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IS *TENNESSEE V. GARNER* STILL THE LAW?

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Since 1985, it would be hard to find any police cadet who did not receive training at the police academy on *Tennessee v. Garner*[1]. Lower courts and commentators consistently believed that *Garner* dramatically altered the "use of force" landscape by prohibiting the use of deadly force on a fleeing suspect unless the suspect posed a significant threat of death or serious bodily injury to the police or others.

However, the United States Supreme Court's recent decision in *Scott v. Harris* significantly clarified the Fourth Amendment standard for claims of excessive force arising under federal law.[2] Though the case most directly affects police pursuits, *Harris* also gave lower courts explicit directions in applying the Fourth Amendment more generally. In *Harris*, the plaintiff asserted that the officer's actions in terminating the pursuit with deadly force had to be analyzed under the standard in *Garner*.[3] Citing *Garner*, the plaintiff alleged that certain "preconditions" had to be met before the officer could prevail under the Fourth Amendment: (1) that the suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect some warning.[4]

The Supreme Court rejected this rigid application of its previous excessive force case law, and noted that there was no "magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force."[5] The Supreme Court contrasted *Garner* with the facts in *Harris* noting that the threat posed by an unarmed suspect on foot is not remotely comparable to the level of danger posed to the public and police officers by a suspect fleeing recklessly in a vehicle.[6]

The Supreme Court ruled that, when analyzing an officer's conduct in an excessive force case arising out of a vehicular pursuit, lower courts must weigh the risk posed by the officer's conduct against the threat posed by the suspect.[7] Thus, the Court considered that the plaintiff in *Harris* intentionally placed both himself and the public in danger by unlawfully engaging in a reckless high-speed chase.[8] The Court noted that those who could have been harmed by the fleeing suspect were innocent, and the suspect had engaged in intentionally criminal conduct.[9] With sweeping language, the Supreme Court held that an "officer's attempt to terminate a dangerous high-speed vehicle pursuit that threatens the lives of the public does not violate the Fourth Amendment," even when the attempt places the suspect at risk of serious injury or death.[10]

There is good reason to believe that *Garner* has been all but cast aside as a tool for analyzing any excessive force case except those with identical facts. In a recent decision by the federal District Court in Colorado, Chief Judge Edward W. Nottingham noted that it would be error to assume that *Garner* remains the law governing the use of deadly force.[11] In *Cordova*, a lengthy pursuit ended when the driver drove his truck and trailer the wrong way down an interstate highway at night.[12] The officer, who was ahead of the driver attempting to

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[1] Tennessee v. Garner, 471 U.S. 1 (1985).
[2] Scott v. Harris, 127 S.Ct. 1769 (2007).
[3] *Id.* at 1777.
[4] *Id.*
[5] *Id.*
[6] *Id.* (quoting Tennessee v. Garner, 471 U.S. 1 (1985)) (citations omitted).
[7] *Id.* at 1778.
[8] *Id.*
[9] *Harris*, 127 S.Ct. at 1778.
[10] *Id.*
[11] Cordova v. Aragon, 560 F.Supp. 2d 1041, 1063 (D. Colo. May 20, 2008).
[12] *Id.* at 1043-48.

deploy stop sticks, was caught in the roadway with the truck headed in his direction.[13] The officer fired his weapon at the truck as it approached and passed him, killing the driver with a bullet that entered the side of the truck.[14]

The court dismissed the case against the officer by applying *Harris*.[15] Judge Nottingham concluded that, regardless of whether the officer was in personal danger when he fired the fatal shot, the threat the driver posed to innocent motorists and other police officers was so great that deadly force was warranted.[16] In so ruling, Judge Nottingham noted that in *Harris*, the Supreme Court suggested that *Garner* is "utterly unpersuasive authority" when considering the reasonableness of the force used in terminating a police pursuit.[17]

The implications of *Harris* are therefore far-reaching, not only in the context of police pursuits, but also in the analysis of deadly force cases generally. Avoiding rigid tests or preconditions, the Supreme Court has given direction to the lower courts to assess the objective reasonableness of the use of deadly force under the traditional "totality of the circumstances" analysis. Equally important, *Harris* instructs the lower courts to weigh, in the totality of circumstances, the relative culpability of the parties and the contrasting threat of injury to the suspect, the officer, and the public. This dramatically diminishes the utility of *Garner* in analyzing use of force issues, while reaffirming the essential Fourth Amendment requirement: reasonableness in light of the situation confronted by the officer.

[13] *Id.* at 1044-46.
[14] *Id.* at 1046.
[15] *Id.* at 1051-65.
[16] *Cordova*, 560 F.Supp. 2d at 1058-59.
[17] *Id.* at 1063.