

THE FEDERAL LAW ENFORCEMENT - INFORMER -

MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW
ENFORCEMENT OFFICERS AND AGENTS

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Concealed Carry by Qualified LEOs and Qualified Retired LEOs

James Fedders
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Introduction

In 2004, Congress passed and the President signed the Law Enforcement Officers Safety Act of 2004 (LEOSA), Pub. L. No. 108-277, 118 Stat. 865 (2004), codified at [18 U.S.C. § 926B](#), “Carrying of concealed firearms by qualified law enforcement officers” and [18 U.S.C. § 926C](#), “Carrying of concealed firearms by qualified retired law enforcement officers.” With explicit limitations and conditions, LEOSA exempts “qualified” active duty law enforcement officers (LEOs)(federal, state, and local), as well as “qualified” retired law enforcement officers from most state laws and local ordinances prohibiting the carrying of concealed firearms. Law enforcement officers are not exempt from federal laws or regulations, which regulate the carrying of firearms onto aircraft, federal property, federal buildings, and national parks. LEOSA does not confer upon law enforcement officers who are off-duty, or qualified retired law enforcement officers any federal law enforcement arrest authority.

Firearms

Under § 926B(e), firearms which may be carried specifically **do not include**

- (1) any machinegun as defined in [26 U.S.C. § 5845](#);
- (2) any firearm silencer as defined in [18 U.S.C. § 921](#); and
- (3) any destructive device as defined in [18 U.S.C. § 921](#).

Qualified Law Enforcement Officers

To be a “qualified law enforcement officer” under § 926B(c) you must be

- (1) a LEO in good standing of a government law enforcement agency;
- (2) authorized and qualified to carry a firearm;
- (3) not under the influence of alcohol or drugs; and
- (4) not prohibited by federal law from possessing a firearm.

The Exemption and Limitations

Those LEOs who are “qualified” under § 926B(c) **and** who are carrying photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer (§ 926B(d)) are, while off-duty, exempt under § 926B(a) from most state laws prohibiting the carrying of concealed firearms, subject to the express limitations in subsection § 926B(b). State laws that allow private persons or entities to prohibit or restrict the possession of concealed firearms on their property remain valid. If state law prohibits it,

qualified LEOs may not carry a concealed firearm on any State or local government property, installation, building, base, or park.

Qualified Retired Law Enforcement Officers

To be a “qualified law retired enforcement officer” under § 926C(c) you must

- (1) be a retired LEO in good standing (other than for reasons of mental instability) from a government law enforcement agency;
- (2) have been authorized and qualified to carry a firearm before such retirement;
- (3) have been a LEO for an aggregate of 15 years or more, or, after any applicable probationary period, retired on a service-connected disability;
- (4) have nonforfeitable right to benefits under the retirement plan of the agency;
- (5) have met, during the most recent 12-month period, at your own expense, the State’s standards for training and qualification for active law enforcement officers to carry firearms;
- (6) not be under the influence of alcohol or drugs; and
- (7) not be prohibited by federal law from possessing a firearm.

Required Photographic Identification

Qualified retired law enforcement officers must possess either

- (1) photographic identification issued by the agency from which the individual retired that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the standards established by the agency for training and qualification for active law enforcement officers to carry a firearm of the same type as the concealed firearm; or
- (2) photographic identification issued by the agency from which the individual retired and firearms certification from the state equivalent to the above.

The Exemption and Limitations

Those retired LEOs who are “qualified” under § 926C(c) **and** who are carrying the required photographic identification are exempt under § 926C(a) from most state laws prohibiting the carrying of concealed firearms, subject to the express limitations in subsection § 926C(b). State laws that allow private persons or entities to prohibit or restrict the possession of concealed firearms on their property remain valid. If state law prohibits it, qualified LEOs may not carry a concealed firearm on any State or local government property, installation, building, base, or park.

Potential Civil and Criminal Liability

Qualified off-duty law enforcement officers and qualified retired law enforcement officers are considered private citizens who have been granted a limited exemption from local laws against carrying a concealed firearm. Qualified federal law enforcement officers acting as a “peace officer” pursuant to state statutory authority are not acting within the scope of federal statutory

authority. Therefore, they may not enjoy the immunities and protections normally available to a federal law enforcement officer. Absent state law immunities and protections, an individual who is carrying a concealed weapon under this statute and who uses that weapon may be personally, civilly liable for damages and injuries as well as subject to possible criminal liability.

Cases

Since LEOSA was only signed into law in 2004, there have been only a few cases dealing with it. Two cases deal with active duty LEOs and § 926B.

In *The People of the State of New York v. Booth*, 862 N.Y.S.2d 767 (2008), defendant was pulled over by the police for speeding. The officer checked defendant's license and registration, learned of a pending warrant for the defendant, that defendant's driver's license was suspended, and that defendant's passenger did not have a valid license. After requesting a tow for the vehicle, the officer began to inventory its contents and found a loaded handgun under the driver's seat. Defendant stated that he did not have a license to possess a firearm but stated that he had a waiver from the United States Coast Guard to use the firearm to practice.

Based on testimony that defendant was a member of the Coast Guard and was permitted to carry a weapon and generally take part in law enforcement duties as part of his duties as a boarding officer, and the Coast Guard identification found in his possession at the time, the court held that defendant was exempt under § 926B(a) from prosecution even though he possessed a handgun for which he had no license. The court dismissed the indictment.

In *State of South Dakota, County of Meade v. Ronald Smith et. al.* (Circuit Court, Fourth Judicial Circuit CRIM NO. 08-829; 08-830; 08-832) (2008), the defendants included Ronald Smith, Detective with the Seattle Washington Police Department, Dennis McCoy, Sergeant with the Seattle Washington Police Department, and Scott Lazalde and James Rector, both law enforcement officers with the U.S. Customs and Border protection Service in Blaine, Washington. They, along with other members of the Iron Pigs Motorcycle Club were socializing at the Roadhouse when they were involved in an altercation with members of the Hell's Angels Motorcycle Club. All defendants were carrying concealed pistols at the time. Defendants were arrested and charged with carrying a concealed weapon in violation of state law. The defendants argued that the indictment fails to describe a public offense concerning Smith, McCoy, Rector and Lazalde as they carried concealed weapons legally due under 18 U.S.C. 926B.

According to the court, "the federal law is clear in its intent to preempt state laws unless either of the exceptions in [§ 926B] (b) (1) or (2) apply. While states retain the right to prohibit the possession of firearms on government property and to permit private persons and entities to prohibit the possession of firearms on their property, they cannot restrict qualified law enforcement officers in any other manner. It is beyond dispute that defendants, Smith, McCoy, Rector, and Lazalde are "qualified law enforcement officers." They were qualified to carry firearms, and at the time in question; they were not under the influence of alcohol or any other drug; they possessed photographic identification issued by their respective employers.

The court also referenced the Memorandum from the Office of the Attorney General on the Application of the Law Enforcement Officers Safety Act of 2004 to various Directors of Federal Agencies, January 31, 2005, 70 Fed. Reg. 42 10673, 10674 (March 4, 2005) (Click [HERE](#)), and cited the South Dakota Attorney General explanation (Click [HERE](#)).

One recent case, ***State of New Jersey v. Andros***, 958 A.2d 78 (2008), deals with the rights of a retired officer under § 926C. Click [HERE](#) for the court's opinion.

Andros had been a city police officer from 1968 to 2003, and retired in 2003 in good standing. The trial court granted the state's application to revoke appellant's firearm permit based on at least four incidents that involved him threatening or actually brandishing the handgun he carried. The trial court found that appellant did not possess the appropriate restraint, judgment, and plain good common sense to avoid confrontations in situations in which it was possible and advisable to do so. Based on the federal preemption under § 926C, Andros challenged both the denial of his motion to dismiss the application and the determination on the merits. The appellate court found no error, concluding that the trial court properly found good cause for revocation of appellant's license based on his conduct. The court further held that § 926C did not prevent the state from revoking the permit of a retired police officer as there was no intent on the part of the United States Congress to preempt the action taken by the state in the case. (Arguably, Andros cannot meet the state's standards for qualification and training absent a license to carry.)

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Jim began his government career as a Naval Flight Officer in 1971 and retired in 1999, as a Senior Special Agent, U.S. Customs Service. Jim also served as a firearms instructor and boat captain for the U.S. Customs Service. Jim is a distinguished honor graduate from the FLETC and briefly served as an instructor in the Driver and Marine Division leaving the position to attend law school.

Jim's education includes B.S. in Biology from St. Mary's College of Maryland and an MIA in Forensic Science from The George Washington University in Washington D.C. Jim received his JD in 2008 after attending law school at the American University, the University of Hawaii, and the New England School of Law.

CASE SUMMARIES

SUPREME COURT

Abuelhawa v. U.S., 129 S. Ct. 2102, May 26, 2009

Title 21 U. S. C. §843(b) makes it a felony “to use any communication facility in committing or in causing or facilitating” certain felonies prohibited by the statute. Using a telephone to make a misdemeanor drug purchase does not “facilitate” felony drug distribution in violation of § 843(b). Where a transaction like a sale necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the other’s conduct. Where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the legislature’s punishment calibration.

Click [HERE](#) for the Court’s opinion.

Dean v. U.S., 129 S. Ct. 1849, April 29, 2009

Under 18 U.S.C. §§924(c)(1)(A)(ii),(iii), an individual convicted for using or carrying a firearm during and in relation to any violent or drug trafficking crime, or possessing a firearm in furtherance of such a crime, receives a 10-year mandatory minimum sentence, in addition to the punishment for the underlying crime, if the firearm is discharged. The government is not required to prove that the defendant intended to discharge the firearm. The 10-year mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident.

Click [HERE](#) for the Court’s opinion.

CIRCUIT COURTS OF APPEALS

6th CIRCUIT

U.S. v. Lopez, 567 F.3d 755, June 01, 2009

Defendant was not within reaching distance of his vehicle’s passenger compartment at the time of the search, but was instead handcuffed in the back seat of the patrol car by then. There was no reason to think that the vehicle contained evidence of the offense of arrest, since that offense was reckless driving. The search of defendant’s vehicle, therefore,

violated the Fourth Amendment as interpreted in Arizona v. Gant, 129 S. Ct. 1710 (Apr. 21, 2009). The 73 grams of crack cocaine, a set of digital scales, and a Glock .40 caliber handgun loaded with ten rounds of ammunition which formed the basis of his conviction for possession with the intent to distribute and for carrying a firearm in relation to a drug trafficking crime are inadmissible. Defendant's conviction is vacated.

Click [HERE](#) for the court's opinion.

8th CIRCUIT

U.S. v. Hrasky, 567 F.3d 367, June 10, 2009

Defendant was arrested for driving on a suspended license (3rd offense), handcuffed and placed in the back of a patrol car. Because defendant was not within reaching distance of his vehicle's passenger compartment at the time of the search and because there was no reason to think that the vehicle contained evidence of the offense of arrest, the search of defendant's vehicle violated the Fourth Amendment as interpreted in Arizona v. Gant, 129 S. Ct. 1710 (Apr. 21, 2009). The two handguns that formed the basis of his conviction for felon in possession are inadmissible. Defendant's conviction is vacated.

Click [HERE](#) for the court's opinion. See also *U.S. v. Hrasky*, 453 F.3d 1099 (8th Cir. 2006).

9th CIRCUIT

Editor's Note: This is an amended opinion adding the discussion and holdings below. See also the report of this case in the February issue of *The Informer* (2Informer09) and the 2006-2009 Case Digests.

U.S. v. SDI Future Health, Inc., 2009 U.S. App. LEXIS 12997, June 01, 2009

In determining whether a warrant is overbroad and lacking particularity, the court must answer the threshold question of whether the warrant incorporates the affidavit. If it was incorporated, then the affidavit and the warrant are evaluated as a whole, allowing the affidavit to "cure" any deficiencies in the naked warrant. An affidavit is part of a warrant only if (1) the warrant expressly incorporates the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search. The goal of the "cure by affidavit" rule is to consider those affidavits that limit the discretion of the officers executing the warrant.

A warrant expressly incorporates an affidavit when it uses "suitable words of reference." There are no required magic words of incorporation. Suitable words of reference are used where the warrant explicitly states: "*Upon the sworn complaint made before me there is*

probable cause to believe that the [given] crime[] . . . has been committed.” There were suitable words in the instant warrant that pointed to the affidavit explicitly noting “the supporting affidavit(s)” as the “grounds for application for issuance of the search warrant.”

Even though the affidavit was not physically attached to the warrant (it had been sealed by the court), by making the affidavit available, the search team ensured that it accompanied the warrant to satisfy the requirements of incorporation. Nothing more is necessary for the affidavit to ensure that the discretion of the officers executing the warrant is limited.

A warrant must not only give clear instructions to a search team, it must also give legal, that is, not overbroad, instructions. Under the Fourth Amendment, this means that there must be probable cause to seize the particular things named in the warrant. The search and seizure of large quantities of material is justified if the material is within the scope of the probable cause underlying the warrant.

Click [HERE](#) for the court’s opinion.