Office of the State Attorney
Eighth Judicial Circuit

Law Enforcement Newsletter

January 2016

A Message from Bill Cervone State Attorney

With the start of a new year I'd like to pass on a reminder about an old problem - misuse of DAVID and other databases.

Last summer a news story out of Jacksonville made the rounds. A female FHP Trooper in Miami pulled over a local police car for going 120mph. The result for the Trooper was that 88 officers from 25 different agencies, including two from Jacksonville, accessed her DAVID records over 200 times, resulting in everything from prank calls to harassment by some who weren't happy with her actions. She has filed a federal lawsuit claiming a violation of her privacy rights under the 4th and 14th Amendments as well as under the federal Driver's Privacy Protection Act, a 1994 law that provides for a penalty of $2500 for each incident of improperly accessing information.

Not to be outdone by that, in the Fall an unsuccessful candidate for State Attorney in Sarasota in 2012 has sued both the sitting State Attorney and Sheriff there, claiming that employees of both agencies improperly accessed his records as a result of a failure to properly monitor their activities, allegedly for political purposes.

Both lawsuits remain active and what may ultimately turn out to be true is up for debate. What isn't is that the improper use of DAVID or any other restricted site can have serious complications, up to and including lost employment and criminal ramifications. Hopefully, these two situations serve as a word to the wise.

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We're on the web:
Www.sao8.org

REMINDER:
LAW ENFORCEMENT NEWSLETTER NOW ON-LINE

The Law Enforcement Newsletter is now available on-line, including old issues beginning with calendar year 2000. To access the Law Enforcement Newsletter go to the SAO website at <www.sao8.org> and click on the "Law Enforcement Newsletter" box.

CONGRATULATIONS TO...

...ASA Stephanie Klugh and her husband, who welcomed their first child, Thomas, on September 19th.

...ASAs Brooke King, Ryan Nagel, and John Kelly, all of whom passed the Florida Bar exam in September and have become Bar members.

...Deputy Chief Investigator Darry Lloyd, who received the Alachua County Branch NAACP's Rev. T. A. Wright Leadership Award in October in recognition of his work in the community, including not just with the SAO but also through many other groups such as the Black on Black Crime Task Force, the Phi Beta Sigma service fraternity, and his church youth programs.

...The Baker County Sheriff's Office held its annual awards banquet in September. Among those recognized were Drew Norman as Detention Deputy of the Year, Lt. Gerald Ray Rhoden as Detention Supervisor of the Year, Victoria McKenzie as Communication Officer of the Year, Becky Snow as recipient of the Laura Roberts Loyalty Award, Sgt. James Marker as recipient of the Archie Roberson Legacy Award, Karen Shook as the recipient of the Sandi Hardee Above And Beyond Award, and Dep. Pete Quinley as recipient of the Sheriff's Citizen Service Award.

...Members of the Gilchrist County Sheriff's Office, which announced several promotions in November, including the promotion of Jeff Manning to Chief Deputy, Troy Davis to Commander of Operations supervising patrol, investigations and the jail, and Cheryl Brown to Captain and Commander of Administration supervising communications, court security, training and other related areas.

...Retired Alachua Police Department Chief Joel Decoursey, who has been named Chief of the High Springs Police Department. Welcome back, Chief Decoursey!

IN MEMORIUM...

Retired Alachua County Sheriff's Office **Capt. Buddy Crevasse** died in November after a long fight against cancer. Buddy spent many years with ACSO in various roles and was extraordinarily active in the community as well.

Former SAO **Executive Director Jim Stringer** died at the age of 93 in October. Jim was the SAO's first Executive Director and served in that role for most of the 1970s and 80s.

Any changes in agency email addresses should be reported to our office at clendeninp@sao8.org.

For a copy of the complete text of any of the cases mentioned in this or an earlier issue of the Legal Bulletin, please call Chief Investigator Paul Clendenin at the SAO at 352-374-3670.

SAO STAFF CHANGES

ASA Carla Newman joined the Baker County office in October, replacing Macon Jones. Carla has been working as a Staff Attorney for Court Administration in Baker, Bradford and Union Counties for the last year and a half, and prior to that was in private practice in Jacksonville.

ASA Christopher Gage started in the Bradford County office in October. Chris is a 2015 UF Law School grad and also passed the bar exam and was sworn as a Bar member in September.

ASA Brad McVay resigned effective at the end of the December. Brad will be entering private practice with a Gainesville firm.

The SAO Is Now On Twitter

The **SAO** has established a Twitter feed to better disseminate information to the media and others such as law enforcement agencies. Like us at #8THCIRCUITSAO. For more information contact Deputy Chief Investigator Darry Lloyd at 352-374-3670.

The City of High Springs dedicated a memorial to Town Marshall George Lasonro Bryant on December 3rd. The memorial which was erected outside of the Police Department building, honors; Marshall Bryant, who lost his life responding to a disturbance on December 3, 1915.

Florida Case Law Update: Traffic Stops for External Obstruction of Vehicle License Plate under Baker v. State.

Contributed by ASA David Byron

Under Florida Statute 316.065(1), all vehicles driven upon the highways, roads, or streets of the state of Florida must be licensed by the owner of the vehicle, and must display the corresponding license plate so that the alphanumeric designation is "free from defacement, mutilation, grease, and other obscuring matter, so that they will be plainly visible and legible at all times 100 feet from the rear or front." Any driver who fails to comply with this statute commits a civil traffic infraction, for which a law enforcement Officer may properly stop the offending vehicle.

In May 2015, the Florida 1st District Court of Appeals issued its ruling in Baker v. State , which differed from prior Florida case law regarding violations of Fla. Stat. 316.605(1) and effectively expanded the scope of permissible traffic stops under this law. **Baker v. State**, 184 So.3d 151 (Fla 1st DCA 2015). Specifically, the 1st DCA held that this law prohibits obstruction of a vehicle's license plate even when the obstruction is from objects external to the license plate itself, such as when a trailer hitch attached to the vehicle blocks law enforcement from reading the license plate within 100 feet.

In issuing this ruling, the 1st DCA explicitly diverged from the more limited reading of this law adopted by the 2nd DCA in Harris v. State, which only allowed traffic stops under this statute if the license plate was obstructed by something that was physically on the license plate. Harris v. State, 11 So.3d 462 (Fla. 2d DCA 2009). As explained below, the 1st DCA's holding in Baker expands the holding of Fla. Stat. 316.605(1), and consequently gives law enforcement broader authority to conduct traffic stops under this statute in the 8th Judicial Circuit.

In the Baker case, law enforcement conducted a traffic stop of the defendant pursuant to Fla. Stat. 316.605(1). The law enforcement officer stated that the defendant's license plate was not fully visible from a distance of about 25 feet, and that it was obstructed by a trailer hitch attached to the defendant's vehicle. During the traffic stop, the officer discovered that the defendant had stolen the vehicle in question, and also discovered narcotics on the defendant's person. The defendant subsequently filed a motion to suppress, challenging the validity of the Officer's traffic stop. The trial court denied the defendant's motion to suppress, and the defendant subsequently appealed that decision.

In upholding the trial court's decision, the 1st DCA held that traffic stop in Baker was valid under Fla. Stat. 316.065(1). The Court first noted that the statutory language of Fla. Stat. 316.605(1) is not ambiguous, and consequently the plain meaning of the language should apply. Looking at the relevant portion of the statute, the Court noted that the law states that the vehicle's license plate shall be, "plainly visible and legible at all times 100 feet from the rear or the front." Examining this language alongside other portions of the same statute that prohibit displaying a license plate whose "letters and numbers…are not readily identifiable," the Court reasoned that the statutory intent of this law was to ensure that every vehicle's license plate is legible from within 100 feet. Consequently, the Court held that if a vehicle's license plate is not fully legible within 100 feet, the driver of that vehicle commits a civil traffic infraction and may be properly stopped by law enforcement, regardless of whether the license plate is obscured by something placed on the plate itself, such as grease or a rag affixed over the plate, or by an external object, such as a trailer hitch or an object hanging in front of the plate.

In reaching this decision, the Court explicitly diverged from the 2nd DCA's 2009 ruling on nearly identical facts in Harris v. State. In that case, the defendant was stopped for a violation of Fla. Stat. 316.605(1) due to his license plate being obscured by a trailer hitch attached to his vehicle. The 2nd DCA found that the stop was improper and suppressed all resulting evidence. Examining the same statute, the 2nd DCA found that the statutory lan-

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Florida Case Law Update: Traffic Stops for External Obstruction of Vehicle License Plate under Baker v. State.

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guage was ambiguous, and applied the doctrine of ejusdem generis to its interpretation of the statute. In doing so, the Court found held that the statute only prohibited "obstructions 'on' the tag such as grease, grime, or rags," and that external objects which obstructed the license plate were not prohibited under the law.

Despite the 2nd DCA's ruling in Harris, the 1st DCA in Baker found that Fla. Stat. 316.605(1) is not ambiguous, and that the plain meaning of the statute prohibits obstruction of a vehicle's license plate by external obstructions, as well as obstructions placed directly on the license plate. Baker, In justifying its interpretation of the statute, the 1st DCA noted that,

> [h]ad the legislature wanted to draft a statute that only made it illegal to obscure the license tag's alphanumeric designation by matter that was "on" the tag, it could have easily done so, as other states have provided.

The 1st DCA also noted that its interpretation of Fla. Stat. 316.605(1) was not only supported by the dissent in Harris v. State, but also by the Fifth DCA's holding in State v. English, which was issued while the Baker appeal was pending. In that case, the 5th DCA interpreted this statute in the same manner as the 1st DCA in Baker, and found that a defendant was properly stopped under this statute where his license plate was obscured by a tag light and wiring which was hanging in front of the plate and made the license unreadable. For these reasons, the Court affirmed the trial court's denial of the defendant's motion to suppress.

The 1st DCA's ruling in Baker ultimately broadens the interpretation of Fla. Stat. 316.605(1), and consequently gives law enforcement greater authority to conduct traffic stops under this section, and as a result, to detect possible criminal activity. Because the 1st DCA's ruling is currently in conflict with the 2nd DCA's holding in Harris, it is possible that this issue will eventually be taken up by the Florida Supreme Court, at which point the state of the law could change. Nonetheless, Baker v. State is currently binding precedent in the 8th Judicial Circuit, and therefore its interpretation of Fla. Stat. 316.605(1) constitutes binding law on this issue in our Courts.

Aguiar v. *State*, 40 F.L.W. D2445a (Fla. 5th DCA – October 30, 2015)

OFFICERS MAY LACK LEGAL AUTHORITY TO ORDER PASSENGERS BACK INTO VEHICLES DURING ROUTINE TRAFFIC STOPS

Contributed by ASA Stephanie Hines

Aguiar was a front-seat passenger in a vehicle which was stopped for multiple traffic violations. As the driver pulled into a parking space, Aguiar exited the vehicle before it came to a complete stop. The officer conducting the traffic stop then ordered Aguiar back into the vehicle, in which contraband was later discovered. Aguiar moved for suppression of the evidence, arguing that the contraband was discovered as a result of an illegal detention. The trial court denied the motion, but on appeal, the Fifth District Court of Appeal reversed the ruling.

The Fifth District Court held that under the circumstances, the officer's command that Aguilar return to the vehicle was unlawful. The appellate court relied upon *Wilson* v. *State*, 734 So. 2d 1107 (Fla. 4th DCA 1999), which reasoned that while a traffic stop sufficiently justifies subjecting the driver to detention, the restraint on the liberty of the blameless passenger is, in contrast, an unreasonable interference. Accordingly, an officer must have an articulable founded suspicion of criminal activity or a reasonable belief that the passenger poses a threat to the safety of the officer, himself, or others before ordering the passenger to return to and remain in the vehicle. In Aguiar's case, the officer's concern that he may flee the scene did not satisfy either of these requirements. Thus, since Aguiar had the right to leave, the contraband discovered subsequent to his mandated return to the vehicle was suppressed. Of note, the appellate court was not moved by the State's argument that Aguiar appeared nervous and resisted the officer's instruction to return to the vehicle because whether an officer has reasonable suspicion to detain a passenger should be based on the facts the officer observes before commanding the passenger to return to the vehicle – not after.

Still, there may be circumstances under which an officer has legal authority to order a passenger back into a vehicle during a traffic stop. For example, *D.N.* v. *State* suggested that an officer may have legal authority to detain the passenger if he intends to conduct investigative questioning of the passenger regarding a crime for which the driver is being investigated, i.e. fleeing & eluding a police officer. Also, in *State* v. *McClendon*, the officer was permitted to order the passenger to sit inside the vehicle without violating the passenger's constitutional rights because the officer was concerned for his safety based on the passenger's behavior, i.e. the passenger exited the vehicle and leaned on the hood of the car, at which point the officer could not see the passenger's hands.

For law enforcement agencies in the Eighth Circuit, this means that officers conducting a lawful traffic stop may not order a passenger who has left a stopped vehicle to return to and remain in the vehicle throughout the completion of the stop *unless* officers have an articulable founded suspicion of criminal activity (about which they intend to question the passenger) or concerns for the safety of officers, the passenger him/herself, or others on scene.

Force & Fleeing Felon

Nothing has become more controversial in the law enforcement world than use of force, especially deadly force. All of us are familiar with various cases that have gotten national attention. We have been fortunate not to have had the kinds of protests and unrest that has occurred far too often, elsewhere.

Following are a series of cases dealing with specific use of force scenarios. As you read them, please understand that the situations described are all very fact specific and that many of the cases do not involve Florida law. These cases, nevertheless, can provide guidance and insight for all of us.

These cases and the accompanying commentary are re-printed with permission from the 15st Circuit State Attorney's Office's law enforcement newsletter.

Sergeant Randy Baker had an arrest warrant for Israel Leija's arrest. When Baker approached Leija's car and informed him that he was under arrest, Leija sped off, headed for Interstate 27. Baker gave chase. Leija entered the interstate and led officers on an 18–minute chase at speeds between 85 and 110 miles per hour. Twice during the chase, Leija called the Police dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit. The dispatcher relayed Leija's threats, together with a report that Leija might be intoxicated, to all concerned officers.

As the officers maintained their pursuit, other law enforcement officers set up tire spikes at three locations. The first was located under an overpass. The officers had received training on the deployment of spike strips, including on how to take a defensive position so as to minimize the risk posed by the passing driver.

Trooper Mullenix also responded. He drove to the overpass, initially intending to set up a spike strip there. Upon learning of the other spike strip positions, Mullenix began to consider another tactic: shooting at Leija's car in order to disable it. Mullenix had not received training in this tactic and had not attempted it before.
Mullenix then asked the dispatcher to inform his supervisor, Sergeant Byrd, of his plan and ask if Byrd thought it was "worth doing." Before receiving Byrd's response, Mullenix exited his vehicle and, armed with his service rifle, took a shooting position on the overpass, 20 feet above I –27. Leija alleges that from this position, Mullenix still could hear Byrd's response to "stand by" and "see if the spikes work first."

Approximately three minutes after Mullenix took up his shooting position, he spotted Leija's vehicle, with officers in pursuit. As Leija approached the overpass, Mullenix fired six shots. Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median and rolled two and a half times. It was later determined that Leija had been killed by Mullenix's shots, four of which struck his upper body. There was no evidence that any of Mullenix's shots hit the car's radiator, hood, or engine block.

Issue:
Was the state of the law clear that the officer's use of deadly force violated the Fourth Amendment such that the officer was not entitled to qualified immunity? No.

Lower Courts' Findings:
The trial court and the 5th Circuit Court of Appeals denied Trooper Mullenix qualified immunity finding that "immediacy of the risk posed by Leija is a disputed fact that a reason- able jury could find either in the plaintiffs' favor or in the officer's favor, precluding us from concluding that Mullenix acted objectively reasonably as a matter of law."

The majority concluded that Mullenix's actions were objectively un- reasonable because several of the factors that had justified deadly force in previous cases were absent here: There were no innocent bystanders, Leija's driving was relatively con- trolled, Mullenix had not first given the spike strips a chance to work, and Mullenix's decision was not a split- second judgment. The court went on to conclude that Mullenix was not entitled to qualified immunity be- cause "the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment." It was this conclusion that was over- ruled by the U.S. Supreme Court.

Lawful Use of Deadly Force:
The doctrine of qualified immunity shields officials from civil liability so long as their conduct "does not violate

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Force & Fleeing Felon (Continued)

clearly established statutory or constitutional rights of which a reasonable person would have known." A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, (S.Ct.1986).

The Supreme Court had previously entertained the same issue in Brosseau v. Haugen, (S.Ct.2004). There the Court held that it was not clearly established that an officer violated Fourth Amendment's deadly force standards by shooting a suspect as he fled in his vehicle, given the grave risk posed to persons in the immediate area. The Supreme Court held that Brosseau was entitled to qualified immunity. The Court has since instructed, "Brosseau makes plain that as of February 21, 1999, the date of the events at issue in that case, it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger."

Supreme Court's Ruling:

"In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at [the overpass]. The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances 'beyond debate.' The general principle that deadly force requires a sufficient threat hardly settles this matter. Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted."

"In Brosseau itself, the Court held that an officer did not violate clearly established law when she shot a fleeing suspect out of fear that he endangered 'other officers on foot who [she] believed were in the immediate area,' 'the occupied vehicles in [his] path,' and 'any other citizens who might be in the area.' The threat Leija posed was at least as immediate as that presented by a suspect who had just begun to drive off and was headed only in the general direction of officers and bystanders. By the time Mullenix fired, Leija had led police on a 25–mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing to- wards an officer's location."

The Supreme Court noted that it had only considered excessive force claims in connection with high-speed chases on only two occasions since Brosseau. In Scott v. Harris, (S.Ct.2007), the Court held that an officer did not violate the Fourth Amendment by ramming (PIT maneuver) the car of a fugitive whose reckless driving "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." And in Plumhoff v. Rickard, (S.Ct.2014), the Court reaffirmed its ruling in Scott by holding that an officer acted reasonably when he fatally shot a fugitive who was "intent on resuming" a chase that "posed a deadly threat for others on the road." All of which led the Court to conclude:

"The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity. Leija in his flight did not pass as many cars as the drivers in Scott or Plumhoff; traffic was light on I–27. At the same time, the fleeing fugitives in Scott and Plumhoff had not verbally threatened to kill any officers in their path, nor were they about to come upon such officers. In any event, none of our precedents 'squarely governs' the facts here. Given Leija's conduct, we can- not say that only someone 'plainly incompetent' or who 'knowingly violates the law' would have perceived a sufficient threat and acted as Mullenix did." … "The dissent can cite no case from this Court denying qualified immunity because officers entitled to terminate a high-speed chase selected one dangerous alter- native over another."

After reviewing and analyzing other cases the Court stated, "These cases shed little light on whether the far greater danger of a speeding fugitive threatening to kill police officers waiting in his path could warrant deadly force. The court below noted that 'no weapon was ever seen,' but surely in these circumstances the police were justified in taking Leija at his word when he twice told the dispatcher he had a gun and was prepared to use it."

"Finally, respondents argue that the danger Leija represented was less substantial than the threats that

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courts have found sufficient to justify deadly force. B ut the mere fact that courts have approved deadly force in more extreme circumstances says little, if anything, about whether such force was reasonable in the circumstances here. The fact is that when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards [another Officer's] position. Even accepting that these circumstances fall some- where between the two sets of cases respondents discuss, qualified immunity protects actions in the 'hazy border between excessive and acceptable force.'" Citing, Brosseau. "Because the constitutional rule applied by the Fifth Circuit was not 'beyond debate,' we grant Mullenix's petition for ...qualified immunity."

Lessons Learned:

In another case, Cass v. Dayton Police Department, (U.S. Court of Appeals – 6th Cir. (2014)), the suspect was fleeing from a buy-bust. In effecting his getaway his vehicle struck two officers moving in his direction to effect his arrest. One officer fired into the vehicle as it went past, striking and killing the passenger. His estate sued arguing that once the vehicle struck the officers and got past them there was no longer a danger warranting the use of deadly force. The 6th Circuit did not agree:

"Based on the fact that suspect had demonstrated that he either was willing to injure an officer that got in the way of escape or was willing to persist in extremely reckless behavior that threatened the lives of all those around, and based on officer's professional assessment of what can only be described as a 'tense, uncertain, and rapidly evolving' situation, officer's use of deadly force was objectively reasonable."

"In short, while it may be easy for [estate] to say that each officer was safe once the officer was no longer in the direct path of [the vehicle], no reasonable officer would say that the night's peril had ended at that point. Suspect remained behind the wheel, other officers were on the scene, and Suspect had demonstrated a willingness to injure officers trying to prevent him from fleeing... in his quest to escape, posed a continuing risk to the other officers present in the immediate vicinity... "

Mullenix v. Luna U.S.
Supreme Court
(Nov. 9, 2015)

Recent Case Law

Deadly Force by Shooting into a Moving Vehicle

Bryan Long's father tried to have him committed to a hospital because Long was suffering from a psychotic episode; but was turned away be- cause of a lack of an available hospital bed. Long's father called the Sheriff's Department and requested assistance. Upon arrival at his home, Long's father waited in his vehicle for help to arrive. Deputy Slaton responded to the call. Slaton, who was alone, got out of his marked sheriff's cruiser, leaving the keys in the ignition and the driver's door open.

Deputy Slaton then approached Long, who was at the end of the driveway, close to the house. Slaton pulled out handcuffs and advised Long he would take him to the jail. Long voiced his disagreement and then ran over to, and got inside, Slaton's cruiser and closed the door. Slaton then ran to the driver's side of the cruiser, pointed his pistol at Long, and ordered Long to get out of the cruiser. Deputy Slaton threatened to shoot Long he did not comply. Long then shifted the cruiser into reverse and began backing away and down the driveway toward the road. Slaton stepped into the middle of the driveway and fired three shots at Long as the vehicle moved away. One shot went through the wind- shield and struck Long in the chest. Long died on scene. At the time, backup had been dispatched.

A lawsuit alleging that Deputy Slaton shot and killed Long in violation of his "civil rights" was filed. The trial court denied Deputy Slaton qualified immunity. On appeal the 11th Circuit disagreed, and dismissed

the sec. 1983 action.

Issue:

Did the deputy use excessive force in discharging his service weapon at a mentally unstable individual driving off (stealing) a marked police vehicle after having been given prior warning? No.

Excessive Force and the Fourth Amendment:

The standard for whether the use of force was excessive under the Fourth Amendment is one of "objective reasonableness." See, Graham v. Connor, (S.Ct.1989). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." In the context of deadly force, the Supreme Court has set out factors that justify the use of such force:

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon ... deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. Tennessee v. Garner, (S.Ct.1985). The Supreme Court has cautioned that "Garner did not establish a magical on/off switch that triggers rigid pre-conditions whenever an officer's actions constitute 'deadly force.' "

"The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechani- cal application," therefore, determining whether "the use of a particular type of force in a particular situa- tion" is "reasonable" in the constitutional sense requires a court to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental in- terests alleged to justify the intrusion." Scott v. Harris, (S.Ct.2007).

In all of these cases in examining whether an officer's use of deadly force was reasonable, courts' must recognize that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situa- tion." Graham. Thus, courts "are loath to second-guess the decisions made by police officers in the field."

Court's Ruling:

The U.S. Court of Appeals in re- viewing the totality of the circumstances concluded that Deputy Slaton's force was objectively reasonable under the Fourth Amendment. "Although Slaton's decision to fire his weapon risked Long's death, that decision was not outside the range of reasonableness in the light of the potential danger posed to officers and to the public if Long was allowed to flee in a stolen police cruiser. 'Under the law, the threat of danger to be assessed is not just the threat to officers at the moment, but also to the officers and other persons if the chase went on.' 'The question then is whether, given the circumstances, [Long] would have appeared to reasonable police officers to have been gravely dangerous.' Considering the circumstances surrounding the shooting, including the threat posed by Long's condition and behavior, this question must be answered 'yes.'"

"We stress these facts: Long was mentally unstable; and he had taken control of not just any vehicle, but a police cruiser. This police cruiser was marked as a County Sheriff's patrol car and was equipped with a flashing light bar on the roof, two police radios, and other emergency equipment. A motor vehicle is, at least, potentially a 'dangerous instrument'—that is, an instrument 'highly capable of causing death or serious bodily injury.' Different from other vehicles, this fully marked and fully equipped police cruiser had an

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Recent Case Law (Continued)

even greater potential for causing—either intentionally or otherwise—death or serious bodily injury."

"Even if we accept that the threat posed by Long to Deputy Slaton was not immediate in that the cruiser was not moving toward Slaton when shots were fired, the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect."

"Although at the point of the shooting Long had not yet used the police cruiser as a deadly weapon, Long's unstable frame of mind, energetic evasion of the deputy's physical control, Long's criminal act of stealing a police cruiser, and Long's starting to drive—even after being warned of deadly force—to a public road gave the deputy reason to believe that Long was dangerous."

"Protecting the innocent public from risks that are not remote is a government interest. See Scott, (noting the importance of the relative culpability of a fleeing driver who had ignored officers' warnings to stop as compared to the innocent public)." The court referenced nu- merous prior appellate decisions that demonstrated, "the risk of serious harm to the public in the circum- stances facing Deputy Slaton was not imaginary. In many cases, people have stolen police vehicles and used them to engage in further criminal conduct or otherwise to harm innocent people."

"The Supreme Court also has noted that providing a warning to a fleeing suspect weighs in favor of the reasonableness of using deadly force. See Garner, (noting the importance of a warning if feasible). Deputy Slaton gave clear warning of the intent to use deadly force before firing his weapon. Under the circumstances, we do not accept that Slaton's use of deadly force to stop Long from fleeing in the sheriff's cruiser was beyond the outside bor- der of constitutionally reasonable conduct."

"We suppose that other means of stopping Long's escape existed that, if used, also might have prevented Long from harming others. But considering the unpredictability of Long's behavior and his fleeing in a marked police cruiser, 'we think the police need not have taken that chance and hoped for the best.' The circumstances made the time to think short. Even if Deputy Slaton's decision to fire his weapon was not the best available means of preventing Long's escape and preventing potential harm to others, we conclude that Slaton's use of deadly force was not an unreasonable means of doing so. For these reasons, Plaintiffs' com- plaint fails to state a claim for the violation of Long's Fourth Amendment rights."

Long v. Slaton
U.S. Court of Appeals – 11th Cir.
(Nov. 16, 2007)

Shooting Innocent Bystander

Joann Cooper and her son were victims of a carjacking. Deputy Ryan Black came to their rescue. Cooper and her son were seriously injured when an armed bank robber attempted to elude the police by endeavoring to steal the car in which they were riding. Rather than allow the armed bank robber to escape with hostages, the officers on the scene fired their weapons at the suspect. Officer Black, along with Officers Darries, Griffith, and York, began to fire at the car. After firing all of the ammunition in his gun's magazine, Black reloaded his weapon and continued firing as Cooper's car began to move past him. The suspect then attempted to exit the car. In total, Officer Black, who continued to fire his weapon until the suspect was neutralized, fired 24 shots—four times as many shots as the officer who fired the second most bullets.

Unfortunately, Cooper and her son were both hit by bullets intended for the bank robber. Ms. Cooper sued the officer and the sheriff for her injuries. The trial court denied the deputy qualified immunity finding that his actions, firing 24 shots com- pared to six or four, was unreasonable and "shocked the conscience."

The U.S. Court of Appeals—11th Circuit disagreed.

Issue:

Did Officer Black's actions of firing at an armed violent felon multiple times until the threat was neutralized, and in the course striking an innocent bystander, Joann Cooper and her son, violate their Fourth Amendment rights? No.

Qualified Immunity:

When faced with a question of qualified immunity, the reviewing court conducts a two-step analysis to deter- mine whether Ms. Cooper carried her burden of establishing that Black committed a constitutional violation. Further, that the law governing the circumstances was already clearly established at the time of the violation, so that deputy had fair warning that his actions would violate Cooper's rights. The Court of Ap- peals found that not to be the case. "[Cooper] has not provided us with any cases suggesting that Black's alleged conduct violated the Fourth or Fourteenth Amend-

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Recent Case Law (Continued)

ments. There- fore, [Cooper] has not carried her burden of showing that the alleged constitutional violations were clearly established under prevailing United States Supreme Court, Florida Supreme Court, or Eleventh Circuit law."

Cooper pointed to an earlier case where a passenger-suspect was shot during a police chase, intended to stop him. There the court found he was seized for Fourth Amendment purposes. But the Court made a dis- tinction when an innocent bystander or hostage is accidentally shot by police officers chasing a fleeing suspect. Therefore, preexisting case law does not clearly establish that Cooper was seized when Officer Black's bullet accidentally struck her during the confrontation with the armed bank robber.

The Court did acknowledge that when an officer's actions are so outrageous that any reasonable officer would have known better, the lack of prior cases factually similar was not necessary. However, in this instance the court found that the law was far from settled, evidenced by the conflicting decisions from other courts across the country.

Court's Ruling:

"We are unaware of any case that clearly establishes that Officer Black's actions were constitutionally unreasonable. The [trial] court deter- mined that the other officers who fired their weapons acted reasonably because the use of deadly force against the fleeing armed bank robber was appropriate, and they only fired between four and six times. However, the [trial] court also found that Officer Black was unreasonable for firing 24 times. We agree that deadly force against the armed robber was appropriate, but we cannot find a single case in this circuit or from the Supreme Court that clearly establishes that a large number of shots fired makes a reasonable use of deadly force unreasonable. In fact, this court recently held that "a police officer is entitled to continue his use of force until a suspect thought to be fully armed is 'fully secured.'" See, Jean-Baptiste v. Gutierrez, (11th Cir. 2010).

"Once the car started moving for- ward, Officer Black was faced with the choice of either allowing the suspect to escape with multiple hostages and perhaps leading police on a high speed chase through the busy streets of Jacksonville or ensuring that the suspect could not leave the Wendy's parking lot. We cannot say that it is clearly established he made the wrong choice and committed a constitutional violation. Because 'preexisting law [did not] provide [Black] with fair notice that' firing 24 shots was unreasonable in these circumstances, he is entitled to qualified immunity as to [Cooper's] Fourth Amendment claim for unreasonable seizure."

The Court of Appeals went further and ruled, "There is no case law from this circuit or the Supreme Court that clearly established that Officer Black's actions shock the conscience. Therefore, we conclude that he is entitled to the defense of qualified immunity as to [Cooper's] substantive due process claim. Officer Black [is] granted qualified immunity and dismissed from this cause with prejudice."

Lessons Learned:

The U.S. Court of Appeals, 11th Circuit in Robinson v. A rrugueta, (11th Cir. 2005), ruled that officers who fired their weapons acted reasonably because the use of deadly force against the fleeing armed bank rob- ber was appropriate. "The Fourth Amendment protects individuals from 'unreasonable' seizures. Deadly force is 'reasonable' for the purposes of the Fourth Amendment when an officer (1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction of serious physical harm; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force, if feasible." Tennessee v. Garner, (S.Ct.1985).

In the case of B rosseau v. Haugen, (S.Ct.2004) the Supreme Court held that it was objectively reasonable for Officer Brosseau to use deadly force against a suspect in an attempt to prevent the suspect's escape and potential harm to others.

Interestingly, in Garcyznski v. Bradshaw, (11th Cir. 2009) the Court of Appeals again found it reasonable for the supervisor on scene to decide not to let the armed, suicidal, Garcyznski leave the parking lot where he was discovered. And, his failure to obey a lawful order to put down his gun warranted the use of deadly force.

Cooper v. Rutherford and Black
U.S. Court of Appeals, 11 Cir.
(Oct. 12, 2012)

"Man with a Knife!"

Officers responded to a "man with a knife," 911 call. The caller reported that Russell Tenorio was intoxicated and holding a knife to his own throat. She said that she was afraid that Tenorio would hurt himself or his wife. She further related that Russell had been violent in the past, took meds for seizures, and "…he is still holding the knife in his hand and is waiving knife around."

Three officers arrived on scene within 8 minutes. Officer Pitzer announced that he was "going lethal." Without asking if there

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Recent Case Law (Continued)

was a hostage or settling on a tactical plan, the officers lined up outside the front door to the residence. Pitzer was in the front with his handgun drawn. Moore was behind him, carrying a Taser, and Liccione was third, with his handgun drawn. Hernandez was behind the other officers, carrying a shotgun loaded with beanbag rounds. All civilians had been removed from the house.

Tenorio stepped out of the kitchen holding a 3 ¼ inch bladed knife loosely in his right hand, his hand hanging by his side. Tenorio walked forward into the living room at an "average speed." Pitzer saw the knife and yelled, "Sir, put the knife down! Put the knife down, please! Put the knife down! Put the knife down!" When Tenorio was about two and one-half steps into the living room, Pitzer shot him, Moore Tased him, and he fell to the floor. The commands and the shooting lasted two or three seconds. The time between the first officer's arrival and the shooting was less than four minutes.

Tenorio was hospitalized for two months as a result of his life threatening injuries. He sued Officer Pitzer for violating his civil rights. The trial court denied the officer qualified immunity. On appeal the 10th Circuit agreed and sustained the trial court's findings.

Issue:

Was the officer's belief that Tenorio posed a threat of serious harm to the officers or others reasonable? At the moment of the shooting, No.

Fourth Amendment and Excessive Force:

The U.S. Supreme Court has held that Fourth Amendment claims of excessive force are evaluated under a standard of "objective reasonable- ness," judged from the perspective of a reasonable officer on the scene.

See, Graham v. Connor, (S.Ct.1989).

"The reasonableness of [officers'] actions depend both on whether the officers were in danger at the precise moment that they used force and on whether [the officers'] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." Sevier v. City of Lawrence, (10th Cir.1995). But, "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

Where a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made not slicing or stabbing motions toward him, it was unreasonable for the office to use deadly force against the suspect.

The Fourth Amendment permits an officer to use deadly force only if there is "probable cause to believe that there [is] a threat of serious physical harm to [the officer] or to others." "A reasonable officer need not await the glint of steel before taking self-protective action; by then, it is often too late to take safety precautions." The ultimate inquiry is "whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force." The belief need not be correct—in retrospect the force may seem unnecessary—as long as it is reasonable from the perspective of the officer on the scene, under the totality of the circumstances occur- ring at that time.

Trial Court's Findings:

The trial court denied qualified immunity because the record supported potential jury findings that would support Tenorio's claim (of excessive use of force) —in particular, that Tenorio "did not 'refuse' to drop the knife because he was not given sufficient time to comply" with Pitzer's order; that Tenorio made no hostile motions toward the officers but was merely "holding a small kitchen knife loosely by his thigh and made no threatening gestures toward anyone;" that Tenorio was shot "before he was within striking distance of Pitzer;" and that, "the only information that Pitzer had was that Tenorio had threatened only himself and was

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Recent Case Law (Continued)

not acting or speaking hostilely at the time of the shooting."

Court's Ruling:

The U.S. Court of Appeals was comfortable with the conclusions reached by the trial court. The Court looked to two previous cases with similar fact patterns to reach its conclusion. The Court noted that the earlier cases "specifically established that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions to- ward him, that it was unreasonable for the officer to use deadly force against the suspect."

The Court found that standard applied in this case as well. "Tenorio was not charging Pitzer. He had merely taken three steps toward the officer…Unspeaking and with a blank stare on his face, he made no aggressive move toward any of the officers with his knife. …The district court said that the jury could find that he was not 'within striking distance' when he was shot and was only 'holding a small kitchen knife loosely by his thigh.' Unlike in [the previous case], Tenorio actually had a knife. But …, as determined by the district court here, the jury could have found that Tenorio did not have enough time to obey Pitzer's order. Finally, Tenorio's behavior before the officers arrived was not more aggressive than what had been re- ported [in the earlier case]."

The Court further distinguished the earlier case because "the distinction we made in that case was that the [shooting] victim had made 'hostile actions toward' the officer. We said that 'the undisputed facts there showed that [the victim] ignored at least four police commands to drop his weapon and then turned and stepped toward the officer with a large knife raised in a provocative motion.' In contrast, the evidence in this case would support a finding that Tenorio took no hostile or provocative action toward the officers."

The Court of Appeals concluded that the trial court did not err in denying the officer's qualified immunity motion. But, the court did acknowledge, "that because our re- view is predicated on the district court's assessment of the evidence in the light most favorable to Tenorio, a contrary judgment may be permissible after a trial to a jury." That is, a jury could find based on their assessment of the evidence after trial that the officer's actions were reasonable.

Lessons Learned:

In evaluating this decision, it is important to keep in mind that the weapon used was a 3 ¼ inch kitchen knife, not a Rambo style hunting knife or a machete. Further, the subject had not made any threatening statements to the persons in the house before the police arrived, nor threatened the officers on the scene. Coupled with the fact that the knife was being held loosely by his side, that Tenorio made no aggressive moves towards the officers, nor aggressive movements with the knife (no slicing or stabbing motions), nor was the knife raised "in a provocative motion" at the time the officer discharged his weapon. Lastly, the court gave great weight to the finding that Tenorio was no allowed sufficient time to comply with the lawful order to drop the knife before he was shot.

While the "21-foot rule" is common police knowledge this case makes clear that the knife and distance, in and of itself, without more will not support the use of deadly force.

Tenorio v. Pitzer

U.S. Court of Appeals – 10th Cir.

(October 6, 2015)