Tenth Circuit

# Legal Advisor

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*Florida Law makers were busy the first half of the year, fine-tuning the rules that law enforcement works by. Felony Division Prosecutor Vince Patrucco gives a rundown of new and updated laws in August Legal Advisor.*

# Roundup of 1995 criminal justice legislation

By Vince Patrucco

Section 39.01, Florida Statutes, has been modified to provide procedures for detention of juvenile sexual offenders as well as for notice to law enforcement and school personnel of the offender's release or transfer.

Courts are now empowered to place such offenders in community-based treatment at the adjudicatory hearing.

The new provisions are set out in House Bill 2023, which went into effect June 13, 1995.

The legislature created a third degree felony for individuals convicted for the third time of driving on a suspended or revoked driver's license.

This penalty was added to section 322.34, Florida Statutes. It is effective October 1, 1995.

There may be a problem proving this felony, however, since the courts do not fingerprint individuals convicted of DWLSR (unlike petit theft or DUI).

The prosecution has the burden of proving that the defendant was the person convicted in the prior cases.

If the defendant challenges the prior convictions, a certified driving record will be insufficient to establish the defendant's guilt.

Therefore, if you wish to charge the felony DWLSR, it will be extremely helpful to obtain an admission from the defendant about the prior convictions.

Without that it may be difficult, if not impossible, to prove the prior record.

Battered domestic violence victims will receive additional protection from defendants with two prior convictions for domestic violence battery.

A third domestic violence battery

will be a third degree felony after October 1, 1995 under Senate Bill 658 creating section 784.035, Florida Statutes.

The statute does not require the same victim on each of the battery cases.

Since there is not a separate offense of "domestic battery", however, merely reviewing the defendant's prior NCIC/FCIC will not reveal whether or not the prior battery convictions involved domestic violence.

Therefore, unless the victim or the arresting officer knows that the defendant has two prior domestic violence convictions, the felony cannot initially be charged.

Section 901.15, Florida Statutes, now permits warrantless arrests for all batteries not committed in the officer's presence if the officer finds probable cause for the charge.

Previously, battery arrests were limited to domestic violence batteries unless the offense was committed in the officer's presence.

This statute became effective July 1, 1995.

Effective July 1, 1995, the legislature expanded the grounds under which the first degree misdemeanor offense of violating an injunction for protection against domestic violence, section 741.31, Florida Statutes, may be charged.

The following are now grounds for filing the charge:

(a) Refusing to vacate the dwelling the parties share; (b) Going to the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member; (c) Committing an act of domestic violence against the petitioner; (d) Committing any other violation of the injunction through an intentional threat, word, or act to do violence to the petitioner; (e) Telephoning, contacting, or otherwise communicating with the petitioner

directly or indirectly, unless the injunction specifically allows indirect contact through a third party.

The legislature also created section 784.047, Florida Statutes. to cover violations of non-domestic injunctions for protection.

This statute creates a first degree misdemeanor for violating the injunction in any of the same ways listed above for the domestic injunction.

This statute became effective July 1, 1995.

The "Officer Evelyn Gort and All Fallen Officers Career Criminal Act of 1995" substantially revises section 775.084, Florida Statutes, and takes effect October 1, 1995.

The statute creates a new class of career criminals known as "violent career criminals".

A violent career criminal must have been convicted three or more times for murder, manslaughter, sexual battery, carjacking, home invasion robbery, robbery, burglary, arson, kidnapping, aggravated assault, aggravated battery, placing or throwing a destructive device, aggravated stalking, aggravated child abuse, lewd conduct, escape, a felony violation of Chapter 790 involving the possession or use of a firearm, or any other felony which involves the use or threat of physical force or violence against an individual.

In addition, the defendant must have previously been sentenced to prison.

The new felony charge must be for one of the offenses mentioned above.

This new offense must have been committed within five years of one of the prior convictions or within five years of the defendant's release from prison or other commitment.

For crimes committed after October 1, 1995, habitual, habitual violent, and violent career criminals will be required to serve a minimum of 85 percent of their

sentence.

Aggravated Stalking has become one of the enumerated predicate felonies for treatment as an habitual violent felony offender.

Sexual predators received some attention from the state legislature this year in amendments to section 775.21, Florida Statutes.

Among the additions to the statute is a requirement that the community be notified of the presence of certain sexual predators.

The notification process would make information available to the Sheriff or Chief of Police which could be brought to the attention of a Circuit Judge.

Should the judge find a threat to the public, law enforcement would then notify the public of the presence of the sexual predator in their community.

This statute becomes effective on October 1, 1995.

As before the revisions, the statute requires the State Attorney to tend to the procedural mechanics of the hearing, which is adversarial in nature and affords the sexual predator the right to cross-examine witnesses and challenge findings.

Upon a finding that a threat is posed by the individual, notice must be published in a newspaper of general circulation once a week for two consecutive weeks.

The court is required to provide notice at the time of sentencing to the sexual predator of the requirement for hearing at the point of release to the community to determine his status as a threat to the community.

Senate Bill 1536 creates a third degree felony for luring or enticing a child into a structure or a conveyance without a lawful purpose.

This statute only applies to individuals who have previously been convicted of sexual battery or

lewd assault on or in the presence of a child.

Its provisions appear in section 787.025, Florida Statutes, as revised. It is effective October 1, 1995.

Finally, the statute dealing with the exploitation, abuse or neglect of the elderly or disabled has been revised and renumbered.

The portion of the previous statute dealing with the exploitation of the elderly had been found unconstitutional by the courts.

That provision has been reenacted with changes in an attempt to pass constitutional muster.

The new statutes are sections 825.101 through 825.104, Florida Statutes. They become effective July 1, 1995.

The penalty for abuse or neglect which does not result in great bodily harm, permanent disfigurement, or permanent disability has been increased to a third degree felony from a first degree misdemeanor.

The exploitation statute creates penalties based on the amount of money or property the defendant obtains, uses, or endeavors to obtain or use.

It provides for a first degree felony ($100,000 or more), second degree felony ($20,000 or more but under $100,000), and a third degree felony (under $20,000).

The statute requires that the defendant stand "in a position of trust and confidence," or that the defendant "knows or should know that the elderly person or disabled adult lacks the capacity to consent".

This statute is section 825.103, Florida Statutes.

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# FROM THE COURTS

Edited by Chip Thullbery

## DNA evidence admissible when proper procedures used

The defendant was charged with first degree murder.

At his trial, the court, over defense objection, allowed the state to present evidence of DNA tests done on a vaginal swab and a tank top.

The defendant was convicted as charged.

On appeal, the Supreme Court reversed, holding that while DNA evidence is generally admissible, the state failed to show that the laboratory had followed accepted testing procedures.

Hayes v. State, 20 FLW S296 (Fla. June 22, 1995).

## Carnal Intercourse Statute unconstitutional as to juvenile defendants

The defendant, a sixteen year old juvenile, was charged with having unlawful carnal intercourse with an unmarried person of previously chaste character who was under eighteen years in violation of section 794.05, Florida Statutes, for having sex with his sixteen year old girlfriend.

He filed a motion to dismiss asserting that section 794.05 was unconstitutional.

The court granted the motion, and on appeal, the Supreme Court affirmed, holding that section 794.05 was unconstitutional as applied to a minor because it violates the minor's right of privacy.

B.B. v. State, 20 FLW S306 (Fla. June 29, 1995).

**Wiretaps may not be used to catch prostitutes and pimps**

The defendants were charged with RICO violations and prostitution and filed a motion to suppress evidence obtaiend from wiretaps.

The court granted the motion and on appeal, the Supreme Court affirmed, holding that under federal law, law enforcement may not use wiretaps to otain evidence concerning prostitution because prostitution is not dangerous to life, limb or property.

State v. Rivers, 20 FLW S315 (Fla. July 6, 1995).

**If your grandmother cleans your room, she can consent to its being searched**

The defendant was charged with first degree murder and filed a motion to suppress evidence.

The facts on which the motion was based were that after the defendant had been arrested, the police went to the apartment where he lived with his grandmother.

The grandmother was present and gave consent to search the defendant's room.

The trial court denied the motion to suppress, and the defendant was convicted as charged.

On appeal the Fourth District affirmed, holding that because the defendant was in custody and the grandmother was responsible for picking up his room, she had authority to consent to the search of his room.

Leonard v. State, 20 FLW D1459(Fla. 4th DCA June 21, 1995).