LEGAL EAGLE

October 2025

Nanny Cam

Though this appellate case is civil in nature, a side issue is relevant to the topic under consideration. In simple terms, a civil disagreement arose between doctors who formed an eye care practice. The founding doctor had cause to believe that the dissident doctors were planning to remove him from the practice. He hired a private investigator to assist him. With his concurrence, the investigator set up hidden security cameras at the eye clinic. Although the cameras were equipped with audio as well as video recording capabilities, the audio recording never worked and therefore never intercepted any oral communications. Within a few days of their installation, the doctors were alerted to the cameras. The cameras were then removed, but not before video was recorded of the doctors in their offices, both alone and with their patients.

As part of the civil suit dissolving the clinic, the doctors also sued for interception of communications. The operator of the camera was able to record video, but not audio, of the doctors dealing with patients and working alone in their offices. The doctors testified as to their emotional turmoil at having been surreptitiously viewed.

At the conclusion of the plaintiffs' case, the senior doctor moved for a directed verdict on the interception of communications claims, arguing that there was no evidence that wire communications had been intercepted in that no sound had been captured. The trial court denied the motion. On appeal, that ruling was reversed.

Issue:

ls it legal to install a hidden camera under Florida law? **Yes,** to record images, but not to capture audio.

Lawful Video Surveillance:

While all 50 states permit the placement of video surveillance, aka nanny cam, in private homes, Florida has its unique statutory requirements. While image recording is allowed, with some limitations, audio recording is not lawful. Florida is a "two-party consent" state, with some narrow exemptions discussed below. F.S. 810.45 outlines video limitations that impact reasonable privacy expectations, such as surveillance in bathrooms, bedrooms, and changing room areas.

The extensive use of visual surveillance, including outdoor security cameras that monitor the front and back yards of private homes, as well as Ring cameras that watch for porch pirates, etc., are lawful as they surveil open areas where there is no reasonable expectation of privacy. This is because there is no

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expectation of privacy in what one knowingly exposes to the public. However, the law does protect those areas where a person has a reasonable expectation of privacy.

Sec. 810.145, Digital voyeurism: (1)(f), "Reasonable expectation of privacy" means circumstances under which a reasonable person would believe that he or she could fully disrobe in privacy, without being concerned that the person's undressing was being viewed, recorded, or broadcasted by another, including, but not limited to, the interior of a residential dwelling, bathroom, changing room, fitting room, dressing room, or tanning booth.

Thus, a nanny cam installed in a private home to monitor the care of the infant children may not be placed in the caretaker's room, bathroom, or other private locations.

Section 934.06, F.S. prohibits any intercepted *oral communication* from being used as evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, … if the disclosure of the intercepted communication would be in violation of Chapter 934. Prohibited is the interception of **communications** unless authorized by a court or consented to by *both parties* to the communication. Thus, nanny cams may not capture oral evidence. The statute does not contemplate video surveillance that fails to capture the substance of any wire, electronic, or oral communications.

The case that tangentially leads to our analysis is *McDade v. State*, (Fla. 2014). Defendant's stepdaughter surreptitiously audio-recorded conversations he had in his bedroom with her as he sexually abused her. Defendant was convicted at trial. On appeal, he argued the taped conversations should have been suppressed. In *McDade v. State*, (2DCA 2013), the court affirmed his conviction by ruling that the tapes were admissible in evidence.

The Florida Supreme Court accepted the certified question of great public importance concerning the application of the prohibition under Chapter 934, on intercepting certain oral communications. Specifically, the Court considered whether the prohibition applied to recordings of solicitation and confirmation of child sexual abuse when the recordings were surreptitiously made by the victim child in the bedroom of the accused. The Court ruled that Florida statute mandated a finding that the recordings were unlawful. Florida is an "all-party consent" state for audio recording, meaning that all parties to a conversation must consent to be recorded.

As a direct result, the Florida Legislature amended the statute. Sec. 934.03 Interception and disclosure of wire, oral, or electronic communications now provides:

(2)(c) It is lawful under this section and ss. 934.04-934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the **purpose of such interception is to obtain evidence of a criminal act**.

(3)(k) It is lawful under this section and ss. 934.04-934.09 for a child under 18 years of age to intercept and record an oral communication if the child is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that **the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child**.

(3)(l) 1. It is lawful under this section and ss. 934.04-934.09 for a parent or legal guardian of a child under 18 years of age to intercept and record an oral communication if the child is a party to the communication and the parent or legal guardian has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to **commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child**.

2. A recording authorized under this paragraph which captures a statement by a party that the party **intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against a child** *must be provided to a law enforcement agency* and may be used for the purpose of evidencing the intent to commit or the commission of a crime specified in subparagraph 1. against a child. A recording authorized under this paragraph may not be otherwise disseminated or shared.

Unfortunately, these expanded wiretap provisions do not pertain to Elder Abuse situations.

Florida Statute Chapter 825 addresses the abuse, neglect, and exploitation of elderly persons and disabled adults.

The Florida elder abuse statute is designed to protect vulnerable seniors and hold exploiters accountable. Aging often leads seniors to depend on others for care, heightening their risk of abuse and exploitation. Thus, despite being as vulnerable as children, sections 934.04 -934.09 are not applicable.

While the use of a hidden camera in a private dwelling to monitor those responsible for the care of children or elderly is lawful, there are limitations on the ability to record audio evidence. However, the amended statutes set out above move the analysis from "all-party consent" to the preservation of child abuse (not elder abuse) evidence.

Court's Ruling:

"Chapter 934 [F.S.], was modeled after the Federal Wiretap Act, 18 U.S.C., as amended by the Electronic Communications Privacy Act of 1986. Florida follows federal courts as to the meaning of provisions after which Chapter 934 was modeled. Federal decisions uniformly have held that *the Act's provisions do not apply to surveillance that fails to capture the substance of any wire, electronic, or oral communications*."

"Several federal cases have held that the Federal Act does not apply to silent surveillance videos. In *United States v. Koyomejian*, (9th Cir. 1992), the court held that silent surveillance videos were not covered by the Federal Wiretap Act, reasoning that *the act did not apply to the interception of visual images without oral communications*. The court stated:

'The statute defines a 'wire communication' as 'any aural transfer made ... through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception....' An 'oral communication' is defined as 'any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation....' 'Finally, 'intercept' means 'the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.' '

"By their plain meaning, these definitions do not apply to silent video surveillance. See, *United States v. Jackson*, (10th Cir.2000) (holding that the Federal Wiretap Act, which prohibits the intentional interception of 'any wire, oral, or electronic communication,' did not apply to silent video surveillance camera on a telephone pole outside defendant's residence); See also, *United States v. Falls*, (8th Cir.1994) (same)."

"Most recently, in *United States v. Larios*, (1st Cir. 2010), the First Circuit also held that silent video surveillance is not covered by the terms of the act, noting that every other federal circuit which has addressed the issue has come to the same conclusion. We agree with our sister circuits that, by its plain meaning, the text of Title III does not apply to silent video surveillance."

"As the Florida statute is patterned after the Federal statute and contains essentially the same language, we conclude that silent video surveillance is not covered by section 934.02 or 934.10. … Indeed, when one thinks of the extensive use of video surveillance today, it is not at all surprising that the Legislature has determined not to include it within its terms. Video cameras capture activity in the public streets, in our stores and banks, and even as nanny-cams in our homes. They are a valuable tool in fighting crime, preventing thefts, and keeping our homes safer. To hold that silent video camera surveillance would violate the terms of the act would create a substantial impediment to this useful technology in fighting crime. If the Legislature wishes to include silent video surveillance within the provisions of the act, it can do so. It is not up to the courts to rewrite the statute to include it."

"Dr. Minotty's motion for directed verdict should have been granted. The plaintiffs did not prove their cause of action under the act. We thus reverse the final judgments and damages award."

Lessons Learned:

As the 4th D.C.A. pointed out, the Florida Wiretap statute, Chapter 934, was modeled after the Federal Wiretap Act, 18 U.S.C. However, the Florida law is not entirely consistent with federal wiretap law. While both laws aim to protect privacy, Florida's law is more restrictive. Specifically, Florida is a "two-party consent" state, meaning all parties in a conversation must consent to recording, while Federal law generally follows a "one-party consent" rule.

The provision in 934.03 provides, "It is lawful under this section and ss. 934.04-934.09 for an investigative or law enforcement

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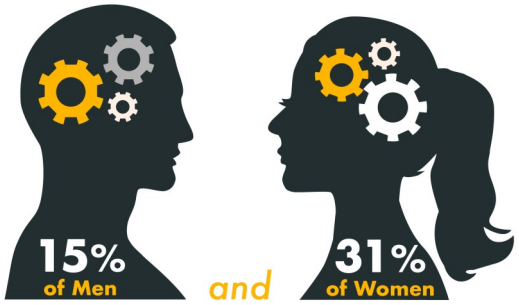
Behavioral Health Issues in Jails

GET THE FACTS

Behavioral Health Issues in Jails and Prisons

DID YOU KNOW?

Approximately...



in jails have a serious mental illness...

...compared to approximately **4%** of people in the general populations.

Source: Prevalence of Serious Mental Illness Among Jail Inmates (2009)

Estimates suggest that **more than 60,000** evaluations of adjudicative competence are conducted annually in the United States.

Approximately **20 - 30%** of those individuals are adjudicated **incompetent** to stand trial.

These individuals can spend *more time in jail awaiting restoration services* in order for their case to proceed to trial *than they face as a sentence* for the alleged offense.

Sources: Melton G, Petrila J, Poythress NG, et al: Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers, Third Edition. New York: Guilford Press, 2007; Just and Well: Rethinking How States Approach Competency to Stand Trial. 2020.

More than **half** (58 percent) of people in state prisons and 63 percent of people sentenced to jail met the criteria for **substance use** or **dependence**.

Source: BJS: Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009

State prisoners who had a mental health problem were **twice as likely** as those without to have been homeless in the year before their arrest.

Source: BJS: Mental Health Problems of Prison and Jail Inmates, 2006

Inmates experiencing homelessness in the year before incarceration made up 15.3% of the U.S. jail population.

Source: Greg A Greenberg, Robert A Rosenheck: Jail incarceration, homelessness, and mental health: a national study, 2008

Recent homelessness among jail inmates:

7.5 - 11.3x more likely

than the general population.

Source: Greg A Greenberg, Robert A Rosenheck: Jail incarceration, homelessness, and mental health: a national study, 2008

For more information on this and similiar topics visit: bja.ojp.gov/program/pmhc

Recent Case Law

Johnny Appleseed of Drugs

Federal agents and DEA went looking for Robbie Kennedy at an apartment that he rented with his girlfriend, Ashley Galindo. When the agents knocked, Galindo opened the door, Kennedy was standing behind her. The agents asked the two of them to come outside, at which time Kennedy said, without prompting: "Everything's mine."

In a living room coffee table drawer, they found numerous plastic baggies and some digital scales. On the floor next to the table was a small, zipped toiletry bag. When the agents unzipped the bag, they discovered syringes and a knotted plastic baggie containing another substance they suspected was drugs. Chemical analysis later confirmed that the substances in the toiletry bag contained heroin and methamphetamine.

Under the couch, the agents found multiple firearms and an "ammo can" containing hundreds of rounds of ammunition. In total, the agents recovered five digital scales of varying sizes and four handgun magazines in Kennedy and Galindo's apartment as well as a handgun.

Defendant was indicted on multiple drug and firearm counts. Kennedy contended that there was insufficient evidence to support his convictions. He also argued that there was not enough evidence to show that he was distributing drugs because the evidence *did not prove he intended to sell them instead of giving them away*. And he argued that there's no "nexus" tying him to the drugs and gun because he didn't "possess sufficient control over the house" or the safe where those items were seized. Instead, he says, the evidence established only his "mere presence at the residence where drugs were found." On appeal, the 11th Circuit rejected his arguments.

Issue:

Was the State required to prove the Defendant sold, rather than gave away, the controlled drugs seized from his abode? **No**.

Controlled Substance:

In response to the Supreme Court's decision in *Chicone v. State*, (Fla. 1996), the Florida Legislature enacted Sec. 893.101. The Legislative notes include the following: "1. The Legislature finds that the cases of *Scott v. State*, (Fla. 2002) and *Chicone v. State*, (Fla. 1996), holding that the State must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.

2. The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this Chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this Chapter.

Subsequently, the Florida Supreme Court authored *State v. Adkins*, (Fla.2012), where the Court ruled, "Here, the Legislature's decision to make the absence of knowledge of the illicit nature of the controlled substance an affirmative defense is constitutional. Under section 893.13, as modified by section 893.101, the State is not required to prove that the Defendant had knowledge of the illicit nature of the controlled substance in order to convict the Defendant of one of the defined offenses. *The conduct the Legislature seeks to curtail is the sale, manufacture, delivery, or possession of a controlled substance, regardless of the Defendant's subjective intent*. …"

Court's Ruling:

For those who have forgotten their childhood stories, Johnny Appleseed, a.k.a. John Chapman, (1774 - 1845), the popular image was of Johnny Appleseed spreading apple seeds randomly everywhere he went "free-for-nothing." For the Court of Appeals to characterize the Defendant's defense as the Johnny Appleseed argument does not bode well for his appeal.

"As for what we are calling Kennedy's Johnny Appleseed argument, illegal drugs are not apple trees. The criminal drug possession statute he was convicted of violating makes *no distinction between selling drugs and giving them away*. It makes it 'unlawful for any person knowingly or intentionally to ... possess with intent to manufacture, distribute, or dispense, a controlled substance.' The terms 'dispense' and 'distribute' are both defined to mean

'deliver.' The statute prohibits possession with intent to transfer controlled substances whether for gain or gift. In the *Catchings* case the defendant thought the person to whom he transferred crack cocaine wanted it for his own use instead of to distribute it. See, *United States v. Catchings*, (11th Cir. 1991). The [trial] court had instructed the jury that 'to distribute simply means to deliver or transfer possession to another person *with or without any financial interest* in the transaction.' We affirmed."

"Other circuits agree that there is no Johnny Appleseed exception to statutes prohibiting the distribution of controlled substances. See, *United States v. Cortes-Caban*, (1st Cir. 2012) ('It is well accepted that drugs may be distributed by giving them away for free; [statute] imposes no requirement that a sale take place.'); *United States v. Vincent*, (6th Cir. 1994) (affirming a conviction and explaining: The Government needed only to show that defendant knowingly or intentionally delivered a controlled substance. *It was irrelevant for the Government to also show that defendant was paid for the delivery.*); *United States v. Ramirez*, (9th Cir. 1979) (affirming a conviction stating: Although apparently no commercial scheme is involved, [the defendant's] sharing the cocaine with [his friends] constitutes 'distribution' for purposes of [statute]. AFFIRMED."

Lessons Learned:

Providing illegal drugs to another person, even if given for free, constitutes the crime of drug distribution or delivery under Florida law as well.

Drug distribution in Florida encompasses more than just selling. It includes the "sale, delivery, or transfer" of a controlled substance to another individual, regardless of whether money is exchanged.

Florida Statute 893.13 prohibits the delivery or possession with intent to deliver controlled substances. *The intent to transfer possession is the crucial element, not the exchange of money*. As can be seen from the definitions in F.S. 893.02:

(6) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Florida Jury Instructions are helpful as well:

Certain drugs and chemical substances are by law known as "controlled substances." (Specific substance alleged) is a controlled substance.

To prove the crime of (crime charged), the State must prove the following three elements beyond a reasonable doubt:

1. Defendant [sold] [*delivered*] [possessed with intent to [sell] [*deliver*] [purchase]] a certain substance.
2. The substance was (specific substance alleged).
3. Defendant had knowledge of the presence of the substance.

"Deliver" or "delivery" means the actual, constructive, or attempted *transfer from one person to another* of a controlled substance, whether or not there is an agency relationship.

United States v. Robert Scott Kennedy
U.S. Court of Appeals, 11th Cir.
(July 25, 2025)

Miranda—Invoked or Not?

A grand jury indicted James Earl Gafford for first-degree murder. He was interviewed twice concerning the murder, once in April and again in June. The trial court suppressed the statements obtained from Gafford during the June interview, during which he confessed. On that occasion, Gafford was escorted to an interview room in handcuffs. Detective Maganiello read Gafford his *Miranda* rights. He then asked Gafford whether he understood that if he could not afford an attorney, one would be provided for him; Gafford responded, "I understand that. But ... would I be able to get one?" Maganiello responded, "Would you—of course. Everyone has a—everyone has a right to an attorney. Sure." After responding, Maganiello continued, "Has anyone threatened you or promised you anything to get you to talk to me?" Gafford said he felt threatened because he had been arrested for something he did not do.

After some questioning, Gafford stated, "Damn. I want to speak with my lawyer." Directly after that statement, Gafford, without prompting from either officer in the interview room, stated, "How long did it take you to prove this?"
Maganiello responded, "I'm sorry?"
Gafford: What about the shoestrings? What about that?
Maganiello: I'm sorry.
Gafford: What about the shoestrings around her neck? You get anything off that, on me?
Maganiello: I have to be clear. I don't know if you said it or not because you kind of said it under your breath. Were you requesting an attorney? I just got to be clear on that

because I'm not going to continue. I just heard you say something; I wasn't sure what you said.

Gafford: Nah. I was just saying you wanted uh you said about you can't afford one you can get one.

Maganiello: Ok. So, you're not requesting an attorney. Gafford: No.

Maganiello: Ok. I just wanted to make sure we're clear because I thought I heard you say something but it wasn't clear. So, what was your question about the shoelaces?

Shortly after that exchange, Gafford confessed to the murder.

The Defendant filed a motion to suppress his statements. The trial court granted his motion on two grounds: 1. Detective did not provide an adequate response to Gafford when he asked, "Will I be able to get an attorney?"; and 2. the interview did not stop when Gafford said, "Damn. I want to speak to my lawyer." On appeal, those rulings were reversed.

Issue:

Did the detective provide a fair and direct response to Gafford when he asked, "Will I be able to get an attorney?" **Yes**.

Did the detective stop the interview when Gafford said, "Damn. I want to speak to my lawyer."? **Yes**

Miranda:

In *Miranda v. Arizona*, (1966), the U.S. Supreme Court held that, to safeguard the Fifth Amendment's right against compelled self-incrimination, police must advise suspects of certain rights—including the right to silence and counsel—before subjecting them to custodial interrogation. When a suspect unequivocally invokes the *Miranda* right to counsel, (or silence), the officers must immediately stop questioning the suspect. See, *Edwards v. Arizona*, (S.Ct.1981). "If a suspect clearly and unequivocally requests counsel at any time during a custodial interview, the interrogation must immediately stop until a lawyer is present or the suspect reinitiates conversation."

However, that invocation does not mean that law enforcement may never again question the suspect in a custodial setting. See, *Oregon v. Bradshaw*, (S.Ct.1983), which held that a properly Mirandized suspect waives the right to counsel by initiating further conversation about his or her case. In *State v. Pena*, (Fla. 2024), the Florida Supreme Court receded from its earlier ruling in *Shelly v. State*, (Fla. 2018), which required a full re-reading of *Miranda* warnings before the police could re-engage with the accused. The Court ruled, "*Bradshaw* does not state a legal rule that a suspect must always be reminded of or re-given *Miranda* rights following reinitiation of contact with police. Instead, *Bradshaw* laid out a two-part test that asked whether the Defendant reinitiated contact with police and waived his rights as determined by the *totality of the evidence*. Thus, at a minimum, *Shelly* improperly expanded *Bradshaw* by adding a new requirement."

"For these reasons, we now recede from *Shelly*'s categorical remind-or-readvise requirement. In doing so, we reiterate that *Bradshaw* provides the proper standard which should be applied in this case. That standard asks two things: 1. Did the suspect reinitiate contact with police, and, if so, 2. did he knowingly and voluntarily waive his earlier-invoked *Miranda* rights? The latter inquiry turns on the totality of the circumstances. We add a final observation. Although we hold that there is no *per se* requirement that an officer remind or readvise a Defendant of his *Miranda* rights, *evidence of such would certainly be relevant to an overall analysis of whether the defendant voluntarily waived those rights*."

On the other hand, a suspect who has knowingly and voluntarily waived his rights makes an equivocal or ambiguous request for counsel, police officers are not required to stop the interrogation or ask clarifying questions. See, *Walker v. State*, (Fla.2007) (finding that the Defendant did not make an unequivocal request for counsel when he said, "I think I might want to talk to an attorney" and later asked the agent if he needed an attorney). Again, these are instances **after** a suspect has acknowledged his rights and has begun making statements.

In *Almeida v. State* (Fla. 1999), the Florida Supreme Court noted that a suspect who asks questions **while being advised of their rights** must be responded to in a *fair and direct manner*. "If, at any point during custodial interrogation, a suspect asks a clear question concerning his or her rights, the officer must stop the interview and make a good-faith effort to give *a simple and straightforward answer*. To do otherwise—i.e., to give an evasive answer, or to skip over the question, or to override or 'steamroll' the suspect—is to actively promote the very coercion that *Traylor v. State*, (Fla.1992) was intended to dispel."

"A suspect who has been ignored or overridden concerning a right will be reluctant to exercise that right freely. Once the officer

properly answers the question, the officer may then resume the interview (provided of course that the Defendant in the meantime has not invoked his or her rights). ... A prefatory utterance must be subject to the following three-step analysis: 1. whether the defendant was in fact referring to his right to counsel; 2. whether the utterance was a clear, bona fide question calling for an answer, not a
rumination or a rhetorical question; and 3. whether the officer made a good-faith effort to give a simple and straightforward answer."

In *State v. Glatzmayer*, (Fla.2001), the Florida Supreme Court held that where the defendant asked the officers if "they thought he should get a lawyer?" the officers' response that it was the Defendant's decision was a good-faith effort to give a simple and straightforward answer because "their response was simple, reasonable, and true." "Unlike the situation in *Almeida*, the officers did not engage in 'gamesmanship'; they did not try 'to give an evasive answer, or to skip over the question, or to override or steamroll' the suspect."

At the same time, the courts recognize that the officer should not be placed in the situation of providing legal advice to the suspect.

Court's Ruling:

"We turn first to determine whether Maganiello properly answered Gafford's prefatory question. 'If, at any point during custodial interrogation, a suspect asks a clear question concerning his or her rights, the officer must stop the interview and make a good-faith effort to give a simple and straightforward answer.' *Almeida v. State*, (Fla. 1999). Once the officer provides an answer, the interview may continue provided that the suspect has not invoked his or her rights in the meantime. Accordingly, to comply with the rule announced in *Almeida*, law enforcement must make a good-faith effort to give a simple and straightforward answer to a clear question concerning a suspect's rights; if, after answering, the suspect does not make an invocation, the interview may continue."

"Here, Maganiello complied with *Almeida*. After explaining that if Gafford could not afford an attorney, one would be provided, Gafford responded, 'I understand that. But ... would I be able to get one?' The trial court characterized this question as a prefatory question seeking clarification about his right, not an invocation of Gafford's right to counsel. The trial court, however, then determined that Maganiello's response, 'Would you—of course. Everyone has a—everyone has a right to an attorney,' was, in effect, a refusal to answer Gafford's question. On this point, the trial court's determination is incorrect. Maganiello did exactly what *Almeida* requires; he provided a straightforward, accurate, and simple response to Gafford's question."

"Instructive is *State v. Glatzmayer*, (Fla. 2001), where under similar circumstances, the Florida Supreme Court found law enforcement officers complied with *Almeida*. In *Glatzmayer*, the suspect asked if the law enforcement officers 'thought he should have an attorney.' In response, the officers responded, 'That's not our decision to make, that's yours, it's up to you.' The *Glatzmayer* court found this response was 'simple, reasonable, and true.' See also, *State v. Parker*, (1DCA 2014) (holding that Detective gave a good faith response, 'simple, straightforward, and honest,' to Defendant's question, 'Can you just tell me if I need to get a lawyer or something?' when Detective said, 'Listen, that's your right. But what I'm interested in is the truth.' Same as in *Chaney v. State*, (3DCA 2005) (holding that where Defendant asked officer whether he thought Defendant needed a lawyer, officer's response, 'Do you think you need one?' was proper and correctly informed defendant that it was up to him)."

"Having determined that Maganiello sufficiently responded to Gafford's prefatory question, we turn next to determine whether the officers improperly continued their questioning after Gafford stated later in the interview, "Damn. I want to speak with my lawyer."

" 'When a suspect unequivocally invokes [his] right to counsel, the officers must immediately stop questioning the suspect.' *State v. Penna*, (Fla. 2024) (citing *Edwards v. Arizona*, (S.Ct.1981)). That invocation, however, does not mean officers may never again question a suspect in a custodial setting. (Citing *Oregon v. Bradshaw*, (S.Ct.1983)). In *Penna*, the Florida Supreme Court established a two-prong analysis to determine whether post-invocation statements violate *Miranda* based on their interpretation of *Edwards* and *Bradshaw*: 1. the Defendant must reinitiate contact with the police; and 2. there must be a valid waiver of the *Miranda* rights already invoked."

"After Gafford said, 'Damn. I want to speak with my lawyer,' the officers did not thereafter question Gafford. Instead, Gafford then

reinitiated contact with the officers, asking Maganiello, 'So how long did it take you to prove this?' Maganiello responded, 'I'm sorry?' After which, Gafford again continued speaking at length. When Gafford stopped speaking, Maganiello sought to clarify whether Gafford was invoking his right to counsel. Gafford said, 'Nah. I was just saying you wanted uh you said about you can't afford one you can get one.' Maganiello again asked Gafford if he was requesting an attorney. Gafford, without equivocation said, 'No.' The entire exchange—Gafford invoking his right to counsel, reinitiating contact with the officers, and later asserting that he was not requesting an attorney—lasted four minutes. Under the circumstances, the officers complied with the mandate in *Penna*. See, *Herard v. State*, (Fla. 2024) (holding that law enforcement officer's continued questioning after three-minute exchange where Defendant invoked counsel, then immediately reinitiated contact with interrogating officers and waived right to counsel did not violate Defendant's *Miranda* rights). Accordingly, the trial court erred by granting Gafford's motion to suppress statements. REVERSED."

Lessons Learned:

While not emphasized by the 6th D.C.A. here, the U.S. Supreme Court has noted a distinction between a suspect who acknowledges that he understands his rights, waives them, and answers questions, and a suspect who asks questions while his rights are being read to him, to understand what his rights are under *Miranda*. As a general rule nothing in *Almeida* requires a law enforcement officer to act as a legal advisor or personal counselor for a suspect. "Such a task is properly left to defense counsel. To require officers to advise and counsel suspects would impinge on the officers' sworn duty to prevent and detect crime and enforce the laws of the State."

An interesting issue was raised in *Taylor v. Sec. Fla. Dept. Corrections*, U.S. Court of Appeals, 11th Cir. (April 11, 2023). The Defendant was arrested and invoked his right to counsel. He was taken to the nurses' station at the county jail so that a blood sample could be taken. Later that day, after the samples were taken, Taylor asked the Detective how long it would take to get the results back. Instead of directly responding to the question, the Detective asked Taylor why he wanted to know. Taylor responded that he was just wondering when they would be back out to pick him up, indicating guilty knowledge.

The issue on appeal was did the officer's response of "Why?" to Defendant's question constitute interrogation reasonably likely to elicit an incriminating response. The 11th Circuit ruled it did not. "A defendant who has invoked his right to counsel, as Taylor did, cannot be 'subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' *Edwards v. Arizona*, (S.Ct.1981). Interrogation includes 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' *Rhode Island v. Innis* (1980)."

"A reasonable jurist could interpret Officer Bogers' question—'Why?'—in response to Taylor's question as ordinary, run-of-the-mill conversation rather than the sort of query that a reasonable officer would have known would elicit an incriminating response. And whatever happened here, the likelihood that a suspect would answer a question like Officer Bogers' with incriminating information seems exceedingly small, or so, in any event, a reasonable jurist could conclude. That's especially true if we're also to believe, as Taylor urges, that his question about when the DNA analysis would be complete didn't **reinitiate** the conversation with Officer Bogers. *If Taylor's question was casual enough that it didn't constitute a reinitiation, then a reasonable jurist could certainly conclude that Officer Bogers' follow-up was casual enough that it didn't constitute interrogation.*"

State v. Gafford
6th D.C.A.
(July 18, 2025)

Victim Rights

Defendant violated a no-contact order and thereby the terms of his probation. He entered an open plea of guilty to the court. At the sentencing hearing, the Victim gave a lengthy statement. She testified that during their marriage, Defendant had abused her, their children, and their pets; committed marital rape; and damaged her home and belongings. These incidents were not included in the charged crime he pled to. The victim also gave charged crime testimony relevant to the case.

The trial court sentenced Defendant to nine months in jail with credit for twenty-five days served for

the violation of the domestic battery probation, and twelve months of probation with conditions to begin after his release for violating the injunction. Defendant appealed this sentence, arguing it was aggravated by the victim's extraneous testimony. On appeal, the sentence imposed was affirmed.

Issue:

Was the victim's testimony so egregious as to taint the trial court's announced sentence? **No**.

Victim's Rights:

Article I, §16(b), Florida Constitution, provides: "Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."

Marsy's Law in Florida, also known as Amendment 6, is a constitutional amendment that expands the rights of crime victims in Florida. It was approved by voters in November 2018 and took effect in 2019. The law seeks to provide victims with rights equal to those of the accused, ensuring they are treated with fairness, respect, and free from intimidation. Marsy's Law pertinently states, "every victim is entitled to ... the right to be heard in any public proceeding involving pretrial or other release from any form of legal constraint, plea, sentencing, adjudication, or parole, and any proceeding during which a right of the victim is implicated." Art. I, § 16(b)(6)b, Florida Constitution.

Sec. 921.143, Appearance of victim ... to make statement at sentencing hearing, provides:

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has been convicted of any felony or who has pleaded guilty or nolo contendere to any crime, … the sentencing court shall permit the victim of the crime for which the defendant is being sentenced, the victim's parent or guardian if the victim is a minor, the lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, or the next of kin of the victim if the victim has died from causes related to the crime, to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; and

(b) Submit a written statement under oath to the office of the State Attorney, which statement shall be filed with the sentencing court.

(2) The State Attorney or any Assistant State Attorney shall advise all victims … that statements, whether oral or written, shall **relate to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, loss of earnings directly or indirectly resulting from the crime** for which the defendant is being sentenced, and any matter relevant to an appropriate disposition and sentence.

"Marsy's Law does not provide procedures and guidelines as to how its purpose is to be achieved." See, *L.T. v. State*, (1DCA 2020). However, "these provisions call for a careful balance of the rights of the defendant and those of the victim ... without impacting the basic constitutional foundations of the criminal justice system."

In the present case, Defendant argued the trial court failed to maintain a "careful balance" when it permitted the Victim to testify to actions of Defendant that were not at issue, thus tainting his sentencing hearing and the sentence imposed.

Court's Ruling:

"Trial judges are routinely made aware of information which may not be properly considered in determining a cause. Our judicial system is dependent upon the ability of trial judges to disregard improper information and to adhere to the requirements of the law in deciding a case or in imposing a sentence." See, *Harvard v. State*, (Fla. 1982).

"Generally, 'when a sentence is within statutory limits, it is not subject to review by an appellate court.' *Landis v. State*, (4DCA 2024). Here, Defendant faced a maximum two-year sentence after pleading guilty to two first-degree misdemeanors. The trial court sentenced Defendant within the statutory limits when it sentenced him to nine months in jail, followed by twelve months on probation."

The 'consideration of subsequent charges with which the defendant has not been convicted violates due process' and, therefore, creates a fundamental error in the sentencing process. *Norvil v. State*, (Fla. 2016). 'However, the mere fact that a sentencing judge hears improper information related to uncharged conduct during a sentencing hearing does not necessarily warrant reversal.' *Serrano v. State*, (1DCA 2019) ('There must be some indication that the court based its sentence on an impermissible factor before this Court will reverse.')."

"Here, the State satisfied its

burden to prove that the trial court did not improperly rely on the uncharged crime testimony. The trial court stated immediately after Victim's statement that it would consider such statements as they pertain to the charged domestic battery and not weigh 'the prior bad acts that are alleged' for sentencing purposes. The trial court also declared that it would only review Victim's testimony, as it concerned uncharged conduct, for the impact of Defendant's contact as it affected Victim's 'frame of mind.' Finally, the trial court sentenced Defendant well within the statutory limits. AFFIRMED."

Lessons Learned:

While the Florida Constitution and the relevant sentencing statutes attempt to afford the victims meaningful input at sentencing proceedings, those rights are "limited to the extent that they do not interfere with the constitutional rights of the accused." As the present case demonstrates, once the victim is afforded the opportunity to be heard, limiting those comments to "relate to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced," is nigh impossible.

As the D.C.A. noted in the present case, "A trial court is left in a particularly challenging spot when it must balance the rights of the defendant with those of the victim. While the law requires the court to permit victims to testify at their aggressors' sentencing hearings, if they so wish, it also commands the sentencing court not to consider uncharged conduct. The sentencing judge here carefully threaded that needle, especially considering the absence of an objection. Although Victim testified to Defendant's uncharged conduct, the trial court properly explained that it would not consider nor rely on that testimony of uncharged conduct. Under these circumstances, Victim's statement did not fundamentally taint Defendant's sentence, nor constitute a violation of due process."

Manna v. State
4th D.C.A.
(Aug. 13, 2025)

(Continued from page 3)

Nanny Cam

officer or **a person acting under the direction of an investigative or law enforcement officer** to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the *purpose of such interception is to obtain evidence of a criminal act*."

Mead v. State, (4DCA 2010), answered the question, how much supervision of the civilian is required. Can an investigating officer merely "authorize" the intercept without being present monitoring the recording? The 4th D.C.A. responded in the affirmative.

"Mead argues that the phrase 'under the direction' connotes 'significantly greater supervision than where a person merely acts at the direction of another.' However, the language of the statute **does not require active police involvement or presence during the recording process.** We construe 'under the direction' as synonymous with 'authorized by.' "

While the 4th D.C.A.'s opinion in *Mead v. State* makes clear that the statute allowing telephonic intercepts does not require the active supervision of law enforcement, better practice does. Criminal investigations that permit the informant or even the victim to operate independently of the police investigator open the door to abuse and a possible entrapment defense.

Minotty v. Baudo
4th D.C.A.
(July 21, 2010)