

# LAW ENFORCEMENT NEWSLETTER

May 2013

## A MESSAGE FROM BILL CERVONE STATE ATTORNEY

As I write this and prepare for a May 1<sup>st</sup> distribution date the legislature is finishing its annual session. Until bills are passed in final form and signed by the Governor, nothing is final but I can share with you some of the topics where it is likely if not certain that new or amended laws affecting criminal justice will result.

First, many of you are familiar with the problems surrounding sentencing for juveniles who commit very serious crimes such as murder

and who end up being prosecuted as adults. The United States Supreme Court issued two decisions in recent years saying that it is unconstitutional to impose a mandatory life sentence on a juvenile. Instead, some process to either allow a possibility of release or at least consideration of alternatives is required. After not addressing this problem for the last few sessions, the legislature appears to be ready to pass something addressing the situation.

Perhaps of more frequent potential application are

two bills regarding search and seizure that are under consideration. First, it appears likely that the legislature will either outlaw or at a minimum severely restrict the ability of law enforcement to use surveillance drones. Second, efforts are being made to require a search warrant before law enforcement could look at the contents of a lawfully seized cell phone. This would squarely contradict United States Supreme Court decisions, also issued in the last year or so. Although the law enforcement community has spoken strongly against this, something may pass.

Finally, there has been much debate in Tallahassee about drug mandates. These range from the ridiculous to the sublime, covering viewpoints that would argue for no incarceration for drug offenders to those who would increase what now exists. Look for something moderate that perhaps adjusts the quantity of some pills that would subject a defendant to a mandatory prison term.



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## MESSAGE FROM BILL CERVONE (CONTINUED)

As we always do, the fall issue of the Legal Bulletin will focus on all legislative changes impacting us. Until then, pay attention to news that might come out of the Capitol. Most criminal laws

are given effective dates of either July 1<sup>st</sup> or, more often, October 1<sup>st</sup>. Anything needing immediate attention will be circulated.



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Any changes in agency email addresses should be reported to our office at [clendeninp@sao8.org](mailto:clendeninp@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 Paul Clendenin at the SAO

## SAO PERSONNEL CHANGES

SAO Chief Investigator Spencer Mann retired on April 12<sup>th</sup> after many years of dedicated service to our law enforcement community, including both at the SAO and the Alachua County Sheriff's Office. During his tenure at the SAO, he was the voice of the office in acting as Public Information Officer in addition to many other duties, and his contributions will be greatly missed.

Replacing Spencer as

Chief Investigator is Paul Clendenin, in addition to which Inv. Darry Lloyd has been promoted to Deputy Chief Investigator and been assigned the additional duties of PIO.

Josh Wright joined the SAO in February and has been assigned to the County Court Division in Gainesville. Josh is a 2012 graduate of Florida Coastal School of Law and a Kentucky native who comes to us after working briefly in private

practice in Jacksonville.

Also joining the SAO in April was Nicole Chiappone, who comes to our Circuit after working as an ASA in the Ft. Lauderdale SAO for over seven years. Nicole will work in the Gainesville felony division, where she has assume responsibility for Lua Lapienka's caseload, allowing Lua to transfer to the Gainesville Intake unit so that greater service can be provided there.

State Attorney Bill Cervone presents Chief Investigator Spencer Mann with a plaque honoring him upon his retirement in April. The plaque was carved from a piece of granite facing removed from the SAO building in Gainesville during recent renovations.



## CONGRATULATIONS TO...

...ASA Marcus Cathey and his wife on the birth of their third child, Miriam, on February 15<sup>th</sup>.

...ASA Stephanie Burt, who was married on April 13<sup>th</sup> and will now be Stephanie Klugh



Office of the State Attorney Eighth Judicial

# LAW ENFORCEMENT MEMORIAL DATES

Alachua County's Law Enforcement Memorial will be on May 9<sup>th</sup> from 6-8pm at the Veterans Memorial Park in Gainesville.

The combined Union-Bradford County Memorial will be at 7:30pm on May 2<sup>nd</sup> at the Maines Community Center in Lake Butler.

Baker County's Law Enforcement Memorial Service will be on May 2<sup>nd</sup> at 7pm at the Baker County Sheriff's Office in Macclenny.



### FOR COPIES OF CASES...

For a copy of the complete text of any of the cases mentioned in this or an earlier issue of the Law Enforcement Newsletter, please call Chief Investigator Paul Clendenin at the SAO at 352-374-3670.

## IN MEMORIAM

Former SAO Investigator Chris Johnson, who had a long law enforcement career in Alachua County with not only the State Attorney's Office but also ASO and as head of security for AGH/Shands, died on January 30<sup>th</sup>. He was a friend to many of us who remain on duty throughout the circuit and will be missed by all.

Sgt. Chuck Harper, High Springs Police Department, died on February 5<sup>th</sup>. Sgt. Harper served his community and department with honor, and most notably prevented an individual who was about to commit an armed assault at a school from doing so even though his own safety was at great risk.



## Constructive And Joint Possession

Among the most perplexing and difficult situations officers encounter is the problem of multiple occupants in a vehicle in which drugs or some other illegal object might be found for which, of course, none of the occupants will take ownership. Two recent cases from the 2<sup>nd</sup> DCA illustrates some of the problems.

In the first case, Rangel v State, Rangel had been targeted through a CI as a dealer. Officers arranged a buy, and Rangel showed up at the designated location in a vehicle being occupied by himself and three others, and a transaction occurred, after which the vehicle was allowed to leave while the CI brought what he had obtained to observing officers. The vehicle was then stopped a short distance away, by which time there were only three occupants, one of whom was Rangel. Rangel was seen rummaging on the floorboard at that point, but officers could not see what he was actually doing. Ultimately, a container was found on the floorboard where Rangel was sitting, and cocaine derivatives were found in the container. Rangel was asked at one point what was in the container and he said only that the officer should drink what was in it to find out. This cocaine, and not what was involved in the hand to hand buy, ultimately became the subject of a prosecution.

In reversing the conviction that a jury returned, the DCA started by noting that to establish Rangel's possession the State had to establish his knowledge, dominion, and control over it. The court also noted that mere proximity is insufficient. When joint possession is possible, proximity is only one factor to be considered and the State must still establish knowledge and control.

The court further noted that there was no independent proof linking Rangel to the container, such as fingerprints, incriminating statements, or statements from the other occupants, all of who apparently remained silent. That Rangel had been seen rummaging in the area where the container was found was insufficient to infer control because doing so required inferring not only that he might have touched the container but also that he therefore knew what was in it, and that pyramiding inferences in that fashion is not permitted. Even if it was, the court concluded, his mere rummaging was no more than proximity evidence. Rangel's flippant remark was also dismissed by the court as being far less than incriminating or an admission. According to the DCA, the case should have been thrown out by the trial court.

The second case, Williams v State, is similar in many ways. Williams was pulled over for traffic violations. She was driving a rental car and had two passengers. She was very excited and agitated, and there was a strong odor of marijuana apparently coming from a black bag found in the car after a consent search. A pound of cannabis was found in the black bag as well as a small amount of cocaine and paraphernalia. Nothing about the bag, however, tied it to either Williams or either of her two passengers, and none of the occupants of the car apparently admitted to or tried to accuse anyone else of being the owner of the drugs.

In this case, the court felt that there was enough evidence to establish knowledge based on the obvious odor of marijuana and the defendant's behavior. Where the case failed was on the question of dominion and control. Again ruling that proximity alone absent proof of the ability to control is not enough the conviction obtained at trial was overturned.

As with so many of these cases, both of these fact situations point out the difficulty of proving what seems obvious - that everyone in a car is probably guilty of possessing what's in it in these circumstances. To do so as to any or all of the occupants, there must be actual proof to establish knowledge, dominion and control. That burden is often difficult if not impossible to meet. What is required is something irrefutable, such as statements, fingerprints, of direct observations of control. It's not good enough to just charge everyone on the assumption that all or some of them are guilty. They might be, but that inference is not proof.



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## Vehicle Stops Based On Color Change Ruled Illegal

Quite a few years ago the Supreme Court decided that it was impossible to enter the mind of patrol officers and decide whether their intent in making a vehicle stop was based on some pretext or other. The result was the elimination of that kind of analysis in favor of an objective standard: was there a permissible reason to make the stop? If there was, the subjective thinking of the officer didn't matter and the stop would be legal.

That doesn't mean that all stops are reasonable or permitted, even if the officer can articulate a reason for doing so. A recent case points out that there must still be some articulable and reasonable suspicion that a particular person is committing a crime in the absence of any other suspicious behavior or circumstances to allow an investigative stop.

In the case, VanTeamer v State, a patrol deputy in Escambia County saw a person driving a bright green Chevy. He ran a check on the tag number and DHSMV records showed it to be assigned to a blue Chevy. Based purely on the color inconsistency, he pulled the car over. The occupants explained that the car had recently been painted, thus explaining the inconsistency. Sure enough, however, there was a smell of cannabis, a search ensued, both marijuana and cocaine was found, and the driver was immediately arrested and whisked off to jail.

At the inevitable suppression hearing, the deputy conceded that it was purely the color discrepancy

that piqued his interest and that there had been no traffic violation, no suspicious or furtive behavior, and no reports of stolen vehicles or swapped plates in the area. He simply could not confirm whether the tag matched the vehicle without stopping it and checking the VIN.

Although the trial judge felt that this was sufficient for an investigatory stop, the 1<sup>st</sup> DCA disagreed and threw out the resulting drug convictions and prison sentence. The Court noted that any discrepancy between a vehicle's plates and registration may legitimately raise a concern that the vehicle is stolen or that the plates have been swapped. The Court also felt, however, that such a concern had to be weighed against the 4<sup>th</sup> Amendment right to travel the roads without government intrusion and concluded that a color change alone, in the absence of any other suspicious behavior or circumstance, does not allow an investigatory stop.

Underlying this decision is the facts that changing the color of a vehicle is not illegal and that Florida law does not require someone to report a color change to DHSMV. In fact, while DHSMV has a form to report a change to the body of a vehicle, there is no such mechanism to report a change to its color.

Sure enough, there are contrary cases holding that a color change is sufficient reason to stop a vehicle, including from other parts of Florida. For the 1<sup>st</sup> DCA, however, it's simply not enough. The Court specifically stated that it was "hesitant" to license an investigatory stop of every

## Continued

### Vehicle Stops Based On Color Change Ruled Illegal

person driving a vehicle with an inconsistent color in the absence of other suspicious behaviors or circumstances because doing so would leave the decision as to which vehicles to stop wholly up to the discretion of law enforcement.

Why does this matter? Because all six counties in the 8<sup>th</sup> Circuit are controlled by the 1<sup>st</sup> DCA, which means that this prohibition is now the controlling law throughout our circuit and must be followed. On the plus side, the 1<sup>st</sup> DCA did at least certify that its opinion is in conflict with controlling law in oth-

er parts of Florida, meaning that this question will ultimately make its way to the Florida Supreme Court for resolution. That process can take months if not years, however, and until the Florida Supreme Court rules you may not stop a vehicle just because of a color discrepancy.

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## US Supreme Court Reverses Florida Dog Sniff Rulings

The United States Supreme Court issued an important ruling in February reversing the Florida Supreme Court's previous opinion in Harris v State, in which the Florida Supreme Court had imposed significant and burdensome requirements on the State to prove the reliability of a drug sniff dog. Harris v State was one of a series of Florida cases doing so in recent years. In a striking rebuke, the US Supreme Court stated that the Florida decisions "flouted" the established approach to determining probable cause.

The new opinion, now styled Florida v Harris, centered on a Liberty County case in which a Sheriff's deputy stopped Harris's vehicle for an expired tag and then had his canine sniff the outside when the driver refused consent to a search. The dog, Aldo, alerted on the driver's side door handle and, believing that to be sufficient probable cause, the deputy searched the vehicle and found a variety of pills as well as ingredients commonly used to make meth. Harris

was arrested, and moved to suppress, claiming that Aldo's alert did not constitute sufficient probable cause for the search. Ultimately, the Florida Supreme Court agreed, putting in place a series of requirements for proving the reliability of a drug dog that in most instances would be impossible to meet.

In reversing, the US Supreme Court began by noting that the test for probable cause "is not reducible to precise definition or quantification," and that for that reason few bright line or absolute rules should be applied. To the contrary, what is required is a "fair probability on which reasonable and prudent people, not legal technicians, act." This, in turn, calls for a practical and common sense standard based on the totality of the circumstances.

What the Florida Supreme Court failed to recognize was that it was creating "a strict evidentiary check-

list whose every item the State must check off." Since the Florida Supreme Court's requirements included comprehensive documentation of a dog's field performance, which was absent in Harris's arrest, this resulted in a situation where no matter how much other proof of reliability the State had it could never satisfy the requirements being imposed. A missing piece of proof of one sort, the US Supreme Court said, "should not sink the State's case; rather, that deficiency may be compensated for" by other factors. In other words, "a finding of a drug detection dog's reliability cannot depend on the State's satisfaction of multiple, independent evidentiary requirements. No more for dogs than for human informants is such as inflexible checklist the way to prove reliability, and thus establish probable cause." The Court went on at length to discuss all of the reasons this is so, including obvious factors such as that a

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## Continued US Supreme Court Reverses Florida Dog Sniff Rulings

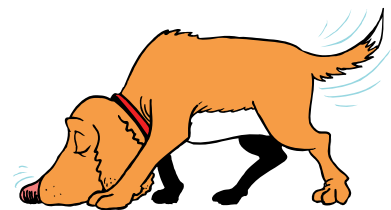
dog's alert may have been totally correct even when nothing is found because the drugs may have been hidden too well to be discovered or there may have been a quantity too small for an officer to find.

So what's the bottom line? For starters, the burdensome and practically impossible requirements previously imposed by the Florida Supreme Court for qualifying a drug detection dog are gone. In their place, the US Supreme Court has set out as the required test that evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs."

A defendant may, of course, challenge the State's evidence of reliability by cross-examination or through his own witnesses, and the dog's field history may well be relevant. Courts, however, are to allow each side to put on it's best case and then evaluate the evidence to decide what all the circumstances demonstrate. A court should not require, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. The question "is whether all the facts sur-

rounding an alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." As the US Supreme Court concluded, "a sniff is up to snuff when it meets that test."

Where does this leave us? Pretty much back where we were before the Florida Supreme Court and other DCAs started issued the restrictive opinions that have come out over the last few years. Canine officers and agencies that use them must continue to be aware that dogs will still be challenged, and it's even possible that the legislature may impose restrictions by statute that go beyond what the US Supreme Court has required. But for now, all that is required as a threshold is that a dog have been certified in some fashion in drug detection.



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## Limitations On Dog Sniffs At Residences Upheld

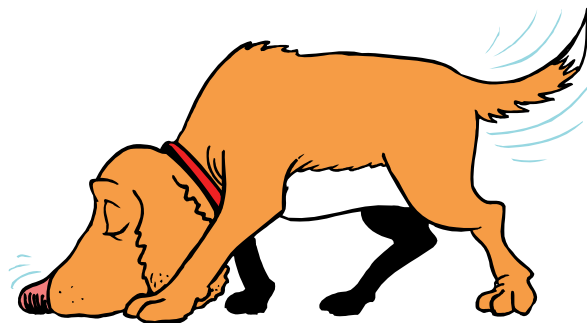
In a second case involving dog sniffs, the United States Supreme Court upheld the Florida Supreme Court's 2011 ruling that the use of a dog sniff on a porch at the front door of a home without probable cause and a warrant violates the 4<sup>th</sup> Amendment. This case, Florida v Jardines, continues to draw the distinction between a home and a vehicle for 4<sup>th</sup> Amendment purposes.

In the case, a Miami-Dade detective had an unverified tip that marijuana was being grown in the home of Jardines. A surveillance team observed the home for a few moments and saw no activity. The detective then approached the home with a trained drug dog, which alerted on the front porch and at the front door of the home. A warrant was then obtained and executed, resulting in the discovery of marijuana inside the home.

As did the Florida Supreme Court, the US Supreme Court held that the original sniff was a search within the meaning of the 4<sup>th</sup> Amendment. The front porch, the court noted,

was clearly a part of the area to which the activity of home life extended and a part of the curtilage and a location where the right to be free from unreasonable governmental intrusion exists. While an officer not bearing a warrant may approach a home in the hopes of speaking to its occupants because that is no more than any private citizen might do, taking a dog to the door to sniff without probable cause is forbidden. The court concluded that while officers need not "shield their eyes" when passing by a home on public roads or sidewalks, they may not do what was done in this case on mere suspicion.

As the Florida Supreme Court did, this case focused on traditional search and seizure law. No mention of the requirements imposed on law enforcement for authenticating the reliability of drug dogs, as dealt with in the Harris case, occurred. The Harris requirements, however, would clearly apply if a dog is lawfully used for this kind of activity at a residence.





## Barricaded Suspects Not Entitled To Miranda

In a case deciding this question for the first time in Florida, the 4<sup>th</sup> DCC recently ruled that a person who has barricaded himself in his apartment and threatened harm to himself or others is not entitled to Miranda warnings when police engage him in conversations to try to resolve the standoff.

The case, Atac v State, occurred in Broward County. Atac was a suspect in the murder of his father. When police went to his apartment, intending to arrest him and serve a search warrant, they initially attempted to call him and have him come outside. Atac, however, noticed officers positioning themselves around the apartment so he refused to exit, telling police that he was armed and would shoot anyone

who came in as well as himself. He then hung up the phone.

Over the next several hours, police had multiple phone conversations with Atac trying to resolve the situation. During those conversations, Atac at one point made incriminating statements about having killed his father. Eventually he was convinced to surrender and was arrested.

At trial, Atac claimed that he was entitled to Miranda warnings, which were never given. Joining many other states that have ruled on this, however, the 4 DCA held that he was not. Under the traditional test criteria for when a person is in custody so as to require

Miranda, the court concluded that law enforcement was not present to question Atac but to arrest him, that Atac was not in a location such as a police station but was rather free to move about his own apartment, albeit knowing that if he walked out he would be arrested, that any conversation about his father's murder was relatively inconsequential to the standoff, and that whether or not he was free to leave was simply not applicable under the circumstances.

In essence, a barricaded individual is not in custody even if clearly surrounded by police and there is no requirement that such a person be advised of his Miranda rights when police communicate with him as he is holding them at bay.

## Facebook Threats Violate FS 836.10



Today's world of instant and electronic communication allows for new ways to commit old crimes. Such is the case with FS 836.10, Written Threats To Kill Or Do Bodily Injury.

Timothy O'Leary (not the well known advocate of psychedelic drugs but another one from Jacksonville) took offense to a family member's homosexuality and posted on his Facebook page a diatribe that can best be summarized as profane, vitriolic, and quite threatening to the safety of the family member and her partner. When charged with violating FS 839.10, he claimed that he had not "sent" anything but had merely "published" his comments and that, quite accurately, sending a written threat is a required element of the statute. He argued that he had nei-

ther asked anyone to read the post nor addressed it to anyone as one would with a letter or e-mail. Thus, he said, he could not be guilty, one supposes, of anything beyond bad judgment and poor social skills.

The court disagreed. First, it noted, FS 836.10 was amended in 2010 to specifically include "electronic communications" to more traditional writings. Then the court observed that the act of composing a thought and displaying it in such a way that someone can see it is the first step in "sending" it. When the threatened person or a family member views those thoughts the act of "sending" is completed.

The only purpose of Facebook, the

court held, is to communicate. it is not used as a journal or diary and by its very nature is intended to be read by others. Thus, by posting the threatening message, even though on a personal Facebook page, the defendant sent it to all of his Facebook friends, which included the victim.

As with other means of electronic communication, this is an example for the unwary of how a moment's restraint in the face of anger is no longer available when the "send" button can be instantaneously hit. Gone are the days when the time it took to find someone in order to vent, in criminal or non-criminal ways, allows one to calm down and think better of it.