

LEGAL EAGLE

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False Arrest with Force

Municipal police officers responded to a reported physical attack at a nursing home. The call described three suspects: two Black females and one Black male with dreadlocks. At the scene, an employee informed the officers that the assailants had fled across the street. While they were speaking, Terrell Daniels arrived. He was a Black male with dreadlocks, tied up in a bun, and was wearing a black shirt. He briefly shouted toward the nursing home staff.

Officers Blakley and Wood returned to the nursing home, where they viewed a nurse's cellphone video of the altercation. Officer Wood asked whether the man who had just yelled at the staff across the street—Daniels—was the person in the video. An employee said 'yes.'

The officers returned to the house. Daniels was standing in the driveway. Officer Blakley ordered him to put his hands behind his back, and Daniels appeared to comply. Officer Blakley grabbed his wrists, and as Officer Wood approached to apply handcuffs, Daniels stiffened his shoulders and pulled forward.

The officers took him to the ground. Officer Blakley, with a leg across Daniels's back, held him down while Officer Montgomery handcuffed him. Daniels protested

that he had done nothing wrong. Officer Wood replied, "We have you on video," and told him he was going to jail.

Before they reached the patrol car, a nurse from the nursing home stopped the officers and said Daniels was not the man in the video. She described the actual suspect as shorter and darker-skinned. The officers then uncuffed Daniels and released him. The entire detention lasted just under four minutes.

Daniels sued the officers alleging various claims under state and federal law for false arrest. The trial court granted summary judgment for the defendant officers, finding that they violated no constitutional rights and thus qualified immunity barred all claims. On appeal, the 11th Circuit affirmed the trial court's ruling.

Issue:

Did the officers violate Defendant's Fourth Amendment rights against wrongful arrest? **No.**

Did the officers violate Defendant's Fourth Amendment rights against excessive use of force? **No.**

Reasonable Mistake:

In *Hill v. California*, (S.Ct.1971), the Supreme Court concluded that arresting a man named Miller in the mistaken belief that he was Hill—who

Officers should consult with their agency advisors to confirm the interpretation provided in this publication and to what extent it will affect their actions.

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the police had probable cause to arrest—did not violate the Constitution. The Supreme Court stated that the “mistake was understandable and the arrest [was] reasonable” because Miller fit Hill’s description, the Officers discovered Miller inside Hill’s home, and Miller’s “explanation for his mode of entry into Hill’s apartment was not convincing.” The Court determined that the Officers had a “reasonable, good faith belief that Miller was in fact Hill” even though Miller maintained his innocence and produced forms of identification.

The 11th Circuit in *Rodriguez v. Farrell*, (11th Cir. 2002), relying on the *Hill* decision, concluded that officers “committed no constitutional violation” when they arrested Victor Heredia during a nighttime traffic stop for a warrant issued for Joe Rodriguez. Heredia used Rodriguez’s name as an alias. The court explained that the failure to notice “small differences” in the men’s appearances did not make the mistaken identity unreasonable because the officers had to make a prompt determination while “in the field and not in a police station.”

The court in *Nerio v. Evans*, (5th Cir. 2020), ruled, “We carefully considered the plaintiff’s claims and found them wanting. We noted that **‘reasonable mistakes by police officers, even leading to the arrest of the wrong person, do not implicate the Fourth Amendment.’** And the officers’ identification of the plaintiff was just that sort of mistake. We therefore concluded that the Officers hadn’t violated his Fourth Amendment rights at all, much less any rights that were clearly established. AFFIRMED.”

Reasonable Force:

The Fourth Amendment provides a “right of the people to be secure in their persons ... against unreasonable ... seizures.” This right “encompasses the plain right to be free from the use of excessive force.” The Fourth Amendment’s objective reasonableness standard governs the excessive force inquiry. *Graham v. Connor*, (S.Ct.1989). “With respect to a claim of excessive force ... not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment.”

In determining the reasonableness of the force applied, courts will 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). A court must look at the “totality of the circumstances” in making this assessment. *Tennessee v. Garner*, (S.Ct.1985).

The Supreme Court has identified a non-exhaustive list of factors to consider under the totality of the circumstances, including “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 for flight.” Other considerations are “the need for the application of force, the relationship between the need and the amount of force used, the extent of the injury inflicted, and whether the force was applied in good faith or maliciously and sadistically.” *Baker v. City of*

Madison, Alabama, (11th Cir. 2023).

“The calculus of reasonableness must embody the 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.” *Graham v. Connor* (1989).

Court’s Ruling:

“First, we must determine the nature of Daniels’s detention: whether it was a brief investigatory stop under *Terry v. Ohio*, (S.Ct.1968), or a full-blown arrest requiring probable cause. *United States v. Acosta*, (11th Cir. 2004) (distinguishing a *Terry* stop from an arrest). We treat Daniels’s detention as an arrest. The Officers placed Daniels in handcuffs, told him he was ‘going to jail,’ and began escorting him toward a patrol car. They asked him no questions and did not respond when he told Officers he had an alibi. Under the factors we use to determine whether a stop was a *Terry* stop or arrest—including the scope, intrusiveness, and purpose of the stop—this amounted to an arrest.”

“That brings us to probable cause. An arrest is lawful if the Officers had probable cause to believe that Daniels committed an offense. Even if actual probable cause was lacking, qualified immunity applies so long as the officers had *arguable probable cause*—that is, if a reasonable officer in the same situation could have believed that probable cause existed.”

“Here, the officers had arguable probable cause. They responded to a reported altercation at a nursing home involving a Black male with dreadlocks. Daniels

matched that description—he is a Black man with dreadlocks, and he appeared at the scene wearing a black shirt, shortly after one of the female suspects arrived. A nurse showed the officers a grainy cell-phone video of the fight, which appeared to depict a Black male with dreadlocks kicking staff. When one officer asked a witness whether Daniels was the man in the video, the witness said ‘yes.’ Daniels also yelled at the nursing home staff while officers were on scene, further linking him to the altercation. Given the totality of the circumstances—the description, the video, the eyewitness identification, and Daniels’s conduct—reasonable officers could have believed he was the suspect. That is more than enough to satisfy the forgiving standard of arguable probable cause. The [trial] court correctly granted summary judgment on this claim.”

“Daniels next contends that the officers used excessive force in taking him to the ground and handcuffing him. That claim also fails. The Fourth Amendment prohibits officers from using excessive force when seizing a person. The inquiry is objective: whether the force used was reasonable under the circumstances. See *Graham v. Connor*, (1989). Courts evaluate the need for force, the relationship between the need and the amount of force used, and the extent of any injury. See *Vinyard v. Wilson*, (11th Cir. 2002).”

“Here, Daniels was suspected of a violent attack on nursing home staff. Officers had seen a video of the attack and had been told that Daniels was the man shown kicking a nurse. When Officer Blakley ordered Daniels to put his hands

behind his back, Daniels appeared to comply. But as Officer Wood moved in to apply the handcuffs, Daniels stiffened his shoulders and pulled forward. A struggle ensued, and the officers brought him to the ground. Officer Blakley applied pressure across Daniels’s upper legs while Officer Montgomery cuffed him. Daniels was on the ground for under a minute and in handcuffs for less than four. And while he says he was injured, Daniels has never identified any specific injury—nor does the bodycam footage suggest visible harm.”

“This level of force was minimal. The officers did not use strikes, chokeholds, or weapons. They did not yell or escalate. They quickly subdued a suspect whom they reasonably believed to be violent. That conduct was neither objectively unreasonable nor constitutionally excessive. See, *Durruthy v. Pastor*, (11th Cir. 2003) (‘Even if the force applied by [the officer] in effecting the arrest—forcing [the suspect] down to the ground and placing him in handcuffs—was unnecessary, plainly it was not unlawful. The amount of force used was *de minimis*.’); *Nolin v. Isbell*, (11th Cir. 2000) (This Circuit has established the principle that **the application of *de minimis* force, without more, will not support a claim for excessive force in violation of the Fourth Amendment.**’). Because the force used was objectively reasonable, the officers committed no constitutional violation and are entitled to qualified immunity. The District Court’s judgment is AFFIRMED.”

Lessons Learned:

“An officer can stop and briefly

detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks probable cause.” *Cortez v. McCauley*, (10th Cir. 2007). ‘The reasonable suspicion necessary to justify such a stop is dependent upon both the content of information possessed by police and its degree of reliability.’ See, *Navarette v. California*, (S.Ct.2014).”

In *Fields v. City of Tulsa, OK*, (10th Cir. 2023), the court ruled: “Here, the undisputed material facts establish that an investigative detention was permissible because the officers had reasonable suspicion to believe that Mr. Fields may have violated Oklahoma’s domestic abuse and domestic assault statutes. Oklahoma law prohibits ‘domestic abuse,’ which it defines as ‘any act of physical harm or the threat of imminent physical harm which is committed by an adult ... against another adult ... who is currently or was previously an intimate partner or family or household member.’ ... Ms. Warren’s allegations against Mr. Fields were sufficient for the officers to believe that Mr. Fields had threatened her. She had informed the police that they were going through a divorce, that he had approached her car before dawn in a parking lot, and that he had wielded a hammer against her. **Even if these allegations would be insufficient to convict Mr. Fields of a crime, they were sufficient, at a minimum, to create reasonable suspicion.**”

Daniels v. Blakley
U.S. Court of Appeals – 11th Cir.
(May 28, 2025)

SIGNS OF HEAT ILLNESS

Heat Exhaustion	Heat Stroke
<p>Faint or dizzy</p> <p>Excessive sweating</p>	<p>Throbbing headache, confusion</p> <p>No sweating</p>
<p>Cool, pale, clammy skin</p>	<p>Body temperature above 103°F</p> <p>Red, hot, dry skin</p>
<p>Nausea or vomiting</p>	<p>Nausea or vomiting</p>
<p>Rapid, weak pulse</p>	<p>Rapid, strong pulse</p>
<p>Muscle cramps</p>	
TAKE ACTION	
<p>MOVE to a cooler place</p> <p>COOL with ice/cold water and lay down</p> <p>DRINK cool water or sports drinks</p> <p>CALL 9-1-1 if symptoms last longer than 1 hour</p>	<p>CALL 9-1-1 IMMEDIATELY</p> <p>MOVE the person to a cool, shaded area</p> <p>COOL the person with a cold water or ice bath, or by placing ice packs on the neck, armpits, and groin areas</p>

Source: *Signs of Heat-Related illness: Maricopa County, AZ*

Police officers face severe heat risks due to heavy protective gear, prolonged outdoor exposure at traffic stops or crime scenes, and intense physical exertion. These conditions significantly increase the likelihood of heat exhaustion, heat stroke, and cognitive fatigue. Extreme heat has also been linked to increased aggressive tendencies and higher rates of violent encounters.



Recent Case Law

Invocation of Counsel

Jorge Hurtado was questioned by the U.S. Army Criminal Investigative Command (CID). During the interview, Special Agent NL asked Defendant whether he had “ever requested a lawyer after being read [his rights].” Defendant replied, “no this is the first time.” NL next asked, “Do you want a lawyer at this time?” to which Defendant responded, “I mean, I would like to speak to a lawyer, but, um, yeah.” NL replied, “Okay,” before re-asking: “So you want a lawyer at this time?” NL then explained to Defendant what the process would be if he invoked his right to counsel. Defendant ultimately made various admissions to the charged offenses.

Defendant filed a motion to suppress his statement to law enforcement because he had unequivocally invoked his right to counsel prior to questioning. The military judge granted the motion, on appeal to an interim court that ruling was reversed. In the lower court’s view, Defendant’s expressed desire to speak to a lawyer, immediately followed by “but” signaled a contradictory intent. However, the U.S. Court of Appeals for the Armed Forces reversed that ruling, finding that Defendant’s statement would be understood by a reasonable law enforcement officer as a clear request for counsel.

Issue:

Was the Defendant’s statement a clear and unequivocal invocation of

his right to counsel? **Yes.**

Right to Remain Silent:

In *Miranda v. Arizona*, (S.Ct.1966), the Supreme Court held that whenever a criminal suspect is subjected to custodial interrogation, he must be advised of certain rights, including his right to remain silent. When the police fail to give the required warnings, “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant.” When the police do give the warnings, the Court explained, the suspect has a “right to cut off questioning” that must be “*scrupulously honored*.” “If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease”

The Supreme Court has subsequently clarified that the suspect’s right to cut off police questioning is triggered only when the suspect unambiguously and unequivocally asserts it, by invoking either the right to remain silent or the right to counsel. Thus, the Court has found that remaining “largely silent” during an interrogation or saying “Maybe I should talk to a lawyer,” is not enough. When it is objectively unclear whether the suspect is invoking his *Miranda* rights, the police may continue to ask questions.

However, the cases requiring clear and unequivocal assertion of *Miranda* rights are not a license for the police or the courts to override a suspect’s clearly expressed

request to remain silent. “A suspect need not ‘speak with the discrimination of an Oxford don.’ ” Rather, he need only “articulate his desire to [remain silent or] have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be [such] a request.”

In *Smith v. Illinois*, (S.Ct.1984), the Supreme Court explained that “where nothing about the request ... or the circumstances leading up to the request would render it ambiguous, all questioning must cease.” In such circumstances, the Court held, **it is improper for an officer to attempt to clarify the request**; indeed, there is nothing to “clarify.” Accordingly, if an officer seeks to clarify an unambiguous request and elicits an equivocal response, the suspect’s post-request statements “may not be used to cast retrospective doubt on the clarity of the initial request itself.” As occurred in the present case, after Defendant asserted his desire for counsel the Investigator explained to him what the process would be if he invoked his right to counsel, thereby inducing the incriminating statements. The *Smith* Court explained that *Miranda* was a “bright-line prohibition”—a rule necessary to prevent the authorities from “wearing down the accused and persuading him to incriminate himself notwithstanding his earlier request.”

Court’s Ruling:

“Supreme Court precedent is clear ‘that when an accused has invoked

his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.’ *Edwards v. Arizona*, (S.Ct.1982).”

“To effectively invoke the right to counsel and trigger the *Miranda/Edwards* protections, ‘the suspect must unambiguously request counsel.’ Whether a suspect has done so ‘is an objective inquiry.’ See, *Connecticut v. Barrett*, (S.Ct. 1987). Thus, the suspect must ‘articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.’ Once a suspect unambiguously invokes the right to counsel, authorities must immediately cease questioning. *Michigan v. Mosely*, (S.Ct.1975). However, should that statement ultimately be ambiguous, indicating that ‘the suspect might be invoking the right to counsel, [Supreme Court] precedents do not require the cessation of questioning.’ ”

“The Government further contends that [Defendant’s] use of ‘like,’ ‘but,’ and ‘um’ rendered his statement equivocal. As noted above, the determination of whether an invocation is unambiguous (requiring the agents to immediately terminate the questioning) or ambiguous (permitting further clarifying questions) is an objective inquiry based upon how a ‘reasonable police officer’ would view the comments. The military judge found that [Defendant] unequivocally invoked his right to counsel when he stated, “I mean, I would like to speak to a

lawyer, but um, yeah.” Viewing the evidence in the light most favorable to [Defendant], a reasonable law enforcement officer would understand “I would like to speak to a lawyer” as a clear request for counsel, and the intervening filler phrase “but um,” followed by the affirmative “yeah,” does not change that meaning.”

“In ordinary speech, filler words such as ‘but um,’ often serve as conversational hesitations rather than signaling a retraction of the speaker’s expressed intent, particularly in a stressful custodial interview. That [Defendant’s] statement included such filler words does not render his request ambiguous, especially where he both began by expressing a desire to speak with a lawyer and ended with an affirmative ‘yeah.’ ... A reasonable law enforcement officer hearing [Defendant’s] statement would therefore understand it as a request for an attorney, triggering the obligation to cease questioning.”

“The military judge correctly determined that [Defendant] unequivocally invoked his right to counsel, and once he did so, law enforcement was required to cease questioning. Because CID continued questioning [Defendant] after that invocation, the military judge did not abuse his discretion in suppressing [Defendant’s] subsequent statements.”

Lessons Learned:

The rule could not be simpler. The Supreme Court in *Miranda v. Arizona* said that when a suspect “indicates in any manner ... that he wishes to remain silent, the interrogation must cease.”

Miranda could not have

been more clear on this point: when an “individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” Once he has exercised “the right to cut off questioning,” his right must be “*scrupulously honored.*” **Clarifying questions are the antithesis to this rule.**

This “bright-line” rule is designed to protect interrogated suspects from police “ ‘badgering’ or ‘overreaching’—explicit or subtle, deliberate or unintentional.”

Once asserted, only the suspect, by reinitiating contact with law enforcement, can reopen the lines of communication.

United States v. Hurtado
U.S. Court of Appeals –
Armed Forces
(March 23, 2026)

Possession of a Machinegun

A grand jury indicted Maxon Alsenat for possession of a machinegun. 18 U.S.C. § 922(o)(1). The indictment alleged that he knowingly possessed a machinegun conversion device, which meets the statutory definition of a machinegun. Alsenat moved to dismiss the indictment on the grounds that section 922(o)(1) violates the Second Amendment as applied to adult citizens with no felony convictions.

After the trial court denied his motion to dismiss the indictment, Alsenat pleaded guilty. He renewed his challenge to the constitutionality of section 922(o) on appeal. Because machineguns are not protected by the Second Amendment as weapons in common use for lawful purposes, the 11th Circuit affirmed.

Issue:

Does the Second Amendment protect the possession of machineguns? **No.**

Bruen Ruling:

In simple terms, two average citizens who sought unrestricted licenses to carry a handgun in public, together with a public-interest group organized to defend the 2nd Amendment rights of New Yorkers, brought § 1983 civil rights action against the New York State Police and an individual licensing officer. The Plaintiffs argued that the denial of their license applications for failing to satisfy New York’s “proper cause” standard, under which the applicants had to demonstrate a special need for self-protection as differentiated from that of the general public, violated their Second and Fourteenth Amendment rights. The case made its way to the U.S. Supreme Court, where they found the City’s licensing requirements violative of the 2nd Amendment as inconsistent with the “principles that underpin” our nation’s historical tradition of firearm regulation. See, *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022).

The Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home. Thus, the City’s special needs scrutiny did not apply in the Second Amendment context. And New York’s “proper cause” standard violated the 14th Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms.

“The Second Amendment provides that ‘a well-regulated Militia, being necessary to the security of

a free State, the right of the people to keep and bear Arms, shall not be infringed.’ The phrase ‘keep and bear Arms’ cannot be divorced from the text that immediately precedes it— ‘the right of the people.’ This right of the people is to be interpreted based on the scope of the historical right ‘inherited from our English ancestors.’ See, *District of Columbia v. Heller*, (S.Ct.2008) (quoting *Robertson v. Baldwin*, (S.Ct.1897)). And *Heller* further cautioned that like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry *any weapon whatsoever* in any manner whatsoever and for whatever purpose; (noting that ‘nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.’). See, *United States v. Rahimi*, (S.Ct.2024) (‘At the founding, the bearing of arms was subject to regulations ranging from rules about firearm storage to restrictions on gun use by drunken New Year’s Eve revelers. Some jurisdictions banned the carrying of ‘dangerous and unusual weapons.’ Others forbade carrying concealed firearms.’ ”

“Most relevant here, *Heller* concluded that ‘the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.’ That is, the Court recognized that an

‘important limitation on the right to keep and carry arms’ existed regarding the ‘sorts of weapons protected.’ Drawing on its opinion in *United States v. Miller*, (S.Ct.1939), the Court recognized that a limitation on the types of weapons protected was supported by the ‘historical tradition of prohibiting the carrying of dangerous and unusual weapons.’ ”

Court’s Ruling:

“The Supreme Court in *District of Columbia v. Heller* (2008), made clear that the Second Amendment ‘does not protect those weapons *not typically possessed by law-abiding citizens* for lawful purposes.’ It surveyed a host of ancient sources and concluded that such a ‘limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.’ ”

“In *Heller*, the Court also grounded the constitutionality of banning the possession of machineguns in this historical understanding. The Court stated that it would be ‘startling’ to conclude that Federal ‘restrictions on machineguns ... might be unconstitutional.’ And it reiterated that ‘weapons that are most useful in military service—M-16 rifles and the like—may be banned.’ ”

“The Supreme Court has made clear, in other contexts, that machine guns are not weapons in common use for lawful purposes. See, *Staples v. United States*, (1994) (‘Certain categories of guns—no doubt including the machineguns ... that Congress has subjected to regulation—[are] items the ownership of which would have the same quasi-suspect character we attributed to owning *hand grenades*.) ... Unlike handguns, ‘the most popular

weapon’ for ‘the core lawful purpose of self-defense,’ the ability of machineguns to fire automatically is best suited for criminal purposes, see *United States v. O’Brien*, (S.Ct.2010) (acknowledging the ‘immense danger posed by machineguns’ and ‘the moral depravity in choosing the weapon’).”

“Handheld machineguns like the Tommy gun entered the civilian market after World War I and were quickly adopted by criminals. ... At least 32 states responded by enacting anti-machinegun laws between 1925 and 1934. ... In 1934, Congress enacted the National Firearms Act, which imposed a \$200 tax on machineguns and required their registration with the federal government. More than 35 jurisdictions ‘strictly regulate’ machinegun possession today.”

“Nothing in *Bruen* or *Rahimi* altered how *Heller* described the scope of the Second Amendment. See, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, (S.Ct.2022) (citing *Heller* for the proposition that the Second Amendment only ‘protects the possession and use of weapons that are in common use at the time’ and not those that are ‘dangerous and unusual’; *United States v. Rahimi*, (2024) (explaining that the Second Amendment right is subject to limitations such as ‘bans [on] the carrying of dangerous and unusual weapons’). So, we join several sister circuits in holding that the Second Amendment does not protect the possession of machine guns. AFFIRMED.”

Lessons Learned:

In considering the protection of the possession of a machinegun a concurring opinion of *N.R.A. v. Pam Bondi*, U.S. Court of Appeals, 11th

Cir. (March 14, 2025), is meaningful:

“When thousands of Florida students, teachers, and parents who survived a terrible tragedy [such as Marjory Stoneman Douglas High School] have pleaded for commonsense firearm reform, we should pay attention. The Second Amendment ‘does not require courts to turn their backs to democratic cries—to pile hopelessness on top of grief.’ If we are to make law based on ‘history and tradition,’ we should do so in a way that explicitly recognizes present-day realities—not one that is more concerned with the Founding Fathers as schoolboys than contemporary Florida schoolchildren. Because the majority opinion strikes the appropriate balance between historical analogues and present-day realities, I respectfully concur.”

United States v. Alsenat
U.S. Court of Appeals – 11th Cir.
(April 21, 2026)

Concealed Firearm

Deputy Rafael was in his marked patrol car at the Martin Luther King, Jr. Day parade when he was approached by an unidentified woman who wished to remain anonymous. The two engaged in a brief conversation, the contents of which are not set out in the case. But the woman was ostensibly “desperate” and pointed out E.L. Based on the officer’s actions, it is reasonable to believe the citizen informant was reporting that the Defendant had a firearm concealed on his person. E.L. noticed Deputy Rafael and first began walking, then running in the opposite direction. Deputy caught up with E.L. and ordered him to stop and raise his hands. E.L. turned and

faced the Officer, and when he raised his hands, his shirt lifted, exposing a firearm in his waistband directly below his navel. He then told the officer to “take [the gun], take it, take it.” Deputy retrieved the firearm, handcuffed E.L., and effectuated a formal arrest. The gun was thus in plain view.

The State filed a delinquency petition charging E.L. with carrying a concealed firearm and possession of a firearm by a minor. On appeal, he argued the evidence was insufficient to establish concealment, and therefore, he was entitled to a judgment of dismissal on the offense. The D.C.A. disagreed.

Issue:

Was the firearm recovered from the Defendant concealed as a matter of law? **Yes.**

Gun Tip:

Interestingly, a U.S. Supreme Court case with nearly the same title and similar facts is relevant to this analysis. In *Florida v. J.L.*, (S.Ct. 2000), an anonymous caller reported to the Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Officers went to the bus stop and saw three black males, one of whom, Defendant J. L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of them of illegal conduct. The officers did not see a firearm nor observe any unusual movements. One of the officers frisked J.L. and seized a gun from his pocket. J.L., who was then almost 16, was charged under state law with possessing a firearm while under the age of 18. The trial court granted his motion to suppress the gun as the fruit of an unlawful search. The D.C.A. reversed that

ruling, but the Florida Supreme Court held the search invalid under the Fourth Amendment. That ruling was affirmed.

The U.S. Supreme Court ruled that an anonymous tip, “standing alone, would not warrant a man of reasonable caution in the belief that [a stop] was appropriate.” *Alabama v. White* (S.Ct. 1990). “The tip lacked sufficient indicia of reliability to provide reasonable suspicion to make a *Terry* stop: It provided no predictive information and therefore left the police without means to test the informant’s knowledge or credibility.” For an anonymous tip to reasonably support an officer’s suspicion of criminal activity, it must be accompanied by sufficient indicia of the tip’s reliability. *Florida v. J.L.*, (2000).

In the past, the Supreme Court had suggested that only an anonymous tipster’s ability to “predict [a defendant’s] future behavior” could sufficiently indicate his or her reliability. See, *White*. Such predictions, the Court concluded, “demonstrate inside information—a special familiarity with [a Defendant’s] affairs.” However, the Supreme Court has since backed away from this approach. In *Navarete v. California*, (S.Ct. 2014), the Supreme Court held that a detailed, contemporaneous report of suspicious activity to a 911 emergency dispatcher carried with it sufficient indicia of reliability when the details and location of the described events turned out to be correct. See also, *United States v. Jean-Charles*, United States District Court, S.D. Florida. (March 3, 2016).

Stop and Frisk has been codified by F.S. 901.151. And while

sec. 901.151(5) provides that when an officer has “probable cause “to believe the suspect he is detaining is armed with a dangerous weapon, the Florida Supreme Court in *Mackey v. State*, (Fla. 2013) emphasized that “probable cause” is not the touchstone. “Contrary to the decision below, Officer May did not need probable cause to frisk Mackey. Only reasonable, articulable suspicion is required before an officer may conduct a protective frisk pursuant to the decision of the United States Supreme Court in *Terry*.”

See also, *State v. Webb*, (Fla.1981), “Viewing section 901.151 in the context of its stated purpose to permit officers to temporarily detain and question persons under circumstances reasonably indicating criminal activity, past, present, or imminent, and to frisk where they have reasonable belief that the person detained is armed, it would be unreasonable and contrary to the legislature’s intent to require an officer, before he may frisk a person whom he reasonably believes is armed with a dangerous weapon, to have the same probable cause that would be required for an arrest or for a search warrant.”

The legal basis for a frisk usually depends on the observation of a bulge under an individual’s clothing. However, an officer’s experience, knowledge, and training can provide other indicators.

Court’s Ruling:

“To prove the offense of carrying a concealed firearm, the State must establish that the accused carried a firearm ‘on or about [his] person in such a manner as to conceal [it] from the ordinary sight of another person.’ See § 790.001(3) F.S. The term

‘ordinary sight of another person’ means the casual and ordinary observation of another in the normal associations of life. *Ensor v. State*, (Fla. 1981); see also *State v. Riocabo*, (3DCA 1979) (holding ‘a concealed firearm may be accidentally, partially exposed so that an arresting officer may see a portion of the firearm’ but that the firearm may still be concealed under the statute); *State v. Joseph*, (5DCA 1987) (‘The fact that [the weapon] is revealed to the arresting officer when the person turns and his coat swings away sufficiently for the officer to identify it as a pistol does not keep it from being a ‘concealed weapon’ under the law.’).”

“E.L. correctly posits that just because a portion of the weapon cannot be seen upon casual observation does not automatically create a triable issue of fact. The Florida Supreme Court has instead focused on the ‘manner’ in which the weapon is carried. *Dorelus v. State*, (Fla. 1999). As the court has recognized, ‘a statement by the observing officer that he or she was able to ‘immediately recognize’ the questioned object as a weapon may conclusively demonstrate that the weapon was not concealed as a matter of law because it was not hidden from ordinary observation.’ See, *State v. Hardy*, (5DCA 1992); *Cope v. State*, (5DCA 1988).”

“But in this case, the converse was true. Deputy Rafael testified on direct examination that the firearm was ‘concealed out of ordinary sight’ until E.L. raised his shirt and requested to be disarmed. That testimony was sufficient to sustain the trial court’s denial of both dismissal motions and the finding of delinquency. AFFIRMED.”

Lessons Learned:

In *Regalado v. State*, (4DCA 2009), under similar circumstances, the 4th D.C.A. ruled that carrying a concealed firearm is not illegal in Florida if one has a concealed weapons permit. The 3rd D.C.A. in *Mackey v. State*, (2013), when reviewing Mackey's conviction, refused to be bound by the 4th D.C.A.'s ruling and upheld Mackey's CCF conviction. On appeal to the Florida Supreme Court, the Court agreed with the 3rd D.C.A., finding that whether a suspect has a concealed weapons permit is an affirmative defense and not an element of the criminal offense of CCF. "Florida's legislative scheme causes us to hold that licensure is an affirmative defense to a charged crime of carrying a concealed weapon, as codified at section 790.01, F.S., and the lack of a license is not an element of the crime."

E.L. v. State
3rd D.C.A.
(April 15, 2026)

2nd Amendment— Again

The federal Gun Control Act prohibits various categories of people from possessing guns. These categories include individuals convicted of crimes "punishable by imprisonment for a term exceeding one year," fugitives from justice, and those convicted of domestic violence crimes. This case concerned another of the statute's provisions. Under its terms, anyone who is an unlawful user of, or addicted to, a "controlled substance" is automatically banned from possessing a gun. The penalty is up to 15 years in federal prison, and disarmament for life.

Ali Hemani used marijuana a few times a week. That fact alone, the Government said, meant he was automatically banned from possessing a firearm under the federal law. And because Hemani admitted he owned a gun, despite this ban, the Government sought to prosecute him, imprison him for up to 15 years, and disarm him for life. The case before the Supreme Court posed the question of whether the Government's prosecution of Hemani was consistent with the Second Amendment. They ruled it was not.

Issue:

Did the Government establish that disarming contraband drug users was consistent with the nation's history and tradition of firearm regulation?

No.

Supreme Court Rulings:

The United States Supreme Court's ruling in *New York State Rifle & Pistol Ass'n v. Bruen*, (S.Ct. 2022), is germane to this analysis. Two 'ordinary, law-abiding, adult citizens' who sought unrestricted licenses to carry a handgun in public, together with a public-interest group organized to defend the 2nd Amendment rights of New Yorkers, brought § 1983 civil rights action against the New York State Police and an individual licensing officer. The Plaintiffs argued that denying their license applications for failing to satisfy New York's "proper cause" standard, under which the applicants had to demonstrate a special need for self-protection as differentiated from that of the general public, violated their Second and Fourteenth Amendment rights.

The case made its way to the U.S. Supreme Court, where they found the City's licensing

requirements violative of the 2nd Amendment as inconsistent with the "principles that underpin" our nation's historical tradition of firearm regulation.

The Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home. Thus, the City's special needs scrutiny was inconsistent in the Second Amendment context. And New York's "proper cause" standard violated the 14th Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms.

Moreover, *District of Columbia v. Heller*, (S.Ct.2008), cautioned that like most rights, the right secured by the Second Amendment was not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. Further, "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

The Supreme Court later decided, in *United States v. Rahimi*, (2024), that a federal law forbidding persons subject to domestic-violence restraining orders from possessing firearms was constitutional because it was consistent with our historical tradition of regulating firearms.

Zackey Rahimi was indicted under a federal statute that prohibited individuals subject to a domestic violence restraining order from possessing a firearm. He challenged the law. The U.S. Supreme Court sustained the limiting language of the challenged statute”

“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 consistent 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.’ Why and how the regulation burdens the right are central to this inquiry. As *Bruen* explained, a challenged regulation that does not precisely match its historical precursors ‘still may be analogous enough to pass constitutional muster.’ ”

Court’s Ruling:

To meet its burden of showing the federal law was consistent with the Nation’s tradition of firearm regulation, the Government relied on an analogy to what it calls “habitual drunkard” laws. These laws, the Government argued, enjoy deep roots in the country’s history and are “relevantly similar” to the regulation it wished to enforce against Mr. Hemani. The Supreme Court was not impressed.

“This case illustrates the disconnect. The Government considers Mr. Hemani an unlawful user of a controlled substance because he admits to using marijuana about every other day. But how much marijuana does Mr. Hemani use, in what potency, and to what effect? Is he routinely unable to manage his affairs, a risk to himself or his family? Or does he use a mild gummy as a sleep aid a few times a week? We do not know and, the Government says, it doesn’t matter. The Government asks us to analogize him to a habitual drunkard all the same.”

“Nor does the Government’s theory stop at Mr. Hemani. It extends equally to a husband who regularly takes his wife’s prescription Ambien to sleep and a college student who routinely uses a friend’s Adderall to cram for exams. The drug involved makes no difference. Nor, again, does it matter how much an individual uses or the effects it has on him. That someone regularly uses any substance found on any of the CSA’s five schedules for anything other than its ‘prescribed purpose’ is enough. Without more, the Government asks us to analogize all such persons to habitual drunkards. To state the analogy is to expose its deficiency.”

“ ‘Even when a law regulates arms-bearing for a permissible reason,’ we have said, ‘it may not be compatible with the [Second Amendment] if it does so to an extent beyond what was done at the founding.’ See, *Rahimi*. And the way habitual drunkard statutes worked in the past differs significantly from how § 922(g)(3)’s unlawful user provision works today.”

“The historical laws the

Government identifies usually provided some form of process before an individual lost any of his liberties, even temporarily. Normally, a vagrant could be sent to a workhouse or jail only upon a ‘conviction.’ Generally, a habitual drunkard could be assigned a guardian or committed to an asylum *only after proceedings before a probate court* or something like it. ... None of that holds true for § 922(g)(3). On the Government’s account, the statute automatically divests an individual of his constitutional right to bear arms the moment he becomes an unlawful user and until he ends his drug use—all *without any pre-deprivation process*. To be sure, and as the Government highlights, an unlawful user who violates this ban is entitled to ‘a full-dress criminal trial’ before he can be imprisoned or permanently disarmed. But be that as it may, § 922(g)(3) offers an unlawful user no pre-deprivation process before his ‘temporary disarmament,’ the very burden the Government says is akin to the burden vagrancy, civil-commitment, and surety laws imposed on habitual drunkards.”

The Supreme Court then went on to set out the change in public and government attitudes with regard to marijuana use. “Whatever one thinks of these developments, the federal government has not just tolerated them; it helped fuel them. All of which leaves it awkwardly positioned to suggest that the millions of Americans who now regularly use marijuana are categorically and unusually dangerous.”

“In saying this much, we do not question that sometimes an individual’s unlawful use of marijuana (or any other controlled substance)

may render him a danger to others. But, again, the government disclaims the need to show anything like that in this case. Instead, *it asks us to conclude that anyone who regularly uses marijuana is categorically violent and dangerous without any further showing.* All based on little more than its current say-so, one at odds with its own regulatory actions. And **affording the Government that kind of ‘broad power to designate any group as dangerous and thereby disqualify its members from having a gun’ would risk allowing it to ‘quickly swallow’ the Second Amendment.** *Kanter v. Barr*, 919 F. 3d 437, 465 (CA7 2019).”

“In many respects, this case is a narrow one. We do not address efforts to ban addicts, or those presently intoxicated, from possessing a firearm. We do not address other prophylactic laws Congress might adopt after determining that users of a particular drug pose a special risk of misusing firearms. We do not address 18 U. S. C. § 922(g)(1)’s provision disarming individuals convicted of felonies (often including drug-related ones). We do not even address whether the government could bring a prosecution under § 922(g)(3) accompanied by individualized proof that the Defendant’s use of marijuana (or any other drug) renders him a danger to himself or others. Or proof that a certain drug always renders its users dangerous because of its potency or for some other reason. None of those issues is before us and we do not pass on them either way.”

“All that is before us is one, if surely ambitious, theory. The Government maintains that it may

automatically strip Mr. Hemani of his Second Amendment right to possess a firearm because he uses marijuana a few times a week. More than that, because he possessed a gun despite this prohibition, the Government insists it may imprison him for up to 15 years and disarm him for life. According to the Government, none of this turns on how much marijuana Mr. Hemani uses or what effect it has on him. It makes no difference either if he keeps a firearm only in his home for self-defense, never misuses a gun while intoxicated, and never poses a danger to himself or others as a result of his marijuana use. The only thing the Government must show, it says, is that an individual like Mr. Hemani regularly uses any amount of any controlled substance.”

“To square that expansive theory with the Second Amendment, the Government invites us to draw an analogy between its present regulation and historical laws addressing habitual drunkards. Those laws, the Government contends, demonstrate a tradition of firearm regulation consistent with its effort to disarm any regular user of any controlled substance without any further showing. But the Government’s analogy fails under every measure it asks us to consider: The historical laws on which it relies targeted different kinds of people, did so for different reasons, and operated in different ways. And faced with all these shortcomings in the Government’s submission, we cannot say it has carried its conceded burden of showing its prosecution of Mr. Hemani complies with the Second Amendment.”

Lessons Learned:

In a case with a similar vibe the 11th

Circuit Court of Appeals in *Fla Comm Agriculture v. Atty Gen of U.S. and A.T.F.*, (2025), ruled that the Government’s attempt to disarm medical marijuana users also failed.

“Similarly, the Federal Government’s argument that medical marijuana users pose a risk of committing violent crimes to obtain marijuana finds no support in the FAC. True, federal law prohibits using or carrying a firearm ‘during and in relation to any crime of violence or drug trafficking crime.’ And ‘our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others.’ But this tradition ‘distinguishes citizens who have been found to pose a credible threat ... from those who have not.’ Nothing in the FAC indicates that Cooper and Hansell are engaged in any drug market aside from the Florida medical marijuana market, which is highly regulated and requires dispensaries to comply with State law as enforced by the Florida Department of Agriculture and Consumer Services. Nor is there any indication in the FAC that Cooper and Hansell ‘pose a credible threat’ to the public safety of others based solely on their use of medical marijuana.”

“Based on [Petitioners’] factual allegations, [Petitioners] cannot be considered relevantly similar to either felons or dangerous individuals based solely on their medical marijuana use. Accordingly, the Federal Government has failed, to establish that disarming [Petitioners] is consistent with [2nd Amendment].”

United States v. Hemani
U.S. Supreme Court
(June 18, 2026)