

# LAW ENFORCEMENT NEWSLETTER

JANUARY 2017

## A MESSAGE FROM BILL CERVONE STATE ATTORNEY

While it hardly seems possible that 2017 is upon us there is no escaping that or what it means: the legislature is about to convene. I've probably mentioned before what some wag, maybe Will Rogers or maybe someone else, once said. None of us are safe while the legislature is in session.

There are certain areas and themes that all of us should be aware of this year. First, all of the gun rights measures that have been introduced but failed to pass in the

last several years will be back. The results of last Fall's election, along with committee assignments by Senate and House leadership as they have been announced, seem to have stacked the deck in favor of everything and anything in this area passing but there will still be debate and compromise, at least theoretically. Those of you who share my concerns about measures like open carry and campus carry would be well advised to speak up through your various organizations.

Second, and this perhaps falls in the category of being a victim of our own success, the continuing decline in Florida's crime rates is leading to discussion in Tallahassee about the necessity of maintaining various tools we've all used successfully to lock up dangerous and repeat offenders. These include drug mandatories as well as other habitual sentencing options. We've already seen this is the removal of Aggravated Assault/Firearm from 10-20-Life mandatory provisions a few years ago. Look for more of the same, maybe under the guise of shifting to community treatment modalities rather than incarceration.

Finally and once again, juvenile criminal processes as we know them are under attack. Efforts will be made again to eliminate or reduce direct file authority, to force civil citation processes, and to otherwise make cosmetic changes that will not always serve the law enforcement community or Florida's young people well.



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**REMINDER:  
 LAW ENFORCEMENT  
 NEWSLETTER NOW ON-LINE**

The Law Enforcement Newsletter is now available on-line, including old issues beginning with calendar year 2000. To access the Law Enforcement Newsletter go to the SAO website at <[www.sao8.org](http://www.sao8.org)> and click on the "Law Enforcement Newsletter" box.

**CONTINUED: MESSAGE FROM  
 STATE ATTORNEY  
 BILL CERVONE**

If you have an interest in some particular area, please let us know. As things start developing, information will be circulated as well.

**SAO STAFF CHANGES**

**SAO Investigator Mike Combs** retired on October 31st. His position was filled by Jeff **Nordberg**, who will be responsible for investigative assistance in Baker, Bradford and Union Counties. Many of you will know Jeff from his days at GPD and more recently FDLE.



**Congratulations To...**

...**ASA Carla Newman**, who has been appointed to serve on the Florida Bar Unauthorized Practice of Law committee.

...**Former Chiefland Police Department Chief Robert Douglas**, who resigned in November to return to Marion County, where he will become Chief Deputy for newly elected Sheriff Billy Woods in January. Congratulations as well to Scott Anderson, who has been named as the new Chief.

...**The Alachua County Sheriff's Office SWAT Team**, which won the 34th Annual SWAT Roundup International 2016 team competition in Orlando in November. Members of the team are Sgts. Jon Schabruch, Joe VanGorder and Josh Crews and Deps. Chuck Drake, Marvin Gunn, Tyler Cook, James Ferguson and Alex Black.



**The SAO Is Now On Twitter**

The **SAO** has established a Twitter feed to better disseminate information to the media and others such as law enforcement agencies. Like us at #8THCIRCUITSAO. For more information contact Deputy Chief Investigator Darry Lloyd at 352-374-3670.



## Santa Fe College Safety App

Chief Ed Book of the Santa Fe College Police Department announced last Fall that the College has launched a safety app that is available for anyone who is interested. The app, Safe Santa Fe, is free and works on both Apple and Android devices. Although much of the information is applicable only to the Santa Fe campus some is of general utility and everyone is welcome to look at or download it. Thanks, Chief Book!



Any changes in agency email addresses should be reported to our office at [clendenin@sao8.org](mailto:clendenin@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 at 352-374-3670.

# Safe Santa Fe Campus Watch



Call 352.395.5555 Or 911  
Non-Emergency 352.395.5519

## Important Considerations For Recording Breath Test Room Proceedings

Contributed By  
Assistant State Attorneys Ryan Nagel and John Kelly

On February 10, 2016, the local media ran an article about GPD breath test room recordings. The issue addressed how recordings were only kept for 30 days, and ultimately GPD retooled their policy to address the problem. Yet, while the media attention was barely a hiccup, it does call to the foreground an interesting question. Should our law enforcement agencies be recording, and preserving, the breath test process?

To address this issue, we answer first a narrower question. If a recording is made, must it be preserved during the pendency of a criminal prosecution? The answer is yes. Under *Brady v. Maryland*, prosecutors in Florida have an ethical and legal obligation to disclose to the Defendant any material information favorable to the defense. The State, by and through the Assistant State Attorney on any given case, is required to actively seek information of this nature from law enforcement, because all exculpatory information known to police is imputed upon the prosecutor. For instance, if a breath test operator does not follow the 20-minute observation period, the prosecutor must tell the defense. Having the test recorded would prevent any miscommunication between law enforcement and the office of the State Attorney.

Failure to preserve evidence, or the inadvertent destruction of evidence, regardless of the good or bad faith on behalf of the State and its agents, is likely to result in sanctions of varying severity. For instance, in *State v. Leslie*, when video was recorded but not preserved, the court instructed the jury they may infer that had the State produced the video, it would likely have been favorable to the defense. More recently in *Patterson v. State*, a 1<sup>st</sup> DCA case approved by the Florida Supreme Court, it was implied that “bad faith” destruction of evidence should result in sanctions. It can be argued that if video is being made, and *can* be recorded, to fail to do so becomes, at some point, vulnerable to a bad faith claim. In the most severe sanction a court might decide to dismiss the charge altogether.

It is also important to keep in mind that evidence need not be “exculpatory” in order to be “material” for the purpose of required disclosure. For instance, as recently as 2009, the 4<sup>th</sup> DCA in *State v. Davis* addressed an inadvertent failure to preserve a video containing of a defendant’s field sobriety exercises. The Court held the evidence was material, because “in the absence of a videotape, a jury would have only... [the arresting officer’s] interpretation of Defendant’s performance of the FSTs, demeanor, appearance, and speech patterns... the videotape evidence is unique because it would provide the Defendant with an objective video replay of the events from which a jury could draw its own conclusions.” While the court in *Davis* ultimately found that the trial court’s dismissal of the DUI charge was too harsh a sanction, it nevertheless reversed and determined that a lesser sanction would have been appropriate.

A video recorded inside a breath test room will be relevant in any criminal prosecution for DUI, whether we proceed on a DUBAL, impairment, or both methods of proving the crime. It will always have evidence either corroborating or rebutting whether the breath test operators were in compliance with FDLE regulations. Additionally, video will always have evidence regarding the defendant’s level of impairment, such as for his ability (or inability) to walk on his own, maintain his balance, stay awake during the procedure, etc.

Knowing that the law is strongly in favor of preserving video once it is created, we can address the initial ques-

Continued:  
**Important Considerations For Recording Breath Test Room Proceedings**  
**Contributed By**  
**Assistant State Attorneys Ryan Nagel and John Kelly**

tion; should law enforcement agencies be recording the breath test process to begin with?

There is no legal precedent requiring that law enforcement agencies *must* record the breath test process, and of course instituting a policy of recording has difficulties. Understandably, any conversation of adding technology necessarily must consider cost. A few costs that come to mind include cost of installing and maintaining the equipment, as well as additional electronic storage that would be needed. Agencies would need to factor these added costs into an already tight budget. Additionally, any installation would have to be tested to make sure that the breath test instruments did not begin to register RFI (radio frequency interference) due to the use of remote recording. Surely, there are a myriad of other costs and difficulties that would arise in changing law enforcement policy – far more than can be addressed in this brief discussion. However, any discussion about the costs of implementing the policy should be viewed in light of the perceived benefits to the State in obtaining such recordings.

We anticipate that far more often than not, the recording of the breath test process would benefit the State. The State would be able to demystify the breath test process for the jury, give the jury confidence that the procedures which preserve the integrity of the instrument have been followed, and show any signs of impairment the Defendant exhibits in the breath test room. Moreover, recording the breath test process can help the State in situations outside of criminal prosecution. For instance, *Hamann v. Department of Highway Safety and Motor Vehicles*, a case out of Orange County, shows how the video can be used to sustain an administrative suspension. The Defendant in this case claimed the breath test operator did not follow the 20-minute observation period. The Circuit Court, relying in part on the video held “the video demonstrates that Officer Meadows was in a position to observe Hamann to ensure that he had not placed anything in his mouth or regurgitated.”

The video can also be a safety net for law enforcement agencies confronted with allegations of misconduct during the breath test process. In February, 2015, in Louisville, Kentucky, a Louisville Metro Police Department officer was accused of assaulting a Defendant in custody during the breath test. At the time of the allegation, the prosecutor there believed the breath test room to be a “live feed only” device. However, the department was able to produce a preserved video absolving the officer of any wrongdoing. This situation shows that the best way to avoid a Defendant from crying foul is to preserve breath test room recordings if the capability exists. (The Kentucky article can be found at <http://www.wdrb.com/story/28161780/sunday-edition-attorneys-cry-foul-over-jail-surveillance-videos>).

It is the prerogative of each individual agency to decide whether or not to install recording equipment in their various breath test rooms. However, should one agency do so, it is advisable that all agencies follow suit. And once equipment is installed, it is the position of the Office of the State Attorney that any video created needs to be preserved and disclosed as material evidence in DUI cases.

## 1DCA UPHOLDS DETAINING PASSENGERS DURING VEHICLE STOPS

As you may recall, the May 2016 Legal Bulletin discussed a 5th DCA case that had been issued last April in which that court allowed the detention of a vehicle passenger. The opinion, Aguillar v State, reversed prior decisions to the contrary and recognized that officer safety concerns took precedence over any minor intrusion on the passenger's freedom of movement. At the time, we noted that the 1st DCA, under which 8th Circuit counties operate, had not ruled on that subject.

That has now changed with a late September opinion, Presley v State, from the 1st DCA that makes the same holding as Aguiar. The facts in Presley are simple. Officers made a traffic stop in a high crime area at night, and Presley, a passenger, was told by one of the backup officers who responded, that he could not leave. In fairly short order it was discovered that Presley was on probation, and since he had been drinking he was arrested for a violation of that probation. A search incident to that arrest resulted in cocaine being found on him. The backup officer later testified at a suppression hearing that there was another passenger who was belligerent, that there were many people milling around, and that he did not consider it safe to allow Presley to leave for various reasons.

In upholding Presley's detention and everything that flowed from it, the 1st DCA said that "concerns for police officers' safety during a traffic stop outweigh the limited intrusion on passengers' rights by requiring them to remain at the scene for the reasonable duration of the traffic stop," and that "an officer may, as a matter of course, detain a passenger during a traffic stop without violating the passenger's Fourth Amendment rights."

This opinion is obviously important to law enforcement and now brings the six counties of our circuit under the protection of the concept started with the Aguiar case. The matter is still not totally resolved, however, because both the Aguiar and Presley cases remain in conflict with other, older Florida cases. The entire matter now sits before the Florida Supreme Court for resolution. That will not likely occur for some months yet but hopefully the ultimate decision on this will affirm what the 1st DCA has now allowed.

As a side note, Presley is an Alachua County case that started with a Gainesville Police Department stop and arrest, and the suppression issues were argued here by former Assistant State Attorney Tori Armstrong and ruled on by Circuit Judge Robert Groeb. Good work by all!



## PCP and Deadly Force

Around 2:00 a.m. Officer Thomas Dempsey received a radio call that a naked man was standing in the street. He responded and saw a naked man, later identified as Kenyado Newsuan, standing in front of a residence. Dempsey estimated Newsuan to be six feet tall and 220 pounds. Dempsey did not radio to dispatch that he had encountered the subject or stopped his car. Dempsey exited the car with his Taser in his hand and told Newsuan to “come here.” Newsuan began screaming obscenities at Dempsey and “flailing his arms around.” Dempsey could see that Newsuan was completely naked and had nothing in his hands.

Newsuan began running toward Dempsey and yelling. Dempsey gave two verbal commands to stop. When Newsuan was five feet away, Dempsey fired his Taser into Newsuan’s chest. Despite the direct hit into his chest Newsuan kept coming forward and grabbed Dempsey’s shirt. A violent struggle ensued. Newsuan struck Dempsey in the head multiple times, threw Dempsey up against a parked van, and then pushed him into a parked SUV. As they were wrestling against the SUV Newsuan reached for Dempsey’s service weapon. Dempsey removed the gun from its holster, wedged it between his body and Newsuan’s, and, from a distance of no more than two inches, fired two shots into Newsuan’s chest. Newsuan attempted to reach for the gun, and Dempsey shot him again in the chest. Still grappling, Newsuan reached for the gun again, and Dempsey shot him again. Newsuan collapsed face down and died. Dempsey was taken to a hospital, treated for minor injuries, and released the same night.

Two civilians observed the events from their bedroom windows. Both testified that they saw Newsuan “completely naked, rushing over to the police office.” Newsuan “slammed the officer against his patrol car and grabbed him by the neck and started pummeling his head against the car.” Newsuan “reached for” Dempsey’s gun. While Newsuan “had him by the neck,” Dempsey unholstered the gun and shot Newsuan three times at close range, at which point Newsuan fell to the ground.

Newsuan’s estate sued the City and the officer arguing that the shooting was unreasonable under the Fourth Amendment because Dempsey unnecessarily

initiated a one-on-one confrontation with Newsuan, contrary to department policy, that led to the subsequent fatal altercation. The trial court dismissed the civil right suit. The U.S. Court of Appeals affirmed that decision.

### Issue:

Was the use of deadly force reasonable under the totality of the circumstances? **Yes.**

### Force and Reasonableness Standard:

A claim that a police officer used excessive force during a seizure is “properly analyzed under the Fourth Amendment’s “objective reasonableness standard.” There is no dispute that Officer Dempsey “seized” Newsuan for Fourth Amendment purposes when he shot and killed him. The only question is whether Officer Dempsey’s use of force was objectively reasonable under the circumstances.

Following the Supreme Court’s lead in *Tennessee v. Garner*, (S.Ct.1985), courts have ruled that an officer’s use of deadly force is justified under the Fourth Amendment only when (1) the officer has reason to believe that the suspect poses a “significant threat of death or serious physical injury to the officer or others,” and (2) deadly force is necessary to prevent the suspect’s escape or serious injury to others. In *Scott v. Harris* (S.Ct.2007), however the Supreme Court clarified that “*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’” The reasonableness of a seizure is assessed in light of the totality of the circumstances. Courts will analyze this question “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” making “allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”

### Court’s Ruling:

“We begin with a proposition that can scarcely be disputed: **once Newsuan began reaching for Dempsey’s gun, Dempsey was justified in using deadly force to defend himself.** Each of the three witnesses to the fight (Cruz, Rivera, and Dempsey) testified that Newsuan



*Continued: PCP and Deadly Force*

rushed at Dempsey) testified that Newsuan rushed at Dempsey, began violently grappling with him, and slammed Dempsey into multiple cars. Dempsey and Rivera testified that Newsuan struck Dempsey in the head multiple times. All three witnesses agree that Newsuan then attempted to grab Dempsey's gun out of its holster. At that point there was a serious risk that Newsuan would kill Dempsey, and *no reasonable juror could conclude that it was unreasonable for Dempsey to deploy lethal force in response.*"

"This conclusion, however, does not end the inquiry. A proper Fourth Amendment analysis requires us to assess not only the reasonableness of Dempsey's actions at the precise moment of the shooting, but the 'totality of circumstances' leading up to the shooting. Building out from this principle, Plaintiff argues that even if Dempsey was justified in using deadly force after he was attacked, the seizure as a whole was unreasonable because Dempsey should never have confronted Newsuan in the first place. In support of this argument, Plaintiff cites a Philadelphia Police Department directive that instructs officers who encounter severely mentally disabled persons (including persons experiencing drug-induced psychosis) to wait for backup to attempt to de-escalate the situation through conversation, and to retreat rather than resort to force. Plaintiff points out that Dempsey knew or should have known that Newsuan was obviously disturbed; that Dempsey knew Newsuan was naked and unarmed; and that Dempsey also knew that he had responded to two prior calls to the same area without receiving any indication that the subject was endangering or threatening people. Plaintiff asserts that, under these circumstances, it was unreasonable for Dempsey to flout departmental policy by initiating a one-on-one encounter with Newsuan."

"Whether or not Dempsey acted unreasonably at the outset of his encounter with Newsuan, Plaintiff must still prove that Dempsey's allegedly unconstitutional actions proximately caused Newsuan's death. Under ordinary tort principles, a superseding cause breaks the chain of proximate causation...While there is no precise test for determining when a civilian's intervening acts will constitute a superseding cause of his own injury, relevant con-

siderations include whether the harm actually suffered differs in kind from the harm that would ordinarily have resulted from the officer's initial actions; whether the civilian's intervening acts are a reasonably foreseeable response to the officer's initial actions; *whether the civilian's intervening acts are themselves inherently wrongful or illegal*; and the culpability of the civilian's intervening acts."

"Here, we conclude as a matter of law that Newsuan's violent, precipitate, and *illegal attack* on Officer Dempsey severed any causal connection between Dempsey's initial actions and his subsequent use of deadly force during the struggle in the street. *Whatever harms we may expect to ordinarily flow from an officer's failure to await backup when confronted with a mentally disturbed individual, they do not include the inevitability that the officer will be rushed, choked, slammed into vehicles, and forcibly dispossessed of his service weapon.* We therefore have little trouble concluding that Newsuan's life-threatening assault, coupled with his attempt to gain control of Dempsey's gun, was the direct cause of his death. We will therefore affirm."

**Lessons Learned:**

The U.S. Court of appeals went on to sound a word of caution. "The question of proximate causation in this case is made straightforward by the exceptional circumstances presented—namely, a sudden, unexpected attack that instantly forced the officer into a defensive fight for his life. As discussed above, the rupture in the chain of events, coupled with the extraordinary violence of Newsuan's assault, makes the Fourth Amendment reasonableness analysis similarly straightforward. *Given the extreme facts of this case, our opinion should not be misread to broadly immunize police officers from Fourth Amendment liability whenever a mentally disturbed person threatens an officer's physical safety.* Depending on the severity and immediacy of the threat and **any potential risk to public safety posed by an officer's delayed action**, it may be appropriate for an officer to retreat or await backup when encountering a mentally disturbed individual. It may also be appropriate for the officer to attempt to de-escalate an encounter to eliminate the need for force or to reduce the amount of force necessary to control an individual. Nor should it be assumed that mentally disturbed persons are so inherently unpredictable that



*Continued: PCP and Deadly Force*

their reactions will always sever the chain of causation between an officer's initial actions and a subsequent use of force. If a plaintiff produces competent evidence that persons who have certain illnesses or who are under the influence of certain substances are likely to respond to particular police actions in a particular way, that may be sufficient to create a jury issue on causation. And of course, *nothing we say today should discourage police departments and municipalities from devising and rigorously enforcing policies to make tragic events like this one less likely.* The facts of this case, however, are extraordinary. Whatever the Fourth Amendment requires of officers encountering emotion-

ally or mentally disturbed individuals, *it does not oblige an officer to passively endure a life-threatening physical assault, regardless of the assailant's mental state.*"

**Johnson v City of Philadelphia**  
**U.S. Court of Appeals—3rd Cir.**  
**(Sept.20, 2016)**



## Federal Courts Restrict TASER Use

The US Supreme Court refused to hear a 4th Circuit Court of Appeals case regarding taser usage, effectively leaving the lower court ruling in place. The federal 4th Circuit includes Maryland, Virginia, West Virginia and North Carolina but the ruling is nonetheless important precedent, holding that the use of a taser on a mentally impaired subject when there was no immediate danger was an unconstitutional use of force.

In the case, Ronald Armstrong, who suffered from bipolar disorder and paranoid schizophrenia, had been off his meds for several days and was actively harming himself. His sister got him to agree to go to a hospital, where she initiated the equivalent of Baker Act proceedings in North Carolina, but Armstrong fled from the hospital while those papers were being finalized. Police were called to assist and found him in the area, where he was engaged in self-destructive behavior. As they tried to take him into custody he wrapped himself tightly around a street sign post. After briefly struggling with him in an effort to loosen him from the post so that he could be taken to the hospital, officers proceeded to tase Armstrong, using drive stun mode five times over about two minutes. Ultimately and while Armstrong continued to resist he was controlled but he started to complain about being choked (the evidence was apparently contradictory as to whether that actually happened) and he quickly became non-responsive. CPR was administered, EMS was called, and he was taken to the hospital ER, where he died. The entire incident lasted just over six minutes.

To make a long story short, a law suit for wrongful death ensued. The federal court held that deploying a taser "is a serious use of force," and that it is appropriate "proportional force only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser." The court also noted that each use of the taser must be viewed separately and evaluated by what is occurring at the moment of usage. The court concluded that "taser use is unreasonable force in response to resistance that does not raise the risk of immediate danger" and that an "officer may only use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of

immediate danger that could be mitigated by the use of force. At bottom, 'physical resistance' is not [the same thing as the] 'risk of immediate danger.' "

The bottom line is that the court found that because Armstrong did not present a danger to officers as he sat hugging the sign post the repeated use of a Taser was excessive force. In this particular case, because the court was in essence announcing a new rule of law, the officers involved were granted qualified immunity and dismissed from the lawsuit. Prospectively, that does not apply, at least in the federal 4th Circuit, and indeed all agencies are now on notice of this decision. Various considerations therefore come into play, including the following:

1. That a mental health patient and not someone who has committed a crime is involved weighs heavily against the use of force, specifically by taser use.
2. An officer must consider that a subject is mentally ill, especially if the subject is unarmed.
3. Officers who encounter an unarmed and minimally threatening person exhibiting obvious signs of mental instability must de-escalate the situation and adjust the use of force downward.
4. When the purpose of an apprehension is Baker Act custody in order to prevent someone from harming himself, any force that causes harm is contrary to that.
5. While non-compliance with lawful orders justifies some use of force, the level of force varies with the risks posed by the resistance being encountered. In other words, the question is how much force was used in proportion to what the subject was doing. The refusal to do something is not the same as active resistance or even fleeing.

All of this is very problematic for agencies and officers. The law, federal or state, does not prohibit the use of force, even deadly force, when mentally ill persons are confronted. The courts, however, are shifting into a very gray area in assessing after the fact what might or could have been done in crisis situations, and that is an analysis that those situations do not usually allow any time to reflect on as they unfold.

## Abandoned Cellphones Require A Warrant Prior To A Search

Ordinarily, search and seizure law provides that the abandonment of property by a suspect allows law enforcement to search it upon its recovery. The basic proposition this recognizes is that someone who has tossed something away, even in a police chase, has abandoned not just physical possession of it but also any legal claim to a privacy or possessory interest that would prevent a search or give any grounds to even contest a search. A new decision by the 4th DCA, however, has held that this does not apply to an abandoned cellphone, at least not one that is password protected.

In the case, State v K.C., Lauderhill police initiated a traffic stop for a vehicle that was speeding without headlights on at night. The vehicle pulled over and two people got out, looked quickly at the officer, and fled. It turned out, of course, that the vehicle was stolen. The officer found a cellphone inside with a lock screen photo of someone who looked like one of the two people who had fled from the stop. Otherwise, the cellphone was passcode protected. The officer turned it over to detectives as a part of the stolen car investigation. Without obtaining a warrant, a detective was later able to unlock the phone, leading to the identity of the owner, who was charged with a felony offense related to the stolen car. The trial court ultimately rejected the State's argument that this was lawful despite the general rule of abandonment, relying instead on developing case law from both the United States and Florida Supreme Courts focusing more on the qualitative and quantitative difference between the information contained on a cellphone and other property. The 4th DCA upheld the trial court's order of suppression.

In so doing, the 4th DCA first acknowledged that the test for abandonment is whether the defendant voluntarily discarded left behind, or otherwise relinquished his interest in the property so that he no longer had a reasonable expectation of privacy in it. In such circumstances, there is, in essence, no search, at least not in constitutional terms.

However, the court went on to draw a distinction in the fact that the contents of the cellphone were password protected, which the court determined showed a continued expectation of privacy regardless of how the phone itself came to be recovered by law enforcement. The court went on to review cases in which higher courts have discussed the significantly different nature of the information that can be stored on a cellphone from other situations, including a great deal of data that would be wholly unrelated to whatever criminal behavior might be reflected in such a device. A cellphone is simply not the same as anything else.

The bottom line is that before searching an abandoned, password protected cellphone what police must do is simple: get a warrant.

Another recent and somewhat related case allowed the State to successfully move the trial court for an order compelling a defendant to turn over his passcode after a search warrant for a phone had been issued. In that case, the court ruled that doing so did not violate a defendant's rights against self-incrimination because providing the passcode was not "testimonial" information. This, at least, provides some relief to the problem of how to access a passcode protected cellphone even with a warrant. Whether this decision sticks on the inevitable appeal to the Florida Supreme Court remains to be seen. The ruling in State v K.C. likely will. And the entire mess related to searching cellphones will continue to be a problem while this is all sorted out. The bottom line "Get a warrant" advice is the best course.