

# Legal Advisor

Volume XXII, Issue III

June 2008



**Jerry Hill**

STATE ATTORNEY

<http://www.sao10.com>

## BARTOW PHONE NUMBERS:

<b>SWITCHBOARD</b>	<b>534-4800</b>
<b>Misdemeanor Intake</b>	<b>534-4928</b>
<b>Misdemeanor</b>	<b>534-4926</b>
<b>Domestic Violence</b>	<b>534-4882</b>
<b>Victim Assistance</b>	<b>534-4861</b>
<b>Felony Intake</b>	<b>534-4987</b>
<b>Felony</b>	<b>534-4964</b>
<b>Investigations</b>	<b>534-4804</b>
<b>Violation of Probation</b>	<b>534-4803</b>
<b>CHILD ABUSE / NEGLECT</b>	<b>534-4857</b>
<b>Homicide Division</b>	<b>534-4959</b>
<b>On Call Pager</b>	<b>819-1526</b>
<b>Worthless Checks</b>	<b>534-4874</b>
<b>Juvenile Division</b>	<b>534-4905</b>
<b>Fax - Mailroom</b>	<b>534-4945</b>
<b>WITNESS MANAGEMENT Misdemeanor/Traffic</b>	<b>534-4021</b>
<b>WITNESS MANAGEMENT Felony</b>	<b>534-4020</b>
<b>WITNESS MANAGEMENT FAX</b>	<b>534-4034</b>

## USING CONFIDENTIAL INFORMANTS WITH PENDING CHARGES OR ON PROBATION

By Wayne Durden

It is the policy of the State Attorney's Office that the use of confidential informants with pending charges, or who are on probation, should be approved in advance by the appropriate division director of the office. Otherwise, we are placed in a position of not knowing that law enforcement has made representations to defendants that in light of their cooperation, which, may receive some degree of leniency, while our prosecutor may be making contrary representations to judges and defense counsel. Defendants qualifying for enhanced sentencing, such as 10/20/Life or Prison Releasee Re-Offenders, will NOT be considered for lenient sentencing as a result of work as a confidential informant. Our office will also not recognize or approve assistance provided by another person

on behalf of any defendant.

If you wish to use a defendant as a confidential source to provide substantial assistance the following procedure must be followed:

1. The criminal investigator must contact the appropriate division director, indicated below, and seek approval for use of the defendant as an informant before use begins. The SAO director will review the pending file(s) in a timely manner, and either approve or disapprove of the request.
2. If approved, the investigator must forward to the director a letter documenting the request. The letter should reflect the investigator's request to use the defendant as an informant and

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# USING CONFIDENTIAL INFORMANTS WITH PENDING CHARGES OR ON PROBATION

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your expectations for what the defendant can do as an informant. THE LETTER SHOULD NOT HOWEVER IDENTIFY SPECIFIC INVESTIGATORY TARGETS OR OTHER INFORMATION THAT WOULD DISCLOSE THE IDENTITY OF THE DEFENDANT AS AN INFORMANT IN ANY SPECIFIC INVESTIGATIONS OR OTHERWISE COMPROMISE THE SAFETY OF THE DEFENDANT AS AN INFORMANT. You must also indicate how long we should pend a prosecution to allow for completion of assistance rendered by the defendant.

3. Upon completion of assistance by the defendant or failure by the defendant to render expected assistance, the investigator should inform the SAO director.
4. It may then be necessary to forward a second letter to the director, if requested, informing the State Attorney's Office of the level of assistance, or lack thereof, rendered by the defendant and further indicating what degree of leniency you feel the defendant has earned as a result of the assistance provided. THE SECOND LETTER SHOULD LIKEWISE NOT DISCLOSE ANY INFORMATION THAT WILL RESULT IN IDENTIFYING THE DEFENDANT AS AN INFORMANT IN ANY SPECIFIC ONGOING INVESTIGATION OR PROSECUTION COMMENCED AS A RESULT OF INFORMATION PROVIDED BY THE DEFENDANT.
5. You should thereafter expect to be contacted by the assigned Assistant State Attorney to discuss the resolution of the defendant's pending case(s).
6. If the defendant is on probation, the investigator must seek and receive permission from the judge who sentenced the defendant, or his or her successor judge in the division to which the defendant's case was assigned, and the defendant's assigned Probation Officer.

7. In certain LIMITED situations, it may not be practical to contact a Director before use begins, e.g. if an arrested individual can immediately upon arrest provide assistance by contacting another drug source. In those LIMITED situations, contact should be made with the appropriate Director as soon as possible thereafter, and all other procedures herein adhered to.

Please note that failure to comply with this procedure will likely result in this office refusing to recognize assistance provided by the defendant despite whatever representations you have otherwise made to a defendant pending prosecution.

The following division directors should be consulted in accordance with this policy:

- ◆ Polk County defendants with felony charges pending, or any combination of felony and other charges pending

**Wayne Durden, 534-4824**

- ◆ Polk County defendants with misdemeanor charges only pending

**Rey Ojeda, 534-4918**

- ◆ Polk County defendants with juvenile charges only pending

**Deb Oates, 534-4905**

- ◆ Polk County defendants with violation of probation charges only pending

**Gary Allen, 534-4803**

- ◆ All defendants charged in Highlands or Hardee Counties

**Steve Houchin in Sebring, (863) 386- 6562**

The procedure contemplates the use of informants ONLY in a NON-TESTIFYING capacity. In the event you wish to use ANY informant, whether with charges pending or not, in a testifying capacity, specific

# USING CONFIDENTIAL INFORMANTS WITH PENDING CHARGES OR ON PROBATION

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prior approval must be obtained in person from Felony Division Director Wayne Durden and Felony Intake Director Mike Cusick in Polk County or from South Counties Director Steve Houchin in Hardee and Highlands Counties.

Questions about this procedure should be directed to Wayne Durden at 534-4824.

## EVIDENCE INSPECTION / COPYING PROCEDURES

BY WAYNE DURDEN

Regarding requests by defense counsel to inspect evidence, we request that the assigned Assistant State Attorney be contacted prior to inspection by defense counsel in Murder Cases, Child Abuse Cases, Pornography Cases and DUI Manslaughter/Vehicular Homicide Cases. In all other cases, defense counsel may view only (not handle) evidence without first consulting with the Assigned ASA. Please notify the Assigned ASA if any problems arise during the viewing process, such as missing or damaged evidence.

We have no objection to a copy of the computer generated evidence log or copies of evidence tags being provided to the defense, IF REQUESTED by defense counsel, PROVIDED a second copy is made and forwarded to the assigned ASA as well.

Finally, regarding audio/video recordings, please adhere to the following



*Wayne Durden is an Assistant State Attorney with the State Attorney's Office, Tenth Judicial Circuit. In addition to his caseload, he also serves as the Felony Director. He has been with the office since November 1987.*

procedure. Should defense counsel request copies of audio/video recordings, please confirm that they are entitled to such by viewing a copy of the discovery response provided to defense counsel by the State Attorney's Office for the case in which copies are sought.

Copies should not be made on materials provided by the agency at agency expense. Defense counsel should provide a blank tape or disk for reproduction.

PLEASE NOTIFY THE ASSIGNED ASA, HOWEVER WHEN DEFENSE COUNSEL REQUESTS A COPY OF VIDEO OR AUDIO RECORDINGS. There is no need to make a second copy for the assigned ASA unless the assigned ASA specifically makes such a request.

Thank you for your attention to this matter. Please contact me at (863) 534-4964 if any further questions arise.



# TOP COPS



I wanted to take a moment and congratulate all of the members of the Lakeland Police Department who worked on the Roy Ballard case. Those members are: Brian Shinn (memory eternal), Nicole Cain, Nona Dyess, Dave Anderson, Scott Kercher, Brad Grice, Ed Mingus, Michelle Newsome, Bryan Wallace, Tracy Grice, Rena Arlt, Gary Gross, John Thomason, Ralph Schrader, Tom Collins and Randy Harrison. This case took a great deal of team work and time to arrive at its conclusion. As a result of your hard work, the jury came back with a 'Guilty as Charged' verdict.

You should all be proud of what you have accomplished. This was a first for LPD (no body case). I am extremely proud of all of you. If you happen to see ASA Cass Castillo in your visits to the SAO give him a pat on the back. He fought for this case and worked hard to present the facts as he did to the jury.

I hope I have not let anyone out, if so pass it along. Always an honor to have served with you!

**Mike Ivancevich, SAO Investigator**

I am sure most of you have already heard by now that former Deputy Jose Aponte was found guilty of Sexual Battery, Violation of an Injunction and Threats and Extortion. He was sentenced as a Sex Offender and ordered to serve 15 years state prison followed by 10 years of supervised probation.

I wanted to take a moment to recognize all the members of the Polk County Sheriff's Office who worked on the Aponte case. Each of you were tasked to investigate one of your own and deal with charges that were of a very delicate nature. At all times, you conducted yourselves with the utmost professionalism and dignity and displayed compassion and sensitivity not only toward the victim, but also toward the Defendant's family. There were many requests made during the trial preparation phase of this case and none were met with any hesitation.

**ASA Beth Stockdale, Felony 6 Division Director**



# ...FROM THE COURTS...

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## ARREST FOR PURPOSES OF ESCAPE STATUTE DEFINED

The defendant was charged with, among other things, escape. At his trial, the evidence established that an officer answered a domestic complaint and found the defendant in his residence, holding what the officer believed was a shotgun. The officer told the defendant he was under arrest and to put the gun down. The deputy then ran outside, continuing to shout to the defendant that he was under arrest. The defendant ran out of the house, and a chase ensued, which ended when

a shot from the officer hit the defendant and brought him to the ground. The defendant was convicted as charged. On appeal, the Fourth District reversed the escape conviction, holding that the defendant was never under arrest because there was never a touching by the officer or a submission to authority by the defendant prior to the time he fled. *Bebert v. State*, 32 FLW D1629 (Fla. 4<sup>th</sup> DCA July 5, 2007).

## VALID PRESCRIPTION DEFENSE APPLIES TO TRAFFICKING.

The defendant was charged with trafficking in hydrocodone. At his trial, he presented evidence that physicians had prescribed the Vicodin tablets, which contained the hydrocodone for pain related to injuries sustained in an automobile accident and a chronic inflammatory joint disease. He then requested a jury instruction that it is not illegal to possess hydrocodone if it had been prescribed. The state objected, asserting

that possessing prescribed drugs was not a defense to trafficking. The court denied the request, and the defendant was convicted as charged. On appeal, the Second District reversed, holding that the valid prescription defense applies not only when a defendant is charged with possession, but also when he or she is charged with trafficking. *O'Hara v. State*, 32 FLW D1707 Fla. 2d DCA July 18, 2007).

## COMMUNITY CARETAKING DOCTRINE EXPLAINED.

The defendant was charged with, among other things, felony boating under the influence and filed a motion to suppress evidence. The facts upon which the motion was based were that while eating dinner at a restaurant along the intracoastal waterway, two off-duty marine patrol deputies observed a boat approaching the restaurant at a fast rate of speed through an idle speed zone. They went to the water where they were told by excited passengers on the boat that there had been a boat accident and that a boat which was nearby had been involved in the accident. The deputies made contact with the other boat, which was manned by the defendant. As a result of their interaction with the

defendant, they determined he was under the influence and arrested him. The trial court denied the motion to suppress, and the defendant was convicted of the BUI charge. On appeal, the Fourth District affirmed, holding that under the community caretaking doctrine, the deputies were justified in stopping the defendant's boat in order to obtain any information they could about the accident in order to effectuate any rescues that might be necessary and to protect the general public from the dangers of a damaged vessel on the waterway. *Castella v. State*, 32 FLW D1784 (Fla. 4<sup>th</sup> DCA July 25, 2007).

## POLICE ARE PEOPLE TOO.

The defendant was charged with burglary of an occupied structure. At his trial, the evidence established that after receiving information about a planned burglary, police arranged with the owner of the store to set up a stake out in order to catch the burglar. In the middle of the night the defendant entered the store and

was arrested by police. He was convicted as charged. On appeal, he argued that the store was not occupied because the only people there were the police on their stake out. The Fifth District rejected this argument and affirmed. *Reidy v. State*, 32 FLW D2035 (Aug. 24, 2007).



#### **Hardee County**

124 South 9th Avenue  
Wauchula, FL 33873  
Phone: (863) 773-6613  
Fax: (863) 773-0115

#### **Highlands County**

411 South Eucalyptus  
Sebring, FL 33870  
Phone: (863) 402-6549  
Fax: (863) 402-6563

#### **Polk County**

P.O. Box 9000, Drawer SA  
Bartow, FL 33831-9000  
Phone: (863) 534-4800  
Fax: (863) 534-4945

#### **Child Support Enforcement**

215 N. Floral Avenue  
Bartow, FL 33830  
Phone: (863) 519-4749  
Fax: (863) 519-4759

#### **Lakeland Office**

930 E. Parker Street, Suite 238  
Lakeland, FL 33801  
Phone: (863) 499-2596  
Fax: (863) 499-2650

#### **Winter Haven Office**

Gill Jones Plaza  
3425 Lake Alfred Rd. 9  
Winter Haven, FL 33881  
Phone: (863) 401-2477  
Fax: (863) 401-2483

The "Legal Advisor" is published by:  
Office of the State Attorney, 10th Circuit  
P. O. Box 9000 Drawer SA  
Bartow, Florida 33831

#### **The Legal Advisor Staff:**

Jerry Hill, Publisher

\* email: [jhill@sao10.com](mailto:jhill@sao10.com)

Chip Thullbery, Managing Editor

\* email: [cthullbery@sao10.com](mailto:cthullbery@sao10.com)

Michael Cusick, Content Editor

\* email: [mcusick@sao10.com](mailto:mcusick@sao10.com)

Lorena Diaz, Graphics Design

\* email: [ldiaz@sao10.com](mailto:ldiaz@sao10.com)

# ...FROM THE COURTS...

## **DEFENDANT SHOULD HAVE STOPPED AT ROADBLOCK.**

The defendant was charged with violating his probation and filed a motion to suppress evidence. The facts on which the motion was based were that an officer set up a roadblock in order to assist a motorist. The defendant drove around the roadblock and then ignored the officer's attempts to stop him for several blocks. After he did stop, the officer arrested him for

driving without a license and then discovered marijuana. The trial court denied the motion, and the defendant was found in violation. On appeal, the Fourth District affirmed, holding that the officer had the right to stop the defendant for ignoring his lawful directions and orders. *Alphonso v. State*, 32 FLW D1818 (Fla. 4<sup>th</sup> DCA Aug. 1, 2007).

## **A DISCUSSION OF WHAT INTERROGATION MEANS.**

The defendant was charged with possession of marijuana with intent to sell and filed a motion to suppress, asserting that his consent to search his hotel room was tainted by an illegal interrogation. The facts on which the motion was based were that an officer arrested the defendant in a hotel parking lot for possession of marijuana. Prior to reading the defendant his *Miranda* rights, the officer asked the defendant if he was staying at the hotel. When the defendant said he was, the officer asked for and obtained consent to

search the defendant's room. The search turned up additional marijuana. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Fourth District affirmed, holding that the officer's question about whether the defendant was staying at the hotel did not violate *Miranda* because it did not constitute interrogation in that the question was not designed to elicit incriminating information from the defendant. *Timmons v. State*, 32 FLW D1819 (Fla. 4<sup>th</sup> DCA Aug. 1, 2007).

## **RACING ON HIGHWAY STATUTE IS UNCONSTITUTIONAL.**

The defendant was charged with racing on a highway in violation of section 316.191, Florida Statutes. He filed a motion to dismiss, asserting that section 316.191 is unconstitutional. The trial court

granted the motion, and on appeal, the Fourth District affirmed, holding that section 316.191 is unconstitutionally vague. *State v. Wells*, 32 FLW D2159 (Fla. 4<sup>th</sup> DCA Sept. 12, 2007).