



# The Rap Sheet

Legal News for Law Enforcement in Brevard and Seminole Counties

State Attorney Norm Wolfinger  
Editor, Assistant State Attorney Chris White

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## *Message from State Attorney Norm Wolfinger*



Once again, I am pleased to provide you with this issue of the Rap Sheet devoted to a summary review of the legislation passed during the 2011 regular session of the Florida legislature. I hope that this review will be of help to you in identifying and interpreting the new laws applicable to law enforcement. I would like to acknowledge and thank our editor, Chris White, Assistant State Attorney and Chief of Operations in Seminole County for all his hard work in putting this information together. Thanks also to 17<sup>th</sup> Circuit Assistant State Attorney and Executive Director Monica Hofheinz through the Florida Prosecuting Attorneys Association and other assistant state attorneys throughout the state who assisted.

We have also included an article written by Assistant State Attorneys Chris White and Jim Carter on the state of the law reference use of dogs in scent work.

Special thanks to my Seminole County Assistant Carol Floyd for getting this newsletter out in proper format and to Chris White, who after thirty-five years of dedicated service, is retiring September 30, 2011. Best wishes to him and his family.

This issue of the Rap Sheet is dedicated to former Assistant State Attorney and Editor of this newsletter for many years, James Graham, who passed away on August 25, 2011.

### Editor's Notes:

The use of "HB" or "SB" indicates the House Bill or Senate Bill number assigned by the legislature. **BECAUSE THIS IS A SUMMARY, IT IS IMPORTANT THAT YOU REFER TO AND READ THE COMPLETE BILL OF INTEREST.**

You will need Adobe Acrobat reader to read the bills. It may be downloaded from:

<http://www.adobe.com/products/acrobat/readstep2.html>

To access the full body of the law you can use the hyperlink next to the title of the bills. If that does not work, go to the Florida Legislature's site and pull up the laws by their bill number. See [www.leg.state.fl.us](http://www.leg.state.fl.us)

## 2011 Legislative Update

### **HB 0003 Relating to Assault or Battery of Law Enforcement Officer**

Requires FDLE to issue a blue alert via specified means if a law enforcement officer has been killed, suffered serious bodily injury, or been assaulted and suspect has fled scene, or if law enforcement officer is missing while in line of duty and provides that emergency traffic information may take precedence over blue alert information. Effective Date: October 1, 2011. Approved by Governor; Chapter No. 2011-72

### **HB 0039 Relating to Controlled Substances**

Defines term "homologue" for purposes of Florida Comprehensive Drug Abuse Prevention & Control Act; includes certain hallucinogenic substances on list of controlled substances in Schedule I; provides it is a misdemeanor to be in possession of less than specified amount of certain hallucinogenic substances; provides exception for powdered form of such substances; and reenacts affected provisions to incorporate the amendments. Eff. Date July 1, 2011. Approved by Governor Chapter 2011-73

### **HB 0045 Relating to Regulation of Firearms and Ammunition**

This new law further clarifies the State's preemption of the laws regulating firearms and ammunition, declares any local laws regarding this area of the law are null and void, any governmental entity acting in violation of this could be fined up to \$5,000 and provides for civil injunctive relief. It provides that officials in violation may have their employment terminated and contractors may have their contract terminated. It also provides for specified damages and interest against violators. It specifically voids and disallows any local laws relating to waiting periods to purchase guns. Effective Date: October 1, 2011. Approved by Governor; Chapter No. 2011-109

### **HB 0059 Relating to Service of Process**

Authorizes sheriff to charge fee for processing writ of execution; grants authorized process server's unannounced access to specified residential areas such as gated communities or condominiums where defendant or witness resides or is known to be; provides that records may be retained as paper or electronic copies. Effective Date: July 1, 2011. Approved by Governor; Chapter No. 2011-159

### **HB 0075 Relating to Offense of Sexting**

Provides a new statute addressing minors who commit the offense of sexting, and defines sexting as knowingly using a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of any person which depicts nudity and is harmful to minors; provides noncriminal and criminal penalties; provides that transmission, distribution, or possession of multiple photographs or videos is single offense if transmission occurs within 24-hour period, etc. Effective Date: October 1, 2011. Approved by Governor; Chapter No. 2011-180

### **HB 0105 Relating to Open House Parties**

Provides that person who violates open house party statute a second or subsequent time commits a misdemeanor of first degree; provides that person commits misdemeanor of first degree if violation of open house party statute causes or contributes to causing serious bodily injury or death to minor, or causes or contributes to causing serious bodily injury or death to another person as result of minor's consumption of alcohol or drugs at open house party, etc. Effective Date: July 1, 2011. Approved by Governor; Chapter No. 2011-161

**SB 146 Relating to Employment by Convicted Felons**

This is the Jim King Keep Florida Working Bill, which amends FS 112.011 to add a provision requiring state agencies with regulatory authority to review available positions that are subject to licensing or regulation by state agencies and determine the least restrictive restrictions that are needed. Every state agency shall ensure that appropriate restrictions are in place by December 31, 2011 and report every four years including a list of agencies or board rules or statutes that disqualify persons convicted of a crime from employment after they have completed incarceration and restitution for their crime, a determination whether such statutes or rules are readily available to prospective employees and licensees, and shall identify and evaluate alternatives that would allow such convicted persons employment without endangering the public. It also provides convicted persons may be denied employment if their crime is directly related to the standards determined by the regulatory agencies to be necessary and reasonably related to the work being done. Effective date: upon becoming a law, except as otherwise provided 6/21/2011. Approved by Governor; Chapter No. 2011-207

**HB 0155 Relating to Privacy of Firearms Owners**

Creates FS 790.338 which provides that a licensed medical practitioner or facility may not record firearm ownership information in patient's medical record unless such information is relevant to patient's medical care or safety or safety of others; provides exception for EMTS and paramedics; provides that patient may decline to provide information regarding ownership or possession of firearms; clarifies that physician's authority to choose patients is not altered; prohibits discrimination by licensed practitioners or facilities based solely on patient's firearm ownership or possession; prohibits harassment of patient regarding firearm ownership during examination; prohibits denial of insurance coverage, increased premiums, or other discrimination by insurance companies issuing policies on basis of insured's or applicant's ownership, possession, or storage of firearms or ammunition; clarifies that insurer is not prohibited from considering value of firearms or ammunition in setting personal property premiums; provides for disciplinary action. Effective upon becoming law June 2, 2011. Approved by Governor Chapter No. 2011-112

**SB 170 Relating to Electronic Filing of Court Documents**

Requires the Florida Prosecuting Attorneys Association and the Florida Public Defender Association report to the President of the Senate and the Speaker of the House of Representatives by a specified date on the progress made to use the Florida Courts E-Portal system or the clerks' offices portals to electronically file and receive court documents. Effective date July 1, 2011. Approved by Governor; Chapter No. 2011-208

**HB 0227 Relating to Federal Write-in Absentee Ballot**

Authorizes absent uniformed services voters and overseas voters to use federal write-in absentee ballot to vote in any federal and certain state or local elections, under certain circumstances; directs Department of State to adopt rules to determine what constitutes valid vote on federal write-in absentee ballot; provides restrictions; provides minimum requirements; conforms provisions to changes made by act. Effective Date: July 1, 2011. Approved by Governor; Chapter No. 2011-162

**SB 0228 Relating to Code of Student Conduct "Pull those pants up."**

Requires the district school board to include in the code of student conduct adopted by the board an explanation of the responsibilities of each student with regard to appropriate dress and respect for self and others and the role that appropriate dress and respect for self and others has on an orderly learning environment, etc. Effective date: July 1, 2011 Approved by Governor; Chapter No. 2011-103

### **SB 234 Relating to Carrying Firearms**

Provides that a person who is licensed to carry a concealed firearm is not in violation of law if the firearm is briefly and openly displayed under certain circumstances. Allows the Division of Licensing of the DOACS to take fingerprints from concealed carry license applicants. Provides that a person may not openly carry a weapon or firearm or carry a concealed weapon or firearm into specified locations. Provides that concealed carry licensees shall not be prohibited from carrying or storing a firearm in a vehicle for lawful purposes. Effective Date: upon becoming a law: June 17, 2011 Approved by Governor; Chapter No. 2011-145

### **SB 240 Relating Injunctions for Protection**

Provides that FS 784.047 which provides for penalties for violating injunctions for protection is amended by broadening the proscribed behavior to require they remain at least 500 feet from prescribed areas or at least 100 feet from the petitioner's car. It also provides that they not deface or destroy personal property of the petitioner, including the vehicle and they are in violation if they do not surrender firearms upon order of the court. Effective date July 1, 2011: Approved by Governor June 17, 2011. Chapter No. 2011-146.

### **SB 251 Relating to Sexual Offenses**

Known as the "Walk In their Shoes Act," this law amends FS 90.404 to redefine child molestations for purposes of admitting similar fact evidence; amends FS 92.55(4) to provide that a court may allow a child victim to testify with a service or therapy animal, and provides that any evidence that portrays a child in a sex act or constitutes child pornography must be kept locked and secure by law enforcement, the state attorney or by the court. It also provides that no court shall allow any defendant to duplicate such material so long as the material is available for inspection at a designated facility. It also amends the statute of limitation as to video voyeurism to allow prosecution within one year of the time the victim obtains actual knowledge of the existence of such recording. Amends FS 794.052 to provide that a victim shall be allowed by review the final report of a sexual battery investigation and make a statement as to the accuracy of the report. It also provides for additional collections of costs from court fines to fund the Rape Crisis Program and rape crisis centers by expanding the designated crimes for which such costs are required. Requires the court to order the defendant submit to HIV and hepatitis testing within 48 hours of an information being filed, or if that is not done, within 48 hours of an order being obtained. For purposes of voyeurism, defines "intentionally view, further defines illegal possession of material depicting sexual conduct by a child to include "control or intentionally view" and exempts law enforcement possession or viewing of such material for purposes of an investigation. Effective Date: July 1, 2011. Approved by Governor: Chapter No. 2011-220

### **SB 330 Relating to Election Code**

Provides it is a violation of the Florida Election Code for a candidate to falsely represent that he or she is serving in the military. Effective date July 1, 2011. Approved by Governor; Chapter No. 2011-148.

### **HB 339 Relating To Credit Card Theft**

Amends FS 817.60 to define the crime of unlawful possession of a credit or debit card providing it is punishable as provided in FS 817.67.(2) for a person to knowingly possess, receive or retain a stolen credit card with the intent to impede the recovery of the card by the cardholder. It specifically exempts retailers or their employees from being charged with such crime if they are unaware it is stolen or possess it only to investigate whether it is stolen. Effective Date: October 1, 2011. Approved by Governor; Chapter No. 2011-184

### **SB 344 Relating to Sexual Conduct/Animal Abuse**

Creates FS 828.126 making it unlawful for a person to engage in sexual conduct with an animal and broadly defines what constitutes such conduct. Also makes it unlawful for a person to allow such conduct to occur on premises under his or her control, or to organize or perform any service in furtherance of an act of sexual conduct with an animal. A violation of this statute is a first degree misdemeanor. Effective date: October 1, 2011. Approved by Governor; Chapter No. 2011-42

### **HB 347 Relating to Criminal Justice**

Known as the Ashley Nicole Valdez Act, it amends FS 316.027(1)(b) to provide that a person arrested for failing to remain at a crash site involving death who has been previously convicted of a violation of this section or other designated sections of Chapter 316 shall be held without bond until brought before a judge. Furthermore, it provides for a minimum mandatory two year prison sentence if a violator was driving under the influence at the time. Effective Date: October 1, 2011. Approved by Governor; Chapter No. 2011-80

### **SB 400 Relating to Drug Court**

This bill relates to treatment-based drug programs and amends FS 397.334 to provide that any VOP against a participant in a post-adjudicatory drug court program shall be heard by the drug court judge. It amends the qualifications to allow applicants to enter with up to 60 sentencing points (previously it was 52) if the offense is a non-violent felony if he or she otherwise qualifies under FS 397.334(3). The court may order a defendant to complete a post-adjudicatory drug program for offenses committed after July 1, 2009, where there is a violation of probation or community control regardless of the nature of the violation and can do so, if their sentencing points are 60 points or less and the underlying offense is a non-violent felony. Effective date July 1, 2011. Approved by Governor; Chapter No. 2011-33

### **HB 409 Relating to Public Records**

Amends the public records laws contained in FS 119.072(2)(h) to exclude from the definition of public records any criminal investigative information that is a photograph, videotape, or image of any part of the body of the victim of video voyeurism prohibited in FS 810.145. Effective date July 1, 2011. Approved by Governor, Chapter No. 2011-83

### **HB 411 Relating To Public Records**

Amends the public records laws to exclude from the definition of public records any recording that depicts or records the killing of a human being, with provisions for such recording to be available to a surviving spouse or parents of the victim. It further provides for law enforcement to access such recordings and for the court to permit access to such recordings upon a showing of good cause, with guidelines for determining good cause, and a requirement that the surviving spouse or parent be notified of such a proceeding. It further provides that violating this law by allowing unlawful access to such a recording is a third degree felony, and allows retroactive application of the exemption to apply to killings that occurred before the effective date of this law. Effective date July 1, 2011. Approved by Governor; Chapter No. 2011-115

### **SB 0504 Relating to Child Visitation**

Requires probable cause of sexual abuse in order to create a presumption of detriment for purposes of denying child abuse. Provides that persons meeting specified criteria may not visit or have contact with a child without a hearing and court order. Revises requirements for a hearing seeking to rebut a presumption of detriment. Revises provisions relating to hearings on whether to prohibit or restrict visitation or other contact with the person who is alleged to have influenced a child's testimony, etc. Effective Date: July 1, 2011. Approved by Governor; Chapter No. 2011-209

### **SB 0512 Relating to Vessels**

Revises the penalty provisions for the violation of navigation rules. Provides that a violation resulting in serious bodily injury or death is a second-degree misdemeanor. Provides that a violation that does not constitute reckless operation of a vessel is a noncriminal violation. Provides an additional exemption from the requirement that certain persons born after January 1, 1988, possess a boating safety identification card while operating a motor vessel of a specified horsepower. Provides for increased penalties for certain noncriminal violations of navigation rules, etc. Effective date October 1, 2011. Approved by Governor; Chapter No. 2011-152

### **HB 563 Relating to Domestic Violence and Record Keeping**

Amends FS 741.30 relating to domestic violence injunctions, and injunctions for protection from repeat violence, sexual violence or dating violence by requiring the Florida Association of Clerks of Court and the Comptrollers to develop a process by which a petitioner for any such injunction may request notification of service of their injunction and other court actions relating thereto, and requiring that such notification shall be made with 12 hours after service of the injunction upon the respondent, which notice shall include information as to time and place of service. Effective Date: July 1, 2011. Approved by Governor; Chapter No. 2011-187

### **HB 0597 Relating to Public Records/Agency Emergency Notification Information**

Provides information furnished by person to agency for purpose of being provided with emergency notification by the agency is exemption from public records requirements. Effective Date: July 1, 2011. Approved by Governor; Chapter No. 2011-85

### **SB 618 Relating to Juvenile Justice**

This bill repeals a number of statutes in Chapter 985 of the Florida Statutes and amends others. It amends FS 985.494 to provide a child of any age who commits a felony shall be committed to a maximum risk facility if the child has completed two high-risk residential commitment programs. It significantly rewrites FS 985.66 pertaining to juvenile justice training academies, by abolishing the Standards and Training Commission and providing the department shall be responsible for standards and juvenile justice training. Effective date July 1, 2011. Approved by Governor; Chapter No. 2011-70

### **HB 0667 Relating to Public Records/Local Government Inspector General**

Expands exemption from public records requirements to include certain records relating to investigations or audits in custody of the inspector general of local government; provides for future review and repeal of exemption; and provides a statement of public necessity. Effective Date: October 1, 2011. Approved by Governor; Chapter No. 2011-87

### **HB 0677 Relating to Public Records/Office of Financial Regulation**

Provides exemption from public records requirements for information held by OFR that is received from another state or federal regulatory, administrative, or criminal justice agency and is otherwise confidential or exempt pursuant to laws of that state or pursuant to federal law; provides exemption from public records requirements for information held by OFR that is received or developed by OFR as part of joint or multiagency examination or investigation with another state or federal regulatory, administrative, or criminal justice agency. Eff. date: July 1, 2011. Approved by Governor; Chapter No. 2011-88

**SB 0722 Relating to Saving Dogs**

Amends FS 767.11 to redefine the term "dangerous dog" to exclude dogs trained or used for dog fighting from automatic inclusion. Effective date: July 1, 2011. Approved by Governor; Chapter No. 2011-211.

**SB 844 Relating to Release on Bond for VOP**

This bill is referred to as the Officer Andrew Widman Act, who was killed by a defendant on community supervision while trying to effect the arrest of the defendant for violation of a condition of supervision by committing a new law violation for which he had been before a judge for initial appearance and released on bond. The law would specifically permit a judge sitting on an initial appearance involving a new law violation, who becomes aware the defendant is on supervision, to order him arrested for violating conditions of release. The new law provides the judge to advise the defendant of the violation, and if he/she admits the violation shall order them to go before the court where they were placed on supervision. If the violation is not admitted the court should consider whether to confine the offender, or release them with or without bail, is expressly permitted to consider the likelihood of a prison sentence on the violation, and may order them returned to the court which placed him on supervision. Effective October 1, 2011. Approved by Governor; Chapter 2011-38.

**HB 0883 Relating to Public Lodging Establishments and Public Food Service Establishments**

Revises the penalties for establishments operating without valid license; specifies that certain items used in committing offense are subject to seizure and forfeiture; authorizes law enforcement officer to give notice to appear to person without warrant in certain circumstances; Eff. date: June 2, 2011. Approved by Governor; Chapter No. 2011-119

**HB 0997 Relating to Juvenile Civil Citations**

Amends FS 985.12 Civil Citations to mandate that DJJ encourage and assist in the implementation of more civil citation programs in the State. Only misdemeanor 1<sup>st</sup> offenders will be allowed in these specific programs and upon conclusion of the program the agency operating the program is mandated to report the outcome to DJJ. DJJ will develop guidelines for this program including an assessment prior to entry into such program. The amendment did not mandate that each community have such a program... that decision is still left to the community, state attorney and law enforcement. Effective Date: July 1, 2011. Approved by Governor; Chapter No. 2011-124

**HB 1029 Relating to Interstate Compact for Juveniles**

Reenacts the previously lapsed Interstate Compact with no major changes in process. FS 985.802 through 985.8025. Effective Date: May 31, 2011. Approved by Governor; Chapter No. 2011-89

**HB 1039 Relating to Controlled Substances**

Amends FS 893.03(1)(c) to include five additional hallucinogenic substances on list of controlled substances in Schedule I; reenacts provisions to incorporate amendment. Effective Date: July 1, 2011. Approved by Governor; Chapter No. 2011-90

**HB 1111 Relating to Family Law**

Designates Department of Revenue as support enforcement agency of this state; revises provisions relating to remedies provided by act. Approved by Governor; Chapter No. 2011-92

**HB 1473 Relating to Pub. Rec./Florida Health Choices Program**

Creates exemption from public records requirements for personal, identifying information of enrollee or participant in Florida Health Choices Program; provides statement of necessity. Eff. date: October 1, 2011. Approved by Governor; Chapter No. 2011-197

**SB 1884 Relating to Consumer Protection**

Prohibits certain third-party sellers from engaging in certain transactions over the Internet with consumers engaged in transactions with certain merchants except under certain circumstances. Requires disclosures to consumers. Requires a consumer's express informed consent for charges. Authorizes consumers to cancel goods and services and avoid charges. Provides that violations are unfair or deceptive trade practices. Provides penalties and remedies for violations. Effective date: October 1, 2011. Approved by Governor; Chapter No. 2011-156

**SB 2100 Relating to Retirement**

Requires employee contributions to the retirement system. Modifies the early retirement benefit calculation for those members retiring on or after a certain date or before the normal retirement date to reflect the change in normal retirement age, etc. Effective date July 1, 2011, except as otherwise provided Approved by Governor; Chapter No. 2011-68

**SB 2112 Relating to Juvenile Detention Facilities**

Amends 985.686 titles "Shared county and state responsibility for juvenile detention" by adding section (10) exempting counties from paying DJJ if the county provides detention care or contracts with another county to do so. It also amends 985.688 titled "Administering county and municipal delinquency programs and facilities" by adding section (11) (a)-(d) making it easier for a county to create its own detention services. Effective date: July 1, 2011. Approved by Governor; Chapter No. 2011-53

**SB 2114 Relating to Juvenile Justice**

Amends FS 985.441 to provide that conditions of commitment to DJJ may include monitoring for drug abuse and electronic monitoring as part of the active controls used by DJJ to monitor committed juveniles. It further mandates that only Minimum Risk nonresidential programs may be used for the commitment of any juvenile whose underlying offense is a misdemeanor where the court is seeking to commit the child for that misdemeanor offense or violation of probation unless the VOP is for a new felony. Exceptions to this restriction include: 1. Child previously adjudicated for a felony; 2. Child adjudicated or withheld for three or more prior misdemeanor offenses; 3. Child is before court for disposition for violation of FS800.03, 806.031 or 828.12; or 4. If the court finds by preponderance of the evidence and orders in writing and that the protection of the public requires such placement or that the particular needs of the child would be best served by such placement. If one of the exceptions applies the court may commit to a low-risk or moderate –risk residential placement only. Amends (d) (4) to prohibit the transfer of any child adjudicated solely for a misdemeanor to a residential program except as provided under the above list of exceptions. Effective date: July1, 2011. Approved by Governor; Chapter No. 2011-54

**SB 2122 Relating to State Government Operations**

In pertinent part it provides that the State Attorneys and the Department of Legal Affairs, rather than the Department of Agriculture and Consumer Services, enforce the laws prohibiting price gouging, etc. Effective date: May 26, 2011

**HB 4121 Relating to Clove Cigarettes**

Repeals FS 859.058 which prohibited the sale, use, possession, transfer, or other disposing of clove cigarettes or similar products. Effective Date: June 2, 2011. Approved by Governor; Chapter No. 2011-130

### **HB 4159 Relating to State Attorneys**

Amends FS 27.366, which required that each state attorney must submit quarterly deviation memoranda relating to offenders who are not sentenced to mandatory minimum prison sentence in cases involving possession or use of weapon explaining why the defendant did not receive mandatory minimum prison sentence in cases involving certain specified offenses; it amends FS 775.082(9)(d)(1) which required an annual deviation report on PRR offenders; repeals FS 775.0841 relating to legislative findings supporting enhanced prosecution of repeat and violent felony offenders; repeals FS 775.087(5) relating to memorandums of deviation when enhanced penalties for use of firearms during commission of felonies are not sought; and it deletes FS 985.557(4) relating to direct-file policies and guidelines for juveniles. Effective Date: July 1, 2011. Approved by Governor; Chapter No. 2011-200

### **HB 5011 Relating to Commission on Capital Cases**

Repeals provisions relating to creation of Commission on Capital Cases and provides for the assumption of certain duties of the Commission on Capital Cases by Justice Administrative Commission; conforms provisions. Effective Date: July 1, 2011.  
Approved by Governor; Chapter No. 2011-131

### **HB 5401 Relating to Criminal Justice**

Repeals provisions relating to Cybercrime Office within Department of Legal Affairs and creates a Cybercrime Office within FDLE to investigate certain violations of state law pertaining to sexual exploitation of children, effectively transferring the functions and responsibilities of Cybercrime Office from DLA to FDLE. Effective Date: July 1, 2011. Approved by Governor; Chapter No. 2011-132

### **HB 7095 Relating to Prescription Drugs; PILL MILL LEGISLATION**

This is a very lengthy complex bill and among other things it makes the failure of physicians to comply with the requirements of s. 456.44, F.S. grounds for disciplinary action; provides mandatory administrative penalties for certain violations related to prescribing; requires prescriptions for controlled substances to be written on counterfeit-resistant pad produced by approved vendor or electronically prescribed; provides conditions for being approved vendor; requires certain physicians to designate themselves as controlled substance prescribing practitioners on their practitioner profiles, etc. Eff. Date July 1, 2011. Approved by Governor Chapter 2011-141

### **HB 7111 Relating to Supreme Court**

This is a joint resolution proposing that the revision of Article V of State Constitution, relating to the judiciary, to amend sections 2, 11, & 12, of Art. V, of the State Constitution be submitted to the electors for a vote. Those amendments would revise provisions relating to the repeal of court rules by the legislature allowing repeal by a mere majority vote if the policy behind the repeal is stated and restrict re-adoption of repealed court rule by requiring it be consistent with said public policy; provides for Senate confirmation of Supreme Court justices; requires JQC to make all of its files available to the House Speaker; provides for confidentiality of records provided to House of Representatives until impeachment is initiated; and makes other conforming and modernizing changes. Effective date not Specified. Signed by Officers and filed with Secretary of State

## Appellate Dog Days

In April of 2011 the Florida Supreme Court rendered two decisions that will have a major impact on the use of man's best friend, the K-9, in police work. First in *Jardines v. State*, \_\_ So.3d \_\_, 2011 WL 1405080, 36 Fla. L. Weekly S147, April 14, 2011 (No. SC08-2101) the court held that in order for law enforcement officers to utilize a K-9 to conduct a sniff at a residence they must have probable cause. Then, in *Harris v. State*, \_\_ So.3d \_\_, 2011 WL 1496470, 36 Fla. L. Weekly S163, April 21, 2011 (No. SC08-1871) the court held that the state must show the reliability of a K-9 to have a warrantless search upheld when it is based on a K-9 alerting on a motor vehicle. Of course the *Harris* case has implications as to all forms of canine scent work.

The *Jardines* case is being appealed to the United States Supreme Court by Florida Attorney General Pam Bodi. In the *Jardine* opinion the court discusses the history of cases involving dog sniffs and notes that the United States Supreme Court has held that a dog sniff of a legally detained car does not constitute a search under the fourth amendment to the United States Constitution. Also having a K-9 sniff luggage or a mail parcel does not constitute a search. See *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct.834, 160 L.Ed.2d 842 (2005); *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000); *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). However, based on the reasoning that there are greater protections found in the Constitution when it comes to an individual's home the Florida Supreme Court holds that a K-9 sniff of a person's home does constitute a search.

The court discusses at great length how the sniff "constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment." *Jardines* at page 13. They fail to note that it may be as equally embarrassing to be sitting roadside while a K-9 sniffs your vehicle. On a side note it is interesting that Florida Courts recognize that a law enforcement officer smelling cannabis outside of a residence leading to the issuance of a search warrant is lawful. See *Nieminski v. State*, 60 So.3d 521, Fla. App. 2 Dist. (2011). It is hard to see how this decision will not be overturned by the United States Supreme Court. Unfortunately it will take years for that to happen. For now it is the law in Florida and we must abide by it.

The *Harris* case will have more of an impact. In determining that the State must demonstrate the reliability of a K-9 the court held that the State must present the training and certification records of the K-9. The meaning of those records must be explained to the Court who is considering the legality of the search in question. The State must present field performance records, and evidence of the handler's experience and training. In other words the State has the burden of proving the reliability of the law enforcement officer and the K-9 in the detection of illegal substances. Be prepared for this rationale to be applied to all functions of the working K-9. K-9s that conduct tracks will be put to the same requirements; as will bomb dogs, although we may be better able to establish their reliability. Record keeping as to training and field work is vital to the continued use of K-9s.

Almost as important will be law enforcement's ability to testify in court as to the meaning of the records. In the *Harris* case the officer who testified at the suppression hearing did not help the case. Law enforcement need officers who handle or train dogs need to be able to explain why a K-9 alerted and then no illegal substances were found. Residual odor will need to be explained to the Court by law enforcement.

Another aspect to the case is how it will affect obtaining search warrants based on the sniff of a K-9. While *Harris* dealt with a situation in which a search warrant was not obtained the court equated the use of a K-9 to the use of a confidential informant (CI). As the law stands now, when obtaining a search warrant based on a CI, the affiant to the warrant must demonstrate the reliability of the CI. Likewise when obtaining a search warrant with the use of a K-9 the affidavit must demonstrate the reliability of the K-9 used to obtain the probable cause.

*Harris* is also being appealed. However it is not as clear that it will be overturned. The Second District Court of Appeals has already applied the *Harris* decision in *Wiggs v. State*, --- So.3d ----, 2011 WL 3300139 (Fla.App. 2 Dist.,2011). There the court considered a drug sniff by a drug detection dog of a car stopped on a traffic violation. The State presented detailed information indicating that in each prior instance where the dog alerted and no drugs were found, the officer was able to verify that drugs had been in the vehicle sometime prior. However, the court determined that the information provided did not show that the dog was reliable in that it had more false alerts than hits. It would appear that even though the false alerts were explained as probable alerts on residual odor, this is still seen as undermining the reliability of the dog. Whether the other DCA's will follow this path is yet to be seen, but the Second District's ruling in *Wiggs* sets a very high (perhaps insurmountable) standard for us to meet to establish reliability of a K9 scent dog in drug cases.

Until the appellate courts have had time to further address *Harris* we must make adjustments in how we use and document training and work of our K-9s. Handlers must document the work and the training of their dog sufficiently to meet the requirements set forth in *Harris* and must be prepared to testify effectively about those records. It would seem that a crucial factor in the *Harris* and *Wiggs* cases was the false alerts on residual odor. Therefore, it would seem that dogs that are detecting bombs and following scent trails are not as likely to suffer from that deficiency and we may be able to authenticate their work if their training and work records are well documented and explained in court. How about that for a small ray of sunshine in this otherwise gloomy report?