

The Rare Full Court Press: En Banc Arguments in the DCA's

by [John J. Cavaliere, III](#)



On January 29, 2024, the Fifth District Court of Appeal did something the Second District hasn't done since 1990: The court held an en banc oral argument.¹ Twelve judges took the bench. Chief Judge James A. Edwards welcomed everyone to "the first annual, if not ever, en banc oral argument" in the Fifth DCA's history before introducing each judge. For the next hour and twenty minutes, the judges questioned counsel about whether the "plain smell" of "fresh cut" marijuana triggers reasonable suspicion for an investigatory stop now that marijuana has a lawful purpose in some circumstances.

Whatever the court decides,² the event raised my own questions about en banc arguments in the DCAs. So, I called each DCA's clerk's office to ask when they held their last en banc argument.

By far the most active court has been the First DCA, having held four en banc arguments since 2017,³ including one on Halloween 2023.⁴

The Third and Fourth DCAs haven't hosted one in so long that the answers from their respective clerk's offices were, "we don't know the exact date, but it's been several years," and, "not in recent memory." Unsurprisingly, the Sixth DCA hasn't held one in its fifteen-month history.

The Second DCA's lone en banc argument was in 1990. Former Judge Chris Altenbernd described the scene in an email to me: "There were 12 of us and we were in a horseshoe at the front of the courtroom in Lakeland." Seated on one end of the horseshoe as the junior judge, "[t]he lawyers would have been unable to make eye contact with me."

"At the end, we concluded that it was such a bad experience for the lawyers and the judges that we promised never to do it again. We used to remind every new judge that OA en banc was not a good idea."

None of the participants from that argument remain on the court. Will the current judges stay the course charted in 1990 or break with tradition and follow the First and Fifth DCAs after the new courthouse opens? Stay tuned.

About the Author

John J. Cavaliere, III is an attorney at Lewis, Longman & Walker, P.A., practicing in the areas of governmental law, land use and real estate law, and administrative, civil, and appellate litigation. Before LLW, he represented community associations and individuals in appellate, trial, administrative, and bankruptcy courts, provided corporate general counsel, and served as special district counsel. He can be reached at jcavaliere@llw-law.com or by calling 727-245-0820.

Footnotes

¹ *Baxter v. State*, Case No. 5D23-0118; watch at: <https://www.youtube.com/watch?v=oB78QAJ13wo>.

² As of March 19, 2024, the court has not issued an en banc opinion in the case. The panel opinion is available at 2023 WL 7096645 (Oct. 27, 2023).

³ *Sec'y of State Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 375 So. 3d 335 (Fla. 1st DCA 2023) (argued Oct. 31, 2024); *Rosier v. State*, 276 So. 3d 403 (Fla. 1st DCA 2019) (argued Apr. 10, 2019); *Davis v. State*, 268 So. 3d 958 (Fla. 1st DCA 2019) (argued Nov. 27, 2018); *Woods v. State*, 214 So. 3d 803, 804 (Fla. 1st DCA 2017) (argued Jan. 4, 2017).

⁴ *Black Voters Matter*, 375 So. 3d at 335; watch at: <https://www.youtube.com/watch?v=f7rPk4z39Z4>.

⁵ *Bryant v. Lucky Stores, Inc.*, 577 So. 2d 1347 (Fla. 2d DCA 1990) (argued June 21, 1990).