

LAW ENFORCEMENT NEWSLETTER

September 2011

A MESSAGE FROM BILL CERVONE STATE ATTORNEY

We are once again undergoing changes in format as we struggle to find new and better ways to prepare this Newsletter and accommodate shifting staffing needs at the SAO. The unexpected retirement of ASA Geoff Fleck, who was to replace ASA Rose Mary Treadway as Editor, leaves

a temporary vacancy that will be addressed at least for this issue and perhaps in the future by our having a more collaborative approach, as you'll see with various articles having been prepared by different staff members. My intention and goal is still to provide you legal updates that

you can use as well as information about what's happening across the Circuit.

In that regard, and thankfully, we are now finished with the legislature, at least for this year. The good news is that, after months of unpleasant bickering and posturing, when all was said and done the budget for the SAO and all of Florida's prosecutors was left pretty much undamaged. In fact, several circuits were even given new money to address population and case load driven problems that have been building for years. This is great news for all of us and allows me to do things that I had not thought would be possible, much less to avoid the

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Any changes in agency email addresses should be reported to our office at manns@sao8.org.

For a copy of the complete text of any of the cases mentioned in this or an earlier issue of the Legal Bulletin, please call Chief Investigator Spencer Mann at the SAO at 352-374-3670.

SAO PERSONNEL CHANGES



Chris Elsey joined the Gainesville office on August 29th and has been assigned to the Firearm Prosecution Unit. Chris comes to us from SAO4, where he was most recently working in Jacksonville's Repeat Offender Court prosecuting serious felony offenders. Chris is a UF Grad and former intern with the office. ASA Steffan Alexander resigned effective September 2nd to join the legal staff of Infinite Energy, a Gainesville firm. ASA Jacob McCrea has been re-assigned to Steffan's felony position. Julie Fine, who was an intern with the office earlier this year and is a recent UF Law School grad, has been hired to fill the Alachua County Court position this creates.

MESSAGE FROM BILL CERVONE CONTINUED

drastic cuts that might otherwise have been necessary. You'll find news about these moves elsewhere in this issue and in the future as they develop.

In terms of substantive law, there was little of consequence passed. This issue includes highlights of new or amended criminal statutes.

Our goal continues to be to

provide all of the agencies and the entire population of the Circuit with the best service possible. As always, I invite your comment and input.

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CONGRATULATIONS TO...

- And welcome to new Williston Police Department **Chief Dennis Strow**, who was appointed on August 16th. Chief Strow comes to the 8th Circuit after serving with the Marion County Sheriff's Office for 38 years.
- **Brian Rodgers**, who became our newest ASA on May 16th. Brian graduated from the University of Florida Law School this Spring and has been interning with the office prior to his graduation. He will be assigned to the Gainesville Intake Division pending taking the Bar exam later this year.
- **SA Harlan McGuire**, who passed the Bar exam in April and has been sworn as a Bar member
- **ASAs Harlan McGuire and Adam Lee**, both of whom were married in the Spring.
- **UPD's Tony Dunn and Darren Baxley**, both of whom were promoted on May 13th to the position of Associate Director/Deputy Chief by Chief Linda Stump.
- **Baker County Sheriff's Office Deputy Matt Sigers**, who received the agency's Morris Fish Award, **Deputies Rodney Driggers and Shawn Bishara**, who received the agency's Joseph Burtner Award, and **Correctional Officer Jeffrey Davis**, recipient of the agency's Correctional Officer of the Year award, all of which were presented at the Baker County Law Enforcement Memorial ceremony on May 5th.
- **Julie McCall**, who many will remember from her 25 years at the Alachua County Sheriff's Office, was named Florida parole Commission Employee of the Year. Julie currently serves as Co-Coordinator for the Office of Executive Clemency, a position she took in January of 2010.
- **GPD Detective Patti Nixon**, who retired on June 30th after a nearly 25 year career with the Department.
- **GPD Officers Jeff Blundell, Bruce Giles, Jorge Campos, and Whitney Stout**, who have been promoted to the rank of Lieutenant, **Stephen Girard, Tscharna Senn, Paris Owens, Nick Ferrara, Jaime Kurnick, Dave Blizzard, Courtney Roberts Jr., Adebowale Alade, Audrey Mazzuca, Robert Fanelli** all promoted to Sergeant., **Chris Cardwell, Joseph Dixon, Alan Gray, Michael Henagan, Robert Kennedy, Renee Nichols, David Schramek and Charles Ward III**, all promoted to Corporal and **Robert Huff**, promoted to PST III.



CELL PHONE SEARCHES



The 1st DCA has issued two important opinions dealing with cell phone searches in recent weeks. Because the 1st DCA generally controls appeals from the 8th Circuit these opinions are controlling law for all of our counties. These opinions, styled Smallwood v State and Fawdry v State,

both hold that a police officer may search through the contents of a cell phone taken from a person at the time of a valid arrest, even if there is no reasonable belief that the cell phone contains any evidence.

In the Smallwood case, officers arrested a person for robbery and removed a cell phone from him. They looked through the files on the phone and found photos of a gun and articles apparently taken in the robbery. In the Fawdry case, officer also removed a cell phone from a person being arrested for a child sexual battery. One officer knew that guns could sometimes be disguised to look like cell phones so he flipped the phone open and found a wallpaper image of child pornography. He looked further and found several files containing additional

child porn.

Both decisions turn on the court's determination that a cell phone is a container. It is a given that a lawful arrest allows a search of personal effects, including open and closed containers, carried by a suspect. Such a search is reasonable under the 4th Amendment.

Whether a cell phone is a container is subject to differing opinions across the nation. The 1st DCA concluded that digital files contained in a cell phone are no more than the modern equivalent of address books, calendar books, photo albums and the like that were previously carried in tangible form. Modern technology simply allows them to be carried as data and a cell phone merely acts as a case, or container, for them. In tangible form, these things could clearly have been searched incident to arrest, and the court concluded that there is no distinction warranted on the basis of how the information is carried.

These two decisions also rely on the applicability of federal search and seizure law to Florida, as required under the state constitution. It is clear from the language of the opinions, however, that the court is not 100% sold on this posi-

tion. The court noted that there is a countervailing position, adopted in some states, that the unique properties of a cell phone and its immense storage capacity give a higher expectation of privacy and make a search of its contents more intrusive than would be so for ordinary containers. Both opinions have been sent to the Florida Supreme Court for review. This is important because the federal law relied on by the 1st DCA dates to 1973 when cell phones and digital images were unknown and probably unimaginable. What the Florida Supreme Court will ultimately rule and when it will do so is anyone's guess. In the meantime and even acknowledging the risk that they could be overturned, since these are 1st DCA cases they allow officers to conduct a search of this sort in the 8th Circuit.



Proper Procedure Concerning Victims Retrieving Stolen Items From Pawnbrokers

Contributed by ASA Debbie Hunt

Questions frequently arise about how theft victims can deal with pawn shops when their property is located there. The statute which entitles victims to retrieve stolen items from pawn brokers without paying for the items reads as follows:

F.S. 539.001 (15) Claims against purchased goods or pledged goods held by pawnbrokers

- (a) To obtain possession of purchased or pledged goods held by a pawnbroker which a claimant claims to be misappropriated, the claimant must notify the pawnbroker by certified mail, return receipt requested, or in person evidenced by signed receipt, of the claimant's claim to the purchased or pledged goods. The notice must contain a complete and accurate description of the purchased or pledged goods and must be accompanied by a legible copy of the applicable law enforcement agency's report on the misappropriation of such property. If the claimant and the pawnbroker do not resolve the matter within 10 days after the pawnbroker's receipt of the notice, the claimant may petition the court to order the return of the property, naming the pawnbroker as a defendant, and must serve the pawnbroker with a copy of the petition. The pawnbroker shall hold the property described in the petition until the right to possession is resolved by the parties or by a court of competent jurisdiction. The court shall waive any filing fee for the petition to recover the property, and the sheriff shall waive the service fees.
- (b) If, after notice and a hearing, the court finds that the property was misappropriated and orders the

return of the property to the claimant:

1. The claimant may recover from the pawnbroker the cost of the action, including the claimant's reasonable attorney's fees; and
 2. If the conveying customer is convicted of theft, a violation of this section, or dealing in stolen property, the court shall order the conveying customer to repay the pawnbroker the full amount the conveying customer received from the pawnbroker for the property, plus all applicable pawn service charges. As used in this paragraph, the term "convicted of" includes a plea of nolo contendere to the charges or any agreement in which adjudication is withheld; and
 3. The conveying customer shall be responsible to pay all attorney's fees and taxable costs incurred by the pawnbroker in defending a replevin action or any other civil matter wherein it is found that the conveying customer was in violation of this paragraph.
- (c) If the court finds that the claimant failed to comply with the requirements in paragraph (a) or otherwise finds against the claimant, the claimant is liable for the defendants' costs, including reasonable attorney's fees.
- (d) The sale, pledge, or delivery of tangible personal property to a pawnbroker by any person in this state is considered to be:
1. An agreement by the person who sells, pledges, or delivers the tangible personal property that the per-

son is subject to the jurisdiction of the court in all civil actions and proceedings arising out of the pledge or sale transaction filed by either a resident or nonresident plaintiff;

2. An appointment of the Secretary of State by any nonresident of this state as that person's lawful attorney and agent upon whom may be served all process in suits pertaining to the actions and proceedings arising out of the sale, pledge, or delivery; and

3. An agreement by any nonresident that any process in any suit so served has the same legal force and validity as if personally served in this state.

Simplified, the procedure is as follows:

Victim/Law Enforcement identifies an item at a pawn shop to be stolen.

Victim sends a certified letter with return receipt to the pawnbroker (or goes to the pawnbroker and has them sign a written receipt) claiming rightful possession of the item. The victim is to provide a clear and accurate description of the item and include a copy of the original police report.

The victim and the pawnbroker have 10 days from the receipt of the above-mentioned letter to work out return of the victim's item.

If the pawnbroker refuses to return the item to the victim without consideration (meaning payment), victim

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Continued:**Proper-Procedure-Concerning Victim Retrieving Stolen Items from Pawnbrokers**

may go to the civil courthouse and file a writ of replevin and serve it on the pawnbroker. At this point, the pawnbroker **MUST** maintain (hold, not sell/melt, etc) the item in question until the matter is resolved.

The victim will not have to pay filing fees with the clerk or service fees with the sheriff for this process.

The court will then hold a hearing to determine if the property should rightfully be returned to the victim.

If the victim prevails, the pawnbroker has to pay all costs associated with the replevin action, and the pawnbroker becomes the victim for restitution purposes in any ensuing criminal case. The pawnbroker may then lawfully ask the state for the cost they paid for the item as well as any and all legal fees incurred in the replevin hearing.

If the victim has not complied with the appropriate pre-replevin hearing procedures, or the court finds against the victim, the victim may

pay the pawnbroker's legal fees and court costs.

This, of course, assumes that the property has not been seized by law enforcement as evidence, which may be the case. If that has not been done or cannot be done, officers may want to provide this information to a victim who reports locating their property at a pawn shop. While victims in this situation may think or be told by a pawn broker or someone else that they have to pay to recover their property, that is not so under this stat-

New Requirements For Drug Dogs Contributed By ASA Brian Rodgers

The Florida Supreme Court issued two cases in April that will have a significant impact on how and when drug detection dogs can be used. In the first case, the Court has held that probable cause must exist before a dog can be

used to sniff at the door of a residence. In the second, the Court held that the State must establish in detail the reliability of the dog, and set criteria for what is necessary to prove that. Although the second case specifically involved a dog sniffing a

stopped vehicle, the reasoning behind the requirements for reliability will no doubt be applied to any situation in which a drug dog is used. Following are detailed summaries of both cases.

***Jardines v. State,* 36 Fla. L. Weekly S 147 (Fla. April 14, 2011) DOG SNIFF OF A PRIVATE RESIDENCE REQUIRES A SEARCH WARRANT**

Miami-Dade Police Detective Pedraja received a "Crime Stoppers" tip that Defendant Joelis Jardines was growing marijuana inside his home. A month later, Detective Pedraja, along with several other Miami-Dade police officers, state Narcotics Bureau members, federal Drug Enforcement Administration agents, and federal Department of Justice officials, took up a perimeter

around Jardines's home. The place appeared deserted, though the air conditioning units ran constantly, a fact which Detective Pedraja's training and experience told him meant that UV heat lamps might be operating inside. A Miami-Dade drug detection dog and its handler approached the house and, after performing a "vigorous and intensive" sniff of the front door, the dog alerted to the pres-

ence of contraband. Detective Pedraja confirmed the dog's alert when he too detected the scent of live marijuana plants emanating from within. While various law enforcement agents waited on scene, Detective Pedraja obtained a warrant and the subsequent search revealed that Jardines's home indeed contained a grow operation.

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Continued:
Dog Sniff of a Private Residence Requires A Search Warrant

Jardines argued that the evidence collected inside his house should be suppressed and the trial court agreed by finding a drug detection dog to be no different than any other "sense-enhancing technology" that police can use to reveal intimate details of a person's home. The Third DCA reversed and then after several years of ensuing litigation, Florida's Supreme Court finally concluded in Jardines v. State that a sniff test by a drug detection dog conducted at the front door of a private residence is a search that warrants the protections of the Fourth Amendment. Accordingly, police must first show probable cause and obtain a warrant to conduct a sniff test of a suspect's home.

While the United States Supreme Court has previously held that dog sniffs of things such as luggage seized at the airport on reasonable suspicion of criminal activity, the exterior of automobiles stopped at drug interdiction checkpoints, and the exterior of automobiles that have been subjected to lawful traffic stops are valid, the state high court drew a "bright" and "firm line at the entrance of a house." It held that dog sniffs performed at the threshold of a home potentially expose the resident to public humiliation and may leave the impression among neighbors that the

resident has been officially accused of a crime. Even more troubling to the court was the possibility of arbitrary and discriminatory application of dog sniffs by law enforcement. "If government agents can conduct a dog sniff test at a private residence without any prior evidentiary showing of wrongdoing, there is simply nothing to prevent the agents from applying the procedure based on whim and fancy at the home of any citizen." Throughout its holding the court strongly echoed the common refrain that a person's home is afforded special status under the law and that its sanctity may be breached only with a warrant

Importantly for law enforcement agencies that employ drug detection dogs, several of the Justices commented that simply permitting officers to assert in a warrant affidavit that their dogs are properly trained without more unduly burdens defendants who wish to challenge the validity of warrantless dog sniffs of their homes. The Justices remarked that because there is no uniform training or certification system for these animals, a dog's alert may be an insufficient basis for a finding of probable cause of criminal activity. As an example of the disparities among agencies and dogs, they

specifically contrasted the training procedures used by the United States Customs Service with those of the Hillsborough County Sheriff's Department. Customs dogs and their handlers undergo a rigorous twelve-week training course during which the dogs are taught to ignore distractions and residual scents. The course culminates in a multi-part certification exam during which the dog must perform perfectly or it is sent for remedial training. If a dog fails the exam more than once, it is retired from service. In contrast, the Hillsborough County Sheriff's Department apparently requires its dogs to train for just thirty days and it does not condition them to ignore residual odors. Their animals can pass the final exam with proficiency of as little as seventy percent. The Justices commented that the lack of uniformity should require a specific, substantive showing of the dog's reliability for a court to make an intelligent finding of probable cause.

Harris v. State, 36 Fla. L. Weekly S 163 (Fla. April 21, 2011)

DOG'S CAN'T BE CROSS-EXAMINED - PROVING A DRUG DETECTION DOG'S RELIABILITY REQUIRES MORE THAN ITS HANDLER'S WORD

Continued:**Dog Sniff of a Private Residence Requires A Search Warrant**

Liberty County Sheriff's Deputy William Wheatley stopped Defendant Clayton Harris's truck for an expired license plate. Harris was acting nervous and breathing rapidly when Deputy Wheatley approached. An open container of alcohol was sitting in the vehicle in plain view. When Harris refused to consent to a search of his truck, the Deputy retrieved Aldo, his drug detection dog, for a sniff of the exterior of the vehicle. After Aldo alerted to the driver's side door handle, the truck was searched and the makings for a batch of methamphetamine were found including muriatic acid, 200 pseudoephedrine pills, and 8000 matches. Post-Miranda, Harris admitted to cooking and abusing meth. Two months later, Deputy Wheatley pulled Harris over for another traffic infraction and once again Aldo alerted to the presence of contraband. This time, though, nothing illicit was located inside Harris's truck. Deputy Wheatley would testify that Aldo was likely responding to the residual odor of drugs transferred from a person's hand, though it would be impossible to determine with certainty how long the residual odors had been present or who had transferred them to the truck.

Harris asserted that the search of his truck was illegal and moved to suppress the items. He argued that the State failed to establish Aldo's reliability as a drug detection dog. He specifically pointed out observations, the State must affirmatively prove a dog's reliability. To do so, it must present evidence concerning not only the training and experience of the officer handling the dog, but also of the dog's training and .

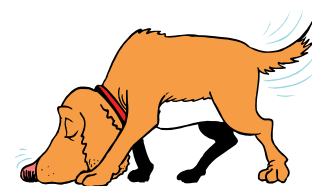
to Aldo's false alert on the same vehicle just months after the initial sniff. He further argued that even the initial search did not turn up any actual drugs that Aldo was trained to detect. Harris claimed that while "any dog can be trained, what matters most is that the dog obtains positive results in the field." The State established that Aldo had completed an initial 120 hour training program to detect cannabis, cocaine, ecstasy, heroin, and meth, followed by annual forty hour training seminars. The dog's limited training records indicated 100% satisfactory performance, though the definition of satisfactory was not clear. Field performance records were kept only in the event of a successful alert and arrest. It was impossible to determine how many times Aldo had falsely alerted to the presence of drugs or had not alerted at all.

When the United States Supreme Court held warrantless sniffs of the exterior of lawfully stopped vehicles to be valid, it was on the basis of the dog's that performed the sniffs being "well-trained." The Supreme Court equated a well-trained drug detection dog with one that does not expose non-contraband items that otherwise would remain hidden from public view. In other words, a well-trained dog is not one that has merely been trained and certified, but instead it is one that is reliable. Critical to determining a dog's reliability is its track record of giving accurate information in the past.

Recognizing a conflict among all five of Florida's District Courts of Appeal on the issue of when a drug detection dog's alert to the exterior of a vehicle provides law enforcement with probable cause to search the interior of the vehicle without a war-

rant, Florida's Supreme Court established a standard in **Harris v. State**. The high court held that the issue hinges on a given dog's reliability. If a warrantless search of a car on the basis of a positive alert from a drug detection dog is later challenged, the State must demonstrate by a totality of the circumstances that the officer had a reasonable basis for believing in the dog's reliability. No longer will the burden be on the defendant to challenge a particular's dog's reliability in the face of the State's bare assertions that a dog is trained and certified. In fact, since there are no uniform training or certification standards for drug-detection dogs and since a dog cannot be cross-examined about its certification, an explanation of what that training and certification means for that particular dog, and detailed records of its performance in the field.

Importantly, the Florida Department of Law Enforcement has adopted a uniform standard of certification for dogs that are dual purpose, such as ones trained for detecting contraband and for apprehending suspects. In any event, this case illustrates the importance of law enforcement agencies to maintain detailed records of each drug detection dog's training, certification, and field performance as to real alerts, false alerts, and even non-alerts. A failure to do so might lead to tossed searches and dropped cases



TRAFFIC STOPS - OBSTRUCTED TAGS

Contributed By Assistant State Attorney Rich Chang

Recently the SAO has received several cases in which traffic stops that led to the discovery of narcotics have been predicated on Section 316.605, Florida Statutes, which provides that every vehicle driven, stopped, or parked, on the highways and roads in this state shall “display the license plate or both of the license plates assigned to it by the state, one on the rear and, if two, the other on the front of the vehicle, each to be securely fastened to the vehicle outside the main body of the vehicle not higher than 60 inches and not lower than 12 inches from the ground and no more than 24 inches to the left or right of the centerline of the vehicle, and in such manner as to prevent the plates from swinging, and all letters, numerals, printing, writing, and other identification marks upon the plates regarding the word 'Florida,' the registration decal, and the alphanumeric designation shall be clear and distinct and free from defacement, mutilation, grease, and other obscuring matter, so that they will be plainly visible and legible at all times 100 feet from the rear or front.” Based on a literal reading of this statute, partial or complete concealment of the wording at the top or bottom of a tag, such as the state motto, has been used as probable cause to stop even though the actual tag number in the body of the tag is clearly and completely visible.

The possible argument that these stops are permissible regardless of a claim that they are a pretext based on federal authority notwithstanding, it appears that the courts in this jurisdiction are now going to suppress evidence based on this interpretation of Section 316.605. This is because of a Fifth District Court of Appeals opinion styled State v. St. Jean, 697 So.2d 956, and issued in

1997, which interpreted that statute to stand for the proposition that the identifying marks on the license plate are the letters and numbers, and the registration information, and nothing else. The relevant language from the holding in that case is as follows:

The use of license plate rims or frames which obscure the county name appearing at the bottom of the plate is a common practice of long-standing among the citizens of our state. They are frequently supplied by car dealers and many otherwise law abiding citizens install them specially to show allegiance to a club, fraternity, college or sports team or, as a means of other self-expression. It is extremely odd that such an obvious and prevalent practice has generated no reported decisions and no enforcement that the state can identify. Absent any more clear prohibition against this activity in Florida statutes, we decline to declare it a traffic infraction.

Interestingly, but not a part of its holding, the 5th DCA in its opinion also opined as follows:

We make one additional observation about this statute that was not raised by the parties, in the likely event this issue comes up in another district. It appears to us that essential to a correct interpretation of [section 316.605](#) is the phrase, “visible and legible at all times 100 feet from the rear or front.” ^{FN2} Plainly, any writing contained on a Florida tag produced and sold by the state that is not “visible and legible” at 100 feet could not be an “identification mark” as referred

to in this statute. Otherwise, under the statutory scheme, every citizen who complies with the law by displaying the tag assigned to it by the State of Florida would be in violation of the law requiring legibility at 100 feet. This would yield an absurd result and cannot be what the legislature intended. We question whether the state could establish that the county name on the tags supplied by the State of Florida is visible and legible to a person with normal vision at 100 feet.

The bottom line is that only if the actual tag number, the registration sticker, or the word Florida is observed would a stop under this statute be permissible. A good rule of thumb is this: if you can read enough to see that it's a Florida tag and to run it, it's not obscured. If you can't, it is. If it is, your citation should also describe exactly what is obscured so that the judge knows, and so that you can remember if you ever have to testify.



2011 CRIMINAL LEGISLATION

The following are legislative enactments from the 2011 session that impact or affect criminal justice issues. Little of major importance was done this year as the legislature's primary focus was on fiscal matters. The entire text of these bills is available on line at many sites, including www.leg.state.fl.us, or by contacting the SAO. These summaries are intended only to highlight the content of the bills. Prior to acting on them the entire text should be read.

Senate Bill 344/Session Law 2011-42 - Animal Cruelty - This bill creates Section 828.126 to establish a 1st degree misdemeanor crime for engaging in sexual conduct or contact with an animal, or knowingly promoting, organizing, or participating in that as an observer for commercial or recreational purposes. This becomes effective on October 1, 2011.

House Bill 409/Session Law 2011-83 - Public Records - This bill creates a new exception from public records disclosure for photos or videos related to a video voyeurism case, which no longer are required to be released under Chapter 119. This provision was effective July 1, 2011.

House Bill 105/Session Law 2011-161 - Open House Parties - This bill increases the penalty for an open house party violation to a 1st degree misdemeanor on a second or subsequent offense, and creates a new 1st degree misdemeanor offense if serious bodily injury or death to a minor results or if a minor causes serious injury or death as a result of

the use of alcohol or drugs at an open house party. This provision was effective July 1, 2011.

Senate Bill 240/Session Law 2011-146 - Violations Of Injunctions For Protection - This bill adds as violations of an injunction under Section 784.047 going within 500 feet of the petitioner's home, school, or job or within 100 feet of the petitioner's vehicle, occupied or not, defacing the petitioner's property, or refusing to surrender firearms or ammunition if ordered to do so by the court. This provision was effective July 1, 2011.

House Bill 75/Session Law 2011-180 - Sexting - This bill creates a new but not yet numbered statute that prohibits a minor from knowingly transmitting to another minor or possessing after soliciting any harmful image of nudity by any electronic means. A first offense is a non-criminal violation, a second offense becomes a 1st degree misdemeanor, and a third offense is a 3rd degree felony. This provision becomes effective on October 1, 2011.

House Bill 251/Session Law 2011-220 - Sexual Offenses - This bill addresses many matters related to sexual offenses. Similar fact or Williams Rule evidence in sexual offense cases is expanded. Service or therapy animals are allowed to be used with sexual offense victims who are under 16 or who suffer from mental retardation. Child pornography must stay with the law enforcement agency, State Attorney or court and is not to be copied or provided to the defense although the State Attorney must make it

readily available. The statute of limitations for video voyeurism is changed to one year from the time the victim knows of it or law enforcement confiscates it. Sexual Battery victims' rights are expanded to require an office who is investigating such a crime to transport the victim to a facility for a rape exam and to allow the victim to review any final report for accuracy before it is submitted and to provide a statement as to its accuracy. Hepatitis testing of a defendant charged with Sexual Battery may now be done in addition to HIV testing. "Intentionally viewing" or "controlling" are added to the prohibitions of Section 827.071, Child Sexual Performance, and proof of "intentionally viewing" is defined to require more than a single viewing. These provisions became effective on July 1, 2011.

House Bill 155/Session Law 2011-112 - Privacy Rights Of Firearms Owners - This provision amends Chapter 790 prohibits doctors and other medical providers from asking patients about gun ownership or possession if that is not relevant to medical care or safety. Although not criminal, a violation is grounds for licensing or disciplinary action. This provision became effective on June 2, 2011.

Senate Bill 234/Session Law 145 -Open Carrying Of Firearm - This bill amends Section 790.338 to provide that it is not a violation of the open carry law for a person who is lawfully carrying a concealed firearm when the weapon is briefly visible to

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Continued: 2011 CRIMINAL LEGISLATION

others so long as there has been
no display in an angry or threat-
ening manner not in lawful self-
defense. This provision was ef-
fective on June 17, 2011.

House Bill 1039/Session Law
2011-90 - Controlled Substances
- This amendment to Chapter 893
adds several hallucinogenic
drugs to the list of controlled sub-

stances. It was effective July 1,
2011.

House Bill 4121/Session law
2001-130 - Clove Cigarettes - This
bill repealed the prohibition
against the sale, use, possession
transfer or other disposal of clove
cigarettes in Section 859.058. It
was effective on June 2, 2011.

UPDATE: CHAPTER 893 ISSUES

Most of you know that several
weeks ago a Federal Judge ruled
that Florida's drug delivery statu-
te was unconstitutional. His
basis for that is that is a claim
that the legislature's statutory
elimination of the requirement
that the defendant know that
what he has is a controlled sub-
stance is unconstitutional.

Federal opinions of this sort do
not control Florida courts. Most
Florida courts, including the 1st
DCA, which controls 8th Circuit
cases, have already rejected this
argument. As a result law en-
forcement does not need to do
anything and can continue mak-
ing cases as in the past.

Defense attorney will, of course,
file motions bases on this new
federal case but so far those
motions have been summarily

denied by our local Judges. There
have been one or two adverse
rulings in South Florida, but those
do not directly affect us. Until and
unless appeals force us to do oth-
erwise, however, this is not some-
thing requiring any changes by law
enforcement. While it will likely
take several years for this to be
sorted out, all indicators now are
that the State will prevail.

