LEGAL EAGLE

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In this issue:

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Lawful but Awful

Officer David Alexander was on foot patrol with his partner in the Galleria Mall. An active shooter incident became known. Approximately five seconds after hearing the initial gunshots, Officer Alexander shot and killed Mr. Bradford. Alexander had seen E.J. Fitzgerald Bradford moving toward two men in the crowd of panicked shoppers. The video clip from the mall surveillance camera indicated that when the armed man was just 10 feet from the others — positioned between the officer and his partner — Officer Alexander shot the subject, killing him. Neither officer had issued a verbal warning.

It was later determined that Bradford was legally authorized to carry his gun under a permit issued under state law and was going toward the sound of the shots in an attempt to assist. His estate sued the officers. The trial court ruled that Officer Alexander's use of deadly force was reasonable under the Fourth Amendment and that, under the totality of the circumstances, providing a verbal warning was not feasible. The Court of Appeals concluded the officer "was forced to make a split-second judgment as to whether Bradford posed a threat of serious physical harm to others."

Issue:

Did the totality of the circumstances justify the Officer's use of deadly force? **Yes**.

Reasonable Use of Force:

The Fourth Amendment to the United States Constitution protects against unreasonable seizures, which include the use of excessive force by law enforcement officers. Shooting Bradford was a seizure under the Fourth Amendment. *Tennessee v. Garner*, (S.Ct.1985). Thus, to be constitutional, it must be reasonable.

The reasonableness of a seizure depends on context: officers may use "some degree of physical coercion or threat" to effect an arrest, but the amount of force must be objectively reasonable under the totality of the circumstances. *Graham v. Connor*, (S.Ct.1989). Important factors considered by the courts for determining reasonableness include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." In deadly force cases, the most critical factor is the immediate danger to officers and members of the public in the area. *Cass v. City of Dayton*, (6th Cir. 2014). Where an officer has probable cause to believe the suspect poses such a threat of serious physical harm, "it is not constitutionally un-

reasonable to prevent escape by using deadly force."

When courts review the use of force the circumstances are considered as they would have appeared to "a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." See, *Graham*. "...It is from that point on that we judge the reasonableness of the use of deadly force in light of all that the officer knew. We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct. Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer." *Plakas v. Drinski*, (7th Cir.). "We are loath to second-guess the decisions made by police officers in the field." *Vaughan v. Cox*, (11th Cir.2003). No precise test or "rigid preconditions" exist for determining when an officer's use of deadly force is excessive. See, *Scott v. Harris*, (S.Ct.2007). Thus, in deciding the merits of a claim of excessive force, the court must determine whether, given all the facts and circumstances of a particular case, the force used was "reasonable" under the Fourth Amendment. "In determining the reasonableness of the force applied, we look at the fact pattern from the perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts and balance the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate." *McCullough v. Antolini*, (11th Cir.2009).

Courts have focused on the need for a verbal warning as a condition precedent to the use of deadly force. "Although a warning is one factor that weighs in favor of reasonableness, the Supreme Court has stressed that '*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force.' Instead, reasonableness is determined based on all the facts and circumstances of each individual case."

"In the light of the Supreme Court's later clarification in *Scott v. Harris*, (S.Ct.2007) of the *Garner* legal standard, we now know ...that an officer's failure to issue a seemingly feasible warning—at least, to a person appearing to be armed—does not, in and of itself, render automatically unreasonable the use of deadly force. See, *Penley v. Weippert*, (11th Cir.2010) (rejecting the argument that *Garner* mandates the issuance of a warning and explaining that this Court has 'declined to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing—particularly where such a warning might easily have cost the officer his life.')." See, *Quiles v. City of Tampa Police Department*, (11th Cir. 2015)."

Court's Ruling:

"Officer Alexander's use of deadly force is reviewed under an 'objective reasonableness' standard, which 'requires a careful balancing of the nature and quality of the intrusion on [Mr. Bradford's] Fourth Amendment interests against the countervailing governmental interests at stake.' *Graham v. Connor*, (1989). Reasonableness is assessed 'from the perspective of a 'reasonable officer on the scene.' ' *Cantu v. City of Dothan, Ala*., (11th Cir. 2020)."

"The operative question in excessive force cases is 'whether the totality of the circumstances justifies a particular sort of ... seizure.' *Cnty. of L.A. v. Mendez*, (S.Ct.2017). Generally speaking, a law enforcement officer is permitted to use deadly force if he '1. has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, 2. reasonably believes that the use of deadly force was necessary to prevent escape, and 3. has given some warning about the possible use of deadly force, *if feasible*.' *Perez v. Suszczynski*,(11th Cir. 2016)."

[Bradford's estate] asserts that the [trial] court improperly granted summary judgment in favor of Officer Alexander because 1. he lacked probable cause to believe that Mr. Bradford presented a serious or deadly threat, and 2. there is a genuine dispute of material fact as to whether a verbal warning was feasible. Given the totality of the circumstances, we reject both arguments." "As noted, we analyze the question [of Fourth Amendment reasonableness] from the perspective 'of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' We thus 'allow 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.' *Plumhoff v. Rickard*, (S.Ct.2014)."

"Here the suspected crime—the shooting of a patron at the Galleria Mall—was a serious one. Under the circumstances, and

given the short amount of time available to him, Officer Alexander reasonably perceived Mr. Bradford to be the shooter and therefore a person who posed an immediate danger to others. Officer Alexander, with only seconds to react, then fatally shot Mr. Bradford when he was just ten feet away from the men. Only five seconds elapsed from the time of the first two gunshots to the time that Officer Alexander discharged his weapon, and only about two to three seconds elapsed from the time Mr. Bradford came into Officer Alexander's line of sight to the fatal shots."

"In our view, Officer Alexander was 'forced to make [a] split-second judgment' as to whether Mr. Bradford posed a threat of serious physical harm to others. 'Perspective ... is crucial to the analysis, and the only perspective that counts is that of a reasonable officer on the scene at the time the events unfolded.' *Tillis ex rel. Wuenschel v. Brown*, (11th Cir. 2021). To a reasonable officer under the circumstances, Mr. Bradford was not a 'fleeing non-dangerous suspect in a non-violent crime,' *Powell v. Snook*, (11th Cir. 2022), or a Good Samaritan trying to render assistance, but rather an armed man in an enclosed crowded space, where gunshots had just been fired, moving toward two men, one of whom appeared injured. Officer Alexander, in other words, had probable cause to believe that Mr. Bradford was the shooter and a serious threat even though he was not in a 'ready fire' position. See, *District of Columbia v. Wesby*, (2018) (explaining that probable cause is satisfied when there is a 'substantial chance of criminal activity'). Mr. Bradford was holding a gun in his hand and at his side, and 'there was nothing to prevent him from shooting at the [two men] in an instant.' *Garczynski v. Bradshaw*, (11th Cir. 2009)."

"As to the need for a prior warning, we 'have declined to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing—particularly where such a warning might easily have cost the officer his life.' *Penley v. Eslinger*, (11th Cir. 2010). Nevertheless, sometimes the feasibility of providing a warning constitutes a disputed issue of fact that a factfinder must resolve. For example, in *Vaughan v. Cox*, (11th Cir. 2003), where the officer drove next to a suspected stolen truck for 30 to 45 seconds, we held that a 'reasonable jury could conclude that [he] had the time and opportunity to warn [the occupants of the truck] that he was planning to use deadly force before he opened fire.' See also *Adams v. City of Cedar Rapids*, (8th Cir. 2023) ('Whether Officer Trimble was able to forego the warning requirement because of a risk to his safety was a factual question in this case.'). We conclude that, under the circumstances he faced, Officer Alexander did not have to issue a warning to Mr. Bradford. Stated differently, the lack of a warning did not make the use of deadly force excessive under the Fourth Amendment."

"The feasibility of a warning is dependent on many variables, two of which are the proximity of the danger to the officer or others and the time available to the officer. See, Seth W. Stoughton, Jeffrey J. Noble, and Geoffrey P. Alpert, *Evaluating Police Uses of Force* (explaining that 'time is the single most important tactical concept in policing,' and that 'generally speaking, the distance between the officer and the subject is inversely correlated with the threat of physical harm')."

"Here, both of these variables weigh against the feasibility of a warning. First, at the time Officer Alexander fired his weapon, Mr. Bradford was just ten feet away from the two men near the railing and was running in their direction with a gun ahead of Officer Alexander and his partner. Second, Officer Alexander had very little time to react; only five seconds elapsed from the sound of the first two gunshots to his use of deadly force, and only two to three seconds elapsed from the time Officer Alexander saw Mr. Bradford running with a gun towards the two men. Mr. Bradford was armed with a gun, and nothing prevented him from shooting at the two men (or anyone else) in an instant. In sum, Officer Alexander did not violate the Fourth Amendment when he fatally shot Mr. Bradford. The shooting was, as the [trial] court noted, undoubtedly tragic. But under governing precedent it was not unconstitutional. Affirmed."

Lessons Learned:

The outcome of this critical incident was undeniably a tragedy. To intercept and halt an active shooter, the officer took a life. Yet the record revealed that the officer's use of force was objectively reasonable considering all the circumstances from a reasonable officer's viewpoint. Thus, no constitutional violation occurred. "Policing in the Age of the Gun", NYU Law Review, (Vol. 98, no. 6, Dec. 2023), reminds us that, "In the mind of the police officer, the lawfully-carried gun can kill just as easily as the illegal one;

(Continued on page 9)

United States
Consumer Product Safety Commission

Fireworks Injuries & Deaths

2023 REPORT

#CelebrateSafely

Safety Tips

- ★ Never allow children to play with or ignite fireworks, including sparklers.
- ★ Make sure fireworks are legal in your area before buying or using them.
- ★ Keep a bucket of water or a garden hose handy in case of fire or other mishap.
- ★ Light fireworks one at a time, then move back quickly.
- ★ Never try to re-light or pick up fireworks that have not ignited fully.
- ★ Never use fireworks while impaired by alcohol or drugs.
- ★ More Fireworks Safety Tips: **cpsc.gov/fireworks**

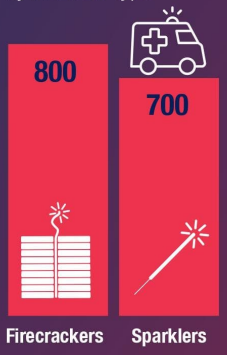
Injuries & Deaths

9,700 people were **treated in ERs** for fireworks injuries in 2023

8 Deaths from Fireworks in 2023

How & When Injuries Occurred

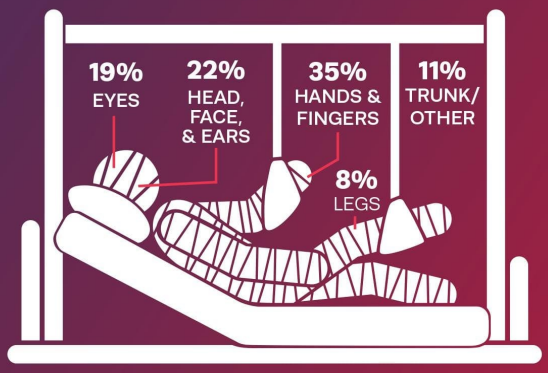
2023 Injuries by Firework Type



66% **of injuries occurred** in the weeks before & after the July 4th holiday

Most Injured Body Parts

42% of the injuries were **burns**



Source: *U.S. Consumer Product Safety Commission 2023 Fireworks Annual Report*

NSN NSN-11-062024

CPSC.gov
USCPSC

Recent Case Law

Disarming an Officer

Officers responded to a theft call from an AT&T store. A store clerk confronted Brandon Thompson about a missing Apple watch. Officers responded to the store, confronted Thompson, and requested to pat him down. He initially agreed but then changed his mind and ran out of the store. Officers gave pursuit. Thompson tripped a fell. Officer Johnson attempted to handcuff Thompson and got on top of him. Thompson then grabbed onto the Officer's holster and firearm with both of his hands and began to pull. Fortunately, Eusebio Santos, a retired New York Police Department officer, saw the officers attempting to subdue Thompson. He got out of his truck to assist. According to Santos, Thompson had "completely gripped" the firearm, had pulled it partially out of the holster, and had his finger on the trigger.

As Santos approached, Thompson pulled the trigger causing a round to fire into the ground. Officers radioed that shots were fired. After the shot, a melee followed with Santos and the officers attempting to get Thompson's hands off of the firearm. The struggle ended when Officer Johnson Tased Thompson and the officers then detained him.

Defendant was charged with being a felon in possession of a firearm. At trial, the Government introduced testimony from Santos and the Officers, as well as video evidence of the altercation which was recorded on the Officer's body camera. Additionally, Officer Johnson testified that his holster had a lever that needed to be switched to remove the firearm from the holster. This made the firearm's trigger inaccessible and invisible while it was *in the holster*. Additionally, the firearm had a safety mechanism that was located within the trigger itself. The trigger had two stages (the safety trigger and the actual trigger) which both had to be pressed fully in order to fire the firearm.

The trial court's jury instruction regarding actual possession provided in pertinent part: "A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. The amount of time a person knowingly has direct physical control over a thing need not be lengthy, a second or two can be sufficient."

Defendant was convicted as charged and appealed. He argued there was insufficient evidence that he had direct physical control of the firearm to support his conviction; and there was insufficient evidence that he knowingly possessed a firearm to support his conviction. On appeal, the conviction was affirmed.

Issue:

Was the testimony of the civilian and police witnesses as to the events during the struggle for the firearm sufficient to establish that Defendant was in actual possession of the firearm? **Yes**.

Possession Defined:

The Supreme Court has recognized that "possession" can be either "actual" or "constructive." *Henderson v. United States*, (2015). "Actual possession exists when a person has **direct physical control** over a thing." Comparatively, "constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object." The concept of "exclusive" control over an object may arise in the constructive possession context. See, *United States v. Johnson*, (10th Cir. 2022). For example, "when a Defendant has exclusive control over the property where contraband is found, a jury can reasonably infer the defendant constructively possessed the contraband." See also, *United States v. Samora*, (10th Cir. 2020) ("Knowledge, dominion, and control can be inferred when a Defendant has exclusive control over the premises in which the firearm was found.").

"Actual possession exists where a defendant has physical possession of contraband." *Scruggs v. State*, (4DCA 2001). Further, consistent with the felon in possession statute and case law holding that either actual or constructive possession will support a felon in possession conviction, the jury needs to be instructed accurately that "possession" could be either actual or constructive. The instruction defined each form of possession, tracking the pertinent portions of Standard

Jury Instruction as follows:

To "possess" means to have personal charge of or exercise the right of ownership, management, or control over.

Possession may be actual or constructive.

Actual possession means,

a. the gun is in the hand of, or on, Defendant person, or

b. the gun is in a container in the hand of, or on, Defendant's person, or

c. the gun is so close as to be within ready reach and is under the control of Defendant.

Court's Ruling:

Defendant argued on appeal that for his possession to have been actual, not constructive, the jury should have been instructed that his possession had to be *exclusive*. The Court disagreed, finding no 10th Circuit authority for such an instruction.

"Given the absence of support for Mr. Thompson's position, we can hardly say that the [trial] court abused its discretion in refusing his requested instruction. Critically, the language of the [given] instruction accurately stated the law and closely tracked the Supreme Court and Tenth Circuit definitions of actual possession. See, *Henderson*, ('Actual possession exists when a person has **direct physical control** over a thing.'); *United States v. Johnson*, (10th Cir. 2022) (explaining that 'a mere second or two' of control can be sufficient for actual possession of a firearm). The [trial] court's decision to focus the jury on whether Mr. Thompson achieved direct physical control of the firearm — the *sine qua non* of actual possession — was appropriate."

"Ample evidence supports the jury's conclusion that Thompson had direct physical control of the firearm. First, video evidence clearly showed that Thompson had both of his hands on the gun and was aggressively pulling on it for much longer than a few seconds before the firearm discharged. The video evidence was bolstered by testimony from Mr. Santos and the officers that Thompson had his hands on the gun, and as Thompson himself acknowledges, supports the reasonable inference that he was the one who pulled the trigger.

"The Government also introduced evidence that the firearm's holster had a securing mechanism that would conceal the trigger unless the firearm was *pulled out of the holster*. Additionally, the firearm's trigger safety mechanism had two stages which both needed to be pressed fully in order to shoot the firearm. Thus, 'viewing all the evidence collectively and in the light most favorable to the Government, a reasonable jury could conclude that Thompson had direct physical control over the firearm.' See, *United States v. Morales*, (10th Cir. 2014). AFFIRMED."

Lessons Learned:

Although the present case did not interpret Florida law, the definition of actual possession, as set out by the Supreme Court, resolves any such issues.

Florida law, specifically F.S. 843.025, is germane to this case analysis. The statute entitled "Depriving officer of means of protection or communication" states:

"It is unlawful for any person to deprive a law enforcement officer …, a correctional officer …, or a correctional probation officer …, of her or his *weapon* or radio or to otherwise deprive the officer of the means to defend herself or himself or summon assistance. Any person who violates this section is guilty of a felony of the third degree, …"

In *Rodriguez v. State*, (4DCA 2006), the court explained, "There are no cases specifically addressing the definition of a weapon or means of defending oneself as applied to section 843.025. …

"We agree with the State and decline to … limit the 'means' to defend oneself to only 'weapons.' It is clear from the title of section 843.025 that it is a third-degree felony to deprive an officer of a means of protection or communication. In the instant case, Deputy Keegan was attempting to gain control of Rodriguez …. Keegan's first choice to protect and defend himself was to resort to the use of handcuffs. Rodriguez's refusal to submit to the arrest and grabbing the handcuffs from Deputy Keegan resulted in Deputy Keegan's use of pepper spray and then his baton to subdue Rodriguez. Clearly, the handcuffs were an instrument used by Deputy Keegan to *protect and defend* himself. We therefore affirm the conviction and sentence. Affirmed."

The Florida Jury instructions adopted in 2013, are also helpful here:

To prove the crime of Depriving an Officer of Means of [Protection] [Communication], the State must prove the following two elements beyond a reasonable doubt:
1. Defendant deprived (victim) of [his][her] [weapon] [radio] [means to defend [himself] [herself]] [means to

summon assistance].
2. At the time, (victim) was a [law enforcement officer] [correctional officer] [correctional probation officer].

"Law enforcement officer" means any person who is elected, appointed, or employed full-time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. [This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.]

Lastly, while in the present case the attempt to disarm the officer and take control of his firearm failed those acts were also actionable under the Theft statute. That statute makes "endeavoring" to steal punishable as theft. § 812.014(1), F.S. "A person commits theft if he or she knowingly obtains or uses, or *endeavors* to obtain or to use, the property of another with intent to, either temporarily or permanently:
(a) Deprive the other person of a right to the property or a benefit from the property.
(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.
(c) It is grand theft of the third degree and a felony of the third degree, … if the property stolen is:
5. A firearm."
See, *Strattan v. State*, (1DCA 2001).

United States v. Thompson
U.S. Court of Appeals, 10th Cir.
(April 15, 2025)

Porch Pirates

A home resident was expecting an Amazon package delivery. When she did not observe the package on the porch by the front door, she checked the video feed from the Ring security camera. She observed a woman taking the packages from in front of the house. The victim provided a description of the woman, including a tattoo located behind her ear. The crime scene investigator testified she took photos of the Defendant after the arrest. She noted the Defendant's specific features, including tattoos. The Defendant was charged with residential burglary. The jury found her guilty of burglary, dwelling unoccupied, a lesser-included offense of burglary of an occupied dwelling. On appeal, the Defendant argued that the front porch did not qualify as a dwelling. The D.C.A. disagreed.

Issue:

Does a porch constitute the curtilage of a home for the purposes of the Burglary statute? **Yes**.

Curtilage of the Home:

'Dwelling' as used in section 810.011(2) is defined as "a building or conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the *curtilage* thereof." However, section 810.011 does not define 'curtilage,' even though a definition is crucial to comprehending the full scope of the crime of burglary.

In a burglary context, Florida courts have quoted with approval the current jury instruction for "structure" which interprets curtilage to mean the enclosed grounds immediately surrounding the building. Utilizing this logic, the Florida Supreme Court held in *State v. Hamilton*, (Fla.1995), that "some form of an enclosure [is required] in order for the area surrounding a residence to be considered part of the 'curtilage' as referred to in the burglary statute."

Further, *L.K.B. v. State*, (5DCA 1996), extended the Supreme Court's ruling in *Hamilton* to the trespass statute, holding that because both burglary and trespass rely on the definition of "structure" found in section 810.011(1), there was no reasonable basis to limit *Hamilton* to burglary cases. In the present case, the Defendant argued that a "porch" is more akin to "an additional room attached to the home" and that a porch under the burglary statute must have some type of enclosure for the area to be considered part of the curtilage. The State, however, responded that the area was both an attached porch within the dwelling definition and a structure within the burglary statute.

Court's Ruling:

"An accused commits burglary by 'entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein.' 810.02(1)(b), F.S. Florida defines a 'dwelling' as 'a building or conveyance of any kind, including any *attached porch*,

whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof.' 810.011(2), F.S."

The Defendant relied on prior cases that found a concrete slab carport adjacent to the home not to be curtilage. The 4th D.C.A., referencing its own earlier rulings, and disagreed.

"Yet, other cases have found their respective areas in question to be within the curtilage of the house. *Medrano v. State*, (4DCA 2016) (carport sharing one wall with the house was a porch); *Small v. State*, (4DCA 1998) (open carport attached to a residence and walled on one side was a dwelling); *Weber v. State*, (5DCA 2001) (unenclosed, but covered porch/patio was an attached porch)."

"We find this case most like *Morlas v. State*, (4DCA 2017). There, the Defendant tried to break into the victim's house through a door but aborted the mission when he could not get inside. The State charged him with burglary of a dwelling, among other charges. The area in question … constituted an 'attached porch.' [In the present case], the area is covered by the same roof that covers the rest of the house. It is adjacent to and touching the front door and had several of the victim's belongings in it, including a 'welcome' rug. In short, the area constitutes a porch. The trial court did not err in denying the Defendant's motion for judgment of acquittal. AFFIRMED."

Lessons Learned:

On April 9, 2024, Gov. DeSantis signed into law Florida's Porch Piracy, Sec. 812.014 (2)(d)1., making the act of stealing packages from someone's porch a 3rd degree felony:

"It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is valued at $40 or more, but less than $750, and is taken from a dwelling as defined in s. 810.011(2) or from the unenclosed curtilage of a dwelling pursuant to s. 810.09(1)."

The new law, effective October 1, 2024, made it a third-degree felony to steal items valued at $40 or more from a dwelling, which includes the porch area. Stealing items under $40 is a first-degree misdemeanor, but a subsequent theft of any amount, even if under $40, can be charged as a third-degree felony if the Defendant has a prior theft conviction. Obviously, porch thieves can also face burglary charges if they enter the curtilage of a dwelling or structure with the intent to commit a crime, even if they don't steal anything.

Also to consider:
Palm Beach County Planning, Zoning and Building Division, Policy and Procedure, PPM#PBO-089, Residential Patio and Porch Enclosures, and Sunrooms, (and other County provisions like it) sets out the Florida Building Code requirements for these areas. Which should be of assistance in presenting to the trial court the needed basis to argue the area entered by the Defendant constituted an integral part of the dwelling.

Krasner v. State
4th D.C.A.
(June 11, 2025)

Felon in Possession

Defendant was convicted of the misdemeanor charge of carrying a concealed weapon. He reserved his right to appeal the denial of his motion to dismiss the State's original felony charge of possession of a firearm by a convicted felon. His primary argument was that the statute was unconstitutional under the Second Amendment because his felony convictions had occurred thirteen years earlier. The 4th D.C.A. disagreed and affirmed the conviction.

Issue:

Is the prohibition on the possession of firearms by convicted felons in violation of the 2nd Amendment? **No**.

Right to Bear Arms:

"The right to keep and bear arms is among the 'fundamental rights necessary to our system of ordered liberty.' *McDonald v. City of Chicago*, (S.Ct.2010). *That right, however, is not unlimited,' District of Columbia v. Heller*, (S.Ct.2008). The reach of the Second Amendment is not limited only to those arms that were in existence at the Founding. Rather, it 'extends, prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence.' By that same logic, the Second Amendment permits more than just regulations identical to those existing in 1791."

"Under our precedent, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin the Nation's regulatory tradition. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, (S.Ct.2022). When firearm regulation is challenged under the Second Amendment, the Government must show that the restriction 'is con-

sistent with the Nation's historical tradition of firearm regulation.' A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances.' "

"Together, the surety and going armed laws confirm what common sense suggests: *When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed*. …" *United States v. Rahimi,* (S.Ct.2024).

Court's Ruling:

"Binding precedent from the United States Supreme Court requires us to conclude both arguments lack merit. See, *District of Columbia v. Heller*, (2008) ('Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.'); *McDonald v. City of Chicago*, (2010) ('We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as prohibitions on the possession of firearms by felons.') *N.Y. State Rifle & Pistol Ass'n v. Bruen*, (2022) (quoting *Heller* and *McDonald*); *United States v. Rahimi*, (2024) ('[*Heller*] stated that many such prohibitions, like those on the possession of firearms by felons ... are presumptively lawful.'). See also, *Edenfield v. State*, (1DCA 2023) ('The majority of cases post *Bruen* that have applied its historical traditions test have upheld the prohibition on felons possessing firearms.') *United States v. Jackson*, (8th Cir. 2024) ('There is no need for felony-by-felony litigation regarding the constitutionality of [18 U.S.C.] § 922(g)(1).'); *United States v. Hunt*, (4th Cir. 2024) (concluding, like the Eighth Circuit, that 18 U.S.C. § 922 (g)(1) is constitutional as applied to all convicted felons, and no need exists for felony-by-felony litigation). But see, *Range v. Attorney General*, (3d Cir. 2024) ('The record contains no evidence that Range poses a physical danger to others. Because the Government has not shown that our Republic has a longstanding history and tradition of depriving people like Range of their firearms, [18 U.S.C.] § 922(g)(1) cannot constitutionally strip him of his Second Amendment rights.')."

"On the Defendant's remaining argument—that the Circuit Court fundamentally erred by denying his motion to dismiss because the State allegedly failed to carry its burden under *Bruen* to 'affirmatively prove that [the subject] firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms'—we affirm without further discussion. Affirmed."

Lessons Learned:

United States v. Rahimi, (S.Ct.2024) is instructive here. Following the denial of the Defendant's motion to dismiss the indictment, he pleaded guilty to possessing a firearm while subject to a domestic violence restraining order. Defendant appealed. The United States Supreme Court ruled that the statute under which Defendant was convicted, which was based on a finding that he posed a credible threat to the physical safety of another, was facially constitutional under the Second Amendment.

Fleming v. State
4th D.C.A.
(April 23, 2024)

(Continued from page 3)

Lawful but Awful

It is never more than a moment away from doing so."

The Court in the present case summed up their opinion with the following: "Christopher Fry, the English playwright, remarked that 'in tragedy every moment is eternity.' Tulane Drama Review (March 1960). Those words are both an accurate comment about the human condition and a poignant truth about those who have to bear the weight of calamity. But they do not negate the undeniable reality that, as here, tragedy can strike in an instant.

"In an effort to prevent harm to others, Officer Alexander shot and killed Mr. Bradford, whom he mistakenly thought was the shooter at the Galleria Mall. That use of deadly force, within seconds of the initial gunshots, unfortunately and tragically took the life of a Good Samaritan who was trying to render assistance. Given the circumstances, however, Officer Alexander acted reasonably and did not violate the Fourth Amendment. The operative complaint, moreover, did not state plausible claims against the Mall defendants under [state] law. The [trial] court's dismissal and summary judgment orders are affirmed."

A tragedy for sure, but also a sad learning opportunity for officers and citizens lawfully in possession.

Pipkins v. City of Hoover, AL
U.S. Court of Appeals, 11th Cir.
(April 17, 2025)