

LAW ENFORCEMENT NEWSLETTER

May 2012

A MESSAGE FROM BILL CERVONE STATE ATTORNEY

With this issue we are again at the point of the year when the legislative session has come and gone. Perhaps not surprisingly given that reapportionment and re-election dominated the minds of all legislators, little of consequence was done. The good news in that is that there aren't lots of new laws or changes to old laws to try to absorb. I've always

thought that the legislature should leave things alone for long enough for us to figure out what they've done to us anyhow, and they seldom do that. The bad news is that important issues like juvenile sentencing in non-homicide cases went un-addressed. For that we will have to wait another year.

Also bound to be on the agenda next year will be a re-

visiting of the controversial Stand Your Ground law. Everyone is familiar with the recent events in Seminole County and the attention that has gotten. Much of the public is unaware, however, that the facts involved in that case are not all that different with many others that happen all across the state on a frequent basis, as they have since Stand Your Ground was passed. In fact, what happened is no more than what the law enforcement community warned the legislature would happen back when the self-defense laws were changed. Whether anything comes from the debate on this will have to wait for another day, but it certainly warrants our paying close attention.

As a point of personal privilege, and as some of you may know, the qualifying date for my office has come and gone and I am unopposed for another term beginning in Janu-

Continued Page 2



INSIDE THIS ISSUE:

MESSAGE FROM BILL CERVONE	1-2
SAO PERSONNEL CHANGES	1-2
LAW ENFORCEMENT MEMORI-	2
CONGRATULATIONS	3
DUI TIPS	3
SUPREME COURT: POLICE CAN- NOT BE SUED OVER GOOD FAITH RELIANCE ON A WARRANT	4-5
SO YOU GOT A SUBPOENA FOR A FORMAL REVIEW HEARING	6
SAFE UNIT UPDATE	7



SAO PERSONNEL CHANGES

On February 3rd ASA Lee Libby left the SAO for a position with the Gainesville City Attorney's Office. Lee was the mainstay of the Gainesville office's Intake Division. After spending over 20 years with the office his presence and work will be

greatly missed. ASA Michael Becker has been re-assigned to the Intake Division to replace Lee. ASA David Margulies was moved to Michael's felony position.

On February 17th, ASA Josh Kuhlmann transferred to the 4th Circuit SAO, where he will initially be doing misdemeanor cases but anticipates a re-assignment to felony prosecu-

Continued Page 2



MESSAGE FROM BILL CERVONE CONTINUED

ary of 2013. I am privileged to be your State Attorney and honored to be able to continue in that role for another four years, not to mention relieved that doing so will not require the time, energy and expense of an election and all

of the distractions that brings. I hope that both I and my staff can continue to earn your confidence as we go forward, and I pledge to you, as I did when first elected in 2000, that you will have my best

effort towards meeting the goals we all share.

**Office of 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

tions. ASA Angela Pritchett has been temporarily assigned to the Baker County office to help with the County Court case load until a permanent replacement for Josh is in place.

ASA Camaria Pettis-Mackle left the Gainesville SAO on April 20th and transferring to the Tampa SAO. Lindsay Morauer has been hired to replace Camaria in the Gainesville County Court division. Lindsay will graduate from the University of Florida Law School on May 11th and start work as an Assistant State Attorney on May 14th, although she has been interning with the of-

fice for nearly a year.

Two other new ASAs will start with the office in May. Dan Owen, a former prosecutor in both the Daytona Beach and Jacksonville offices, starts on May 7th and will take Phil Pena's felony sex crimes and domestic violence case load. Dan is a 2007 graduate of the UF Law School. On May 14th Jonathan Ramsey will also start work as an ASA. Jon is a new grad from UF Law who like Lindsay has been interning with the office for several months. Jon will start in the Alachua County Court Division while preparing to take the Bar exam in July, and will be assigned to Levy

County when he has been sworn as a Bar member in the Fall.

At the end of May, SAO Executive Director Dave Remer will retire after many years of service to the office in that and other roles. Replacing Dave will be ASA Brian Kramer. This will mark the first time that the SAO has had an attorney holding the position of Executive Director, a job that is equivalent to the managing partner of a law firm. Brian will continue to have some case load and trial responsibilities as we go forward.

LAW ENFORCEMENT MEMORIALS

Alachua County's 2012 Law Enforcement Memorial has been scheduled for May 22nd and will include a social gathering starting at 6pm to be followed by the service at 7pm. The event will be held at the Veteran's Memorial Park in Gainesville, as in past years.

ing this year at the Bradford county fairgrounds.

Baker County will also hold its memorial on May 3rd at 7pm at the Sheriff's Office in Macclenny.



Bradford/Union Counties will hold their combined memorial at 6:30pm on May 3rd. Bradford County will be host-

CONGRATULATIONS TO...

ASA Phil Pena, who has been appointed by the Governor to an Alachua County Court judgeship. Phil took office in April and will initially be assigned to a civil docket.

Former SAO8 ASA Heather Palmer, who some of you may remember from the 90s, and who was appointed to the Circuit Bench in Orlando recently. Heather and Phil bring the number of 8th Circuit ASAs appointed or elected to the bench in recent years to well over a dozen, and we're proud of them all.

High Springs Police Department Sgt. Steve Holley, who was named the new Chief for HSPD in February.

ASA Brad McVay, who became the proud father of twin girls, McKenzie and Madison, in late February.

Alachua County Sheriff's Office Sgts Tim Price, Terry Neal, Pete Briggette and Terry Crews and Deputies Sheryl Strickland, Heather Palmer, Jim Richeson, Don Dennis, Carl Mader and Robert Gaff, all of whom received the agency's Employee Of The

Year award at a ceremony on March 29th for their combined efforts in performing CPR as well as deploying an Automated External Defibrillator to save the life of a fellow employee who had suffered cardiac arrest last year.

Alachua County Sheriff's Office Maj. Charlie Lee, who was promoted to that rank and named Director of the Alachua County Jail in April.



Many DUI stops involve vehicles with multiple occupants, not just the driver. This is especially common in cases where a group of people have been out bar hopping or otherwise socializing together. In these situations, an officer who makes a DUI stop should always interview the passengers, include their contact information in the offense report, and document what they might say, especially about the defendant.

Witnesses of this sort can be important sources of information. They can, for example, fill in the gaps about where the defendant has been in the hours before arrest and how much the defendant has had to drink. They can also provide information that will contradict the defendant's story. If they are interviewed away from the defendant, as should be done in any investigation,

DUI TIPS

what they have to say may be valuable evidence later on.

Even if witnesses of this sort tend to provide exculpatory evidence ("He wasn't drinking." or "He was fine to drive or I wouldn't have gotten into the car with him.") having that kind of statement locked down at the beginning of the case prevents the witness from later embellishing or fabricating a more damaging story and provides a good basis to impeach the witness with.

One thing is for sure: if these witnesses were not identified and listed in the offense report, a decent defense lawyer will use that failure to document as evidence of a careless or incomplete investigation. Almost equally as certain is that a good defense lawyer will locate and

interview passengers to see if they can be helpful witnesses. Prosecutors need to know who they are and what they have to say beforehand to most effectively deal with them.



SUPREME COURT: POLICE CANNOT BE SUED OVER GOOD FAITH RELIANCE ON A WARRANT

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The United States Supreme Court issued an opinion in February styled Messerschmidt v Millender that can be important to all law enforcement officers. The case arose in California and started with a domestic dispute.

The facts of the case are that a woman who was afraid of her boyfriend requested police protection while she moved out of his apartment because she thought he would attack her. Officers arrived, but were called away to an emergency before the woman completed what she needed to do. No sooner had the officers left than the boyfriend showed up. He attacked her, yelling "I told you never to call the cops on me, bitch," and tried to throw her over a second story landing. She managed to escape to her car, and he chased her and pointed a sawed-off shotgun at her, threatening to kill her. She fled in the car, and he fired five shots at the car, blowing out one of its tires.

The woman ultimately got away and then met with police, including a Det. Messerschmidt. She described what had happened and told him that the boyfriend had assaulted her before, that he might be staying at the home of his former foster mother, Millander, and that he had gang ties.

Messerschmidt did some follow-up and verified that the boyfriend was a member of two gangs and had numerous convictions for violent and firearm related offenses. He then drafted a search warrant for the Millender home, outlining his reasons for looking for guns and ammunition as well as any gang related evidence. The warrant application was reviewed and approved by Messerschmidt's supervisor, another ranking officer, and a prosecutor before being signed by a magistrate. When executed, however, only a single shotgun and one box of ammunition was recovered.

Millander sued Messerschmidt and his supervisor in federal court, claiming that she had been subjected to an unreasonable search in violation of the 4th Amendment. In essence, her claim was that the warrant was over-broad in seeking articles that no probable cause to think might be present existed or was alleged. Various levels of federal courts allowed the suit to go forward, holding that the officers were not entitled to qualified immunity. The Supreme Court, however, reversed those rulings and said that they were and that there could be no law suit.

In so doing, the Supreme Court reaffirmed the principle that qualified immunity protects a law enforcement officer from liability and civil damages when his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." When the alleged violation involves a 4th Amendment search and seizure pursuant to a warrant, the fact that a judge has issued the warrant is a clear indication that the officers have acted in an objectively reasonable manner, or in objective good faith.

There is an exception to this, the Court noted, when the warrant is based on an affidavit that is so lacking in probable cause as to render any belief in the existence of probable cause entirely unreasonable. But ordinarily an officer cannot be expected to question a judge's probable cause finding when he or she issues a warrant because it is the judge's responsibility to determine if the officer's allegations establish probable cause and whether the warrant meets the requirements of the 4th Amendment.

Continued Page 5

CONTINUED: SUPREME COURT: POLICE CANNOT BE SUED OVER GOOD FAITH RELIANCE ON A WARRANT

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The court further noted that the fact that Messerschmidt sought and obtained the approval of the warrant not only from a supervisor but also from a prosecutor before going to the judge further supports the conclusion that he was acting reasonably in believing that the warrant was proper and supported by sufficient probable cause. To conclude otherwise, the Court said, would be to conclude that not only were Messerschmidt and his supervisor plainly incompetent but also so were the prosecutor and the issuing judge.

In other words, Messerschmidt could not be sued because he was entitled to rely on the review and approval of the warrant by a supervisor, a prosecutor and a judge, regardless of the fact that what he hoped he would find for the most part wasn't there.

How does this apply to the 8th Circuit? As everyone knows, local procedure is that warrants are presented to judges only after being reviewed and approved by an Assistant State Attorney. There are multiple reasons for this, and the Messerschmidt case highlights one of them: an officer is better protected from law-

suits such as were attempted in this case when his probable cause affidavit has been reviewed not only by a judge but also by a prosecutor as an intermediary step. It stands to reason that a prosecutor is trained to know what is and isn't sufficient probable cause in ways beyond what any law enforcement officer can be expected to know. To the State Attorney's Office, the chance to review a warrant application is a chance to make sure that technical or fact errors are taken care of, given that a judge might not always read the application with enough care to spot them, especially in the middle of the night. After all, it is the prosecutor that will ultimately have to defend the warrant against any challenges. To the officer, while it may seem inconvenient or of no use to add the step of an ASA's review, that added protection for not just your case but also for you in giving you qualified immunity from suit may well end up being invaluable.

Would Detective Messerschmidt have ultimately been successful in having the suit against him thrown out on the basis of qualified immunity even if the prosecutor hadn't

We're on the web:
www.sao8.org

SO YOU GOT A SUBPOENA FOR A FORMAL REVIEW HEARING?

As a law enforcement officer, you've probably been involved in a DUI case at some point. You've also probably gotten a subpoena to attend a Formal Review Hearing. The scope of these hearings is supposed to be limited to the following:

- 1) Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
- 2) Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
- 3) Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

If the suspect provided a breath sample, then second and third parts don't apply. The hearing officer then merely determines whether the suspect's BAC was at, or above, a .08.

In theory, it's pretty simple. However, it's no secret that defense attorneys use FRHs as informal depositions to explore any potential legal problems the case may have. This makes FRHs a gateway for how the case will proceed. If the testimony does not bring to light and issue or

issues with the case, then the case will probably be resolved. If issues arise beginning at this hearing, then expect more subpoenas for potential trial, suppression hearings and pre-trial conferences.

That being said, here are some dos and don'ts regarding any FRH appearance.

DO:

**At a minimum, read over any report or supplemental report you generated. If you didn't generate a report, then read the AO's report in the case as a refresher. DO YOUR HOMEWORK: chances are the defense attorney, who is getting paid a hefty sum, knows your report better than you do – and you were the one who was there at the scene!

**Watch the video of the stop if it was your stop.

**Watch the video of the FSEs if you conducted the FSEs

**Beforehand, ask the Assistant State Attorney who's present any questions you have about the hearing the case itself. If things get heated, you can ask for a recess and speak to the Assistant State Attorney outside in the hallway, but please keep in mind that our office has no standing to object or interject in the testimony.

**Ask questions after! You can tell if the defense attorney is harping on certain aspects of the case during his/her questioning. You may not be quite sure why. If you ask an

ASA why the defense attorney was concentrating on that point or area, you'll learn something to either do again in the future or not do in the future. But more importantly, you will understand why it's a potential issue.

DO NOT:

**Roll out of bed and go straight to the hearing. We understand that these hearings are unfortunately timed for evening shift officers. Regardless, allow yourself some time to wake up, get collected and go over the report.

**Worry about showing up in nice dress or work clothes. These hearings are informal.

**Be afraid to say "I don't remember/recollect" at this time. A fact may have slipped your mind at the moment that you will recall later. This answer is honest and allows you the opportunity to reflect on the case and remember.

Remember, these hearings are important. We all know how serious DUIs are and the potential consequences for both defendants and people of the community. Your answers and assertions can be used later. If you write a good report and your testimony reflects your report at these hearings then chances are you won't be expecting another subpoena down the road.



SAFE UNIT UPDATE

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In January of 2011 the SAO initiated a specialized firearms prosecution unit in Alachua County. The unit has been designated the State Attorney Firearms Enforcement Unit, or SAFE, and was originally staffed by a single Assistant State Attorney, Adam Urra. The unit has now grown to its current staffing by Division Chief Adam Urra, Assistant State Attorney Chris Elsey, and Investigator Darry Lloyd. Support staff services for the SAFE unit are provided by Valerie Merrifield and Debbie Snyder.

The mission of the SAFE unit is to investigate and prosecute firearm related offenses to ensure that the community's most violent offenders are convicted and sentenced using the laws at our disposal. Through early April, the unit had screened 191 cases that were potentially eligible for 10-20-Life prosecution. Of those, 172 cases, or 91%, were filed as 10-20-Life cases. Only three of those cases that were filed resulted in later waivers of 10-20-Life sentencing.

To date, ASAs Urra and Elsey have tried 17 firearm cases ranging from Aggravated Assault to First Degree Murder, and 17 convictions have been won. No defendant has walked out of the courtroom after trial with a full acquittal. Additionally, 60 other defendants have been convicted by plea. Among them, these 77 defendants have received 5 life sentences and 397 years of addi-

tional DOC time, much of it mandatory under 10-20-Life.

The success of the SAFE unit is attributable to the hard work and dedication of those directly involved with it, and to the relationships and co-operation they have developed with the law enforcement community. Going forward, the SAFE unit will grow and continue to accomplish what it has set out to do: remove dangerous criminals from our streets.

