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The Federal Law Enforcement -Informer-

MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

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SUPREME COURT PREVIEW

Law Enforcement Cases To Be Decided In The
October 2006 Term

A. **EXCESSIVE USE OF FORCE / QUALIFIED IMMUNITY**

Scott v. Harris

See the article below by Senior Instructor Ed Zigmund for a full discussion of this case.

Click **HERE** for the Eleventh Circuit's Opinion.

B. **FIREARMS VIOLATIONS**

James v. U.S.

Is the felon-in-possession statute, 18 U.S.C. § 922(g), facially invalid because Congress failed to define commerce as interstate or foreign commerce?
Additionally, is the statute is unconstitutional because Congress acted beyond the power of the commerce clause by failing to require a substantial nexus?

Click **HERE** for the Eleventh Circuit's Opinion.

C. **SENTENCE ENHANCEMENT under 18 U.S.C. § 924(c)**
IMMIGRATION

Toledo-Flores v. U.S.

Is a state felony conviction for simple possession of a controlled substance a "drug trafficking crime" under 18 U.S.C. § 924(c) (2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a) (43) (B), even though the same crime is a misdemeanor under federal law?

(The Fifth Circuit says yes while the Second, Third, Sixth, and Ninth Circuits say no.)

This is an unpublished opinion of the Fifth Circuit.

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Upcoming Supreme Court Case on the Use of Deadly Force During High-Speed Police Pursuits

Edmund Zigmund
Senior Instructor
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In 2007, the United States Supreme Court will hear an appeal of a case in which the Eleventh Circuit Court of Appeals ruled that a police officer was not entitled to qualified immunity. In the case, during a high-speed chase, the officer rammed his vehicle into a suspect's vehicle, resulting in serious bodily injury to the suspect.

The Eleventh Circuit Case

In *Harris v. Coweta County*[1], an officer clocked Harris' vehicle at 73 miles-per-hour in a 55 miles-per-hour zone at night. After the officer flashed his blue lights, Harris fled, drove in excess of the speed limit at speeds between 70 and 90 miles per hour, passed vehicles on double yellow traffic control lanes, and ran through two red lights. Harris stayed in control of his vehicle, utilizing his blinkers while passing or making turning movements. The officer radioed dispatch and broadcast the vehicle's license plate number. He did not relay that the underlying charge was speeding. Another officer heard the radio communication and joined the pursuit.

After crossing into a nearby city, Harris slowed down, activated his blinker, and turned into a parking lot. The second officer attempted to prevent the suspect from leaving the parking lot by driving his vehicle directly into the suspect's path. The suspect collided with the officer's cruiser causing minor damage. Harris then entered the highway and continued to flee at a high speed. The pursuing officer radioed a request for permission to use a "PIT" (Precision

[1] 433 F.3d 807 (11th Cir. 2005).

Intervention Technique). This maneuver is a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop. A supervisor granted the officer permission to employ the PIT.

After receiving approval, the officer determined that he could not perform the PIT maneuver because he was going too fast. Instead he rammed his cruiser directly into Harris' vehicle, causing Harris to lose control, leave the roadway, run down an embankment, and crash. As a result, Harris was rendered a quadriplegic. The lawsuit, filed under 42 U.S.C. § 1983, claimed that the officer used excessive force during the high-speed car chase, and that the supervisor authorized that use of force. The officer and supervisor were denied summary judgment by the trial court on their claims of qualified immunity.

On appeal, the Eleventh Circuit Court of Appeals held that Harris was seized when the officer rammed his vehicle, causing him to lose control and crash, and that the ramming of Harris' car could constitute a use of "deadly force." "Deadly force" means force that creates a substantial risk of causing death or serious bodily injury.

The Eleventh Circuit affirmed the denial of qualified immunity to the officer. The essence of qualified immunity is notice. Was the law as it existed sufficiently clear to give a reasonable law enforcement officer "fair notice" that ramming a vehicle under these circumstances was unlawful? At the time of this incident, a reasonable police officer would have known that a vehicle could be used to effectuate a seizure and could be used to apply deadly force. Common sense would inform any reasonable officer that there are substantial risks of death or bodily harm when ramming another vehicle at high speeds in the manner employed in this case. A reasonable officer would know that deadly force cannot be used to apprehend a fleeing suspect unless the conditions set out in *Tennessee v. Garner*[2] exist. However, none of the limited circumstances identified in *Garne*r that might render this use of deadly force constitutional were present. The officer did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm. Prior to the chase, Harris did not pose an imminent threat of serious physical harm to the officer or others. Harris' infraction was speeding (73 mph in a 55 mph zone). There were no warrants out for his arrest. There was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and the suspect remained in control of his vehicle. Harris could have been arrested later. As such, the use of deadly force was not "reasonable" in this high-speed chase based only on a speeding violation and traffic infractions.

However, the Eleventh Circuit reversed the trial court and held that summary judgment should be granted in the supervisor's favor. The facts do not establish that the supervisor authorized deadly force. Rather, the supervisor authorized a PIT, which assumes that the maneuver will be executed at lower speeds by properly trained officers, and therefore can terminate a flight "safely." The officer, however, chose not to execute a PIT at all, but rather to ram the car at a very high speed from behind. Because this ramming was not authorized by the supervisor, the supervisor's conduct cannot be said to have violated Harris' constitutional rights.

[2] 471 U.S. 1 (1985).

The Supreme Court Appeal

On October 27, 2006, the United States Supreme Court decided to hear the appeal filed by the officer from this decision by the Eleventh Circuit. The case is captioned as *Scott v. Harris*, No. 05-1631. In general, the issue will involve whether deadly force can be used against a fleeing motorist. The officer is making a number of arguments.

First, the officer argues that the Eleventh Circuit decision creates a split in the circuits by concluding that the officer's decision to use deadly force to terminate the high-speed pursuit could violate the Fourth Amendment. Specifically, the officer states that other circuits have held that officers may use deadly force when a fleeing suspect appears likely to drive in a manner that places the officers or others at risk. In contrast, the Eleventh Circuit decision requires officers to call off the pursuit and allow the fleeing driver to drive as recklessly as he desires; or wait until the fleeing suspect actually injures or kills a bystander before initiating a "seizure" to terminate the pursuit.

Second, the officer argues that the Eleventh Circuit decision is contrary to the Supreme Court's qualified immunity precedent. Specifically, the officer argues that the cases cited by the Eleventh Circuit reveal that the general tests enunciated in *Garner* and *Graham v. Connor*[3] serve as the sole basis for finding that the officer had "fair and clear" warning that his conduct was unconstitutional. The officer observes that there has been no decision from the Supreme Court or any other circuit that addresses the use of push bumpers to terminate a pursuit. Further, the officer had at least "arguable probable cause" in light of the information he possessed that the suspect posed a threat of immediate harm to the public. The officer argues that, to begin and end the qualified immunity analysis with *Garner*, despite the suspect's admission of reckless and dangerous driving, effectively eliminates the application of qualified immunity to police pursuit cases.

Third, the officer argues that this case has significant public policy implications for law enforcement in pursuit cases. Specifically, the officer asserts that the Eleventh Circuit decision evinces a policy preference that officers should allow reckless and dangerous drivers to escape if the underlying violation consists of a traffic law violation. This policy undermines the very purpose of traffic laws, i.e. to protect the lives of the motoring public. Certainly, there may be circumstances when allowing a suspect to escape is preferable; but if the escape itself puts others at risk of harm, officers should be given the discretion to use force to terminate the risk and protect innocent bystanders. In conclusion, the officer asserts that this is a significant case for the law enforcement community and the orderly administration of justice with serious implications nationwide.

Decision Expected in 2007

Will the officer prevail in his appeal before the United States Supreme Court? Will this case result in another landmark Supreme Court decision regarding the use of deadly force by law enforcement officers? It is anticipated the Supreme Court will hand down its decision during the

[3] 490 U.S. 386 (1989).

summer of 2007.

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CIRCUIT COURTS OF APPEALS
CASE SUMMARIES

2nd CIRCUIT

U.S. v. Ness, 466 F.3d 79, October 10, 2006

"Transaction money laundering" and "transportation money laundering," in violation of 18 U.S.C. §§1956(a)(1)(B)(i) and 1956(a)(2)(B)(i), both proscribe conduct "designed in whole or in part . . . to *conceal or disguise* the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." (italics added). Highly complex and surreptitious processes through which the funds are transferred — involving coded language, the use of intermediaries, secretive handoffs, and cash transactions — suffice to permit the inference that the deliveries have been designed in a way that would conceal the source of the moneys.

The 5th and 10th Circuits disagree, holding that the concealment element is satisfied only when the transaction or transportation at issue is designed to give unlawful proceeds the appearance of legitimate wealth. (cites omitted).

Click **HERE** for the full opinion.

* * * *

5th CIRCUIT

U.S. v. Pope, 2006 U.S. App. LEXIS 26303, October 17, 2006

This opinion vacates and reverses the opinion first reported in QR-7-4.

In the earlier decision, the court refused to apply the "good faith" exception, holding that an officer's subjective motive to search does matter, and that when applying for a search warrant, the stated purpose of the warrant must match the officer's actual motivation for the search. The court now holds that even though the facts in the affidavit supporting the warrant were stale, good faith reliance on the issued warrant makes the evidence admissible.

Click **HERE** for the full opinion.

6th CIRCUIT

U.S. v. Carter, 465 F.3d 658, October 17, 2006

It is not necessary to allege nor prove the existence of a "trigger mechanism" to meet the definition of "machine gun" in 26 U.S.C. § 5845(b). Section 5845(b) defines "machine gun" as

> …any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

The statute includes a total of four definitions of a "machinegun," *i.e.*, the initial definition in the first sentence followed in the second sentence by three independent, alternative definitions added by amendment to the statute in 1968.

The 3rd, 4th, 7th, and Federal Circuits agree. (cites omitted).

The 10th Circuit disagrees. (cite omitted).

Click **HERE** for the full opinion.

* * * *

8th CIRCUIT

U.S. v. Zacher, 465 F.3d 336, October 11, 2006

A seizure of a package sent through FedEx occurs only when law enforcement "meaningfully interferes" with an individual's possessory interests in the property. A meaningful interference occurs only if the detention delays the timely delivery of the package.

No change of custody occurs just because the carrier gives the package to police at the carrier's place of business. The sender's reasonable expectations of how the carrier will handle the package define the scope of the carrier's custody. A reasonable person could expect FedEx to handle his or her package the same way.

(See ***U.S. v. Va Lerie***, reported in QR-6-2).

Click **HERE** for the full opinion.

9th CIRCUIT

U.S. v. Mendez, 2006 U.S. App. LEXIS 26952, October 30, 2006

Past gang membership and a felony conviction do not give rise to the requisite type of particularized, reasonable suspicion necessary to expand questioning beyond the scope of the traffic stop.

Click **HERE** for the full opinion.

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10th CIRCUIT

U.S. v. Pettigrew, 2006 U.S. App. LEXIS 28128, October 13, 2006

The admissibility of an unsolicited inculpatory statement, following a voluntary statement made in violation of *Miranda*, turns on whether the inculpatory statement was knowingly and voluntarily made. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. In the absence of coercion or improper tactics, a broader rule would "undercut the twin rationales of *Miranda's* exclusionary rule - trustworthiness and deterrence."

The 7th and 9th Circuits agree. (cites omitted).

18 U.S.C.S. § 113(a)(4), Assault by Wounding, is a general intent crime. Driving while voluntarily intoxicated supports an inference that the defendant intended the consequences of his actions.

Click **HERE** for the full opinion.