



BJA
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Considerations and
Recommendations Regarding

State and Local Officer-Involved

Use-of-Force Investigations



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Introduction

As first responders, law enforcement officers protect the communities they serve; maintain order; render aid; and enforce state, county, municipal, and federal laws. In performing these duties, officers sometimes must use force, including deadly force, which they are permitted to do, but only consistent with the authority delegated to them by state and federal laws. Particularly when law enforcement officers use force resulting in death or serious bodily injury, there must be a complete, thorough, and transparent investigation conducted in a timely manner. The public has a right to expect that all involved parties be held legally accountable—including criminally accountable when appropriate—for their actions under applicable law. Because the use of force may potentially deprive individuals of their lives and/or liberty, a law enforcement officer's use of force in such cases must be treated as a critical incident. Accordingly, these critical incidents must receive appropriate investigation, review, and disposition.

This document is a resource that sets forth recommendations and issues to consider for municipal, county, and state law enforcement officials tasked with ensuring accountability for critical use-of-force incidents¹ that result in death or serious bodily injury to any party.² It is designed to follow existing laws, regulations, and statutes, and agencies should review their operating structures to ensure adherence to governing processes as they seek to implement recommendations identified in this document. This document is intended to be used prior to critical use-of-force incidents to identify and implement recommendations, address issues, and better equip agencies to effectively respond to use-of-force investigations.

The areas identified in this resource are not in chronological order but rather address common areas of the investigative process.

As agencies develop or review their processes, including policies and procedures, about responding to and investigating critical use-of-force incidents, they should include explanatory language that describes the methodology and reasoning behind the approach. This language on the process will help build or strengthen the trust between law enforcement and the public, since it communicates the rationale behind the investigatory process. It is important for an agency to have credibility in the investigatory process; however, the agency should prioritize the integrity of the investigation.

This document supports the work of the Federal Bureau of Investigation's (FBI) National Use-of-Force Data Collection initiative. This initiative is designed to provide a better understanding and awareness of use-of-force incidents from a nationwide perspective, providing an aggregate view of incidents that are reported on.³

In addition, this document focuses on the criminal investigation of critical use-of-force incidents. It does not provide detailed steps that address administrative investigations, civil liability investigations, or any other type of related investigatory applications, though these types of investigations may occur concurrently or subsequent to the primary criminal investigation.

Finally, the document does not address in-custody deaths in jails or prisons and the investigations thereof.

Terminology

This resource is designed to provide recommendations and issues for state and local law enforcement agencies to consider when investigating officer-involved use-of-force incidents resulting in serious bodily injury or death. It does not supersede existing federal, state, and local laws, statutes, or ordinances. As such, it is important to provide a list of common terms to assist agencies in understanding the focus of this document.

Broadly speaking, **use of force** by law enforcement officers is permitted under specific circumstances such as in self-defense, in defense of another, to bring a person being detained or arrested under control, or to effect the capture of an escapee. To understand and identify the circumstances for when to use force, most law enforcement agencies have policies related to use-of-force responses. These policies typically describe a series of actions an officer may take to resolve a situation.⁴ Officers are instructed to respond with force appropriate to the situation at hand, exercising objective reasonableness, acknowledging that an officer may move from one type of force to another in a matter of seconds.

The International Association of Chiefs of Police (IACP) defines **deadly force** as any use of force that creates a substantial risk of causing death or serious bodily harm.⁵ The FBI's National Use-of-Force Data Collection effort defines **serious bodily injury**, based in part on 18 United States Code, Section 2246(4), as: "bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." For purposes of this discussion, serious bodily harm and serious bodily injury refer to the same level of harm or injury. Based on the context of a particular incident, deadly force could include, but is not limited to, use of a firearm; an electronic control device; an explosive device; a chemical agent (e.g., pepper spray or an oleoresin capsicum spray); an impact projectile; a baton or blunt instrument; one's hands, feet, or fists; or a canine. This is true regardless of whether the force so utilized is normally considered nonlethal. The above definitions of deadly force and serious bodily injury capture the essence of the concepts found in most state statutes.

To be lawful, officers' use of force must be **objectively reasonable**. Objectively reasonable means that the use of force "must be judged from the perspective of a reasonable officer on the scene,"⁶ in light of the facts and circumstances of a particular case, including "the severity of the crime at issue, whether the suspect

poses an immediate threat to the safety of the officers or others, and whether he or she is actively resisting arrest or attempting to evade arrest by flight.”⁷ *(For additional information, see the section titled “Legal Considerations Regarding Use of Force, Part B,” at page 25 herein.)*

Pre-Investigation Considerations

Pre-investigation considerations acknowledge the critical importance of an agency's policies, procedures, training, and relationships that relate to an investigation of a critical use-of-force incident. Pre-investigation involves the need to develop or refine the process and protocol for responding to a critical use-of-force incident, which includes determining the impetus event for a response and investigation, as anticipated by the protocol, identification of the entities that will respond to a use-of-force incident, designation of the lead criminal investigative entity, and articulation of a uniform and standard investigative process to be used in each such situation. Developing a written policy or standard operating procedures prior to the occurrence of a critical use-of-force event will ensure that all involved entities know and understand their roles, expedite the response to the event, and promote more efficient investigative efforts. This, in turn, will make it more likely that authorities will make reliable determinations of fact to resolve whether officers have committed any violations of law. Justice is ensured when persons are held accountable for their criminal conduct and when those who have not engaged in criminal conduct are absolved. Of note, the time following an incident is not the time to sort out responsibilities for responding to, and investigating, what has occurred.

The development of a protocol will assist affected agencies in articulating to the public how an investigation will occur, promote the public's confidence that a fair and objective investigation will occur, and enhance the overall sense of community justice.

The development of a protocol prior to an investigation will help affected agencies articulate to the public how an investigation will occur, promote the public's confidence that a fair and objective investigation will occur, and enhance the sense of community justice. When developing a protocol, an agency should consider consulting with an existing citizen advisory body in order to promote understanding and acceptance of the investigative process by the community. The development and codification of a process will ensure that all participating agencies know and understand their roles, thereby maximizing the likelihood that the process will be followed and increasing the likelihood that a fair and accurate determination of facts related to an incident will be made. A written protocol with a reliable process also

may be shared with public stakeholders to instill confidence that law enforcement takes its use of deadly force seriously and will subject such use to appropriate and fair review.

Establishing a protocol for investigating use-of-force incidents requires careful review of an agency's current policies, mutual aid agreements or memoranda, general orders, and other documents that establish the roles, responsibilities, obligations, and reporting duties relating to the investigative process—as well as those of the investigating agency, if different. If these items do not reflect the intended protocol for investigating critical use-of-force incidents, they should be revised.

Considerations

- ◆ Develop a protocol that addresses the investigating agency's response and investigative process. Topics to address in the protocol include the following:
 - Identify the types of events that give rise to a critical use-of-force incident investigation, including when a state, county, municipal, and/or federal law enforcement officer discharges his or her weapon, or when an individual dies or sustains serious physical injury during any contact with law enforcement during arrest or while in the custody or control of a law enforcement officer or agency, even though no firearm discharge is involved.
 - Identify the agency tasked with investigating the critical use-of-force incident. The involved and investigative agencies may be the same or different entities, depending on the jurisdiction and the involved agency's policies and procedures.
 - Identify when and how the investigating agency should be notified to provide assistance, with emphasis on notification as soon as possible after the event has occurred, and clearly designate who within the notifying agency is to initiate the request.
 - Specify the person within the investigating agency to receive the request for investigative response, including an alternative manner of notification (such as notification to a supervisor or an alternate investigator) if that person is not available.
 - Explain that the investigating agency is being utilized to provide an independent and credible fact determination, with the goal of mitigating concerns regarding potential conflicts of interest should the involved agency investigate the incident itself or should other potential concerns by the community arise.
 - Identify an agreed-upon statement of responsibilities for all affected entities, including the investigating entity, the requesting agency, officer(s) on scene, and the prosecutor.

Example From the Field:

In the state of Georgia, the Georgia Bureau of Investigation has agreements with local agencies to be the lead investigative agency on officer-involved use-of-force incidents.

- Specify which entities will be permitted inside the crime scene (such as, but not limited to, emergency medical personnel, crime scene technicians, medical examiner personnel, prosecutor’s office personnel, fire/arson investigators, and/or specific investigators), and emphasize the importance of excluding all others from the crime scene.
- Identify when union representatives or attorneys representing the involved officer(s) have a legal right to consult with the officer(s) and establish the appropriate rules of engagement.
- Recognize the rights granted involved officers by the state’s “law enforcement officer’s bill of rights” or other statutory law or applicable court rulings. (*See also: “Legal Considerations Regarding Use of Force, Part C,” at page 27 herein.*)
- Limit the outside investigating agency’s scope to making a factual determination for consideration by the prosecutor, and clarify that any administrative investigation remains the role of the involved officer’s employing agency (or its designee).
- Establish an Incident Command System (ICS) protocol to be used when responding to and investigating a use-of-force incident.⁸
- Establish a Joint Information Center (JIC) to lead media-related information dissemination and queries, including press releases and information provided to the public. As a part of the JIC, identify the agency with primary responsibility for handling media inquiries and requests for convening press conferences and for prohibiting unilateral press releases outside the established protocol.
- Require that all relevant parties, including the prosecutor, review the protocol after each event for which it has been initiated.
- ◆ Develop a prosecution protocol that addresses the prosecutorial role in the investigative process related to critical use-of-force incidents.⁹
- ◆ Establish a memorandum of understanding (MOU) with appropriate federal agencies, such as the FBI, the U.S. Drug Enforcement Administration (DEA), the U.S. Immigration and Customs Enforcement (ICE), the U.S. Marshals Service, the U.S. Attorney’s Office, and the U.S. Department of Justice’s Civil Rights Division, as appropriate. For use-of-force incidents that involve federal law enforcement officers or federal task force officers (state or local officers participating on a federal task force), a predefined relationship will assist in expediting investigative efforts. The MOU should address the federal investigative process, including what initiates it, the roles of a task force officer acting in a federal (or local) capacity at the time of the incident, the lead investigative entity for investigations regarding a federal law enforcement officer, and a local or state officer acting as a federal task force officer; roles and processing of the crime scene; the collection of evidence; the sharing of investigative reports; crime lab findings; community engagement; media relations; prosecution declinations; and subject and witness interviews.

Recommendation

State, local, and federal agencies (as appropriate) should develop written protocols such as MOUs or standard operating procedures (SOPs) to identify and determine each jurisdiction’s investigative response

to a use-of-force incident, including which agency will serve as the primary investigative entity, the role of the prosecutor, and contact protocols. Agencies taking on the investigative responsibility should develop a uniform standard agreement to promote consistency and uniformity of approach.

Investigation Considerations

An agency should develop and regularly review its use-of-force investigation processes and procedures in order to ensure that the investigation of a use-of-force incident is objective, transparent, and comprehensive. The investigative process in a use-of-force incident should include composing an investigative team, articulating the investigative process (e.g., conducting officer and witness interviews, gathering evidence, and viewing video related to the incident), and developing findings of fact to provide to the prosecution.

The agreement between the agency conducting the criminal investigation and the employing agency should establish detailed parameters to avoid confusion or conflicts between the involved agencies when an actual situation develops and the investigation takes place.

The investigative agency should collect information, prepare reports, and submit its product to the prosecutor for review. The protocol agreement should make it clear that the investigating agency will offer no recommendations or reach tentative determinations regarding the legality of the use of force. That is a matter for the prosecutor to decide. The investigative agency is to be engaged solely in fact-finding.

In all cases, mandates imposed by state statute or case law will override the suggestions or processes recommended in this publication.

In addition to the considerations below, the impact of a state's statutory protection for officers under investigation must be assessed. Various "law enforcement officer's bill of rights" provisions will dictate when an officer's statement can be taken, may require that the officer be the last witness to be questioned, or may impose other limitations by particular states. Although this document does not attempt to address all of the restrictions, note that in all cases, mandates imposed by state statute or case law take precedence over the recommended suggestions or processes provided in it.

Considerations

- ◆ Articulate the timeline(s) of the criminal investigation process and the administrative review. Administrative reviews are conducted for all use-of-force incidents to assess the officer's compliance with agency policy and procedures. To expedite the investigative activity and also minimize duplication of efforts, some agencies now conduct concurrent reviews, but consideration should be given to when the administrative review should occur and whether it should be concurrent with the investigation or before or after. At a minimum, there should be a process by which the investigating agency and the prosecutor indicate that the administrative investigation can be safely initiated. (See sample agreement language in "Legal Considerations Regarding Use of Force, Part C," at page 27 herein.)
- ◆ Create a checklist of investigative steps outlining the process for use by both the involved agencies and the community (to promote awareness of the process).
- ◆ Standardize the report-writing process, including using common report titles and neutral language when referring to individuals associated with the incident such as "deceased," "subject," etc.
- ◆ Articulate how the independence of the investigating entity and the components of the investigative team will be maintained. Hold a meeting with all personnel involved in the investigative process, including the lead investigator, the crime laboratory technician, prosecutorial representatives, and other representatives to ensure that there are no conflicts of interest that may impact the investigative process.
- ◆ Require that all evidence be preserved and remain in the secure custody of the law enforcement agency conducting the investigation until such time as it is to be turned over to the prosecution or, as approved by the prosecution, returned to the officer's employing agency.
- ◆ Identify the roles and responsibilities of various members of the investigative team, including supervisors. This is particularly important to help prevent Garrity issues. (See "Legal Considerations Regarding Use of Force, Part C," at page 27 herein.)
- ◆ Acknowledge the role of crime-scene technicians and others responsible for collection of forensic evidence, with the tasking for such efforts placed with the investigating agency. A successful investigation requires crime-scene integrity. The role of crime-scene personnel should be included in investigative process checklists. Ensuring the protection of a crime scene, involved subjects, and potential witnesses will improve the accuracy and detail of the investigation. Proper handling and recording of evidence at the crime scene are critical in determining what happened during a critical use-of-force incident. Specific actions for crime-scene technicians to consider include the following:
 - Use dual crime-scene perimeters (inner and outer) to delineate and secure the area of the incident. Access to the inner perimeter is restricted to those individuals who have a clearly defined investigative function and requires sign-in and sign-out on the crime-scene security log. The outer perimeter is used for other law enforcement efforts such as staging of assets, logistics, briefings, debriefings, and other command-and-control functions. Access to the outer perimeter is restricted to law enforcement and investigative personnel but does not require recording on

the crime-scene log. Investigators should be mindful that it is easier to collapse the size of an initial large perimeter than to expand a smaller scene if new information requires expansion.

- Conduct proper transitional briefings and documentation anytime there is a transition or hand-off of investigative responsibility to another agency.
 - Prioritize the collection and processing of evidence, making the most fragile or transient evidence top priority. All evidence should be properly collected, bagged, marked, and labeled as evidence, as it applies to the investigation. Crime-scene technicians should keep the principal investigator informed of any relevant findings within the crime scene that may aid in the interviewing of witnesses, etc. The principal investigator also should inform the crime-scene technician of information learned during the course of the investigation that may assist the processing of the crime scene. The return of any evidence, to include involved weapons and vehicles, must be approved by the appropriate prosecutor and coordinated between the investigating and involved agencies.
 - Hold the crime scene for a longer duration of time than the initial processing. In these instances, the principal investigator will ensure that appropriate measures are in place to protect the security of the scene and that law enforcement has the legal authority to continue the search at a later time.
 - Prioritize evidence to determine which pieces are to be submitted to the crime laboratory and the specific forensic testing that will be sought. The principal investigator should clearly understand what information he or she needs from the crime lab, rather than submit evidence unnecessarily for testing. The principal investigator is encouraged to consult with the crime laboratory supervisors on any questions of evidence value, handling, prioritization, and forensic testing potential. The investigative team may convene a pre-submission meeting, including crime-scene technicians and prosecutorial representatives, to discuss evidence prioritization submission processes.
- ◆ Address how the scene is to be secured should post-event public reaction to the situation threaten to impact the crime scene. Note that the investigating agency has a specific role and likely cannot or prefers not to assume responsibility for protecting the perimeter of the crime scene.
 - ◆ Identify the roles and responsibilities of the prosecutor, including access to the scene of the investigation.
 - ◆ Conduct interviews and gather statements. A state's "law enforcement officer's bill of rights" or similar statutory provision and various court cases dictate to a great extent how interviews of the involved officers will be conducted. (*See "Legal Considerations Regarding Use of Force, Part C," at page 27 herein.*) For example:
 - There are several considerations for interviewing the officer(s) involved in the incident. For law enforcement officers acting under the color of lawful authority, the interview must be voluntary, and it must be clearly indicated that an officer being questioned is not under threat of job-related sanctions if he or she chooses not to provide a statement. (*See Garrity and related discussion in "Legal Considerations Regarding Use of Force, Part C," at page 27 herein.*)

- As a part of the interview, the investigating agency should consider electronically recording the interview, including the voluntariness waiver. A determination of whether to provide Miranda warnings must be made. The Miranda decision¹⁰ requires advising of Miranda rights when two factors exist: (1) an interrogation is occurring and (2) the subject being interrogated is in custody. If either factor is not present, the Miranda case does not mandate providing the Miranda warnings. However, some state statutes or police union collective bargaining agreements may independently require a Miranda warnings type of advisory before interviewing involved officers, even if they are not in custody. The protocol must conform with local law and contractual obligations.

Example From the Field:

The Louisiana State Police (LSP) investigative guide regarding subject interviews states: “The interview of the officer(s) involved in the incident should be conducted in a timely manner. There may be several factors that prevent this from occurring: the medical condition of the officer, the officer refuses to speak with investigators, the officer wanting an attorney present during the interview, or the officer wanting to wait to do the interview until after he or she has had sleep cycles (as numerous agencies have policies or practices regarding this). LSP will not create any artificial time delays nor unnecessarily rush the interview of the involved officer.”

- The time frame for the interview should be considered; there are diverse perspectives among agencies around the country on this issue. Some agencies wait 24 hours or a “sleep cycle” prior to conducting the initial interview, while others may conduct the interview immediately after the incident. As in any criminal investigation, it is helpful to obtain a narrative statement of what occurred from the involved officer(s) as soon after the incident as possible. Some state statutes require that the involved officer(s) be the last to be interviewed and often dictate that the subject officer(s) be granted review of all other statements before being interviewed. The protocol must conform with state law and mandated procedures. Investigators can return for more in-depth interviews, after gathering additional information, to ask further questions as necessary. When an agency identifies the time frame for the initial interview, it should document the process and the purpose of the process. If an agency adopts a practice that may result in a disparity between how a law enforcement officer and a civilian are treated in similar circumstances, the agency should develop a protocol or include with the current protocol something that explains the disparity.
- The investigating agency should be prepared to acknowledge and communicate why its investigative process is trustworthy (such as stressing the rigor of the internal review process, the dedicated units that are charged with investigative critical use-of-force incidents, or the timely collection of evidence and witness statements). A determination of who should be present during the interview with the officer also should be made.
- As a part of the interview, the investigating agency should direct no additional personnel to participate in the walk-through without the permission or direction of the case supervisor. In addition, under no circumstances should members of the involved employee’s chain of

command, or any other employing agency representative such as the employing agency's administrative investigator, be present during an involved employee's interview and/or walk-through. The presence of any employing agency's personnel in the interview or walk-through could be characterized as a type of employer "compulsion" being indirectly focused on the officer, which could give rise to *Garrity*-type immunity claims.

- The investigating agency should consider possible union or legal counsel and indicate specific time frames or other parameters involved in officer interviews. State law requirements must be honored. *(For more discussion of Garrity obligations, see "Legal Considerations Regarding Use of Force, Part C," at page 27 herein.)*
 - The investigating agency should obtain narrative statements from all officers present before, during, or after the incident as soon after the incident as possible. This effort will require a determination of whether other officers are potentially subjects of the investigation or not and whether the other officers are potentially subjects of their employing agency's administrative or disciplinary review/investigation. If the officers are potential investigative subjects of either the criminal investigation or an administrative/disciplinary investigation, their state "law enforcement officer's bill of rights" and their *Garrity* rights must be honored. Investigators should collect all incident reports and use-of-force reports by all officers. Investigators may conduct more in-depth follow-up interviews after reviewing this material. When appropriate, law enforcement witness interviews may take place at the scene to aid a witness in recalling and explaining the exact location of the parties and events that took place. Further, separate interviews should occur and be electronically recorded to strive to prevent collusion or the tainting of witnesses in order to maintain the integrity of their individual statements. Any circumstances preventing these practices will be fully documented in a written report.
 - The investigating agency should make every attempt to locate, identify, and interview all potential civilian witnesses to an incident as soon as possible. When appropriate, the interviews may take place at the scene to aid a witness in recalling and explaining the exact location of the parties and events that took place. Further, separate interviews should occur and be electronically recorded to strive to prevent collusion or the tainting of witnesses by other witnesses in order to maintain the integrity of their individual statements. Any circumstances preventing these practices will be fully documented in a written report.
- ◆ Gather all electronic evidence related to the incident.

Agencies that have incorporated body-worn or dashboard cameras into agency operations should ensure that they have appropriate policies, procedures, and processes in place prior to agency implementation. Agencies also should provide training on these tools to all appropriate personnel.

- Define what electronic evidence will be collected, such as 9-1-1 calls, audio dispatch logs, body-worn cameras, witnesses' mobile phones, closed-circuit TV, or in-car dashboard cameras.¹¹ Securing cell phones or similar video from citizens taken at the time of the incident requires that the video be voluntarily provided, or, when consent is not provided, requires a warrant to seize the video. The protocol agreement should identify the applicable process in the subject jurisdiction, as approved by the prosecutor who ultimately will be reviewing any such video evidence.
- Gather electronic evidence from the public, obtained via cell phones, social media resources, or other means. Consider affirmatively seeking the public's assistance in submitting to an investigating agency any videos or pictures taken during a use-of-force incident. This might include, for example, a public request that persons having such video evidence contact the investigating agency.
- Identify whether and when the electronic evidence (collected from the officer via body-worn camera or dashboard camera) should be reviewed by the officer. This may be dictated by a state's "law enforcement officer's bill of rights" statute or applicable court ruling.
- Agencies should consider collaborating with the prosecutor's office to develop a detailed process about handling electronic evidence, such as body-worn camera (BWC) footage.
- Many states treat BWC or dash camera video as a public record that may be subject to public disclosure. Handling of such evidence must conform with state public records laws.
- ◆ Collect data about the use-of-force incident. To support national efforts to better understand use-of-force incidents occurring across the nation, the FBI is developing a national use-of-force data collection process. Data to be collected include incident information, subject information, and officer information. As a part of the investigation, the investigative team is encouraged to collect this data to support national efforts.¹²

Recommendation

Investigating agencies should develop a checklist or manual that guides the investigative process related to use-of-force incidents, including identification of roles and responsibilities of responding officers, the case lead investigator, crime-scene technician(s), the prosecutor, and other participants in the investigative process, as well as the process to collect data related to the incident for national reporting efforts.

Prosecution

County attorneys, district attorneys, commonwealth attorneys, and/or state attorneys share a common legal responsibility: the enforcement of criminal statutes in their jurisdictions with the primary responsibility to ensure that justice is obtained. Because all critical use-of-force investigations originate in the primary jurisdiction of a given prosecutor, the local prosecutor should be involved in investigations involving an officer-involved use of deadly force. If a critical use-of-force incident involves federal as well as local officers, the United States Attorney also will be involved. If a federal officer is involved, it is likely that a federal agency also will assume a role as an “investigative agency.” The standard protocol should determine the expectations of the U.S. Attorney’s office and federal investigators in such a situation and plan for the additional complexity that active federal investigative involvement brings to the investigation. Regardless, the state prosecutor will maintain his or her role in determining whether state criminal charges will be filed.

The role of the prosecutor may include responding to the scene, actively participating in (or having a prosecutor’s investigator participate in) investigating activities, participating in regular post-incident meetings with the investigative team, requiring additional investigative steps after initial review of investigative findings, or taking a hands-off approach to the investigation, pending an official review of investigative findings to determine whether a prosecution is appropriate. In some instances, a prosecutor may take the matter before a grand jury. If a coroner’s inquest has been held, the prosecutor will consider the findings of the inquest in making a charging decision. Regardless of the day-to-day role of the prosecutor, it is important that the prosecutor’s office be involved from the beginning of the investigative process. In any investigation of an officer-involved shooting, the prosecutor has a duty and a responsibility to ensure that justice is achieved. The written agreement should briefly specify the role of the local prosecutor, based on discussions of that role prior to an incident. That role will vary from one jurisdiction to another and from one prosecutor’s office to another.

With the advent of new technologies, advanced investigative techniques, and an ever-increased public expectation as to the quality of evidence prosecutors are expected to produce at trial, the responsibilities of prosecutors have rapidly evolved and expanded.

With the advent of new technologies, advanced investigative techniques, and an increased public expectation as to the quality of evidence prosecutors are expected to produce at trial, the responsibilities of prosecutors have rapidly evolved and expanded. Prosecutors are no longer confined to offices, libraries, and courtrooms. Experienced prosecutors' duties now may include responding to actual crime scenes. On-scene prosecutors now assume an active and collaborative role in criminal investigations. It is not unusual for prosecution offices to send attorneys to crime scenes to further the investigations of DUIs, sex crimes, gang offenses, repeat offenders, and homicides. The prosecutor's presence at the scene of a crime may promote the quality and efficiency of the entire criminal justice investigation. The prosecutor's presence, oversight, and leadership also serve as a valuable check and balance on the quality, competency, and reliability of the police investigation. Nowhere is this check and balance more important than in the investigation of a law enforcement officer's use of deadly force. Not all prosecution agencies have the resources and expertise to send their prosecutors to the scene of every major crime; however, given the complexity and sensitivity of police critical use-of-force investigations, the presence and involvement of a prosecutor is recognized as a best practice and is strongly recommended in use-of-force investigative protocols if at all possible.

Considerations

- ◆ Clarify with the prosecutor's office its role in response to a critical use-of-force incident. Suggested responsibilities and roles of the prosecutor include:
 - Develop an investigation plan that takes into account the unique challenges posed by potential prosecution of law enforcement officers, including the need to develop law enforcement witnesses for the government's case.
 - Observe and monitor the investigative agency's criminal investigation.
 - Designate a primary prosecutor who will remain easily accessible to assist in issuing subpoenas and/or securing search warrants as may be necessary to support investigative efforts.
 - Assist investigators in addressing all legal issues as related to the criminal investigation.
 - Work with the investigators to determine when and to what extent immunity from prosecution is required to secure crucial testimony, and coordinate necessary steps to secure any such immunity.
 - Monitor efforts to guard against *Garrity* immunity taints. Guard the criminal investigation against becoming intertwined with any aspect of the administrative investigation. After determining that there will be no *Garrity* or any other conflict with the criminal investigation, notify the employing agency that the administrative investigation can proceed. (*Garrity issues are discussed in "Legal Considerations Regarding Use of Force, Part C," at page 27 herein.*)
 - Assist the case lead investigator in identifying relevant evidence and interviewing witnesses.
 - Use the grand jury to secure truthful information from witnesses, both law enforcement and civilian.
 - Regularly advise the elected and/or appointed prosecutor concerning the status and findings of the criminal investigation.

- Assist in the dissemination of information to the public by reviewing proposed press releases and ensuring that the content is legally and ethically correct and appropriate.
- ◆ Partner with the prosecutor's office to establish a unit or a person within the prosecutor's office dedicated to use-of-force incidents, if feasible. (This designation is particularly important in larger metropolitan areas, where critical use-of-force incidents may occur on a more regular basis.)
- ◆ Participate with the prosecutor's office in joint training on investigating use-of-force incidents.
- ◆ Develop background and guidance resources (via a prosecutor coordinator) to assist prosecutors within the jurisdiction where a use-of-force incident occurred.
- ◆ Hold regular (no less than once weekly) meetings between the prosecutor's office and the investigative team to review progress, resolve issues, and review the ongoing findings of the investigative effort.
- ◆ Submit reports from the investigation to the prosecutor as soon as possible. If the investigation has not been completed within a defined number of days after the incident, submit a summary of the status of the investigation and estimated date of completion to the prosecutor. Forward supplemental reports to the prosecutor as they are completed, regardless of whether all reports are completed. This will permit the prosecutor to review what has been completed and to recommend and proceed with additional follow-up investigations. It will also permit timely requests, completion of any additional investigation, and clarification of completed reports, if required.
- ◆ When there has been a critical use-of-force incident, if the involved agency does not have an internal mechanism for reviewing its officers' use of force, at minimum, the agency should convene an incident review team to review the investigative findings and the prosecutor's recommendations and actions. This review should focus on whether agency policy should be revised or amended, whether additional training is needed by agency officers, and whether any additional pertinent lessons learned from the incident demand change or agency response.
- ◆ Work with the prosecutor's office to identify an additional prosecutor to participate in the investigation of subjects who sustain injury and survive the encounter with law enforcement for any criminal conduct against the involved officers. By separating an officer's case from a subject's case, the on-scene prosecutor prevents an appearance of a conflict of interest from negatively tainting the integrity of the critical incident investigation. Since many use-of-force incidents may be predicated upon or involve crimes committed by any surviving recipient(s) of the force against officers or others, the prosecutor's office should consider assigning a separate prosecutor to handle issues regarding criminal charges that may be brought against the recipients themselves. Care should be taken to ensure that there is no appearance of impropriety in this review. The appointment of a separate prosecutor frees the use-of-force investigation prosecutor to focus solely on that effort.

Recommendations

- ◆ A designated representative from the prosecutor's office should be involved in any investigation of a use-of-force incident.

- ◆ The investigating agency should establish an incident review team (composed of law enforcement and community members) to participate in the review of incident findings and recommendations developed by the prosecutor's office.

THE PROSECUTOR'S RESPONSIBILITIES

1-1.1 Primary Responsibility

The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

1-1.2 Societal and Individual Rights and Interests

A prosecutor should zealously protect the rights of individuals, but without representing any individual as a client. A prosecutor should put the rights and interests of society in a paramount position when exercising prosecutorial discretion in individual cases. A prosecutor should seek to reform criminal laws whenever it is appropriate and necessary to do so. Societal interests rather than individual or group interests also should be paramount in a prosecutor's efforts to seek reform of criminal laws.¹³

Public Information/ Community Relations

Recently, high-profile critical use-of-force incidents have amplified community interest and awareness of the investigative activity related to such incidents. As such, regardless of an agency's process for critical use-of-force investigations, it is imperative that the community understand the investigative process. This effort will assist the agency in demonstrating its credibility during the investigatory process, which, in turn, will help build and maintain transparency in its mission and purpose.

Considerations

- ◆ Educate the public, including the local media, on the agency's use-of-force policy, including the expected actions of investigators and prosecution. This will inform the community about the investigatory process, including a high-level overview of how an investigation is conducted, the timelines of activity, and how information will be released. This public education should include posting the policy on the agency's website and periodically holding public meetings to discuss the policy. If an agency adopts a practice that may appear to treat a law enforcement officer and a civilian differently in similar circumstances, the agency should be prepared to communicate why its process is credible, trustworthy, and necessary.
- ◆ An agency also may consider educating the media on other relevant policies, including body-worn and dashboard cameras.

The *Officer-Involved Shootings Investigative Protocols*, developed by the IACP and the COPS Office, identifies four main areas to inform the community of officer-involved shootings:



- ◆ Ensure that spokespeople have a basic understanding of the U.S. Supreme Court’s application of the Fourth Amendment reasonableness test to help explain what legal standards apply to the investigation. *(This is further discussed in detail in “Legal Considerations Regarding Use of Force, Part B,” at page 27 herein.)*
- ◆ Conduct a periodic, external review of the use-of-force investigative team and process. This external review, which may include suggested input or recommended language from members of a citizen advisory board or other appropriate public advisory body (such as local government officials), should be designed to build and maintain confidence and to ensure the quality of the investigative process associated with use-of-force investigations.
- ◆ Develop a process to address the public release of information. Building on the consideration to establish a Joint Information Center (JIC) for media engagement, agencies should carefully consider whether and when to release information, including physical evidence (such as videos containing body-worn camera footage) and officer information (such as officer name and badge number).
 - Physical evidence is a critical piece of an investigation; however, in this era of instant access to news, video-enabled smartphones, and live streaming, agencies should articulate in their policies how and when physical evidence will be released. Policy issues to consider regarding the release of physical evidence include:
 - » Which agency should release evidence (the investigating agency or the agency of the officer involved in the use-of-force incident). Investigating agencies may address this issue in a pre-investigation protocol or MOU.
 - » When to release evidence, including video evidence, and issues surrounding the time frame for release such as exigent circumstances and public safety concerns. Agencies may seek to use a hierarchical approach to the release of evidence. This hierarchy may include the family of the victim, community advocates/civil rights groups, select media contacts, and then the general public.
 - The release of the name(s) of the officer(s) involved in a use-of-force incident may be useful to the community, but any such release should be subject to the immediate safety and security concerns of the officer(s), including the notification of family, and upon attending to every officer’s health concerns such as injuries received as a result of the incident. The residence addresses of involved officers may be derived from public information or from the Internet.

Example From the Field:

The San Diego County Police Chiefs and Sheriffs Association’s protocol for disclosure of video evidence from an officer-involved shooting states, “Law enforcement leadership in San Diego County agrees it should be the practice in most situations to release video in officer-involved shooting cases whenever possible, as soon as it’s appropriate to do so.”

Once officer names are released, the possibility of harassment or physical endangerment of these officers by those outraged by the use of force increases.

- Make sure responses to critical use-of-force incidents take into account the powerful influence texting and social media have on public opinion. Those with access to texting and social media have the ability to share information in minutes—whether that information is accurate or not. If agencies do not provide the public with accurate information in a timely fashion, supposition and inaccurate information may circulate to fill the void. If law enforcement is not actively providing reliable and accurate information, perception driven by inaccurate texts and postings will become the community’s perceived “truth.” In the space of 5 or 10 minutes, the latest rumor can reach thousands, and, unless countered by truthful disclosure, that rumor is likely to be accepted as true by vast numbers of those who read it.
- ◆ Seek the input of representatives from a local civilian oversight board about the policies in place regarding use of force and the process for investigating use-of-force incidents.

Recommendations

- ◆ Subject to immediate officer safety/security concerns, an involved officer’s name should be released in conformance with existing policy, procedures, and statutes, after contact with the officer’s family and attending to the officer’s health concerns (such as injuries received as a part of the incident). Any release should be assumed to be providing information that will allow third parties to discern where the officer resides, and appropriate steps to secure that location should be taken.
- ◆ Subject to the first recommendation, the investigating agency, in consultation with the prosecutor’s office, should release accurate information as expeditiously as possible and monitor and correct inaccurate information, where appropriate.
- ◆ The investigating agency, in partnership with the jurisdiction agency, should consider consulting with the local community to identify representative community members who can receive briefings regarding the investigative process.

Training

Training is designed to equip law enforcement personnel with the necessary skills, knowledge, and abilities to effectively conduct criminal investigations of critical use-of-force incidents. Effective and appropriate use-of-force investigations require specialized and enhanced training to effectively assist investigators, prosecutors, and others in completing the investigations in a timely, appropriate, and successful manner. The following considerations relate to training for investigators who are assigned to conduct use-of-force investigations.

Considerations

- ◆ Develop or host trainings on prevention and mitigation of potential use-of-force incidents for all agency personnel. Training components should include:
 - De-escalation awareness and techniques
 - Understanding mental health issues and response techniques
 - Crisis intervention
 - Implicit bias
 - Waiting for backup when possible to help reduce the possibility that significant force will have to be utilized
- ◆ Develop or attend training that specializes in investigating critical use-of-force incidents. Training elements should include:
 - Basic investigator techniques
 - Interview techniques
 - Crime-scene responsibilities
 - Ethics
 - Implicit bias
 - Critical thinking
 - Legal issues



- Role of grand juries
- Officer rights
- Handling obstruction cases
- State laws and statutes
- 42 U.S.C. §1983/42 U.S.C. §14141/18 U.S.C. §241–242
- Review of use-of-force cases
- Handling of electronic evidence (including body-worn and dashboard cameras)

The National Resource and Technical Assistance Center for Improving Law Enforcement Investigations (NRTAC) is designed to improve law enforcement investigations through the development of resources on new tools and methodologies; assessment of current practices and recommendations on innovative investigative policies and practices; assessment of departmental investigatory functions and practices; and issue-related recommendations for improvement of investigative practices.

For additional information on the NRTAC, visit:
<http://centerforimprovinginvestigations.org>

- ◆ Develop a job description and requirements for law enforcement personnel who investigate use-of-force incidents. Job knowledge, skills, and abilities may include (but are not limited to):

- Ethics training
- Legal knowledge or background
- Homicide investigations
- Defensive tactics
- Internal affairs
- Firearms instruction or subject-matter expertise

- ◆ Include representatives from the prosecutor's office in use-of-force investigations training.
- ◆ In addition to training, agencies should seek to create and foster a culture of candor among their law enforcement officers. This culture will assist investigators and prosecutors in expeditiously determining whether or not a case has merit. Officers are sometimes reluctant to be forthcoming with investigators about use-of-force incidents and what they witnessed, but officers who are frank and open with investigators help expedite successful resolution of the investigation.

The Police-Mental Health Collaboration Toolkit provides resources for law enforcement agencies to partner with mental health providers to effectively respond to calls for service, improve outcomes for people with mental illness, and advance the safety of all.

The toolkit is available at
<https://pmhctoolkit.bja.gov/>

Recommendations

- ◆ Agencies should develop job descriptions that identify the knowledge, skills, and abilities of use-of-force investigations, and those investigators will attend specialized training.
- ◆ Agencies should ensure that all officers receive regular and ongoing use-of-force training, including a review of the current legal standards applied to use of force.

Evaluation

Post-investigation analysis of officer-involved use-of-force investigations is broader than the typical agency incident review team analysis, which focuses on whether agency policy was followed and whether additional training is needed. The post-investigation evaluation process is designed to provide the investigating agency, the jurisdictional agency, the prosecution, and community partners with an opportunity to discuss and review the process as it was implemented in order to identify lessons learned and areas for improvement, as well as to continue to build partnerships and relationships between agencies and with the community at large.

Considerations

- ◆ Conduct a post-investigation analysis to create an after-action report.
- ◆ As a part of the analysis, identify lessons learned, both positive and negative.
- ◆ Regularly review the jurisdictional agency's use-of-force policy.
- ◆ Regularly review the investigating agency's policy on investigating use-of-force incidents.
- ◆ Include community members in the post-investigation analysis process, including receiving input from the public as a part of the analysis process.

The National Consensus Policy on Use of Force states that the

“... policy is to be reviewed annually and any questions or concerns should be addressed to the immediate supervisor for clarification.” Law enforcement agencies also should consider this recommendation and its applicability to an annual review of the investigative policy.

Recommendations

- ◆ Identify a process, documented in policy, to conduct a post-investigation analysis at the conclusion of a use-of-force investigation. The analysis should include input from community members, investigators, the jurisdictional agency, and the prosecution.

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- ◆ Agencies charged with conducting use-of-force investigations should conduct an annual analysis or review to identify local, state, and national trends and patterns to incorporate into training opportunities for police agencies and training academies.

Legal Considerations Regarding Use of Force

Tennessee v. Garner

In 1985, the U.S. Supreme Court limited use of deadly force to seize a person in *Tennessee v. Garner*.¹⁴ In 1974, a Memphis officer shot and killed a person he believed was 17 or 18 years old and unarmed as he fled the site of a nighttime (felony) burglary. The person ran from the back of the house and continued running after the officer shouted, “Police, halt.” As the suspected burglar (Garner) began to climb over the fence, the officer shot him because he would have escaped otherwise. Garner was hit in the back of the head and died shortly thereafter.¹⁵ The officer was acting under authority of Tennessee statutory law and department policy, which allowed the use of “all necessary means” (including deadly force) to prevent escape.¹⁶

The responding officers, including the officer who shot Garner, were not charged or disciplined by reason of the incident. Garner’s father sought damages in federal court by suing the Memphis Police Department and those involved under 42 U.S.C. §1983, alleging that the shooting violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution. On appeal, the Court of Appeals for the Sixth Circuit affirmed the trial court, noting with regard to the shooting officer that he acted in good faith and was entitled to qualified immunity.¹⁷

The matter was appealed to the U.S. Supreme Court, which ruled that deadly force may be used to seize a person only if an officer has probable cause to believe the suspect poses a threat of serious bodily harm to the officer or others. The court held that:

1. Whenever an officer restrains the freedom of a person to walk away, he or she has seized the person, and there can be no question that the use of deadly force is a seizure of a person subject to the reasonableness requirement of the Fourth Amendment.¹⁸
2. To determine the constitutionality of a seizure, the court must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.¹⁹
3. Notwithstanding probable cause to seize a suspect, an officer may not always do so by killing the suspect. The intrusiveness of a seizure by means of deadly force is unmatched. It impacts the suspect’s interest in his own life. It frustrates society’s interest in obtaining a judicial

determination of guilt and punishment. The court indicated that it was not convinced “that the use of deadly force is a sufficiently productive means of accomplishing” society’s goals “to justify the killing of nonviolent suspects.”²⁰

4. The use of deadly force to prevent the escape of all felony suspects is unreasonable. “When a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him or her does not justify the use of deadly force to do so A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.”²¹
5. “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 or there is probable cause to believe that he or she has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”²²

The court indicated that the Memphis officer could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. The sole articulated justification was simply to prevent Garner’s escape. The court remanded to determine whether the Memphis Police Department and the City of Memphis would be held liable for damages. It also indicated that the Tennessee statute was invalid insofar as it purported to give police authority to act as the Memphis officer did but would be valid if applied within the guidelines the court had articulated.²³

Within four years, the Supreme Court provided additional instruction and guidance on the concept of “objective reasonableness” when it issued its *Graham v. Connor* opinion.

Graham v. Connor

In 1989, the U.S. Supreme Court established considerations to be taken into account in determining whether an officer’s use of force was constitutionally appropriate (i.e., was “reasonable use of force”). The case was *Graham v. Connor*,²⁴ and any law enforcement officer investigating lawfulness of the use of force by another law enforcement officer must understand the standards articulated by the Supreme Court.

Briefly, the facts in *Graham* were that Mr. Graham was a diabetic and felt the onset of an insulin reaction. He had a friend drive him to a convenience store. He “hastily” ran into the store to get some orange juice but found the line to be too long. He then “hastily” ran back to his friend’s car and they drove off. These actions at the store were seen by Officer Connor. Believing the actions might indicate a robbery, Connor conducted a stop of the friend’s vehicle. Connor was not convinced by the friend’s explanation of Graham’s condition. He made them wait while another officer went to the store to see if anything was amiss. While waiting, Graham exited the car and ran around it a couple of times, then sat on the curb and passed out. Backup officers arrived. They cuffed Graham and shoved his face to the car hood before throwing him “headfirst” into the backseat of a patrol car. A friend brought Graham some orange juice, but the officers, who did not believe he was having an insulin reaction, refused to let him drink it. Finally, the officer who went to the store reported nothing was amiss. The officers drove Graham home, where he was released.

But Graham, in the meantime, had suffered cuts on his wrists, a bruised forehead (from having his face shoved down on the hood of the patrol car), a broken bone in his foot, and an injured shoulder, as well as a persistent ringing in his right ear.

Graham sued the officers under 42 U.S.C. §1983, alleging they had used excessive force in making the investigatory stop (the seizure of his person), in violation of the “rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.”²⁵ But the U.S. Fourth Circuit dismissed the case, applying the standard in law at the time, stating that there was no proof the officers acted maliciously or sadistically. The U.S. Supreme Court reviewed the case and reversed the Fourth Circuit, with orders to evaluate whether the officers’ actions were objectively reasonable under the Fourth Amendment. In its opinion, the Supreme Court articulated important factors to take under consideration when evaluating an officer’s use of force to effect a seizure of a person.

The court indicated that claims of excessive force in the course of an arrest, an investigatory stop, or other seizure of a person are governed by the Fourth Amendment standard of objective reasonableness. Reasonableness is judged from the perspective of a reasonable officer on the scene with allowances for the need for split-second decisions and without regard to the officer’s underlying intent or motivation. An officer’s right to arrest or stop carries with it the right to use reasonable physical coercion.

The opinion identified three major elements important in applying the objective reasonableness test:

1. The severity of the crime at issue
2. Whether the suspect poses an immediate threat to the safety of the officers or others
3. Whether he or she is actively resisting arrest or attempting to evade arrest by flight²⁶

These three “*Graham* factors” guide the court in determining whether the “totality of the circumstances” justifies a particular use of force applied in a particular situation. This “objectively reasonable” test makes an officer’s actual intent when using force irrelevant in determining whether the force was excessive. An objectively reasonable use of force will not become a Fourth Amendment violation because the officer acted maliciously or sadistically. Nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.

In *Graham*, Chief Justice William Rehnquist wrote:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application²⁷ 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 hindsightThe 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.²⁸

While there may be more than one way to resolve an encounter that is “tense, uncertain, and rapidly evolving,” and while one option may be better than another, the *Graham* test does not demand that only one option be found objectively reasonable. There may be a range of alternatives that would have been reasonable. If an officer uses force that is objectively unreasonable, the use of force is unlawful.

The *Graham* analysis may require a review of factors such as whether the officer was armed, any physical size differences between the officer and the other person, and (when deadly force was used) whether options short of deadly force could have been reasonably considered. The underlying question to be resolved is whether a reasonable officer, faced with the exact same situation, having the same training and physical build, conditioning, etc., would reasonably have made the decision to use the force in the same way the subject officer used it.

This is why, for example, an officer’s decision to shoot a person who appeared to be aiming a gun at the officer in a dimly lit alley can be found to be a reasonable use of deadly force even when it turns out that the person was pointing a cell phone at the officer and not a gun. If a reasonable officer faced with the same situation would have made the same conclusion that the person was threatening the officer with a gun, the use of deadly force may be deemed reasonable, not excessive. On the other hand, if a reasonable officer would not have used deadly force, the officer’s conduct would violate the Fourth Amendment.

Failure of authorities to explain to the public the *Graham* standard and the resultant failure by the public to understand the *Graham* standard can fuel public outrage and distrust of law enforcement. The public is inclined to apply the “all facts as we know them after investigation” standard, ignoring or minimizing the reality that the decision to use force is made on what the officer perceives, whether shown later to be correct or not.

Even when an officer’s use of force is found to be reasonable under the *Graham* factors, if the facts show the other person was not armed, many in the public will be outraged as they focus on the fact that an unarmed person was shot by the officer instead of considering whether the officer’s decision to shoot was objectively reasonable at the moment the decision was made. The Supreme Court recognizes that reasonable use of force is not easily determined. **To help reduce adverse reactions to findings that an officer acted reasonably when using force, the public should be clearly advised of the requirements under *Graham* and the reality that they relate to what was reasonably perceived at the moment the decision was made, not on what may have been learned after the use of force has occurred.**

Evaluating an officer’s decision-making process at the time he or she used force means that the officer’s assessment of the situation and the person against whom force was used is very important. The officer’s post-event report should provide a narrative of what occurred and include all relevant facts and circumstances. Follow-up questioning of the involved officer may be necessary to fill in any gaps.

The statement of the involved officer is clearly crucial in making determinations regarding whether force was reasonably used.

Regarding the investigation of involved officers, the Supreme Court has addressed how officers may be questioned in matters such as a use-of-force investigation and has protected an officer's right against self-incrimination under the Fifth Amendment. The rules articulated by the court must be taken into account in any investigation of an officer's use of force. In short, an officer cannot be compelled under threat of employer discipline or dismissal to provide a statement that may be self-incriminating. If the officer is so compelled, use and derivative use immunity automatically applies and will exclude all information provided by reason of the compulsion.

A corresponding legal issue relates to body-worn and dashboard cameras. There is disagreement on whether an officer who has used force and is under review or investigation should be allowed to view his or her body-worn or dashboard camera video before providing a statement. Many believe that the officer should provide his or her statement without viewing video because that is more likely to reveal what the officer subjectively perceived at the time decisions were made. A body-worn or dashboard camera may reveal details that the officer did not perceive at the time and that could affect the officer's statement and explanation of what occurred. The officer might add something seen on the video that he or she had not perceived at the time the force decision was made. Others argue that the viewing of the video could help the officer in stating important factors in his or her decision to use force as well as help the officer to better recollect what he or she did, in fact, perceive. Investigators should determine the preference of the involved prosecuting attorney's office before allowing officers to view video prior to providing a statement. In reality, each alternative has its positives and negatives, and ultimately, the effect of viewing the video before providing a statement must be evaluated by those who will be making crucial decisions on whether to prosecute. In some states, a statute may direct whether the subject officer is to have access to the video before providing any statement. Regardless of the approach utilized, it is a matter that should be resolved in setting up the investigative plans and not be delayed until an actual event forces the issue.

Garrity v. New Jersey

In 1967, the U.S. Supreme Court issued its opinion in *Garrity v. New Jersey*.²⁹ Police officers in New Jersey boroughs were being investigated for traffic ticket "fixing." Each officer was advised that anything he or she said might be used against the officer in a state criminal proceeding and that he or she had a right to refuse to answer if those answers would tend to be incriminating. However, officers also were advised that if they refused to answer, they would be subject to removal from office under authority of a state statute. Most officers responded to "being between a rock and the whirlpool"³⁰ by answering the questions. No immunity was granted to them by the state. Those answers were admitted over their objections in subsequent criminal prosecutions. After convictions were obtained, the officers appealed, but the New Jersey Supreme

Court upheld their convictions and did not accept their argument that the threat of loss of office was in effect coercing their incriminating responses in violation of constitutional protections.

On appeal, the U.S. Supreme Court held that the threat of a severe sanction for failing to answer questions that could incriminate an officer constituted unconstitutional coercion of incriminating evidence, in violation of the Fifth Amendment of the U.S. Constitution. The officers were given the choice to either forfeit their jobs or incriminate themselves. This was coercion. Under the circumstances of *Garrity*, the officers were under duress when they had to choose whether to waive one or the other alternative. As a result, their compelled statements were inadmissible in criminal prosecutions.

This is the case that gives rise to the concept of “*Garrity* rights.” The case and its progeny constitute major concerns when law enforcement officers are under investigation (although it applies to all public sector employees, not just law enforcement).

Garrity rights protect public employees from being compelled to incriminate themselves during investigative interviews conducted by their employers. For public employees, the employer is the government itself. The Fifth Amendment right against self-incrimination or coerced confessions has been applied to state and local governments under the Fourteenth Amendment. (In addition, states have their own functional equivalent of the Fifth Amendment in their own constitutions.) *Garrity* means that any evidence provided by a public officer by reason of being coerced to provide it under threat of dismissal cannot be used in a criminal prosecution, nor can evidence derived from the coerced statement be used against the officer. This is referred to as “use and derivative use immunity.”

In 1968, the Supreme Court issued *Gardner v. Broderick*,³¹ which held that a public employer cannot dismiss an employee solely for refusal to waive his or her *Garrity* rights if that refusal to waive derives from the threat of adverse job action if answers are not provided.

On the same day *Gardner* was announced, the Supreme Court issued *Uniformed Sanitation Men Association v. Commissioner of Sanitation (Sanitation I)*,³² which held that a public employer cannot dismiss public employees solely for exercising their Fifth Amendment rights and refusing to incriminate themselves. Public employees are entitled, like all other persons, to the benefit of the constitutional privilege against self-incrimination, and they may not be faced with proceedings that present them with a choice between surrendering their constitutional rights or their jobs.

Sanitation I was followed in 1970 by *Uniformed Sanitation Men Association v. Commissioner of Sanitation (Sanitation II)*,³³ in which the U.S. Circuit Court for the Second Circuit held that if an employee’s *Garrity* rights are recognized and maintained (meaning the officer is advised that he or she receives immunity in a criminal prosecution for whatever is said) and yet the employee still refuses to answer, the employee can be discharged for refusal to answer the administrative investigation questions. There is no coercion, since *Garrity* immunity against use in a prosecution still exists. Once use and derivative use immunity in a prosecution are ensured, the public employee can no longer refuse to cooperate in his or her employer’s administrative (“internal”) investigation and avoid job action for that refusal.

A warning should be provided to an employee when he or she is being compelled to answer administrative or disciplinary investigation questions with the understanding that the responses cannot be used in a criminal proceeding. The warning should follow this sample wording:

You are being questioned as part of an internal and/or administrative investigation. You will be asked a number of specific questions concerning your official duties, and you must answer these questions to the best of your ability. Failure to answer completely and truthfully may result in disciplinary action, including dismissal. Your answers and any information derived from them may be used against you in administrative proceedings. However, neither your answers nor any information derived from them may be used against you in criminal proceedings, except if you knowingly and willfully make false statements.³⁴

In 1972, the Court announced *Kastigar v. United States*,³⁵ which held that notwithstanding the conferral of use immunity on a defendant for certain statements, the defendant may still be prosecuted as long as the evidence used against him or her was obtained from a source (i.e., evidence not compelled and not derived from a compelled statement). In practice, neither *Garrity*, *Gardner*, nor *Sanitation I* makes public officers “untouchable” for a disciplinary response. They can still be disciplined based on independent evidence that was not provided by the officer under coercion or derived from such evidence. The same principle applies to prosecuting persons on evidence other than what they provided in violation of their Fifth Amendment rights. As long as the evidence is “independent” and is otherwise admissible, it can be legally utilized at trial.

Many public employers will advise their employees under an administrative investigation that as a matter of law, they will receive immunity for the use of their responses against them in a criminal prosecution. As a result, employers can direct their employees that they must answer questions. Having criminal immunity, the employees must answer their employers’ questions or face discipline (including dismissal) for failing to do so.

While this allows answers to be compelled for administrative purposes, an officer’s compelled statements cannot be used directly or indirectly *in any manner* to criminally prosecute that officer. Any sharing of information obtained in an administrative investigative questioning (or written statements provided in response to questions posed in the administrative investigation) will “taint” the criminal investigation. If any taint occurs, the prosecution faces a very difficult burden of demonstrating that none of the evidence being used against a public employee in a criminal prosecution was obtained from the administrative investigation or derived from that investigation. If an administrative inquiry or investigation has produced incriminating statements of the employee, a “wall” must be placed between all such information that has been obtained and that which is known by or being used by criminal investigators and prosecutors. Reports cannot be shared. The administrative investigators cannot communicate with the criminal investigators so that there is no basis to allege the administrative investigation has tainted the criminal investigation with immunized information.³⁶

When an officer has used deadly force and the incident is under investigation, it is likely that the employing agency will want to conduct its own investigation to determine whether policy was followed or whether discipline/termination is warranted. The restrictions imposed by *Garrity* must be honored. If the officer provides an administrative investigative statement after being advised that nothing he or she provides can be used in a criminal investigation or prosecution, extreme care must be taken by the administrative investigators not to discuss or share anything they have learned with the criminal investigators. Any such disclosure may taint the criminal prosecution.

The easiest way to ensure that there is no taint of the criminal investigation is to place the administrative inquiry on hold until the criminal investigation and prosecution (if any) have been completed. If there has been no compelled statement provided in the administrative investigation, there is nothing that could be disclosed to the criminal investigation. There can be no taint.

To protect the rights of law enforcement officers and the integrity of both administrative and criminal investigations, investigators should ensure that the terms under which interviews are conducted are clear and unambiguous. Officers should be told and acknowledge in writing that they are being compelled to answer interview questions under threat of discipline, including termination, and that answers they give cannot be used against them in future criminal proceedings (administrative interviews). There is no prohibition or Fifth Amendment compulsion when one provides a voluntary statement (e.g., not ordered or otherwise compelled to provide the statement). Should a subject officer choose to voluntarily provide criminal investigators with a statement, the voluntary nature of the interview should be clearly noted, and the officer should be advised that he or she may refuse to answer questions on the ground of self-incrimination and that a refusal to answer questions alone will not subject the officer to termination. If officers give several interviews, then these terms should be reviewed before each interview.

Any agreement allowing a third-party agency investigation of an officer-involved use of force should include language defining the roles and priorities of those conducting the criminal investigation versus the employer administrative investigation. A clause such as this should be explicitly stated in the agreement:

(Employer) will retain overall direction and responsibility for any internal or administrative investigation(s) initiated in response to any of (enumerated predicate events). However, the parties agree that the criminal investigative efforts take precedence over any internal or administrative investigation(s). No internal report or statement authored or obtained by (employer's) personnel that has been provided to (employer's) agents or employees shall be provided or its contents revealed to any criminal investigative team member or the prosecutor unless and until such time as the investigative team and the prosecutor agree that the criminal investigation will not be adversely impacted by any actual or potential immunity that may attach to such report or statement. To help ensure that the criminal investigation is not impeded or negatively affected by an internal or administrative investigation, the (employer's) internal or investigative investigation shall be initiated only after the criminal investigative efforts have been concluded or (investigative agency) has specifically authorized the initiation of the internal or disciplinary investigative effort.

Additional Legal Considerations

In addition to the above legal considerations, use-of-force investigators must be aware of the intent requirements of applicable criminal statutes such as intent, negligence, recklessness, etc. Knowing the relevant *mens rea* standard is critical to conducting an investigation and developing evidence sufficient to prove the *mens rea* element.

Endnotes

- 1 This document refers to officer-involved use-of-force incidents where there is serious bodily injury or death. For the purposes of this document, these are referred to as “critical use-of-force incidents.”
- 2 The primary audience of this resource is law enforcement; however, other criminal justice partners, including prosecution partners, are integral in use-of-force investigations and should be included in the investigative process.
- 3 <https://ucr.fbi.gov/use-of-force>.
- 4 “Police Use of Force,” National Institute of Justice, <http://nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx>, modified November 29, 2016.
- 5 IACP’s Use of Force Model Policy, September 2015.
- 6 *Graham v. Conner*, 490 U.S. 386 (1989).
- 7 *Graham v. Conner*, 490 U.S. 386 (1989).
- 8 See *Officer Involved Shootings: A Guide for Law Enforcement Leaders* (http://www.theiacp.org/portals/0/documents/pdfs/e051602754_Officer_Involved_v8.pdf) (page 10) for additional information on implementing the ICS in an officer-involved shooting incident.
- 9 Additional considerations regarding the prosecutor’s role in use-of-force investigations are addressed on page 18.
- 10 <http://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-miranda-v-arizona>.
- 11 This resource does not address agency policies regarding the operation of body-worn cameras (such as when cameras are turned on and off). For additional resources on the use of body-worn cameras, please visit the Bureau of Justice Assistance’s *Body-Worn Camera Toolkit*, <https://www.bja.gov/bwc/>.
- 12 Additional information on the National Use-of-Force Data Collection effort is available at <https://ucr.fbi.gov/use-of-force>.
- 13 *National Prosecution Standards*, 3rd edition, National District Attorneys Association, <http://ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.
- 14 *Tennessee v. Garner*, 471 U.S. 1 (1985).
- 15 *Ibid.*, pp. 3–4.
- 16 *Ibid.*, p. 4.
- 17 *Garner v. Memphis Police Dept., etc.*, 600 F.2d 52 (1979).

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- 18 *Tennessee v. Garner*, 471 U.S. 1 (1985), p. 7.
- 19 *Ibid.*, p. 8.
- 20 *Ibid.*, pp. 9–10.
- 21 *Ibid.*, p. 11.
- 22 *Ibid.*, pp. 11–12.
- 23 *Ibid.*, p. 22.
- 24 *Graham v. Connor*, 490 U.S. 386 (1989).
- 25 *Ibid.*, at 490.
- 26 *Ibid.*, at 396.
- 27 *Ibid.*, at 396.
- 28 *Ibid.*, at 396, 397.
- 29 *Garrity v. New Jersey*, 385 U.S. 493 (1967).
- 30 *Ibid.*, at 498.
- 31 *Gardner v. Broderick*, 392 U.S. 273 (1968).
- 32 *Uniformed Sanitation Men Association v. Commissioner of Sanitation (Sanitation I)*, 392 U.S. 280 (1968).
- 33 *Uniformed Sanitation Men Association v. Commissioner of Sanitation (Sanitation II)*, 426 F.2d 619 (2nd Circuit, 1970).
- 34 See *Kalkines v. United States*, 473 F.2d 1391 (U.S. Court of Claims) (1973).
- 35 *Kastigar v. United States*, 406 U.S. 441 (1972).
- 36 Information normally immunized under *Garrity* may still be utilized in limited circumstances, such as to impeach the officer’s testimony in a criminal trial or as proof in a charge based on perjury or false swearing if the officer willfully and knowingly provided false statements.

Appendix A—Resources

Data

Federal Bureau of Investigation's (FBI) National Use-of-Force Data Collection

<https://ucr.fbi.gov/use-of-force>

Policy Guidance

National Consensus Policy on Use of Force (January 2017)

A collaborative effort by: Association of State Criminal Investigative Agencies (ASCIA); the Commission on Accreditation for Law Enforcement (CALEA); Fraternal Order of Police (FOP); United States Federal Law Enforcement of Officers Association (FLEOA); International Association of Chiefs of Police (IACP); Hispanic American Police Command Officers Association (HAPCOA); International Association of Directors of Law Enforcement Standards and Training (IADLEST); National Association of Police Organizations (NAPO); National Association of Women Law Enforcement Executives (NAWLEE); National Organization of Black Law Enforcement (NOBLE); National Tactical Officers Association (NTOA)

http://www.theiacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf

Officer Involved Shootings: A Guide for Law Enforcement Leaders (2016)

Office of Community Oriented Policing Services (COPS Office), U.S. Department of Justice

http://www.theiacp.org/portals/0/documents/pdfs/e051602754_Officer_Involved_v8.pdf

Police Use of Force (modified November 29, 2016)

National Institute of Justice (NIJ)

<https://nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx>

Use of Force Policy

International Association of Chiefs of Police (IACP)

(must be logged in to view) <http://www.iacp.org/useofforce>

Final Report of the President's Task Force for 21st Century Policing (May 2015)

Office of Community Oriented Policing Services (COPS Office), U.S. Department of Justice

https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf

Training

Bureau of Justice Assistance's Body-Worn Camera Toolkit

<https://www.bja.gov/bwc/>

Bureau of Justice Assistance's (BJA) VALOR Initiative

<http://www.valorforblue.org/>

Case Law

***Gardner v. Broderick*, 392 U.S. 273**

<http://caselaw.findlaw.com/us-supreme-court/392/273.html>

***Garrity v. New Jersey*, 385 U.S. 493**

<http://caselaw.findlaw.com/us-supreme-court/385/493.html>

***Graham v. Connor*, 490 U.S. 386**

<http://caselaw.findlaw.com/us-supreme-court/490/386.html>

***Kalkines v. United States*, 473 F. 2d 1391**

<http://www.garrityrights.org/kalkines-v-us.html>

***Kastigar v. United States*, 406 U.S. 441**

<http://caselaw.findlaw.com/us-supreme-court/406/441.html>

***Tennessee v. Garner*, 471 U.S. 1**

<http://caselaw.findlaw.com/us-supreme-court/471/1.html>

***Uniformed Sanitation Men Association v. Commissioner of Sanitation (Uniformed Sanitation I)*, 392 U.S. 280**

<http://www.garrityrights.org/uniformed-sanitation-i.html>

***Uniformed Sanitation Men Association v. Commissioner of Sanitation (Uniformed Sanitation II)*, 426 F.2d 619**

<http://www.garrityrights.org/uniformed-sanitation-ii.html>

Field-Based Resources

Law Enforcement Use of Force and Custodial Death Investigations Manual

Georgia Bureau of Investigation (revised September 10, 2015)

https://gbi.georgia.gov/sites/gbi.georgia.gov/files/related_files/document/Use%20of%20Force-Custodial%20Death%20Inv%20Manual%20Revised%20090415.pdf

Protocol for Disclosure of Officer Involved Shooting Video Evidence

San Diego County Police Chiefs and Sheriffs Association

http://media.10news.com/document/2016/09/29/Addendum%20to%20OIS%20Protocol%20Release%20of%20Video%20Evidence_47139793_ver1.0.pdf

Prosecutorial Resources

National Prosecution Standards, 3rd Edition

National District Attorney's Association

<http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>

The 21st Century Principles of Prosecution Use-of-Force

Association of Prosecuting Attorneys

<http://www.apainc.org/peace-officer-use-of-force/>

About Global

The Global Justice Information Sharing Initiative's (Global) Advisory Committee (GAC) serves as a Federal Advisory Committee to the U.S. Attorney General. Through recommendations to the Bureau of Justice Assistance (BJA), the GAC supports standards-based electronic information exchanges that provide justice and public safety communities with timely, accurate, complete, and accessible information, appropriately shared in a secure and trusted environment.

GAC recommendations support the mission of the U.S. Department of Justice, initiatives sponsored by BJA, and related activities sponsored by BJA's Global. BJA engages GAC-member organizations and the constituents they serve through collaborative efforts to help address critical justice information sharing issues for the benefit of practitioners in the field. These include the facilitation of Global Working Groups.