

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT

WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2001-03

Editors: VonCille Bruce and William P. Cervone

July 2001

A MESSAGE FROM

STATE ATTORNEY BILL CERVONE

Over the next few months I expect to see considerable community talk, especially in Gainesville and Alachua County, urging the creation of citizen oversight boards to control to at least some degree the actions of police agencies. I am convinced that this is a bad idea and would like to briefly outline some of the reasons why.

First, I believe that citizens have a legitimate role in how police agencies should conduct their affairs. There is a difference, however, between offering policy suggestions and providing supervisory oversight of day to day operations. I believe that those latter matters are best left to agencies and the chain of command, which ultimately allows for voter approval of elected officials. No matter how well intended, citizen panels do not have the training or experience to evaluate the complex matters that those we select to run our police agencies have. External review can only serve to erode the ability

of those who are in charge to effectively manage. Additionally, what power do we grant to such a board? Without meaningful authority any review process is meaningless. But do we want or need another layer of bureaucracy?

Second, there are already many avenues of citizen input available. For example, in Gainesville the Black On Black Crime Task Force has for years been involved in citizen-police relations, as have many crime watch associations and other groups in all parts of the Circuit. When necessary, ad hoc committees have been created to provide input, such as happened in Gainesville several years ago. In appropriate cases, the Grand Jury serves as a review panel as well. The courts, both in litigating actual disputes and in making rulings governing how police conduct their affairs, guide law enforcement on a daily basis.

Law enforcement must be responsive to the community it serves. The work of law enforcement, however, is complex and not always or easily conducted in the same way that other service industries are expected to

perform. After all, few people who need to call upon law enforcement are happy about whatever has caused that need or able to resolve the problem without police help, and many have their own agenda. The ultimate question is one of trust: who should be entrusted with control of police matters? I choose those who are specifically educated and trained by schooling and experience, knowing that as citizens we in turn choose those people and their supervisors. After choosing them, we should let them do the job we have chosen them for. My greatest fear is that to do otherwise risks allowing politics to become a factor, and the safety of our communities is too important to become subject to anyone's political agenda.

As this debate comes into focus, each of us in the law enforcement community should pay attention to what is being said and participate in discussions on the issues involved. These issues are complex and the public is entitled to believe and must be convinced that the law enforcement community can effectively police itself. It is up to each of us from our own perspectives as participants in the criminal justice community to demonstrate that that is so.

SAO PERSONNEL CHANGES

On April 4th **BETH TORRES**

joined the SAO as an Investigator. Beth has been hired to assist with mid-level narcotics investigations through an FDLE task force.

On April 30th, **ASA YVENS PIERRE-ANTOINE** resigned from his position in the Gainesville County Court Division. Yvens was replaced on May 14th by **FRANCINE JOSEPHSON**, who has been interning with the SAO since January and is a May, 2001, graduate of the University of Florida Law School.

On May 4th, **ASA ALISON TALBERT** resigned to enter private practice. Alison's position has been taken by **ASA MICHAEL BECKER**, who is returning from the Bradford County office. Michael's position in Starke was filled on June 1st by **MELISSA RICH**, who is also a May, 2001, graduate of the University of Florida Law School and who has also been interning in the Gainesville office since January.

On June 29th, **ASA ERICA BLOOMBERG-JOHNSON** resigned from her position in the Gainesville Juvenile Division in order to devote her time to being a full time mom. On July 2nd, **TODD HINGSON**, who has been in private practice in Jacksonville for the last year, joined the office to replace Erica. Todd was previously with the office as a clerk in 1996 before leaving to attend law school in Mississippi.

On June 25th **ALI VAZQUEZ**

joined the SAO in the Child Welfare project. Ali comes to the office after having most recently been the Managing Director for Three Rivers Legal Aid. She will handle CWLS cases in Bradford and Putnam Counties.

Also on June 29th, **ASA SUSANNE WILSON BULLARD** resigned in order to take a position with Sante Fe Community College, through which she will provide instructional support to both Sante Fe's criminal justice program and the police academy. Susanne will retain her status as an Assistant State Attorney for the purpose of being assigned to assist with some cases and for occasional court coverage and in house training.

CONGRATULATIONS TO...

...Bradford County Sheriff's Office Employees Of The Year for 2000 Investigative Assistant **MELISSA BRITT** (full time) and Deputy **GEORGE KONKEL** (part time), as well as Employees of the Quarter recognized for outstanding performance during 2000 Communications Officer **DIANE GOSNELL**, Deputy **SEAN KANNALLY**, Courthouse Security Office **BRUCE MILLER**, and Deputy **SHANE HADDOCK**.

...**ASA KIRSTIN STINSON** and her husband John for the birth of their second son, Nicholas Owens Stinson, on

March 29th.

...**ASAs BRANDE SMITH** and **P. J. HITCHINS**, both of whom were notified in April that they had passed the Florida Bar exam. Brande and P. J. have both been sworn in as Bar members.

... FDLE Special Agent **JEFF FORTIER**, who was one of five law enforcement officers honored at a congressional breakfast in Washington DC on May 23rd by the United States Department of Justice Office of Juvenile Justice and Delinquency Prevention, the Fraternal Order of Police, and the National Center For Missing And Exploited Children. As a result of his work in 2000 in the investigation of a Gilchrist County child kidnapping, he was presented with the 2001 National Missing and Exploited Children's Award by Attorney General John Ashcroft. Jeff was nominated for the award by Gilchrist County Sheriff David Turner and FDLE Regional Director Ken Tucker.

...Chiefland Police Department Officer **JIMMY ANDERSON**, named Officer of the Year, Levy County Sheriff's Office Deputy **MIKE NARAYAN**, named Deputy of the Year, and GFWFC Officer **DAVID STRAUB**, named Levy County Officer of the Year, all of whom received these awards at Chiefland's Law Appreciation Celebration on May 3rd.

... Alachua County Sheriff's Office **Capt. BUBBA**

ROUNDTREE and **Capt. SAM SHOEMAKER**, both of whom have retired after 30 years of service to their agency and community.

... Alachua County Sheriff's Office **Capt. EMORY GAINEY**, who was recently promoted to that rank and placed in charge of the Patrol Division, **Lts. DARRYL WHITWORTH** and **RYAN COX**, both newly promoted to that rank, and **Sgts. DARYL BESSINGER, STEPHEN MAYNARD,** and **LESLIE RICHARDSON**, all recently promoted to that rank. Also, at the Department of the Jail, **KIMBERY CALVIN** has been promoted to Detention Sergeant.

... Gainesville Police Department **Lt. LYNNE BENCK**, who received the 2001 Martha Varnes Award for outstanding service and commitment to victims of sexual violence and assault. The award is named after retired University of Florida Police Department Detective Martha Varnes in tribute for her many years of service in that field.

...Gainesville Police Department **Sgt. WAYNE MCINTYRE**, who retired on May 17th.

...**ASA JOHN BROLING** and his wife, Marie, who became the proud parents of their second child, Mary Grace, on May 9th.

...Alachua County Fire Rescue Firefighter **MATT JOHNSON**, who was named Firefighter of the Year at a May 9th Gator Exchange Club meeting in recognition of his efforts combating brush fires.

... Gainesville Police Department's **DEE WELCH**, who was promoted to Lieutenant, **MIKE PRUITT**, who was promoted to Sergeant, and **MICHAEL DOUGLAS, KEITH KAMEG,** and **JOHN KLEMENT**, who were promoted to Corporal, all at an awards ceremony on June 22nd. Also honored at that time with GPD's Police Star award for rendering life saving assistance to another were **Sgt. CHUCK REDDICK** and **Officers ROBERT HAGER, MIKE SCHENTRUP** and **RODNEY SCOTT**. Receiving GPD's Award of Excellence for acts exemplifying diligence, innovation and excellence contributing to the achievement of departmental missions, goals and operational objectives were **Officers DAN STOUT** and **DIAMOND SMITH** and **Cpls. ED BARRY**, now retired, and **ROB KOEHLER**.

...Florida State Prison's **A.C. Clark**, who was promoted to Colonel on June 29th.

OPEN HOUSE PARTIES

Particularly in Alachua County as another Gator football season approaches, now is a good time to review what must be proven in order to prosecute an Open House Party violation under FS 856.015.

First, the statute sets out some basic definitions that must be applied. An "open house party" is a social gathering at a residence, and a "residence" means a home, apartment, condominium, or other

dwelling unit. "Control" means the authority or ability to regulate, direct or dominate. "Adult" means a person not prohibited by reason of age from possessing alcoholic beverages, and "minor" means a person not legally permitted to do so by reason of age under Chapter 562. That, in turn, refers to the legal drinking age in Florida of 21.

The leading case on this offense is State v Manfredonia, which was issued by the Florida Supreme Court in 1995. In that case, the court held that the State must establish the following elements:

1. An adult in control of the premises **knowingly** allowed a social gathering to take place at the location,

2. The possession or consumption of alcoholic beverages or controlled substances **by one or more minors** occurred during the gathering,

3. The adult in control **had actual knowledge** of the possession or consumption of alcoholic beverages or controlled substances by the minor or minors, and

4. The adult in control allowed the party to continue and **failed to take any reasonable step** to prevent the possession or consumption.

In reference to (1), a law enforcement officer will need to determine on the scene that the charged defendant, who must in some

way be in control, as defined above, of the residence, knowingly allowed a party to take place on the premises. At the very least, the officer will need to determine and be able to testify that the defendant did not claim or complain to the officer at any time that he (the defendant) had not authorized the party.

In reference to (2), the officer must be able to testify that at least one minor was witnessed with an alcoholic beverage or controlled substance in the minor's possession.

Remember, in this context, a "minor" means anyone under age 21. An officer should try to identify as many under-aged drinkers as possible. Completely aside from the Open House Party statute, these minors could be charged separately under FS 562.111 with Possession Of An Alcoholic Beverage By A Minor. If minors under 18 are found drinking at the party, FS 322.056 could also be used, upon conviction, to cause a loss of driving privileges. In addition, an adult in control of a party where minors under 18 are in possession of alcohol could also be charged with Contributing To The Delinquency Of A Minor under FS 827.04.

In reference to (3), after witnessing minors in possession of alcoholic beverages on a first trip to the scene, an officer should ensure that the defendant has actual knowledge that under-age drinking is taking place. To accomplish this,

the officer should on that first visit issue a strong verbal warning to the potential defendant and then leave the party in order to give a reasonable time for the defendant to restrict access to the alcohol. (Anywhere alcohol is mentioned, controlled substances are also included, although that is less often the problem involved.)

In reference to (4) a defendant allows the party to continue if he does not make a reasonable attempt to break it up. If the defendant tells an officer that the party is continuing without his permission, the officer may break up the party immediately and disperse the partygoers. Any who refuse to leave may be charged with Trespass After Warning under FS 810.09.

Also in reference to (4), the State must prove beyond a reasonable doubt that the defendant failed to take any reasonable steps to prevent minors from possessing or consuming alcohol. In Manfredonia, the court stated that "the State has a heavy burden of proving beyond a reasonable doubt that the adult in charge stood by and did nothing in the face of the adult's actual knowledge of the minor's consumption or possession of alcohol or controlled substances." The court went on to say that the phrase "did nothing" implied two things: that the adult in control took no steps whatsoever, or that

the adult in control did nothing that could be fairly characterized as reasonable to prevent the continued consumption or possession of the alcohol or drugs.

Unless an officer is going to stand by and monitor everything that happens, which is not practical, to prove that this burden has been met the State will need eyewitnesses who were at the party after officers left the scene. These must be witnesses who are willing to testify, although the prosecutor can offer to reduce charges or penalties against under-aged drinkers in exchange for their co-operation and testimony at trial. Without the testimony of at least some of the partygoers, however, it will be next to impossible to prove by the require standard that a defendant violated all of the elements sent out in Manfredonia.

One question that arises is the practice of visiting the party location twice before making a charge. The reason for this is to assure that the adult in charge had actual knowledge and to allow a reasonable chance for that person to correct the situation, which Manfredonia requires. This is obviously at odds with the notion that an officer should do something when he sees under-aged drinking or any use of illegal drugs. One resolution of this conflict is to deal with any under-aged drinkers or drug users on a first visit, and to warn the adult in charge

about the Open House Party law at that time, but to defer acting under FS 856.015 until it can be demonstrated that the defendant has failed to do anything about that violation but rather allowed the problem to continue. While a case could arguably be made without law enforcement involvement, a stronger case exists when officers have visited the party, seen what was happening and done whatever seemed necessary, and then warned the ultimate defendant to correct the situation. Following these practices can enhance the chances of a successful prosecution and, more importantly, cause a reduction in the number of Open House Party violations that occur and the brashness with which they are carried out.

2001 BURGLARY LEGISLATION

Although we will as usual review newly enacted criminal legislation fully in the October issue of the Legal Bulletin, one change affecting burglary charges became effective on July 1st so will be discussed now.

As you may recall from the October 2000 Legal Bulletin, the Florida Supreme Court issued an opinion last summer styled Delgado v State that effectively and by judicial fiat rather than legislative act added the requirement that an unlawful remaining

in a structure or conveyance had to be surreptitiously accomplished. In other words, once lawfully inside, a defendant had to somehow conceal his present in order to convert an otherwise consensual entry into a burglary.

This year's legislature acted quickly to cure that problem, as did the Governor, who on May 25th signed into law amendments to the burglary statute that include specific language declaring that the legislature fully intends to nullify the Delgado decision.

To do so, effective with offenses committed after July 1, 2001, burglary is defined as follows:

1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or

2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure or conveyance:

a. Surreptitiously, with the intent to commit an offense therein;

b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or

c. To commit or attempt to commit a forcible felony, as defined in s. 776.08

This new language addresses virtually any method through which a burglary might have been

committed after an originally consensual entry. Perhaps most noteworthy is the Sub-section (2)(c) language concerning the commission of a forcible felony. This language seems to allow for a burglary charge whenever consensual entry is involved, perhaps in a domestic situation, and the offender commits a sexual battery or an aggravated assault.

The new statute goes on to provide that consent remains an affirmative defense to burglary which can be proven by the defense. This may allow for some interesting claims, but affirmative defenses do not preclude charging. What may result from all of this remains to be seen, but at a minimum Delgado can in the future be disregarded.

2001 CRASH REPORT LEGISLATION

A second act of the 2001 legislature also already in effect and of significance to many agencies deals with public access to crash report information. This legislation substantially re-writes FS 316.066 concerning how agencies must handle crash reports, and goes so far as to create new criminal offenses for what is now the unlawful dissemination of those crash reports. The following changes became effective on June 5th so will also be discussed now rather than in October's issue.

As a prelude, the legislature has made a finding that it is necessary to prevent the early release of portions of crash reports revealing personal information because of the often unscrupulous activities of some people (Yes, this probably means lawyers) who exploit those who have been involved in accidents, especially immediately afterwards when they might be in emotional distress. The legislature has also found that there is a significant correlation between insurance fraud and illegal solicitation of accident victims that needs to be addressed.

To combat this, FS 316.066 now provides that crash reports revealing the identity, home or employment telephone number or address, or other personal information of parties to a crash which are received or prepared by any agency that regularly has such information are confidential and not subject to Chapter 119 disclosure for 60 days after filing. The reports may, however, be made available immediately to the parties, their lawyers, and their insurance agents and adjusters. They may also be given immediately to prosecutors and to FCC licensed radio and TV stations as well as to general news periodicals. Specifically excluded from this last category are publications that could be considered trade journals, advertising publications, or papers primarily concerned

with publishing this kind of information. Those seeking access are required under the law to present legitimate credentials or identification demonstrating entitlement to have the information in the reports.

In order to enforce these new restrictions, the law goes on to create two new criminal offenses. The first provides that any employee of an agency possessing the information that is now confidential who knowingly discloses it to a person not entitled to have it commits a third degree felony. The second provides that any person who knows that he is not entitled to the information and who obtains or attempts to obtain it also commits a third degree felony.

This new law is of obvious impact to virtually every agency in the Circuit.

All agencies need to review existing policies or, if necessary, create new ones in order to insure that these restrictions are complied with.

ANONYMOUS TIPS AND SEARCH AND SEIZURE

In several previous issues of the Legal Bulletin cases dealing with the sufficiency of anonymous tip information and when that is sufficient to act have been reviewed. Usually, the appeals courts are issuing opinions rejecting what law enforcement has done. In March, the 4th DCA issued an

opinion that outlines acceptable activity based on an anonymous tip.

In the case, League v State, a veteran officer of the Vero Beach Police Department received an anonymous tip that a certain person was selling drugs out of his house. The officer knew that that person had previously been arrested for drug dealing and had himself received complaints about him but had not had time to actually investigate him. Based on the anonymous tip, he went to the person's house and hid where he could watch the residence. After a short time, he saw another person, who soon became the defendant, drive up and go to the door. The soon to be defendant, Ronald League, knocked and the person who had been named in the tip came out. The two talked and League handed the other person some money. That person went inside briefly and then returned and dropped something small into League's hand. The officer recognized the resident of the house as the person he knew and the person who had been named in the tip, so he had League stopped as he tried to leave. Sure enough, League still had several small pieces of cocaine in his hand and he was arrested.

Under the law, anonymous tips are not in and of themselves sufficient to constitute either reasonable suspicion or probable cause but when independent investigation reveals corroboration of the

substance of the tip the totality of the circumstances may rise to the level required. In this case and under these facts, the court held that the anonymous tip had been sufficiently corroborated by the independent observations of conduct consistent with a drug transaction. Specifically, the case was won because a trained officer saw a hand to hand transaction involving a known drug dealer where money was exchanged for a small object. As a result, the court ruled, there was probable cause to stop League and for the arrest that resulted.

Another way to look at this is to consider what the tip actually did. It did not authorize the officer to stop League. It did give him the reason to be where he was and to see what he saw, which did allow him to stop the defendant. Had he been there without the tip ever happening and seen the same events, the same result would have happened. Had he not taken the time to watch and see whether events confirmed the tip, the case would quite likely have been thrown out by the courts. The point is that anonymous tip information is a start, not an end, to an investigation.

PREMEDITATION EVIDENCE

Over the last few years, several cases have been reviewed in the Legal

Bulletin where appellate courts have rendered opinions reducing First Degree Murder convictions on various theories that the State had failed to sufficiently prove premeditation, even when the evidence was consistent with classic definitions of what constituted premeditation. We have on occasion observed that there may be a developing trend towards some sort of requirement substituting the capital murder definition of heightened premeditation as a aggravating factor for traditional premeditation, for whatever reason. In March, the 2nd DCA issued another such opinion, this one styled Graham v State.

In the case, the bodies of each victim, Graham's mother and his three-year-old nephew, were found in a bedroom of the house he shared with them and the mother's boyfriend. Each had been shot in the head and both bodies were concealed under a blanket. The mother's boyfriend was also shot by Graham, who chased him around the house and fired multiple shots at him when he came home, apparently after the first murders. The boyfriend lived to testify but had no knowledge about what had happened to the other victims.

The evidence showed that Graham was angry at his mother for not allowing him to use her car, that he was jealous of his mother's attention to her boyfriend and his nephew, and that

since there were no guns kept in the house he would have had to deliberately obtain a gun and himself.

Despite all of this, the court held that because there was no evidence to establish what had happened immediately before the shooting there was insufficient evidence presented to circumstantially show premeditation. The court therefore reduced the First Degree Murder convictions to Second Degree Murder.

Interestingly, the opinion does not say that Graham had advanced any theory as to his having acted under a depraved mind or out of ill will or any of the other conditions that would constitute Second Degree Murder. The opinion does, however, point out many reasons why Graham's mental health was questionable, including that a failed defense of insanity had been asserted. It may be that the underlying reason for the result is a judicial discomfort level with convicting someone of First Degree Murder when they suffer from mental problems that, while clearly existing, are insufficient to form a legal defense. If so, the court may be legislating rather than interpreting the law. Also if so, it is noteworthy that the court did allow a conviction for Attempted First Degree Murder as to the boyfriend to stand, distinguishing what happened to him as involving a continual attack of some

duration. One is left to wonder why a sudden sneak attack that succeeds with a single shot is less premeditated than an unsuccessful attack just because the intended victim has the good fortune to escape.

Regardless of such speculation, what should be taken from this case is the certainty that every effort must be made to determine and document the circumstances surrounding any killing. What might also be taken is that there are sometimes situations where opinions of this sort will compel a plea to Second Degree Murder, even when most of us would have thought a clear case of First Degree Murder existed.

CONSENT TO SEARCH

A March opinion from the 2nd DCA addresses the problems connected with a consent to search for premises occupied by people with different degrees of ownership interest.

In the case, styled State v Miyasato, the defendant, who was 23 years old, lived in a bedroom of his parent's house along with his girlfriend and young child. He did not work or pay rent, there was no rental agreement, and about all he did to support anyone was occasionally buy food for the household.

Apparently, he did earn some income by selling drugs because when another person

was arrested for possession of cannabis he said that he'd bought the drugs from Miyasato. Police thus went to the house where Miyasato lived and, among other things, asked his mother for permission to search Miyasato's bedroom. She agreed, stating that she did not want any drugs in the house. Miyasato himself was present in another location of the house with other officers, who were busily conducting an illegal pat-down that will be mentioned later, but his mother did not know this at the time. Of course, drugs were found in a desk in the bedroom.

Calling the question of the mother's consent "a close issue," the court noted that there is some authority allowing a "general" search of a bedroom in circumstances such as this. The court also noted that if the defendant had been a younger person who had not established his own family unit, albeit a non-traditional one, the result might be different. Nevertheless, the court held that when an adult lives with his parents and maintains a separate bedroom, police may not obtain consent to search inside furniture in that bedroom without first establishing that the parent has equal access and common authority over the contents of the furniture. To further compound the problem, the court commented that even proof that the mother regularly cleaned the

desk drawer in question would be insufficient because cleaning alone does not amount to access or control sufficient to give a consent to search. The only facts that might have done so would have been owning or using the desk or having regular access to its contents.

Reconciling this opinion with the general concept in other cases allowing a parent to consent may turn on the presence or absence of the child, minor or adult, but it seems clear that a new restriction on how far that consent can go under the best of circumstances has been born.

Incidentally, as to Miyasato himself the court also suppressed a physical search of his person resulting in the seizure of a baggie containing marijuana. The baggie was sticking out of his pocket but no contraband was visible, despite which an officer removed it from his pocket. That search was admittedly not for officer safety and was without probable cause or reasonable suspicion even though the officer knew that baggies such as he could see are often used to carry drugs.

INVESTIGATORY STOPS AND RACIAL PROFILING

A March decision of the 3rd DCA illustrates some of the basic concepts involved with stop and frisk situations as well as the

problems and dangers of anything that even suggests racial profiling.

In the case, styled Phillips v State, an officer in Dade County responded to a burglar alarm and found the door of a house kicked in. He detained a black man sitting in a car directly across the street from the house. This occurred at about 11am.

At about the same time, a second officer who was responding to the same alarm saw a black man crossing a major highway a block or two away from the burglarized home. The man was not doing anything unusual. When he arrived at the scene of the burglary, the second officer saw that the first officer was detaining a black man. He then put out a BOLO for the black man he had seen crossing the street. There was still nothing to connect that man to the burglary, but the officer testified that he was suspicious because the black man was in a predominately white neighborhood.

A third officer, also responding to the alarm, heard the BOLO and saw a black man who matched the description given. He and other officers converged on the man, ordered him to the ground, and searched him for weapons. They found a watch that was later determined to have come from the burglarized home.

In analyzing these facts, the court noted that there are three levels of police-citizen encounters. The first level is a

consensual encounter, which this clearly was not. The second level is an investigatory stop as allowed and controlled by Terry v Ohio and the cases that have followed that decision, all of which require a "well-founded, articulable suspicion that a person has committed, is committing, or is about to commit a crime." This case falls into that level of encounter. The third level is an arrest, which, of course, requires complete probable cause.

In then discussing the reasonable and well founded suspicion needed to justify an investigatory stop, the court commented that the totality of the circumstances must be examined to determine whether or not there is sufficient reason to act. Applying that standard to these facts, the court concluded that although the officer's hunch that the defendant was involved turned out to be correct, "a hunch that criminal activity may be occurring is not sufficient." The court quoted from several older cases holding that "mere suspicion is not enough to support an investigatory stop."

All of this is well established and well known.

It is one of the great paradoxes of the criminal justice system that sometimes good police work is acting on a hunch that something is amiss. Using whatever word you want, a hunch or an educated guess

or a gut feeling based on experience and training is a part of a police officer's stock in trade. Unfortunately, at least in this case, it also walked right into the buzzsaw called racial profiling.

On these facts, the court concluded that the defendant was stopped because he was a black man walking in a white neighborhood. Indeed, the officer who had the defendant stopped testified that he only became suspicious of the defendant when he saw that the first officer had already detained another black man.

"Clearly," the court stated, "the fact that a black person is merely walking in a predominately white neighborhood does not indicate that he has committed, is committing, or is about to commit a crime.

Racial incongruity, a person being allegedly 'out of place' in a particular area, cannot constitute a finding of reasonable suspicion of criminal behavior." Race or color alone is simply not a sufficient basis for making an investigatory stop. The result in this case was that both the stop and the discovery of the watch that resulted were suppressed and the defendant's conviction was reversed.

Obviously, anything even approaching racial profiling is off limits, not just because it is illegal but also because it is inappropriate. Does the result of this case

demonstrate that kind of improper motive? That's a difficult question to answer but certainly the court took that position and certainly those who seek to criticize and restrict law enforcement would claim that. Did these facts mean that the officer involved had no choice but to let a man who in fact turned out to be involved go un-caught? Maybe in the long run but the officer was not without other options. At a minimum, a consensual encounter ("May I talk to you?" as opposed to "Get on the ground!") until additional facts were developed, perhaps from the other detainees, could have been instituted. Or perhaps some degree of surveillance on the defendant might have been pursued. Initiatives such as those might or might not have developed the required degree of evidence for further action, but that's the price we pay for our criminal justice system and its presumption of innocence.

OPEN BUSINESS BURGLARY

A Florida Supreme Court opinion issued in late March and styled Johnson v State may have answered the lingering questions surrounding when an open business can be burglarized.

As has been noted frequently over the past few years, this topic has been the subject of many appellate decisions from Florida's five District

Courts of Appeal, which have not always agreed. Most recent decisions have held that an open business simply could not be subject to a burglary.

In this new case, the Supreme Court has re-opened the door to such charges. The facts of the case showed that Johnson, the defendant, needed money to post bail for his girlfriend. He and a partner went to a convenience store, intent on robbery. The store was open for business. Holding a gun on the storeowner, Johnson followed the owner behind the counter where the cash register was located, despite the owner's protests that Johnson was not allowed in that area, which Johnson, not surprisingly, ignored. Somehow, the owner's wife got a gun of her own and a shootout followed. She got the better of Johnson and his companion and held them for police.

Under these facts, most recent cases would have forbidden a charge of Burglary being prosecuted on a theory that the defendant entered with intent to commit a robbery because the business was open. Some cases would have allowed such a charge premised on Johnson having entered a non-public area of the business when he went behind the counter. The Supreme Court itself ruled this way in a 1998 case, Miller v State, which was discussed in the October 1998 and July 1999 Legal Bulletins. The Supreme Court has also issued several opinions

since then following that same logic. In the Johnson case, however, the Supreme Court has side-stepped the debate this caused when several of the DCAs tried to talk around the Miller holding by simply declaring that its earlier opinions "were not intended to foreclose the State from proving to a jury that an area behind a counter was not open to the public." The Supreme Court also noted that the question of whether such an area is open to the public is for the jury to decide.

This new opinion agrees with the 1st DCA, which had originally approved Johnson's conviction, and modifies the Supreme Court's earlier Miller decision. Both of these earlier cases were discussed in the issues of the Legal Bulletin mentioned above.

The result is that we are, after several years of sometimes tortured legal rulings, basically back to where we began, albeit with some refinements. It is now possible to charge a burglary when the business or structure is open to the public so long as there is some proof that the defendant actually entered a non-public access area with criminal intent.

**MIRANDA WARNING
CLARIFICATION**

The Florida Supreme Court issued an opinion of great importance in May that

clarifies the obligation of an interrogator when a suspect asks questions about Miranda warnings. The opinion, State v Glatzmayer, reversed a 4th DCA opinion from 2000 in the same case that was reported in the July 2000 Legal Bulletin.

By way of background, in 1999 the Supreme Court issued an opinion styled Almeida v State, which required interrogators to give a straightforward answer to any question asked by a suspect about his right to counsel. In interpreting Almeida, the 4th DCA's 2000 opinion in Glatzmayer basically said that officers could only answer a question from a suspect about whether or not he should exercise his right to counsel by saying yes. The implications of this were obviously harmful to effective law enforcement. Although some DCA opinions have taken a softer stance, notably State v Seaton from the 5th DCA that was reported on in the April 2001 Legal Bulletin, the 2000 Glatzmayer ruling has still been a problem. Now, however, the Supreme Court has reversed that opinion with language that is helpful to law enforcement.

The facts of the case were that the defendant asked officers if they thought he should have an attorney. They responded that that was not up to them and that the defendant would have to make his own decision. The 4th DCA ruled that the only straightforward answer would

have been yes, and as a result of not answering yes the officers had violated Almeida. That court then suppressed the resulting confession.

In reversing, the Supreme Court noted that the defendant's question was soliciting a subjective opinion and that the response really said that the officer's opinions were beside the point and that the defendant needed to make up his own mind. This response, the court noted, was simple, reasonable, and true.

The court went on the explain that "nothing in Almeida requires that law enforcement officers act as legal advisors or personal counselors for suspects. Such a task is properly left to defense counsel. To require officers to advise and counsel suspects would impinge on the officers' duty to prevent and detect crime and enforce the laws of the state. All that is required of interrogating officers ... is that they be honest and fair when addressing a suspect's constitutional rights: In sum, whenever constitutional rights are in issue, the ultimate bright line in the interrogation room is honesty and common sense."

This new opinion allows an officer to honestly tell a suspect that it is his choice alone as to whether or not to invoke his rights.

It also allows an officer the latitude to refuse to give a personal opinion one way or the other about the

exercise of those rights. It should be fairly obvious that an answer suggesting that rights not be invoked would be viewed with great skepticism by the courts, but so long as an interrogator honestly tells a suspect that he (the interrogator) cannot or will not give an opinion on a matter that must be a personal decision of the suspect's there should be no problem. As the Supreme Court said, honesty is and remains the best policy.

UNITED STATES SUPREME COURT ADDRESSES INTERROGATION

The United States Supreme Court issued an opinion styled Texas v Cobb in April which holds that the 6th Amendment right to counsel does not bar police from interrogating a suspect about one crime while he is under charge for another related crime.

In the case, Cobb had confessed to a burglary but denied involvement in the disappearance and subsequent murder of the two occupants.

He was charged with the burglary and counsel was appointed. He later told his father that he had committed the murders and his father notified the police, who returned to question him again, this time about the murders. He waived his rights and confessed to the killings during the second interview. Cobb tried to have the confession to the murders

suppressed because when he was interviewed the second time he already had an attorney on the burglary charge. The Supreme Court disagreed, holding that since he had not been charged with the murders the 6th Amendment did not prevent questioning on those charges even though they were related to the burglary for which he did have a lawyer. Where this case may go in Florida law is to some degree uncertain. Existing Florida case law, such as the 1st DCA's 1999 decision in Taylor v State, discussed in the April 1999 Legal Bulletin, holds that police may not approach a defendant to discuss a second charge that is inextricably intertwined with a first charge for which counsel has been appointed. The 1st DCA concluded that whether two cases were so closely related as to prevent additional questioning was dependent on the facts of each case. Texas v Cobb will be watched to see if it results in a more liberal ruling from Florida courts in the future.

CHILD ADVOCACY CENTER MOVES, CHANGES DIRECTORS

For those agencies who regularly use the Child Advocacy Center in Gainesville and in case you are not aware of this, the Center has relocated. The Center's new building will offer greater space and convenience and is at 2720

N.E. 20th Way in Gainesville.

The Center also uses P. O. Box 1128, Gainesville for mail. The telephone is 352-376-9161 and the FAX is 352-376-9165.

In addition, CAC Project Director DeeDee Smith resigned effective July 1st in order to devote more of her time to personal and family goals. DeeDee was replaced by Karen Godley, who has been serving as Director of the Gainesville Juvenile Assessment Center.

TRAFFIC ISSUES AND PROCEDURES

As everyone knows, for purposes of the discovery rules law enforcement officers are considered agents of the State Attorney. This means that an Assistant State Attorney is considered to have all of the information an officer or agency has about a case and is responsible for disclosing that information.

A problem often arises with late disclosure because information is not promptly turned over to the prosecutor. In a worse case scenario, a judge might even dismiss a case when this happens.

To try to combat this, all officers must be aware that even though the time required may not seem worthwhile all information must be documented and forwarded to the SAO. This is so even in relatively insignificant traffic cases as it is in the most

important homicide case. After all, if you go to the trouble to initiate a citation or case, and if you expect something to result from it, then you should take the time to do whatever is involved completely.

Here are some specific things needed in reports in traffic cases:

1. Any and all law enforcement officer notes written on the scene or otherwise that includes information about the defendant or any aspect of the offense.
2. Probable cause for a stop **MUST** be written on a citation or included in a companion report.
3. Defendant's statements should be written on the citation or included in separate notes and provided to the SAO. This is particularly important in DWLSR cases where knowledge may become an issue. Un-disclosed statements of a defendant are seldom allowed into evidence by the courts when they are revealed only at the last minute!
4. List all names of all officers present, not just those who you think were involved, and list all other witnesses, including passengers! In Alachua County, Judge Crenshaw has gone so far as to threaten to dismiss cases, including DUIs, after defense complaints about unknown or unidentified passengers having been present in vehicles that were stopped. That the

courts may not have the lawful authority to actually dismiss a case for this reason does not mean that a judge might not do so anyhow and force an appeal, with all of the extra paperwork and delay that entails, or that we cannot work to avoid the problem even coming up. Remember, it is the State's responsibility to disclose everyone who might have information bearing on the case, not just people who we believe know something relevant. If we do not disclose someone, the defense can and will claim that the unnamed person would have proven innocence, and a judge may accept that claim, resulting in a dismissal.

DOMESTIC VIOLENCE AWARENESS
SOFTBALL TOURNAMENT

Bradford County's 2nd Annual Domestic Violence Awareness Softball Tournament will be held on October 5-7 at the Edwards Road ballfields in Starke. Proceeds will benefit the Bradford County Domestic Violence Task Force. The entry fee is \$100 per team and entries must be received by September 17th. Trophies, t-shirts, a sports celebrity autographed memorabilia raffle, a home run derby, and concessions are all planned.

For additional information or to register a team contact Barry Warren at

the Starke Police Department (904-964-5400) or James Colaw at the State Attorney's Office (352-491-4433).

LAW ENFORCEMENT TRAINING
DAY SET

This year's Law Enforcement Training Day is tentatively set for Wednesday, October 17th, and will be jointly sponsored by the State Attorney's Office and the SFCC Institute Of Public Safety. The one-day seminar is scheduled to be held at the Sante Fe Community College main campus in Gainesville. Anticipated topics will include certification and disciplinary procedures applicable to law enforcement officers, 2001 legislation of interest to the criminal justice community, traffic and DUI issues, child abuse, and search and seizure. The cost should be \$20 for each attendee, including lunch.

Registration information, including a complete agenda, will be mailed to all agencies in late August or early September. Pending that, for additional information or to make sure your agency is included in that mailing, contact Inv. VonCille Bruce at the SAO (352-374-3680, ext. 2164) or Louis Kalivoda at the Institute of Public Safety (352-334-0300).

IN MEMORY OF:

...Retired Gainesville
Police Department Officer
Richard Dukes, who served
with GPD for 24 years, and
who died on May 23rd.

...Retired Alachua County
Sheriff's Office Detective
Bubba Griffin, who had also
worked for the Gainesville
Police Department, and who
died on June 17th.

FOR COPIES OF CASES...

To receive a complete
copy of any of the cases
mentioned in this issue of
the Legal Bulletin, please
call Inv. VonCille Bruce at
the SAO at 352-374-3680,
ext. 2164.

