

Florida Criminal Law *Newsletter*

Big Changes in Florida Criminal Law and Procedure

*DNA affects plea colloquies, State
gets first and last closing
argument in every case*

Florida's criminal laws – and the Florida Rules of Criminal Procedure – were changed by the legislature.

New Florida Statute Section 925.12 requires that felony case pleas of No Contest or Guilty be preceded by an inquiry of the defendant *and* counsel as to whether any DNA evidence exists which could exonerate the defendant. Several specific inquiries are required: Whether counsel has reviewed the Discovery Exhibit, whether the exhibit included physical evidence, whether the defendant has reviewed the Discovery Exhibit, whether counsel is aware of any physical evidence disclosed by the State for which DNA testing may exonerate the defendant, whether the defendant is aware of any physical evidence disclosed by the State for which DNA

testing may exonerate the defendant, and whether the State is aware of any exonerative evidence. The Florida Supreme Court was ordered to adopt Rules of Procedure consistent with this inquiry.

First Judicial Circuit Staff Attorney **Melissa Condon Onacki** has already sent a memorandum to all Circuit Court judges regarding this new law, and has suggested that the inquiry begin effective July 1, 2006.

Okaloosa County has a new felony plea form reflecting this change. Other counties are expected to change their forms as well.

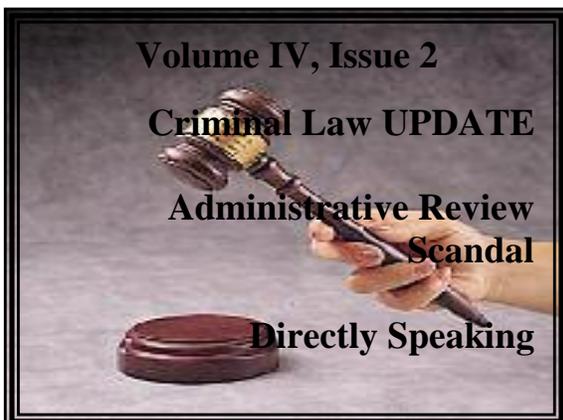
Perhaps the biggest change in over one hundred years was House Bill 147, now Chapter 2006-96, Laws of Florida. Already approved by the governor, this new law allows the State to get first and last closing argument in every case, beginning October 1, 2006.

Pretrial Release is more complicated in that the First Appearance Judges, after October 1, 2006, will be required to set a specific bond for each count rather than one amount for all charges in a particular case.

Other laws allow for more driver's license suspensions, provide new requirements in DNA cases, substitute STAR programs for boot camps, regulate stun guns, amend Section 893 and regulate agency e-mail.

TRIVIA ANSWER:

Yes, Florida Statute Section 775.13 requires registration even in cases where adjudication has been withheld.



Directly Speaking

By Stephen G. Cobb
Editor, FCL Newsletter

Special Guest **Doc Tomkiel**, a former Administrative Hearing Officer with the Department of Highway Safety and Motor Vehicles, was invited to write an article for this edition of the *Florida Criminal Law Newsletter*. He was kind enough to do so, and this explosive article exposes government corruption on a statewide level.

Although my practice is gravitating more towards major felony 'heavy litigation' cases, I always have Doc review every single one of my DUI cases – misdemeanor or felony - prior to the administrative hearing. As a former Hearing Officer, Doc's advice and insight are invaluable. Obviously, he doesn't give legal advice, but having insider agency information can often mean the difference between winning or losing an administrative hearing.

Speaking of administrative hearings, we are starting to see the non-lawyers at DHSMV come up with some real interesting 'legal' tests. We are starting to see cases where we should win result in sustained suspensions under the 'totality of the documents' test. Arguments are not being addressed in the orders, and one can sense that the Hearing Officers have basically been told that this is an election year and they should ink their rubber stamp marked 'sustained' before the hearing even starts. Thus the client is stuck with the decision to file a Petition for a Writ of Cert to the Circuit Court, spending even more time and money – and often finding their suspension period will run before the legal issues are resolved in their favor.

The Department knows this, and this tactic is nothing less than a symptom of a government out of control.

Since 9/11, we have seen a deterioration of our liberties in the name of security at all levels of government. The president, the governor, and even local school boards believe that they are unaccountable, they believe that they are the law.

Perhaps Judge Taylor said it best, when finding the NSA wiretapping program illegal:

"There are no hereditary kings in America and no powers not created by the Constitution."

We have no kings or queens in this great state either.

I have often joked that I should be made King of Florida for a ten year term with unlimited power in order to break the logjam of government inefficiency (and downright dumbness). Yet the real separation of powers between co-equal branches of government isn't a laughing matter.

Here, we appear to have an agency which is out of control. They are taking advantage of people who are charged with an unpopular crime and the agency responsible for upholding the law – *using non-lawyer judges* – appears to be breaking the law with King George's immunity. Thank you, Doc, for having the courage to speak out.



Stephen G. Cobb is a Board Certified Criminal Trial Law Specialist and Editor of the Florida Criminal Law Newsletter.

The Florida Bureau of Administrative Reviews – An Agency in Crisis

It's very difficult for the Florida motoring public to receive justice at the administrative level of government without expert "insider" guidance. I walked away from a six year career with the Department for only one reason – certain administrators made it impossible for me to render legal decisions in a fair and impartial manner without having to endure threats of adverse personnel action when I refused to rule as directed. I can name at least a dozen other hearing officers who have walked away from their careers for the same reason - all because of an unwritten invalidation policy that the Department says does not exist.

Every time a hearing officer is directed to exceed the limits of his/her lawful authority – every time they are ordered to disregard certain appellate court decisions in order to sustain a suspension that should be invalidated – the corruption is perpetuated. Just look at how the Department handled the Interlock issue. Four Florida DCA's ruled against them and the Florida Supreme Court refused to hear their appeals. The Department never had the lawful authority to impose the Interlock sanction, but that didn't stop overzealous administrators. Hearing officers and their supervisors have been demoted or fired on charges of "poor performance" after they have questioned the administration's authority to compel them to act unethically or illegally in violation of their oath of office.

Internal directives are given verbally to the hearing officers in order to avoid public accountability - and they are strictly enforced. If an attorney fails to make the proper motion, the suspension may be sustained even if the case is fatally flawed. Nevertheless, a

Bureau of Administrative Reviews administrator recently testified under oath that the hearing officers do not have to seek approval regarding their invalidation decisions. To learn that this administrator – someone I know very well, testified under oath that there is no such policy or practice regarding invalidations – it's unbelievable. A new hearing officer still on probation in Tallahassee quit, and a veteran hearing officer in Panama City just left a few months ago because of this "non-existent" invalidation policy

As a former law enforcement supervisor, I share the Department's desire to get the drunk drivers off the road. However, it must be done in a legal and ethical manner. This isn't about putting drunk drivers back out on the road – this is all about due process of law and providing the Florida motoring public with justice at the administrative level of government. The Department has no right to compel the hearing officers to disregard the law in the name of highway safety. By putting hearing officers, who are not members of the Florida Bar, in a position of public trust, the Florida legislature created a system where these legal "decision-makers" must rely upon others for the legal advice that they need to do their job. This kind of in-house quasi-judicial system is prone to administrative abuse.



Should you be interested in having Doc Tomkiel review your DUI and .02 cases prior to the administrative hearing, he can be reached at:

DueProcess@Comcast.Net

Florida Criminal Law Trivia:

Does a sentenced felony defendant have to register with the local sheriff's department if adjudication has been withheld? *Answer on page 1.*

NEXT FACDL-OW MEETINGS:

Noon, August 22, 2006 at Sculley's in Fort Walton Beach, Florida.

Noon, September 28, 2006 at Sculley's in Fort Walton Beach, Florida.

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