RHODE ISLAND OFFICE OF THE ATTORNEY GENERAL
USE OF FORCE POLICY & GRAND JURY PRESENTATION

Attorney General Peter F. Kilmartin
An officer-involved shooting or an in-custody death represents the most challenging investigation a law enforcement agency can undertake.
QUESTIONS

Did the officer use force?

Was the Officer’s use of force proper?

Was the officer’s use of force CRIMINAL?
Basic Legal Concepts

- When is the use of Deadly Force by an Officer legally justified
- What the investigation entails and what it does not

The Attorney General’s Protocol Regarding Use of Deadly Force incidents and Custodial Deaths

Grand Jury Presentation
LAW and OFFICER SURVIVAL

DEADLY FORCE
The law recognizes the unique duties of police officers and allows them to use deadly force under circumstances that non-police officers would not be entitled to.
Guidance from CIVIL Cases
Decided by our courts.
Tennessee v. Garner

- 471 U.S. 1, 105 S.Ct. 1694 (1985)
- Was the Police Shooting a 4th Amendment Seizure?
- Was the Seizure of Unarmed, Non-Dangerous Fleeing Felon Reasonable under the 4th Amendment?
- Shooting Unarmed, Non-Dangerous Felon Unreasonable
“When the officer has probable cause to believe that [a] 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”

471 U.S. at 11, 105 S.Ct. at 1701
Constitutional Rule for Use of Deadly Force:
Three Requirements:

- Suspect Must Be Dangerous
- Deadly Force Must Be Necessary
- Warning if Feasible
Graham v. Connor

- Court applies a 4\textsuperscript{th} amendment analysis
“The reasonableness of a particular use of force must be judged from the perspective of a reasonable police officer on the scene, rather than with the 20/20 vision of hindsight. * * * ‘Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers’ (citations omitted) violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain, and rapidly evolving …”

(Emphasis added) 490 U.S. at 396-97, 109 S.Ct. at 1872
“With respect to a claim of excessive force, the same standard of reasonableness at the moment applies.”

**Bottom Line** – Question not whether officer took best or perfect course of action but rather **Was Course of Action Reasonable?**
Graham v. Connor

- **Objective Reasonableness Factors:**
  - Severity of Crime
  - Was Suspect Immediate Threat to Officer or Others?
  - Resistance or Attempted Flight?
We “must avoid substituting our personal notions of proper police procedures for the instantaneous decisions of the officer at the scene. We must never allow the theoretical, sanitized world or our imagination to replace the dangerous and complex everyday world that the police officers face.” Smith v. Freeland, 954 F.2d 343 (6th Cir. Court of Appeals 1992)
Dean v. City of Worcester, 924 F.2d 364 (1st Cir. 1991)

The ORS is trained in the law and his department’s policy on the use of Deadly Force

A trained officer in the use of firearms, one who practices his skill

Trained and practices in Deadly Force situations simulated and other
Objectively Reasonable Officer

Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994)

“There is no precedent in this Circuit or any other which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can be justifiably used.”
Rhode Island Office of the Attorney General Use of Force Protocol
These are all being investigated.

Shouldn’t the PO be cleared by an agency other than the one they work for?

The public must have confidence in the fact that the police officer discharged a weapon, that his actions were reasonable under the circumstances.
When should the Protocol be utilized?

- Whenever the use of deadly force by police results in the death or injury of any person
- Whenever any person dies while in police custody or during the apprehension or attempted apprehension of any person
ATTORNEY GENERAL’S PROTOCOL

- Includes death of suspect occurring during a police pursuit.
ATTORNEY GENERAL’S PROTOCOL

- **Recommended** when deadly force is used but does not result in any injury
- **May** be used to review an incident in which the action or conduct of police has resulted, directly or indirectly, in the injury to any civilian whose conduct was of the focus of police activity
Regardless of whether a person is injured or not, the police department using the force should immediately notify the

- Attorney General’s office

- RISP (if municipal agency used force)

- Municipal agency (if RISP used force)
This notification should occur REGARDLESS of whether a multi-agency investigative team is utilized
Multi-Agency Investigative Teams

- Lead agency will generally be the agency whose officer(s) used deadly force.
  - *** Some departments have deferred to RISP as lead agency, NOT REQUIRED.

- Investigative steps taken prior to the assembly of the multi-agency team should be limited to those necessary to preserve evidence or those required due to other exigent circumstances.
LAW ENFORCEMENT DUTIES

- Multi-Agency Investigative Teams
  - The chief of the lead agency whose officer utilized deadly force should normally serve as the primary point of contact for media inquiries, and coordinate responses with the investigative team
  - Flexible process
AAG/SAAG DUTIES

- Provide legal advice throughout the course of the investigation
- Make available office resources, including assistance with public information and public records requests
- Present case to grand jury if necessary
- Conduct Review in lieu of grand jury presentation
AAG/SAAG DUTIES

- Participate and if possible assist in directing the course of the investigation
- You really have to be there!!!
  - Visit the scene before it is released
  - Review the “Use of Force” protocols of the department whose officer employed the deadly force
  - Make every effort to ensure that ALL witness statements are taken immediately thereafter
THIS MEANS THE OFFICER(S) INVOLVED TOO!!!
AAG/SAAG DUTIES

- Inform supervisors immediately
- Keep them informed as investigation progresses
- Coordinate a public response through supervisors and the office of Public Information
ISSUES

- “Lead Investigator”
- Timing of Statements
- Officer’s Right to Counsel
- Access to Crime Scene and Reports by counsel for the officer
- Are all witnesses being treated equally?
- Less than Lethal Weapons
- Public information Requests
- Implications of Garrity
Timing of Statements

- We require civilian witnesses to give statements immediately after the incident.
- Because “accuracy” is presumed when statement made close in time to incident.
  - Rule 803 Prior Recorded Recollection- Made when the matter was fresh in the witnesses memory
  - Rule 612 Writing used to refresh recollection
Timing of statements

- Will impact civil litigation... “I gave my statement three days later, after two REM sleep cycles, after reviewing all other officers statements, and yes, a videotape.”

- VS

- The girlfriend of the deceased, shot by the police officer, who was brought in the back of the police car.
Timing of Statements

- We require civilian witnesses to give statements immediately after the incident.
- When’s the last time the civilian was told, come back tomorrow.
- Because “accuracy” is presumed when statement made close in time to incident.
  - Rule 803 Prior Recorded Recollection- Made when the matter was fresh in the witnesses memory
  - Rule 612 Writing used to refresh recollection
Any delay, must be balanced with the possibility that the delay will reduce, or even eliminate, the probative value of a subsequent statement.

If, for example, a witness discusses the incident with others, including witnesses, or becomes privy to news reports, the probative value of a subsequent statement is reduced.
Lead Investigator

- Who does the questioning? The lead. Department of the officer who fired.
- Methods of recording
  - Is your county/city/town/state a mandatory recording state?
  - Record.
A case which on the day or evening in question seems straightforward may behave been resolved by letter may now be presented to the Grand Jury
Garrity v. New Jersey

- 385 U.S. 493, 87 S.Ct. 616 (1967)
- Officers being investigated for fixing traffic tickets
- Officers were questioned in conjunction with this and were told that they had the choice of asserting their Fifth Amendment right or maintaining their job
- Statements obtained were coerced and violative of 14th Amendment
As a result, police departments now have a procedure, a *Garrity Hearing*, which allows police departments to elicit certain testimony from officers without threat of potential criminal liability.

May be proper to utilize in IA proceedings.
What it is not...

- A right for the police officer to **INVOLVE** in deciding whether or not to give a statement.
- Only applicable if an officer is ordered to give a statement, and job depends on it, cannot use in subsequent criminal investigation.
- Not proper to be utilized in an officer involved shooting investigation.
Therefore, the assigned prosecutor, needs to be aware of when the statement was taken, by whom and under what conditions.
GRAND JURY PRESENTATION
It is important to distinguish what this investigation is NOT designed to do:

- It is not to determine whether police procedures could be improved.
- It is not to determine whether police procedures were even followed.
- It is not to assess whether anyone was negligent.
- It is not to determine whether the decedent’s surviving family should recover damages.
Instead, the focus is EXCLUSIVELY upon whether the officer’s actions were lawful or legally justified.

As stated, that will depend on whether their actions were reasonable under the circumstances existing at that time.
FACTORS FOR GJ TO CONSIDER

- Size disparity, if any, between the arresting officers and decedent
- Decedent’s physical condition at the time of the altercation, e.g. intoxicated, agitated
- The decedent’s willingness or unwillingness to follow the commands of the officers, and whether those commands were reasonable
FACTORS TO CONSIDER

- The manner in which decedent submitted or refused to submit to the officers instructions
- The degree of force employed by the officers
- How long the force was employed

Accord Statchen v. Plamer, 623 F.3d 15 (1st Cir. 2010)
USE OF FORCE

USE OF FORCE CONTINUUM

- Presence
- Verbal Command
- Physical Restraint
- Less than Lethal Force
- (Tasers/Pepper spray)
- Lethal Force
USE OF FORCE

- Serious consideration should be given to presenting an expert before the Grand Jury.
  - If it is not so clear to you, how is it going to be clear to a grand juror.

- Chief, Deputies should be consulted before and expert is retained.
Juror’s expectations?
“Couldn’t he have fired a warning shot?”
“Why couldn’t he have shot him in the leg?”
JUROR’S EXPECTATIONS

• “Why didn’t he just shoot the gun out of his hand?”
• “Why couldn’t he have shot him in the leg?”
• “He was standing so far away from that man with the knife, why did he have his gun drawn?”
We need to give them the law.

We need to explain the objectively reasonable officer.

We need an expert to explain what training is received and what officers are taught to do in certain circumstances and why.

We need an expert to explain what an officer who shoots experiences.

We need to make jurors understand the reality of police work, that it is dangerous and sometimes we need to take the gun off the belt and fire.

We need to explain basic concepts of self defense.
42 U.S.C. § 1983

- Persons
- Acting Under Color of Law
- Deprive Another Person
- Of a Constitutional Right