LEGAL EAGLE

May 2025

2nd Amendment—Juvenile

In response to the massacre, the Florida Legislature enacted the Marjory Stoneman Douglas High School Public Safety Act to "address the crisis of gun violence, including but not limited to, gun violence on school campuses." The law states that a "person younger than 21 years of age may not purchase a firearm." § 790.065(13), F.S. It also prohibits a "licensed importer, licensed manufacturer, or licensed dealer" from "making or facilitating" the "sale or transfer of a firearm to a person younger than 21 years of age." A violation of the Florida law is a third-degree felony. The law contains exceptions permitting the purchase of a rifle or shotgun by peace officers, correctional officers, or military personnel under the age of 21.

After the Florida Legislature enacted this prohibition, the National Rifle Association and an individual member sued the Commissioner of the Florida Department of Law Enforcement. The district court granted summary judgment for the Commissioner. On appeal, that ruling was affirmed.

Issue:

Does the Florida statute that prohibits the purchase of firearms by minors violate the Second and Fourteenth Amendments as applied to individuals between the ages of 18 and 21? **No,** because the Florida law is consistent with the historical tradition of firearm regulation.

Bruen Ruling:

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 a §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 reached the 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

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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.

"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." Since the Founding, American law has regulated arms-bearing conduct in many ways: from prohibitions on "gun use by drunken New Year's Eve revelers" to bans on "dangerous and unusual weapons" to restrictions on concealed carry.

Court's Ruling:

"To determine whether the Florida law is consistent with our regulatory tradition, we must first decide *what* tradition is relevant to that inquiry. For purposes of this appeal, the Founding era is the primary period against which we compare the Florida law. The Supreme Court has 'made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government.' That is, 'incorporated Bill of Rights protections,' like the Second Amendment, 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.' *Malloy v. Hogan*, (S.Ct.1964)."

"Our conclusion that we first look to the Founding understanding finds additional support in the Supreme Court's repeated interpretations of other amendments based on their public meaning at the Founding. For example, in *Crawford v. Washington*, (2004), the Court explained that the 'founding generation's' understanding of the 'right to confront one's accusers' derived from the common law. *Crawford* canvassed English legal history, colonial practice, state law contemporary to the ratification of the Sixth Amendment, ratification debates, and early state practice to ascertain the scope of the right. Likewise, in *Virginia v. Moore*, (2008), the Court explained that it 'looks to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve.' And in *Nevada Commission on Ethics v. Carrigan*, (2011), the Court considered legislative enactments, treatises, and conflict-of-interest rules contemporaneous to the ratification of the First Amendment to determine whether legislative recusal rules violate the First Amendment. These precedents reflect the preeminence of Founding-era sources to the meaning of the Bill of Rights. Because the Supreme Court relies on sources from the Founding era to interpret the Bill of Rights, including the Second Amendment, we do too."

Thus, in the present case, the 11th Circuit spent six pages of their opinion setting out the historical tradition of firearm regulation.

"The law of the Founding era, which restricted the purchase of firearms by minors, continued into the nineteenth century in the form of statutory prohibitions. By the end of the nineteenth century, at least 19 states and the District of Columbia—representing roughly 55 percent of the population of states admitted to the Union, restricted the purchase or use of certain firearms by minors. When the common-law regime became less effective at restricting minors' access to firearms, statutes increasingly did the work. These mid-to-late-nineteenth-century laws also carried the threat of criminal penalties."

"From this history emerges a straightforward conclusion: the

Florida law is consistent with our regulatory tradition in why and how it burdens the right of minors to keep and bear arms. Because minors have yet to reach the age of reason, the Florida law prohibits them from purchasing firearms, yet it allows them to receive firearms from their parents or another responsible adult."

"The Florida law has the same 'why' as the Founding-era limitations: individuals under the age of 21 have not reached the age of reason and lack the judgment and discretion to purchase firearms responsibly. To reduce the likelihood that another individual like Nikolas Cruz [Marjory Stoneman Douglas High School shooter] would lawfully purchase a firearm and use it to inflict grievous harm on himself or others, the Florida law restricts the purchase of firearms by individuals under the age of 21. Likewise, our legal system 'imposed age limits on all manner of activities that required judgment and reason' at the Founding. But when an individual reaches the age of reason and the need to protect himself and the public from his immaturity and impulsivity dissipates, the Florida law permits him to purchase firearms."

"The Florida law is also consistent with our regulatory tradition in 'how' it burdens the right. Founding-era law precluded individuals under the age of 21 from purchasing arms because they lacked cash and the capacity to contract. Access to arms was a matter of parental consent. When Founding-era laws required minors to carry arms for militia service, states *required their parents to provide the arms*. And universities, standing in for students' parents, imposed significant restrictions on both firearm access and use. Consistent with these Founding-era limitations, states in the nineteenth century expressly prohibited the sale of arms to minors with some exceptions for parents to provide firearms to their children. The Florida law burdens the right no more than these historical restrictions because it prohibits purchase but preserves access to firearms with parental consent."

"Notably, the Florida law is less restrictive than the law at the Founding in some ways. The militia laws did not empower any individuals under the age of 21 to purchase arms. But the Florida law contains exceptions permitting the purchase of a rifle or shotgun by peace officers, correctional officers, or military personnel. This exception is *more generous* than the Founding-era militia laws because it empowers minors to purchase firearms when needed for public service."

"The question is whether the modern law is 'analogous enough,' and the Florida law is. Like the Founding-era legal regime, the Florida law prevents purchases by minors. The difference between the Florida law and the Founding-era regime is that the law at the Founding was *more restrictive* than the Florida law because it prevented the purchase of many goods besides firearms. The Florida law does not violate the Second and Fourteenth Amendments because it restricts the rights of minors less than the Founding-era law did."

"The Florida law that prohibits minors from purchasing firearms does not violate the Second and Fourteenth Amendments because it is consistent with our historical tradition of firearm regulation. From the Founding to the late-nineteenth century, our law limited the purchase of firearms by minors in different ways. The Florida law also limits the purchase of firearms by minors. And it does so for the same reason: to stop immature and impulsive individuals, like Nikolas Cruz, from harming themselves and others with deadly weapons. Those similarities are sufficient to confirm the constitutionality of the Florida law.

"The judgment in favor of the Commissioner is AFFIRMED."

Lessons Learned:

Among the Concurring Opinions were these two:

"Today, the Majority Opinion correctly concludes that the Marjory Stoneman Douglas High School Public Safety Act does not violate the Second and Fourteenth Amendments. Since the Founding, Americans have restricted the sale of firearms to Under-21s, whether through common-law limitations on commercial rights or, once those limitations faded away, direct criminal prohibitions. And since the Founding, Americans have limited Under-21s' ability to buy firearms to abate the risk their still-developing decision-making ability may pose to public safety. Though our Founders imposed these limitations based on their observations and lived experiences, medical science now confirms under-21s' not-yet-fully-developed reasoning abilities. So I join the Majority Opinion and conclude that Florida's ban on the sale of firearms to Under-21s comports with this Nation's history and tradition of firearms regulations."

(Continued on page 12)

'PERPETUALLY TIRED': WHAT OFFICERS ARE SAYING ABOUT FATIGUE

HERE'S WHAT POLICE OFFICERS ARE SAYING ...

71%
report having trouble sleeping due to work-related stress

68%
report feeling unmotivated due to poor sleep or fatigue

42%
report fatigue significantly reduces their performance

34%
report work hours or shifts frequently disrupt their sleep

DID YOU KNOW?

Officers experiencing chronic exhaustion are slower to react, less alert and more prone to errors in high-stakes situations.

2,833 LEOs responded to the 2024 survey

ACTION ITEMS FOR POLICE SUPERVISORS:

- INTRODUCE RECOVERY DAYS
- USE DATA-DRIVEN SCHEDULING TO REDUCE FATIGUE
- PROVIDE SLEEP PODS OR REST ZONES AT PDS
- DEPLOY REAL-TIME FATIGUE MONITORING TOOLS
- PROVIDE SUPPORT FOR OFFICERS ON NIGHT SHIFTS

"I dream every single night, wake up and feel like I worked all night in my sleep."
– *Survey respondent*

SEE MORE OF POLICE1'S STATE-OF-THE-INDUSTRY SURVEY RESULTS:

Police1.com/What-Cops-Want

Recent Case Law

Flawed Baker Act Seizure and Search

Two officers responded to a call for a welfare check. K.M.'s girlfriend reported he had sent a text threatening suicide. "This is it. Once you're done reading this, I will be gone." Officer testified that the girlfriend stated that she received a picture of K.M. holding a needle. She testified that she viewed the text messages, that the sender's phone number appeared in the screenshot she viewed, and that she knew that the number appearing as the sender was associated with K.M.

When asked what criteria is used, based on police policies, to determine whether someone should be taken into protective custody pursuant to the Baker Act, Officer testified: "It—text messages from a complainant stating that they have made suicidal statements—suicidal statements directly from the person that I made contact with. Their actions at the time that I made contact with them." Officer testified that she decided to take K.M. into protective custody pursuant to the Baker Act due solely to the text messages. *She made the decision before she had any interaction with K.M.*

Both Officers at the scene testified that the search of K.M. was a *full search and not simply a pat down*. Both officers also testified that it was department policy to fully search an individual before placing him into a police vehicle for transport. Drugs were found on K.M.'s person prior to transport.

K.M. contended in his motion to suppress that the officers failed to comply with the requirements of the Baker Act when they placed him in custody, handcuffed and searched him. He argued that the search violated his Fourth Amendment rights because there was no probable cause for the search; that even had the officers complied with the Baker Act, a search pursuant to the Baker Act must be reasonable under the circumstances; and that the policy which required the officers to search K.M. after placing him in protective custody pursuant to the Baker Act is unreasonable. On appeal, the court agreed.

Issue:

Was the search of K.M. unlawful, without a legal basis? **Yes**.

Baker Act Search:

The Baker Act provides for the voluntary and involuntary commitment of people suffering from mental illness. Sec. 394.463(2)(a)(2), states in part, "Law enforcement officer shall take a person who appears to meet the criteria for involuntary examination into custody and deliver the person or have him or her delivered to the nearest receiving facility for examination."

"For Plaintiff to be detained lawfully under the Baker Act, probable cause must have existed -- evidenced by Plaintiff's recent behavior -- to believe that a 'substantial likelihood' existed that Plaintiff would cause 'serious bodily harm' to himself or to others in the near future. This standard is a high one: for example, a reasonable belief about 'some likelihood,' 'might cause' 'some kind of bodily harm,' 'at some point in the future' is not good enough for probable cause to deprive a person of their freedom." *Watkins v. Bigwood*, (11th Cir. 2019).

The 4th D.C.A. in *Collins v. State*, (4DCA 2013), ruled: "Here, officers decided to take [Defendant] into custody under the Baker Act after his family and neighbors expressed concern that he might be a threat because of his unwavering belief that his neighbors had kidnapped and murdered his child. *Both officers testified that local policy requires them to conduct a search before transporting a person to a mental health receiving and treatment facility*. Under the facts and circumstances of this case, where the officers were concerned for [Defendant's] safety and the safety of others, and acted pursuant to a reasonable local police policy, the trial court was entitled to conclude that the officers' actions were reasonable and that the officers were acting in good faith. We therefore affirm the trial court's denial of the motion to suppress."

However, in the present case, the D.C.A. found that K.M.'s seizure was contrary to the Baker Act, thus calling into question the viability of the pre-transport search.

Court's Ruling:

"This case turns on whether text messages and the request for a welfare check—standing alone—are sufficient to take a person into

protective custody under the Baker Act or to otherwise detain a person in compliance with the Fourth Amendment. *We have found no case where the facts indicate that a person was taken into protective custody pursuant to the Baker Act without the officer first having had a face-to-face encounter with the person and then making the decision to take the person into protective custody.*"

"Applying the 'probable cause' standard to the Baker Act's 'reason to believe' language, (see *Watkins v. Bigwood*, (11th Cir. 2019)), we conclude that Officer's subjective interpretation of the text — 'This is it. Once you're done reading this, I will be gone' — is insufficient to have subjected K.M. to involuntary physical seizure under the Baker Act. … Further, the testimony from Officer does not support a finding that K.M. was unable to determine for himself that examination was necessary, as required by subsection (1)(a)2."

"Given our conclusion that K.M. could not legally be seized under the Baker Act, we address the ultimate issue of suppression. Citing *Lukehart v. State*, (Fla. 2011), the State argues that the Florida Supreme Court has held that the exclusion of evidence is not the proper remedy for a violation of the Baker Act *unless a constitutional violation has also occurred* and that such a constitutional violation did not occur in this case. We cannot agree that a violation did not occur."

"The Fourth Amendment applies where officers are 'engaged in a noncriminal function,' such as where they are conducting welfare checks. This court has held 'that police officers may conduct welfare checks and that such checks are considered consensual encounters that do not involve constitutional implications.' *Dermio v. State*, (2DCA 2013). 'Searches and seizures conducted in connection with welfare checks are 'solely for safety reasons, and '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.' Simply stated, 'the Baker Act does not (and could not) categorically preclude the protections of the Fourth Amendment.' 'The necessity of ensuring safety in these situations does not create an inchoate warrant to bypass every protection of the Fourth Amendment.' See, *S.P. v. State*, (2DCA 2022)."

"Here, there was no evidence presented that the officer who placed K.M. into protective custody was aware of the details of why K.M. was being seized pursuant to the Baker Act. [In *S.P. v. State,* there was a report that she was in possession of a handgun]. Officer Corujo testified that K.M. did not give him any cause for concern. *He searched K.M. only because of the department policy* to conduct searches before placing anyone in the police cruiser: 'By policy, we have to search. I won't—even for a courtesy transporting.' He also testified that *he did not do a pat down and then search the pocket based on what he felt during the pat down; the officer testified that he went right to the full search because that was policy.* Officer Neris-Ruiz testified, 'The purpose of the search is to completely empty their pockets of any personal effects, anything that's in their pockets regardless of what it is.' "

"Such a search has been deemed to be without a legal basis by this court: 'The officer did not have a legal basis to search A.B.S.'s person before transporting him in his cruiser.... The officer had no indication that A.B.S. was in possession of either a weapon or contraband when he searched A.B.S. He admitted that he searched A.B.S. solely because it was his policy to search people before transporting them in his cruiser. See, *A.B.S. v. State*, (2DCA 2010); *see also R.A.S. v. State*, (2DCA 2014) ('It is also the case that an officer may conduct a pat-down for weapons before placing a truant in his vehicle, but he is not authorized to conduct a full search.'); *L.C. v. State*, (3DCA 2009) ('The uniqueness of this case lies in the fact Officer Quintas did not pat-down L.C. prior to directly searching her pockets. Although we appreciate the concern of officer safety, *we are aware of no case that stands for the proposition officers can search an individual without having performed a pat-down simply because the individual is being placed in a police vehicle*.' There is no evidence that Officer Corujo believed that he was in danger; rather, Officer Corujo testified that K.M. gave him no concern. Further, it is undisputed that a pat down was not done in this case."

"Finally, we note that the State argues that the suppression motion was properly denied because exigent circumstances such as medical emergencies or threats of suicide are exceptions to the warrant requirement for a search. It is apparent that no exigent circumstances existed in this case. There was no medical emergency. K.M. was calm and cooperative and did not appear to be

under the influence of anything. In that respect, this court's opinion in *Fields v. State*, (2DCA 2013), is instructive. There, while the officer had 'initially responded to address a feared medical emergency, by the time [the officer] demanded the pill bottle from Fields, any exigency had clearly dissipated,' and this court concluded that the suppression motion should have been granted."

"K.M.'s motion to suppress should have been granted. There was no basis to take K.M. into protective custody pursuant to the Baker Act, and K.M. was detained and searched in violation of his Fourth Amendment rights.

"Accordingly, we reverse K.M.'s judgment and sentence and remand with directions to discharge him."

Lessons Learned:

It is important to recognize that the custody authorized by the Baker Act is a non-criminal seizure. Section 394.459(1) makes clear, "a person who is receiving treatment for mental illness shall not be deprived of any constitutional rights." Moreover, other than firearms and ammunition, there is no explicit authorization under the Baker Act for law enforcement officers to search individuals taken into custody or to seize their personal property. Accord § 394.463 (2)(d). ("Law enforcement agencies must develop policies and procedures relating to the seizure, storage, and return of firearms or ammunition held under this paragraph.").

While citing police department policy will often establish that the officer was not on a "frolic of his own," the policy must still meet constitutional muster. Florida statutes and case law require that. Testimony as to one's experience, knowledge, and training, coupled with the time of day, location of contact with suspects, unusual behavior, false answers to questions, furtive gestures, reaching into a pocket and turning away from the deputy, or reaching around one's back and grabbing for something, all have been sufficient to substantiate a pat-down even without observing a bulge in a pocket. However, none of those elements were present here. In fact, the officers testified they had no cause to fear K.M. Despite that, they conducted a full search without a pat-down based solely on department policy.

Similarly, truants are taken into protective custody as well, with no formal arrest. In *L.C. v. State*, (3DCA 2009), the 3rd D.C.A. found that the officer's practice of searching anyone he transported in his police vehicle violated the truant's 4th Amendment rights. "Because L.C. was not arrested in this case, the search incident to arrest exception to the warrant requirement cannot apply. Ordinarily, a warrantless search incident to arrest is permissible because of the need to disarm a suspect to take him into custody and to preserve evidence for trial. However, when there has not been a custodial arrest, the danger to the officer is considered to be significantly lessened due, in part, to the brief encounter between the officer and suspect."

"The uniqueness of this case lies in the fact Officer Quintas did not pat-down L.C. prior to directly searching her pockets. Although we appreciate the concern of officer safety, *we are aware of no case that stands for the proposition officers can search an individual without having performed a pat-down simply because the individual is being placed in a police vehicle."*

One more issue for responding officers to consider - the Supreme Court has ruled that the community caretaking exception to the Fourth Amendment does not justify warrantless searches of homes.

In *Caniglia v. Strom* (2021), the Court ruled that police cannot enter a home without a warrant or exigent circumstances. In *Cady v. Dombrowski* (1973), the Supreme Court recognized the community caretaking exception. The community caretaking exception allows police to act when public safety is at risk, even if they haven't seen a crime. The exception was originally limited to situations involving vehicles, but courts expanded it over time.

In *Caniglia v. Strom*, the Court ruled that the community caretaking exception does not apply to warrantless searches of homes. The court distinguished between vehicles on public roads and homes. The court said that the home is given more constitutional protection than a car. Thus, police cannot enter a home without a warrant in the absence of exigent circumstances, such as preventing a suicide. A welfare check by definition is exploratory, officers don't know if there is an emergency, i.e. exigency. They will need a warrant or consent, and even then, it can end badly.

K.M. v. State
2nd D.C.A.
(April 14, 2023)

SYG and LEO

Sheriff's deputies received a report of a robbery near a convenience store. The victim knew the perpetrator and was able to describe him and

his vehicle to the officers. The victim also knew where the suspect lived and pointed out the residence to the deputies. Sergeant Johnson arrived, parked his vehicle out of sight of the home, and approached on foot. He positioned himself so that he could watch the home.

While watching the home in the dark, Sergeant Johnson saw the garage door to the home open and saw Keenan Finkelstein leave the garage and walk toward a vehicle similar in description to that given by the robbery victim. Johnson informed the other deputies that he was going to contact the Defendant and then stepped out of the darkness to address him. Johnson testified that he shined his flashlight on Defendant's face and announced, "Sheriff's office, show me your hands." Another deputy also testified that Sergeant Johnson identified himself immediately upon encountering Defendant. However, Defendant denied hearing such identification. Johnson testified that upon his calling out to the Defendant, Defendant immediately responded by shooting him. The testimony of various witnesses conflicted about what happened next, but there was no question that gunfire was exchanged, and Sergeant Johnson was seriously injured.

Finkelstein was charged with battery on a law enforcement officer with a deadly weapon. He asserted that he was immune from prosecution under the Stand Your Ground Law, section 776.032, F.S., because the deadly force he used was justified to defend himself. However, the statute also provides that immunity is **not** available if the person against whom the force is used is 1. a law enforcement officer; 2. acting in the performance of his or her official duties; and 3. identified himself in accordance with any applicable law, or the person using force knew or should have known the person was a law enforcement officer. See, sec. 776.032(1), F.S.

Issue:

At the time of the shooting, was Defendant lawfully defending himself when shooting Sergeant Johnson, who was performing his official duties and had identified himself as a police officer? **No**.

When is a Law Enforcement Officer Acting as One?

A person is guilty of battery on a law enforcement officer for:

Knowingly committing an assault upon a law enforcement officer while the officer or firefighter is engaged in the lawful performance of his duties ...§ 784.07(2), F.S.

When a person commits a battery on a law enforcement officer, the battery is enhanced from a misdemeanor of the first degree to a felony of the third degree.

In *Silas v. State*, (5DCA 1986), Silas argued that Officer McGill was not "engaged in the lawful performance of his duties" because he was outside of his jurisdiction, and he had no authority to act as an officer in the county. Silas relied on a line of cases that held that a police officer cannot make a valid arrest outside of his jurisdiction unless in fresh pursuit or the actions can be classified as actions of a private citizen. *State v. Carson*, (4DCA 1979).

In *Clinton v. State*, (2DCA 1982) the court held, "If a law enforcement officer is investigating a disturbance outside of his jurisdiction at the request of the sheriff or deputy having jurisdiction over the area involved, he is then engaged in the lawful performance of his duties. The court also held that the *scope of an officer's official duties is not co-extensive with his power to arrest*.

In response, the State cited a line of cases that held that "use of force in resisting an arrest by a person reasonably known to be a law enforcement officer is unlawful notwithstanding the technical illegality of the arrest." *Lowery v. State*, (4DCA 1978).

Several decisions have held that, under *Lowery*, a Defendant could be charged with battery upon a law enforcement officer even though the Defendant alleged that the arrest was illegal because there was no arrest warrant. In *Lowery*, the Defendant contended that his warrantless arrest was unlawful because the misdemeanor was not committed within the officer's presence, and the arresting officer was outside his jurisdiction. The court upheld the conviction because "*the place to contest the legality of arrest is in the court and not on the street*."

In *Silas*, the court concluded that: 1. in responding to directions from his dispatcher, Officer McGill was acting in the performance of his duties; 2. he was in uniform and easily identifiable as a police officer; and 3. Silas committed a battery on the officer. Therefore, the elements of the statute were all present. "The mere fact that McGill was technically outside the city limits will not save Silas from the consequences of his ill-considered behavior."

Court's Ruling:

"[Defendant] asserts that 'official duties,' for purposes of section 776.032 immunity, are limited to

execution of warrants for search or arrest, execution of lawful warrantless arrests, legally detaining or stopping a citizen, and service of process. However, the statutory definitions of 'law enforcement officer' uniformly describe the 'primary responsibility' of law enforcement officers as 'the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state.' ...This broad description of responsibilities or duties is not limited to execution of warrants, service of process, or actual arrests. '*An officer is engaged in the performance of his official duties when acting within the scope of his employment*.' As stated in *Clinton v. State*, (2DCA 1982), 'the scope of an officer's official duties is not coextensive with his power to arrest ... an officer's duties may cover many functions which have nothing whatsoever to do with making arrests.' … Investigation of a reported crime to discover additional information which could lead to the issuance of a warrant or to a lawful arrest falls squarely into the definitions of the official duties of 'detection of crime' or 'enforcement of the ... laws of this state.' "

"[Defendant] further argues that Sergeant Johnson was violating his constitutional rights by pointing his service weapon at him and illegally detaining him, and thus Sergeant Johnson could not have been performing any official duties. Any challenge to the legality of the search and seizure of [Defendant] is separate from the determination of immunity under section 776.032, F.S. *The question of whether the law enforcement exception to the statutory immunity applies does not involve the admissibility of evidence obtained from the [Defendant] by any search by Sergeant Johnson, or a civil action against the Sheriff's Office for a violation of [Defendant's] civil rights*. Even if Sergeant Johnson's actions were illegal, which we do not find here, [Defendant's] emphasis on the 'lawful execution' of legal duties is misplaced. As pointed out in the State's Response, **the phrase 'performance of ... official duties' in section 776.032 differs from the phrase 'lawful execution of a legal duty' in statutes defining resisting arrest and other obstruction crimes.** See, § 843.02, F.S. ('whoever shall obstruct ... any officer ... in the lawful execution of any legal duty')."

"Because the evidence supports the trial court's findings of fact, and because the trial court correctly applied section 776.032(1) to those facts, the writ of prohibition is denied. This denial pertaining to the exception to statutory immunity from prosecution [stand your ground law] is without prejudice to [Defendant's] ability to raise the affirmative defense of self-defense at trial. See, *Mederos v. State*, (1DCA 2012).

Lessons Learned:

A similar issue was litigated in *State v. Argerich*, (4DCA 2025), where Defendant Alejandro Argerich was charged with resisting officers with violence and aggravated assault on a law enforcement officer stemming from an incident in which he used a sword against three officers who were detaining him following a Baker Act referral. Defendant asserted immunity under the Stand Your Ground statute for using force "necessary to prevent imminent death or great bodily harm" and moved to dismiss the case.

The trial court determined that the State did not prove by clear and convincing evidence that the officers had a right to take Defendant into custody under the Baker Act and were thus acting outside their lawful duties. On appeal, the 4th D.C.A. noted that a distinction exists between an officer's *official duties*, which are protected under section 776.032, and an officer's *legal duties*, which are subject to a myriad of legal challenges and defenses to a prosecution, or perhaps through a civil rights action.

"Whether the officers exceeded the scope of their legal duties by improperly detaining Defendant or failing to comply with criteria set forth in the Baker Act is irrelevant to whether Stand Your Ground immunity can be applied. Even if a court ultimately determines an officer's actions were without probable cause, or involved excessive force during the attempted detention, Defendant's emphasis on the officers' "lawful execution" of legal duties is misplaced. As the First District explained in *Finkelstein*, the phrase "performance of his or her official duties" in section 776.032 differs from the phrase "lawful execution of a legal duty" in statutes defining resisting arrest and other obstruction crimes.

Finkelstein v. State
1st D.C.A.
(Feb. 26, 2015)

Duty of Care

At 1 p.m. the Portland Police Department received an emergency call. The caller said that Eric Cohen, apparently in the throes of a psychotic episode, had attacked his girlfriend,

stripped off his clothes, and fled the scene into the waist-deep waters of the Back Cove, which was approximately forty-one degrees Fahrenheit.

Shortly after Cohen entered the water, Sgt. Christopher Gervais asked the Portland Fire Department for a rescue boat to retrieve him. Gervais drove across the city to get the boat, a trip that took him around eleven minutes. The rescue boat set off at 1:34 p.m. with Gervais and two other officers on board.

Two other officers discussed entering the water to "rescue" Cohen. Sgt. Michael Rand responded, "We should have the fire boat right off, but I understand what you gotta do." At 1:40 p.m., Blake Cunningham, a former U.S. Coast Guard rescue swimmer, remarked that Cohen would likely drown soon. Rand replied, "Oh, I know," but added that he did not want Cunningham retrieving Cohen without a life jacket. He then began looking for a life jacket to give to Cunningham. At 1:42 p.m., Cunningham "reported that [Cohen] had gone under water," and commented, "he is dead."

At 1:47 p.m., Gervais reported that the rescue boat had pulled Cohen from the water. Cohen had been face down in the waist-deep water, and Gervais could not find a pulse. Neither Gervais nor any other officer on the rescue boat attempted to resuscitate Cohen. Two minutes later, the boat arrived on shore with Cohen's body. No medical or emergency equipment was on shore. A firefighter covered Cohen with his jacket, but no officer tried to revive or otherwise tend to Cohen. An ambulance arrived at 1:53 p.m., and paramedics administered CPR. Cohen was pronounced dead at Maine Medical Center at 2:52 p.m. The medical examiner ruled that Cohen died from hypothermia and drowning.

His estate sued the City of Portland, as well as several members of the City's police and fire departments. The estate claimed that the officers violated Cohen's substantive due process rights by failing to rescue him from a state-created danger. [Both trial court and appellate court found no evidence that the officers at the scene created the danger]. The estate further claimed that the City violated the same due process rights when it failed to train its employees in crisis intervention techniques that could have saved Cohen. Both the district court and the Court of Appeals rejected the claim.

Issue:

Did the City police officers and firefighters violate Eric Cohen's constitutional rights by failing to rescue him? **No**. Did the officers' and Firefighters' failure to perform emergency procedures on Cohen affirmatively create or enhance any danger to him? **No.**

Zone of Care:

Under ordinary circumstances, a law enforcement officer, in the exercise of his discretion to arrest or not to arrest, does not create a duty of care to the suspect or the public at large. An officer's decision not to arrest an individual for DUI who then goes on to kill another in a vehicular accident is not liable to the family of the deceased on a "but for…" theory.

In *Milanese v. City of Boca Raton, FL*, (4DCA 2012), the court set forth the issue as, "We also must consider that, in the law enforcement context, a duty of care exists when law enforcement officers become directly involved in circumstances which place people within a 'zone of risk' 1. by creating or permitting dangers to exist, 2. by taking persons into police custody, 3. detaining them, or 4. otherwise subjecting them to danger."

An example of action by an LEO that did create a zone of risk that resulted in a finding of liability can be found in *Kaisner v. Kolb*, (Fla. 1989) (police officer created a "zone of risk" for the plaintiff by directing him to stand between his vehicle and a police cruiser during a traffic stop, thus depriving him of his ability to protect himself from oncoming traffic).

Eric Cohen's estate's basic claim was that the City deprived Cohen of his life -- in violation of the Due Process Clause -- by failing to rescue him from his self-imposed danger by volitionally entering the cold waters of Portland's Back Cove. A position firmly rejected by the U.S. Supreme Court. "The Due Process Clause does not create an affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."

"The Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.' Its purpose was to protect the people from the State, *not to ensure that the State protected them from each other*."

"If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State

cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs*. (S.Ct.1989).

Court's Ruling:

"The Due Process Clause does not create an 'affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.' See, *DeShaney*. However, a plaintiff may hold a State officer liable for 'failing to protect plaintiffs from danger created or enhanced by [the officer's] affirmative acts.' To make out a State created danger claim, a plaintiff must establish that: 1. a state actor 'affirmatively acted to create or enhance a danger to the plaintiff,' 2. the challenged acts created or enhanced a danger specific to the plaintiff and distinct from the danger to the general public,' 3. the challenged acts 'caused the plaintiff's harm,' and 4. the State actor's conduct, 'when viewed in total, *shocks the conscience*.' With these requirements in mind, we consider the claims against each police sergeant in turn."

"Gervais appears twice in the complaint. First, at 1:23 p.m., Gervais drove eleven minutes to retrieve a rescue boat. Then, at 1:47 p.m., Gervais retrieved Cohen's body from the water, but did not perform CPR or any other emergency procedure. Neither piece of conduct created or affirmatively enhanced the danger to Cohen. Rather, *the danger to Cohen emerged when he entered the icy waters of the Back Cove*. There is no allegation that Gervais forced Cohen into the water, prevented him from leaving the water, or drove him into the water through 'deliberate indifference' for his safety. If anything, Gervais's retrieval of the rescue boat was an attempt to mitigate the danger that Cohen faced."

"Taking a slightly different tack, Cohen's estate argues that Gervais enhanced the danger to Cohen when he 'deliberately chose' not to perform CPR promptly. The Estate's view is basically that an officer must attempt to rescue a plaintiff from a danger that the officer did not create, because any undue recalcitrance on the officer's part would enhance the danger to the plaintiff. *This is just another way of saying that a plaintiff has an affirmative right to government aid in the face of a preexisting danger -- a view that DeShaney squarely rejects*. See also, *Callahan v. N.C. Dep't of Pub. Safety*, (4th Cir. 2021) ('Allowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger.') Ultimately, the Estate's counter-argument depends entirely on 'recasting inactions and omissions as affirmative acts.' We therefore affirm the district court's dismissal of the state-created danger claim against Gervais."

"The state-created danger claim against Rand fares no better. In its brief, the Estate makes three arguments for concluding otherwise. First, the Estate stresses that Rand did not attempt to rescue Cohen or contact a crisis intervention specialist. Second, the Estate complains that Rand did not arrange for an ambulance or emergency medical equipment upon Cohen's removal from the water. Third, the Estate argues that Rand should be liable because he prevented Cunningham from rescuing Cohen."

"The Estate's first two arguments presume that Rand had a duty to rescue Cohen. But Cohen had already been in the water for ten minutes before Rand arrived at Back Cove. As we have explained, given these facts, Rand had no constitutional duty to undertake the actions that he opted against."

"That leaves the Estate's argument that Rand affirmatively enhanced the danger to Cohen by preventing Cunningham from entering the water *without a life jacket*. This argument presumes that Rand had a duty to let Cunningham attempt a rescue. Yet, that presumption is likely wrong. If Rand had no individual duty to interrupt Cohen's 'continued exposure to an existing danger,' it follows that he also had no duty to order another officer to do so. In any event, Rand's requirement that Cunningham wear a life jacket before entering forty-one-degree water to engage with an individual undergoing a mental health crisis hardly *shocks the conscience*. For that reason alone, the Estate's argument fails. We therefore also affirm the district court's dismissal of the state-created danger claim against Rand."

The Court of Appeals summed up the law of this case as, 'Protect and Serve' the motto of the Portland Police Department. "Even acknowledging the challenge posed by Cohen's behavior, the efforts of the responding officers likely fell short of the aspirations behind that motto. That being said, this appeal turns on whether any defendant [officer or firefighter] violated Cohen's constitutional rights. And

for the foregoing reasons, the answer is clearly 'No.' The district court's dismissal and summary judgment orders are therefore, AFFIRMED."

Lessons Learned:

Both the trial court and the reviewing appellate court failed to find any grounds to impose liability on the officers or firefighters. The best argument the Estate had, "outrageous" behavior, likewise failed.

"Cases finding a due process violation based on outrageous government conduct have one common thread: *affirmative and unacceptable conduct* by law enforcement or its agent." For example, the Florida Supreme Court found paying an informant a contingent fee for each drug arrest to be outrageous behavior:

"We can imagine few situations with more potential for abuse of a Defendant's due process right. The informant here had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee. The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital State witnesses who have what amounts to a financial stake in criminal convictions." *State v. Glosson*, (Fla. 1985).

As another example, the court found sending a C.I. into the community unsupervised to make drug cases egregious behavior. "Due process of law will not tolerate the law enforcement techniques employed in this case. Sending an untrained informant out into the community, with no control, no supervision, and not one word of guidance or limitation about whom he may approach or what he should do was an invitation to trouble…Due process is offended on these facts." *State v. Anders,* (4DCA 1992).

None of the actions or inactions of the officers or firefighters in the present case even remotely approached that level of abuse. Cohen entered the water of his own volition, no one was responsible for his situation other than he. Bringing to mind the old maxim, "Lack of planning on your part, does not constitute an emergency on our part."

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2nd Amendment

"When thousands of Florida students, teachers, and parents who survived a terrible tragedy 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."

N.R.A. v. Pam Bondi
U.S. Court of Appeals, 11th Cir.
(March 14, 2025)