluded that the trial court did not abuse its discretion in awarding permanent, periodic alimony; however, it erred in failing to impute income to former wife. The appellate court emphasized use of the word “should” in s. 61.08(2)(d)-(e), F.S. and noted that there was competent, substantial evidence former wife had earned \$80.00 an hour in her own photography business; the record reflected a lack of best efforts on her part to seek employment. The appellate court concluded that the final judgment lacked the requisite findings to justify an alimony award equating to 43% of former husband’s gross monthly income in addition to the assignment of credit card debt. On remand, the trial court was instructed to impute income to former wife and to recalculate the alimony award in light of that imputation and the “disproportionate distribution” of the credit card debt.
<http://www.4dca.org/opinions/June%202012/06-06-12/4D10-4706.op.pdf> (June 6, 2012).

Piedra v. Peidra, __ So. 3d __, 2012 WL 2014306 (Fla. 4th DCA, 2012). **IMPUTATION OF INCOME MUST BE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE; HEALTH INSURANCE PREMIUMS MUST BE APPORTIONED.** Former husband appealed the trial court’s scheme of equitable distribution, the amount of income it imputed to him, and the lack of apportionment of the minor children’s health insurance premiums. The appellate court affirmed the equitable distribution and the trial court’s conclusion that income should be imputed, but reversed the amount of income imputed and remanded for clarification of the apportionment of the costs of the insurance premiums. The appellate court reiterated that imputation of income must be supported by competent, substantial evidence. It found that the trial court correctly ordered former husband to obtain insurance, but failed to indicate in the judgment the apportionment required by s. 61.30(6), F.S.
<http://www.4dca.org/opinions/June%202012/06-06-12/4D11-2023.op.pdf> (June 6, 2012).

Gilbert v. Katz-Gilbert, __ So. 3d __, 2012 WL (Fla. 4th DCA 2012). **TRIAL COURT MUST INCLUDE FACTUAL FINDINGS, BASED ON COMPETENT, SUBSTANTIAL EVIDENCE, WHEN MAKING AN UNEQUAL DISTRIBUTION.** The appellate court agreed with former husband that the trial court erred in allocating a disproportionate share of the marital liabilities to him without providing an explanation or justification for the unequal distribution. The appellate court held that a trial court commits reversible error if it makes an unequal distribution of marital assets or liabilities without including factual findings, based on competent, substantial evidence, which explain or justify the unequal distribution. Accordingly, it reversed and remanded for the trial court to either reallocate the marital liabilities or make the necessary factual findings to support its unequal distribution.
<http://www.4dca.org/opinions/May%202012/05-30-12/4D10-4556.op.pdf> (May 30, 2012).

Forest-Kohl v. Kohl, __ So. 3d __, 2012 WL (Fla. 4th DCA 2012). **TRIAL COURT MUST CLASSIFY A LIABILITY AS MARITAL OR NONMARITAL.** The appellate court agreed with former wife that the trial court erred in failing to designate her credit card and student loan debt as either marital or

nonmarital liabilities in the scheme of equitable distribution. She had incurred both debts during the marriage. The appellate court held that a trial court commits reversible error if it fails to classify a liability as either marital or nonmarital. Accordingly, it reversed and remanded for the trial court to make the necessary statutory findings.

<http://www.4dca.org/opinions/May%202012/05-23-12/4D11-698.op.pdf> (May 23, 2012).

Elbaum v. Elbaum, __So. 3d__, 2012 WL (Fla. 4th DCA 2012). **TRIAL COURT MUST MAKE CERTAIN FINDINGS WHEN REQUIRING SPOUSE TO OBTAIN OR MAINTAIN LIFE INSURANCE TO SECURE ALIMONY OBLIGATION.** Former husband appealed the final judgment of dissolution of marriage, arguing trial court error. The appellate court found no abuse of discretion by the trial court in either the type or amount of permanent alimony awarded to former wife; however, it did find that the trial court erred in failing to include the requisite factual findings when it ordered former husband to secure the alimony obligation with life insurance.

<http://www.4dca.org/opinions/May%202012/05-09-12/4D10-4554.op.pdf> (May 9, 2012).

Randazzo v. Randazzo, __So. 3d__, 2012 WL (Fla. 4th DCA 2012). **IN AWARDING FEES TRIAL COURT MUST MAKE FINDINGS AS TO THE REASONABLE HOURLY RATE, THE NUMBER OF HOURS REASONABLY EXPENDED, AND ANY APPROPRIATE REDUCTION OR ENHANCEMENT FACTORS.** Former wife appealed an order reimbursing former husband for overpayment of child support and awarding him attorney's fees; the appellate court affirmed. The appellate court concluded that the trial court had made sufficient findings regarding the award of fees and costs.

<http://www.4dca.org/opinions/May%202012/05-09-12/4D09-4394.op.pdf> (May 9, 2012).

Galstyan v. Galstyan, __So. 3d__, 2012 WL 1319031 (Fla. 4th DCA 2012). **TRIAL COURT FAILED TO MAKE REQUIRED FINDINGS AND THUS ABUSED DISCRETION.** Former husband appealed the final judgment of dissolution of marriage. The appellate court reversed and remanded due to the trial court's failure to make required findings of fact regarding former husband's: ability to pay, financial resources, and source of income. The appellate court stated that a trial court abuses its discretion when it orders a spouse to make a monthly alimony payment far above his or her monthly income in the absence of competent, substantial evidence that the spouse's actual monthly income exceeds his or her stated monthly income. It also abuses its discretion if it establishes a child support arrearages repayment plan without having made factual findings regarding a spouse's ability to pay. Imputation of income must also be supported by competent, substantial evidence. The appellate court construed ss. 61.13(1)(c) and 61.08, F.S. as authorizing a trial court to order a spouse to obtain either life insurance or a bond to secure alimony and child support obligations—but not both. The appellate court reiterated that if the trial court orders a spouse to obtain life insurance, it must make specific findings as to the availability and cost of such insurance for the paying spouse in addition to finding that a need for securing the obligations has been demonstrated. In addition, there must be a relationship between the amount of insurance the spouse is required to obtain and the amount of the obligation.

<http://www.4dca.org/opinions/April%202012/04-18-12/4D11-641.op.pdf> (April 18, 2012).

Hartman v. Hartman, __So. 3d __, 2012 WL 1108524 (Fla. 4th DCA 2012). **TRIAL COURT CANNOT MODIFY JUDGMENT WITHOUT A PETITION TO MODIFY.** In another case involving payment of college expenses, former wife appealed a nonfinal order denying her motion to hold former husband in contempt for failing to pay one-half of college expenses for their oldest son, pursuant to the marital settlement agreement (MSA). The appellate court based its reversal upon its conclusion that, absent a pending motion to modify, the trial court lacked authority to modify the terms of the MSA. The appellate court held that a trial court is without jurisdiction to modify a final judgment where no petition to modify has been filed.
<http://www.4dca.org/opinions/April%202012/04-04-12/4D11-2258.op.pdf> (April 4, 2012).

Witte v. Witte, __So. 3d __, 2012 WL 1108539 (Fla. 4th DCA 2012). **CERTIORARI GRANTED FOR TRIAL COURT TO MAKE A FACTUAL DETERMINATION AS TO WHETHER SPOUSE'S COMMUNICATIONS IN PRESENCE OF CLOSE FAMILY MEMBER WERE INTENDED TO REMAIN CONFIDENTIAL.** Former wife sought certiorari review of nonfinal order finding that she had waived the attorney-client privilege because a significant portion of her communications with her lawyer were in the presence of her daughter and son-in-law, both of whom she relied on for assistance during her communications with counsel. Noting that there are few Florida appellate opinions construing s. 90.502(1) (c), F.S. the appellate court found that the cases outside Florida "suggest that the presence of a close family member does not, in and of itself, waive the attorney-client privilege." The appellate court granted the petition to the extent of remanding the case to allow the trial court to make a factual determination as to whether former wife's communications with her lawyer in the presence of her daughter and son-in-law were intended to remain confidential.
<http://www.4dca.org/opinions/April%202012/04-04-12/4D11-3520.op.pdf> (April 4, 2012).

Ramirez v. Ramirez, __So. 3d __, 2012 WL 1108544 (Fla. 4th DCA 2012). **CONTEMPT ORDER MUST INCLUDE FINDING THAT SPOUSE HAS PRESENT ABILITY TO PAY SUPPORT AND THAT THEY WILLFULLY REFUSED TO DO SO; IF TRIAL COURT ORDERS INCARCERATION, IT MUST ADDITIONALLY FIND THAT THE SPOUSE HAS PRESENT ABILITY TO PAY PURGE AND STATE FACTS IN SUPPORT OF SUCH.** Former husband appealed a nonfinal order finding him in contempt and ordering incarceration for having failed to make support payments to former wife, pursuant to a temporary relief order entered previously. Concluding that the contempt order failed to include the required findings that former husband had the present ability to pay the support and that he willfully refused to comply with the prior court order, the appellate court reversed. The appellate court noted that if the trial court orders incarceration, it must affirmatively find that the contemnor has the present ability to pay the purge and include the factual basis for that finding; that was not done in this case.
<http://www.4dca.org/opinions/April%202012/04-04-12/4D11-3818.op.pdf> (April 4, 2012).

Fifth District Court of Appeal

Schwieterman v. Schwieterman, __So. 3d __, 2012 WL (Fla. 5th DCA 2012). **NO ABUSE OF DISCRETION IN TIME-SHARING SCHEDULE BASED ON COMPETENT, SUBSTANTIAL EVIDENCE; PROVISIONS IN FINAL JUDGMENT ALLOWING FORMER SPOUSE'S PARENTS TO RESOLVE**

PARENTING DISPUTES BETWEEN FORMER SPOUSES STRUCK AS IMPROPER. Former wife appealed the trial court's findings and rulings regarding time-sharing in its final judgment of dissolution of marriage. In what it termed, "a very close case," the appellate court stated that while another trial court might have reached a different decision, it was unable to find a lack of competent, substantial evidence to support the trial court's determination regarding time-sharing, nor could it conclude that the trial court had abused its discretion. Accordingly, it affirmed the time-sharing plan adopted by the trial court; however, it struck provisions allowing former husband's parents to resolve disputes between the parenting disputes between the former spouses from the final judgment.

<http://www.5dca.org/Opinions/Opin2012/052112/5D11-143.op.pdf> (May 25, 2012).

Robinson v. Robinson, __So. 3d__, 2012 WL 1440435 (Fla. 5th DCA 2012). **SPOUSE ENTITLED TO FEES AFTER LITIGATING OTHER SPOUSE'S VIOLATIONS OF STAY ORDER ISSUED BY APPELLATE COURT.** Former wife appealed a second final judgment of dissolution of marriage on two points: one, a mathematical error in the distribution of assets, which was remanded for correction; and two, former husband's violation of the appellate court's stay order. Although it found that former husband had "remedied much of the damages that might have otherwise resulted from his violations of the stay order," the appellate court held that former wife was entitled to recover reasonable attorneys' fees in litigating that issue.

<http://www.5dca.org/Opinions/Opin2012/042312/5D10-2645.op.pdf> (April 27, 2012).

Fernandes v. Fernandes, __So. 3d__, 2012 WL 1364995 (Fla. 5th DCA 2012). **CONTEMPT REQUIRES CLEAR LANGUAGE IN ORDER PLUS WILLFUL DISREGARD OF IT; NEITHER SPOUSE SHOULD PASS FROM PROSPERITY INTO MISFORTUNE OR THE REVERSE; ONE SPOUSE CANNOT BE REQUIRED TO MAINTAIN THE OTHER'S STANDARD OF LIVING WHEN THAT MAINTENANCE STRETCHES BEYOND THE FINANCIAL CAPABILITIES OF THE PAYING SPOUSE.** Former husband appealed a supplemental final judgment of dissolution of marriage and contempt order. The appellate court agreed that the trial court abused its discretion in the monthly amount of permanent alimony it ordered and in finding him in contempt for failing to make payments under a mediation agreement which had been superseded by the final judgment. Following issuance of the final judgment, the spouses had different interpretations of what it required. Contempt requires that the language of the order be clear and precise so that a party is given notice of what he or she is required to do in order to comply; in addition, the party must clearly violate the order. The appellate court held here that former husband could not be held in contempt for willful violation of a judgment whose terms were unclear. It also held that although the trial court's reasoning for the amount of alimony it awarded was to place former wife in the financial position she was in before losing her job, it abused its discretion in requiring former husband to "shoulder that entire burden" with the upshot of not being able to support himself. The appellate court reiterated that a trial court should work to ensure that neither spouse passes from prosperity to misfortune or the reverse, nor should either be shortchanged or impoverished in the process.

<http://www.5dca.org/Opinions/Opin2012/041612/5D10-3741.op.pdf> (April 20, 2012).

Pirzada v. Pirzada, __ So. 3d __, 2012 WL 1364990 (Fla. 5th DCA 2012). **CHILD SUPPORT AWARD MUST ACCOUNT FOR ALIMONY AWARD**. Former husband appealed an amended final judgment of dissolution of marriage. In the absence of a transcript, the appellate court found no apparent error in the alimony award; however, it concluded that the child support award did not appear to account for the alimony award. Accordingly, it reversed and remanded for explanation or recalculation of child support.

<http://www.5dca.org/Opinions/Opin2012/041612/5D10-3249.op.pdf> (April 20, 2012).

Diament v. Diament, __ So. 3d __, 2012 WL 1231176 (Fla. 5th DCA 2012). **SPOUSE SHOULD BE GIVEN AN OPPORTUNITY TO PROVE HIS ATTEMPT TO ATTEND THE HEARING ON HIS EMERGENCY PETITION ON PARENTING ISSUES**. Former husband argued that the denial of his emergency petition to modify parental responsibility without his having been allowed to attend the hearing on the petition was a violation of his due process. The appellate court reversed and remanded for further proceedings to allow former husband an opportunity to prove that he had attempted to attend the hearing, but was prevented from doing so by the Department of Corrections (DOC).

<http://www.5dca.org/Opinions/Opin2012/040912/5D11-1495.op.pdf> (April 13, 2012).

Domestic Violence Case Law

Florida Supreme Court

In re Amendments to the Florida Supreme Court Approved Family Law Forms, __ So. 3d ____, 2012 WL 2036033 (Fla. 2012). **FORM AMENDMENTS ISSUED**. The Supreme Court amended 24 forms regarding domestic, repeat, dating, and sexual violence. The amendments do the following: (1) revise language in notices of hearing to comply with Florida Rule of Judicial Administration 2.540 (Requests for Accommodations by Persons with Disabilities); (2) remove unnecessary or unauthorized requests for personal information, such as place of marriage and place of birth or gender of a minor; (3) add language to forms used in proceedings for temporary injunctions to expressly advise litigants that failure to appear at the final hearing may result in the issuance of a permanent injunction; (4) add language in the petition for temporary injunction forms making a specific prayer for entry of a temporary injunction; (5) update language relating to health and dental insurance, where applicable, to reflect current statutory requirements; and (6) revise the method of payment sections, where applicable, to add the central depository within each circuit as an entity able to accept court-ordered payments.

<http://www.floridasupremecourt.org/decisions/2012/sc12-510.pdf> (June 7, 2012).

First District Court of Appeal

Giddens v. Tlsty, __ So. 3d ____, 2012 WL 1870076 (Fla. 1st DCA 2012). **REPEAT VIOLENCE INJUNCTION REVERSED**. The appellant appealed a final injunction for protection against repeat violence. The trial court made no findings of fact and therefore did not explicitly find two

incidents of violence or stalking as required by s. 784.046(1) (b), F.S. Because the final injunction was not supported by competent, substantial evidence, the appellate court reversed. <http://opinions.1dca.org/written/opinions2012/05-23-2012/11-2941.pdf> (May 23, 2012).

Preston v. State, ___ So. 3d ___, 2012 WL 1758985 (Fla. 1st DCA 2012). **STALKING SENTENCE REVERSED**. The defendant appealed his convictions and sentences for battery and two counts of aggravated stalking. The appellate court affirmed his convictions, but reversed the sentences and found that it was error to impose consecutive sentences for the two counts of aggravated stalking. The defendant was sentenced as a prison releasee reoffender (PRR) and PRR sentences may not be ordered to run consecutively when the crimes were committed during a single criminal episode.

<http://opinions.1dca.org/written/opinions2012/05-18-2012/10-5085.pdf> (May 18, 2012).

Ramirez v. Teutsch, ___ So. 3d ___, 2012 WL 1759382 (Fla. 1st DCA 2012). **MOTION TO DISSOLVE A DOMESTIC VIOLENCE INJUNCTION REMANDED**. A respondent appealed an order denying his motion to dissolve a domestic violence injunction in favor of his former wife. In his motion, the respondent alleged that circumstances between the parties had changed since the injunction was entered. Specifically, he alleged that the parties had interacted without violence for several years, that he now lives 341 miles away from his former wife, and that the parties' only interaction relates to time-sharing exchanges of their child, which were scheduled to end in January 2012. In light of these allegations, the trial court erred in summarily denying the motion to dissolve the injunction. The appellate court remanded the case for an evidentiary hearing.

<http://opinions.1dca.org/written/opinions2012/05-18-2012/10-5888.pdf> (May 18, 2012).

Second District Court of Appeal

In re G.S., ___ So. 3d ___, 2012 WL 1193358 (Fla. 2d DCA 2012). **CASE PLAN ACCEPTANCE REVERSED**. After a dependency adjudication, the mother objected to tasks outlined in her case plan, including that she participate in domestic violence evaluation and counseling, because they did not address the reasons for removal. The child was adjudicated dependent after his mother was arrested for a custody violation and the child had no other place to go. The appellate court held that because the case plan tasks requiring the mother to participate in domestic violence counseling, prescription drug monitoring, and parenting classes were irrelevant to the issue that resulted in the dependency, these tasks violated ss. 39.6011 and 39.603, F.S. and were improperly included in the Department's case plan for the mother. The dependency adjudication was affirmed; however, the acceptance of the case plan was reversed and remanded so the Department could prepare an amended case plan that contained tasks for the mother that addressed the reasons for the dependency.

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2012/April/April%2011,%202012/2D12-69.pdf (April 11, 2012).

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

Holley v. State, ___ So. 3d ____, 2012 WL 2327741 (Fla. 4th DCA 2012). **JUDGE NOT REQUIRED TO DISQUALIFY HIMSELF**. Although primarily a burglary case, the court noted in a footnote that the prosecution argued that the presiding trial judge should have disqualified himself from this case because of his previous membership in the Women in Distress Judicial and Legal Council, an organization dedicated to assisting victims of domestic violence. The court stated that the appellant's motion for disqualification did not allege that the judge had a personal bias against him, and the judge's prior membership in the Women in Distress organization was not, without more, a legally sufficient ground for disqualification. A trial judge's "alleged desire to solve the problem of domestic violence is not a legally sufficient basis for his disqualification." <http://www.4dca.org/opinions/June%202012/06-20-12/4D09-4066.op.pdf> (June 20, 2012).

Gayoso v. Gayoso, ___ So. 3d ____, 2012 WL 2012392 (Fla. 4th DCA 2012). **INJUNCTION REVERSED**. The respondent appealed the trial court's entry of an injunction for protection against domestic violence and the trial court's denial of his motion to vacate the final injunction. The trial court entered the injunction after a notice was put in the temporary injunction regarding the final hearing; however, the respondent claimed he was never served with the temporary injunction and filed two affidavits supporting that assertion. The appellate court reversed and remanded the case to the trial court for an evidentiary hearing on the issue of whether the respondent had notice of the final hearing on the injunction. <http://www.4dca.org/opinions/June%202012/06-06-12/4D10-2048.op.pdf> (June 6, 2012).

Harden v. State of Florida, ___ So. 3d ____, 2012 WL 1859267 (Fla. 4th DCA 2012). **PRIOR ACT OF DOMESTIC VIOLENCE INADMISSIBLE**. The appellant appealed his convictions for sexual battery, false imprisonment, and domestic battery. He was accused of beating and raping his girlfriend following an argument. Before the trial, the prosecutor notified the trial court that he intended to ask the girlfriend about her relationship with the appellant, including a prior domestic violence incident that occurred six months before the rape; the trial court found the evidence admissible. Because the trial court abused its discretion in admitting the evidence of a prior incident of domestic violence that served only to show propensity, the appellate court reversed the decision and remanded the case for a new trial. <http://www.4dca.org/opinions/May%202012/05-23-12/4D10-2615.op.pdf> (May 23, 2012).

Cirillo v. Jones, ___ So. 3d ____, 2012 WL 1108518 (Fla. 4th DCA 2012). **REPEAT VIOLENCE INJUNCTION REVERSED**. The respondent appealed after the trial court entered a final judgment of injunction for protection against repeat violence after two incidents of violence. During the first incident, the respondent poked the petitioner in the chest and spat on him while cursing and threatening him. The second incident occurred at a board meeting where the respondent was cursing at the petitioner and ended it by saying "I will kill you or sue you." In his defense, the respondent testified that what he was trying to say was "I will sue you and kill you in court."

The appellate court noted that during the incident at the board meeting, the evidence did not show that the respondent made any overt acts at the time of the threat which indicated an ability to carry out the threats or justified a reasonable belief by the petitioner that violence was imminent, as required by statute. Therefore, the court concluded that the evidence was insufficient to prove two incidents of violence occurred, and reversed.

<http://www.4dca.org/opinions/April%202012/04-04-12/4D11-1478.op.pdf> (April 4, 2012).

Fifth District Court of Appeal

Strogis v. Muttu, ___ So. 3d ___, 2012 WL 2466566 (Fla. 5th DCA 2012). **REPEAT VIOLENCE INJUNCTION UPHOLD**. The respondent appealed a final judgment of injunction for protection against repeat violence-no hostile contact. She asserted that the trial court erred by denying her motion to dismiss the petition because the petition failed to meet the legal requirements of s. 784.046(4) (a), F.S. She also argued that there was not competent, substantial evidence in the record to establish the two predicate acts of violence. The facts underlying this proceeding involve long-standing animosity between the two parties, and both acts of violence alleged during the hearing involved brief shoving or punching at crowded off-campus parties. The evidence offered at the hearing as to whether the contact was intentional or which of the two young women was the aggressor was in complete conflict. The appellate court found no merit in the appellant's claim of reversible error based on the legal insufficiency of the petition, and that the testimony was legally sufficient to support the trial court's decision, and affirmed the lower court's decision.

<http://www.5dca.org/Opinions/Opin2012/062512/5D11-3392.op.pdf> (June 29, 2012).

Williams v. Williams, ___ So. 3d ___, 2012 WL 2051082 (Fla. 5th DCA 2012). **INJUNCTION REVERSED**. The respondent appealed a final judgment of injunction for protection against domestic violence. The appellate court reversed and remanded the case for dismissal because the trial court never made a finding of domestic violence, and because, according to the record, the petitioner did not present evidence that could support a finding that she had been a victim of domestic violence or was in imminent danger of becoming a victim of domestic violence.

<http://www.5dca.org/Opinions/Opin2012/060412/5D11-217.op.pdf> (June 8, 2012).

Shawver v. Scarvelli, ___ So. 3d ___, 2012 WL 1121434 (Fla. 5th DCA 2012). **REPEAT VIOLENCE INJUNCTION REVERSED**. The respondent appealed a final judgment of injunction for protection against repeat violence and claimed that the trial court erred by entering the injunction where the petition only alleged one act of violence and the evidence presented by petitioner was only sufficient to support a finding of one act of violence. The appellate court agreed and reversed, noting that s. 784.046(2)(b), F.S. requires two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition.

<http://www.5dca.org/Opinions/Opin2012/040212/5D11-3199.op.pdf> (April 5, 2012).

Drug Court/Mental Health Court Case Law

Florida Supreme Court

No new opinions for this reporting period.

First District Court of Appeal

No new opinions for this reporting period.

Second District Court of Appeal

No new opinions for this reporting period.

Third District Court of Appeal

No new opinions for this reporting period.

Fourth District Court of Appeal

McGrill v. State, 82 So. 3d 130 (Fla. 4th DCA 2012). Rehearing was denied March 30, 2012. **PORTION OF DRUG OFFENDER PROBATION STATUTE (S. 948.20(1), F.S. (2009)) THAT REQUIRES A DEFENDANT'S SENTENCING SCORESHEET TO BE FIFTY-TWO POINTS OR FEWER DOES NOT APPLY TO DEFENDANTS CONVICTED UNDER SS. 893.13(2)(a) OR (6)(a), F.S. (2009).** McGrill pleaded no contest to possession of cocaine in violation of ss. 893.03(2) (a) (4) and 893.13(6) (a), F.S. (2008). His Criminal Punishment Code sentencing score sheet tallied 78.4 points. He filed a motion for an alternative sentence under s. 948.20, F.S. (2009). The motion was denied and the defendant appealed. The State had argued that s. 948.20, F.S. (2009), did not apply to any person charged with a felony who scored fifty-two points or higher on his score sheet. McGrill argued that only offenders charged with a non-violent felony committed on or after July 1, 2009, were required to score fifty-two points or fewer. Prior to its amendment in 2009, s. 948.20, F.S., made no mention of a defendant's criminal score sheet and allowed for drug offender probation if the defendant appeared to be a chronic substance abuser whose criminal conduct was a violation of s. 893.13(2)(a) or (6)(a), F.S. Effective July 1, 2009, the statute was amended, in pertinent part as follows:

948.20 Drug offender probation.—If it appears to the court upon a hearing that the defendant is a chronic substance abuser whose criminal conduct is a violation of s. 893.13(2)(a) or (6)(a), or other nonviolent felony if such nonviolent felony is committed on or after July 1, 2009, and notwithstanding s. 921.0024 the defendant's Criminal Punishment Code score sheet total sentence points are 52 points or fewer, the court may either adjudge the defendant guilty or stay and withhold the adjudication of guilt

The Fourth District Court of Appeal found that the statute was ambiguous as to whether the 52 points or fewer requirements applied to the drug offenders or only to other nonviolent felony offenders. The comma that set the requirement off from the description of nonviolent felony offenders could have been intended as a joining comma, such that the requirement would apply to both categories, or could have been present simply because it followed the year

component of a date. The Fourth District found that the State's interpretation of the statute would render a great deal of its language superfluous. A defendant whose criminal conduct solely violated s. 893.13(6) (a), F.S. would be a non-violent felon. There would be no reason to set off offenders found to be in violation of s. 893.13(2)(a) or (6)(a), F.S. if they were subject to the same restrictions as all other non-violent felony offenders. If the legislature had intended that all offenders seeking an alternative sentence have a score sheet totaling fifty-two points or fewer, then it would have excised any s. 893.13, F.S. language when it amended s. 948.20, F.S. Further, the rule of lenity required that when the language of a statute is susceptible to differing constructions, it must be construed most favorably to the accused. In the instant case, when construed in the light most favorable to the accused, s. 948.20(1), F.S. does not require that a defendant whose criminal conduct is in violation of s. 893.13(6) (a), F.S. have a score sheet totaling fifty-two points or fewer. However, the Fourth District noted, that their opinion should not be interpreted as holding that all offenders who seek an alternative sentence under s. 948.20(1), F.S. and whose criminal conduct is in violation of s. 893.13(2)(a) or (6)(a), F.S. are entitled to one. McGrill's score sheet reflected a significant amount of criminal history on his part. The Fourth District held only that McGrill's score sheet did not bar him from obtaining an alternative sentence; it was simply a factor the trial court should consider before deciding whether or not to impose an alternative sentence.

<http://www.4dca.org/opinions/Feb%202012/02-08-12/4D10-3695%20co-op.pdf> (February 8, 2012).

Fifth District Court of Appeal

No new opinions for this reporting period.