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*OFFICE OF THE STATE ATTORNEY TENTH JUDICIAL CIRCUIT*

**June 2015**

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## ***SURVIVING REVIEW AT FIRST APPEARANCE AND GETTING CHARGES FILED***

Assistant State Attorney: Meley Lorren

The burden of proof at first appearance is that there is probable cause to believe the person arrested committed the offense alleged in the probable cause affidavit/arrest report. While this burden is relatively low, it is still important to lay out the allegations clearly and completely.

At First Appearances the court is essentially looking for two things:

1. Was a crime committed?
2. Is there probable cause that the person arrested committed the offense?

While these appear to be fairly simple questions, it is important to make sure the arrest report contains all of the elements of the crime alleged within the four corners of the affidavit. The court is allowed to make reasonable inferences however, recently the courts have been reading the affidavits strictly and if the affidavit does not clearly state how the arrestee committed all of the elements of a crime, the court has been declining to find probable cause. Defense counsel (both Public Defender and Private Bar) have been arguing against probable cause when the smallest detail is missing from the affidavit. The court has been agreeing with the defense in that if all of the elements are not spelled out within the four corners of the affidavit, probable cause will not be found. This results in either the case being continued for 24 hours to get more information or the release of the arrestee without having to post any bond or abide by any pre-trial release conditions.

An example of this could be an arrestee charged with burglary where the affidavit indicates

the person entered a building unlawfully but the affidavit does not allege the arrestee did anything to show the intent to commit another crime while inside. Facts supporting each element of the crime charged need to be alleged clearly in the affidavit.

Even the smallest detail is needed to show the elements of the crime alleged. For example, if one of the elements is that an illegal item was brought into the state in violation of the statute then the fact that the item came from another state must be included in the affidavit (i.e. a package containing narcotics originated in Texas and was delivered to an address in Florida).

Another example of a technical fact not being covered is when an enhancement is being alleged. For example in Felony Battery or Petit Theft charges based on prior convictions, most judges are requiring that the arresting officer list the prior conviction in the affidavit. While the court has access to the arrestee's record, if the prior conviction is not alleged in the four corners of the probable cause affidavit, the court will only find probable cause for the lesser offense and often set a lower bond.

Now that the arrest affidavit has made it through first appearance, it then has to make it through intake in order to get the charges filed. It is not only important to make sure a report is complete and accurate to survive a Judge's review at First Appearance, it is vital during the intake stage once the affidavit reaches the State Attorney's Office. While the remainder of this article will address the issues that arise in Misdemeanor cases, the general principles are applicable in felony cases too.



Assistant State Attorney:  
Meley Lorren



Time is of the essence. If an arrestee remains in jail on a misdemeanor charge, he/she may come to arraignment within two weeks or less. The State Attorney's Office has to file a charging document (Information) at arraignment, so a complete probable cause affidavit is crucial.

### Identifying the parties

The probable cause affidavit needs to include all identifying information about the victim as well as the arrestee. Often, I see affidavits that charge crimes like Trespass but fail to list the victim or which lists the victim as the "State of Florida." If there is an actual victim (person, business or local government entity) that information needs to be included in the victim information on the affidavit. The name of the victim needs to be specified rather than just the address. Employees in the Misdemeanor Intake attempt to research this when time allows but it is much more efficient if the victim name is included on the affidavit.

Another example of listing all victim information is in resisting cases. If another officer/deputy was the person actually resisted it is crucial that the officer's full name is listed either in the victim/witness line or somewhere else in the affidavit. Often I see affidavits where one officer is writing the arrest report but another officer was the actual person the resisting was committed against. The arrest reports often only mention the other officer's last name and sometimes a Badge/ID number. The name of the officer that is the victim of the resisting has to be included in the charging document filed by the State Attorney's Office. In most of those cases, a search by the name in the affidavit can be done identify who the officer victim is but if it is a common name such as "Jones" or "Smith" this can be very time consuming and in some cases the correct officer cannot be identified.

### What evidence is there to prove the case?

While the standard at Misdemeanor Intake is still probable cause, the intake attorney still has to consider the likelihood of proving the case at trial so that resources are committed to only those cases with a reasonable likelihood of success at trial.

The more detail given in the arrest report the better. Often each misdemeanor case is reviewed fairly quickly at the intake stage as there is a very short turnaround from first appearance until the arraignment.



If there are witnesses (even for the defendant), identify them with a short synopsis of their statements in the arrest report. This assists in determining whether there is any supporting evidence for either party or if the case is going to boil down to a swearing match. Any injuries to either party should also be

documented. Any oddities in the surrounding area is also helpful (i.e. was the room in disarray, any objects damaged, etc.).

By having an arrest report with complete information it not only helps the intake attorney have a clearer picture of what happened, it also aids the trial attorneys in working through discovery and deciding which cases are appropriate to push to trial and which cases need to be worked out early.

For the officer, while ensuring that the probable cause affidavit is clear and complete at the beginning may seem time consuming, it will ultimately save time by preventing the need for supplements on a rush basis for a continued court hearing. This will keep a defendant in custody at first appearance and won't require you to respond to subsequent requests for additional information from the attorneys and it may even prevent a case from being dismissed altogether.



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

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# FROM THE COURTS...

## SEARCH AND SEIZURE – KNOCK AND TALK

The defendant was charged with manufacturing cannabis arising out of evidence discovered by law enforcement following a knock and talk encounter. Law enforcement traveled to the defendant's property based upon an anonymous tip that the owner may be growing cannabis on the property. The defendant lived on a large piece of property, surrounded by a barbed-wire fence, with several "no trespassing" signs posted. The entry point to the property was a chain-link push gate at the entry of a dirt driveway. Police found the gate open and proceeded to drive in, then exited their vehicle about forty yards from the front porch. They then knocked on the door. The knock and talk resulted in the eventual seizure of cannabis. Law enforcement admitted they did not have consent to enter the property and they did not have a warrant. Additionally, there was nothing in plain view that was illegal. The defendant filed a motion to suppress. He presented additional testimony that occasionally parcel delivery drivers come on to his property as do his friends. The trial court denied the motion to suppress. On appeal, the Fifth District reversed the trial court, holding that the evidence should have been suppressed. The Fifth District distinguished a Second District case that found a proper knock and talk where the property was not posted and did not have any other signs that might discourage a person from entering for the purpose of knocking on the front door. The Fifth District held that the defendant had an expectation of privacy that was violated when law enforcement came on to his property. *Bainter v. State*, 39 Fla. L. Weekly D677a (Fla. 5<sup>th</sup> DCA March 28, 2014).

## POSSESSION OF A FIREARM BY CONVICTED FELON -- CONSTITUTIONAL

The Second DCA held that a defendant, who was in possession of a modern firearm, had no legal basis to argue that prior cases, which held that an antique or replica firearms were as applied unconstitutional, meant that the statute was unconstitutional as applied to him. The defendant's conviction was upheld. *Walker v. State*, 39 Fla. L. Weekly D929a (Fla. 2d DCA May 2, 2014).

