LEGAL EAGLE

November 2024

2nd Amendment Limitation

Jose Paz Medina-Cantu was charged with illegal re-entry into the United States, and possession of a firearm and ammunition as an illegal alien in violation of U.S. Code. Cantu moved to dismiss the count of his indictment charging him with unlawful possession of a firearm, arguing that in light of the United States Supreme Court's ruling in *New York State Rifle & Pistol Ass'n v. Bruen*, (S.Ct. 2022), the law was unconstitutional.

Issue:

Are the 2nd Amendment protections limitless? **No.** Do they apply to non-citizens? **No**.

Bruen Ruling:

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 made its way to the U.S. Supreme Court, where they found the City's licensing requirements violative of the 2nd Amendment as inconsistent with the "principles that underpin" our nation's historical tradition of firearm regulation

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

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

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firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Court's Ruling:

"In *Portillo-Munoz*, this court adjudicated the constitutionality of [U.S. Code] in light of the Supreme Court's decision in *District of Columbia v. Heller*, (S.Ct.2008), which held that the Second Amendment guarantees an individual right to possess and carry firearms. We noted that although the Supreme Court in *Heller* did not purport to 'clarify the entire field' of the Second Amendment, the Court's language did provide some guidance as to the meaning of the term 'the people' as it is used in the Second Amendment. Namely, we highlighted that the Court in *Heller* held that the Second Amendment 'surely elevates above all other interests the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home. We also noted the Court's conclusions that the term 'the people' is generally employed in the Constitution to refer to 'all members of the political community,' and that there is a 'strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.' "

"Drawing upon this language we concluded that illegal aliens are not 'law-abiding, responsible citizens' or 'members of the political community,' and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood. Accordingly, we held that the Second Amendment's protections do not extend to illegal aliens, and that [U.S. Code] is therefore constitutional under the Amendment."

"Additionally, *Bruen* provided no clarification as to the meaning of 'the people' in the Second Amendment. As Justice Alito noted in his concurring opinion, *Bruen* 'decided nothing about **who** may lawfully possess a firearm.' See also case notes that it was undisputed that the Petitioners raising the Second Amendment challenge were 'ordinary, law-abiding, adult citizens'—part of 'the people' whom the Second Amendment protects'). Accordingly, we find that the Supreme Court's decision in *Bruen* did not abrogate *Portillo-Munoz*. Affirmed."

Lessons Learned:

In a concurring opinion, in the present case, one Justice observed:
The Second Amendment protects the right of "the people" to keep and bear arms. Our court has held that the term "the people" under the Second Amendment does not include illegal aliens.

The Defendant here contends that *Portillo-Munoz* is no longer good law, in light of recent decisions from the Supreme Court. But there's no basis to question our precedent. To begin with, no Supreme Court precedent compels the application of the Second Amendment to illegal aliens—and certainly not *New York State Rifle & Pistol Association v. Bruen*, (2022), or *United States v. Rahimi*, (2024). That should be the end of the matter. *We should not extend rights to illegal aliens any further than what the law requires*. See, *Young Conservatives of Texas Foundation v. Smatresk*, (5th Cir. 2023) ("Our national objectives are undercut when [we] encourage illegal entry into the United States.").

Moreover, it's already well established that illegal aliens do not have Second Amendment rights. In *United States v. Verdugo-Urquidez*, (S.Ct. 1990), the Court noted that "the people" is "a term of art employed in select parts of the Constitution"—namely, the First, Second, Fourth, Ninth, and Tenth Amendments. The term "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

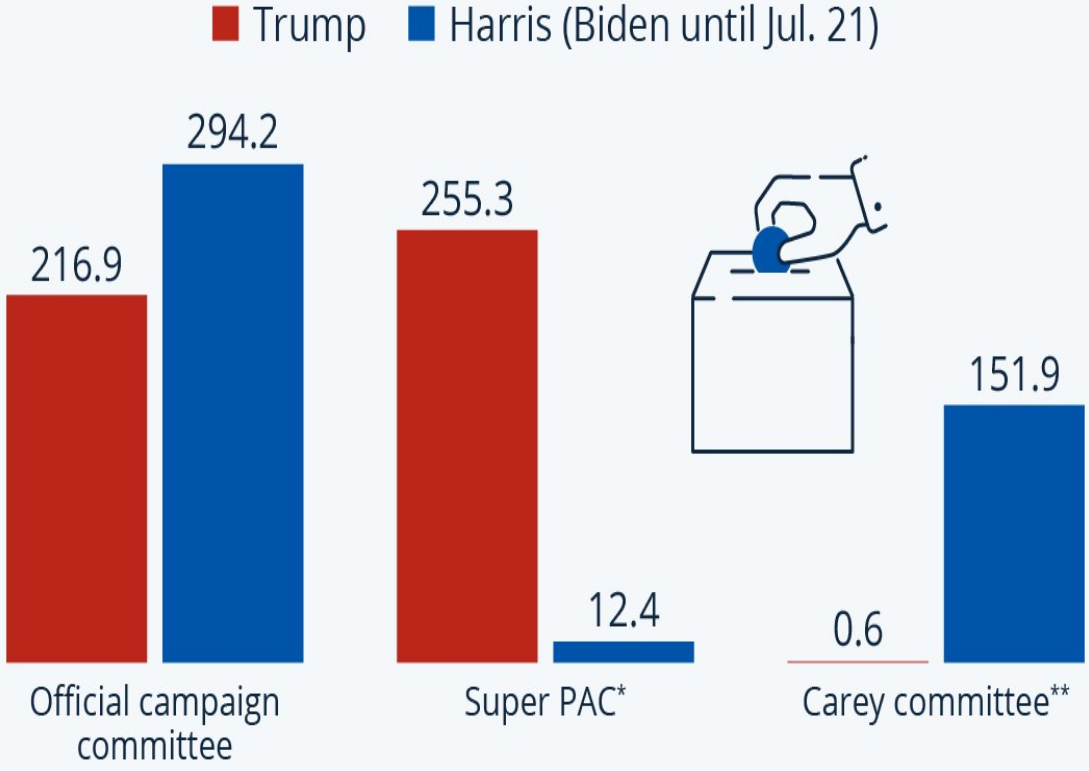
Illegal aliens don't qualify under the definition of "the people" set forth in *Verdugo-Urquidez* and *Heller*—not as a matter of common sense or Court precedent. As to common sense, an illegal alien does not become "part of a national community" by unlawfully entering it, any more than a thief becomes an owner of property by stealing it.

And, as to precedent, the Court has repeatedly explained that "an alien ... does not become one of *the people* to whom these things are secured by our Constitution *by an attempt to enter forbidden by law.*" *United States ex rel. Turner v. Williams*, (S.Ct.1904). But that's, of course, the very definition of an illegal alien—one who "attempts to enter" our country in a manner "forbidden by law." So illegal aliens are not part of "the people" entitled to the protections of the Second Amendment.

United States v. Medina-Cantu
U.S. Court of Appeals - 5th Cir.
(Aug. 27, 2024)

Who Funds the U.S. Presidential Campaigns?

Total partisan funding of the Harris/Trump campaigns as of Jun. 30, 2024 by group (in million U.S. dollars)



* outside groups with no donation limit

** hybrid of super PAC (no donation limit) and regular PAC (donation limit of $5,000/year per donor)

Source: Federal Election Commission via OpenSecrets

statista

Recent Case Law

Involuntary Confession

Detectives were investigating the theft of a pickup truck from a business. They obtained surveillance video from surrounding businesses which showed a truck registered to Jason Vera parked in the area at the time of the crime. However, Vera was not observed in the videos.

After obtaining the surveillance videos, two detectives went to an automobile garage where Defendant's truck was parked and asked whose silver truck was parked out front. Defendant answered that the truck was his. The Detectives asked to talk to Defendant somewhere private and they went into a private room. The Detectives did not tell Defendant he was free to leave, and they admitted they did not have probable cause to arrest Defendant for any crime at that time. Before questioning Defendant, a Detective read him his *Miranda* rights.

Defendant gave inconsistent explanations for his whereabouts and the location of his truck. Detective explained having security video from the area, and Defendant's statement were in conflict. Detective then said, "So, either you cooperate with us, or we take your truck. Permanently. So, confiscation because it was used in the commission of the crime. So, before you answer, okay?" "I'm sure that that vehicle that transports you, you hold dear to yourself, right? So, if I take it, because it was used in a commission of a crime, where you going to be when it comes to your vehicle? Because you're not going to get it back."

Defendant then immediately admitted his role in the theft and was arrested. Before questioning, the Detectives did not have probable cause to arrest Defendant, but they did regard his truck as a "suspect vehicle" as it appeared on surveillance video outside the business from which the stolen truck was taken. The Detectives did not have video showing Defendant in his truck or in the area, so they were not truthful when they told Defendant that they knew his whereabouts from the video. From the transcript of the Defendant's statement, it was clear that he began to cooperate and answer the Detectives' questions only after they threatened to confiscate his truck. Without Defendant's confession, the State did not have evidence that he was involved in the burglary, grand theft, or criminal mischief.

The trial court found that Defendant was in custody during the entire questioning, and he waived his *Miranda* rights after adequate warning. The court decided that the detective's threat to take the truck was a deceptive tactic to obtain a confession, but the threat was a true legal statement as the truck was sufficiently linked to the burglary. The court concluded the threat did not render the confession involuntary and denied the motion to suppress. On appeal, that ruling was reversed.

Issue:

Did the trial court err by denying the Defendant's motion to suppress because the police detectives obtained his confession by coercion? **Yes**.

Threats and Promises:

Merely advising a suspect of his *Miranda* rights is insufficient to admit a Defendant's statement at trial. The State must also establish that the statement was freely and *voluntarily* given. Further, that there were no threats or promises made to overcome the will of the suspect. "To render a confession voluntary and admissible as evidence, the mind of the accused should at the time be free to act, uninfluenced by fear or hope. To exclude it as testimony, it is not necessary that any direct promises or threats be made to the accused. It is sufficient, if the attending circumstances, or declarations of those present, be calculated to delude the prisoner as to his true position and *exert an improper and undue influence* over his mind." *Simon v. State*, (Fla. 1853).

"To be admissible in evidence, a confession must be voluntary -- the product of a 'free and rational choice.' The court must look at the totality of the circumstances surrounding the confession to determine whether it was the product of a free choice."

"Recently, in *Day v. State*, (4DCA 2010), we explained that a confession must not be induced by any threat or promise, however slight: 'A confession or inculpatory statement is not freely and voluntarily given if it has been elicited by direct or implied promises, however

slight.' *'If the interrogator induces the accused to confess by using language which amounts to a threat or promise of benefit, then the confession may be untrustworthy and should be excluded.*' We further noted that there must be a 'causal nexus' between the promises and the confession." *Squire v. State*, (4DCA 2016).

In *Edwards v. State*, (4DCA 2001), the DCA found it was error to admit that portion of Defendant's statement made after a threat to load up Edwards with added and more serious charges. "Certainly, a threat to charge a suspect with more, and more serious, crimes unless he or she confesses is coercive. Further, it is essentially a promise not to prosecute to the fullest extent allowed by law if that person confesses. Hence, *the investigators' threats amounted to an exertion of improper and undue influence, rendering the affected portion of Edwards' statement involuntary*. See, *Brown v. State,* (5DCA 1982)."

Court's Ruling:

"In order for a confession or an incriminating statement of a defendant to be admissible in evidence, it must be shown that the confession or statement was voluntarily made. *Brewer v. State*, (Fla. 1980). The detectives threatened Defendant with the loss of his truck if he did not confess. 'A confession or inculpatory statement is not freely and voluntarily given if it has been elicited by direct or implied promises, however slight.' *Day v. State*, (4DCA 2010). The Detective threatened confiscation of his truck not just once, but three times. She pointed out that this would be a permanent confiscation and that he could not afford to buy a new truck."

"In *Martin v. State*, (Fla. 2012), our Supreme Court set forth the test to determine whether a confession was voluntary:

'The test to determine whether a confession is voluntary—in other words, not coerced—is whether it was the product of free will and rational choice. See *Blake v. State*, (Fla. 2007) (noting that 'the salient consideration' is whether the Defendant's free will was overcome). This is determined based on 'an examination of the totality of the circumstances surrounding the confession.' *Traylor v. State*, (Fla. 1992). In assessing the totality of the circumstances, a court must consider any promises or misrepresentations made by the interrogating officers. See, *Frazier v. Cupp*, (S.Ct.1969) (noting that misrepresentation by law enforcement is a relevant consideration in the totality-of-the-circumstances assessment).' "

"In *Martinez v. State,* (4DCA 1989) and *Brewer v. State*, (Fla.1980), while it was true that the death penalty would have been possible if the Defendants were convicted, the confessions were inadmissible because the officers not only told the Defendants that they could face the death penalty but suggested that whether this punishment occurred ***depended on whether they confessed at that moment.*** Likewise, in this case, the Detectives told Defendant that they could seize his truck, but suggested that whether they did so depended on whether he confessed. The Detective conveyed an express *quid pro quo*, as she told Defendant that either he confessed, or his truck would be seized."

"The entire interrogation lasted about thirty minutes. Defendant began confessing about three or four minutes after the Detectives first threatened to seize his truck, and almost immediately after a Detective said, 'I'm sure that that vehicle that transports you, you hold dear to yourself, right? So, if I take it, because it was used in a commission of a crime, where you going to be when it comes to your vehicle? Because you're not going to get it back.' "

"The immediacy of Defendant's confession after the threat to take his truck distinguishes this case from *Nelson v. State*, (4DCA 1997), cited by the State. In *Nelson*, the Defendant was accused of first-degree murder, and during his interrogation the officers told him that Florida uses the death penalty and that his cooperation 'could help,' although they 'wouldn't guarantee it.' On appeal, we affirmed, finding that the trial court did not abuse its discretion because the officers did not expressly offer the Defendant leniency or any benefit in exchange for a confession. We also highlighted that the objectionable comments by the officers occurred *over two hours before the confession*, with the Defendant continuing to deny involvement in the meantime. In contrast, here, *Defendant quickly confessed after the officers threatened to take his truck if he did not confess*."

"Considering the totality of the circumstances, the trial court erred in denying the motion to suppress. As the confession was the sole evidence tying Defendant to the crime, his conviction and sentence should now be vacated. Reversed."

Lessons Learned:

While an officer may misstate the facts (fingerprints or DNA), he may

not delude the Defendant as to his legal position, or the "unrealistic hope and delusions as to his true position." In *Johnson v. State*, (4DCA 2019), the court emphasized, "Significantly, several times during the exchange, the officer gave incorrect appraisals of the law that misled [Defendant] to believe that the law supported his actions on that day. Unlike misrepresentations of fact, which generally 'are not enough to render a suspect's ensuing confession involuntary,' 'police misrepresentations of law ... are much more likely to render a suspect's confession involuntary.' "

In the present case the State argued that under Florida law, police may seize property used in the commission of a crime. Therefore, the Detective's threats were not coercion because the Detective had accurately stated the law. See*, Green v. State*, (1DCA 2003) ("Engaging in a discussion with the Defendant about the realistic penalties that may be imposed after cooperation or non-cooperation is not coercive."). "Generally, 'to advise a suspect of potential penalties and consequences does not amount to a threat,' and 'encouraging a suspect to cooperate with law enforcement is not coercive conduct.' " See, *Bussey v. State*, (2DCA 2015).

The DCA disagreed, "While the trial court found that the officers were truthful in stating that [Vera's] truck could be seized, this ignores the fact that at the time they had no evidence of Defendant's involvement and only stated that Defendant's truck was a 'possible suspect vehicle' in the theft. Without more, the officers would have been misrepresenting their authority to take his truck."

However, a confession can be inadmissible when officers expressly or implicitly condition leniency or harsher punishment on whether the Defendant gave a confession. *Martinez v. State*, (4DCA 1989) (holding that confession was not voluntary when the police elicited confession by telling Defendant that he "could wind up" in the electric chair if he was not truthful).

Vera v. State
4th D.C.A.
(Sept. 25, 2024)

Chain of Custody

Deputy Buchanan testified that he attempted to conduct a traffic stop of a car. Refusing to stop, the driver led Deputy on a 45-mile *high-speed* chase along a major Highway. During the chase, Deputy observed items being thrown out of the car, he radioed backup officers to tell them where items were thrown from the vehicle.

Ultimately, Deputy stopped the fleeing car using a PIT maneuver. He then detained all three occupants: Robert Perkins, the driver; Taylor Perkins, Robert's wife and the front seat passenger; and Defendant Constantine Varazo, the backseat passenger.

The *next morning*, Deputy and other officers searched the locations along the highway where he observed items being thrown. The officers recovered several hypodermic needles and multiple bags of pills in the ditch beside the highway found to be methamphetamine. At trial, Deputy identified photographs of the bags of drugs that he and the other officers found.

Codefendant Taylor Perkins testified that Defendant Varazo paid her and her husband Robert to drive him from Pensacola to Georgia to buy drugs. On the drive back to Pensacola, upon seeing Deputy Buchanan's blue lights, Defendant told Robert to keep driving so he could get rid of the drugs he bought. Taylor further testified that Defendant threw the items out of the car window but did not identify specific items.

Defendant objected on appeal, that the trial judge abused its discretion in admitting the bags of contraband drugs over his chain-of-custody objection. On appeal, the trial court's ruling was affirmed.

Issue:

Did the trial court err by permitting the introduction of the drug evidence despite the break in the chain of custody prior to their seizure? **No**.

Chain of Custody:

A recurring issue with most drug cases is the chain of custody. The failure to establish a chain of custody and to respond to possible claims of contamination may result in the exclusion of the drugs in evidence. On other occasions, courts find slight breaks in a chain of custody or some questions raised concerning it insufficient to exclude the evidence.

See, *State v. Blevins*, (10th Dist. Franklin County, 1987) (adequate chain of custody for marijuana was established by testimony of police officer that substances came in unusually wrapped packages which were assigned an identification number, that they were opened for analysis and the contents were later placed in three bags along with the original wrapping, and that the bags were sent to the lab for analysis, and by testimony by State's expert that he performed the analysis on the

contents of the bags, which tested positive for marijuana).

See also *Meeks v. State*, (Ala. Ct. App. 2021) (State is not required to prove chain of custody of blood samples before that evidence comes into the State's possession; *the chain of custody begins when the item is seized by the State*).

United States v. Perry, (4th Cir. 2024), is also helpful. "Even if the prosecution did fail to establish a perfect chain of custody, which we need not decide, the [trial] court did not plainly err in admitting the drugs. A chain of custody is not necessary for authentication under [Evidence] Rule 901. As we have repeatedly held, the 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence.' It is not an 'iron-clad requirement' but permits the admission of evidence, even with a 'missing link,' where 'the authentication testimony was sufficiently complete so as to convince the court that it is improbable that the original item had been exchanged with another or otherwise tampered with.' As long as the prosecution can establish to the satisfaction of the [trial] court 'that the item to be introduced, i.e., marijuana, is what it purports to be, i.e., marijuana seized from the [Defendant],' there can be no Rule 901 or chain of custody objections."

"Here, the [trial] court did not plainly err by admitting the drugs because ample evidence showed that the marijuana admitted at trial '[was] what it purported to be'—the marijuana seized from Perry. First, Officer Miller testified that the marijuana submitted at trial was the same 'weed that was found' during the 'search incident to arrest.' And, second, a forensic scientist for the Virginia Department of Forensic Science, testified that the drugs submitted at trial were those marked with 'the unique forensic science laboratory number for this case.' "

Court's Ruling:

"Varazo argues that the [trial] court abused its discretion in admitting the bag [of drugs] and its contents over his chain-of-custody objection. We disagree. *Challenges to the chain of custody generally go to the weight rather than the admissibility of evidence*. *United States v. Lopez*, (11th Cir. 1985); *United States v. Hughes*, (11th Cir. 2016); *United States v. Roberson*, (11th Cir. 1990). 'The adequacy of the proof relating to the chain of custody is not a proper ground to challenge the admissibility of the evidence.' "

The Court of Appeals went on to note that the predecessor Court twice rejected a chain-of-custody challenge where, like this case, the gap occurred **before** the government took possession of the evidence. *United States v. White*, (5th Cir. 1978); See also, *United States v. Henderson*, (5th Cir. 1979) ("It is well settled that whether the Government has proved an adequate chain of custody *goes to the weight rather than the admissibility of the evidence*."

The Court went on to rule, "Following our binding precedent in *White* and *Henderson*, we conclude that Varazo's chain-of-custody challenge regarding the bag and its contents goes to the weight of the evidence, not its admissibility."

"Specifically, uncontroverted evidence established that Varazo 1. bought drugs in Cordele with Robert and Taylor Perkins present, 2. told codefendant Robert Perkins not to stop when Deputy Buchanan tried to pull them over so Varazo could get rid of the drugs, and 3. threw objects out of the window during the chase on Highway 82. Officers found drugs and drug paraphernalia along Highway 82, where the chase occurred. Chapman himself received a call about a bag, went to the Miller Supply store on Highway 82, and picked up the bag at Miller Supply. Chapman had firsthand knowledge of his own conduct and could testify about what he did and what was in the bag he retrieved personally."

"In addition to the drugs and a firearm, the bag contained a cell phone that had images of Varazo's driver's license and auto insurance information and text messages that included Varazo's name. The only missing link perhaps is Eidson's testimony about where he first found the bag—a ditch on Highway 82 in front of Miller Supply. Still, in that regard, there is no dispute that: 1. Eidson worked for Miller Supply, 2. Miller Supply is located on Highway 82, 3. The chase occurred on Highway 82, 4. Eidson found the bag a few days after the chase on Highway 82, and 5. Both Eidson and Miller were present when [Officer] Chapman picked up the bag."

"The overall circumstances of the bag's discovery are more than sufficient to show that Varazo threw the bag and its contents from the car during the chase on Highway 82. The Government also established exactly how the bag went from Eidson and Miller to [law enforcement]."

"Varazo's argument is inconsistent with our precedent, which provides that gaps in the chain of

custody affect weight and not admissibility. Varazo was free to attack the evidence during cross-examination of the Government's witnesses or at closing argument, and indeed did so. His arguments on appeal do not provide a basis to reverse."

"Varazo also argues that because Eidson did not testify at trial, it is possible that the items in the bag were not in the same condition as when they were discovered by Eidson or that someone altered or interfered with the bag. Varazo thus asserts that the circumstances surrounding the bag's discovery were insufficient to *authenticate* the bag. Even phrased in terms of authenticity, Varazo's challenge fails. A proponent of evidence may authenticate the evidence 'solely through the use of circumstantial evidence,' including the evidence's 'distinctive characteristics and the circumstances surrounding its discovery.' *United States v. Williams*,(11th Cir. 2017) (quoting *United States v. Smith*, (11th Cir. 1990)). As we explained above, the circumstantial evidence presented at trial was sufficient to authenticate the bag as found on Highway 82 and to connect it to Varazo. AFFIRMED."

Lessons Learned:

While the present case is decided under Federal evidence rules, it is still applicable. The Florida Supreme Court has made clear that the basic legal principle here is that "relevant physical evidence is admissible unless there is an indication of probable tampering." *Peek v. State*, 395 So.2d 492, 495 (Fla.1980).

In seeking to exclude certain evidence, Defendant bears the initial burden of demonstrating the probability of tampering. Once this burden has been met, the burden shifts to the State to submit evidence that tampering did not occur.

As an example of this process, *Murray v. State*, (Fla. 2002), is instructive: "In reviewing the testimony of Officer Laforte and [crime analyst] Warniment, we find that the Defendant carried his burden in demonstrating the probability of evidence tampering. Laforte clearly remembered placing both the bottle of lotion and the nightgown in the same bag and specifically did so in order to keep them together. The analyst who received the sealed bag, however, stated unequivocally that although the bag had not been previously opened, it no longer contained the lotion and further she never received the lotion.

"We find that based on this obvious discrepancy, the Defendant has met his burden of showing the *probability of evidence tampering*, and hence the burden shifted to the State to explain the discrepancy or to submit evidence that tampering did not occur. As the State failed to meet its burden, the trial court erred in finding the challenged evidence admissible."

United States v. Varazo
U.S. Court of Appeals – 11th Cir.
(October 10, 2024)

Search Warrant Specificity

A young girl was tragically shot and killed by a stray bullet from a nearby altercation while she and her parents were sitting in their car. Witnesses identified Larry Young as the shooter, but he denied involvement, testifying that he had left the scene quickly after arriving because he had children in his car. Defendant was indicted for first-degree murder for the shooting of the young child, and for two counts of attempted second-degree murder of the young child's parents who were in the car with her.

After Defendant was identified as a suspect, a County Sheriff's detective applied for a search warrant to search the Facebook account of "Stunt Young," believed to be Defendant's account. The trial court initially signed the warrant, but subsequently granted Defendant's motion to suppress the records obtained, because the detective could not articulate his probable cause for the warrant at the hearing. Thereafter, the prosecutor approached another detective with the Sheriff's office and inquired about obtaining the Facebook records by a subpoena. That detective told the prosecutor that Facebook records from the same account had been obtained several months earlier pursuant to a *search warrant for retail theft and organized fraud* involving Defendant, which was totally unrelated to the shooting.

After notifying the prosecutor of these records' existence and without applying for his own search warrant, the Detective searched through these records and reviewed Defendant's messaging history, which linked Defendant to a phone number that his accomplice had called shortly before the shooting, and which contained a picture of Defendant brandishing a gun matching the description of the gun used in the shooting. Defendant filed a motion to suppress the Facebook evidence contending that the Detective did not have a warrant to search the records for evidence in the *murder case*. In essence, Defendant argued that the Detective could not rely on

the theft case search warrant but needed to secure a second warrant to search the Facebook records for evidence of the homicide.

Upon conviction Defendant argued that the trial court erred in denying his motion to suppress Facebook records obtained from a warrantless search, arguing that the trial court wrongfully applied the good-faith exception to the exclusionary rule. The D.C.A. agreed and reversed and ordered a new trial.

Issue:

Was the mistaken use, at trial, of evidence obtained by a search warrant cured by the "good-faith" exception to the warrant requirement? **No**.

Facebook Records Search:

What is at issue here is the need for specificity in applying for, executing, and using the search warrant proceeds. Although in the present case, the Facebook data utilized to convict the Defendant was obtained by a search warrant, that warrant was for a theft/fraud investigation, not a homicide.

"To establish probable cause for the issuance of a search warrant, a supporting affidavit must set forth facts establishing two elements: 1. the commission element—that a particular person has committed a crime, and 2. the nexus element—that evidence relevant to the probable criminality is likely to be located in the place to be searched." *State v. Felix*, (5DCA 2006).

Florida Statute, 933.05, provides in part: "Issuance in blank prohibited.—A search warrant cannot be issued except upon probable cause supported by affidavit or affidavits, naming or *describing the person, place*, or thing to be searched and *particularly describing the property or thing to be seized*; no search warrant shall be issued in blank, …" For a warrant to issue, the issuing magistrate must find probable cause to believe that the contraband is presently in the place specified. "The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, (S.Ct.1983).

In *Riley v. California*, (S.Ct. 2014), the Supreme Court held that people have a reasonable expectation of privacy in their cell phone data and that law enforcement must obtain a warrant to search such data. ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."); *State v. Worsham*, (4DCA 2017) ("Modern technology facilitates the storage of large quantities of information on small, portable devices. The emerging trend is to require a warrant to search these devices.").

In the present case, the Detective found the evidence used at trial by reviewing Defendant's private messages and his private subscriber information, which are clothed with a reasonable expectation of privacy. The D.C.A. correctly concluded that the Detective's warrantless search of Defendant's Facebook records was in violation of the Fourth Amendment.

While the Theft Warrant authorized officers to search through a large amount of Defendant's Facebook data, the warrant authorized such a search for evidence relevant to proving a theft or fraud. Nonetheless, the State argued it was reasonable for the Detective to believe that because the theft evidence was lawfully obtained by warrant it gave him authority to search the same records for evidence of the homicide.

"A successful inevitable discovery argument requires the government to proffer clear evidence of an independent, untainted investigation that inevitably would have uncovered the same evidence as that discovered through the illegal search."

Court's Ruling:

"Although the search at issue was of a Facebook account, the same privacy concerns [for cellphones] apply because the Detective garnered the evidence at issue through Defendant's private messages, which are analogous to a cell phone's text messages. Several federal courts have recognized a reasonable expectation of privacy in a person's private social media content. *See United States v. Zelaya-Veliz*, (4th Cir. 2024) ('Most federal courts to rule on the issue have agreed that Facebook and other social media users have a reasonable expectation of privacy in content that they exclude from public access, such as private messages.')."

"While the detective conducted an illegal search through the Facebook records, 'the fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies.' *Herring v. United States*, (S.Ct.2009). 'To trigger the exclusionary rule, police conduct must be

sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.' The good-faith exception to the exclusionary rule applies 'when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful ....' *Davis v. United States*, (S.Ct.2011) (quoting *United States v. Leon*, (S.Ct.1984))."

"The State argues we should find that the Detective had a good-faith belief that his conduct was lawful because no binding precedent holds that he was required to obtain a second warrant to search through the Theft Warrant evidence. …Thus, *while an officer may reasonably rely on firm, binding precedent, the lack of binding precedent is not evidence of good faith*."

"Without legal precedent, the trial court found that the Detective reasonably believed the Theft Warrant authorized him to search the Facebook records for evidence of homicide. To determine whether an officer had an objectively reasonable belief that a search was authorized by a warrant, 'courts must assess, whether, given the totality of the circumstances, an officer 'armed with the information possessed by the officer who conducted the search' would have believed the warrant to be valid.' "

"Defendant's Facebook records were seized and retained pursuant to the Theft Warrant, and the Detective's subsequent search through those records for homicide evidence therefore violated the Fourth Amendment. We hold that these circumstances do not fit the good-faith exception to the exclusionary rule, as it was not objectively reasonable for the Detective to believe that the Theft Warrant, which authorized a search of Defendant's Facebook records for evidence of theft and organized fraud, authorized him to search the same records for evidence of an unrelated homicide."

"Although the trial court correctly concluded that the Detective's warrantless search through Defendant's Facebook records violated the Fourth Amendment, the court abused its discretion in applying the good-faith exception to the exclusionary rule. ***Good faith cannot be based on the lack of binding precedent****, and it was not objectively reasonable for the Detective to believe that the Theft Warrant authorized him to search the Facebook records for evidence of homicide*. Finally, the error was not harmless, as the evidence from the Facebook records was important to identifying Defendant as the shooter. We reverse and remand for a new trial, at which the Facebook records may not be admitted."

Lessons Learned:

Despite the Detective not seeking a search warrant for the homicide-based data, it is helpful to remember that a search warrant issued by a magistrate is presumed to be facially valid. A reviewing court limits its inquiry to "the four corners of the affidavit," and must determine whether, "based on the totality of the circumstances and a commonsense assessment, probable cause is shown." "The magistrate's decision must be upheld unless there was no substantial basis for concluding that probable cause existed."

Of note was the 4th D.C.A.'s rejection of the State's suggestion that the good-faith exception to the exclusionary rule should apply to the fruits of the search. "Our precedent is to the contrary. 'Where, as here, the supporting affidavit fails to establish probable cause to justify a search, Florida courts refuse to apply the good faith exception.' **A reasonably trained law enforcement officer would have known that the affidavit in this case failed to establish probable cause for the search, so the good-faith exception does not apply."** *Smitherman v. State*, 2nd D.C.A. (March 11, 2022).

Young v. State
4th D.C.A.
(Sept. 25, 2024)