



To: Paul Koppel

From: Bridgette Thornton, Deputy City Attorney for the City of Coral Gables

Edited and Approved: Craig Leen, City Attorney for the City of Coral Gables 

RE: Legal Opinion Regarding CGPD SOP – Return of Firearm

Date: September 24, 2013

I reviewed your email as well as the summary related to the domestic call at issue. As I previously opined, pursuant to Florida Statutes Section 933.14(3) where an officer observes a breach of the peace and a firearm is seized, then the firearm should not be returned to the subject until the subject obtains a court order. See Fla. Stat. Section 933.14(3) ("[n]o pistol or firearm taken by any officer with a search warrant or without a search warrant upon a view by the officer of a breach of the peace shall be returned *except pursuant to an order of a trial court judge.*") (emphasis added). Likewise, generally where an arrest is made any firearms in the subject's possession may be confiscated and, depending upon the criminal charge and/or disposition of the criminal matter, retained until the subject obtains a court order authorizing the return of the firearms or is acquitted. See, e.g., Fla. Stat. Section 790.08. But, as discussed in more detail below, if an officer does not view a breach of the peace, an arrest is not made, and there is no court order prohibiting return of the firearm, then any seized firearms should be returned to the subject upon the subject's request -- without requiring a court order. Indeed, there is an Attorney General Opinion on this issue as it relates to individuals who were involuntarily committed pursuant to the Florida Mental Health Act, Fla. Stat. 394.463(2)(a)(2) (commonly referred to as the "Baker Act"). In this opinion, the Attorney General was responding to a query regarding whether a sheriff's office was "required to return firearms that have been confiscated from persons who are sent for evaluation under Florida's Baker Act." Fla. Att'y Gen. Op., 2009-04 at p. 1. The Attorney General concluded that the firearms should be returned and, in relevant part, stated, "it is my opinion that in the absence *of an arrest and criminal charge* against the person sent for evaluation under Florida's Baker Act, the Sheriff of Bay County may not retain firearms confiscated from such persons and retained by that office." *Id.* at 2-3 (emphasis added). While Attorney General Opinions are not binding, I find this Opinion persuasive as it provides an instructive outline of the governing

Florida Statutes and addresses an analogous situation. Furthermore, when I worked at the Miami Dade County Attorney's Office we reached a similar conclusion where an individual who was involuntarily committed, due to a suicide threat, filed a replevin action against the County to recover his firearms upon being released from the mental hospital. There, we advised the Miami-Dade Police Department to return the firearms because the individual was not arrested and charged with a criminal offense and there was no court order prohibiting return of the firearms. More specifically, under Florida law, involuntary commitment proceedings are not criminal proceedings, Fla. Stat. Section 394.459(I). As such, we found that there was no lawful basis to retain the weapons, after the individual's release from the mental hospital, as he had not been adjudicated incapacitated. And there were no other judicial orders prohibiting the return of the firearms. In fact, Florida Statutes Section 394.459(1) states, "[a] person who is receiving treatment for mental illness shall not be deprived of *any* constitutional rights. However, if such a person is adjudicated incapacitated, his or her rights may be limited to the same extent the rights of any incapacitated person are limited by law." *Id.* (emphasis added). As you know, the right to bear arms is secured under both the U.S. Constitution and the Florida Constitution. Thus, where an officer does not view a breach of the peace, or make an arrest, and there is no court order prohibiting return of the firearm (such as an adjudication of incapacity), then any confiscated firearms/weapons should be returned to the subject(s) - without requiring a court order. Please, however, contact this Office if the CGPD has information indicating that a subject seeking return of his/her firearms was adjudicated incapacitated - as that scenario may require additional legal analysis from this Office or outside counsel. Finally, I would like to discuss further your pending SOP provision #7 below relating to an employee's "articulable concern for the safety of the owner or others in releasing the firearm." The extent of that provision as it relates to an "articulable concern." We may also need to bring in our outside legal counsel on that issue.

Hernandez, Cristina

From: Thornton Richard, Bridgette
Sent: Thursday, September 26, 2013 12:10 PM
To: Hernandez, Cristina
Subject: FW: Property SOP - Return of Firearms
Attachments: 2010.01 Letter to Edith Murphy 9.27.12.pdf; 2010 01 Legal Opinion Re 933 14 (ELECTRONICALLY EXECUTED BY & APPROVED BY IUR 9-18-12).pdf

Arias,

Please make sure the attached opinions are in the opinion binder.

Thank you! ☺

Bridgette N. Thornton Richard
Deputy City Attorney for the City of Coral Gables
405 Biltmore Way, 2nd Floor
Coral Gables, FL 33134
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Cell: (305) 801-5797
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From: Manuel Guarch [mailto:mguarch@reyeslawfirm.com]
Sent: Wednesday, September 25, 2013 5:51 PM
To: Thornton Richard, Bridgette; Israel Reyes, ESQ
Cc: Tastet, Rene; Leen, Craig; Figueroa, Yaneris; Franqui, Susan; Hernandez, Cristina; Koppel, Paul
Subject: RE: Property SOP - Return of Firearms

Bridgette,

Please see the attached Legal Opinion (and related letter) which was issued last year in relation to an incident similar (though not directly on point) to the one addressed below. Specifically, as it relates to the retention of impounded firearms pursuant to a view by an officer of a breach of the peace in a Baker Act incident.

In addition, to address the question raised by Lt. Tastet regarding how one might obtain an Order Compelling the Return of the Firearm when there is no active criminal case, I would note that it is possible for a citizen to file an action for replevin (return of property) in order to have said order issued. This does not however replace the need for the seizures to be justified by either a breach of the peace showing or seizure incident to the execution of a warrant.

The most important factor in instances such as those outlined below and in the above opinion, is that the responding/impounding officer be as thorough and detailed as possible as to the cause for his dispatch and the circumstances which he believed to be a breach of the peace, sufficient to justify impounding the seized firearms. This is important because, in the event a seizure is effected without justification, the City may be subjected to liability for attorney's fees and/or damages incurred by the person seeking return of the firearm.

As to the proposed SOP, if you would like, our office can provide guidance as to the revisions or a more generalized opinion on this topic.

If everyone is available tomorrow around noon, Izzy would like to get on the phone to discuss this matter. Please let me know and I will provide our conference call information.

Sincerely,



Manuel Guarch, Esq.
Associate Attorney
THE REYES LAW FIRM, P.A.
One Columbus Center
1 Alhambra Plaza, Suite 1130
Coral Gables, FL 33134
Tel: 305.403.2272
Fax: 305.403.2273
mguarch@reyeslawfirmmpa.com

THE REYES LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS



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From: Thornton Richard, Bridgette [<mailto:bthornton@coralgables.com>]
Sent: Wednesday, September 25, 2013 2:11 PM
To: Israel Reyes, ESQ; Manuel Guarch (mguarch@reyeslawfirmmpa.com)
Cc: Tastet, Rene; Leen, Craig; Figueroa, Yaneris; Franqui, Susan; Hernandez, Cristina; Koppel, Paul
Subject: RE: Property SOP - Return of Firearms

Good Afternoon Judge Reyes and Manny,

I would like to discuss a legal opinion with you that our Office needs in relation to: 1) the return of firearms to individuals who were Baker Acted and then released from the mental hospital; and 2) where an individual was not arrested, charged, or Baker Acted but firearms were seized and the CGPD has legitimate safety concerns about returning the firearms to the individual. Please give me a call sometime today or tomorrow. I have to leave early today but my cell phone is listed below. Additionally, below is the Miami-Dade Police Department's policy on the Baker Act situation as well as a few emails to give you some context – including two that reflect my prior legal opinions tangentially related to the above. I look forward to speaking with you.

Thank you,
Bridgette

MDPD Policy

IV.
SECTION:

MDPD POLICY: RELEASING FIREARMS FROM THE BUREAU

FS 933.14(3) states that, "No pistol or firearm, taken by any officer with a search warrant or without a search warrant upon a view by the officer of a breach of the peace, shall be returned except pursuant to an order of a Circuit Judge or County Court Judge." If a firearm was seized pursuant to a search warrant, it cannot be returned without a Court Order. Breach of the peace is a generic term, which includes disturbances of public peace or order. In the context of FS 933.14(3), it also includes any behavior that would be a violation of law.

Use of a firearm, or a threat or reference to use a firearm, would constitute a breach of the peace. An incident that resulted in taking a person into custody pursuant to the "Baker Act," would also constitute a breach of the peace.

In accordance with the DM, the OIR must specifically state that a breach of the peace has occurred or that a breach of the peace has not occurred. If the narrative indicates that a breach of the peace occurred, the firearm will not be released without a Court Order. Likewise, firearms seized pursuant to a Domestic Violence Injunction will not be released without a Court Order. If the facts are unclear, the releasing employee will seek clarification from a PES lieutenant. If further clarification is required, a PES lieutenant or higher will contact PLB.

Bridgette N. Thornton Richard
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retained expert of the office of the City Attorney, you should maintain its contents in confidence in order to preserve the attorney-client or work product privilege that may be available to protect confidentiality.

From: Thornton Richard, Bridgette
Sent: Tuesday, September 24, 2013 9:31 PM
To: Koppel, Paul
Cc: Tastet, Rene; Leen, Craig; Figueroa, Yaneris; Franqui, Susan; Hernandez, Cristina
Subject: Re: Property SOP - Return of Firearms

Thank you. It was my pleasure. I will try to arrange a meeting with Renee. Enjoy your day off!

Sent from my iPhone

On Sep 24, 2013, at 7:43 PM, "Koppel, Paul" <pkoppel@coralgables.com> wrote:

Bridgette,
I hope this email finds you feeling much better. Unfortunately, I won't be back in the office until Thursday but Rene should be available to discuss provision #7 further.

Thank you very much for sharing your personal experience, outstanding insight and legal opinion on returning firearms!

Sincerely,
Paul Koppel

On Sep 24, 2013, at 7:02 PM, "Thornton Richard, Bridgette" <bthornton@coralgables.com> wrote:

Good Evening Sgt. Koppel,

I apologize for the delay in responding. I was sick the past few days. I reviewed your email as well as the summary related to the domestic call at issue. As I previously opined, pursuant to Florida Statutes Section 933.14(3) where an officer observes a breach of the peace and a firearm is seized, then the firearm should not be returned to the subject until the subject obtains a court order. *See Fla. Stat. Section 933.14(3) ("[n]o pistol or firearm taken by any officer with a search warrant or without a search warrant upon a view by the officer of a breach of the peace shall be returned **except pursuant to an order of a trial court judge.**")* (emphasis added). Likewise, generally where an arrest is made any firearms in the subject's possession may be confiscated and, depending upon the criminal charge and/or disposition of the criminal matter, retained until the subject obtains a court order authorizing the return of the firearms or is acquitted. *See, e.g., Fla. Stat. Section 790.08.* But, as discussed in more detail below, if an officer does not view a breach of the peace, an arrest is not made, and there is no court order prohibiting return of the firearm, then any seized firearms should be

returned to the subject upon the subject's request -- without requiring a court order. Indeed, there is an Attorney General Opinion on this issue as it relates to individuals who were involuntarily committed pursuant to the Florida Mental Health Act, Fla. Stat. 394.463(2)(a)(2) (commonly referred to as the "Baker Act"). In this opinion, the Attorney General was responding to a query regarding whether a sheriff's office was "required to return firearms that have been confiscated from persons who are sent for evaluation under Florida's Baker Act." Fla. Att'y Gen. Op., 2009-04 at p. 1. The Attorney General concluded that the firearms should be returned and, in relevant part, stated, "it is my opinion that in the absence *of an arrest and criminal charge* against the person sent for evaluation under Florida's Baker Act, the Sheriff of Bay County *may not* retain firearms confiscated from such persons and retained by that office." *Id.* at 2-3 (emphasis added). While Attorney General Opinions are not binding, I find this Opinion persuasive as it provides an instructive outline of the governing Florida Statutes and addresses an analogous situation. Furthermore, when I worked at the Miami-Dade County Attorney's Office we reached a similar conclusion where an individual who was involuntarily committed, due to a suicide threat, filed a replevin action against the County to recover his firearms upon being released from the mental hospital. There, we advised the Miami-Dade Police Department to return the firearms because the individual was not arrested and charged with a criminal offense and there was no court order prohibiting return of the firearms. More specifically, under Florida law, involuntary commitment proceedings are not criminal proceedings, Fla. Stat. Section 394.459(1). As such, we found that there was no lawful basis to retain the weapons, after the individual's release from the mental hospital, as he had not been adjudicated incapacitated. And there were no other judicial orders prohibiting the return of the firearms. In fact, Florida Statutes Section 394.459(1) states, "[a] person who is receiving treatment for mental illness shall not be deprived of *any* constitutional rights. However, if such a person is adjudicated incapacitated, his or her rights may be limited to the same extent the rights of any incapacitated person are limited by law." *Id.* (emphasis added). As you know, the right to bear arms is secured under both the U.S. Constitution and the Florida Constitution. Thus, where an officer does not view a breach of the peace, or make an arrest, and there is no court order prohibiting return of the firearm (such as an adjudication of incapacity), then any confiscated

firearms/weapons should be returned to the subject(s) — without requiring a court order. Please, however, contact this Office if the CGPD has information indicating that a subject seeking return of his/her firearms was adjudicated incapacitated — as that scenario may require additional legal analysis from this Office or outside counsel. Finally, I would like to discuss further your pending SOP provision #7 below relating to an employee's "articulable concern for the safety of the owner or others in releasing the firearm." Are you available to discuss that provision tomorrow at 11 am or any time tomorrow afternoon before 3 pm? I would like a bit of clarification regarding the extent of that provision as it relates to an "articulable concern." We may also need to bring in our outside legal counsel on that issue. Hopefully, we can discuss this tomorrow.

Thank you and have a nice evening,

Bridgette

Bridgette N. Thornton Richard
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From: Koppel, Paul
Sent: Tuesday, September 24, 2013 1:31 PM
To: Thornton Richard, Bridgette
Cc: Tastet, Rene
Subject: RE: Property SOP - Return of Firearms

Ms. Thornton Richard,

I left you a voice message but forgot to mention that I'll be out of the office tomorrow. You can reach Lt. Rene Tastet via email or at 305-460-5461 should you have any questions or need clarification.

Thank you!
Paul Koppel

From: Koppel, Paul
Sent: Thursday, September 19, 2013 3:10 PM
To: Thornton Richard, Bridgette
Cc: Tastet, Rene; Frevola, Michael Lt.; Miller, Michael; Schultz, Beth
Subject: RE: Property SOP - Return of Firearms

Ms. Thornton Richard,

Thank you for the below legal opinion however, there's still a question regarding the return of firearms when no arrest was made and/or a breach of peace had not been viewed. When the owner of the firearm wants to get their firearm back, they aren't able to obtain a court order since there's no active court case on file with SAO.

The below incident report narrative (Case # 13-5403) provided by Sgt Beth Schultz is a good example of when an officer did not arrest either party but firearms were impounded for an undetermined cooling off period or what we call "Safekeeping".

Please provide guidance on the following SOP section language regarding this matter:

6. Firearms impounded as a result of a breach of peace, including but not limited to Domestic Violence cases, will require a court order for release pursuant to FSS 933.14(3). If there is no arrest made and there is no active court case (including Family Court) regarding the matter, the firearm(s) may be returned to the lawful owner after the firearm(s) has been returned from being entered in the National Integrated Ballistic Information Network Computer. A Property & Evidence Section Clerk must search the RMS and check court records to verify that the owner was not arrested and is not the subject of an open court case in order to release the firearm(s) without a court order.

7. The Department may require the owner, or their authorized representative, to present a court order for the release of an impounded firearm when an employee has articulable concern for the safety of the owner or others in releasing the firearm.

Respectfully,

<image001.png> *Sgt Paul Koppel*

Coral Gables Police Department
Professional Standards Division
2801 Salzedo Street
Coral Gables, FL., 33134
Office: 305-476-7810

From: Schultz, Beth
Sent: Wednesday, September 18, 2013 11:56 AM

To: Tastet, Rene
Cc: Frevola, Michael Lt.; Koppel, Paul
Subject: Property SOP - Return of Firearms
Importance: High

Lieutenant Tastet,

This is the question I think should be asked.

If an officer responds to a Breach of Peace, no arrest is made and a firearm is impounded, not related to the Breach of Peace, does the owner of the weapon need a court order for the return of the firearm?

Below is the narrative of case 13-5403, reference a Domestic Disturbance in which three firearms were impounded. (Since this email is public record, I removed all names from the report.)

13-5403

I responded to 2005 Red Rd in reference to a Domestic Disturbance in which both parties called 911 emergency. Upon arrival both parties were outside and Involved Other XX2 was holding their shared child in common. I separated the parties to determine what had occurred and I received two conflicting accounts. I spoke with Involved Other X1 first and her account is as follows. She has been in a long-term tumultuous relationship with XX2 (two years) and the two decided to separate a week ago. On this date they were arguing and she stated that she only wanted to hold their child to which he refused. She stated that while trying to grab the baby XX2 struck her in the cheek (no apparent marks) with a backhand motion. During the argument she said that XX2 began recording her and himself. X1 stated that XX2 began walking around the house and she followed screaming for him to hand her the baby. X1 further stated that she has documented evidence proving a long history of verbal abuse and aggressive actions from XX2 such as punching holes in walls.

XX2 stated that X1 is unstable and he is concerned for the well-being of their son if left in the custody of X1. XX2 stated that he did in fact record the altercation and I viewed several snippets of the video which showed both parties involved in a heated exchange; however, it did not show any acts of overt violence. XX2 stated that the argument began while he was working on his lap-top computer and holding his son. XX2 said that X1 approached him and took the computer and threw it on the ground. XX2 also said that X1 hit him with the computer there were however no marks or signs of him being struck and the computer is still operational.

Due to conflicting testimony and no physical evidence aside from video showing an argument no arrest was executed. The parties were advised to separate for the foreseeable future and XX2 agreed to leave. XX2 told me earlier that there were firearms inside the house and I secured them prior to him packing up his belongings. XX2 agreed to have his firearms impounded into CGPD property for safe-keeping. XX2 was provided a CGPD property receipt and instructed on the procedure for obtaining his property.

Both parties were given CGPD Domestic Violence packets and signed for them. Both parties filled out witness/victim affidavits recounting in their own words the events which were submitted to records via the UIR box. Both parties were referred to the family courts and the State Attorney's Office to further pursue their options.

On-duty Detective V. Zaccheo (ID#8019) was contacted and advised of the situation. He informed me that lacking physical evidence and conflicting statements the best option was to separate the parties until a mutual agreement could be reached between them.

From: Frevola, Michael Lt.

Sent: Tuesday, September 10, 2013 11:30 AM

To: Schultz, Beth; Tastet, Rene

Subject: FW: Legal Opinion RE Fla. Stat. Section 933.14(3) Return of Firearms

This is exactly what we need to put into or leave in the sop for the return of firearms when they are taken in conjunction with a breach of the peace type call.

Respectfully,

Lieutenant Michael H. Frevola
Coral Gables Police Department
2801 Salzedo St.
Coral Gables, FL 33134
305-460-5075

From: Thornton Richard, Bridgette

Sent: Tuesday, September 10, 2013 11:16 AM

To: Frevola, Michael Lt.

Cc: Leen, Craig; Figueroa, Yaneris; Franqui, Susan; Hernandez, Cristina

Subject: Legal Opinion RE Fla. Stat. Section 933.14(3) Return of Firearms

Good Morning Lt. Frevola,

It is my legal opinion that where an officer observes a breach of the peace and a firearm is seized, then the firearm should not be returned to the subject until the subject obtains a court order. Indeed, Florida Statutes Section 933.14(3) states, "[n]o pistol or firearm taken by any officer with a search warrant or without a search warrant upon a view by the officer of a breach of the peace shall be returned *except pursuant to an order of a trial court judge.*" Fla. Stat. Section 933.14(3) (emphasis added). Thus, the

express language of the Section 933.14(3) requires a court order for the return of a pistol or firearm whenever an officer seizes a pistol or firearm upon viewing a breach of the peace. As such, the CGPD should follow Section 933.14(3) and include its dictates in CGPD SOPs. Please let me know if you have any further questions or concerns.

Thank you,

Bridgette N. Thornton Richard
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THE REYES LAW FIRM, P.A.

ATTORNEYS AND COUNSELORS

September 27, 2012

CERTIFIED MAIL

Return Receipt Requested

7011 3500 0000 6906 2996

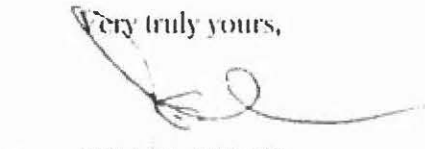
Ms. Edith Acosta Murphy
105 Morningside Drive,
Coral Gables, Florida 33146

Re: Firearm Impounded on August 27, 2012 - CGPD Case# 12-006634

Dear Ms. Murphy:

I am writing in response to your request for the return of the firearm seized and impounded on August 27th, 2012 as the result of an emergency call to the location of 105 Morningside Drive, Coral Gables, Florida 33146. Pursuant to Florida Statutes §933.14(3), The Coral Gables Police Department cannot, and will not, return the Smith & Wesson revolver seized from the above location absent a lawful Court Order mandating the return of said firearm.

Very truly yours,


ISRAEL REYES
Managing Partner
Police Legal Advisor

cc: Craig Leen, Esq., City Attorney
Scott Masington, Acting Chief

THE REYES LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS

LEGAL OPINION

To: S. Masington, Acting Chief
City of Coral Gables Police Dept.

VIA: C. Leen, City Attorney
City of Coral Gables

From: Israel U. Reyes, Managing Partner
Manuel A. Guarch, Associate



Date: September 18, 2012

Re: Clarification of CGPD Right to Impound Firearm under Fla. Stat. §933.14

Attorney-Client/Work Product Privileged Document

The Coral Gables Police Department seeks to clarify its rights and obligations relating to the seizure and treatment of firearms pursuant to Florida Statutes section 933.14(3) (2012), in connection with the involuntary hospitalization of an individual pursuant to Florida Statutes section 394.463 (2012), under CGPD case number 12-006634. This memorandum will consider the aforementioned Florida Statute section 933.14(3), Return of Property Taken Under Search Warrant; Florida Statutes sections 932.701 – 932.706, The Florida Contraband Forfeiture Act; Florida Statutes section 877.03, Breach of the Peace; Disorderly Conduct, and the applicability of CGPD Standard Operating Procedure #50 Property & Evidence Management, all viewed in light of relevant case law. Also considered will be whether CGPD can initiate forfeiture proceedings for the firearm at issue, whether CGPD is under any obligation to return the impounded firearm in question, absent a court order, and what if any liability may flow from the return of said firearm.

Factual Background

According to the narrative contained within the Incident/Investigation Report created for CGPD Case Number 12-006634, on or about August 27, 2012 at approximately 23:00 hours, Officer D. Rosario (ID 10178) responded to 105 Morningside Drive in reference to a disturbance involving a firearm. Upon arrival at the residence, Officer Rosario made contact with a Mr. Darin Zenov, the individual who summoned emergency services. Mr. Zenov indicated to Officer Rosario that he and his girlfriend, Ms. Edith Murphy, had gone out to dinner together earlier in the evening where an argument ensued. Upon returning to the residence, Ms. Murphy apparently retrieved a firearm and locked herself in the bathroom of the residence. Subsequently, Mr. Zenov called 911.

Officer Rosario made contact with the subject, Ms. Edith Murphy, who was unarmed and out of the bathroom. Ms. Murphy made a number of statements to Officer Rosario regarding the events that transpired. Ms. Murphy stated to Officer Rosario that she had been having suicidal thoughts for the past few weeks. Ms. Murphy admitted to locking herself in the bathroom with the firearm, and claimed that she was "loading it and analyzing the weapon to make sure it was working properly." Officer Rosario inquired whether the firearm was for protection from Mr. Zenov, at which point Ms. Murphy responded that "the gun was not for Zenov, it was for herself." Additionally, Ms. Murphy stated to Mr. Zenov that "if she ends up dead her blood would be in his hands." According to Officer Rosario, Ms. Murphy "showed without treatment she would hurt herself or someone else." Based upon these observations, Officer Rosario proceeded to involuntarily commit Ms. Murphy under the Baker Act, Florida Statutes 394.463 (2012). Ms. Murphy's firearm was then impounded. No arrest was made, and no criminal charges were filed or have been filed to date.

Legal Analysis

Florida Statutes section 933.14(3) (2012) states, “No pistol or firearm taken by any officer with a search warrant or without a search warrant upon a view by the officer of a breach of the peace shall be returned except pursuant to an order of a trial court judge.”

Similarly, Coral Gables Police Department Standard Operating Procedure #50 Property & Evidence Management (Rev. No. 15) subsection X (B)(6) states “Firearms impounded as a result of a breach of peace, including but not limited to Domestic Violence cases, will require a court order for release pursuant to FSS 933.14(3).”

Inextricably intertwined with the aforementioned statute and Standard Operating Procedure are the concepts of seizure as viewed under the Fourth Amendment analysis; also attendant to the seizure issue are the issues of impoundment and forfeiture in relation to or following the seizure. The law clearly defines a seizure as the act of taking custody of evidence or contraband. *See, Mata v. State*, 380 So. 2d 1157, 1158 (Fla. 3d DCA 1980) (citing, *Lightfoot v. State*, 356 So.2d 331 (Fla. 4th DCA 1978)). An impoundment is the “temporary taking of tangible, personal property” whereas, “forfeiture is the permanent taking of real or personal property.” *See, City of Hollywood v. Mulligan*, 934 So.2d 1238, 1247 (Fla. 2006).

Forfeitures in Florida are governed by Florida Statutes sections 932.701 – 932.706, The Florida Contraband Forfeiture Act. The Florida Contraband Forfeiture Act provides that contraband articles may be seized for forfeiture by a law enforcement agency in certain circumstances, and further provides that personal property can be designated as contraband for the purposes of the Act, specifically, “Any personal property, including ... weapon[s] ... used or ... attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony...” However, while the Act does allow for the forfeiture of weapons

and personal property in relation to the commission or attempted commission of a felony or drug related offense, it does not, allow for the forfeiture of the firearm in the instant circumstances. Based on the factual circumstances described in the narrative of the Incident/Investigation Report, there does not appear to have been a violation of any criminal statutes that may be classified as a felony, nor, based on the information provided was there the commission or attempted commission of any act in violation of Florida Statutes chapter 893. Therefore, the CGPD cannot use the Florida Contraband Forfeiture Act to forfeit the subject weapon.

However, Florida Statute section 933.14(3) does not require that a felony offense or drug related offense be committed for an officer to seize the pistol or firearm, it merely refers to “a view by the officer of a breach of the peace”. *Id.* Florida Statute section 933.14(3) does not refer specifically to Florida Statute section 877.03, Breach of the Peace; Disorderly Conduct, however, 933.14(3) should be read with a view toward Florida Statute section 877.03. Florida Statutes section 877.03 states,

Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree

§ 877.03, Fla. Stat. Ann.

As observed in *Gonzales v. City of Belle Glade*, 287 So.2d 669, 670 (Fla.1973),

In order for the [disorderly conduct] statute to be constitutionally applied, it must be proved that some act on the part of the accused either corrupted the public morals, outraged the sense of public decency, affected the peace and quiet of persons who witnessed the conduct of the accused, or that the accused engaged in brawling or fighting, or engaged in conduct constituting a breach of the peace or disorderly conduct. As to what constitutes a ‘breach of the peace’ or ‘disorderly conduct,’ any factual situation can be viewed in light of the common law meaning of those terms.

Therefore, as the court clearly states, the instant factual scenario recounted by Officer Rosario, which occurred on August 27, 2012, must be viewed in the terms above.

Ms. Murphy, the subject who Officer Rosario eventually encountered can be viewed to have taken certain steps in an attempt to commit suicide. By her own admissions, she retrieved her firearm, she loaded the firearm, ensured the firearm was working properly, and admittedly planned to use the firearm to cause herself some measure of harm. Currently, Florida has no law against committing suicide¹; however, at common law committing suicide was a criminal offense, resulting in the forfeiture of the suicide's goods and chattels. *See, Krischer v. McIver*, 697 So. 2d 97, 100 (Fla. 1997). The Florida legislature has expressed its disapproval of the act of suicide by criminalizing assisting self-murder pursuant to Florida Statutes section 782.08. Additionally, the state has an unqualified interest in the preservation of life. *See, Krischer v. McIver*, 697 So. 2d 97, 100 (Fla. 1997)(citing, *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990)). This expression of disapproval by the legislature coupled with the common law view of the act of self-murder means that an attempt to commit self-murder may constitute an "act as [is] of [the] nature to corrupt the public morals, or outrage the sense of public decency..." *See*, 877.03, Fla. Stat.

Alternatively, leaving aside the question of whether or not attempting suicide, or taking steps in furtherance of self-murder constitutes an act as [is] of [the] nature to corrupt the public morals, or outrage the sense of public decency..." the argument can be made that Ms. Murphy's actions "affect[ed] the peace and quiet of persons who may [have] witness[ed] them..." *Id.* Specifically, according to Officer Rosario's factual account of events, Ms. Murphy and Mr.

¹ Recognizing one cannot be tried criminally if one is deceased.

Zenov were in the midst of an argument, when Ms. Murphy retrieved her firearm. Zenov witnessed Ms. Murphy retrieve the weapon and lock herself in the bathroom of the residence. It is clear from Mr. Zenov's account that he feared for Ms. Murphy's life, thereby affecting his "peace and quiet."

In 2009, Florida Attorney General, Bill McCollum, addressed this issue in reference to a concern submitted by the Sheriff of Bay County. In the opinion, the Attorney General opines that "in the absence of an arrest and criminal charge against [a] person sent for evaluation under Florida's Baker Act, the Sheriff of Bay County may not retain firearms confiscated from such persons and retained by that office." *See*, Fla. Att'y Gen. Op. 2009-04 (2009). Similarly, referencing this Attorney General Opinion, the Federal District Court for the Middle District of Florida stated in a footnote in *Keck v. Seminole County Sheriff's Office*, "[i]t is fairly clear, however, that absent an arrest and filing of criminal charges, law enforcement cannot retain—and must return—firearms seized from persons who are taken into custody for an involuntary mental health examination under Florida's Baker Act." *Keck*, 610-CV-847-ORL-31GJK, 2010 WL 2822011 (M.D. Fla. 2010). However, it should also be noted that the Attorney General Opinion referenced factual circumstances in which "officers ... are dispatched to calls involving an individual who threatens suicide or behaves in a manner that results in the person being sent for evaluation under Florida's Baker Act," whereas, pursuant to facts recounted by Officer Rosario and Mr. Zenov, Ms. Murphy took substantial steps in attempting suicide, making the circumstances factually distinguishable.

Conclusion

Florida Statutes 933.14(3) does not explicitly require that the officer who views the breach of the peace affect an arrest. Similarly, Florida Statutes section 933.14(3) does not

explicitly require the presence of an ongoing criminal case in order for the law enforcement agency which affected the seizure of the firearm to maintain possession of the firearm, absent a court order mandating the release of the firearm to the possession of the owner. *See*, 933.14(3), Fla. Stat.

It is the opinion of this Firm, that upon receipt of an order from any court of competent jurisdiction mandating the release of the subject firearm, the Coral Gables Police Department must relinquish possession to the owner of the firearm, pursuant to Florida Statutes section 933.14(3). This opinion is in accordance with the Attorney General Opinion and the *Keck* case, in that this Firm is also of the opinion that law enforcement cannot permanently retain firearms seized from persons who are taken into custody for an involuntary mental health examination under Florida's Baker Act, but that the Department must return the firearm in the event it is ordered to do so by court order. *Id.*

It is also the opinion of this Firm that Coral Gables and the Coral Gables Police Department are completely immune from suit for any cause of action resulting from the release of said firearm under the Litigation Privilege if released pursuant to a Court Order. The Supreme Court of Florida has held that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding. *See, Levin, Middlebrooks, Mabie, Thomas, Maves & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994). *See also, American National Title & Escrow of Florida, Inc. v. Guarantee Title & Trust Co.*, 748 So.2d 1054 (Fla. 4th DCA 1999)(holding actions taken by receiver in reliance upon court order were protected by litigation privilege).

Therefore, so long as the court orders the release of the firearm to the owner, Ms. Murphy, the Coral Gables Police Department cannot be held liable for any potential consequences flowing from compliance with the aforementioned order. It is nonetheless the intent of this firm to object to the release of the firearm to the potentially unstable individual, in the interest of protecting the general public.

Hernandez, Cristina

From: Thornton Richard, Bridgette
Sent: Tuesday, September 24, 2013 9:30 PM
To: Hernandez, Cristina
Subject: Re: Property SOP - Return of Firearms

Thanks!

Sent from my iPhone

On Sep 24, 2013, at 7:40 PM, "Hernandez, Cristina" <chernandez@coralgables.com> wrote:

Will do. Thank you.

From: Thornton Richard, Bridgette
Sent: Tuesday, September 24, 2013 7:03 PM
To: Hernandez, Cristina
Subject: FW: Property SOP - Return of Firearms

Please add the below to the opinion binder.

Bridgette N. Thornton Richard
Deputy City Attorney for the City of Coral Gables
405 Biltmore Way, 2nd Floor
Coral Gables, FL 33134
Office: (305) 460-5084
Cell: (305) 801-5797
Fax: (305) 476-7795

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From: Thornton Richard, Bridgette
Sent: Tuesday, September 24, 2013 7:02 PM
To: Koppel, Paul
Cc: Tastet, Rene; Leen, Craig; Figueroa, Yaneris (yfigueroa@coralgables.com) (yfigueroa@coralgables.com); Franqui, Susan (sfranqui@coralgables.com); Hernandez, Cristina
Subject: RE: Property SOP - Return of Firearms

Good Evening Sgt. Koppel,

I apologize for the delay in responding. I was sick the past few days. I reviewed your email as well as the summary related to the domestic call at issue. As I previously opined, pursuant to Florida Statutes Section 933.14(3) where an officer observes a breach of the peace and a firearm is seized, then the firearm should not be returned to the subject until the subject obtains a court order. *See Fla. Stat. Section 933.14(3)* (“[n]o pistol or firearm taken by any officer with a search warrant or without a search warrant upon a view by the officer of a breach of the peace shall be returned *except pursuant to an order of a trial court judge.*”) (emphasis added). Likewise, generally where an arrest is made any firearms in the subject’s possession may be confiscated and, depending upon the criminal charge and/or disposition of the criminal matter, retained until the subject obtains a court order authorizing the return of the firearms or is acquitted. *See, e.g., Fla. Stat. Section 790.08.* But, as discussed in more detail below, if an officer does not view a breach of the peace, an arrest is not made, and there is no court order prohibiting return of the firearm, then any seized firearms should be returned to the subject upon the subject’s request -- without requiring a court order. Indeed, there is an Attorney General Opinion on this issue as it relates to individuals who were involuntarily committed pursuant to the Florida Mental Health Act, Fla. Stat. 394.463(2)(a)(2) (commonly referred to as the “Baker Act”). In this opinion, the Attorney General was responding to a query regarding whether a sheriff’s office was “required to return firearms that have been confiscated from persons who are sent for evaluation under Florida’s Baker Act.” Fla. Att’y Gen. Op., 2009-04 at p. 1. The Attorney General concluded that the firearms should be returned and, in relevant part, stated, “it is my opinion that in the absence *of an arrest and criminal charge* against the person sent for evaluation under Florida’s Baker Act, the Sheriff of Bay County *may not* retain firearms confiscated from such persons and retained by that office.” *Id.* at 2-3 (emphasis added). While Attorney General Opinions are not binding, I find this Opinion persuasive as it provides an instructive outline of the governing Florida Statutes and addresses an analogous situation. Furthermore, when I worked at the Miami-Dade County Attorney’s Office we reached a similar conclusion where an individual who was involuntarily committed, due to a suicide threat, filed a replevin action against the County to recover his firearms upon being released from the mental hospital. There, we advised the Miami-Dade Police Department to return the firearms because the individual was not arrested and charged with a criminal offense and there was no court order prohibiting return of the firearms. More specifically, under Florida law, involuntary commitment proceedings are not criminal proceedings, Fla. Stat. Section 394.459(1). As such, we found that there was no lawful basis to retain the weapons, after the individual’s release from the mental hospital, as he had not been adjudicated incapacitated. And there were no other judicial orders

prohibiting the return of the firearms. In fact, Florida Statutes Section 394.459(1) states, “[a] person who is receiving treatment for mental illness shall not be deprived of *any* constitutional rights. However, if such a person is adjudicated incapacitated, his or her rights may be limited to the same extent the rights of any incapacitated person are limited by law.” *Id.* (emphasis added). As you know, the right to bear arms is secured under both the U.S. Constitution and the Florida Constitution. Thus, where an officer does not view a breach of the peace, or make an arrest, and there is no court order prohibiting return of the firearm (such as an adjudication of incapacity), then any confiscated firearms/weapons should be returned to the subject(s) — without requiring a court order. Please, however, contact this Office if the CGPD has information indicating that a subject seeking return of his/her firearms was adjudicated incapacitated — as that scenario may require additional legal analysis from this Office or outside counsel. Finally, I would like to discuss further your pending SOP provision #7 below relating to an employee’s “articulable concern for the safety of the owner or others in releasing the firearm.” Are you available to discuss that provision tomorrow at 11 am or any time tomorrow afternoon before 3 pm? I would like a bit of clarification regarding the extent of that provision as it relates to an “articulable concern.” We may also need to bring in our outside legal counsel on that issue. Hopefully, we can discuss this tomorrow.

Thank you and have a nice evening,

Bridgette

Bridgette N. Thornton Richard
Deputy City Attorney for the City of Coral Gables
405 Biltmore Way, 2nd Floor
Coral Gables, FL 33134
Office: (305) 460-5084
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From: Koppel, Paul
Sent: Tuesday, September 24, 2013 1:31 PM
To: Thornton Richard, Bridgette
Cc: Tastet, Rene
Subject: RE: Property SOP - Return of Firearms

Ms. Thornton Richard,

I left you a voice message but forgot to mention that I'll be out of the office tomorrow. You can reach Lt. Rene Tastet via email or at 305-460-5461 should you have any questions or need clarification.

Thank you!
Paul Koppel

From: Koppel, Paul
Sent: Thursday, September 19, 2013 3:10 PM
To: Thornton Richard, Bridgette
Cc: Tastet, Rene; Frevola, Michael Lt.; Miller, Michael; Schultz, Beth
Subject: RE: Property SOP - Return of Firearms

Ms. Thornton Richard,

Thank you for the below legal opinion however, there's still a question regarding the return of firearms when no arrest was made and/or a breach of peace had not been viewed. When the owner of the firearm wants to get there firearm back, they aren't able to obtain a court order since there's no active court case on file with SAO.

The below incident report narrative (Case # 13-5403) provided by Sgt Beth Schultz is a good example of when an officer did not arrest either party but firearms were impounded for an undetermined cooling off period or what we call "Safekeeping".

Please provide guidance on the following SOP section language regarding this matter:

6. Firearms impounded as a result of a breach of peace, including but not limited to Domestic Violence cases, will require a court order for release pursuant to FSS 933.14(3). If there is no arrest made and there is no active court case (including Family Court) regarding the matter, the firearm(s) may be returned to the lawful owner after the firearm(s) has been returned from being entered in the National Integrated Ballistic Information Network Computer. A Property & Evidence Section Clerk must search the RMS and check court records to verify that the owner was not arrested and is not the subject of an open court case in order to release the firearm(s) without a court order.
7. The Department may require the owner, or their authorized representative, to present a court order for the release of an impounded firearm when an employee has articulable concern for the safety of the owner or others in releasing the firearm.

Respectfully,

<image001.png> *Sgt Paul Koppel*

Coral Gables Police Department
Professional Standards Division
2801 Salzedo Street
Coral Gables, FL., 33134
Office: 305-476-7810

From: Schultz, Beth
Sent: Wednesday, September 18, 2013 11:56 AM
To: Tastet, Rene
Cc: Frevola, Michael Lt.; Koppel, Paul
Subject: Property SOP - Return of Firearms
Importance: High

Lieutenant Tastet,

This is the question I think should be asked.

If an officer responds to a Breach of Peace, no arrest is made and a firearm is impounded, not related to the Breach of Peace, does the owner of the weapon need a court order for the return of the firearm?

Below is the narrative of case 13-5403, reference a Domestic Disturbance in which three firearms were impounded.

(Since this email is public record, I removed all names from the report.)

13-5403

I responded to 2005 Red Rd in reference to a Domestic Disturbance in which both parties called 911 emergency. Upon arrival both parties were outside and Involved Other XX2 was holding their shared child in common. I separated the parties to determine what had occurred and I received two conflicting accounts. I spoke with Involved Other X1 first and her account is as follows. She has been in a long-term tumultuous relationship with XX2 (two years) and the two decided to separate a week ago. On this date they were arguing and she stated that she only wanted to hold their child to which he refused. She stated that while trying to grab the baby XX2 struck her in the cheek (no apparent marks) with a backhand motion. During the argument she said that XX2 began recording her and himself. X1 stated that XX2 began walking around the house and she followed screaming for him to hand her the baby. X1 further stated that she has documented evidence proving a long history of verbal abuse and aggressive actions from XX2 such as punching holes in walls.

XX2 stated that X1 is unstable and he is concerned for the well-being of their son if left in the custody of X1. XX2 stated that he did in fact record the altercation and I viewed several snippets of the video which showed both parties involved in a heated exchange; however, it did not show any acts of overt violence. XX2 stated that the argument began while he was working on his lap-top computer and holding his son. XX2 said that X1 approached him and took the computer and threw it on the ground. XX2 also said that X1 hit him with the computer there were however no marks or signs of him being struck and the computer is still operational.

Due to conflicting testimony and no physical evidence aside from video showing an argument no arrest was executed. The parties were advised to separate for the foreseeable future and XX2 agreed to leave. XX2 told me earlier that there were firearms inside the house and I secured

them prior to him packing up his belongings. XX2 agreed to have his firearms impounded into CGPD property for safe-keeping. XX2 was provided a CGPD property receipt and instructed on the procedure for obtaining his property.

Both parties were given CGPD Domestic Violence packets and signed for them. Both parties filled out witness/victim affidavits recounting in their own words the events which were submitted to records via the UIR box. Both parties were referred to the family courts and the State Attorney's Office to further pursue their options.

On-duty Detective V. Zaccheo (ID#8019) was contacted and advised of the situation. He informed me that lacking physical evidence and conflicting statements the best option was to separate the parties until a mutual agreement could be reached between them.

From: Frevola, Michael Lt.
Sent: Tuesday, September 10, 2013 11:30 AM
To: Schultz, Beth; Tastet, Rene
Subject: FW: Legal Opinion RE Fla. Stat. Section 933.14(3) Return of Firearms

This is exactly what we need to put into or leave in the sop for the return of firearms when they are taken in conjunction with a breach of the peace type call.

Respectfully,

Lieutenant Michael H. Frevola
Coral Gables Police Department
2801 Salzedo St.
Coral Gables, Fl 33134
305-460-5075

From: Thornton Richard, Bridgette
Sent: Tuesday, September 10, 2013 11:16 AM
To: Frevola, Michael Lt.
Cc: Leen, Craig; Figueroa, Yaneris; Franqui, Susan; Hernandez, Cristina
Subject: Legal Opinion RE Fla. Stat. Section 933.14(3) Return of Firearms

Good Morning Lt. Frevola,

It is my legal opinion that where an officer observes a breach of the peace and a firearm is seized, then the firearm should not be returned to the subject until the subject obtains a court order. Indeed, Florida Statutes Section 933.14(3) states, "[n]o pistol or firearm taken by any officer with a search warrant or without a search warrant upon a view by the officer of a breach of the peace shall be returned *except pursuant to an order of a trial court judge.*" Fla. Stat. Section 933.14(3) (emphasis added). Thus, the express language of the Section 933.14(3) requires a court order for the return of a pistol or firearm whenever an officer seizes a pistol or firearm upon viewing a breach of the peace. As such, the CGPD should follow Section 933.14(3) and include its dictates in CGPD SOPs. Please let me know if you have any further questions or concerns.

Thank you,

Bridgette N. Thornton Richard
Deputy City Attorney for the City of Coral Gables

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