

# LEGAL EAGLE

May 2026

## Critical Incident

Officers with the Sheriff's Department prepared to arrest Wainer Ancheta, whom they suspected of trafficking drugs. The Officers were briefed on Ancheta's background, including his history of gang affiliation and firearm possession.

When Defendant's car entered a gas station, five police cars—including an unmarked SUV—converged at the scene and boxed in the sedan. Officer Marino, dressed in plain clothes, exited the SUV and drew his service weapon. Almost simultaneously, a marked police car behind the sedan turned on its emergency flashers.

Ancheta, who had recently been shot multiple times by gang members, believed he was being ambushed. Though Marino testified that he shouted "Police. Police. Hands up," Ancheta denies that he heard those words, adding that nothing about Marino's clothes or car identified him as an officer. Within moments of seeing Marino, Ancheta drew his own weapon and fired it in the air (Marino says Ancheta fired at him), and Marino fired back.

Ancheta brought his civil rights suit asserting that the Officers violated his Fourth Amendment rights by using excessive force when they shot him, and that the Officers acted unreasonably by failing to

announce their presence with a loudspeaker or marked police cars and uniforms.

The trial judge ruled for the Officers finding the evidence uncontested that Ancheta fired at Marino first. Regardless of whether Ancheta fired in the air or directly at Marino, the judge ruled, *an officer under the circumstances could reasonably conclude that Ancheta posed a threat to the other officers and bystanders.*

The judge added that Marino's testimony that he announced "Police. Police," paired with the emergency flashers on the marked police car behind Ancheta, were sufficient to apprise Ancheta of the Officers' presence. On appeal, that ruling was affirmed.

### **Issue:**

Are police tactical mistakes that result in an avoidable use of deadly force amount to a Fourth Amendment violation? **No.**

### **Tactical Mistakes:**

The 7<sup>th</sup> Circuit in an earlier case, *Biegert v. Molitor*, (7<sup>th</sup> Cir. 2020), addressed a similar situation. "The officers might have made mistakes, and those mistakes might have provoked Biegert's violent resistance. Even if so, however, it does not follow that their actions violated the Fourth Amendment. See, *City & County of San Francisco v. Sheehan*,

### In this issue:

- ❖ **Right to Counsel**
- ❖ **Cellphone Seizure**
- ❖ **Taser Possession**



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(S.Ct.2015), ('Even if [the officers] misjudged the situation, Sheehan cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided')."

Lastly, the *Biegert* Court acknowledged that *escalating resistance leads to escalating force*. "We must evaluate the reasonableness of the Officers' actions with the understanding that the situation they faced was 'tense, uncertain, and rapidly evolving' and required them to 'make split-second judgements' about how much force to apply to counter the danger Biegert posed. ...Biegert posed an imminent threat to the officers once he had armed himself with a knife, attacked [Officer] Dunn, and advanced toward [Officer] Krueger. At this point, the Officers reasonably resorted to firing at Biegert in response to the imminent threat he posed."

The U.S. Supreme Court has as yet not addressed this issue. In *Barnes v. Felix*, (S.Ct.2025), they reviewed a lower court's use of the "moment of threat" to evaluate an officer's actions. They disagreed with that analysis as contrary to the "totality of the circumstances" standard. They did, however, note: "The Court does not address a separate question about whether or how an officer's own 'creation of a dangerous situation' factors into the reasonableness analysis. The courts below never confronted that issue, and it was not the basis of the petition for certiorari."

Courts have addressed an agency's failure to plan for a foreseeable danger. In *Carroll v. County of Monroe*, (2nd Cir. 2013), the Court

concluded with this admonition, "As a cautionary note, however, we do not mean to endorse the [County's] apparent position that the failure to plan for the known presence of a dog is always acceptable when the police are executing a no-knock warrant. There may very well be circumstances under which a Plaintiff could prove that lack of an adequate plan rendered the shooting of his or her dog unreasonable even during execution of a no-knock warrant, and we urge the [County] to consider whether more comprehensive training and planning would better serve the public, as well as its officers, in the future."

#### **Court's Ruling:**

"Even if we assume that Marino did not announce himself as an Officer, it does not follow that his actions violated the Fourth Amendment.

**Tactical mistakes that result in an avoidable use of deadly force do not usually amount to a Fourth Amendment violation.** *Est. of Biegert by Biegert v. Molitor*, (7th Cir. 2020). In general, *an officer does not act unreasonably simply 'because he created a situation where deadly force [becomes] essentially inevitable.'* Even if the [Officers'] actions exacerbated the possibility of a dangerous confrontation, Ancheta's action—the use of his gun—was an 'intervening cause of the deadly force.' The [Officers] 'escalated the force that they applied in response to the force with which [Ancheta] resisted; the situation requiring them to use deadly force was not primarily of their own making.' *Horton v. Pobjecky*, (7th Cir. 2018) (Officer's response with deadly force 'under immense pressure, and with limited time' to an encoun-

ter with a suspected armed robbery subject was reasonable, appropriate and justified ... in compliance with the Fourth Amendment.). Affirmed."

#### **Lessons Learned:**

There is undoubtedly always room to question the actions of the Officers who were involved in a shooting. But the courts have made it clear that second-guessing the Officers' actions prior to the use of force is not supported in the law. In *Plakas v. Drinski*, (7th Cir. 1994), cert denied, (S.Ct.1994), the court stated:

"...It is from that point on that we judge the reasonableness of the use of deadly force in light of all that the officer knew. *We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct.* Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer."

"The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the Officer had decided to do nothing, then no force would have been used. In this sense, *the police officer always causes the trouble.* But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing."

**Ancheta v. Fred Jones**  
**U.S. Court of Appeals, 7th Cir.**  
**(Jan. 21, 2025)**

Protect your every day.

# RECOGNIZE THE SIGNS OF TERRORISM-RELATED SUSPICIOUS ACTIVITY



### EXPRESSED OR IMPLIED THREAT

Communicating a spoken or written threat to commit a crime that could harm or kill people or damage a facility, infrastructure, or secured site



### OBSERVATION/SURVEILLANCE

A prolonged or unusual interest in facilities, buildings, or infrastructure beyond casual or professional interest, in a suspicious manner



### PHOTOGRAPHY

Taking pictures or videos of persons, facilities, buildings, or infrastructure in a covert manner, such as taking photos or video of security-related equipment or personnel, infrequently-used access points, or the structure of a building



### THEFT/LOSS/DIVERSION

Stealing or diverting items—such as equipment, uniforms, or badges—that belong to a facility or secured site



### TESTING OR PROBING OF SECURITY

Challenging or testing a facility's security or IT systems to assess the strength or weakness of the target



### AVIATION ACTIVITY

Operating or interfering with the operation of an aircraft that poses a threat of harm to people and property



### BREACH/ATTEMPTED INTRUSION

Unauthorized people trying to enter a restricted area or impersonating authorized personnel



### MISREPRESENTATION

Presenting false information or misusing documents to conceal possible illegal activity



### ELICITING INFORMATION

Questioning personnel beyond mere curiosity about an event, facility, or operations



### ACQUISITION OF EXPERTISE

Gaining skills or knowledge on a specific topic, such as facility security, military tactics, or flying an aircraft



### CYBERATTACK

Disrupting or compromising an organization's information technology systems



### RECRUITING/FINANCING

Funding suspicious or criminal activity or recruiting people to participate in criminal or terrorist activity



### SABOTAGE/TAMPERING/VANDALISM

Damaging or destroying part of a facility, infrastructure, or secured site



### MATERIALS ACQUISITION/STORAGE

Acquisition and/or storage of unusual materials such as cell phones, radio controllers, or toxic materials



### WEAPONS COLLECTION/STORAGE

Collection or discovery of unusual amounts of weapons including explosives, chemicals, or other destructive materials



### SECTOR-SPECIFIC INCIDENT

Actions which raise concern to specific sectors, (e.g., power plant) with regard to their personnel, facilities, systems, or functions

The above activities should only be reported if they are conducted in a manner that would arouse suspicion of terrorism.

If you **see** something, **say** something<sup>®</sup>

REPORT SUSPICIOUS ACTIVITY TO LOCAL AUTHORITIES OR CALL 9-1-1 IN CASE OF EMERGENCY

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## Recent Case Law

### Invoking Right to Counsel

Defendant, Raymond Reese, was charged with first-degree murder with a firearm. Following his arrest, a Detective spoke with him while he sat in the back of a patrol vehicle. After being advised of his rights under *Miranda v. Arizona*, the Defendant agreed to speak with detectives. The conversation was recorded on officer's cell phone. Detective then asked the Defendant where the firearms used in the murder were, and the Defendant provided their location. The Detective testified that the Defendant did not invoke his right to counsel and that, if he had done so, the questioning would have been terminated.

Officers then transported Defendant to the police station, where a recorded interview was conducted. During the interview, the Defendant acknowledged that he had called 9-1-1 and stated:

"Everything's going bad at once. And this lady put me to the edge, and I'm a good person. But this is on her, man."

Defendant further explained that he called 9-1-1 because he shot someone but claimed he did not know the victim's identity.

Throughout the interview, Defendant stated that *he was going to need some sort of advice*. At one point in the recorded interview, Defendant stated, "I know, you know, I don't want this to go south, but I'm telling you, *I'm going to need some advice because I'm – I am*

*too fucking stupid*." Detectives continued questioning briefly until the Defendant specifically stated that he needed to speak with a lawyer. The interview was then terminated.

Defendant moved to suppress his post-*Miranda* statements, arguing that his *Miranda* rights had been violated during the interrogation when he stated *he was going to need some sort of advice*. The trial court agreed. On appeal, that ruling was reversed.

#### Issue:

Did the Defendant unequivocally request the presence of counsel before speaking with the detectives?

No.

#### "I'm Going to Need Some Advice:"

As a general rule, when an accused has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself reinitiates further communication, exchanges, or conversations with the police."

*Edwards v. Arizona*, (S.Ct. 1981).

Which brings up the golden rule - "once an individual has invoked his or her right to counsel, police questioning of the person must cease." *Black v. State*, (4DCA 2011).

In *Miranda v. Arizona*, (S.Ct. 1966), the Supreme Court recognized that a suspect's right to remain silent extends to custodial interrogations. The Supreme Court also has held "that a suspect subject to custodial interrogation has the

right to consult with an attorney and to have counsel present during questioning." *Davis v. United States*, (S.Ct. 1994) (explaining that *Miranda* recognized this preventative right). "The right to counsel established in *Miranda* was one of a series of recommended 'procedural safeguards' that were not themselves rights protected by the Constitution but were instead measures to ensure that the right against compulsory self-incrimination was protected." So "if ... [the suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning."

However, "the suspect must unambiguously request counsel." "He must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." "If the statement fails to meet the requisite level of clarity," *there is no requirement that "officers stop questioning the suspect."* While the "police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation," they need not stop questioning when an "ambiguous or equivocal reference to an attorney" leaves officers unclear "whether or not the suspect wants a lawyer," or when a "reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel."

See *Walker v. State*, (Fla.2007) (finding that the defendant did not make an unequivocal request for counsel when he said, “I think I might want to talk to an attorney” and later asked the agent if he needed an attorney). Again, these are instances after a suspect has acknowledged his rights and has begun making statements.

The court is required to determine whether the accused actually invoked his right to counsel, and “this is an objective inquiry,” one necessitating “some statement that can reasonably be construed to be an expression of a desire for an attorney’s assistance.” An accused’s post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. *Smith v. Illinois*, (S.Ct. 1984).

In *Cuervo v. State*, (Fla. 2007), after the Defendant invoked his right to remain silent, the police told him that he still had the opportunity to tell “his side of the story.” The Florida Supreme Court held, “These remarks undermined the warning to [the Defendant] that anything he said could be used against him in a court of law.” Furthermore, the officer’s failure to *scrupulously honor* the Defendant’s decision to remain silent and persistent questioning nudged the Defendant into waiving his *Miranda* rights, requiring suppression.

#### **Court’s Ruling:**

“A reviewing court must consider the totality of the circumstances in determining whether a suspect’s statement unequivocally invoked a *Miranda* right.” *Langel v. State*, (4DCA 2020). To be unequivocal, a suspect must articulate a request for an

attorney with sufficient clarity that a reasonable officer would understand the statement to be a request for counsel to invoke the right to counsel. *Davis v. United States*, (S.Ct. 1994). Ambiguous or equivocal references to counsel do not require officers to cease questioning. *State v. Owen*, (Fla. 1997).”

“The Defendant’s statement that he would ‘need some advice’ did not mention an attorney and was reasonably susceptible to multiple interpretations. Police in Florida need not ask clarifying questions if a Defendant who has received proper *Miranda* warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her *Miranda* rights. *State v. Craig*, (Fla.1970) (holding that where the Defendant stated, ‘Well, I would like to have one [a lawyer] in a way, but I don’t see how it can help me,’ the Defendant had not invoked his right to counsel); *McKenzie v. State*, (4DCA 2013) (explaining that the statement, ‘I think I’d like a lawyer,’ followed by the Defendant’s reinitiation of conversation with the interrogating officers was an equivocal invocation of right to counsel). Notably, here the Defendant continued speaking with detectives after the statement, expressly indicating that he did not mind continuing the conversation.”

“A generalized request for ‘advice’ is not an unequivocal invocation of the right to counsel under the objective standard governing *Miranda* inquiries. See *Washington v. State*, (1DCA 2018) (holding that a Defendant’s question to officers as to whether he needed an attorney amounted to a request for advice about his rights and therefore was

not an unequivocal request for counsel); *State v. Perez*, (Idaho Ct. App. 2008) (‘His statement to the officers was, ‘Yeah, **I think I need advice**, man.’ As *Perez* did not directly refer to a desire to see an attorney, he may have been expressing a wish for advice from family, friends, a clergyman, or other advisor. Viewed objectively, *Perez*’s statement would not necessarily be understood by a reasonable police officer as a present request for an attorney.’).”

“Throughout the interview, any hesitation about talking with the detectives appeared to be more related to not wanting to hear details of the alleged crime, rather than a desire for an attorney. The defendant turned himself in to the police, freely admitted to shooting the victim, and volunteered information such as the murder weapon’s location. Later in the interview, the Defendant clearly stated that he would like to speak with a lawyer, at which point detectives immediately terminated the interrogation. Because the Defendant’s earlier reference to needing ‘advice’ was not an unambiguous request for counsel, the trial court erred in suppressing the statements that followed that ambiguous comment. Reversed and remanded.”

#### **Lessons Learned:**

Along similar lines, where the suspect, after *Miranda*, asked the Detective, “Do you think I need a lawyer?” the officer responded that it was his decision to make. In *State v. Glatzmayer*, (Fla.2001), the Florida Supreme Court held that the officers’ response that it was the Defendant’s decision was a good-faith effort to give a simple and straightforward answer because “their response was simple, reasonable, and true.”

“Unlike the situation in *Almeida v. State*, (Fla.1999), the officers did not engage in ‘gamesmanship’; they did not try ‘to give an evasive answer, or to skip over the question, or to override or steamroll’ the suspect.”

In *Brooks v. State*, (5DCA 2023), the court did not take issue with the Detective when Defendant asked if he was allowed to have a lawyer present, he answered affirmatively indicating that the interview would end if Defendant requested counsel, and “they would not get to hear his side of the story if the interview ended,” because the Defendant did not make an unequivocal request for counsel. Under other circumstances, that response to convince the Defendant not to request an attorney would have led to the suppression of the interview.

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

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

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

**State v. Reese**  
4<sup>th</sup> D.C.A.  
(April 8, 2026)

## Cellphone Seizure

Two gang members shot and killed each other in the front yard of a private home. One of the gang members—Jamien Davis—was a friend of Lance Nealy’s and was affiliated with the same gang. Exactly a year later, another fatal shooting occurred at that same home.

A surveillance video captured the shooting. The footage showed a tall, thin, light-skinned black male approach the home, knock on the door, wait for someone to answer, shoot five times through the door, and then run away. Nealy matched the description of and closely resembled the shooter depicted in the video. .40 caliber shell casings were recovered at the scene.

Additionally, before the shooting, a confidential informant notified law enforcement that Nealy mentioned that he was going to retaliate for Jamien Davis’ death. Nealy skipped school on the day of the shooting, but he was back in school the following morning. An officer contacted him at the school. The officer asked Nealy if he had any weapons on him. Nealy responded

by placing his phone on the counter and emptying his pockets. The officer seized the phone. The officer then told Nealy that she was present at the school to discuss the shooting from the night before. Nealy immediately asked to leave. A search warrant for the phone was obtained.

Nealy moved to suppress the evidence found on his phone, arguing that law enforcement had unlawfully seized the phone without a warrant. The State argued that law enforcement had probable cause to seize Nealy’s phone and that the exigent circumstances exception to the warrant requirement applied because Nealy could have deleted evidence from the phone if he had been allowed to leave the school with it.

The trial court issued a written order granting Nealy’s motion to suppress. The court found that law enforcement had probable cause to seize Nealy’s phone, but that no exigent circumstances existed. The court ruled that for the State to establish exigent circumstances, the State “must” identify some “affirmative” indication from the Defendant that he will imminently destroy evidence. Finding that Nealy gave no such indication here, the court granted his motion to suppress. On appeal, that ruling was reversed.

### Issue:

Did the trial court err when it ruled that the exigent circumstances exception applied only if Nealy “affirmatively indicated” that he would destroy evidence on the cellphone if it were not immediately seized? **Yes.**

### Exigent Circumstances:

The Eleventh Circuit stated in *U.S. v. Babcock*, (11 Cir. 2019), “The

Supreme Court has interpreted the Fourth Amendment to allow a warrantless seizure when police can show both 1. probable cause to believe that property contains contraband or evidence of a crime and 2. an applicable warrant exception, such as exigent circumstances. See, e.g., *Kentucky v. King*, (S.Ct. 2011).”

Thus, absent either a warrant or probable cause plus an exception, police may not seize private property.

The United States Supreme Court stated in *Texas v. Brown*, (1983), “Probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a [person] of reasonable caution in the belief that certain items may be ... useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A practical, non-technical probability that incriminating evidence is involved is all that is required. Moreover, our observation in *United States v. Cortez*, (1981), regarding “particularized suspicion,” is equally applicable to the probable cause requirement. “The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same, and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”

“The test of whether exigent

circumstances exist is an objective one.” *United States v. Tobin*, (11 Cir. 1991). “Whether exigent circumstances exist in a given case is a fact-specific inquiry that depends on the totality of the circumstances.” As the United States Supreme Court stated in *United States v. Banks*, (2003), “We have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.”

One type of exigent circumstance is the imminent destruction of evidence. “The government must show more than a subjective fear of imminent destruction of evidence; the fear must be objectively reasonable. In determining whether the agents reasonably feared imminent destruction of the evidence, the appropriate inquiry is whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced agent to believe that evidence might be destroyed before a warrant could be secured. In other words, were the police unreasonable in not getting a warrant in the circumstances that confronted them?” *Gilbert v. State*, (4DCA 2001).

Application of the exigent circumstance exception is “particularly compelling” in cases involving electronic files, which can easily and quickly be destroyed. See, *United States v. Bradley*, (6Cir. 2012) (“Courts have doubted the wisdom of leaving the owner of an easily destructible electronic device containing incriminating material in

possession of that electronic device once the owner is aware that law-enforcement agents are seeking a search warrant.”).

### **Court’s Ruling:**

“A warrantless search or seizure is ‘*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions’ *Katz v. United States*, (S.Ct.1967). A warrantless seizure will not be considered unreasonable when 1. there is probable cause to believe the property is or contains evidence of a crime and 2. the seizure falls within an established exception to the warrant requirement. *Jones v. State*, (Fla. 1994) (citing *United States v. Place*, (S.Ct.1983)).”

“The first prong that must be satisfied for a warrantless seizure to be permissible is probable cause. ‘Probable cause is a flexible, common-sense standard’ that ‘merely requires that the facts available to the officer would ‘warrant a [person] of reasonable caution in the belief,’ that certain items may be ... useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.’ *Texas v. Brown*, (1983). Here, the trial court correctly found that law enforcement had probable cause to seize Nealy’s phone.”

“Once probable cause is established, the other prong that must be satisfied for a warrantless seizure to be permitted is an established exception to the warrant requirement. One such exception is exigent circumstances. In determining whether exigent circumstances existed at the time of a seizure, courts employ ‘a fact-specific inquiry that depends on the totality

of the circumstances.’ *State v. Darter*, (4DCA 2022). The exigent circumstance the State argued here was that, if the investigating officer did not seize Nealy’s phone after alerting him that law enforcement was on to him, Nealy would have destroyed the evidence on his phone.”

“To determine whether the officer’s fear that Nealy would destroy evidence could justify a warrantless seizure, the trial court had to conduct a fact-specific inquiry to determine whether the totality of the circumstances indicated that it was reasonable for the officer ‘to believe there was a risk evidence would be destroyed.’ **Missing here is any requirement that the Defendant must affirmatively indicate that he is about to destroy evidence.** While such an indication or the lack thereof is a circumstance, the inquiry focuses on the totality of the circumstances.”

“Even so, the trial court concluded that for the exception to apply, Nealy had to affirmatively indicate he was about to destroy evidence before the officer could seize his phone without a warrant. In reaching this conclusion, the trial court cited several opinions where appellate courts upheld warrantless seizures after the defendants gave such indications. *While each Defendant’s affirmative indication was a circumstance that helped establish exigency in those cases, it does not mean that the same circumstance is necessary to establish exigency in every case.* Instead, the proper inquiry focuses on the totality of the circumstances in a given case. *Herring v. State*, (1DCA 2015) (observing that ‘there is no exhaustive list of what constitutes exigent

circumstances’ while identifying factors that may indicate exigency, including the ‘likelihood that delay could cause ... the destruction of essential evidence’).”

“And so, we hold that the trial court erred when it concluded that Nealy had to affirmatively indicate that he planned to destroy the evidence on his phone before officers could seize the phone without a warrant. REVERSED.”

### **Lessons Learned:**

The U.S. Supreme Court decided *Riley v. California*, (S.Ct.2014), holding that “a warrant is generally required before ... a search [of a cell phone], even when a cell phone is seized incident to arrest.” The Court went on, however, to note that “other case-specific exceptions may still justify a warrantless search of a particular phone.” Specifically, the exigency exception “could include the need to prevent the imminent destruction of evidence in individual cases, ...”

In *U.S. v. Camou*, (9Cir. 2014), Agents searched a seized cell phone without a warrant, arguing that “the volatile nature of call logs and other cell phone information with the passing of time” presented an exigent circumstance. However, the Supreme Court’s decision in *Riley* foreclosed that argument.

The *Camou* court ruled, “In *Riley*, the Court determined that ‘once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.’ And although ‘information on a cell phone may nevertheless be vulnerable to ... remote wiping,’ there is ‘little reason to believe that [this] problem is

prevalent.’ And, ‘as to remote wiping, law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting the phone from the network.’ When ‘the police are truly confronted with a ‘now or never’ situation—for example, circumstances suggesting that a Defendant’s phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately.”

Clearly, at this time, the U.S. Supreme Court’s ruling in *Riley v. California* eliminates search incident to arrest as a basis for a lawful cell phone search. Still, the court’s observation as to what constitutes a search incident to arrest is instructive.

**State v. Nealy, Jr.**  
**1<sup>st</sup> D.C.A.**  
**(Jan. 7, 2026)**

## **Taser Possession**

The D.C.A.’s opinion does not set forth the underlying facts. It is evident, however, that the Officer found the Defendant in possession of a Taser on his person. The facts surrounding their encounter are absent, but given the lack of a motion to suppress, the stop and seizure were undoubtedly lawful. Given the Court’s order, it is safe to conclude that the Defendant was a convicted felon.

The Defendant’s sole issue on appeal was that the State failed to prove the Taser found in his possession was operable. The trial court denied his motion for acquittal, and on appeal, that ruling was affirmed.

### **Issue:**

Does Florida Statute make the

possession of a Taser or other weapon contingent on its being operable? **No.**

### **Operable Weapon:**

Under Florida law, possession of a Taser or stun gun is generally lawful for most individuals, subject to specific restrictions on how these devices may be carried and who may possess them.

Florida law permits individuals to possess Tasers and stun guns for lawful self-defense purposes. The statute defines a “dart-firing stun gun” as “any device having one or more darts that are capable of delivering an electrical current.” A person may carry “a nonlethal stun gun or dart-firing stun gun or other nonlethal electric weapon or device that is designed solely for defensive purposes” in a concealed manner for lawful self-defense without violating the concealed weapons statute. Additionally, individuals may openly carry such devices “for purposes of lawful self-defense.” Sec. 790.053(2)(b).

The issue raised by the Defendant in the present case is resolved by the language contained in Florida Statutes. For example, section 790.01(9), in its definition of ‘firearm,’ answers the question is a gun without a firing pin considered a firearm. The answer is “Yes.” A firearm under Florida law is defined as “any weapon which will, is designed to, or *may readily be converted* to expel a projectile by the action of an explosive...” A missing firing pin is considered an inoperable condition that can be easily fixed, keeping it classified as a firearm.

Section 790.23(1)(a), makes it unlawful for a convicted felon “to own or to have in his or her care, custody, possession, or control any ...

*electric weapon or device ....”* An “electric weapon or device means any device which, through the application or use of electrical current, is designed, redesigned, used, or intended to be used for offensive or defensive purposes, the destruction of life, or the infliction of injury.”

The officer here testified that Tasers use an electric current to incapacitate a person and that they are used for self-defense, which satisfies the statutory requirements. Thus, the trial court did not err in denying Smith’s motion.

### **Court’s Ruling:**

After reciting the above definitions, the D.C.A. ruled, “Contrary to Smith’s contention, the statute contains no requirement that the device be ‘operable.’ Rather, according to the statutory definition, Smith’s Taser qualifies as an electric weapon or device if it is simply designed to be used for defensive purposes through the application or use of electrical current. It does not have to work. Because the State was not required to prove the Taser was operable in order to convict Smith of possession of an electric weapon or device by a convicted felon, we affirm.”

### **Lessons Learned:**

There is an interesting further restriction on the carrying of a Taser on the person. Sec. 790.25 provides an exception to carrying a concealed weapon, as defined in section 790.01 (2), and states in pertinent part:

“Notwithstanding subsection (2), it is lawful and is not a violation of s. 790.01 to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the

firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use.”

“Securely encased” is defined as: “in a glove compartment, whether or not locked; snapped in a holster; in a gun case, whether or not locked; in a zippered gun case; or in a closed box or container which requires a lid or cover to be opened for access.”

In *Gemmill v. State*, (4DCA 1995), the court held that a motorist carrying an electric stun gun in a leather waist pouch did not qualify for the “securely encased” exception because the exception “does not legalize the carrying of a concealed weapon *on the person*.” The statute language could not be clearer: “Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person.” This means that while individuals may carry these devices concealed for self-defense under section 790.01(5)(b), they cannot rely on the vehicle exception if carrying them on their person.

Lastly, Open Carrying Weapons, as amended in 2023, provides in part, “1. Except as otherwise provided by law and in subsection 2., it is unlawful for any person to openly carry on or about his or her person any firearm or electric weapon or device. ...2. A person may openly carry, for purposes of lawful self-defense:

- (a) A self-defense chemical spray.
- (b) A nonlethal stun gun or dart-firing stun gun or other nonlethal electric weapon or device that is designed solely for defensive purposes.”

**Smith v. State**  
**6<sup>th</sup> D.C.A.**  
**(March 27, 2026)**