

**THE LEGAL AND JUSTIFIABLE
USE OF FORCE**

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Illinois Use of Force Statutes

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The Concept of Probable Cause:

Probable Cause means there are enough facts and circumstance to lead a police officer, in the light of his/her experience, to the reasonable belief that a person has committed, is committing, or is about to commit a crime. The officer must be able to state his/her "articulable suspicion" for the stop.

Probable Cause balances society's interest in crime control and an individual's right of locomotion --- the freedom to come and go as he/she pleases.

Probable Cause is a common-sense rule. It's day-to-day application rests mainly with officers on the street who often must make split second decisions. They do not have the luxury that professors or judges have to think deeply about technical matters.

According to Brinegar v. United States 338 U.S. 160:

"In dealing with probable cause, as the name implies, we deal with probabilities. These are not technical: they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

So, although officers cannot arrest on a hunch, whim, or mere suspicion, courts tend to accept facts as police see them:

"Police officers patrolling the streets do not pre-arrange the setting within which they operate. They do not schedule their steps in the calm reflective atmosphere of some remote law library. Events occur without warning and the police are required as a matter of duty to act as a reasonably prudent police officer would under the circumstances as those circumstances unfold before him/her." People v. Brown 248 N.E.2d 867.

The Concept of "Qualified Immunity":

Government officials performing discretionary functions generally are shielded from liability for civil damages if their conduct does not violate clearly established laws or constitutional rights of which a reasonable person would have known.

A qualified immunity analysis is a two-step process:

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.

When courts are looking at whether a police officer has violated a constitutional right, most often they are looking at violations of the fourth amendment. In other words, the courts are analyzing whether there was an unlawful "seizure" of the person who was being stopped, arrested, or being seized in some respect.

The application of qualified immunity does not depend upon an officer's subjective state of mind, but on whether a reasonable person in the officer's position would have known their actions were in line with clearly established legal principles.

Whether an officer was acting "reasonably" requires a balancing of two interests: the nature and quality of the intrusion of the individual's fourth amendment interests versus the countervailing governmental interests of providing law, order, and protection to its citizens.

In order to balance these two interests, the courts look at three things:

1. The severity of the crime at issue
2. The extent to which the suspect posed an immediate threat to the safety of the officers or others
3. Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

In determining whether reasonable force was used, the courts look at the extent of the force used compared to the circumstances confronted by the officer.

I. 720 ILCS 5/7-1 Use of Force in Defense of Person

A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony.

Cases on Use of Force in Defense of Persons:

Excessive Force Used During Arrest:

Officer testified that four officers got out of car with weapons drawn to confront the defendant. The testifying officer did not remember whether he identified himself as an officer. Defendant fled, was pursued, and defendant punched the officer. The defendant was then tased. The defendant testified that he did not know that his pursuers were police officers, that he ran because he was scared, and that he was punched and choked by one of the officers who caught him. The defendant was charged with resisting arrest.

The court ruled that the evidence supported an instruction of self-defense and use of excessive force due to the inability of the officer to recall whether the defendant was advised that those in pursuit were, in fact, police officers.

People v. Brown 88 N.E.3d 31

Self-defense is an affirmative defense requiring some evidence that:

1. Unlawful force was threatened against defendant or another
2. Defendant was not the aggressor
3. The danger of harm was imminent
4. The use of force was necessary
5. Defendant subjectively believed a danger existed requiring the use of force applied, and
6. Defendant's belief was objectively reasonable

If the State negates any of these elements of self-defense, the defendant's claim of self-defense must fail.

People v. Taylor 65 N.E.3d 514

Initial Aggressors:

A person seeking to avail himself of the defense of self-defense must not be the aggressor.

People v. Walker 374 N.E.2d 880

The affirmative defense of self-defense is unavailable where both parties fought willingly upon equal terms; however, a person who is not the initial aggressor has no duty to retreat.

In re T.W. 888 N.E.2d 148

II. 720 ILCS 5/7-2 Use of Force in Defense of Dwelling

(a) A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon a dwelling. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if:

(1) The entry is made or attempted in a violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to, him or another then in the dwelling, or

(2) He reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling.

Cases on Use of Force in Defense of Dwelling:

Plain-Clothes Police Officers:

The prosecution had no right to rely on the official occupation of a plain-clothes police officer where the officer wore no outward insignia of his profession and did not announce his occupation. The officer appeared after dark at the defendant's home to serve a warrant for his arrest. The officer pounded on the door, did not identify himself or that he was an officer. The defendant, believing his house was about to be invaded, shot and killed the officer. The court ruled that there was no evidence that the defendant knew that the defendant was an officer and, therefore, could reasonably believe that he was about to be the victim of a home invasion.

People v. Lavac 192 N.E. 568

Necessity of Force:

A person may use all of the force apparently necessary to repel any invasion of his home.
People v. Suerth 423 N.E.2d 1185

Reasonable Belief as to Necessity of Force:

If defendant had a reasonable belief that force was necessary to prevent an assault upon himself or another within the dwelling, he had the right to use deadly force.

People v. Morris 520 N.E.2d 390

Danger and Deadly Force:

A man in his own habitation may resist force with force and oppose unlawful entry by one attempting to enter in a violent manner, even to the extent of taking that trespasser's life. This is true even though circumstances do not justify the belief that there is actual peril of death or great bodily harm.

People v. Eatman 91 N.E.2d 387

III. 720 ILCS 5/7-3 Use of Force in Defense of Other Property

A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on or other tortious or criminal interference with either real property (other than a dwelling) or personal property, lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony.

Cases on Use of Force in Defense of Other Property:

Deadly Force:

Filling station employee, as representative of the owner, had the right to use reasonable force to terminate a trespass. However, in the absence of trying to prevent a forcible felony, he was not entitled to use such force that was likely to cause death or great bodily harm.

People v. Dillard 284 N.E.2d 490

Trespass:

In light of undisputed evidence that a tavern owner requested defendant to leave an upstairs dining room where a party was in session, the defendant became a trespasser. The owner then had the right to use reasonable force to terminate the trespass.

People v. Bradshaw 426 N.E.2d 345

Reasonable Belief:

A defendant's house was burglarized. The intruders then fled the burglary and went to their own home. Minutes later, the defendant entered the intruders' home and beat the intruders. The defendant claimed the beating was justified because of the affirmative defense of 'defense of property'. The court disagreed: The crime to defendant's home had already occurred. The defendant could not have the reasonable belief that his conduct was necessary to terminate the burglary. At that point, he should simply have called the police.

People v. Hicks 693 N.E.2d 373

IV. 720 ILCS 5/7-4 Use of Force by Aggressor

The justification described in the preceding sections of this Article is not available to a person who:

- (a) Is attempting to commit, committing, or escaping after the commission of a forcible felony; or
- (b) Initially provokes the use of force against himself, with the intent to use such force as an excuse to inflict bodily harm upon the assailant; or
- (c) Otherwise initially provokes the use of force against himself, unless:
 - (1) Such force is so great that he reasonably believes that he is in imminent danger of death or great bodily harm, and that he has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant; or
 - (2) In good faith, he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force, but the assailant continues and resumes the use of force.

Cases on Use of Force by Aggressor:

Withdrawal or Retreat After Being an Initial Aggressor:

An initial aggressor is not entitled to use deadly force in self-defense unless she has completely withdrawn from the altercation such that victim's actions constitute a separate aggression.

People v. Armstrong 653 N.E.2d 17

Escaping From Crime Scene:

Defendant entered a tavern and tried to kill victim. Defendant then fled the tavern. At that point, the defendant was a "fleeing felon" who was not entitled to use force in defending himself. Therefore, even if someone struggled with the defendant as he tried to leave or someone held out a knife to prevent defendant from leaving, those acts would not allow defendant to then claim self-defense as he attacked those people.

People v. Beacham 550 N.E.2d 559

Sufficiency of Evidence:

A finding that a murder defendant did not act in self-defense was sufficiently supported by the evidence: The defendant initiated the confrontation with the victim and he intended to use force which occurred in response to his provocation as an excuse to shoot and kill the victim.

People v. Tucker 537 N.E.2d 817

V. 720 ILCS 5/7-5 Peace Officer's Use of Force in Making Arrest

A peace officer, or any person who he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

- (1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and
 - (2) The person to be arrested has committed or attempted a forcible felony which involves the infliction or threatened infliction of great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.
- (b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid.

Cases on Peace Officer's Use of Force in Making Arrest:

PLEASE NOTE: THIS SECTION REFERS TO FORCE USED IN THE ACTUAL "TAKING" OF THE PERSON AT THE TIME OF ARREST. IT DOES NOT REFER TO FORCE USED WHEN SOMEONE IS ALREADY IN CUSTODY AND ATTEMPTS TO ESCAPE. FOR THAT, SEE 720 ILCS 5/7-9 BELOW.

Use of Force Must be Reasonable:

Illinois statute providing a peace officer is justified in the use of force which he reasonably believes to be necessary to effect an arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making an arrest does not authorize the unbridled use of force.

Boyle v. Torres 756 F.Supp.2d 983

Justification in Use of Force:

When a police officer believes that a suspect's actions place the officer, his partner, or those in the immediate vicinity in imminent danger or serious bodily harm, the officer can reasonably exercise the use of deadly force under the Fourth Amendment.

Muhammed v. City of Chicago 316 F.3d 680

Search Warrant Scenarios:

Under the totality of circumstances, it was reasonable for police officers executing a drug search warrant to shoot a resident of the home being searched. Officers knew that drug traffickers commonly use firearms to protect themselves and the resident had armed himself with a rifle which he refused to drop.

Sledd v. Lindsay 864 F.Supp. 819

The Act of Making an Arrest:

Police officer was pursuing a robbery suspect. The officer shouted "Halt! Police!" The suspect refused to submit to the arrest and, instead, lunged at the officer while holding a knife in his hand. The officer shot the suspect. The court said: The officer reasonably believed it necessary to use force likely to cause death or great bodily harm to prevent escape of a fleeing felon who was attempting to escape by use of a deadly weapon.

The court also rejected the notion that the officer was first required to fire a warning shot.

Fornuto v. Police Board of the City of Chicago 349 N.E.2d 52

VI. 720 ILCS 5/7-5.5 Prohibited Use of Force by A Peace Officer

- (a) A peace officer shall not use a chokehold in the performance of his or her duties, unless deadly force is justified under Article 7 of this Code.
- (b) A peace officer shall not use a chokehold, or any lesser contact with the throat or neck area of another, in order to prevent the destruction of evidence by ingestion.
- (c) As used in this section, "chokehold" means applying any direct pressure to the throat, windpipe, or airway of another with the intent to reduce or prevent the intake of air. "Chokehold" does not include any holding involving contact with the neck that is not intended to reduce the intake of air.

VII. 720 ILCS 5/7-6 Private Person's Use of Force in Making Arrest

- (a) A private person who makes or assists another private person in making a lawful arrest is justified in the use of any force which he would be justified in using if he were summoned or directed by a peace officer to make such arrest, except that he is justified in the use of force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or another.
- (b) A private person who is summoned or directed by a peace officer to assist in making an arrest which is unlawful is justified in the use of any force which he would be justified in using if the arrest were lawful, unless he knows that the arrest is unlawful.

VIII. 720 ILCS 5/7-7 Private Person's Use of Force in Resisting Arrest

A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful.

Cases on Private Person's Use of Force in Resisting Arrest:

General Rule:

A person has no right to resist even an unlawful arrest.

People v. Atherton 633 N.E.2d 1288

It is a criminal offense for a person to resist or obstruct the performance of an arrest by one known to be a police officer, though the arrest is unlawful and without warrant or probable cause.

Moore v. Chicago Police Board 355 N.E.2d 745

Since a police officer must make an initial determination whether there is probable cause to arrest and his office gives him authority to make an arrest, the accused may not physically resist the arrest. The accused may inquire as to its reason, point out an alleged mistake, or verbally protest/argue.

People v. Carroll 272 N.E.2d 822

A person may not use force to resist arrest by a known police officer, even if the arrest is unlawful. However, an exception to this rule is made when the officer uses excessive force.

People v. Wicks 823 N.E.2d 1153

Third Persons:

The statute prohibiting use of force in obstructing police officers in their performance of authorized acts is not limited to where a person is resisting his own arrest. It also applies to situations where an offender is interfering with the arrest of another.

People v. Villareal 604 N.E.2d 923

The Need for Officers to Identify Their Position/Authority:

In a Resisting a Peace Officer case, the jury must be instructed on self-defense when defendant is not aware of a police officer's identity or police officer-status.

People v. Williams 640 N.E.2d 981

IX. 720 ILCS 5/7-8 Force Likely to Cause Death or Great Bodily Harm

(a) Force which is likely to cause death or great bodily harm, within the meaning of Sections 7-5 and 7-6 includes:

(1) The firing of a firearm in the direction of the person to be arrested, even though no intent exists to kill or inflict great bodily harm; and

(2) The firing of a firearm at a vehicle in which the person to be arrested is riding.

(b) A peace officer's discharge of a firearm using ammunition designed to disable or control an individual without creating the likelihood of death or great bodily harm shall not be considered force likely to cause death or great bodily harm within the meaning of Sections 7-5 and 7-6.

X. 720 ILCS 5/7-9 Use of Force to Prevent Escape

- (a) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person.
- (b) A guard or other peace officer is justified in the use of force, including force likely to cause death or great bodily harm, which he reasonably believes to be necessary to prevent the escape from a penal institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

Illinois Legislative Committee Comments:

This section applies to use of force of those individuals already in custody.

"If an offender is effectively arrested and disarmed and now attempts to escape unarmed and without threatening death or great bodily harm to anyone, deadly force to prevent his escape is not authorized. Conversely, if an offender, in attempting escape, seizes an officer's gun and threatens to shoot anyone who opposes his escape, deadly force may be used to prevent the escape."

XI. 50 ILCS 727/1-10 Investigation of Officer-Involved Deaths

- (a) Each law enforcement agency shall have a written policy regarding the investigation of officer-involved deaths that involve a law enforcement officer employed by that law enforcement agency.
- (b) Each officer-involved death investigation shall be conducted by at least 2 investigators, or an entity or agency comprised of at least 2 investigators, one of whom is the lead investigator. The lead investigator shall be a person certified by the Illinois Law Enforcement Training Standards Board as a Lead Homicide Investigator, or similar training approved by the Illinois Law Enforcement Training Standards Board or the Department of State Police, or similar training provided at an Illinois Law Enforcement Training Standards Board certified School. No investigator involved in the investigation may be employed by the law enforcement agency that employs the officer involved in the officer-involved death, unless the investigator is employed by the Department of State Police and is not assigned to the same division or unit as the officer involved in the death.

- (c) In addition to the requirements of subsection (b) of this section, if the officer-involved death being investigated involves a motor vehicle accident, at least one investigator shall be certified by the Illinois Law Enforcement Training Standards Board as a Crash Reconstruction Specialist, or similar training approved by the Illinois Law Enforcement Training Standards Board or the Department of State Police, or similar training provided at an Illinois Law Enforcement Training Standards Board certified school.
Notwithstanding the requirements of subsection (b) of this section, the policy for a law enforcement agency, when the officer-involved death being investigated involves a motor vehicle collision, may allow the use of an investigator who is employed by that law enforcement agency and who is certified by the Illinois Law Enforcement Training Standards Board as a Crash Reconstruction Specialist, or similar training approved by Illinois Law Enforcement Training Standards Board, or similar certified training approved by the Department of State Police, or similar training provided at an Illinois Law Enforcement Training and Standards Board certified school.
- (d) The investigators conducting the investigation shall, in an expeditious manner, provide a complete report to the State's Attorney of the county in which the officer-involved death occurred.
- (e) If the State's Attorney, or a designated special prosecutor, determines there is no basis to prosecute the law enforcement officer involved in the officer-involved death, or if the officer is not otherwise charged or indicted, the investigators shall publicly release a report.

XII. 50 ILCS 727/1-25 Mandatory Drug and Alcohol Testing (Officer Involved Shooting)

- (a) As used in this Section, "officer-involved shooting" means any instance when a law enforcement officer discharges his or her firearm causing injury or death to a person or persons, during the performance of his or her official duties or in the line of duty.
- (b) Each law enforcement agency shall adopt a written policy regarding drug and alcohol testing following an officer-involved shooting. The written policy adopted by the law enforcement agency must include the following requirements:
 - (1) Each law enforcement officer who is involved in an officer-involved shooting must submit to drug and alcohol testing; and
 - (2) The drug and alcohol testing must be completed as soon as practicable after the officer-involved shooting but no later than the end of the involved officer's shift or tour of duty.

XIII. 50 ILCS 727/1-30 Internal Review of Officer-Involved Shootings

- (a) As used in this Section, "officer-involved shooting" means any instance when a law enforcement officer discharges his or her firearm causing injury or death to a person or persons during the performance of his or her official duties or in the line of duty.
- (b) Each law enforcement agency shall adopt a written policy for the internal review of officer-involved shootings. The written policy adopted by the law enforcement agency must include the following:
 - (1) Each law enforcement officer shall immediately report any officer-involved shooting to the appropriate supervising officer.
 - (2) Each law enforcement agency shall conduct a thorough review of the circumstances of the officer-involved shooting.
- (c) Each written policy under this Section shall be available for copying and inspection under the Freedom of Information Act, and not subject to any exemption of that Act.

United States Supreme Court:

Tennessee v. Garner 105 S. Ct. 1694 (1985)

Tennessee Statute:

"If, after notice of the intention to arrest a defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."

Facts:

On October 3, 1974 at 10:45PM, two Memphis police officers were dispatched to a burglary call. Officer Hymon went to the rear of the house as his partner radioed the station. Hymon witnessed someone running across the back yard. The fleeing suspect, Edward Garner, stopped at a six-foot-high chain-link fence. Hymon shined his flashlight on this suspect. Hymon could see his face and hands and was reasonably sure that Garner was unarmed. After Hymon ordered Garner to halt, Garner began to climb the fence. Believing that Garner would certainly flee if he scaled the fence, Hymon shot him. The bullet struck Garner in the back of the head. Garner died on the way to the hospital. Ten dollars and a purse taken from the burglarized home were found on Garner.

Garner's father filed a Civil Rights suit in Federal Court alleging excessive force was used.

U.S. Supreme Court Ruling:

Where a suspect poses no immediate threat to an 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.

The officer could not have believed that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or to others. The officer could not have reasonably believed that Garner --- young, slight, and unarmed -- posed any threat.

The U.S. Supreme Court concluded that "[A] police officer may not seize an unarmed, non-dangerous suspect by shooting him dead".

Graham v. Connor 490 U.S. 386 (1989)

Facts:

On November 12, 1984, Suspect Graham, a diabetic, felt the onset of an insulin reaction. He asked a friend to drive him to a nearby convenience store to purchase orange juice. Graham entered the store, saw a long line of customers, hurriedly left the store, and asked a friend to drive home.

Police Officer Connor became suspicious when he saw Graham hastily enter and leave the store.

Believing that something was amiss, the officer made an investigative stop on the car. The officer was told that Graham was suffering from a "sugar reaction". The officer ordered Graham and his friend out of the car while he called for backup. Graham got out of the car, ran around it twice, and then briefly passed out.

Additional officers arrived at the scene. An officer rolled Graham over and tightly cuffed his hands behind his back. Graham's friend plead with the police to get Graham some sugar. One officer responded "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the motherfucker but drunk. Lock the son-of-a-bitch up." The unconscious Graham was lifted onto the hood of the friend's car. Graham awoke and told the officers to look at his "diabetic decal" in his

back pocket. Graham was told to "shut up" and his face was shoved into the hood of the car. Four officers then threw Graham head-first into the back of a squad. Another friend approached Graham with some orange juice. The Officers prevented him from drinking it. A short time later, Officer Connor confirmed that Graham had done nothing wrong at the grocery store. Graham was then driven home and released.

Graham had received a broken foot, an injured shoulder, cuts on his wrists, and a bruised forehead. Graham filed a Civil Rights lawsuit alleging excessive force.

U.S. Supreme Court Ruling:

Under the Fourth Amendment, people have the right to "be secure against unreasonable searches and seizures." It is long recognized that "when police make an arrest or investigatory stop, they have the right to use some degree of physical coercion or threat thereof to effect it."

The ultimate question is whether the officers' actions are "objectively reasonable" given the facts and circumstances confronting them.

To determine whether an officer acted reasonably, we must look at:

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 is actively resisting arrest or attempting to evade arrest by flight
4. The manner of arrest

"Objectively Reasonable" means whether the officer acted reasonably based upon the facts of the case. It is irrelevant whether the officer had an underlying intent or motivation.

An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force.

Nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Scott v. Harris 433 F. 3d 807 (2007)

Facts:

In March 2001, a Georgia county deputy clocked defendant's vehicle travelling 73 mph in a 55 mile per hour speed zone. The deputy activated his lights and tried to pull over the defendant. Instead, the defendant pulled away. The defendant travelled mostly down a 2-way road at speeds exceeding 90 mph. The deputy called in his pursuit including a description of the defendant's car and its plate number.

Deputy Tim Scott heard the call and joined in the pursuit. At one point, the defendant pulled into a parking lot. Dep. Scott and other police vehicles boxed in the defendant. The defendant accelerated, struck Dep. Scott's squad, fled the lot, and proceeded down the 2-way highway.

On squad videotape, the viewer can see the defendant racing down narrow two-lane roads in the dead of night at shocking speeds. The defendant swerves around dozens of cars, cross the double yellow lines, and force cars traveling in both directions off the road to avoid being hit. The defendant runs through multiple red lights and often is driving in the wrong lanes of traffic. As the U.S. Supreme Court remarked: "The video resembles a Hollywood-style car chase of the most frightening sort, placing the police and innocent bystanders alike at great risk of serious injury" during this 10-mile chase.

Dep. Scott radioed his supervisor for permission to employ a "Precision Intervention Technique (PIT)" to cause the defendant to spin to a stop. His supervisor responded to "go ahead and take him out".

Instead, Scott applied his push bumper to the rear of the defendant's vehicle. The defendant lost control of his car, left the roadway, ran down an embankment, overturned, and crashed. The defendant was badly injured and rendered a quadriplegic. The defendant filed a lawsuit claiming the officer used excessive force.

Issue:

Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

Court Ruling:

Yes.

In resolving whether an officer has qualified immunity, we must look at two threshold questions:

1. Do the facts show that the officer violated a constitutional right?
2. If yes, the second question is whether the right was clearly established by virtue of the facts of the case.

In this case, there was no violation of the defendant's fourth amendment right. There is no question that there was a "seizure" of the defendant (i.e. a termination of the defendant's freedom of movement).

However, the question that needs to be answered: Whether Dep. Scott's actions were objectively reasonable.

The Court stated: It is clear the defendant posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. It was the defendant, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high speed flight that ultimately produced the choice between two evils that Dep. Scott confronted. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.

Plumhoff v. Rickard 572 U.S. 765 (2014)

Facts:

At midnight on July 18, 2004, an officer of the West Memphis, Arkansas Police Department stopped a Honda Accord for having only one operating headlight. The defendant, Donald Rickard, was the driver and he had a female accompanying him in the front passenger seat. The officer saw an indentation in the windshield of the car that was "the size of a head or basketball". The defendant denied that he had been drinking. The defendant appeared nervous and failed to produce his driver's license. The officer asked the defendant to step out of the car. Instead of complying, the defendant sped away. The officer gave chase and was soon joined by five other police cruisers including one driven by Sgt. Vance Plumhoff.

The pursuit occurred on eastbound Interstate 40 toward Memphis, Tennessee. While on I-40, the police unsuccessfully tried to stop the defendant with a "rolling roadblock". The defendant was swerving through traffic at speeds over 100 miles per hour.

The defendant exited I-40 in Memphis, made a quick right turn, and struck one of the pursuing squads. The defendant's car then spun out into a parking lot and struck Sgt. Plumhoff's cruiser. The defendant was now cornered. He put his car in reverse in order to escape. Sgt. Plumhoff and another officer got

out of their cars and pounded on the defendant's side window. The defendant struck another squad. Though the defendant's bumper was now flush against a police squad, the defendant started spinning his wheels and his car "was rocking back and forth" indicating that he was heavily accelerating. At this point, Sgt. Plumhoff fired three shots into the defendant's car. The defendant "reversed in a 180-degree arc" and "maneuvered onto" another street forcing officers to step out of the way to avoid getting struck by the defendant's car. As the defendant continued to "flee down the street", two other officers fired 12 shots towards the defendant's car, bringing the total number of shots fired to 15. The defendant lost control of his car and crashed into a building.

The defendant and his female companion both died from a combination of gunshot wounds and injuries suffered from the crash that ended the chase.

The defendant's daughter filed suit claiming the officers used excessive force.

Issues:

1. Whether the defendant's 4th amendment constitutional right was violated by being illegally 'seized' by the police?
2. Whether the police were unreasonable by firing 15 shots into the defendant's car?
3. Whether the police were unreasonable by firing shots into a car that was occupied by a second individual who was not involved in the defendant's illegal activities?

U.S. Supreme Court Ruling:

1. There was no constitutional violation by the officers. It is beyond dispute that the defendant's flight posed a grave public safety risk and that the police acted reasonably in using deadly force to end that risk.
2. The police were not unreasonable in firing 15 shots. It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop until the threat has ended. If lethal force is justified, officers are taught to keep shooting until the threat is over. We may have had a different conclusion if the defendant had been incapacitated by an initial shot, if the threat had ended, or if the defendant had clearly surrendered. But that is not what happened here.
3. The fact that the defendant had a female companion in the car with him does not change our analysis. Fourth amendment rights are personal rights that may not be vicariously asserted by a companion. "It was the defendant who put his companion in danger by fleeing and refusing to end the chase, and it would be perverse if his disregard for his companion's safety worked to his benefit."

The Supreme Court cases above involve use-of-force scenarios where an officer is attempting to seize or arrest a defendant.

What is the law regarding the use of force where an offender is not trying to evade arrest and has not committed a crime?

Hill v. Miracle (U.S. Court of Appeals for the Eastern District of Michigan)

Facts:

This case involved a medical emergency.

Corey Hill suffered a diabetic emergency due to low blood-sugar. Hill's girlfriend called 911. Four paramedics arrived at Hill's home. Hill was disoriented, agitated, and combative as the paramedics tried to prick his finger to check his blood sugar level. The paramedics eventually were able to test his level and found that it was a dangerously low 38 (normal is between 60 and 110). A level of 38 is considered a medical emergency that can lead to prolonged seizure and death.

Deputy Miracle arrived at some point in a support capacity after the blood sugar level was determined. Dep. Miracle was aware that low blood-sugar levels can cause a person to be disoriented and unaware of his surroundings.

Paramedics tried to insert an IV catheter into his arm to administer dextrose. Hill became increasingly combative and would not allow the insertion of the catheter. Finally, the catheter was inserted. Hill then hit one of the paramedics with his fist and ripped the catheter from his arm. Blood began spraying in the air from the open vein. Hill continued to kick, swing and swear at the paramedics as they tried to hold him down and stop the bleeding.

Dep. Miracle told Hill to "relax". Hill continued to get more violent. Dep. Miracle advised Hill that he was going to use his taser. Miracle then deployed his taser in drive-stun mode directly to Hill's right thigh. Hill calmed down, a catheter was inserted, dextrose was administered, Hill "became an angel" and apologized to everyone. Hill was taken to the hospital where his levels and vital signs were normal. Hill then sued the deputy and the Oakland County Sheriff's Office. His claim was that, as a result of the incident, he suffered burns to his right thigh and that his diabetes worsened.

Issue:

Whether the deputy sheriff used excessive force in tasing a combative and disoriented diabetic suffering a hypoglycemic episode so that attending paramedics could stabilize his life-threatening condition.

Court Ruling:

No.

The **Graham v. Connor** test should not be applied in this case. **Graham** addresses scenarios where the offender has committed a crime or is resisting arrest. Neither apply here.

The Court decided to create a test that assesses an officer's "objective reasonableness" during a medical emergency.

The Court: "Where an offender has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:

1. Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
2. Was some degree of force reasonably necessary to ameliorate the immediate threat?
3. Was the force used more than reasonably necessary under the circumstances (i.e. was it excessive)?

If the answers to the first two questions are "yes" and the answer to the third question is "no", then the officer is entitled to "qualified immunity."

Hill was facing a life-threatening situation. His mental state and combative actions posed an immediate threat to his own life. Additionally, Hill's constant assaults on the police with blood spraying from his vein posed an imminent threat to the EMS personnel and the Deputy.

The Court said "[T]he record reflects that Miracle acted in an objectively reasonable manner with the minimum force necessary to bring Hill under control, and his actions enabled the paramedics to save Hill's life. We conclude that a reasonable officer on the scene, without the 20/20 vision of hindsight, would be justified in taking the same actions as Miracle."

Armstrong v. Village of Pinehurst (U.S. Court of Appeals of the Fourth Circuit)

Facts:

Ronald Armstrong suffered from bipolar disorder and paranoid schizophrenia. He had been off his medications for five days and was poking holes through the skin on his legs "to let the air out". His sister convinced him to go to the hospital with her in Pinehurst, North Carolina. When Armstrong was being evaluated at the hospital, he became frightened and fled the hospital. The doctor stated that Armstrong was a danger to himself and issued involuntary commitment papers to compel his return to the hospital. Pinehurst police officers were called to aid in his return. In search of Armstrong were three Pinehurst officers, two hospital security guards, and Armstrong's sister.

Armstrong was found wandering around an active roadway. An officer convinced Armstrong to join him on a grassy roadside area. Armstrong then ate grass, dandelions, a piece of gauze, and put cigarettes out on his tongue while the officers awaited word that a judge had signed the commitment papers. When dispatch advised that the papers were completed, the six individuals surrounded Armstrong. Armstrong reacted by sitting down and wrapping himself around a four-by-four stop-sign post. As officers tried to pry his arms and legs from the post, he would not budge. Armstrong was advised that a commitment order had been signed. As everyone continued to plead with Armstrong to return to the hospital, he refused all requests.

30 seconds after Armstrong was advised that a commitment order was final, a lieutenant ordered a fellow officer to tase Armstrong. Officer Gatling drew his taser, set it to "drive stun mode", and told Armstrong that he would be tased if he did not let go of the post. The warning had no effect. Officer Gatling then tased Armstrong 5 separate times over a period of two minutes. Rather than have the desired effect, the tasing actually increased his desire to resist.

After the tasing ceased, the three officers and two guards pulled Armstrong from the post and laid him face down on the ground. Officers pinned Armstrong down by "placing a knee on his back and standing

on his back". As Armstrong was handcuffed, he continued to kick his legs at the officers. His legs were then shackled as well.

The officers stood up to collect themselves. Armstrong remained on the ground face down in cuffs and shackles. Armstrong was now motionless. When the officers turned him over, his skin had turned a bluish color and he was not breathing. CPR was performed and EMS was dispatched. All resuscitation efforts failed. Armstrong was pronounced dead at the hospital.

6 and 1/2 minutes elapsed between dispatch advising that the commitment papers were final and the officers radioing for EMS.

Issue #1:

Did the officers use excessive force in tasing an individual who was avoiding civil commitment by clinging to a pole?

Ruling #1:

Yes.

The government's interest in seizing Armstrong was to prevent a mentally ill man from harming himself. The justification for the seizure, therefore, does not vindicate any degree of force that risks substantial harm to the subject.

Officers who encounter an unarmed and minimally threatening person who is exhibiting conspicuous signs that he is mentally unstable must de-escalate the situation and adjust the application of force downward. Here, Armstrong was stationary, non-violent, and surrounded by people willing to help return him to the hospital. Non-compliance posed little danger or urgency since he merely clung to a pole in a seated position and refused to let go. Therefore, the use of force was objectively unreasonable given these circumstances.

The use of a taser is a proportional response only when deployed in a situation where a reasonable officer perceives some immediate danger that could be mitigated by using the taser.

"Physical resistance" is not the same as a "risk of immediate danger".

Issue #2:

Were the officers protected by Qualified Immunity in this case?

Ruling #2:

Yes.

Because the law was not clearly established at the time of this incident, the officers were not on notice that their actions were improper. Therefore, the officers were dismissed from the lawsuit.

Issues Relating to Use of Force:

Pre-Assault Indicators:

1. Overt Threats:
2. Non-compliance to verbal commands:
3. Non-compliance to non-verbal commands:
4. Suspect's body and hands:
5. Sudden uncontrolled, undirected, unanticipated movement by suspect:
6. Presence of other individuals:
7. Behavioral indicator of weapon concealment:
8. Outstanding warrant and/or prior criminal history (if known):

Variables That Courts Consider When Evaluating Use of Force:

1. Immediacy and severity of the threat to officers or others
2. The conduct of the individual being confronted, as reasonable perceived by the officer at the time
3. Officer/Subject factors: age, size, relative strength, skill levels, injuries sustained, level of exhaustion or fatigue, the number of officers available, the number of subjects present
4. The effects of drugs or alcohol
5. Subject's mental state or capacity
6. Presence or proximity of weapons or potentially dangerous devices
7. The degree to which a subject has been restrained and his ability to resist despite restraint
8. The availability of other options and their possible effectiveness
9. Seriousness of the suspected offense or reason for contact with the suspect
10. Training and experience of the officer
11. Potential of injury to the officers, suspects, or others
12. Whether the person is attacking the officer, resisting, or attempting to evade arrest
13. The risk and reasonably foreseeable consequences of escape

14. The need for immediate control of the subject or a prompt resolution of the conflict
15. Whether subject's conduct no longer appears to pose an imminent threat to the officer or others
16. Prior contacts with subject or awareness of his propensity for violence
17. Exigent circumstances

Quantum of Force:

The reasonably foreseeable effects and injuries that could result from a specific force option based on the totality of circumstances. Quantum of force takes into consideration not only the force option itself but time, place, circumstances confronting the officer, and the injury that may result from its use. As an example, the courts will analyze the location of a defendant when a taser is deployed. A defendant who is on a raised platform, on cement, or near a busy thoroughfare will be viewed differently than a defendant standing on a grassy area. Obviously, the potential for injury is much less in the latter scenario.

Force Continuums:

Control Options –

1. Officer Presence
2. Verbal Control
3. Pressure Point Techniques
4. Joint Manipulations
5. Restraint Devices
6. Stunning Techniques
7. Punches, Strikes, Kicks
8. Takedowns
9. (Less Lethal) Chemical Agents
10. Impact Weapons
11. Taser/ECD's
12. Canine
13. Deadly Force/Firearms

Continuums can be misleading. They suggest that an officer must move through a series of force options in order to utilize a higher level of force.

There is no mandate in the law to run through a laundry list of different force options. There is no mandate in the law that preordains a sequence of actions prior to the use of deadly force. The question is: Was the officer objectively reasonable in his perception that the individual posed a reasonable risk of death or great bodily harm to the officer or others.

In fact, if deadly force is reasonable and justifiable from the beginning, there is no requirement that an officer first utilize verbal control, empty-hand techniques, or intermediate weapons before using deadly force. An officer may immediately resort to any force option that is objectively reasonable and necessary to counter force/resistance.

Use of Intermediate Weapons

A. Use of Physical Force, Batons, or Nightsticks

Cotton v. Basic 793 F. Supp. 191 (Southern District of Indiana)

Facts:

Police were called to a domestic disturbance. The defendant was a schizophrenic and off his medication. As the officers met the defendant, he was armed with two large chunks of concrete. A witness stated that the defendant was aggressive against the police, was "strong as hell", refused to drop the concrete, and put one of the officers in a "bear hug". As the defendant and officer fell to the ground, the defendant got more physically aggressive. The officers struck the defendant with nightsticks and flashlights. When the fight was over, the defendant was missing an eye.

Issue:

Did the officers use excessive force by striking the defendant with intermediate weapons?

Court Ruling:

No.

"A police officer need not suffer brutalizing injury before he inflicts it. Rather, the restraint on an officer's use of force is that it must be reasonable".

Kellough v. Bertrand 22 F. Supp.2d 602 (Southern District of Texas)

Facts:

The defendant, an armed robbery suspect, was stopped while driving down the road. The defendant was ordered out of the car. He did so in a non-threatening manner. The defendant was told to lie face down and he refused to do so. Instead, the defendant demanded to know what he had done. An officer did a "sweep kick" and knocked the defendant's legs from under him. As he fell to the ground, another officer struck him in the arm with a flashlight.

Issue:

Whether this use of an intermediate weapon was a use of excessive force?

Court Ruling:

No. But.....

1. The defendant's refusal to follow the officer's order could cause a reasonable officer to employ some force to make him comply.
2. Though the Court was "troubled" by the strike to the arm, it **occurred before the armed robbery suspect was handcuffed and secured.**

Lewis v. Downs 774 F.2d 711 (Western District of Tennessee)

Facts:

The defendant tried to prevent two officers from arresting his mother. The defendant confronted the officers with an iron rake. One officer drew a gun and told him to drop it. He did. The officers handcuffed the defendant and arrested him for obstructing. As the defendant was subdued and being led away, one of the officers kned him in the groin and hit him in the mouth with a nightstick. The defendant needed numerous stitches for his facial injury.

Issue:

Whether the use of the nightstick exhibited excessive force?

Court Ruling:

Yes.

The Court: "**Striking the head with a nightstick and kicking the groin of an already-restrained man is plainly excessive. This conduct is so disproportionate, harmful, and demeaning as to offend even a person of hardened sensibilities**".

Dixon v. Richer 922 F.2d 1456 (Federal District of Colorado)

Facts:

The defendant damaged some property at a Chinese Restaurant and fled the scene in an automobile. Shortly after, police stopped the defendant. The defendant was ordered out of the car and did so. The defendant was told to place his hands on the hood of the car and spread his legs. He did so. The defendant followed every command and provided no resistance. The officers then hit the defendant in the stomach with a flashlight, kicked him twice in the legs, forced him to the ground, and then beat and choked him.

Issue:

Whether the use of the flashlight and beating of the defendant exhibited excessive force?

Court Ruling:

Yes.

Reasonableness depends not only on when a seizure is made but how it is carried out. No officer could reasonably believe that this conduct did not clearly violate the Fourth Amendment's mandate against "unreasonable searches and seizures".

B. Tasers/Electronic Control Devices (ECD)

1. Taser Use: Minor Offense, No Active Resistance

Yates v. Terry 817 F.3d 877 (Fourth Circuit Court of Appeals - 2016)

Facts:

A motorist passed a police officer who was in his police cruiser in a stationary position. The officer pursued the motorist, activated his lights, and pulled the vehicle over. The case is unclear as to why the officer was making the stop. The officer requested a driver's license. The motorist said he did not have his license but did have his military ID (he was a Sergeant in the U.S. Army). The motorist was ordered out of the car and to place his hands on the car. He did so. The motorist asked for an explanation for the stop. The officer refused to provide one. The officer then deployed his taser. The motorist went to the ground. While incapacitated on the ground, the officer deployed it a second time. When the motorist told his brother to call for the officer's commanding officer, the taser was deployed a third time. The motorist was then arrested for "excessive noise" and "disorderly conduct".

Issue:

Whether the use of the taser, under these circumstances, was excessive force?

Court Ruling:

Yes.

1. The infractions committed by the motorist were minor and non-violent.
2. The motorist presented no threat to the officer's safety during any of the taser deployments.
3. The motorist was not resisting or attempting to flee during the deployments.

The officer should have used the taser only if he was confronted by an exigency that created an immediate safety risk that could reasonably be cured by deploying the taser.

2. Taser Use: Minor Offense, Active Resistance

Lash v. Lemke (United States Court of Appeals, District of Columbia Circuit – 2015)

Protesters established an encampment in Washington, D.C. The purpose of the protest was "Occupy D.C." U.S. Park Police entered the area and announced that, the following day, they would be enforcing anti-camping regulations. The officers posted signs giving all protesters notice that they would have to evacuate the area by the following morning. The officers' entrance was greeted with great hostility. Defendant, Ryan Lash, challenged the officers' right to enter the encampment, swore extensively at the police, and began to violently tear down the signs that the officers had posted. As Lash walked away, the officers followed him. Lash then confronted the officers and exhibited aggressive movements towards them. As two officers attempted to subdue Lash, he pulled his arms away, struggled with the police, and resisted their actions. A third officer deployed her taser. Lash fell to the ground and was handcuffed. He was charged with "Disorderly Conduct". Lash sued the police for excessive force.

Issue:

Whether the use of the taser exhibited excessive force?

Court Ruling:

No.

Based on the evidence submitted, “we know with certainty that the defendant resisted arrest”. The court further explained: “There is no clearly established right for a suspect who actively and violently resists arrest and refuses to be handcuffed to be free from a Taser application”.

3. Taser Use: Active Resistance, Lawful at Outset, Excessive During Deployment

Meyers v. Baltimore County (Fourth Circuit Court of Appeals – 2013)

Facts:

Officers received a call to a domestic disturbance. The suspect had been striking his father and brother and was now hiding inside of the home. When officers arrived, the suspect was standing in the house with a baseball bat. The suspect was repeatedly told to drop the bat. He refused. One officer deployed his taser to no effect. The suspect advanced towards officers with the bat raised. He was tased a second time and the suspect dropped the bat but continued forward towards the police. The suspect was tased a third time and he fell to the floor. Three officers sat on his back. With the suspect now subdued, he was tased a fourth time. The taser was then switched to “stun mode” and applied six more times during a one-minute time period. The suspect entered cardiac arrest and died. An excessive force lawsuit followed.

Issue:

Whether the repeated taser deployment exhibited excessive force?

Court Ruling:

Yes.

1. The first three deployments were constitutionally reasonable. The court: “The suspect was acting erratically, holding a bat that he would not relinquish, and continued to advance on the officers. He posed an immediate threat to the officer’s safety and was actively resisting arrest”.
2. Taser deployments four through ten were excessive: “After the suspect fell to the floor, he was no longer actively resisting arrest and did not pose a continuing threat to officer safety. But the officer continued to tase the suspect until he was unconscious. This was an unnecessary, gratuitous, and disproportionate use of force to seize a secured, unarmed citizen”.

Basic Principles of Taser Use:

1. The deployment of a taser is considered by the courts as a “serious use of force” that is designed to inflict a “painful and frightening blow” to the suspect.
2. An officer should avoid deploying a taser in cases involving minor offenses (“low government-interest seizures”) where there is no immediate danger to the officer or another.
3. A taser may be constitutionally deployed in response to a perceived or actual threat to the officer or another, an actively resistant or combative suspect, or a suspect fleeing from a violent crime.
4. Ensure each application/cycle of the device can be independently justified.
5. Taser deployment must immediately cease when the subject no longer presents a threat to the officers or another.

C. OC Spray/Chemical Agents

Young v. County of Los Angeles 655 F.3d 1156 (2011)

Facts:

A 46-year-old man was driving his truck to the gym. A police officer stopped him due to the driver’s failure to wear a seat belt. The man was cooperative and respectful. He provided his driver’s license, proof of insurance, but could not find his registration. The officer went back to his vehicle to write a citation. The man found his registration form, got out of his truck, and handed it to the officer. The officer told the man to get back in his truck. The man sat on a curb with some vegetables and stated he wanted to sit outside and eat his food. The officer walked behind the man and emptied his pepper spray into the man’s face. As the man stood up and protested being sprayed, the officer pulled out a baton and repeatedly struck the man in the body.

Issue:

Whether the deployment of pepper spray was, by itself, excessive force?

Court Ruling:

Yes.

This motorist was being stopped for a minor traffic offense, was not resisting arrest, and posed no threat to the officer or to the public safety. While pepper spray is less severe than deadly force, it presents a significant intrusion upon a person’s liberty. Given these

circumstances surrounding a seat belt violation, this was clearly a showing of excessive force.

Shreve v. Jessamine County Fiscal Court 453 F.3d 681 (2006)

Facts:

Police were executing a warrant on the home of a woman. The woman was in a closet underneath some coverings. The officers incapacitated her with pepper spray and struck her with a baton. The woman claimed that she was only "passively" resisting and that the force used was improper.

Issue:

Whether the use of pepper spray was an excessive use of force?

Court Ruling:

No.

The woman was hiding under a blanket in a closet. The police could reasonably believe that she was planning an "ambush" on the officers. The use of pepper spray was not excessive given the threat to officers and the potential for danger.

Padula v. Leimbach 656 F.3d 595 (2011)

Facts:

A motorist was driving erratically down the road, pulled into the parking lot of a scrap yard, drove the wrong way down a one-way alley, and pulled onto a car scale. When police approached the person, he was speaking gibberish and was incomprehensible. The police believed the motorist to be driving under the influence. Unknown to the police, the person was suffering from a diabetic reaction. As the police pulled the man out of the car, he flailed at the police and resisted their requests. The police sprayed him with a chemical agent. A paramedic arrived and could see that the man was suffering from hypoglycemia. He was taken to the hospital where he later died.

Issue:

Whether the use of the spray was excessive force?

Court Ruling:

No. The court: "Our analysis is whether the police acted reasonably under the fourth amendment. Clearly they did. The officers could reasonably believe, based on how the motorist drove and how he acted towards uniformed police, that he was intoxicated. His subsequent resistance to the police justified the use of the chemical agent".

Basic Principles of Chemical Agent Use:

1. Chemical sprays should not be used in situations that would not require the use of physical force.
2. Chemical spray may be used to gain/maintain control of persons who are actively resisting arrest or lawful custody, exhibiting active aggression, or to prevent persons from physically injuring themselves, officers, or others.
3. Chemical spray may be used in arrest or custodial restraint situations where physical presence and/or verbal commands have not or would not be effective in overcoming physical resistance.

Documenting Your Use of Force:

Poor incident documentation leads to failed prosecutions, unnecessary exposure to civil litigation, and unfavorable verdicts in those civil lawsuits.

In "Use of Force" cases, the officer must ensure that the statement accurately documents all pre-event, event, and post-event circumstances surrounding the confrontation.

General non-specific wording can lead to confusion and devastating cross-examinations by opposing counsel.

Avoid vague references: The suspect made a suspicious move". Instead, be specific: "The suspect reached under the couch."

Avoid: "The suspect became combative". Instead, describe specifically the physical movements of the suspect.

Remember: If a phrase or statement is unclear and can be construed one of two ways, the opposing attorney will always presume the reading that subverts your theory of the case.

Towards that end, factors that you should keep in mind when documenting your use of force:

1. Pre-Event Details:
 - a. What prompted your response to the scene? Call for service? Flag down? Personal observation of events?
 - b. The details of the location: Who, what, when, where, why, how.
 - c. How was officer(s) dressed. Description of vehicle (if any) that officer was in.
 - d. What drew officer's attention to suspect?
 - e. Suspect's appearance, mannerisms, movements, words spoken, weapons present, objects nearby that could be utilized as a weapon, suspect's surroundings, number of allies with suspect.
 - f. Commands given (if any) to suspect.
 - g. Suspect's response/reaction to commands, movements, directions to others.
2. Reasonable suspicion/probable cause that developed prior to the seizure or force response. Articulate every fact, detail, or element to support the action that you were about to take.
3. Pre-Assault Indicators:

Explain in detail the specific circumstances confronting you.
Those factors will incorporate those outlined above in "Variables That Courts Consider When Evaluating Use of Force".
4. Details of the suspect's reaction to officer:

The **suspect is the one who chooses not to comply** with the officer's demands or requests. This non-compliance is what compels the officer to use a force option to affect compliance, arrest, prevent escape, or overcome the resistance of the suspect.
5. The Event:

Why did the officer use force?

 - a. Severity of the crime
 - b. Threat to officer or others
 - c. Level and duration of resistance
 - d. Number of officers

- e. Number of suspects
 - f. Proximity to weapons
 - g. Size and strength differentials
 - h. Injury or exhaustion of officer
 - i. Details of the force option used
 - j. Manner that force option was used
 - k. The effect or lack of effect of the force option
6. Each officer present for the incident must specifically state what they observed and what they did in response to those observations.
7. Post-Incident Actions:
- a. Location of suspect
 - b. Assistance provided by officer(s)
 - c. Calls for additional assistance
 - d. Was medical treatment provided? By whom? What treatment was provided?
 - e. Manner of transport. Facility to where suspect transported?
 - f. Next steps taken by officer
8. Supervisory Review of investigation and reports
- a. If feasible, partner with your prosecutor's office to establish a contact person (prosecutor) from that office dedicated to use-of-force incidents.
 - b. Utilize your prosecutor for the issuance of subpoenas, overhears, or search warrants as they become necessary.
 - c. Utilize your prosecutor to have access to the Grand Jury to secure truthful testimony from critical witnesses.
 - d. Hold regular meetings between your investigative team and the prosecutor to review progress, resolve problem issues, determine necessary follow-up, and to review the status of the investigation.
 - e. Guard the use-of-force investigation from becoming intertwined with any aspect of an administrative investigation. This will ensure against any Garrity immunity taints.
 - f. Submit your case file to the prosecutor as soon as practical once the investigation has concluded.
 - g. Avoid the dissemination of information to the media or public before the conclusion of the case. Under the Illinois Freedom of Information Act, the following information is exempt from public disclosure: Records in the possession of a law enforcement agency for law enforcement purposes to the extent that disclosure would interfere with pending law enforcement proceedings conducted by any law enforcement agency that is the recipient of the request. 5 ILCS 140/7
 - h. If the suspect survived the incident and is charged with a criminal offense, the primary officer(s) who utilized the use of force should not testify in any preliminary hearing or grand jury proceedings.
If the suspect did not survive the incident, the primary officer(s) who utilized the use of force should not testify in any coroner's inquest proceedings.

THE INVESTIGATION INTO AN OFFICER'S USE OF FORCE:

Garrity Issues: "BEING STUCK BETWEEN A ROCK AND THE WHIRLPOOL"

Garrity v. New Jersey 385 U.S. 493 (1967)

Facts:

Six police officers worked in various jurisdictions in the State of New Jersey. One of the officers was Chief of Police Edward Garrity. Garrity, along with the other officers, was involved in a ticket-fixing scandal where officers would void or dismiss tickets for family members and friends. When the scandal broke, the officers were called upon to speak with their superiors.

When the officers were individually spoken to by their employers, they were advised:

1. Anything said could be used in a criminal proceeding.
2. The officer had the privilege to refuse to answer a question if the answer would tend to be self-incriminatory.
3. Refusal to answer a question would be cause for removal from office.

No immunity was granted to any of the officers. Each officer answered the questions posed to them. Many of the answers incriminated each officer. Each officer was charged with Conspiracy to Obstruct the Administration of the New Jersey Traffic laws.

Each officer was convicted. The officers appealed their convictions to the U.S. Supreme Court.

Issue:

Whether the State can use the threat of discharge against a government employee to secure incriminating evidence against that government employee?

U.S. Supreme Court Ruling:

No.

The threat of a severe sanction for failing to answer questions that could incriminate an officer constitutes unconstitutional coercion in violation of the Fifth Amendment. The officers were given the choice to either forfeit their jobs or incriminate themselves. The officers were under duress when they had to choose between these two options.

Gardner v. Broderick 392 U.S. 273 (1968)

A public employer cannot dismiss an employee solely for refusal to waive his Garrity rights if that refusal derives from the threat of adverse job action if answers are not provided.

Uniformed Sanitation Men Association v. Commissioner of Sanitation (Sanitation I) 392 U.S. 280 (1968)

Facts:

An investigation was commenced involving 15 employees of the New York City Department of Sanitation. The investigation involved claims that the employees were not charging cartmen for the use

of city facilities. Instead, they charged, and kept, the monies of fees that they did charge for their own services.

The employees were brought before the City Commissioner and advised that if they refused to testify about their official conduct on the grounds of self-incrimination, they would be fired. The employees refused to testify and were fired.

Issue:

Whether this violated the employees Fifth Amendment right against self-incrimination?

U.S. Supreme Court Ruling:

Yes.

A public employer cannot dismiss employees solely for exercising their Fifth Amendment right and refusing to incriminate themselves. Public employees are entitled, like all other persons, to the benefit of the constitutional privilege against self-incrimination. Therefore, they may not be faced with proceedings that present them with a choice between surrendering their constitutional rights or their jobs.

Uniformed Sanitation Men Association v. Commissioner of Sanitation (Sanitation II) (1970)

Facts:

As a result of the Supreme Court opinion in "Sanitation I" (above), the Department of Sanitation employees who had been terminated were reinstated to their jobs.

The day they returned to work, they were told to appear before Department of Sanitation management.

They were informed:

1. That any information that they provided could not be used against them in a criminal proceeding (i.e. Use Immunity)
2. However, that they could be subject to disciplinary action for refusing to answer questions relating to the performance of their duties.

The employees refused to answer any questions.

The employees were, once again, terminated from their jobs.

Issue:

Whether this violated the employees' Fifth Amendment right against self-incrimination?

Holding:

No.

If an employee receives his Garrity rights (the employee is advised that he has immunity from a criminal prosecution for any statements made in that interview) and the employee still refuses to answer, the employee can be terminated for refusing to answer the administrative investigation questions. Once use immunity in a prosecution is ensured, the public employee can no longer refuse to cooperate in his employer's administrative (internal) investigation.

Kastigar v. United States 406 U.S. 441 (1972)

Facts:

Two government employees were subpoenaed before a United States grand jury to testify about their activities while public employees. Before their testimony, the government granted the employees use immunity so that their statements could not be used against them in a criminal prosecution.

The employees appeared before the grand jury and refused to answer any questions.

The district judge held both employees in contempt and placed them in jail.

Issue:

Whether testimony can be compelled from government employees by granting use immunity?

U.S. Supreme Court Ruling:

Yes.

Granting use immunity is sufficient to compel a government employee to testify.

For the government to subsequently prosecute an employee for a criminal offense, the prosecution must show that the evidence against that employee is derived from a legitimate source that is wholly independent of the compelled testimony.

THE BOTTOM LINE of GARRITY v. NEW JERSEY:

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.

Garrity means that any evidence provided by a public officer by reason of being coerced under threat of dismissal cannot be used in a criminal prosecution...nor can evidence derived from the coerced statement be used against the officer.

As the Supreme Court said in Garrity: "The choice imposed upon the officers to either forfeit their jobs or to incriminate themselves constituted coercion. **Police officers are not relegated to a watered-down version of constitutional rights.**"

Remember that the public employee can still be prosecuted for a criminal offense so long as the evidence used was obtained from an independent source unrelated to their compelled testimony.

Any sharing of information obtained in an administrative questioning will "taint" the criminal investigation. If any taint occurs, the prosecution will have a difficult burden of proving that none of the evidence used in the criminal prosecution was obtained from the administrative investigation.

The best 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, on the other hand, there has been no compelled statement given by the employee in an administrative investigation, there is nothing that could be disclosed to the criminal investigation (and thus no taint).

A Garrity Warning should include this language:

You are being questioned as part of an internal and/or administrative investigation. You will be asked a series 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.

The Uniform Peace Officers' Disciplinary Act

Illinois law regarding Peace Officers' rights in peace officer inquiries, investigations, interrogations, and administrative proceedings.

All Peace Officer interrogations shall be conducted under **50 ILCS 725/3.1 through 3.11** of The Uniform Peace Officers' Disciplinary Act:

50 ILCS 725/3.1 Place of Interrogation

The interrogation shall take place at the facility to which the investigating officer is assigned, or at the precinct or police facility which has jurisdiction over the place where the incident under investigation allegedly occurred, as designated by the investigating officer.

50 ILCS 725/3.2 Disclosure of information to subject of interrogation regarding nature of investigation and complainants

No officer shall be subjected to interrogation without first being informed in writing of the nature of the investigation. If an administrative proceeding is instituted, an officer shall be informed beforehand of the names of all complainants. The information shall be sufficient as to reasonably apprise the officer of the nature of the investigation.

50 ILCS 725/3.3 Time of Interrogation

All interrogations shall be conducted at a reasonable time of day. Whenever the nature of the alleged incident and operational requirements permit, interrogations shall be conducted during the time when the officer is on duty.

50 ILCS 725/3.4 Disclosure to subject of interrogation of officer in charge, interrogators and others present

The officer under investigation shall be informed in writing of the name, rank and unit or command of the officer in charge of the investigation, the interrogators, and all persons who will be present on the behalf of the employer during any interrogation except at a public administrative proceeding. The officer under investigation shall inform the employer of any person who will be present on his or her behalf during any interrogation except at a public administrative hearing.

50 ILCS 725/3.5 Duration of interrogation sessions

Interrogation sessions shall be of reasonable duration and shall permit the officer interrogated reasonable periods for rest and personal necessities.

50 ILCS 725/3.6 Abusive and offensive language prohibited at interrogation

The officer being interrogated shall not be subjected to professional or personal abuse, including offensive language.

50 ILCS 725/3.7 Record of interrogation; transcript

A complete record of any interrogation shall be made, and a complete transcript or copy shall be made available to the officer under investigation, without charge and without undue delay. Such record may be electronically recorded.

50 ILCS 725/3.8 Admissions; counsel; verified complaint

- (a) No officer shall be interrogated without first being advised in writing that admissions made in the course of the interrogation may be used as evidence of misconduct or as the basis for charges seeking suspension, removal, or discharge; and without first being advised in writing that he or she has the right to counsel of his or her choosing who may be present to advise him or her at any stage of any interrogation.
- (b) Anyone filing a complaint against a sworn peace officer must have the complaint supported by a sworn affidavit. Any complaint, having been supported by a sworn affidavit, and having been found, in total or in part, to contain knowingly false material information, shall be presented to the appropriate State's Attorney for a determination of prosecution.

50 ILCS 725/3.9 Right to counsel; presence of representative of collective bargaining unit

The officer under investigation shall have the right to be represented by counsel of his or her choosing and may request counsel at any time before or during questioning. When such request for counsel is made, no interrogation shall proceed until reasonable time and opportunity are provided the officer to obtain counsel.

If a collective bargaining agreement requires the presence of a representative of the collective bargaining unit during investigations, such representative shall be present during the interrogation, unless this requirement is waived by the officer being interrogated.

50 ILCS 725/3.10 Admissions or confessions obtained in violation of law

Admissions or confessions obtained during the course of any interrogation not conducted in accordance with this Act may not be utilized in any subsequent disciplinary proceeding against this officer.

50 ILCS 725/3.11 Polygraph or chemical tests

In the course of any interrogation no officer shall be required to submit to a polygraph test, or any other test questioning by means of any chemical substance, except with the officer's express written consent. Refusal to submit to such tests shall not result in any disciplinary action nor shall such refusal be made part of his or her record.

50 ILCS 725/7 Retaliatory actions prohibited

No officer shall be discharged, disciplined, demoted, denied promotion or seniority, transferred, reassigned or otherwise discriminated against in regard to his or her employment, or be threatened with any such treatment as retaliation for or by reason of his or her exercise of the rights granted by this Act.

The 10 Myths and Defense Attacks on Police Use-of-Force Decisions:

1. The officer should have used the minimal amount of force necessary to seize the defendant

Remember:

In Scott v. Heinrich 39 F.3d 912, citizens called police regarding a “strange or crazy man” staggering and firing a gun in a two-story apartment building. Police were directed to the man’s apartment. When the police announced their presence and knocked, the door opened. Officers saw a “long gun”. One officer fired a round. Another officer thought the shot was fired by the defendant and, in response, shot and killed the defendant.

The defendant’s widow filed suit and claimed that officers should have used “alternative means of confronting the defendant”.

The Court addressed this argument:

Requiring officers to find and choose the least intrusive alternative would require them to exercise “superhuman judgment”.

“Under the fourth amendment, the appropriate question is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. In the heat of battle with lives in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to subjectively ascertain the least intrusive alternative and choose that option and that option only. That would inevitably induce tentativeness by officers and deter police from protecting the public and themselves. It would also cause courts to endless second-guessing of police decisions made under stress and subject to the exigencies of the moment”.

2. The Officer had wrongful or ill-intent against the defendant

Remember:

Good intentions cannot turn unreasonable force into reasonable force.

Bad intentions cannot turn reasonable force into unreasonable force.

3. The defendant's mental capacity was diminished by reason of drugs, alcohol, or mental illness

Remember:

It requires very little to be dangerous. A defendant can often make a split-second irrational decision without a moment's notice to his victim.

4. Facts discovered post-incident show that the use-of-force was unjustified

The defense will focus on facts like (a) the offender had no weapon, or (b) the offender did not have a pending warrant for his arrest, or (c) the wrong house was searched.

Remember:

The United States Supreme Court has stated that officers are not required to be right, just reasonable. When we measure reasonableness, we look at the officer's actions based upon the information that he/she possessed at the time of the incident.

5. The officer violated departmental policy

Remember:

42 USC 1983 protects plaintiffs from Constitutional violations, not violations of departmental policy.

6. The officer's pre-seizure conduct either provoked, allowed, or created the threat

Remember:

The Fourth Amendment applies to "seizures", not events outside of a "seizure".

Graham v. Connor focuses on the facts confronting the officer at the time the decision is made to use force.

In Plakas v. Drinski, the Indiana Federal Appellate court reviewed an officer-involved-shooting of a man holding a fire-place poker while everyone was in the middle of a field. The court declined to review the officer's actions preceding the deadly confrontation to determine if the actions were proper. The court said that to do so "would nearly always reveal that something different could have been done if the officer knew the future before it occurred".

The court concluded: "All such cases begin with a decision of a police officer to do something to help, to arrest, to inquire. If the officer had decided to do nothing, no force would have been used. In this sense, the officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing".

For an officer's pre-seizure conduct to become relevant, the officer has to intentionally or recklessly or unreasonably provoke the defendant – which itself is a constitutional violation.

7. The officer was under a legal obligation to allow the defendant to escape or to effect arrest by less provocative means

The Plakas Court: "Our jurisprudence does not require our courts to inquire what other means are available to effectuate this seizure. The only relevant inquiry is whether, at the time deadly force is used, the officer has probable cause to believe the suspect poses a threat of death or serious physical harm either to the officer or others".

8. The officer fired an excessive amount of shots which proves unreasonableness and excessive force

Even if the heart is struck by a bullet, there is generally enough residual oxygen in the brain to support full and complete voluntary action for 15-20 seconds.

Again, the issue is whether the officer reasonably believed that he/she or another was in imminent fear of death or great bodily harm.

9. The officer should have fired a warning shot that would have dispersed the threat

Remember:

There is no pre-ordained sequence of lesser force actions prior to the use of deadly force.

Dangers of firing a warning shot:

1. It is haphazard – it could injure innocents
2. It can lead to unintended consequences – it may galvanize a bad guy into action

Many Federal and State agencies have instituted policies to not utilize warning shots.

Be aware of your departmental mandates regarding the utilization of warning shots.

10. "The Escaping Felon" was not a threat to the officer

Response:

1. A fleeing dangerous defendant poses a danger to pursuing police and any citizen he may encounter
2. From the perspective of the officer:
 - (a) Flight is to gain a tactical advantage
 - (b) The defendant can shoot as he runs
 - (c) Defendant can shoot from behind cover
 - (d) Defendant can attack perimeter officers by surprise
 - (e) Defendant could take a hostage
 - (f) Defendant can force entry into homes/properties
 - (g) Defendant can escape to later harm others

