LEGAL EAGLE

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Vehicle Safety Sweep

Calvin Jones had previously fled from a traffic stop after law enforcement observed narcotics in his vehicle. An arrest warrant was subsequently issued for Defendant for Fleeing and Eluding. Prior to arresting Defendant law enforcement conducted an investigatory background check that revealed he had multiple felony convictions, firearms charges, and was on probation for narcotics trafficking. Law enforcement arrived at Defendant's residence to conduct surveillance a few weeks after the traffic stop; upon arriving officers observed that Defendant's vehicle was already present with Defendant as the driver and another individual as a passenger. Law enforcement could not determine if anyone else was inside the vehicle, and after Defendant drove away in the vehicle, the officers decided to follow him until he exited the vehicle to facilitate a safer apprehension and arrest.

Defendant was subsequently arrested outside of a gas station after he exited the vehicle. Officers could detect furtive movements through the heavily tinted windows of the vehicle, causing them to call out for anyone inside the vehicle to exit. A passenger exited the vehicle, closed one of the passenger doors, and was detained. The passenger told law enforcement that no one else was in the vehicle, but officers did not trust her statement in part because she denied knowing the Defendant. Officers then cautiously approached the vehicle with guns drawn; they opened two of the passenger doors of the vehicle and conducted a brief, cursory sweep of the vehicle out of concern for officer safety.

The sweep occurred shortly after Defendant and his passenger were taken into custody, because law enforcement could not see if other occupants were still located inside the vehicle due to the tinted windows. During the protective sweep, officers observed illegal drugs located inside the vehicle in plain view and also smelled burned marijuana. While placing the illegal drugs into evidence bags, the officers also observed a firearm inside the vehicle in plain view.

Defendant was charged with multiple felonies. He filed a motion to suppress alleging the officers' warrantless search of his vehicle failed to satisfy the protective sweep exception to the Fourth Amendment. On appeal, the trial court's ruling denying the motion was affirmed.

Issue:

Was the use of a protective sweep after the Defendant had exited the vehicle lawful? **Yes.**

Safety Sweep:

A protective sweep is a "quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, (S.Ct. 1990). Where a Defendant is arrested outside his or her home, a warrantless protective sweep of the Defendant's home is permissible only if the officers have a reasonable, *articulable suspicion* that the protective sweep is necessary due to a safety threat or the destruction of evidence.

The majority of the Federal courts confronted with this issue have similarly concluded that a protective sweep is not *per se* invalid merely because it did not occur incident to an arrest. However, the Courts that have recognized the validity of protective sweeps not incident to an arrest have generally required the State, at a minimum, to prove the following elements:

1. The police must not have entered (or remained in) the area to be swept illegally, and their presence within it must have been for a legitimate law enforcement purpose;

2. The protective sweep must have been supported by a reasonable, articulable suspicion that the area to be swept harbored an individual posing a danger to those on the scene;

3. The protective sweep must not have been "a full search" but rather a cursory inspection of those spaces *where a person may be found*;

4. The protective sweep must have lasted no longer than was necessary to dispel the reasonable suspicion of danger and no longer than the police were justified in remaining on the premises.

The court in *Runge v. State*, (2DCA 1997), ruled, "The State presented no evidence to support a [broader] precautionary sweep of [the space immediately adjoining the place where Mr. Runge was arrested, i.e.] bedrooms, closets, and bathroom. There is no testimony about the size of this apartment or the location of these rooms. *There is no evidence that these rooms were adjacent to or near the living room where Runge was handcuffed*."

After concluding that the existence of an arrest was not essential to the U.S. Supreme Court's rationale for approving the use of a protective sweep in *Maryland v. Buie*, (S.Ct. 1990), the Florida Supreme Court discussed the need for courts to adopt enhanced precautions to "stem the possibility that a protective sweep as nothing more than an unconstitutional warrantless search." Accordingly, the Court stressed that police "cannot create the danger that becomes the basis for a protective sweep but rather must be able to point to dangerous circumstances that developed once the officers were at the scene." *Hernandez v. State*, (5DCA 2012).

A protective sweep of a home, incident to an arrest **outside the home**, cannot be justified routinely. The arresting officer must have both 1. a reasonable belief that third persons are inside, and 2. a reasonable belief that the third persons were aware of the arrest outside the premises so that they might destroy evidence, escape, or jeopardize the safety of the officers or the public.

Similarly, "exigent circumstances exist where the occupants of a house are aware of the presence of someone outside and are engaged in activities that justify the officers in the belief that the occupants are actually trying to escape or destroy evidence." *Benefield v. State*, (Fla. 1964).

Fears for officer safety based on *generalizations* about drug cases, rather than on any specific risk presented by the facts of Defendant's case, do not qualify as exigent circumstances.

Court's Ruling:

"Having considered the parties' arguments, the record on appeal, and the totality of the circumstances surrounding the search of [Defendant's] vehicle by law enforcement, we affirm the trial court's denial of [Defendant's] motion to suppress based on the protective sweep and plain view exceptions to the warrant requirement. See, e.g., *Arizona v. Gant*, (S.Ct.2009) (holding that established exceptions to the Fourth Amendment's warrant requirement 'ensure that officers may search a vehicle when *genuine safety* or evidentiary concerns encountered during the arrest of a vehicle's *recent occupant* justify a search'); *Maryland v. Buie*, (1990) ('A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a *cursory visual inspection of those places in which a person might be hiding* … The Fourth Amendment permits a properly limited protective sweep in conjunction with an … arrest [as an exception to the warrant requirement] when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual

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NIJ BALLISTIC-RESISTANT BODY ARMOR STANDARDS UPDATES

NIJ is proud to announce the release of new body armor standards 0101.07 and 0123.00.

The National Institute of Justice (NIJ), the research, development, and evaluation arm of the U.S. Department of Justice, has been publishing performance standards for ballistic-resistant police body armor for over 50 years. For many, knowing and understanding NIJ's standard for the testing and certification of ballistic protection gear is a critical first step in a body armor purchase. Standards are crucial to informing buyers and ensuring officer safety.

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Focus on the law enforcement practitioner.
NIJ fosters development of equipment standards and related conformity assessment programs that specifically address the needs of law enforcement, corrections, and other criminal justice agencies.

Raise the bar for safety, reliability, and performance.
NIJ aims to ensure to the degree possible that equipment is safe, reliable, and performs according to established minimum requirements.

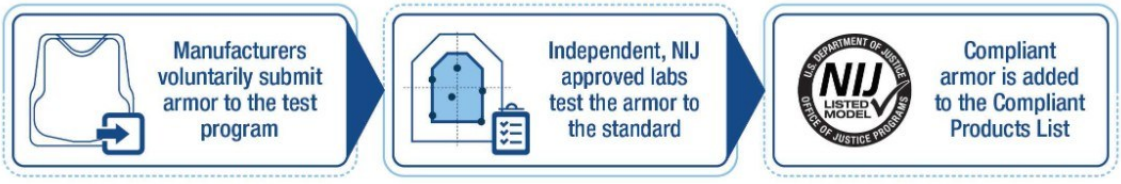
Create documentary standards and guides.
NIJ produces standards and guides, that can be used as guidance for the selection, procurement, use, care, maintenance, and replacement of technology and equipment for the law enforcement and public safety community.

What's New in NIJ Standard 0101.07, *Ballistic Resistance of Body Armor*?

Working through ASTM International, NIJ collaborated with the U.S. Army, the National Institute of Standards and Technology, ballistics laboratories, body armor manufacturers, materials suppliers, and other stakeholders over the last decade to harmonize laboratory test procedures and practices relevant to ballistic testing. They produced a suite of ASTM test methods and laboratory practices that are used as the building blocks of NIJ Standard 0101.07.

The new standard contains:

- Improvements to the test methods for armor designed for women.
- Perforation-backface deformation testing, updated to include an additional shot on soft armor panels near the top center edge.
- Reconfigured perforation-backface deformation testing on hard armor plates, to include striking the crown on curved plates.



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Recent Case Law

Community Care

Road patrol officer testified that he had responded to a 911 dispatch call. The Defendant's daughter had called to report that her father left the house drunk and took her two younger siblings in the vehicle with him. The daughter reported that she was tracking her father using a cellphone or another tracking device. The Officer learned that the Defendant was at a McDonald's restaurant. The daughter described the Defendant's vehicle and provided the license plate number.

The Officer spotted the vehicle in the restaurant's drive-thru lane. Once the Officer confirmed the license plate number, he initiated a traffic stop by getting behind the vehicle and activating his patrol car lights. The vehicle pulled into a parking spot. The officer blocked the vehicle from leaving by parking behind it. Until the Officer walked up to the vehicle, he had been unable to see any children. The Officer testified that he had stopped the vehicle, based upon the daughter's report that the Defendant was driving drunk with young children in the vehicle, to ensure the children's well-being, and to conduct a welfare check for the individuals in the vehicle.

As the Officer approached the vehicle, he saw a young girl in the backseat. The Officer did not see another child in the vehicle. Other officers arrived at that time. The Defendant was charged with driving under the influence and resisting an officer without violence.

At the motion to suppress, the Defendant argued that he was detained and not free to leave as soon as the officer parked behind his vehicle, blocking him in, thereby resulting in an illegal seizure without reasonable suspicion or probable cause to believe the Defendant was committing or had committed a crime. On cross-examination, the officer testified that he had not observed the Defendant commit any traffic infraction and instead *had made the stop for a welfare check*. The only reason the officer had pulled the vehicle over was because of the information relayed by dispatch from the Defendant's daughter.

The trial court granted the motion, ruling that there was no bad driving pattern, and the community caretaking was directed at the children, not the Defendant. Accordingly, the Deputy's actions, constituting a welfare check, were not supported by competent, substantial evidence. "I believe based on the totality of the circumstances, this was an improper search and seizure." On appeal, that ruling was reversed.

Issue:

Did the responding Officer claim that he was making a welfare check stop when, in fact, he was investigating a crime reported by the 911 caller? **No**. Did the officer's use of his vehicle to block the Defendant's vehicle from leaving the parking lot constitute an illegal seizure of the Defendant under the Fourth Amendment? **No.**

Community Caretaking:

A recognized exception to the warrant requirement is the community caretaking exception. That exception traces its roots to the Supreme Court's decision in *Cady v. Dombrowski*, (S.Ct.1973). The *Cady* Court, while upholding a warrantless vehicle search, explained that police officers sometimes may "engage in what . . . may be described as community care-taking functions, *totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute*."

As the law has developed, the community caretaking function has become "a catchall for the wide range of responsibilities that police officers must discharge aside from their criminal enforcement activities." Unfortunately, the case law has become a muddle of exigent circumstances, emergency doctrine, and community caretaking, with no definitive lines separating these individual concepts. However, the one underlying commonality found with all three concepts is that they are each an exception to the warrant requirement. Courts commented that "the touchstone of any Fourth Amendment analysis—including one involving a welfare check—is reasonableness, which is measured by the totality of existing circumstances." "Both the scope and manner of a welfare check must be reasonable." Although law enforcement is not required to use the least intrusive methods available when performing

community caretaking functions, a welfare check that evolves into a seizure "must be commensurate with the perceived exigency at hand."

The United States Supreme Court has opined that "one exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' " *Brigham City, Utah v. Stuart*, (S.Ct.2006).

Brigham City is instructive. There, the Defendants argued the warrantless entry into the home was unreasonable because "the officers were more interested in making arrests than quelling violence." The Court rejected that argument because "an action is 'reasonable' under the Fourth Amendment, *regardless of the individual officer's state of mind*, 'as long as the circumstances, viewed objectively, justify the action.' "

Additionally, the Court held: "The officer's subjective motivation is irrelevant." More importantly, the Court held, "the issue is not [the Officer's] state of mind, but the objective effect of his actions." The Court ultimately upheld the warrantless entry because "the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning."

Court's Ruling:

" 'In the context of a criminal investigation, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop.' *United States v. Mendenhall*, (S.Ct.1980). Nonetheless, our case law recognizes the Fourth Amendment allows a temporary detention 'based on an officer's discharge of his 'community caretaking' duties.' 'Thus, *even without reasonable suspicion of criminal activity, a police officer may detain an individual pursuant to a community caretaking function under certain circumstances*.' Community caretaking encounters 'have been deemed a reasonable and prudent exercise of an officer's duty to protect the safety of citizens.' *Lightbourne v. State*, (Fla.1983)."

"In addition to automobile searches, the doctrine also encompasses the seizure of individuals in order to ensure the safety of the public and/or the individual, *regardless of any suspected criminal activity*. *Samuelson v. City of New Ulm*, (8th Cir. 2006). Such a seizure is reasonable if it is based on specific articulable facts and a reviewing court determines that the balance between law enforcement's interest in protecting public safety and the individual's interest in being free from arbitrary governmental interference favors seizure. Overall, under the community caretaking doctrine, law enforcement 'may make warrantless searches and seizures in circumstances in which they reasonably believe that their action is required to deal with a life-threatening emergency.' *Castella v. State*, (4DCA 2007)."

"Welfare checks pursuant to the community caretaking doctrine permit law enforcement actions that might otherwise violate the Fourth Amendment. *Taylor v. State*, (1DCA 2021). 'Because searches and seizures conducted in connection with welfare checks are 'solely for safety reasons,' *the scope of an encounter associated with a welfare check is limited to prevent the exception from becoming an* ***investigative tool that circumvents the Fourth Amendment***.' In other words, 'the purpose of a welfare check regulates its scope.' Thus, 'without any reasonable suspicion that criminal activity is or was afoot, the welfare check should end when the need for it ends.' "

"Importantly, a welfare check is *not limited to checking on one person*. See, *State v. Brumelow*, (1DCA 2019) (holding a welfare check applied to two occupants in a vehicle). That is because the community caretaking doctrine is applicable to the community at large. Thus, in *Brumelow*, the case upon which the State relied at the suppression hearing, the First District determined that a welfare check's legitimacy had to be evaluated separately as to two occupants whom law enforcement had encountered after responding to a 911 call. The 911 caller had reported that two occupants in a parked vehicle with the motor running appeared to be asleep or unconscious."

"Applying the legal principles discussed above to this case, we begin by observing that the trial court's finding of the officer being truthful in his reason for stopping and blocking the defendant—to conduct a welfare check of the children—is irrelevant. Instead, the question is: under the totality of the circumstances, would an objectively reasonable law enforcement officer, with knowledge of: 1. The facts as relayed by the 911 caller and the Defendant's daughter, and 2. his

observation of the Defendant's vehicle, have stopped and blocked the Defendant's vehicle to ensure that the officer could confirm the children were not in harm's way. A reality of everyday life is that minor children generally are under their parents' control. Another reality of everyday life is that young children generally will follow their parents' instructions, even if the parent is drunk. Yet another reality of everyday life is that children generally are unable to fend for themselves."

"No doubt exists that a drunk driver with children in the vehicle exposes the children to significant risk of severe harm or death. The average citizen with knowledge that a drunk driver has children in a vehicle has little opportunity to stop the vehicle. The average citizen in such cases calls 911 to report the concerns. A law enforcement officer has the best ability to stop the vehicle and prevent danger to the children. In this case, the Defendant did not dispute below that the officer had a right to stop his vehicle based on the information which the officer had received from the 911 caller to check the children's welfare."

"We also determine it was not unreasonable for the officer to block the Defendant's vehicle to ensure the Defendant would not drive away before the officer could accurately and completely determine the children were safe. As stated in *Taylor*, law enforcement is not required to use the least intrusive methods available when performing community caretaking functions. Even though the stop in this case evolved into a seizure, the seizure was reasonably commensurate with the perceived exigency at hand.

We conclude the facts demonstrate the officer was attempting to protect young children, who cannot fend for themselves, from an objectively reasonable assumption that the children were in grave risk of being severely injured by a drunk driver. Thus, blocking the Defendant's vehicle was not impermissibly intrusive to the Defendant's Fourth Amendment right to be free from temporary detention in the context of a welfare check. On the unique facts of this case involving young children and a potential drunk driver, stopping and blocking the Defendant's vehicle to check the children's welfare was justified *without the necessity of viewing impaired driving*. We therefore hold, based on the facts as developed in the record, that the trial court erred in granting the motion to suppress. REVERSED."

Lessons Learned:

The key to not taking the welfare stop beyond its Constitutional limitation is to keep in mind the basis for this warrant exception: "Police officers sometimes may engage in what . . .may be described as community care-taking functions, **totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."**

For the State to meet its burden of proof, the case file must include the originating 911 call, Department SOP on search parameters, all body cam evidence, witness statements, and physical evidence recovered at the scene. While this certainly sounds basic in nature, it is important to keep in mind, as the D.C.A. in a footnote in the present case noted: "The Defendant argued on appeal that the evidence did not support a welfare check because the State had called only one witness at the suppression hearing but did not admit the 911 call or present any other evidence. For that reason, we echo the same caution stated by then Chief Judge Morris's concurring opinion in *Daniels v. State*, (2DCA 2022),

'**The State would be wise to submit the strongest evidence possible to justify the community caretaking detention. Otherwise, the State risks having a conviction overturned or evidence suppressed**.' "

State v. Leiby
4th D.C.A.
(Nov. 5, 2025)

Tainted Police Interview

Detective Jeno Weaver responded to a homicide at a residence. As the lead homicide detective, he learned that the deceased person was Saffore, that there was a fire at the residence, and that Kissy Terice Jovan Mackey was an eyewitness. Weaver subsequently developed Russell Brown as a suspect based on evidence found at the scene. Brown was charged and eventually convicted of first-degree murder.

Over the course of the investigation into Brown, law enforcement learned that Mackey and Brown were in a romantic relationship. Mackey also gave several conflicting and misleading statements about her conduct and observations on the night of the murder. As a result, Mackey was formally interviewed by law enforcement on two separate occasions. The State charged Mackey by Information with being an accessory after the fact of

capital murder by knowingly giving false information to law enforcement concerning the murder. The interviews, recorded and ultimately played for the jury in Mackey's trial, were the basis for Mackey's appeal herein.

During the interviews, Detectives made dozens of comments to Mackey, accusing her of lying and indicating that they knew she was involved in the murder. These comments included statements such as, "your lies are starting to come apart," "you are lying," "everything you told us is a lie," "we can tell that you're lying," "you've engaged in a pattern of lying," and "we know you are lying." Mackey's counsel did not object to each of these statements, but when an objection was made, the trial court ruled that the series of statements from the Officers accusing Mackey of engaging in a pattern of lying was admissible. On appeal, that ruling was reversed.

Issue:

Was it error for the State to introduce a lengthy videotape of the police interview with the Defendant in which the Detectives repeatedly expressed their *personal opinions* about her guilt and their belief that she was lying? **Yes.**

Detective's Opinions:

The Sixth Amendment's Confrontation Clause guarantees that "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford v. Washington*, (S.Ct.2004), the United States Supreme Court held that the Confrontation Clause prohibits out-of-court statements by a witness that are testimonial unless 1. the witness is unavailable and 2. the Defendant had a prior opportunity to cross-examine the witness, regardless of whether such statements are deemed reliable by a court. The *Crawford* Court articulated that the Confrontation Clause applies to "witnesses against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' "

A jury may hear a Detective's statements during an interview with Defendant about the crime *when the statements provoke a relevant response from the Defendant being questioned*. See *Eugene v. State*, (4DCA 2011). "When placed in 'their proper context,' an interrogating detective's statements to a suspect could be understood by a 'rational jury' to be 'techniques' used by law enforcement officers to secure confessions." (quoting *McWatters v. State*, (Fla. 2010)).

However, *"a witness's opinion as to the credibility, guilt or innocence of the accused is generally inadmissible, [and] 'it is especially troublesome when a jury is repeatedly exposed to an interrogating Officer's opinion regarding the guilt or innocence of the accused.'* " *Roundtree v. State*, (4DCA 2014) (quoting *Jackson v. State*, (Fla. 2012)); see also *Page v. State*, (4DCA 1999) ("It is especially harmful for a police witness to give his opinion of a [witness's] credibility because of the great weight afforded an Officer's testimony."). "Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions...." *Tumblin v. State*, (Fla. 2010).

In *Eugene v. State*, (4DCA 2011), the court reversed the Defendant's conviction based on the trial court's failure to exclude the Detective's hypotheses about how the crime occurred from the tape recording played to the jury. The basis of the holding was that the probative value of the Detective's words was "substantially outweighed by the danger of unfair prejudice" or "misleading the jury" under section 90.403. Further, "The law is well settled that expressions of personal belief by a prosecutor are improper." *State v. Ramos*, (4DCA 1991).

Pausch v. State, (2DCA 1992), makes this point dramatically. Detective David Bonsall questioned Defendant Pausch rigorously in an interview conducted shortly following her arrest. During the interview, which was recorded, *Pausch never admitted responsibility for the death of her son*. She simply asserted that Christopher must have fallen to the floor while asleep. Detective disbelieved her story and accused her of lying and of abusing her son. He persistently condemned Pausch as an unfit mother and predicted that if Christopher survived to be returned to her care, she would eventually kill him.

The D.C.A. ruled, "It is our judgment that allowing the jury to hear the nature and intensity of Bonsall's interrogation denied Pausch a fair trial. The introduction of Bonsall's statements was prejudicial, confusing, and misleading. § 90.403, F.S. Although evidence should not be excluded merely because it contains 'emotional overtones,' the jury in this case could not have

reasonably been expected to isolate and extract from the recording that which was admissible as evidence of the crime while disregarding the *aspersions of guilt* created by Bonsall's words."

Court's Ruling:

"Mackey relies on *Jackson v. State*, (Fla. 2012), in which the Florida Supreme Court reversed and remanded for a new trial based on the trial court's erroneous admission of a taped interrogation where the *officers repeatedly provided their opinions of guilt without eliciting a relevant response*. The Court held:

'While the Detectives may have intended to secure a confession by consistently expressing their conviction in Jackson's guilt, they did not secure a confession throughout their thirty-seven-minute dialogue. In addition, although the Detectives' opinions about Jackson's credibility, guilt, and the weight and sufficiency of the evidence were not expressed during in-court testimony, admission of these statements essentially permitted the State to improperly elicit police opinion testimony and invade the province of the jury.' The Court found that the trial court abused its discretion in admitting the videotaped interrogation at trial and that the error was not harmless."

"The facts here are similar to *Jackson*. Prior to the Detectives repeatedly accusing Mackey of lying, their questions and statements **elicited relevant responses**. However, once they began stating that she was lying, Mackey repeatedly stated that she had no reason to lie. As in *Jackson*, Mackey never provided a relevant response to the Detectives' claims that she was lying. The objected to comments—that the Detectives could tell when someone is lying and that Mackey engaged in a pattern of lies and was guilty of being an accessory after the fact—were improper, and it was error to admit them."

"While the Detectives may have intended to secure a confession by consistently expressing their conviction in Mackey's guilt, they never did. Admission of these statements 'essentially permitted the State to improperly elicit police opinion testimony and invade the province of the jury.' See, *Pausch v. State*, (2DCA 1992) (finding it unreasonable to expect the jury to extract admissible evidence while disregarding the aspersions of guilt created by police officers' inadmissible statements)."

"The State argues any error was harmless because: Mackey was resolute that she was not lying; the court's instruction was adequate; and the prosecutor did not mention or allude to the officers' comments in closing argument. We find that the State has not met its burden in showing that the error was harmless. '*The limited probative value of Mackey's statements was outweighed by the prejudicial effect of the Detective's opinion as to [Mackey's] guilt*." *Gaines v. State*, (4DCA 2015) (reversing for new trial where recorded interview was published for jury, wherein Detective stated that Defendant was lying several times and was guilty and finding that error was not harmless).

"The comments resulted in an unfair trial where Mackey's credibility was a feature of the trial. See *Roundtree v. State*, (4DCA 2014) 'We find that the admission of the Officer's statements during the interrogation permitted the State to elicit a police officer's opinion as to [Defendant's] guilt, thereby invading the province of the jury.' Reversed."

Lessons Learned:

The bottom-line issue raised by the present case is the variety of interrogation techniques used by the Detectives to elicit a confession from the Defendant. Examples of these were outlined by the court in *Eugene v. State*, (4DCA 2011):

"The Detectives who questioned Defendant used a variety of interrogation techniques: they worked to develop a rapport with Defendant, pointing out similarities in their beliefs and backgrounds; they closely observed Defendant's non-verbal reactions to questioning; they confronted Defendant with facts in the case that pointed to his guilt; they developed themes about how and why the crime occurred to see if Defendant would latch on to one of the themes and talk about the case; they offered socially acceptable motives to Defendant to see if he would choose one; they offered him opportunities to explain things in a way that would not indicate guilt, but which would require an acknowledgement that he had been lying about certain facts; they encouraged Defendant to refer to himself in the third person, as 'Jimmy,' to distance Defendant from the case so that he would be more comfortable talking about it; they appealed to his closeness with the victim's family to help them solve the case and give the family closure."

However, it is of interest that the D.C.A. in *Eugene* did not have an issue with these actions. "Not everything a Detective says to a Defendant during a recorded interrogation is unfairly prejudicial under

sec. 90.403. The Supreme Court has recognized that a jury may hear an interrogating Detective's statements about a crime **when they provoke a relevant response from the Defendant** being questioned. …"

The DCA went on to conclude, "This case does not present the danger of unfair prejudice. Defendant made no equivocal responses that the jury might have misconstrued. Throughout the eight hours of interrogation, an alert, articulate *Defendant maintained that he did not commit murder, no matter what interrogation technique the Detectives threw at him*. The jury had ample time to consider the Defendant's credibility over the course of the extensive questioning. When placed in the context of the entirety of the interrogation, the trial court did not abuse its discretion in admitting the [transcript]." *Eugene v. State*, (4DCA 2011)

In the present case, the *Detectives suggestions of Defendant's guilt* ***were left unanswered***. "While the Detectives may have intended to secure a confession by consistently expressing their conviction in Mackey's guilt, they *never did.* Admission of these statements [Detectives' expressions of the Defendant's guilt] 'essentially permitted the State to improperly elicit police opinion testimony and invade the province of the jury.' "

Mackey v. State
5th D.C.A.
(Dec. 12, 2025)

Accidental Discharge

A Deputy Sheriff was on patrol when he noticed a white Ford F-350 speeding in the opposite direction. The truck had no license plates. Deputy turned around and pursued the truck, ultimately finding the vehicle parked in a nearby industrial park. The truck was locked and unoccupied. Deputy ran the truck's vehicle identification number and found that the license plates associated with that truck had expired.

Other law enforcement officers were on the scene for unrelated reasons, including Sergeant Skalisky. Employees of the industrial park told the officers that they saw a male running towards the outbuildings on the property. Skalisky searched the outbuildings for the truck's driver, with a *Glock in hand*. He made verbal announcements as he conducted his search, including, "Sheriff's Office, make yourself known," or "Sheriff's Office, come out."

As part of his search, Skalisky lifted a canvas cover over a pickup bed with his left hand, where he found Hernandez hiding inside, lying in a fetal position. As Skalisky opened the canvas cover, Hernandez jerked his feet, which startled Skalisky, causing him to jump back immediately in surprise, exclaim an expletive, and unintentionally fire a round, striking Hernandez in the abdomen. Skalisky immediately treated Hernandez and told the other officers who arrived on the scene to put their weapons away because the shooting was an accident.

Hernandez filed a civil rights suit for excessive force under the Fourth Amendment. The trial court dismissed the lawsuit; that ruling was affirmed on appeal.

Issue:

Can an unintentional act, the discharge of a firearm by a law enforcement officer, violate the Fourth Amendment rights of an individual? **Yes**, but not under the totality of the circumstances set forth in this case.

Fourth Amendment and Unintentional Acts:

Courts have previously ruled, "even the unintentional or accidental use of deadly force in the course of an intentional seizure may violate the Fourth Amendment if the Officer's actions that resulted in the injury were objectively unreasonable."

An element of the Fourth Amendment is to protect an individual from a police officer's use of excessive force in effectuating a seizure. "Where an officer [intentionally] creates conditions that are highly likely to cause harm and unnecessarily so, and the risk so created actually, but accidentally, causes harm, the case is not removed from Fourth Amendment scrutiny." The Fourth Amendment is only implicated if the "governmental termination of freedom of movement [was] through means intentionally applied." *Brower v. Cty. of Inyo*, (S.Ct.1989).

"The *Brower* case stands for the proposition that an Officer can be held liable under the Fourth Amendment for an intentional but unreasonably dangerous seizure, even when the means employed to effectuate the seizure result—unintentionally—in someone's death. In the wake of *Brower*, this court affirmed that 'unintentional conduct [can] trigger Fourth Amendment liability.' "
See, *Stamps v. Town of Framingham*, U.S. Court of Appeals – First Cir. (Feb. 5, 2016).

Court's Ruling:

"Qualified immunity protects officials 'from liability for civil damages insofar as their conduct *does not violate clearly established statutory or constitutional rights* of which a reasonable person would have known.' In order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the Plaintiff maintains. Although Supreme Court precedent 'does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.' "

"Hernandez points us to several Supreme Court and circuit cases that he claims overcome the clearly established prong. But none of the cases Hernandez cites would have alerted a reasonable officer that Sergeant Skalisky's actions were out of bounds. Consider the facts from these cases:

Tennessee v. Garner, (S.Ct.1985), involved an officer who *intentionally* shot a suspect to stop him from climbing over a fence to elude capture.

Cavanaugh v. Woods Cross City, (10th Cir. 2010), involved an officer who followed an unarmed plaintiff and *intentionally* discharged his Taser without warning.

Perea v. Baca, (10th Cir. 2016), involved officers who chased and *intentionally* Tased the plaintiff ten times.

In each of these cases, the Officers *deliberately considered whether to use force, and then chose to do so*. Those facts are far from the ones present here, even when read in the light most favorable to Hernandez where Sergeant Skalisky *fired his gun out of startlement and surprise*."

"Hernandez suggests these cases stand for the general proposition that it is clearly established Officers may not 'purposely shoot' a 'misdemeanant or traffic violation suspect' without warning, and who is otherwise not resisting. But even if that were true as a general matter, the Supreme Court has advised 'not to define clearly established law at a high level of generality,' and that is exactly what Hernandez asks this court to do. None of Hernandez's cases involved officers who discharged his weapon recklessly, or out of startlement, or more specifically, *fired a shot in response to a suspect-in-hiding's sudden movements*. That is the relevant inquiry. In *Garner*, *Cavanaugh*, and *Perea*, the officers had *time to assess the situation and decided to use force*. Sergeant Skalisky confronted a different situation, and none of Hernandez's cases would have put any reasonable officer on notice that actions like the one Sergeant Skalisky took here would be unlawful."

"To the extent Hernandez argues Sergeant Skalisky's *drawing of his weapon or keeping his finger on the trigger during the search amounted to a section 1983 violation (regardless of whether he fired the weapon), that argument fails*. Hernandez cites no cases to show that this conduct violates clearly established law. **It may not be best practice to have a weapon drawn in these circumstances, but even routine traffic stops can sometime escalate into violent confrontations**."

"Because Hernandez fails to satisfy the clearly established prong, he falls short of overcoming Sergeant Skalisky's qualified immunity defense. AFFIRMED."

Lessons Learned:

"Lawful But Awful," *Legal Eagle*, July 2025, reviewed a tragic shooting during an active-shooter episode. Those are not the facts of the present case. Here, Officers were searching for a misdemeanant, who hid from them, and when discovered, jerked his foot, startling the officer, thereby causing his firearm to discharge. Importantly, *the officer had no time to reflect or formulate intent; it was simply a spontaneous reaction* that caused the officer to discharge his firearm.

AELE Law Enforcement Legal Center (aele.org) has provided suggestions to minimize the circumstances in which accidental discharge of a firearm is possible: "The following are some suggestions to consider in this regard:

1. Written policy and procedures on the subject of firearms safety rules should be developed and periodically reviewed.

2. Personnel should receive training on the developed policy and procedures. Such training should include information designed to make personnel aware of the risk of accidental discharge and precautions that can be taken to minimize the danger.

3. The premature or unneeded drawing, pointing, or displays of weapons run the risk of resulting in accidental discharge or use, leading to unjustified injuries. Even if accidental discharge does not occur, a premature drawing or display of

weapons often creates unnecessary apprehension and anxiety on the part of the public. Such incidents impede the police department's public relations, decreasing the willingness of people in the community to cooperate with important investigations and lessening the possibility that persons will volunteer vital information to police.

4. Officers should have a valid reason for displaying a weapon. Those reasons are ultimately strongly related to many of the same factors that may help justify the ultimate decision to actually use deadly force, such a threat to the safety of the officers or members of the public, the actual or reasonably anticipated presence of weapons, the nature of the crime being investigated, and the dangerousness of the locale and circumstances.

5. Officers need not wait to draw and display their weapons until an armed suspect is actually pointing their own weapon at them, perhaps making it too late to adequately meet deadly force with equivalent or superior force. But neither should officers be pointing weapons at non-resisting, subdued suspects, or at non-suspects not engaged in any criminal activity or without the ability to pose a substantial threat, such as small children or incapacitated persons."

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Vehicle Sweep

posing a danger to those on the arrest scene.'); *Pagan v. State*, (Fla. 2002) ('The plain view doctrine provides that items in plain view may be seized when 1. the seizing officer is in a position where he has a legitimate right to be, 2. the incriminating character of the evidence is immediately apparent, and 3. the seizing officer has a lawful right of access to the object.')."

"Because the officer was engaged in a reasonable protective search when he opened the Defendant's passenger door for the limited purpose of determining . . . whether there were any other occupants within the vehicle who might pose a danger to him or his partners, and because the evidence of a crime that the Defendant seeks to suppress was seen by the officer in plain view during the conduct of this reasonable search, the trial court's denial of the Defendant's motion to suppress is affirmed. AFFIRMED."

Lessons Learned:

While the U.S. Supreme Court and, of necessity, Florida courts recognize the legality of the protective sweep, it is not without limitations. As discussed above, the initial entry to effect the arrest carries with it the right to make a cursory inspection of the *area immediately adjacent to the place of arrest* to **disclose persons, not things**, who could launch an attack on the arresting officers on the scene or as they turn their backs and exit the premises. This inspection does not require probable cause or reasonable suspicion of the presence of these individuals. Because this sweep is limited to the area immediately adjacent to the place of arrest, the Officer must include that fact in his report and testimony. It will not be assumed by a reviewing court.

Sweeps further afield will require additional evidence. The more expansive sweep of back rooms away from the place of arrest can only be substantiated with testimony specifically setting forth the perceived threat and the basis for that belief.

"In this case, Detective Brock testified that he checked the bedrooms, the bathrooms, and the closets 'for our safety. Just to make sure no one else was in the apartment.' … Our review of the Detective's testimony *does not reveal any facts supporting a reasonable belief* that there was a dangerous individual in the apartment." *Runge v. State*, (2DCA 1997).

As can be seen, generalized statements regarding officer safety and "how things are always done" will not meet the State's burden of proof supporting the sweep of the premises. That being the case, any evidence found in plain view during the unlawful sweep will be subject to suppression.

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(Feb. 13, 2026)