STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT
WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2001-04 **October 2001**
Editors: VonCille Bruce and William P. Cervone

A MESSAGE FROM

STATE ATTORNEY
BILL CERVONE

The time has come for a re-evaluation and, I believe, a change in the way statements, especially confessions, are dealt with. In order to combat increasing juror skepticism about law enforcement testimony, I am asking each of you and each of your agencies to adopt a policy of audio (and when possible video) recording of at least suspect statements.

The reasons for this are many, although I will only address two here. First, at best the defense bar is now very ably embarrassing many officers during cross-examination by pointing out that no effort was made to use even readily available and cheap equipment, like a simple tape recorder, in order to prove to a jury that a defendant really said what it is claimed he said. In some cases, defendants are questioned in facilities that are fully equipped to both audio and videotape what is said, yet neither is done. The failure to make this small effort is then characterized by the defense as anything from inefficiency to proof of a conspiracy to frame the defendant. Second, juries are increasingly willing to think ill of law enforcement. Every episode where an officer (or a prosecutor, a correctional officer, or even a civilian employee of one of our agencies) gets in trouble or makes unfavorable headlines fuels this fire, and even when those stories have nothing to do with our Circuit we still pay the price.

The combination of these two factors is proving deadly to what used to be good cases. One reality of today's world is that police witnesses are simply not automatically accepted as truthful by juries. We can easily combat that in the area of statements by using the cheap and readily available technology that we all have.

I feel strongly about this and ask for your help in developing new protocols to implement such a change. Over the next few months let's open a dialog aimed at fixing a problem that already plagues us.

*****

SAO PERSONNEL CHANGES

ASA **TRACY CARLISLE** resigned from her position on July 2nd. Replacing her in the County Court Division in Gainesville is **JOSH SILVERMAN**, who started on August 15th. Josh has been interning with the office since late last year and is a May 2001 graduate of the University of Florida Law School.

ASA **CHRISTY BARBER** resigned from her position in the Gainesville felony division in August to be a full time mom. Christy's position was filled by ASA **KIM ECKERT KINSELL**. Kim's position in the Gainesville traffic division was taken by ASA **BRANDE SMITH**, who was previously handling misdemeanor cases. Brande's caseload is now being handled by ASA **STEVE WALKER**, who started on July 23. Steve is also a former intern and a UF Law School gradutate.

ASA **RAY EARL THOMAS** resigned from his position on August 13th. Beginning on September 1st, ASA **KEVIN ROBERTSON** assumed responsibility for Ray's former caseload in the Gainesville Narcotics Division. Kevin's traffic caseload has been assumed by ASA **MICHAEL BECKER**.

Also on September 1st, ASA **ROSA DuBOSE** transferred to a felony position in Bradford County. This transfer was necessitated by Rosa's move to Clay County because of her husband having taken a job in Jacksonville. ASA **LEE LIBBY** was transferred to the Gainesville Intake Unit from Starke on that same date, and ASA **KIRSTEN STINSON** was transferred from the Intake Unit to provide coverage for a portion of the Gainesville felony traffic caseload, some of which Rosa will maintain from her office in Starke.

*****

CONGRATULATIONS TO…

…ASA **CHRISTY BARBER** and her husband Kelly, who became the parents of their first child, a son, on July 24th.

…ASAs **FRANCINE JOSEPHSON**, **ROSALYN MATTINGLY**, **MELISSA RICH**, **JOSH SILVERMAN**, and **STEVE WALKER**, all of whom learned in September that they had passed the Florida Bar exam.

…GPD Detective **REGGIE JOHNSON**, named Florida's Law Enforcement Officer of the Year by FDLE at a Tallahassee ceremony on September 10th.

…GPD Officer **JEFF McADAMS**, who was elected to the FOP State Labor Council Executive Committee in June. He will serve as one of the Labor Council's Board of Directors.

…Gainesville Police Department's **STEVE WEAVER** and **BRIAN HELMERSON**, both of whom were promoted to Sergeant, and **DON GEELHOED** and **MIKE McCULLERS**, both of whom were promoted to Corporal at an awards ceremony on August

24th. Also recognized with GPD's Award of Excellence for exemplary contributions to the Department's goals were Officers **CHUCK DALE** and **MARC PLOURDE**.

*****

DOC RE-ASSIGNMENTS

The Department of Corrections has made numerous re-assignments affecting institutions in the Circuit. **JIMMY CROSBY** is now Region II Director of Institutions. **BRAD CARTER** is now Warden at FSP, and **JOE LAZENBY** is Assistant Warden at FSP. At UCI, **PAUL DECKER** is now Warden and **DON DAVIS** is Assistant Warden. At Baker Correctional **BOBBY DODD** is now Warden and **STEVE SINGER** remains Assistant Warden. At New River, **ADRO JOHNSON** is Warden and **LUTEHR POLHILL** is Assistant Warden. At Lawtey Correctional, **THOMAS FORTNER** is Warden. At Gainesville Correctional, **GREG RISKA** is Warden.

Re-assignments have also occurred within the Inspector General's Office. **RILEY RHODEN** and **DALE HAYES** are now at FSP, **RICHARD JERNIGAN** is at UCI, **DOROTHY MINTA** is at Baker Correctional, **JIMMY CLARK** is at Lawtey Correctional, **K. O. CRAWFORD** is at Gainesville Correctional, and **NEWT LIVINGSTON** is at Lancaster Correctional.

*****

2001 CRIMINAL LEGISLATION

As is our habit, the October issue of the Legal Bulletin is used to outline legislative changes of general interest to the law enforcement community from the most recent legislative session. All of the following summaries deal with such changes, and all are already in effect unless otherwise mentioned. As with cases, full text copies are available from the SAO. Each is referenced by its Session Law number.

2001-50: FS 741.283 now requires a 5 day jail term for a domestic violence conviction in which the allegation is the intentional infliction of bodily harm. FS 784.03 now allows a felony battery charge to be predicated on one prior conviction for Battery, Felony Battery, or Aggravated Battery.

2001-51: FS 827.06 now provides for a series of misdemeanor and felony crimes for the willful failure to comply with child or spousal support orders when the defendant has the ability to pay and has previously been held in contempt for failure to do so.

2001-54: FS 847 has been revised to establish new offenses for electronic transmission of child pornography or material harmful to minors; FS 815.06 now provides for felony offenses involving destruction of or damage to

computer networks.

2001-57: FS 823.10 now sets out a felony offense for maintaining a nuisance warehouse, structure, or building.

2001-58: FS 810.02 re-defines burglary to allow for surreptitious entry (See the July 2001 Legal Bulletin for details).

2001-85: FS 860.146 now provides for a felony offense for the knowing sale, purchase or installation of a junk air bag.

2001-92: FS 944.35 now requires correctional officer training programs to include a section dealing with prohibited sexual activity at correctional facilities; FS 951.221 creates new felony offenses for sexual misconduct with inmates, regardless of consent.

2001-93: FS 944.17 now requires that a county jail sentence imposed on a DOC inmate be served in DOC.

2001-97: FS 925.11 sets forth new procedures for DNA testing after conviction upon a petition to the court, as a part of which timeframes for the retention of evidence are included; FS 943.325 now provides a timeline for the inclusion of DNA testing for databank purposes so that all felonies will be captured by July of 2005.

2001-9: FS 775.0844 establishes the felony offense of Aggravated White Collar Crime when 10 or more elderly people, 20 or more people, the State or a State agency are defrauded of over $50,000; FS 910.15 now provides that Internet communications used to facilitate a theft are considered to have been made in each county of the State.

2001-102: FS 775.15 revises the Statute Of Limitations for Sexual Battery, Lewd And Lascivious, and Incest offenses so that it does not begin until the victim reaches age 18.

2001-109: FS 948.06 now provides that a VOP or VOCC warrant tolls the probationary period until the charges are resolved.

2001-114: FS 934.215 creates a felony offense for the use of a two way communications device to facilitate the commission of a felony.

2001-115: FS 812.015 re-classifies retail theft to a felony if the defendant co-ordinates the activities of one or more persons, commits thefts at multiple locations within 48 hours, otherwise acts in concert with others to distract a merchant, or uses a box containing purchased merchandise to accomplish a theft; FS 812.017 creates misdemeanor offenses for requesting or obtaining refunds with false or fraudulent receipts; FS

812.0195 creates a series of offenses for using the Internet to sell stolen property; FS 817.625 creates a felony for using scanning devices to steal credit card magnetic strip information.

2001-147: FS 316.192 establishes a felony Reckless Driving offense if serious bodily injury results and a misdemeanor Reckless Driving offense if other injury or property damage results; FS 316.1923 provides for an "aggressive careless driving" designation on citations when two successive acts of specified careless driving are committed.

2001-163: FS 316.066 provides that crash reports are not public record for 60 days (See the July 2001 Legal Bulletin for details).

2001-196: FS 322.2615 reduces the time period for temporary driving permits issued at the time of a DUI arrest from 30 to 10 days.

2001-202: FS 921.137 prohibits the imposition of a death penalty upon a mentally retarded person.

2001-209: FS 944.065 now requires DOC notification to the State Attorney and the victim within 30 days of an inmate being approved for community work release.

2001-236: FS 782.04 now includes Resisting With Violence as a predicate offense qualifying a killing as Felony Murder I or II.

2001-264: FS 943.1758 requires law enforcement agencies to include training policies against racial profiling.

*****

INVESTIGATING ON-LINE CHILD SEXUAL EXPLOITATION

The following article is re-produced with permission of and thanks to the American Prosecutors Research Institute, which ran it earlier this year. It was authored by Brad Astrowski, Bureau Chief, Technology And Electronic Crimes Bureau, Maricopa County Attorney's Office, Phoenix, Arizona, and Susan Kreston, Deputy Director, National Center For Prosecution Of Child Abuse, American Prosecutors Research Institute.

INTRODUCTION

With computer facilitated child sexual exploitation coming to the top of the agenda for both police and prosecutors, new issues are arising concerning what should be regarded as the best practice for investigating these crimes against children. To assist front line law enforcement professionals in responding to these issues, the following suggestions are offered.

THE GOLDEN RULES

#1 NEVER SAY OR DO

ANYTHING YOU WOULDN'T WANT TO REPEAT. Keep in mind that whatever is done during the course of an investigation must be presented and justified to a jury. If, for example, a perpetrator sends the undercover detective a sexually provocative piece of clothing and asks the "child" to put it on and send a picture to him, the detective must not do so. Think like a 13-year-old to come up with a reason to decline. Examples would include: "I don't have a camera," "I don't want to send it off to get developed - I might get caught," or "How can I take a picture of myself?" Refusing to pander to the perpetrator's wishes is not the end of the case. Sending a picture of a detective dressed in such an item is.

#2 NEVER SEND CHILD PORNOGRAPHY, ADULT PORNOGRAPHY, EROTICA, PICTURES OF YOURSELF OR YOUR CHILD OVER THE INTERNET. It goes without saying that the job of law enforcement is not to add to the volume of illegal materials available on the Internet. If the perpetrator wants to swap pictures, the detective may send corrupted images. A lack of a digital camera and a scanner might also be raised as a bar. Alternatively, undercover detectives may tell the perpetrator that they don't have pictures, but they do have child pornography videos, so a face to face meeting might be better. Finally, if there is no other way, arrange a controlled delivery of materials with immediate seizure after delivery. The U. S. Postal Service can assist local investigations with this type of operation.

Often, the perpetrator will ask the "child" to send a picture of him or herself. Once an image, no matter how innocent, leaves the possession of the sender, it is forever out of his or her control. There is nothing to prevent the recipient of the image from cutting and pasting the head from the image onto the body of another child being abused in another picture, thereby creating new child pornography.

#3 LOG EVERYTHING. It is as important in these cases as in any other to keep complete, well documented records of any transactions that occur in the course of the investigation. It is of paramount importance to log everything so that a full and absolutely accurate accounting may be made of any correspondence between the victim/undercover detective and the perpetrator. It is incumbent upon the investigator to know what is automatically logged and what is not. For example, Internet Service Providers (ISPs) will not automatically preserve instant messages or chat room conversations on their servers. (This does not

mean, however, that the perpetrator and/or the victim have not logged those conversations themselves. A search of their computers will be necessary to determine if this has occurred.) To do so would be an extreme financial burden. Therefore, if a detective attempts to subpoena an ISP for that information, it will be to no avail. Detectives must save these messages themselves. Detectives must know how to save and log all communications between the perpetrator and the "victim" to best facilitate the effective prosecution of the case.

#4 NEVER WORK FROM YOUR HOME OR YOUR PERSONAL ACCOUNT. Every office should have a protocol delineating the parameters and proper techniques for investigating these cases. When detectives go on line, they should know what is acceptable and legally defensible in such an undercover operation. Two key pieces of any such protocol should be that no detective ever work from his/her home computer or from a personal account. These two rules simplify the issues attendant to properly backstopping accounts, and also firmly and effectively establish the boundaries within which the detective may pursue the case. By particularly designating who will be allowed to conduct these investigations and on what computer(s), the protocol additionally preempts and precludes the defense of "I was working on a case/I had no criminal intent" being raised. It also helps to insulate both the detective and his/her office from liability issues.

#5 GIVE THE DEFENDANT AN OUT. At some point in the correspondence with the perpetrators, give them an out. In a traveler case this might be "Are you sure you want to have sex with me? Can't you get in trouble?" In a child pornography case it might be "I'm worried about getting together to exchange pictures. Isn't 'his stuff illegal? Can't we get in trouble?" This will help the prosecutor to show that the perpetrator had the opportunity to abandon the activity but, rather, chose to pursue it.

#6 DON'T BE THE SLIMEBALL - THAT'S THE DEFENDANT'S JOB. When conducting an undercover investigation, it is crucial that the detective let the perpetrator lead the communication. It should never be the undercover detective who first uses sexually explicit language or suggests a sexual encounter. Issues of both entrapment and jury nullification are always best avoided, particularly in this context. Remember, whatever you say you will have to repeat in front of the jury. Make certain the jurors know that it was the defendant who escalated the

conversation and steered it toward sexual matters, not you.

#7 IF YOU SEIZE IT, YOU MUST SEARCH IT. It is imperative that any computer seized be examined quickly. Jurisdictions in the U.S. are, on average, six months behind in their analysis of computer forensic evidence. With each analysis taking approximately 40 hours to complete, it is extremely easy to fall behind. Backlog, however, is not a legally recognized excuse for failing to conduct a forensic analysis in a timely manner. Charging and pre-trial decisions must be made with all deliberate speed, and with issues of civil liability regarding failing to return the computer to innocent third parties (usually businesses who use the computer(s) in every day work), it is exceptionally important to conduct the forensic analysis of the materials and then return everything that is not evidence to its owner. It should be remembered that seizure of BOTH the defendant's and the victim's computer is optimal to retrieve all possible electronic evidence relevant to the case.

#8 CONSIDER THE PROS AND CONS OF A FACE-TO-FACE MEETING. One of the best ways to place the perpetrator behind the computer and preempt the Some Other Dude Did It (SODDI) defense is to arrange a face-to-face meeting between the perpetrator and the undercover detective purporting to be a child, or purporting to want to exchange child pornography. Two issues must be addressed when deciding whether or not to arrange such a meeting. The first is officer safety. Simply because the perpetrator is (or seems to be) a preferential sex offender does not mean that there are no issues of officer safety. The offender may be armed and fearful that the meeting is, in fact, a sting. Additionally, there is always the possibility that the person who shows up may be a "cyber vigilante (someone who poses on line as a pedophile in hopes of meeting pedophiles and then inflicting harm on them)" prepared to attack the presumed pedophile.

The second issue relates to potential defenses that such a meeting might inadvertently support. While the face-to-face meeting will effectively counter the "it wasn't me on the computer" defense, it may pose other problems. By having a very young looking officer impersonate the "child" the perpetrator is supposed to be meeting, the defense of "fantasy" may be given unintentional credibility. With the fantasy defense the defendant claims that he knew the "child" was not really a child and that he was just role-playing. The defendant could allege that he was expecting a young

looking adult and, in fact, that is who showed up. Before using this technique, consider whether it is necessary to actually have someone impersonate the child/victim or whether the defendant merely showing up is sufficient. UNDER NO CIRCUMSTANCES WHATSOEVER SHOULD A REAL CHILD EVER BE USED TO EFFECTUATE THE MEETING.

#9 IF YOU DISCOVER THAT THE PERPETRATOR IS IN ANOTHER JURISDICTION, IMMEDIATELY FORWARD THE FILE TO THAT JURISDICTION. When you find that the Internet account is registered to a John Doe in another state (or even a foreign country), inform that other jurisdiction immediately and decide if it is better for the perpetrator'' home county to take over the investigation. The multi-jurisdictional aspect of these cases cannot be overemphasized. Cooperation is needed to both apprehend the perpetrator and protect the victim. [See note below]

#10 COMPUTER FORENSICS IS NOT A SUBSTITUTE FOR SOLID, OLD FASHIONED POLICE WORK. Two classic areas of police work predominate this area: suspect surveillance and suspect interrogation. Surveillance is one way to put the perpetrator behind the computer. Meeting the untrue SODDI defense may require that the perpetrator's home /business be surveilled to determine who has access to the computer and at what times of the day. It is crucial that information be gained at the investigatory stage to defeat this claim.

Suspect interrogation remains one of the three most critical pieces of the successful prosecution of these cases, the other two being the victim and the forensic/medical/physical evidence in the case. Questions that should be asked of the suspect include: "How many computers do you have access to?" "How many computers did you use to correspond with the child?" "Where are they all located?" "Are there password protected or encrypted files in those computers?" "What are the passwords?"

CONCLUSION

No one protocol or set of rules can definitively deal with all the issues that might arise in the investigation of a computer facilitated child sexual exploitation case. However, by adhering to some simple strategies that reflect the best practices to date, many of the problems and pitfalls of investigating these cases can be avoided and the children victimized by these crimes will have a better opportunity to obtain justice in the courts.

*Editor's Note: Florida law holds in some DCA decisions that the use of a computer in one county to communicate with a computer in another county establishes venue in either county, so this point

may well be less important here than elsewhere. In essence, Florida law may allow a prosecution for computer offenses in either the location of the sender or the recipient of electronic communications. Decisions regarding which county should proceed would still have to be made after thorough discussion between all involved in the involved counties.

*****

PUBLIC SHOOT-OUTS: THE MODERN DAY OK CORRAL

In an opinion reminiscent of the days of the old West and the Shoot-Out At The OK Corral, the 2nd DCA ruled in March that willingly participating in a public gun battle supports a homicide conviction for a participant who did not fire the fatal shot.

In the case, Reyes v State, the defendant was a gang member who accosted a rival gang member in a public park. He began firing and another person joined in, firing shots that killed a bystander and seriously injured others. In resolving the question of holding Reyes responsible for a death physically effected by one of his antagonists, the court concluded that each participant in a mutually agreed to gun battle in a public place may be held accountable for any death or injury to an innocent person which results from the confrontation. The underlying theory for this conclusion has surfaced in other cases in the past and holds that because all participants were engaged in the same felonious activity - the shoot out - their participation in the episode is sufficient to consider them all aiders and abettors.

Although this case is limited to circumstances involving the death of an innocent person who happens to be in the wrong place at the wrong time, it could arguably apply when a participant is killed as well.

*****

GAME VIOLATION FORFEITURES

An April decision of the 3rd DCA has upheld FS 370.061 and its provisions allowing the forfeiture of boats and equipment used in the illegal taking or attempted taking of salt water fish or other salt water products.

In the case, styled State v Valdes, Florida Marine Patrol officers boarded a 43’ fishing boat being operated by Valdes and seized 137 out of season stone crab claws. The boat was seized for forfeiture but the trial court ruled that FS 370.061 failed to establish procedures that would provide due process to owners. The statute is, in fact, silent as to the procedures to be followed in order to perfect a forfeiture. In acting to save the statute, the appeals court reversed,

holding that there were sufficient procedures contained in related bodies of case law, including opinions by the Florida Supreme Court requiring certain notices and hearings, and that by falling back on those procedures before acting under FS 370.061 a forfeiture could be properly accomplished.

The result is that marine forfeitures of this sort may be pursued, but only through the same mechanisms as other forfeitures. It is likely that the legislature will at some point act to amend FS 370.061 in order to avoid this problem altogether.

*****

MIRANDA FOLLOW-UP

In the July 2001 Legal Bulletin, a new Florida Supreme Court decision in Glantzmayer v State, which set forth requirements to be followed when a suspect asks a question about his Miranda rights, was discussed. That case benefited law enforcement by clarifying the rules regarding questioning in order to make it plain that all an interrogator had to do was honestly respond to a question without giving advice.

A follow-up case has now been issued by the 4th DCA. The case, State v Contreras, demonstrates the importance of the opinion in the Glantzmayer case because the 4th DCA was forced to reverse itself as a result of that holding. In the Contreras case, during interrogation the defendant asked "Do I need an attorney?" As a response, the detective doing the questioning said "Since you brought it up, let me read you your rights and you can make your decision based on me reading you your rights." Originally, the 4th DCA concluded that this was not sufficient and suppressed the resulting confession. As a result of Glantzmayer, however, the court has reversed itself and held that this response was consistent with the requirements of honesty and fair dealing set forth by the Supreme Court.

This language and response can serve as a concise example of how law enforcement officers should deal with this situation.

*****

INTERROGATION TECHNIQUES

A July opinion from the 4th DCA, Edwards v State, has shed new light on interrogation methods that the appeal courts will and will not approve.

In the case, the defendant was charged with Arson. After a fight with his girlfriend, he had broken into her apartment and set fire to it. While being questioned, he denied setting the fire although he admitted some other illegal acts. At that point, one of the officers conducting the interview threatened to

"hit" Edwards with every charge he could if Edwards was not truthful. At that point the defendant admitted setting the fire. Also during the interrogation the officers had reminded Edwards of the Biblical admonition that "the truth will set you free."

Calling "the truth will set you free" statement "questionable," the court nonetheless ruled that it amounted to no more than an encouragement to be truthful or an appeal to Edwards' religious back ground in encouraging him not to lie. The court also noted that the defendant could not have believed that the truth would literally set him free. Finally, the court concluded that since Edwards had not confessed after that statement was made to him, his ultimate confession could hardly be said to have been the result of any influence, improper or otherwise, from that statement. The court thus allowed this as an interrogation comment, albeit reluctantly and with some reservation.

As to the other issue, however, the court noted that a threat to charge a suspect with more, or more serious, charges unless he confesses is coercive because it is essentially a promise not to prosecute to the fullest extent possible if the person confesses. The statement that the defendant would be hit with everything possible absent a confession was, to the court, improper and undue influence, especially since Edwards' confession came immediately thereafter.

The result was that the court suppressed the confession, not because of the religious exhortation but because of the threat of additional charges. In so doing, the court noted the connection that must exist between an impermissible law enforcement comment and a resulting confession in order for suppression to result, a point that is important to remember in terms of documenting the exact sequence of who said what when during an interview so that arguments against suppression can be made if necessary.

*****

SEARCH WARRANT PROTOCOL

The 5th DCA issued an opinion in August which provides a helpful review of some of the protocols that may be followed when a search warrant is executed.

In the case, Harris v State, officers were executing a search warrant in Winter Park at a business where drug activity had been observed. The warrant was for the business building, the surrounding curtilage, meaning the parking lot, and "vehicles thereon and any persons thereon reasonably believed to be connected with" the drug activity.

Harris was an occupant of a car parked in the lot

when the warrant was executed. He and others in the car were asked to get out of it and they were patted down for officer safety. During that pat down, an officer felt what he thought might be a film canister containing drugs. The officer removed the object from a pocket and, sure enough, it had cocaine in it.

To begin its discussion, the court noted that a search warrant carries with it the limited authority to detain those on the premises while the search is conducted in order to minimize any risk to either the officers or the occupants. The initial detention of Harris was thus lawful. The court then went on to note that the warrant authorized a search of any persons on the premises "reasonably believed" to be involved. Harris, however, was searched without any more than his presence being noted. The court held that mere presence of a visitor on premises that are the subject of a search warrant is insufficient to connect the person to the criminal activity involved. As a result, the pat down was not allowed on that basis. The court then noted that while officers may do a pat down if they have a reasonable suspicion that the person being detained is armed, no facts provided that basis. The pat down was thus not allowed on that basis either since it was routine and not based on anything that amounted to the required articulated "reasonable suspicion". Finally, the court noted that even if the pat down had been permitted, the "plain feel" doctrine still required that the illegal nature of an object felt during a pat down must be "immediately apparent" before a seizure is allowed. In other words, the officer must be reasonably certain of the illegal nature of what he is feeling. In this case, a canister alone is not illegal, so the officer's hunch, even based on knowledge that it is often so, that there would be drugs in such a canister was not enough to allow him to take it from the defendant's clothing and look into it.

What all of this amounts to is a reminder that there are different levels of evidence required when different steps are taken.

*****

VEHICLE SEARCHES

The 3rd DCA issued an important opinion styled State v Allende in August which discussed permitted procedures during traffic stops.

In the case, Allende was stopped for an expired tag violation. While he was looking through the glove box for his vehicle registration papers, the officer asked him if he had any weapons in his car. This question was entirely routine and a part of every

stop he made, according to the officer. Allende, with no further questioning, replied that he had a gun "behind the passenger seat." The officer then found and seized a fully loaded handgun hidden in a seat pocket. Subsequently, it was determined that Allende was a convicted felon, so he was charged with both Carrying A Concealed Firearm and Possession Of A Firearm By A Convicted Felon.

Allende complained that the officer had no right to ask this question. The court dismissed this claim, noting that not only is it doubtful that a mere question has any constitutional implications but also that this question was "appropriately incidental" to both a proper Terry and/or traffic stop. The court specifically commented that "the generalized danger presented by even the possibility of a firearm in the car provides constitutional justification for far greater intrusions into the freedom of any driver (or passenger) in a traffic stop than the simple question involved in this case."

Moreover, the court concluded that Allende had volunteered information that amounted to probable cause for the commission of the crime of Carrying A Concealed Firearm, thus justifying his arrest and the seizure of the gun.

In a 2000 case from the 4th DCA, Leahy v State, an opposite result occurred when a trooper asked a similar question and was told that there was "a gun in the car." The 3rd DCA expressed serious doubts about that case, and said that it was distinguishable in several ways. First, the court said, the response in Leahy did not carry some indication of concealment as the comment that the gun was "behind the passenger seat" in this new case did. This is important because the element of concealment is what made Allende's possession illegal, and it is that illegal possession that gives rise to the justification to search. Second, the question in Leahy was asked after the stop was concluded, rather than during it, thus violating the constitutional prohibition against improperly prolonging a traffic stop.

The moral of this case, as is so often true, is timing and precision of language. Asking the question during the routine process of a traffic stop was perfectly permissible. Asking it as an after thought would not have been. Getting a response that suggests concealment of a gun was critical, as opposed to something more vague. Left unanswered is what would have happened if the answer had been vague as to concealment and the officer had concluded after a visual check that a gun, if present, must have been concealed, but the case suggests that such a scenario might also pass court scrutiny.

*****

LAST CHANCE TO REGISTER – LAW ENFORCEMENT TRAINING DAY

This year's Law Enforcement Training Day is **OCTOBER 17th** and will be held at the Santa Fe Community College Auditorium in Gainesville from 8am to 4:30pm. Course description information has been mailed. If you have not received it or to register call Jessica Huffman at SFCC (352-334-0300). Registration is $20, including lunch, and the course has been CJSTC approved for mandatory re-training credit.

Topics to be covered will include Probable Cause, Trial Preparation And Courtroom Presentation, New Criminal Legislation, Search And Seizure, Law Enforcement Disciplinary Procedures, Child Abuse, Traffic And DUI, and Environmental Crimes Issues. Speakers will include County Court Judge Jim Nilon, State Senator Rod Smith, State Attorney Bill Cervone, and other members of the SAO staff.

*****

OPEN CONTAINTER CHARGES

This is the time of year when public alcohol use increases, especially in Gainesville and around Gator football games. The following suggestions will help the SAO process cases more efficiently.

When preparing an NTA, Mittimus or Sworn Complaint for an Open Container charge, please be sure to specify which you are intending to write. It is also important to include the following information:

1. Whether or not the defendant made any admissions concerning what he has.
2. If the beverage is beer, the brand since alcohol content can vary, including non-alcoholic brands.
3. Whether the beverage was in an identifiable bottle or can as opposed to being in a plain glass or cup. This is important because the State cannot infer the presence of alcohol just because of the appearance of a liquid in an unidentified container without chemical analysis, but might be able to draw an inference from a commercially labled beer or alcohol bottle.

-Contributed by ASA Walter Green

FOR COPIES OF CASES…

For a complete copy of any of the cases or statutes mentioned in this issue of the Legal Bulletin, please call Inv. VonCille Bruce at 352-374-3670.