

# STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT

WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2002-04  
Editor: Rose Mary Treadway

October 2002

## A MESSAGE FROM

STATE ATTORNEY

BILL CERVONE

In February of 2001 our local law enforcement community buried one of our own when Gainesville Police Department Officer Scott Baird lost his life in the line of duty. His funeral, in Ocala, occurred on a gray and rainy day. I hoped then never to have to be a part of such a funeral again, and the memories of the procession from Gainesville to Ocala, the services, and the sense of loss to our entire community remain fresh.

In August of 2002, unfortunately, history repeated itself when Union County Sheriff's Deputy Renee Danell Azure lost her life in an on-duty traffic crash. The day of her funeral, also in Ocala, was gray and rainy as well and all of us were reminded by her loss of what we had gone through so recently when Officer Baird died. We remembered as well what we think of each year during law enforcement memorial services in May.

I did not know Deputy Azure, but UCSO Sheriff Jerry Whitehead said she was "certain to become a top-notch deputy." He went on to praise her for the way she handled her job and the people she dealt with. Once again, a young officer who offered so much promise to what we all try to do has been taken from us by circumstances that are impossible to understand.

None of us in law enforcement needed the tragic death of Deputy Azure to remind us of how dangerous the work of police and firefighters can be. If there is any good that can come to us from her death, perhaps it is the awareness we should all have to be grateful for each other and for the demands and dangers those of you on the road in particular undergo each day and duty shift. I have sensed already a lessening in the community support that the events of September 11<sup>th</sup> brought to law enforcement. We cannot control that. We can, however, control our own perspectives. Like any family, we argue and squabble among ourselves. Like any family, we should also stand together for each other, not just at times of

tragedy but always.

May Deputy Azure rest in peace, as may Officer Baird.

May all of the rest of you go safely about your jobs.

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#### SAO PERSONNEL CHANGES

In August ASA **JOHN WHITAKER** resigned from the SAO to enter private practice with the law firm of DeThomasis and Buchanan in Gainesville. John had been an ASA for three years. ASA **STEVE WALKER** has taken over John's caseload in Traffic and **BILL EZZELL** has been assigned Steve's misdemeanor caseload.

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#### CONGRATULATIONS!

ASA **MICHAEL BECKER** and his wife Pam welcomed baby girl Talia Alexandra on June 24.

**DAVE REMER**, Victim Services Director for SAO, was recently elected President of the Florida Network of Victim Witness Services. The organization provides support and assistance to advocates who work with crime victims and also develops and promotes legislation that positively impacts crime victims.

ASA **BILL EZZELL** was married to Tara on August 17.

**WILLISTON Police Chief DAN DAVIS** has been appointed by the Governor to the Florida Violent Crime and Drug

Control Council.

UPD honored **TERRY KILLEN** as Officer of the Year at its recent awards banquet. Other officers awarded letters of commendation were Sgt. **WALT HAMBY**, Police Service Technician **SAM SHEPTOCK**, and Officer **DAVID TAYLOR**.

In July, GPD swore in the largest single class of new officers in recent memory. They are: **NICOLE ARMSTRONG-SNYDER**, **GLEN M. BAKER**, **ADAM S. BATCHELOR**, **CAROL E. DAVIS**, **GERALD C. HUNTER**, **FARRAH E. LORMIL**, **THOMAS C. MULLINS**, **EMILY A OSWALT**, **JON W. PAARLBERG**, **FERNANDO SAAVEDRA**, **JOHN R. SANTOS**, **JOSHUA C. SCHIMMEL**, **ESTHER MONICA WILLIAMS** and **OTTO E. WILLIAMS**.

In August ASO welcomed new deputies: **KAREN HODGKINSON**, **SHAWN ZIMMERMAN**, **SANDRA MYERS**, **BRIAN PHILLIPS**, and **JAMES YANCY**.

Recently promoted GPD employees include: Captain **RAY WEAVER**, Lieutenant **BART KNOWLES**, Sergeants **BRUCE GILES** and **MATTHEW NECHODOM**, and Corporals **BARRY KAYS**, **BILL BILLINGS**, **KEVIN CLIFTON**, **ART ADKINS**, **LISA SATCHER**, **JOHN ROUSE** and **JOHN FRANKLIN**.

In August, SAO Project Payback Director **GRETCHEN HOWARD** was awarded this year's Florida Council on Crime and Delinquency Distinguished Service Award

for Juvenile Justice for her work with Project Payback, a program requiring juvenile offenders to attend counseling and pay restitution.

ASAs **BILL EZELL** and **GLENN BRYAN** passed the Florida Bar Exam with flying colors.

Long time GPD officers **SGT. JOHN BROWER** and **CPL. LARRELL THOMAS** were honored at a retirement party held on September 27.

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#### LAW ENFORCEMENT TRAINING

On Friday, October 25, from 8:00am to 4:30pm, the State Attorney's Office will conduct the CURRENT LEGAL ISSUES training seminar at Santa Fe Community College- E Building Auditorium, at 3000 NW 83<sup>rd</sup> Street in Gainesville. SA **Bill Cervone** and **SFCC** will provide all new and pertinent training to the law enforcement professional dwelling on topics such as Preparing Courtroom Testimony, Investigating Identity Theft, Forensics Update, Domestic Terrorism, Shaken Baby Syndrome, Traffic Law Update, Environmental Crimes, and Legislative Update.

Pre-registration is required and class enrollment is limited to 200 students. This course is a CJSTC approved Specialized Training course and may be used to satisfy mandatory

retraining requirements. Contact Spencer Mann at the SAO for further details.

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#### GOLF TOURNAMENT

On Friday, November 8, the Seventh Annual **NICK OELRICH "GIFT OF LIFE" GOLF CLASSIC** will take place at Haile Plantation Golf and Country Club. Proceeds benefit the National Sheriffs' Association Gift of Life Foundation and its mission of organ and tissue donation awareness and education. Contact Linda White at ASO or Rose Mary Treadway at the SAO for further information.

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#### UPDATE IMPLIED CONSENT WARNING FORM

As you know, effective July 2, 2002, newly created Section 316.1939 establishes a first degree misdemeanor offense for the failure to submit to breath, blood or urine testing under certain circumstances in DUI cases. This new law requires changes in the Implied Consent warnings given to drivers at the time of a DUI arrest. In the interest of circuit wide uniformity, the following language is suggested for all agencies. At a minimum, the implied consent warning given prior to July 1<sup>st</sup> must be modified to reflect the new statute. If all agencies will use the following form it will

assist us in prosecuting cases that are brought under the new law, in educating the courts and juries as to what is required, and in dealing effectively with the inevitable challenges that will be made. The suggested language is:

**IMPLIED CONSENT FOR DUI**

By accepting the privilege of operating a motor vehicle within this state, you have given implied consent to submit to a lawful test of your (breath/urine/blood).

If you refuse to submit to a lawful test of your (breath/urine/blood), your privilege to operate a motor vehicle will be suspended for a period of one(1) year for a first refusal, or eighteen(18) months if your privilege has been previously suspended as a result of a refusal to submit to a lawful test of your breath, urine or blood.

Additionally, if you refuse to submit to a lawful test of your (breath/urine/blood), and if your driving privilege has been previously suspended for a prior refusal to submit to a lawful test of your breath, urine or blood, you will be committing a misdemeanor of the first degree. Refusal to submit to a lawful test of your (breath/urine/blood) is admissible in any future related court proceeding.

Will you take a

(breath/urine/blood) test?

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**DNA DATABASE UPDATE**

Florida Statute 943.325 requires convicted offenders with qualifying offenses to submit two specimens of blood to the FDLE DNA Database. As of July 1, 2002, F.S. 943.325 allows criminal justice agencies to collect and submit an oral swab specimen to FDLE for entry into the DNA Database using the FDLE approved kit. To comply with this legislative change, the FDLE DNA Database developed an oral swab collection kit that is available to all agencies submitting convicted offender DNA specimens. Although basic instructions are included with the oral swab kit, certain procedures must be followed to guarantee an ample amount of DNA specimen is transferred to the application card located in each kit. To ensure agencies are properly prepared to collect and submit an oral swab, a DNA Sample Submission Training CD and video is available from the FDLE DNA Database, as well as on-site training. Contact FDLE Tallahassee Regional Operations Center at 850-410-7645 or [www.fdle.state.fl.us](http://www.fdle.state.fl.us) for further information.

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**TRESPASS AFTER WARNING**

As everyone knows, one of the tools available to law enforcement under the trespass statutes is the ability to warn someone against returning to a place where he or she is not wanted under pain of facing arrest for Trespass After Warning. A question that has arisen regarding the warning process is the length of time that a trespass warning remains valid. Despite some contrary rulings made by local judges, the answer to this is generally that a trespass warning does not expire at all.

Initially, reference to the language in the trespass statutes shows that there is no statutory time limit set for the expiration of a trespass warning. The absence of any direction in the statutes means that case law must be looked at for guidance on this point.

In State V Woods, a 1993 case from Orange County, a defendant was arrested for trespass at a mall after having been warned against returning. The warnings were given in writing in April of 1988 and orally in August of 1989, and the defendant returned and was arrested in December of 1990, well over a year later. It turned out that the Orlando Police Department had a policy to honor trespass warnings for only six months. The defendant tried to argue that that policy precluded a prosecution since the mall

security officer making the case was an off duty Orlando Police Department officer, but the court disagreed, holding that there is no authority for a law enforcement agency to enforce such a policy. The court commented that while "there may be factual situations in which the passage of time might become important the mere passage of time, even eighteen months, seems irrelevant." In addition, the court noted that the trespass statutes allow property owners, not law enforcement officers or by implication the courts, the right to forbid someone from entering their property, suggesting that the right to decide to withdraw that prohibition lies solely with the property owner as well.

In Melton v State, a 1989 case from Nassau County, the court implied but did not hold that a trespass warning "may possibly become 'stale', causing a stop for trespass to become unreasonable." In that case, which really involved the search and seizure of narcotics after a person was stopped in the belief that a trespass warning existed, four months had passed between the warning and the stop. The court's comments concerning staleness were largely un-related to the decision reached, but imply that some circumstance might exist to overcome by the mere passage of time the validity of a trespass warning.

Where does this leave us? In sum, Florida has no blanket statute or appellate ruling setting a time limit on the validity of a trespass warning. Although it is theoretically possible that the passage of time can cause such a warning to become invalid, no case has yet upheld facts in support of such a claim. To the contrary, trespass warnings as much as 18 months old have been upheld. Absent a compelling reason to think that the property owner involved no longer wishes to have a warning enforced, or a compelling reason why a defendant might believe that to be so, law enforcement officers may act upon even old warnings.

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**CASE LAW UPDATE**  
**SEARCH AND SEIZURE**

Officers approached a car parked in a non-designated parking area behind a closed business at 1:30 in the morning and found a man apparently asleep. There was an open restaurant nearby. Officers saw what they believed to be the butt of a handgun partially concealed by an article of clothing beside him. The officers asked him to step out. He could not give a satisfactory answer as to why he was there. He agreed to their request for a

search of the vehicle, which revealed the partially concealed gun to be a fully loaded semi-automatic Tech-9 with 33 rounds of ammunition in it.

The search also revealed a sledge hammer, an AK-47 rifle with 150 rounds, a loaded shotgun, a full face mask, a knife, military clothing and a glass bottle containing paint thinner with a rag inside. The man was arrested for possession of concealed weapons which turned up in the search. At the station, he confessed to previous robberies.

In the July opinion of **BLICE V ST**, the Second DCA held that the initial approach to the defendant's vehicle constituted a police/citizen encounter. The Court held that the officers were duty bound to investigate and to render assistance if needed. Once the officers saw the gun, the level of the encounter increased to a Terry situation because the police had reasonable suspicion that Blice was committing the crime of carrying a concealed firearm.

The Court dismissed the defendant's arguments that if the police could see that the object was a gun, it was not concealed. The Court reasoned that the trial judge should evaluate the time and location Blice had parked his car, the testimony of the officers about the gun when they

first saw it, the nonsensical explanation he gave for being at the location and the fact that the gun was partially covered by a jacket. The Court quoted the Florida Supreme Court opinion of DORELUS V STATE, noting that the judge should evaluate "variables" such as whether the weapon is carried in such a manner as to be hidden from ordinary sight, the location within the vehicle, floorboard, seat, seat pocket or open console; and whether and to what extent the weapon is covered by another object.

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#### DRUG SPITTING

In June, the Second DCA held in CONEY V STATE that the fact that the defendant had an unknown object in his mouth that officers suspected was an illegal drug was **NOT** sufficient to order the defendant to spit out the contents of his mouth.

Tampa police officers were surveilling in an area where many drug arrests had been made. They saw the Defendant approach a car, put his closed hand into the car, and as the car left, that Coney held money. Officers lost sight of Coney until a few blocks later and stopped him. An officer noticed Coney had something in his mouth and ordered him to spit it out. Coney complied and spit out a

"nickel size" bag of marijuana.

At the suppression hearing, the officer testified that he did not know what was in Coney's mouth before he spit it out, but suspected drugs.

The appellant court held that while the officers had a legitimate basis to conduct an investigatory stop of Coney, they did NOT have probable cause to search his mouth and thus suppressed the evidence. "Generally, in order for an officer to direct a person to spit out the contents of his or her mouth, the officer must have probable cause to arrest the person and to conduct a lawful search incident to that arrest." The court distinguished this case from other cases where defendants fled from police and were seen in hand-to-hand transactions where they exchanged unidentified objects for money on multiple occasions. Here, the police did not see what was in Coney's hand when he reached into the car, did not see what was in his mouth before he spit out the object and did not see him involved in more than one transaction.

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#### LIMITATIONS ON DETAINING VEHICLE

In July, the Second DCA issued its opinion in BORYS V ST reversing the defendant's convictions for

DWLSR as an habitual offender and Resisting Without Violence, because the officer had improperly detained the vehicle.

Tampa officers stopped Borys for improper display of a temporary tag. Although the tag was attached to the inside of the rear window, the officer could not read the expiration date while driving behind Borys' vehicle and concluded that the tag was improperly displayed. As the officer approached the car, he was able to read the expiration date and determined that the tag was valid. The officer continued and asked Borys for his DL and registration. Borys produced an ID card. The officer returned to his unit to perform a license check. While the officer was in the patrol car, Borys attempted to flee on foot. He was charged with DWLSR as an habitual offender and Resisting Without.

Borys moved to suppress everything that was learned or happened after the officer determined the expiration date of the tag, alleging that any further detention was illegal and that further information learned from the improper inquiry must be suppressed. The appellate court agreed, holding that once the tag was determined to be valid no further stop or inquiry was justified. Borys should have been free to leave at this point and both the officer's determination that the DL was suspended and

Borys' fleeing the scene occurred after the discovery that the tag was valid. The defendant could not properly be convicted of obstruction without violence for attempting to leave after the defendant had been improperly detained.

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**REMINDER:**

**LEGAL BULLETIN NOW ON-LINE**

As announced in our last issue, the Legal Bulletin is now available on-line, including old issues beginning with calendar year 2000. To access the Legal Bulletin go to the SAO website at <[sawww.co.alachua.fl.us](http://sawww.co.alachua.fl.us)> and click on the "Legal Bulletin" box.

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**IN MEMORIAM**

Union County Deputy **RENEE DANELL AZURE**, 23, was killed in a traffic accident while responding to a call on August 6. Deputy Azure had worked for UCSO for four months and had previously served as an officer for the Alachua Police Department, where she had been assigned to the Eighth Judicial Circuit SIU.

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**FOR COPIES OF CASES...**

For a copy of the complete text of any of the cases or



new statutes mentioned in this or an earlier issue of the Legal Bulletin, please call ASA Rose Mary Treadway at the SAO at 352-374-3680.

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### 2002 CRIMINAL LEGISLATION

Beginning on Page 9 are additional legislative enactments from the 2002 legislative session. These are in addition to new legislation that was published in previous issues of the Legal Bulletin. Each section shows the number attached to the legislation as well as the particular statute that has been enacted or amended. The summary of each is intended to provide a general idea of what is involved. If you have a particular interest in or need for the exact language of any of these new or amended laws, they are most easily researched and located by the legislative number until later this Fall when revised issues of Florida Statutes are available. All of these provisions are in effect now, the exact effective date for each being indicated at the end of the body of the summary.

## MORE 2002 CRIMINAL LEGISLATION

### 2002-24

Amending 468.452 to specify that the term "athlete agent" includes all employees or others acting on behalf of an athlete agent but not a spouse, sibling, parent, grandparent or guardian of a student-athlete or an individual acting for a professional sports team or organization, amending 468.45615 to establish a 2F offense for providing anything of value to a student-athlete prior to a contract being signed or to any other person, for providing material false information, for initiating un-licensed contact, for pre- or post-dating a contract, for failing to give notice of a contract, or for failing to notify a student-athlete that signing a contract may result in collegiate ineligibility. EFFECTIVE DATE: July 1, 2002

### 2002-28

Amending 790.163 and 790.164 to require adjudication and sentencing for false bomb report cases unless the State Attorney moves for a reduction or suspension of sentence due to substantial assistance and to provide that proof of knowingly making a false report is prima facie evidence of the required intent to deceive; amending 790.165 to add displaying, using, threatening or attempting to use, conspiring to use, or making readily accessible to others a hoax bomb as criminal acts and increasing the penalty therefore from a 3F to a 2F Level 7 offense; amending 790.166 to include as weapons of mass destruction biological agents, toxins, vectors or delivery systems designed to harm not only human beings but also animals or designed to create severe emotional or mental harm to a human being, and adding mailing or sending to proscribed acts regarding weapons of mass destruction, to create a 2F Level 7 offense for possessing, displaying or threatening to use a weapon of mass destruction while committing or attempting to commit any other felony, to require adjudication and sentence for weapon of mass destruction offenses unless the State Attorney moves for reduction or suspension of sentence due to substantial assistance, and to provide that proof of death or serious bodily injury is prima facie evidence that the device or object was designed to do so. EFFECTIVE DATE: July 1, 2002

### 2002-30

Amending 383.51 to exempt from public records disclosure the identification of parents who leave an infant at an EMS station as well as at a hospital emergency room or fire station. EFFECTIVE DATE: April 16, 2002

**2002-32**

Amending 944.02 to include in the definition of "prisoner" persons under civil as well as criminal arrest.  
EFFECTIVE DATE: July 1, 2002

**2002-55**

Amending multiple provisions of law to standardize the definition of "Domestic Violence" and related terms as being those provided in 741.28; amending the definitions of 741.28 to provide that "Family Or Household Member" means individuals currently residing or in the past having resided together "with the exception of persons who have a child in common"; amending 741.31 to include as injunction violations being within 500 feet of the petitioner's residence, school or job or 100 feet of the petitioner's vehicle, occupied or not, damaging the petitioner's property, or failing to surrender guns or ammunition; amending 784.046 to establish "Dating Violence" as a predicate for injunctive relief, including definitions and guidelines to determine qualified dating relationships as being "continuing and significant relationships of a romantic or intimate nature." EFFECTIVE DATE: July 1, 2002.

**2002-72**

Amending 934.03 to allow persons acting under color of law to intercept wire or electronic communications of a computer trespasser under some circumstances; amending 934.07 to require a law enforcement agency engaging in authorized wiretapping which reveals information concerning potential terrorism to notify FDLE of such, and FDLE to proceed with independent wiretap applications; amending additional provisions of Chapter 934 as to wiretapping procedures.  
EFFECTIVE DATE: April 22, 2002

**2002-78**

Amending 893.03 to add Carisoprodol to Schedule V. EFFECTIVE DATE: July 1, 2002

**2002-79**

Creating an as yet un-numbered 3F offense for attempting to obtain, soliciting to obtain, or obtaining public or commercial transportation with intent to use such to commit or facilitate commission of a felony. EFFECTIVE DATE: July 1, 2002

**2002-80**

Creating 784.062 as a non-criminal violation for knowingly pointing a laser light device at a law enforcement officer engaged in the course of his duties so as to create the appearance that a gun is being pointed at the officer. EFFECTIVE DATE: October 1, 2002

**2002-178**

Amending 322.121 to create a 3F offense for knowingly selling, manufacturing or delivering or offering to sell, manufacture or deliver blank, forged, stolen, fictitious, counterfeit or unlawfully issued driver's licenses or state identification cards or simulations thereof. EFFECTIVE DATE: October 1, 2002

**2002-192**

Creating 810.0975 to create school safety zones of 500' of any public or private elementary, middle, or high school, to establish a 2M offense for anyone without legitimate business or other invitation to enter, trespass or remain in a school safety zone from one hour before to one hour after the school session, to establish a 2M offense for the failure to leave a school safety zone upon request of a school principal who has a reasonable belief that a crime or harassment of students will occur, and exempting residents and businesses operating within the school safety zone. EFFECTIVE DATE: July 1, 2002

**2002-251**

Amending 316.191 to enhance the penalty for drag racing and racing from a non-criminal violation to a 2M offense including a mandatory fine of \$250-500 and a 1 year drivers license revocation, or, upon a second conviction within 5 years, a 1M offense including a mandatory fine of \$500-1000 and a 2 year license revocation, to allow for immediate arrest of an offender, and to allow for court ordered vehicle impoundment. EFFECTIVE DATE: October 1, 2002

**2002-255**

Amending 901.15 to allow a warrantless arrest for assault on a LEO, firefighter, EMT, public transit employee, or other person as specified in 784.07, and for assault or battery upon an involuntary mental health commitment receiving facility employee; amending 947.141 to require an arrest regardless of a warrant being issued upon probable cause for a violation of conditional release, control release, conditional medical release, or addiction recovery supervision conditions due to the commission of a felony; amending 947.22 to require arrest regardless of a warrant being issued upon probable cause for a parole violation. EFFECTIVE DATE: October 1, 2002

**2002-256**

Creating 119.072 to exempt Social Security numbers from public records disclosure except under specified circumstances, to establish a 3F offense for making false representations in order to obtain a Social Security number and a non-criminal infraction punishable by up to a \$500 fine for a public officer who improperly discloses a Social Security number, to provide that Social Security numbers not be entered on court documents unless specifically required by law. EFFECTIVE DATE: May 13, 2002

**2002-258**

Creating 893.101 to specifically overrule Chicone v State and provide that knowledge of the illicit nature of a controlled substance is not an element of any Chapter 893 offense but is rather an affirmative defense, and that when asserted both actual and constructive possession create a permissive presumption of knowledge as to which the jury shall be instructed. EFFECTIVE DATE: May 13, 2002

**2002-259**

Amending 322.212 to add a 3F Level 1 offense for knowingly selling, manufacturing or delivering, or offering to sell, manufacture or deliver a blank, forged, counterfeit or unlawfully issued drivers license or identification card or similitude thereof unless authorized to do so by DHSMV. EFFECTIVE DATE: October 1, 2002

**2002-297**

Amending 796.07 to enhance penalties for prostitution and soliciting offenses to a 3F offense for a 3rd or subsequent violation, to require an offer of PTI or substance abuse treatment to persons charged with a 3rd or subsequent violation, to impose a \$500 civil penalty (2)(f) soliciting, inducing, enticing, or procuring, said money to go to fund Drug Court programs; amending 322.28 to require a drivers license suspension of not less than a year upon a 2nd or subsequent conviction of a (2)(f) offense involving a motor vehicle; amending 948.08 to include prostitution as a PTI eligible offense. EFFECTIVE DATE: July 1, 2002