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# Officer's Use of Force: The Investigative Process

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## **Introduction**

Law enforcement officers often interact with citizens when the citizens are at their worst. Officers interject themselves into domestic disputes, fights, and crimes in progress. They often handle agitated incarcerated individuals. While a primary goal of law enforcement is to resolve situations peacefully, peaceful resolutions do not always occur. When an officer has to use force (up to and including deadly force) to protect themselves and the public, agencies must be prepared to conduct appropriate investigations into the events surrounding the use of force.

A thorough and impartial investigation is an important goal for a number of reasons. A properly conducted internal and/or criminal investigation can not only exonerate an officer involved in the incident, but these investigations may foster and promote public confidence in the actions of law enforcement officers. Moreover, these investigations could highlight alternatives and options to avoid or minimize use of force incidents in the future.

Following a use of force encounter, law enforcement agencies have the option of conducting an investigation into the actions of the officer that is: 1) administrative or internal; 2) criminal; or 3) both. It is not uncommon for an internal and criminal investigation to be conducted simultaneously. While nothing prevents an agency from conducting its own criminal investigation into its officer's use of force, agencies often seek outside assistance to conduct these inquiries in cases where excessive force has been alleged or deadly force used. Using outside investigative assistance in these extreme cases can often reassure the public and the involved officer that a fair and impartial inquiry into the circumstances surrounding the use of force will take place.

Outside agency support for investigations can come from another local law enforcement agency or the North Carolina State Bureau of Investigation (SBI). In the overwhelming majority of cases, the SBI is the "go to" agency for support in an excessive or deadly force investigation.

## **Authority for an SBI Investigation**

Pursuant to N.C. Gen. Stat. § 143B-917, the SBI is authorized, upon request, to give investigative assistance to "sheriffs, police officers, district attorneys, and judges." Traditionally, the SBI will assist a local agency in four categories of officer-involved use of force situations:

- 1) Non-fatal officer-involved shooting;
- 2) Fatal officer-involved shooting;
- 3) Complaints of use of excessive force by officers; and
- 4) Death in custody.

Between January 1, 2017, and August 7, 2018, the SBI handled 39 non-fatal shooting investigations, 45 fatal shooting investigations, 27 excessive force investigations, and 38 death-in-custody investigations.

The SBI may initiate an investigation at the request of an agency. In addition, N.C. Gen. Stat. § 147-90 requires a district attorney to request an SBI investigation into the death of a private citizen killed as a result of the use of a firearm by a law enforcement officer in the line of duty, if the surviving spouse or next of kin (child, parent or sibling) of the private citizen asks the district attorney to request an SBI investigation within 180 days of the death.

## **Scope and Limitations of Investigations**

Investigations into use of force incidents typically have three goals. First, the agency head may want to determine if the officer's actions and use of force were in conformity with the agency's applicable policies. Second, the agency head may want to determine if there are any facts or circumstances surrounding the incident that raise concerns for potential civil litigation. Finally, the agency head may want to evaluate the officer's conduct to determine whether or not there is any criminal responsibility on the part of the officer. The first two goals are addressed through internal investigations. The third goal is addressed through a criminal investigation. This section will explore internal investigations first before turning to criminal investigations.

Ordinarily, an agency will conduct its own internal investigation into potential policy violations or civil liability concerns. An internal investigation can be conducted simultaneously with a criminal investigation. It is imperative, however, that any ongoing internal investigation be conducted separately and independently from any ongoing criminal investigation.

An administrative investigation carries potential risks for the involved officer if evidence of misconduct is found. These risks can range from agency disciplinary action to litigation in a State or federal civil lawsuit.

Law enforcement officers who appear to have acted in accordance with agency policy and the law should be treated accordingly. Treating officers in the same manner as criminal suspects during these investigations is counterproductive and is not fair to their true status.

It's important to remember that officers involved in use of force incidents could simultaneously (1) face possible criminal charges, (2) be subjected to discipline through their own agency, (3) be witnesses to crimes committed by a suspect who attempted to harm the officers and/or others, (4) be victims of violent crimes committed by the suspect, and (5) be subjected to intense media scrutiny.

No matter how justified the use of force, officers and agencies are always at risk for becoming embroiled in political controversy as a result of a use of force incident. This is yet another reason to have specialized procedures that maximize the thoroughness of internal investigations and any statements provided by the officers.

An adversarial relationship between the investigator and the involved officer can be created unnecessarily by an investigator who handles the interview of an officer more from the perspective of one conducting a suspect interrogation than one conducting a witness interview. In that regard, it is important that use of force investigators be trained to recognize that officers who have been involved in an officer-involved shooting are not necessarily suspects in any wrongdoing (unless

and until evidence of wrongdoing has been developed), but rather are professionals who have been trained to deal with critical incidents.

In any officer-involved use of force investigation, the goal should be to obtain as complete and accurate an understanding of the events and circumstances and the involved officer's perception of those circumstances as possible.

Internal investigations are protected from public disclosure by virtue of North Carolina's Personnel Privacy Act. Information related to disciplinary investigations concerning a sheriff's office employee is confidential and not subject to disclosure. N.C. Gen. Stat. § 153A-98. Similar protections are provided to city and State employees through N.C. Gen. Stat. § 160A-168 and N.C. Gen. Stat. § 126-22, respectively. Recordings however such as body worn camera footage and dashboard camera footage, as defined in N.C. Gen. Stat. § 132-1.4A, are governed under that statute even though they may serve as evidence in a disciplinary investigation.

In *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967), the Supreme Court of the United States held that the constitutional protection against self-incrimination prevents the use in subsequent criminal proceedings of statements obtained under threat of being fired. The court reasoned that employees who make statements under threat of being fired for refusing to answer an investigator's questions do not do so voluntarily. See also *Debnam v. North Carolina Department of Correction*, 334 N.C. 380, 432 S.E. 2d. 324 (1993).

Officers may be compelled as part of their employment to answer questions in furtherance of an internal investigation into the officer's use of force. If the officer fails to cooperate in the investigation by not responding to the investigator's questions and not telling the truth, an officer can be validly dismissed from his/her employment. However, any statements an officer makes during the internal investigation would be considered "compelled," and given the fact that internal investigations are protected from public disclosure by the Personnel Privacy Act (Act), they could not be released for use in a criminal investigation without satisfying one of the conditions for release set out in the Act. Audio and/or video recordings of interviews regarding agency investigations or interviews or interrogations of suspects or witnesses are not subject to the disclosure and release provisions in N.C. Gen. Stat. § 132-1.4A. It is for these reasons that no information or evidence gathered by a local law enforcement agency in an administrative investigation should be offered to any agency that is conducting a criminal investigation of the same incident.

It is also common following a significant use of force incident for an agency to require the involved officer to submit to laboratory testing to confirm the absence or presence of drugs or alcohol in the officer's system. The results of these tests are again protected from public disclosure as part of the employee's personnel file. If the results of these tests (or other non-testimonial evidence) are needed for an ongoing criminal investigation, the SBI will use a court order to obtain them.

While an officer may be compelled as part of his/her employment to answer questions during an internal investigation into the officer's use of force, it is not necessarily the best place to begin the investigative process. Instead, the investigator should attempt to obtain and to preserve objective facts and physical evidence first. Photographs, measurements, diagrams, drawings and

video should be sought in addition to interviews of every witness who may have information relevant to the events.

Such photographic and physical evidence is more objective than mere words or witness descriptions of events. Indeed, courts may be more likely to rely on this objective evidence in making a determination of liability.

A criminal investigation is used to evaluate an officer's actions in a use of force situation to determine whether or not the officer's conduct was in conformity with all applicable laws. These investigations are usually closely coordinated with the local district attorney, as this is the person who will make the ultimate determination as to whether an officer's actions were proper under a criminal law standard. As mentioned previously, interviews and findings from an internal investigation cannot be shared with a person conducting a criminal investigation. However, the converse is not necessarily the case. Interviews taken in the course of a criminal investigation could be considered by an agency when conducting an internal use of force investigation involving the same incident. For this reason, it is advisable to coordinate the involved officer's interview in an internal investigation to follow a criminal investigation interview. If the circumstances and facts allow for it, the internal investigation as a whole is often coordinated to follow the conclusion of the criminal investigation.

## **How to Initiate an SBI Investigation**

As previously mentioned, unless the request for an SBI investigation is made by a district attorney pursuant to N.C. Gen. Stat. § 147-90, the SBI does not have original jurisdiction in these matters. To initiate a use of force investigation, the agency head must make a request for the SBI investigation. The agency head should contact either the Special Agent in Charge (SAC) or the Assistant Special Agent in Charge (ASAC) of his/her SBI district with a request at the earliest possible moment after the incident. If an agency head needs to make a request for an investigation after hours during the work week, or on weekends or holidays, the SBI may be contacted by telephone at 1-800-334-3000.

Once the request is accepted, the SAC or ASAC will start compiling pertinent information to start the criminal investigation. The requesting agency head should be prepared to provide basic information at the time of the request such as who is involved, the number of potential witnesses, the involved officer's and suspect's health condition and location, the location of the incident, and the agency contact person.

When making a request for assistance, the agency head should consider whether the request is for a use of force investigation only or if the request will be for a dual investigation to also investigate any underlying crime in which the suspect may have been involved. For example, a local officer may have had to shoot a fleeing murder suspect leaving the scene of a liquor store robbery. The SBI could be asked to investigate only the officer-involved shooting situation or may also be requested to assist with the robbery investigation. If this type of dual request is made, different case agents will be assigned by the SBI to each investigation. However, information may be shared between the two case agents.

Each investigation will vary in the number of agents assigned. Normally, an officer-involved shooting investigation will have a crime scene agent, a case agent, and a varying number of agents to conduct interviews. All of these agents will report to an SBI supervisor. The investigation will be guided by internal SBI policies and procedures.

The investigation will usually be assigned to a case agent within the SBI district, but who works outside of the county where the incident occurred. This case agent will be the lead agent in the investigation but will retain other agents to assist. Any questions or concerns of the agency head during the course of the investigation should be directed to the case agent.

## **What to Expect During an SBI Use of Force Investigation**

As with most investigations, the first agent on the scene and his/her supervisor has specific responsibilities when undertaking a use of force investigation. Many of these duties and responsibilities are listed below with common issues encountered by the agents.

- 1) Medical assistance for those involved in the incident is a paramount concern and will be one of the first items addressed.
- 2) As with any other criminal investigation, the preservation, protection, and safety of the crime scene is critical. In order to limit the chain of custody for any item(s) of evidence, the responding case agent will prefer SBI personnel conduct the crime scene search. Photographs and video of the entire scene will be obtained along with crime scene sketches. Trajectory examinations will be made of any shooting scene.
- 3) Any physical evidence to be examined will be presented to the State Crime Laboratory. Of note, items of evidence are not automatically “rushed.” Rush requests can be made, however, by the SBI, district attorney, and/or the requesting agency head. Agency heads should coordinate with the responding case agent should they desire a rush for the analysis of any physical evidence in a particular case. Any evidence that is seized can be released to the appropriate person with the district attorney’s approval pursuant to N.C. Gen. Stat. § 15-11.1.
- 4) The case agent will work with the requesting agency to coordinate relative and family notification regarding involved persons.
- 5) The case agent will also work closely with the requesting agency to identify all potential witnesses and leads. These leads will in turn be assigned to assisting agents.
- 6) One of the first inquiries a case agent will make is to solicit a statement from the involved officer. The SBI sets no time limit within which to interview the officer. It is preferable to interview the officer as soon as possible, but often the involved officer may request legal counsel, which may postpone the time of the interview. It is helpful to the SBI investigation if the requesting agency can delay conducting an administrative interview of the involved officer until after the SBI has completed its investigation.

- 7) When the SBI conducts a use of force investigation, it provides the involved officer the same protections as anyone else who is the subject of a criminal investigation. An involved officer retains his/her Fifth Amendment privileges and cannot be compelled to give a statement. When interviewed in a use of force investigation, the involved officers are not under arrest or “in custody” during the interview. Nonetheless, the SBI will provide the officer with his/her Fifth Amendment *Miranda* rights. Agency heads should be careful not to order or otherwise coerce an involved officer into giving a statement to the SBI as part of a use of force investigation. The officer may be accompanied by an attorney or disinterested witness to the interview if he/she desires.
- 8) The case agent will set up a time to brief the local district attorney on the investigation and determine if there are any particular needs or questions that the district attorney wants pursued.
- 9) The requesting agency can expect that one of the first series of documents that the case agent will request will be the department’s use of force policies and procedures.
- 10) Additionally, the involved officer’s training and firearms qualification records will be requested.
- 11) At the conclusion of any shooting incident, all efforts must be made to maintain the involved officer’s weapon in the exact condition it was in at the conclusion of the shooting. Agency officials should not attempt to either unload or reload the weapon. It is critical that the weapon be examined with the exact number of rounds in the magazine (and chamber) as existed at the conclusion of the shooting.
- 12) The SBI will coordinate news releases concerning the investigation with the law enforcement agencies involved. The SBI will coordinate with the involved agency and suggest that the agency release the name of the involved officer first. If, however, the agency declines to do so, it is the policy of the SBI to release the name of the officer if it receives a request to do so.
- 13) If a “Taser” was used in the incident, officers should turn off the battery, but should not attempt to download any information from the device. The SBI will submit the Taser as a unit to the State Crime Laboratory for testing which normally takes one week. The agency should also take steps to preserve any telecommunications related to the use of force incident. Any audio and video recordings of the incident from in-car cameras will be vital to preserve as well. Any dash board or body camera footage is governed by N. C. Gen. Stat. § 132-1.4A and may be disclosed to another law enforcement agency (such as the SBI) under N. C. Gen. Stat. § 132-1.4A(g).

Agencies should pay attention to the needs of the officer after a significant use of force incident. Many officers will vary in their reaction to this stressful situation. If needed, consideration should be given to counseling services for the involved officer. Many times officers involved in shooting situations will want a replacement firearm. Rearming an officer after an incident is discretionary on the part of the agency and will depend on many factors such as any



continuing risks to the officer and his/her family and the officer's physical and psychological state after the event.

The officer's interview with the SBI is relatively standardized. Set categories of questions are prepared for the case agent to ask the involved officer. Personal information (such as the officer's domestic life, medications taken, eating and sleeping habits) may be solicited from the officer. Although this type of information seems irrelevant, it could later be used to insulate the officer against subsequent allegations that the officer was distracted for some reason during the event. The officer will be asked about his/her law enforcement background, his/her relationship to the suspect individual, and for all of the details leading up to the incident. It can be expected that the involved officer will be asked about any other shooting or alleged excessive force incidents in which he/she may have been involved. It is also common for the SBI to request a release from the involved officer to review the officer's personnel file with the employing agency.

While there are some exceptions, as a general rule the suspect individual will not be advised of his/her *Miranda* rights prior to the interview with the SBI. The philosophy of the SBI is that it is more important to obtain the suspect's statement regarding the use of force incident than to obtain a statement from the suspect as to any crime that he/she may have been committing at the time of the incident.

Once the investigation is completed, the case agent will brief the district attorney, the head of the requesting law enforcement agency, and the District SAC. A copy of the case file will be delivered to the district attorney. The requesting law enforcement agency head cannot by law receive a copy of the SBI investigation. However, the case agent may make the file available for review by the agency head once it has been delivered to the district attorney. Often, if the bulk of the investigation is complete and the agent is only awaiting noncritical tests results (such as a toxicology report), the case agent may allow the agency head to review the file after it is delivered to the district attorney and before it is officially concluded.

The goal of the SBI investigation is not to draw any conclusions about the propriety of the officer's use of force during the investigation. The report is designed to set out all of the relevant facts and events leading up to the officer's use of force. In short, the SBI does not "clear" the officer. The SBI defers to the district attorney to make a decision on the criminality, if any, of the officer's use of force.

If the district attorney has received the case file and made a decision that no criminal charges would be pursued or that a particular shooting was justified, the case agent will notify the agency head, the involved officer, and the suspect individual of the district attorney's decision. If there are no criminal charges, the case agent will seek all appropriate court orders to return any seized evidence.

If, in a particular situation, the district attorney has requested that the SBI seek criminal charges against an officer, the case agent will always attempt to inform the agency head in advance about the charges unless extraordinary circumstances present themselves. It is not uncommon for the case agent to seek the involved officer's surrender on the charges and to present the officer to a magistrate during non-traditional times to expedite the process.

Often, what appears to be an excessive delay in the conclusion of the SBI investigation is outside the control of the case agent. For example, an agent may have completed his/her investigation, but may be waiting on autopsies or toxicology reports.

## **What are the Potential Civil Liability Issues After a Use of Force Incident?**

The Fourth Amendment guarantees the “right of the people to be secure in their persons ... against unreasonable ... seizures.” U.S. Const., Amend. IV. The Supreme Court has held that the Fourth Amendment prohibits the use of excessive force by law enforcement officers in the course of apprehending suspected criminals. See *Graham v. Connor*, 490 U.S. 386, 394–95, 109 S. Ct. 1865 (1989).

Because the use of force has a potential for civil and criminal liability, a law enforcement agency is well served to act objectively and thoroughly to determine the facts, assess the potential for liability, and to prepare for the results.

Potential civil liability arising from a use of force incident may involve allegations of a deprivation of the suspect’s civil rights under the United States Constitution or allegations of tort liability under the State Constitution and common law. Many of these State claims involve allegations of gross negligence, negligent retention, failure adequately to train, inadequacy in policy or training, and negligent supervision. Many civil cases combine federal constitutional claims with State law claims.

Federal claims against law enforcement officers and agencies are ordinarily brought pursuant to 42 U.S.C. § 1983. Section 1983 provides a remedy for the deprivation of “rights, privileges, or immunities secured by the Constitution and laws” of the United States caused by a person acting under color of state law (for example, law enforcement officers acting in the performance of their duties). Section 1983 is the most common basis for a lawsuit involving use of force. Most plaintiffs in these lawsuits claim the officer’s use of force amounted to an unconstitutional “seizure” under the Fourth Amendment.

Courts recognize and take into consideration a law enforcement officer’s need to use force in certain situations. Consequently, courts have recognized the doctrine of “qualified immunity,” which grants officers immunity from suit for such a federal claim if their actions could reasonably have been thought consistent with the rights they are alleged to have violated. A public official (such as a law enforcement officer) performing a discretionary function is entitled to qualified immunity in a civil “1983” lawsuit if his/her conduct does not violate clearly established federal statutory or constitutional rights and he/she acted as a reasonable officer would have acted under the same or similar circumstances. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

An officer’s use of force may also give rise to lawsuits under North Carolina law. The general rule in North Carolina is that a governmental agency or a local governmental body or official is immune from torts (civil wrongs) committed by an employee carrying out a

governmental function. A governmental official or governmental agency may, however, waive its governmental immunity to the extent it has purchased liability insurance.

Similarly, the “public officer immunity doctrine” protects law enforcement officers from individual liability for negligence in the performance of their governmental duties. Under this principle, an officer may be held personally liable if the official acts maliciously or corruptly.

Although the legal theories are different between State law claims and federal law claims, the practical approach to investigation of the underlying incidents are substantially the same.

### **Tennessee v. Garner**

An excellent case study on how these claims can arise and how the above referenced defenses can come to the aid of an officer is the well-known case of *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985). In this case, the Supreme Court of the United States set forth the specific constitutional standard governing when law enforcement officers may use deadly force:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead....

... 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 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. *Id.* at 11–12, 105 S. Ct. 1694.

Under *Garner*, deadly force cannot be justified based merely on a slight threat. An officer may not use deadly force “unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” *Id.* at 3, 105 S. Ct. 1694.

When the *Garner* case was decided, this opinion represented a major change in the law in many states. For example, when the shooting took place in Tennessee that formed the basis of *Tennessee v. Garner*, the law in the State of Tennessee allowed law enforcement officers to use any amount of force (up to and including deadly force) to stop a “fleeing felon.” Under this so called fleeing felon rule, an officer could use deadly force to stop a person the officer had probable cause to believe had committed a felony. The following are the facts in *Garner*:

On October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a “prowler inside call.” Upon arriving at the scene, they saw a woman standing on her porch and gesturing toward the adjacent house. She told them she had heard glass breaking and that “they” or “someone” was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was Edward Garner, stopped at a 6-foot-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner’s face and hands. He saw no sign of a weapon and, though not certain, was “reasonably sure” and “figured” Garner was unarmed.

While Garner was crouched at the base of the fence, Hymon called out “police, halt” and took a few steps toward him. Garner then began to climb the fence. Convinced that if Garner made it over the fence he would elude capture, Hymon shot him. The bullet hit Garner in the back of the head. Ten dollars and a purse taken from the house were found on his body.

The officer called to the scene of the breaking and entering was acting in accordance with then state law when he used his sidearm to stop the suspect. When the officer and his agency were subsequently sued civilly for a federal civil rights violation for shooting Garner, the officer relied on the defense of “qualified immunity.”

### **Estate of Armstrong v. Village of Pinehurst**

Most recently, and as another example of the application of this principle, is the Fourth Circuit Court of Appeal’s decision in *Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892, 2016 WL 105386 (4<sup>th</sup> Cir. Jan. 11, 2016).

In *Armstrong*, the United States Court of Appeals for the Fourth Circuit dealt with a law enforcement officer’s use of a “Taser” against a mentally ill subject who had fled a hospital to avoid a mental health evaluation.

After voluntarily going to Moore Regional Hospital in Pinehurst, North Carolina for a mental health evaluation, the mentally ill patient (Armstrong) left the hospital. This individual was bipolar and diagnosed as a paranoid schizophrenic which prompted the doctors at the hospital to request involuntary commitment papers be issued for his return to the hospital. Armstrong was found close to the hospital running through traffic and later eating grass and putting cigarettes out on his tongue. When officers attempted to take him into custody, he wrapped himself around a sign post and would not let go. After 30 seconds of holding onto the post, one of the officers used a Taser to stun Armstrong. He was then stunned by the Taser five separate times, but the Taser did not cause him to release the post. It ultimately took five individuals to unwrap Armstrong from the sign post. After being removed from the post, handcuffed and shackled, he died shortly thereafter.

The Fourth Circuit Court of Appeals held that the officers used excessive force by inappropriately using the Taser on this person. Of particular significance in this case, the Fourth Circuit Court of Appeals found that a Taser was a dangerous weapon in that it may cause serious injury. The Court then concluded that such a device should only be used when the circumstances

present a risk of immediate danger to the public or to an officer and the use of force through a tool such as a Taser is necessary to overcome that immediate danger. In the *Armstrong* case, the Court found the use of a Taser to be inappropriate because the mentally ill person was outnumbered by six people, five of which were available to help remove him from the post; the person appeared to present a danger only to himself; the officer evaluated the situation for only 30 seconds before using the Taser; and the subject was presenting non-violent resistance to being handcuffed. The Court therefore found the officers unreasonably used excessive force. The officers in this case also relied on the defense of qualified immunity.

## **Use of the Doctrine of Qualified Immunity**

The Courts are required to recognize that law enforcement officers are called upon “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.” *Graham*, 490 U.S. at 397, 109 S. Ct. 1865. “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396, 109 S. Ct. 1865.

Accordingly, in an officer-involved use of force case arising under the Fourth Amendment, the courts must evaluate an officer’s action at the time the officer decided to use force, taking into consideration the information and facts known to the officer at that moment in time. As mentioned above, qualified immunity protects officers who commit constitutional violations but who, in light of clearly established law, reasonably believed their actions were lawful. A qualified immunity analysis typically involves two inquires: (1) whether the plaintiff has established the violation of a constitutional right, and (2) whether that right was clearly established at the time of the alleged violation.

Internal investigations must be focused on determining whether the officer’s decision to use force was objectively reasonable under the totality of the circumstances confronting the officer and within the standards required under agency policy. *See Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989). The investigation must be directed at whether there was a proper policy in place (i.e., whether the policy was consistent with the Fourth Amendment) and whether there was proper adherence to that policy by the officer. Reasonableness is determined by the information possessed by the officer at the moment the force is employed. *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005).

Preparation of an officer-involved use of force case must be as comprehensive as possible. Photographs, measurements, diagrams, drawings and video imaging should always be employed in addition to interviews of every witness who may have information relevant to the events, transaction, or occurrences, or series of them which constitute the totality of the circumstances. In addition, all applicable and relevant policies, customs, and procedures must be reviewed and analyzed. Every witness must be interviewed. Backgrounds must be reviewed, and all relevant training records must be obtained and reviewed. The medical records related to injured suspects or officers must also be examined. All these matters must be analyzed in light of the facts shown

and the threat of or commission of any crime committed. The immediacy of any threat posed to the officer and others; the resistance or degree of resistance, if any; the age, capacity, and condition of the persons involved; the presence or absence of weapons; and the other attendant circumstances are all critical in arriving at a well-reasoned and fair conclusion.

Applying the standards for qualified immunity to the facts and circumstances of the *Garner* case, the court found that Officer Hyman acted in good faith reliance on the Tennessee statute and agency policy and was therefore entitled to qualified immunity and dismissed from the lawsuit. The officer reasonably believed that using deadly force against Garner was lawful and proper under those circumstances. No law then existed to tell a reasonable officer you could not use deadly force against a non-threatening, non-dangerous fleeing felon.

The next logical step then is to consider what would happen in a case today given similar facts and policies as in *Garner*. We now know that using deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. Therefore, if an officer were to act today as the officer did in *Garner*, he/she may not be entitled to the qualified immunity defense since a reasonable officer would know (in light of the *Garner* decision) that he/she could not use deadly force under the facts in *Garner*.

In the *Armstrong* case, the family of Armstrong sued under 42 U.S.C. § 1983 alleging the officers used excessive force under the United States Constitution. The Fourth circuit held for the officers on the basis of qualified immunity.

The fourth circuit held that the officers used excessive force under the Fourth Amendment by inappropriately using the Taser on Armstrong under the objective reasonableness standard of *Graham v. Connor*, 490 U.S. 386 (1989). The court stated that the use of a device such as a Taser was appropriate when an officer has an objective reasonable belief that the circumstances present a risk of immediate danger that required this application of force to counter the danger.

However, the court also held that Armstrong's constitutional right to be free from the use of unreasonable force (i.e. not to be Tasered under these circumstances) was not clearly established by case law when this incident took place.

## **Should You Work an Officer Pending an Investigation?**

A common question asked of a case agent is when an agency head can put an officer back to work following a use of force incident. While it is helpful to have the benefit of an SBI investigation and a charging decision from a district attorney before deciding on the officer's employment status, it is the sole discretion of an agency head when and under what circumstances to put an officer back to work. Since there is no time limit within which a district attorney must make a decision as to whether criminal charges are appropriate or not, it is many times incumbent upon an agency head to make an independent decision to place the officer back in service. The agency head is advised to speak directly with the district attorney as quickly as possible in order to make a timely and appropriate decision on the officer's employment status. It is also important

to talk frankly with the district attorney about the content of the SBI investigation and limit, if appropriate, the public release of any sensitive information that may be present in a report.

There is no legal mandate that an officer must be placed on leave following a use of force incident. An agency head has several options when deciding on the work status of an officer following a use of force incident. The physical and mental condition of the officer and the circumstances of the incident will factor heavily into this decision.

Following a use of force incident, the agency head can place an officer on administrative leave, administrative reassignment, or may return the officer to regular duty status. The status of administrative leave will temporarily remove the involved officer from the workplace while the investigation is being conducted. If the circumstances of the incident warrant it, the officer could be placed on administrative reassignment, which would allow the officer to remain in the workplace but carry out different job functions (typically, functions with a lower probability of a confrontation with criminals). The involved officer could also be placed back in a regular law enforcement role. As the investigation proceeds and more facts surrounding the incident come to light, it is also feasible for the agency head to move the officer from one duty status to another during the course of the investigation.

## **Conclusion**

There is an old saying that encourages one to “plan for the worst and hope for the best.” While we all hope to avoid using force in law enforcement, the reality is that many times force is unavoidable. However, a carefully planned and carried out internal and criminal investigation into a use of force incident can not only exonerate an involved officer, but can promote public confidence in the actions of its law enforcement officers.