LEGAL EAGLE

July 2023

On-Line Threats

Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. never responded. Despite efforts to block him, Counterman would create a new Facebook account and resume contacting her. Several of his messages envisaged violent harm befalling her. The messages put C. W. in fear and upended her daily existence: C. W. stopped walking alone, declined social engagements, and canceled some of her performances resulting in financial harm.

C. W. eventually reported the threats to law enforcement. The State charged Counterman under a Colorado statute making it unlawful to "repeatedly ... make any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... to suffer serious emotional distress." Counterman contended that the State must show that the speaker *intends the messages to be threatening*. Colorado, backed by the Justice Department and a majority of states, said it should be enough that a "reasonable" recipient would feel that physical harm could be imminent, on the basis of the context of the circumstances. However, following Colorado law, the trial court rejected that argument under an "objective standard," finding that a reasonable person would consider the messages threatening.

In reaching its conclusion that the First Amendment was not a bar to prosecution the Colorado Court of Appeals viewed the true-threat issue using an "objective 'reasonable person' standard." *People* v. *Cross*, (Colo. 2006). Under that standard, the State had to show that a reasonable person would have viewed the Facebook messages as threatening. By contrast, the State had no need to prove that Counterman had any kind of "subjective intent to threaten" C. W. The court decided, after "considering the totality of the circumstances," that Counterman's statements "rose to the level of a true threat." Because that was so, the court ruled, the First Amendment posed no bar to prosecution. The court accordingly sent the case to the jury, which found Counterman guilty as charged. On appeal to the U.S. Supreme Court that ruling was reversed.

Issue:

Does the First Amendment require proof that the defendant had some subjective understanding of the threatening nature of his communications? **Yes**.

The Supreme Court ruled that it

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does, however, that a mental state of "recklessness" is sufficient. Thus, the State must show that Defendant consciously disregarded a substantial risk that his communications would be perceived as threatening violence.

Communicating Threats:

While this case arose from a Colorado statute, the Florida law is still of interest. Section 836.10(2) provides: "It is unlawful for any person to send, post, or transmit, or procure the sending, posting, or transmission of, a writing or other record, including an electronic record, in any manner in which it may be viewed by another person, when in such writing or record the person makes a threat to:
(a) Kill or to do bodily harm to another person; or
(b) Conduct a mass shooting or an act of terrorism.

According to the Florida Supreme Court, when "the Legislature has not defined the words used in a [statute], the language should be given its plain and ordinary meaning." Debaun v. State, (Fla. 2017). "When considering the [plain] meaning of terms used in a statute, this Court looks first to the terms' ordinary definitions, which ... may be derived from dictionaries."

With regard to the scienter element the Supreme Court's ruling in *Elonis v. United States*, (2015), is instructive. "The fact that the statute does not specify any required mental state, however, does not mean that none exists.... Although there are exceptions, the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.' *United States v. Balint*, (S.Ct.1922). We therefore generally interpret criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."

Elonis further explained that a communication should not be determined to be a threat based on whether a reasonable person would view the communication as a threat, stating: "Having liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—'reduces culpability on the all-important element of the crime to negligence,' and we 'have long been reluctant to infer that a negligence standard was intended in criminal statutes,' ... Under these principles, 'what the defendant thinks' does matter."

Court's Ruling:

"True threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection. And a statement can count as such a threat based solely on its objective content. The first dispute here is about whether the First Amendment nonetheless demands that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications. Colorado argues that there is no such requirement. Counterman contends that there is one, based mainly on the likelihood that the absence of such a *mens rea* requirement will chill protected, non-threatening speech. Counterman's view, we decide today, is more consistent with our precedent."

"To combat the kind of chill he references, our decisions have often insisted on protecting even some historically unprotected speech through the adoption of a subjective mental-state element. We follow the same path today, holding that the ***State must prove in true-threats cases that the defendant had some understanding of his statements' threatening character***. The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again, guided by our precedent, we hold that a *recklessness standard* is enough. Given that a subjective standard here shields speech not independently entitled to protection—and indeed posing real dangers—we do not require that the State prove the defendant had any more specific intent to threaten the victim."

" 'True threats' of violence is another historically unprotected category of communications. *Virginia* v. *Black*, (S.Ct.2003); see *United States* v. *Alvarez*, (S.Ct.2012). The 'true' in that term distinguishes what is at issue from jests, 'hyperbole,' or other statements that when taken in context do not convey a real possibility that violence will follow (say, 'I am going to kill you for showing up late'). *Watts* v. *United States*, (S.Ct.1969). True threats are 'serious expressions' conveying that a speaker means to 'commit an act of unlawful violence.' Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat, as this Court recently explained. See *Elonis* v. *United States*, (2015). The existence of a threat depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end. When the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow. True threats subject individuals to 'fear of violence' and to the many kinds of

'disruption that fear engenders.' The facts of this case well illustrate how. … But the ban on an objective standard remains the same, lest true-threats prosecutions chill too much protected, non-threatening expression."

"The next question concerns the type of subjective standard the First Amendment requires. The law of *mens rea* offers three basic choices. Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove. A person acts purposefully when he '"consciously desires' a result—so here, when he wants his words to be received as threats. Next down, though not often distinguished from purpose, is knowledge. A person acts knowingly when 'he is aware that [a] result is practically certain to follow'—so here, when he knows to a practical certainty that others will take his words as threats. A greater gap separates those two from recklessness. A person acts recklessly, in the most common formulation, when he 'consciously disregards a substantial [and unjustifiable] risk that the conduct will cause harm to another.' That standard involves insufficient concern with risk, rather than awareness of impending harm. But still, recklessness is morally culpable conduct, involving a 'deliberate decision to endanger another.' In the threats context, it means that a speaker *is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway*.' "

"Among those standards, *recklessness offers the right path forward*. ... Here, as we have noted, that value lies in protecting against the profound harms, to both individuals and society, that attend true threats of violence—as evidenced in this case. The injury associated with those statements caused history long ago to place them outside the First Amendment's bounds. [With a higher standard], we prevent States from convicting morally culpable defendants. *For reckless defendants have done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm.*"

"That standard, again, is recklessness. It offers 'enough 'breathing space' for protected speech,' without sacrificing too many of the benefits of enforcing laws against true threats. As with any balance, something is lost on both sides: The rule we adopt today is neither the most speech-protective nor the most sensitive to the dangers of true threats. But in declining one of those two alternative paths, something more important is gained: Not 'having it all'—because that is impossible—but having much of what is important on both sides of the scale."

"It is time to return to Counterman's case, though only a few remarks are necessary. Counterman, as described above, was prosecuted in accordance with an objective standard. The State had to show only that a reasonable person would understand his statements as threats. It did not have to show any awareness on his part that the statements could be understood that way. For the reasons stated, that is a violation of the First Amendment. Reversed."

Lessons Learned:

The 4th D.C.A. in *T.R.W.* v. State, (4DCA 2023), reviewed the conviction with a *mens rea* analysis. "Our Supreme Court has consistently looked to the United States Supreme Court for guidance as to the application of *mens rea* to criminal statutes. In, *State v. Giorgetti*, (Fla. 2004), the court relied on multiple United States Supreme Court opinions to hold that it 'will ordinarily presume that the Legislature intends statutes defining a criminal violation to contain a knowledge requirement absent an express indication of a contrary intent.' "

"Following the reasoning of *Elonis*, a *mens rea* element must be read into section 836.10. A defendant must have intended to make a true threat, namely that he made a communication *with the knowledge that it will be viewed as a threat*. The trial court in this case considered the youth's intent irrelevant; therefore, based on *Elonis* and *Romero*, the court erred."

"We hold that section 836.10 does contain a *mens rea* component. To prove the commission of a violation of section 836.10, the trier of fact must find that **the defendant transmitted a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat**. As the trial court concluded that the intent of the youth was irrelevant, the court erred."

Counterman argued that the State must show that the he intended the messages to be threatening. Colorado countered that it is enough that a "reasonable" recipient feared that physical harm could be imminent. The Supreme Court said the test was recklessness, that the defendant "consciously disregarded a substantial and unjustifiable risk that his conduct will cause harm to another,"

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On-Line Threats

CHALLENGES THAT ORGANIZATIONS FACE WITH PHISHING SCAMS AND THREATS:

1. Continuous Security Incidences and Breaches

IT executives have dealt with a security incident originating with a deceptive email.

2. Ineffective Responses and Security Protocols

43% of respondents say their phishing response ranges from "totally ineffective" to "mediocre".

3. Too Few Responders are Available for 24/7 Support

Nearly 1/2 of respondents say their biggest challenge is too many threats and too few responders.

4. Employees are Afraid of Security Threats at Work

90% of employees still worry most about email-related threats and scams in the work environment.

5. Many Organizations are Still Unprepared for Security Threats

Even after heavy investing in tech, more than 66% of businesses are still frauded by email-related threats.

6. Phishing Scammers Target Senior Decision-Makers

In 2018, majority of reported phishing scams targeted Directors, VPs and Managers.

7. Increased Weekly Volume of Suspicious Emails

33% of Organizations reported over 1000 weekly suspicious emails and threats.

8. Lack of Training about Security Threats and Scams

Organizations need to train their staff on how to spot and properly report suspicious emails.

Recent Case Law

Miranda—Yet again

Robert Brooks fired multiple shots at an occupied vehicle. The next day, officers obtained a warrant for his arrest. A uniformed SWAT officer executed the warrant two weeks later. The SWAT officer informed Defendant that he was under arrest pursuant to a warrant, but the officer did not identify the nature of Defendant's alleged crimes.

After the arrest, two detectives interviewed Defendant at the police station. At the outset of the interview, Defendant asked whether he was being arrested. One of the detectives responded that it "remains to be seen." The detectives then advised Defendant of his *Miranda* rights. Defendant verbally acknowledged his understanding of each right and signed the *Miranda* form. Later in the interview, Defendant asked if he was **allowed** to have a lawyer present. The detectives answered affirmatively and indicated that the interview would end if Defendant requested counsel. They told Defendant that "there is a warrant for your arrest," and they would not get to hear his side of the story if the interview ended. Defendant asked why he was being arrested. One of the detectives answered that he would tell Defendant before they were finished.

Defendant resumed talking with the detectives. They twice interrupted him to confirm that he wished to continue without a lawyer present. Defendant answered affirmatively. While Defendant admitted to being in the area in question, he never confessed to the shooting or even to hearing the gunshots. Ultimately, the detectives told Defendant why he was under arrest.

The defendant was charged with shooting deadly missiles, possessing a firearm by a convicted felon, and three counts of attempted second-degree murder. Defendant moved to suppress the statements he made in his interview. He claimed that the detectives failed to honor his right to counsel and that the arresting officer failed to comply with section 901.16, F.S. (That statute directs officers to inform arrestees of "the cause of arrest" when executing a warrant).

The trial court denied his motion finding that the arresting officer substantially complied with section 901.16 and that Defendant never *unequivocally* invoked his right to counsel. On appeal, those rulings were affirmed.

Issue:

Is a violation of sec. 901.16 constitutional requiring the suppression of evidence? **No**. Did Defendant's query if he was "allowed to have a lawyer present" sufficient to invoke his right to counsel? **No**.

Arrest Warrant:

Section 901.16 provides: "A peace officer making an arrest by a warrant shall inform the person to be arrested of the cause of arrest and that a warrant has been issued, except when the person flees or forcibly resists before the officer has an opportunity to inform the person, or when giving the information will imperil the arrest. The officer need not have the warrant in his or her possession at the time of arrest but on request of the person arrested shall show it to the person as soon as practicable."

The Florida Supreme Court has held that section 901.16 is subject to a substantial compliance analysis because the statute does not have "a constitutional dimension." *See Johnson v. State*, (Fla. 1995) ("Arrest statutes such as [sections 901.16 and 901.17] are subject to a substantial compliance analysis because they *direct ministerial acts not of a constitutional dimension*.") Under certain circumstances, an officer substantially complies with section 901.16 when he informs the arrestee about the existence of the arrest warrant, even if he fails to identify the charged offense at the time of the arrest. As occurred in this case when the arresting officer advised Defendant of the warrant, thus, Defendant failed to demonstrate that the arresting officer violated the statute.

Miranda and Davis:

Miranda v. Arizona, (S.Ct.1966), set forth clear mandates: "prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney." If a suspect "indicates **in any manner** and at any stage of the process that he wishes to consult with an attorney," *all questioning must cease*.

The Supreme Court revisited the scope of *Miranda* in *Davis v. United States*, (S.Ct.1994). There, the Court confronted a scenario where Davis had executed a written waiver of his rights and expressly agreed to speak to the police. After being questioned for ninety minutes Davis uttered the words, "**Maybe** I should talk to a lawyer." The Court went on to clarify, however, that after *Miranda* rights have been provided, and the suspect then agrees to speak with the police, "if a suspect makes a reference to an attorney that is *ambiguous or equivocal* in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." "Rather, *the suspect must unambiguously request counsel*." The Court ultimately concluded that the statement "maybe I should talk to a lawyer" was not an unambiguous or unequivocal request for counsel.

Court's Ruling:

"Even if Defendant could show a violation of the [arrest warrant] statute, he does not identify any authority that provides him with the remedy he seeks—that is, the suppression of his statements. The plain text of the statute includes no such remedy. *Ham v. Portfolio Recovery Assocs., LLC*, (Fla. 2020) (reiterating that the 'words of a governing text are of paramount concern' and that unless context suggests otherwise, courts read statutes according to their plain, obvious, and common-sense meaning …)."

"Moreover, the absence of suppression as a remedy in section 901.16 is conspicuous because the Legislature has expressly included that remedy in other criminal procedure statutes. For example, the stop and frisk statute, which immediately precedes section 901.16, provides that no evidence obtained in violation of the statute is admissible in any Florida court. Such is also true of the statutes governing drone searches and intercepted wire or oral communications. By not including a similar provision in section 901.16, the Legislature has spoken 'loudly and clearly.' And when a legislative body 'knows how to say something but chooses not to, its silence is controlling.' Thus, adopting Defendant's suppression 'argument would result not in a construction of the statute, but, in effect, an enlargement of it.' "

With regard to Defendant's *Miranda* violation claim the D.C.A. was not in agreement. "Before starting their interview, detectives advised Defendant of all his *Miranda* rights. Defendant acknowledged his understanding of those rights verbally and in writing. He then began answering questions. He stopped during one of his answers to ask whether he could have a lawyer present. On these facts, we see no basis for disturbing the trial court's finding that 'any reasonable police officer, observing Mr. Brooks' demeanor and tone of voice,' would view his inquiry '*not as an unequivocal request for counsel, but instead as a genuine question*' about what was allowed during the interview. See*, Washington v. State*, (1DCA 2018) (affirming the denial of a motion to suppress in a case where the detectives 'reasonably interpreted' the suspect's question, 'Can I call my lawyer?' as an inquiry 'about whether he *could* contact an attorney as opposed to expressing a desire to terminate the interview and speak with counsel at that precise moment')."

"In responding affirmatively to Defendant's inquiry, the detectives reminded him that the right to counsel was among those rights they advised him of at the start of the interview. By *clearly and accurately* answering Defendant's question, the detectives fulfilled their obligation under the law. *See Almeida v. State*, (Fla. 1999) (holding that if a suspect asks a clear question during custodial interrogation about his constitutional rights, officers 'must stop the interview and make a good-faith effort to give a simple and straightforward answer'); *see also State v. Glatzmayer*, (Fla. 2001) (clarifying that *Almeida* does not require officers to 'act as legal advisors or personal counselors for suspects,' but only to 'be honest and fair when addressing a suspect's constitutional rights')."

"The detectives also notified Defendant that if he wanted a lawyer, they would stop the interview, which would prevent them from hearing his version of events. Again, the detectives conveyed accurate legal information. *See Ferguson v. State*, (5DCA 2015) (noting that under *Miranda*, officers must immediately stop interviewing a suspect if he requests counsel). Equipped with this information, Defendant resumed answering questions. He twice confirmed that he wished to talk to the detectives without a lawyer present."

"Having never made an unambiguous request for counsel, Defendant cannot prevail on his *Miranda* claim. Indeed, he twice verified his desire to continue the interview without a lawyer. Defendant's allegation that detectives used the

threat of an arrest to coerce his interview participation is undermined by the fact that the SWAT officer had already told him he was under arrest pursuant to a warrant. Furthermore, while they initially told Defendant that it 'remains to be seen' whether he would be arrested, the detectives ultimately told him 'there is a warrant for your arrest' before he made the statements he later sought to suppress. And contrary to what Defendant suggests, the detectives were not obligated to disclose the reason for his arrest before continuing their interview. *See McKenzie v. State*, (4DCA 2013) (holding that '*Almeida* does not require the interrogating officer to answer a question relating to the substance of the interrogation'); *Barger v. State*, (5DCA 2006) ('We find the trial court correctly held that the statement 'I want to know what I am being charged with' was not a prefatory question concerning Barger's constitutional rights. Therefore, the officers were not required to answer the question before continuing the interview.'); *State v. Jones*, (4DCA 2000) ('The failure of law enforcement officials to inform a suspect in custody of the subject matter of the interrogation, i.e., what offenses he or she will be questioned about, does not affect the suspect's decision to waive the Fifth Amendment privilege in any constitutionally significant manner.')."

The D.C.A. went on to note that an error would not result in a reversal of the guilty verdict because the defendant never confessed or otherwise incriminated himself. "Defendant never confessed to the shooting—or even to hearing the gunshots. The most inculpatory admissions Defendant made were that he drove a silver car around Monaco Drive on July 31st and that he 'flicked ... off' his former girlfriend while in the area. Given the other evidence available to the State, we conclude there is no reasonable possibility that any error here affected the verdict. AFFIRMED."

Lessons Learned:

Because Defendant did not make an unequivocal request for counsel the D.C.A. did not take issue with the detective, when asked by Defendant if he was *allowed* to have a lawyer present, he answered affirmatively, indicating that the interview would end. But he went on to say that if Defendant requested counsel, "they would not get to hear his side of the story if the interview ended." Under other circumstances that response to convince defendant not to request an attorney would have led to the suppression of the interview.

In *Gilbert v. State*, (4DCA 2012), the court ruled: "Almost immediately after defendant invoked his right to counsel, the detectives engaged in interrogation by telling defendant that they were trying to 'protect' him and encouraging him to tell his 'side of the story.' Such statements constitute interrogation*, as they were reasonably likely to elicit an incriminating response*. At no point did the detectives cease interrogating defendant after he made clear that he wanted to have an attorney.."

"In *Cuervo v. State*, (Fla.2007) the Florida Supreme Court found that officers engaged in conduct they could reasonably anticipate would elicit an incriminating response where, after the defendant invoked his right to remain silent, the officers stated, 'Now would be your opportunity if you wish to speak and explain your side of your story, your version of what happened.'"

The rule of law stated in *Miranda* and later cases is simply that once a suspect clearly and unequivocally states that he wants to remain silent, or does not wish to talk to the police, or states he wants a lawyer, or only to deal with the police through a lawyer, all conversation with him must end.

Clarifying statements, as were made by the detective in this case, that are designed to ensure that the suspect understands that requesting an attorney will terminate the conversation with him are NOT allowed.

Brooks v. State
5th D.C.A.
(June 16, 2023)

Officer Trespass

Officer Copeland was on the lookout for a specific vehicle. Based on the registration he returned to the known address during his shift. He saw the vehicle approach the residence while rolling through a stop sign. Officer made a traffic stop just as the vehicle came to a stop in front of the registered address. The driver, Albert Ramirez, was the son of the registered owner. He was already exiting the vehicle, which was now parked in front of his mother's chain link fence. Officer observed Ramirez walk toward the gate, tossing his jacket over the fence into his mother's yard and onto a closed trash bin.

Ramirez then began to walk around the front of the truck, at which point Officer confronted him, patted him down, placed him in handcuffs, and detained him in the back of his patrol vehicle.

Officer advised Ramirez

that he had been stopped because he ran a stop sign, to which Ramirez replied, "My bad." While patting him down, Officer asked Ramirez whether he had any weapons, and he responded that he did not. When asked for permission to search the truck, Ramirez agreed. No contraband was found in the truck.

At this point a backup officer arrived and Officer Copeland asked him to reach over the fence and retrieve the jacket, searching it, he discovered a gun in one of its pockets. Officer Copeland did not request consent to search the jacket or to enter the property. Ramirez was charged with being a felon in possession of a firearm. He moved to suppress the gun, arguing that he did not abandon his jacket by tossing it over his mother's fence and that its search violated his privacy and property rights under the Fourth Amendment. The trial court disagreed, finding Defendant abandoned the jacket when he threw it over the fence. On appeal, that ruling was reversed.

Issue:

Did the Defendant, by tossing his jacket over a fence onto his mother's property, forfeit his property or privacy interest in the jacket, thereby freeing officers to seize and search the jacket without violating the Fourth Amendment? **No**.

Expectation of Privacy:

The Fourth Amendment recognizes and protects not only property interests but certain expectations of privacy in that property as well. *Katz v. United States*, (S.Ct.1967). Thus, when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith v. Maryland*, (S.Ct.1979). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll v. United States*, (S.Ct.1925). Fourth Amendment rights "are personal, and only individuals who actually enjoy the reasonable expectation of privacy have standing to challenge the validity of a government search." *United States v. Cooper*, (11th Cir. 2000). So, to state a valid claim for a violation of the Fourth Amendment, a defendant must allege that he had a constitutionally protected reasonable expectation of privacy in the thing searched or seized. A reasonable expectation of privacy exists if the person has a "subjective expectation of privacy in the object of the search" and " 'society is prepared to recognize as reasonable' the expectation of privacy." *Smith v. Pelham*, (11th Cir. 2021).

Court's Ruling:

"One of the many ways a criminal suspect can forfeit his reasonable expectation of privacy, and thus Fourth Amendment protection, is by abandonment—the quintessential examples being a fleeing suspect who abandons contraband by tossing it to the ground as he runs from police and the suspect who abandons an item by insisting that it does not belong to him. In cases of alleged abandonment, courts look to 'all relevant circumstances existing at the time' to determine 'whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question.' *United States v. Colbert*, (5th Cir. 1973)."

"The [trial] court relied on *Colbert* to conclude that Ramirez abandoned his jacket, and therefore retained no reasonable expectation of privacy in its contents, by tossing it over his mother's fence. But we do not think it can fairly be said that Ramirez manifested an intent to disclaim ownership in his jacket simply by placing it on the private side of his mother's fenced-in property line."

"This would be a different case if Ramirez had dropped his jacket on the public sidewalk and ran away, or if he had insisted before the search that the jacket did not belong to him. It would also be a different case if the evidence demonstrated that Ramirez was not permitted to leave his possessions on his mother's property. But the Government has not offered any evidence to that effect. To the contrary, the evidence offered at the suppression hearing overwhelmingly showed that Ramirez was welcome on the property. [And unlike in other cases] Ramirez did not flee from Officer Copeland or leave his jacket in a public place. … Ramirez, …, did not disclaim ownership of his jacket, did not place it in a public place, and consequently did not walk away in a manner consistent with an intent to abandon it. To the contrary, he tossed it over the fence and onto his mother's property."

"While Ramirez's actions might support the inference that Ramirez intended to conceal his jacket and its contents from Officer Copeland, they do not evince an intent to discard, leave behind, or oth-

erwise disavow an ownership or privacy interest in the jacket. In the absence of alternative arguments from the Government, we hold that Ramirez did not lose his reasonable expectation of privacy in the jacket or its contents, and that Officer Copeland's search was subject to Fourth Amendment constraints."

"It follows that Ramirez did not abandon his property interest in his jacket by tossing it over his mother's fence. … Ramirez's placement of his jacket on family property 'excludes the very idea of abandonment.' He put it for safekeeping where he knew he could find it again, and where he could trust that strangers—if acting lawfully—would be unable to get at it. And so, Ramirez's jacket enjoyed Fourth Amendment protection under *United States v. Jones*, (S.Ct.2012), property -rights formulation too."

" …We, therefore, VACATE Ramirez's conviction and sentence…"

Lessons Learned:

While the front porch is viewed as an implied invitation to enter the property the backyard of a residence is more private because a passerby cannot generally view the area. Any departure from the front walk to the porch, any exploration along the side or the rear of the house by an officer, is off-base and any evidence discovered as a result will be suppressed.

This finding is in accord with the Florida Supreme Court's decision in *State v. Morsman*, (Fla. 1981), that the officers were entitled to approach the front door of the residence, but the warrantless entry into the backyard was an unlawful search. The circumstance allowed the deputy to do no more than knock at the front door.

"The constitutional protection and expectation of privacy in the side and backyard area of the home does not depend on whether someone might be home, or if visitors may sometimes be received at a location other than at the front door. Indeed, the Florida Supreme Court's decision clearly establishes that residents have a constitutionally protected privacy interest in the side and backyard area of their home."

In the present case, the officer had to reach over the locked property line fence to retrieve the jacket thereby violating constitutional rights. That action violated the Fourth Amendment. "The Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."

United States v. Ramirez

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On-Line Threats

Accordingly, the U.S. Supreme Court has made it clear that for a threatening communication to be actionable the test is recklessness. "That standard, again, is recklessness. It offers 'enough 'breathing space' for protected speech,' without sacrificing too many of the benefits of enforcing laws against true threats. *For reckless defendants have done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm.*" That is that he "consciously disregarded a substantial risk that his communications would be viewed as threatening violence."

As stated above, "True threats are 'serious expressions' conveying that a speaker means to 'commit an act of unlawful violence.' Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat, as this Court recently explained. The existence of a threat depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end."

Counterman v. Colorado
United States Supreme Court
(June 27, 2023)