

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

Top portion of form to be completed by the Provider

It is preferred that the form is pre-printed with the attendees name and bar number.

Provider Name: Ventura County District Attorney's Office
Provider Number: 1130
Title of Activity: Officer Involved Shootings
Date(s) of Activity: February 12, 2018
Time of Activity: 10:00 a.m. to 12:00 p.m.
Location of Activity (City/State): Ventura, CA

This Activity qualifies for: Participatory Self-Study
Total California MCLE Credit Hours for the above activity: 2.00 hours, including the following sub-field credits:

- Legal Ethics: _____
- Recognition and Elimination of Bias: _____
- Competence Issues: _____

Bottom portion of form to be completed by the Attorney after participation in the above-referenced activity

By signing below, I certify that I participated in all, or some*, of the activity described above and am therefore entitled to claim the following California MCLE credit hours:

Total California MCLE Credit Hours: _____, including the following sub-field credits:

- Legal Ethics: _____
- Recognition and Elimination of Bias: _____
- Competence Issues: _____

(You may not claim credit for the subfields above unless the provider is granting credit in those areas above.)

Print Your Name (clearly): _____

Your California State Bar Number: _____

Signature: _____

* partial participation hours must be pro-rated



**Justice System Integrity Division
J.S.I.D.**

Shannon Presby, Head Deputy
Sean Hassett, Assistant Head Deputy
Amy Pentz, Deputy District Attorney
David Reinert, Deputy District Attorney



Justice System Integrity Division

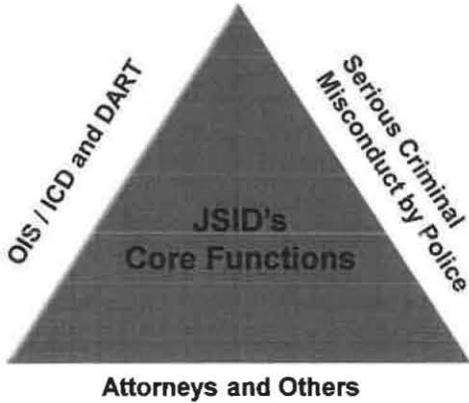
- Overview of JSID
- OIS and ICD Investigations
- Legal Overview
- Emerging Issues

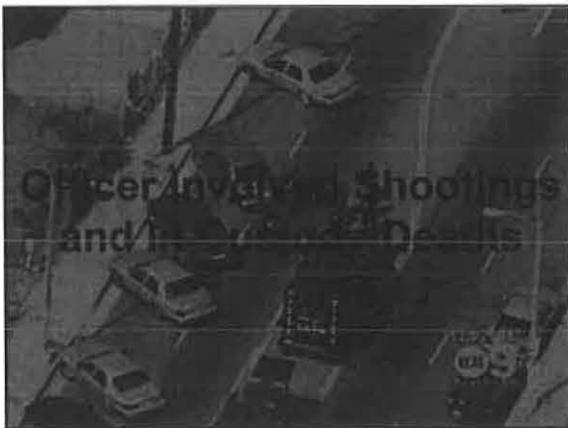
JSID's Mission

- JSID was created in 2000 to investigate and prosecute crimes by members of the justice system.
- Maintain public confidence in law enforcement and courts.
- Independent investigation of officer involved shootings and in-custody deaths.
- Full time investigative support.
- Provide training to police.



*District Attorney
Jackie Lacey*





District Attorney Response Team

OIS Roll Out:

Police shoot *AND* hit a person in L.A. County

ICD Roll Out:

Person dies in police custody and police USE OF FORCE may be PROXIMATE CAUSE of death

By Request Roll Out:

DART will also roll out in an unusual case if requested by investigating agency

District Attorney Response Team

Written protocol agreement defines the type of incident to which **DART** will respond and the roll **DART** plays at the scene.

- Each team consists of one DDA and one DAI
- On Call - 24/7 and 365
- DART averages approximately 8 roll outs per month

Timeline of an OIS Investigation



- At Scene:
- 1) DART gets an initial briefing;
 - 2) Walkthrough of scene;
 - 3) Participates in witness interviews.



Timeline of an OIS Investigation

OFFICE OF THE DISTRICT ATTORNEY
LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
DIVISION OF PUBLIC AND COMMUNITY AFFAIRS

1. INITIAL INVESTIGATION

At the time of the incident, the OIS is notified by the reporting agency. The OIS then begins an investigation into the incident. This includes reviewing the incident report, interviewing witnesses, and reviewing any available video footage. The OIS also identifies the parties involved in the incident and determines if a criminal investigation is warranted.

2. INTERVIEW

The OIS interviews the parties involved in the incident. This includes the reporting agency, witnesses, and the parties involved in the incident. The OIS also interviews the parties involved in the incident to determine if a criminal investigation is warranted.

3. REPORTING

The OIS prepares a report detailing the findings of the investigation. This report is then submitted to the reporting agency and the District Attorney's Office. The OIS also provides a copy of the report to the parties involved in the incident.

4. REVIEW

The District Attorney's Office reviews the report and determines if a criminal investigation is warranted. If a criminal investigation is warranted, the District Attorney's Office will refer the case to the appropriate law enforcement agency for investigation.

5. CONCLUSION

The OIS investigation concludes with the submission of the report to the reporting agency and the District Attorney's Office. The OIS also provides a copy of the report to the parties involved in the incident.



Legally Justified Use of Force

- Pursuant to an Arrest
- Self-Defense
- Defense of Another
- Dangerous Fleeing Felon

Force to Effectuate Arrest

Penal Code section 835a:

"Any officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape, or to overcome resistance."

General Self-Defense Law

Force against another is legal if:

- 1) Person **reasonably** believed that they, or a third party, was in imminent danger of being touched or injured unlawfully
- 2) Person **reasonably** believed that the immediate use of force was necessary to defend against that danger; AND
- 3) Person used no more force than was **reasonably necessary** to defend against that danger

General Self-Defense Law

"When deciding whether the person's beliefs were **reasonable**, consider all of the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a **similar situation with similar knowledge** would have believed. If the defendant's beliefs were **reasonable**, the danger does not need to have actually existed."

CALCRIM No. 3470



Potential Charges in Fatal OIS

Murder: Defendant did not actually believe in the need for self-defense

Voluntary Manslaughter: Defendant actually believed in the need for self-defense, but that belief was **unreasonable**

Graham v. Connor – Reasonableness Factors

To determine if force was **reasonable**, pay careful attention to facts and circumstances of the particular case, including:

- Severity of Crime that is Basis of Arrest.
- Does Person Pose an Immediate Threat to Safety of Officers or Others?
- Is the Person Actively Resisting Arrest or Attempting to Evade Arrest and the Nature of the Resistance?

Justifiable Homicide

Homicide by an officer is justified either:

- 1) *When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,*
- 2) *When necessarily committed in retaking [escaped] felons, or when necessarily committed in arresting persons charged with a forcible and atrocious felony and who are fleeing from justice or resisting such arrest.*

Penal Code section 196.

Justifiable Homicide

An officer “may use all the force that appears to him as a **reasonable** man to be necessary to overcome all resistance, even to the taking of a life; the resistance must be such as appears to the officer likely to inflict great bodily injury upon himself or those acting with him.”

People v. Mehserle (2012) 206 Cal.App.4th 1125

Every Fact Counts

“The jury should consider all relevant circumstances surrounding the defendant’s conduct [in order] to evaluate the conduct of a reasonable person functioning as a police officer in a stressful situation – but this is not the same as following a special ‘reasonable police officer’ standard.”

People v. Mehserle (2012) 206 Cal.App.4th 1125

Every Fact Counts

- Must assess **reasonableness** of the use of force from the perspective of the officer on the scene
- So long as the decision is **objectively reasonable**, courts will not "second-guess" an officer's split-second judgment to use deadly force

Every Fact Counts

- What Information did Officer have?
 - Dispatch records, prior contacts with subject, prior contacts in area, roll call briefings, etc.
- Type of Resistance and Force Employed?
 - Proportionality
- Efforts to Warn Prior to Use of Force?
 - If feasible
- Alternate Means Available?
 - De-escalation attempted
 - Was this really a "split-second" decision?

When is it reasonable for an officer to use deadly force?

- Police use of deadly force to arrest an individual is a seizure subject to the reasonableness requirement under the Fourth Amendment.
 - *Tennessee v. Garner* (1985) 471 U.S. 1, 7. "Where the officer had probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force."

• **Armed Suspects:**

– *Kortum v. Alkire* (1977) 69 Cal. App.3d 325, 333. Deadly force is unlawful when used "against a fleeing felony suspect unless the felony is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another."

• **Armed Suspects:**

– *Martinez v. County of L.A.* (1996) 47 Cal. App.4th 334.

- "[a]n officer may reasonably use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack. In these circumstances, the Courts cannot ask an officer to hold fire in order to ascertain whether the suspect will, in fact, injure or murder the officer."
- "[t]he Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of [legal] protections in close cases . . ."

• **Reasonable Mistake:**

– *People v. Toledo* (1948) 85 Cal.App.2d 577.

- Actual danger is not necessary to justify the use of deadly force in self-defense. If one is confronted by the appearance of danger which one believes, and a reasonable person in the same position would believe, would result in death or great bodily injury, one may act upon those circumstances. The right of self defense is the same whether the danger is real or apparent.

Provocation Rule Repudiated

- **Ninth Circuit Provocation Rule:**

- *Billington v. Smith* (2002 9th Cir.) 292 F.3d 1177; *Alexander v. City of San Francisco* (1994 9th Cir.) 29 F.3d 1355.
- If the police intentionally or recklessly provoke a violent response, and their provocation is an independent constitutional violation, then such reckless pre-shooting conduct may render the subsequent use of defensive force unreasonable under the 4th Amendment.

- **USSCT Overrules Billington:**

- *County of Los Angeles v. Mendez* (2017) 137 S.Ct. 1539
 - *Billington* "mistakenly conflates distinct Fourth Amendment claims . . . The objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional."
 - Constitutionality of use of force is evaluated based on the circumstances presented at the time the force is used.

- *Mendez* eliminates the provocation rule for 4th Amendment analysis however "[L]aw enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. Such liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable. *Hayes v. County of San Diego*, (2013) 57 Cal.4th 622, 639.

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- But see, *Brown v. Ransweiler*, (2009) 171 Cal.App.4th 516, 537–538
"As long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the 'most reasonable' action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence."

When do Police have to Stop Shooting?

- *Plumhoff v. Rickard* (2014) 134 S.Ct. 2012, 2022:
 - "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 shooting until the threat has ended."
- See also, *Mullinex v. Luna* (2015) 136 S.Ct. 305:
 - Also auto flight case, facts not as extreme as *Plumhoff* but divided USSCT held officers entitled to qualified immunity.

- But see, *Estate of Armstrong v. Village of Pinehurst*, (2016 4th Cir.) 810 F.3d 892:
 - Mentally ill suspect (Armstrong) fled from admission to mental health facility. Three officers and two security guards confront him and try to convince him to reenter the facility. Armstrong grabs onto a stop sign and refuses to let go. Officers wait only 30 seconds from receiving the commitment order to employing the TASER in drive stun mode (5 times over 2 minutes). Armstrong dies.

Non-Deadly Unlawful Force

Penal Code section 149:

- "Every officer who, under color of authority, without lawful necessity, assaults or beats any person" is punishable either as a misdemeanor or a felony.

Without Lawful Necessity – What does this mean?

- *People v. Lewelling*, (2017) 16 Cal.App.5th 276
 - "... [t]here is no CALCRIM instruction for Penal Code section 149 . . ."
 - "In order to prove that the defendant acted without legal necessity, the People must prove beyond a reasonable doubt that the defendant used more force than was necessary under the circumstances, which is probably a correct statement of the law."

- *People v. Mehsarle*, (2012) 206 Cal.App.4th 1125, The trial court instructed the jury that it could find defendant guilty of violating section 149 if, while arresting Grant, he used 'more force than was necessary under the circumstances.'
- See also, *People v. O'Callaghan* (2017) Unpublished.
 - "To convict an officer of felony assault, the People must prove that the assault was 'without lawful necessity.' Because police officers 'may use reasonable force to effect [an] arrest, to prevent escape or to overcome resistance' (§ 835a; *Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272-1273), an assault is 'without lawful necessity' only if the officer uses unreasonable force."

Expert Opinion (Necessary / Admissible)

- *Allgoewer v. City of Tracy*, (2012) 207 Cal.App.4th 755, 763-766: Holds that expert opinion regarding a police use of force is **not necessary to prove** action unreasonable and, **depending on the specific instrumentality used, may not be admissible.**
- Generally the **more complex** the instrumentality used to administer force the more likely that expert testimony will be admissible.
- See, *Kopf v. Skym* (4th Cir. 1993) 993 F.2d 374, because use of **slap jack and police dog** were instrumentalities **likely beyond the experience** of a lay juror, expert opinion was admissible. No per se rule of admissibility or exclusion, specific facts of the case determine admissibility.

- *Thompson v. City of Chicago* (7th Cir. 2006) 472 F.3d 444 expert testimony on reasonableness of use of choke hold was excluded because "[t]he jury . . . was in as good a position as the experts to judge whether the force used . . . was objectively reasonable."
- *Robinson v. City of West Allis* (2000) 239 Wis.2d 595 holding expert opinion is not necessary because "determinations of excessive use of force are not, in general, beyond the realm of ordinary experience and lay comprehension . . . Just as the facts of each case dictate the reasonableness inquiry, so too should they dictate whether expert testimony is needed in a given case."



Compelled Statements

- Statements made by a government employee under threat of termination from employment are "compelled" in violation of the 5th Amendment and accordingly cannot be used in a criminal prosecution of the speaker. *Garrity v. New Jersey* (1967) 385 U.S. 493.

- Material obtained as a result of governmental use of compelled testimony is deemed "fruit of the poisonous tree" and therefore inadmissible in a criminal prosecution of the speaker. *Murphy v. Waterfront Commission* (1964) 378 U.S. 52.

- Evidence obtained from a source wholly independent of the compelled statement is admissible. *Kastigar v. United States* (1972) 406 U.S. 441.

• An officer being questioned regarding his professional conduct retains his 5th Amendment privilege to remain silent, however his refusal to answer questions can be deemed insubordination subjecting him to possible administrative discipline. Conversely, if the officer does answer the questions propounded to him on threat of administrative discipline, those statements are compelled and may not be used in a criminal prosecution. *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 829.

• Use and derivative use immunity (as opposed to transactional immunity) is sufficient to protect the 5th Amendment privilege of the compelled officer. *Kastigar v. United States* (1972) 406 U.S. 441, 453.

• In California, The People have a statutory right, pursuant to PC 832.7, to obtain material from the employing department contained in the subject officer's police personnel file (including compelled statements). Obtaining such material does not automatically require the recusal of the prosecuting office, the individual prosecutor or dismissal of criminal charges. Obtaining the material is not the same as using the protected material in a criminal proceeding. However, "the district attorney's decision whether to receive an immunized statement under the authority of Penal Code section 832.7 should be made in contemplation of the risk involved." *People v. Gwillim*, 223 Cal.App.3d 1254, 1270; see also, *In Re Grand Jury Subpoena* (1996) 75 F.3d 446 (affirming District Court's refusal to quash a grand jury subpoena seeking police internal affairs reports that contained compelled material).

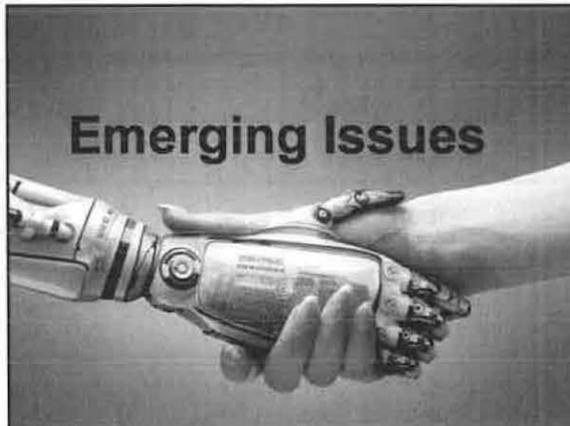
- A witness' knowledge of an officer's compelled statement does not necessarily nullify the witness' testimony so long as the basis of the witness' testimony is his or her personal knowledge independent of the immunized testimony. *U. S. v. Poindexter* (D.D.C. 1988) 698 F.Supp. 300, 314; see also, *People v. Singleton* (2010) 182 Cal.App.4th 1, 17.
- Admonition provided pursuant to *Lybarger* that:
 - 1) contents of the compelled statement cannot be used against the subject in a criminal proceeding and,
 - 2) failure to answer questions could result in administrative discipline, are sufficient to confer use and derivative use immunity.
 - No formal grant of immunity is required. *Spielbauer v. County of Contra Costa* (2009) 45 Cal.4th 704, 725.

- Is non-evidentiary use prohibited?
 - Split in authority:
 - No Dispositive CA precedent
 - No Ninth Circuit precedent
 - Eight Circuit prohibits non-evidentiary uses like: focusing investigation, deciding to initiate prosecution, refusing to plea bargain, trial strategy. *United States v. McDaniel* (8th Cir. 1973) 482 F.2d 305, 311.
 - Second, Seventh and Eleventh Circuits are contrary. *United States v. Mariani* (2nd Cir. 1988) 851 F.2d 595, 600; *United States v. Velasco* (7th Cir. 1992) 953 F.2d 1467, 1472; *United States v. Schmidgall* (11th Cir. 1994) 25 F.3d 1523, 1529.

- In general, routine reports written as a part of a police officer's duties are not compelled even if failure to write the report might be an administrative violation. See, *United States v. Smith* (11th Cir. 2016) 821 F.3d 1923; *United States v. Dellinger* (2013) 2013 US Dist. LEXIS 115452. (false police report admissible on charges of filing a false report, perjury and obstruction of justice).
- A statement can be deemed implicitly compelled and therefore inadmissible in a criminal prosecution if:
 - The speaker testifies that he had a subjective belief that his failure to submit would result in termination of his employment, and;
 - The totality of the circumstances make that subjective belief objectively reasonable.
 - *United States v. Friedrich* (D.C. Cir. 1988) 842 F.2d 382.



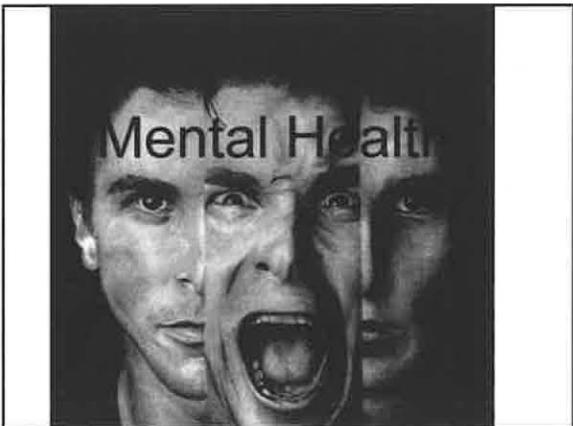
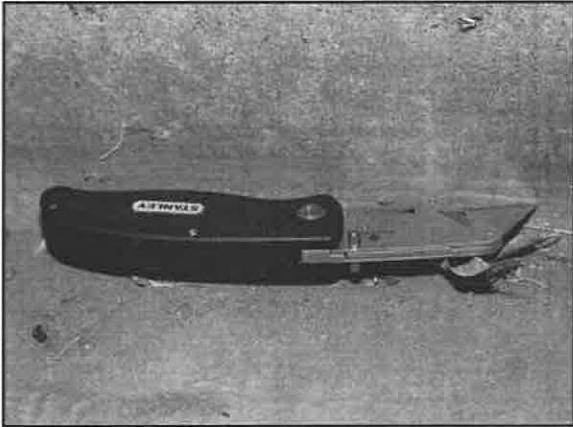
- All JSID evaluations and conclusions are made in writing.
- Evaluations are considered public Records and are disclosed pursuant to the California Public Records Act (CPRA) to anyone who requests.
 - All declination memoranda are disclosed every month to Los Angeles Times pursuant to a monthly CPRA request.
- Also Subject to Civil Subpoena.
- All OIS and ICD evaluations are now posted on LADA website.



Tactical De-Escalation

- Officers need to take every opportunity to slow down a situation when possible.
- Goal is to resolve a tense situation and achieve a good outcome where neither the officer nor the subject is injured
- Dallas Police Department Statistics
 - 2009 – 147 excessive force complaints
 - 2015 – 13 excessive force complaints

• Police Magazine March 2, 2016



- Police interactions with the mentally ill are extremely problematic:

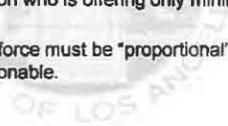
- Often police only called when the subjects' mental distress becomes extreme
- Broader societal problem that falls on police by default

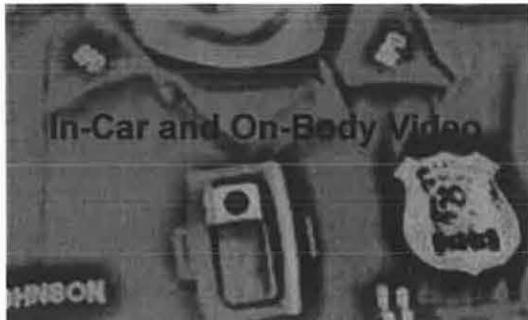
- *Estate of Armstrong v. Village of Pinehurst*, (2016 4th Cir.) 810 F.3d 892:

- Mentally ill suspect (Armstrong) fled from admission to mental health facility. Three officers and two security guards confront him and try to convince him to reenter the facility. Armstrong grabs onto a stop sign and refuses to let go. Officers wait only 30 seconds from receiving the commitment order to employing the TASER in drive stun mode (5 times over 2 minutes). Armstrong dies.

- The 4th Circuit analyzed the *Graham* factors and concluded:

- "Minimal physical resistance" does not equal "risk of immediate danger." Passive resistance does not automatically justify a police use of force.
- Diminished capacity and/or mental illness is a factor that officers must consider in evaluating what force to use and must de-escalate the situation if possible.
- "Serious injurious force including TASER, OC spray, punching, grounding, tackling, and pain compliance is unreasonable and excessive when dealing with a mentally ill person who is offering only minimal resistance."
- Officer's use of force must be "proportional" to be objectively reasonable.





● **Implementation and Evolution**

– **Perceived Benefits:**

- Accountability / Transparency
- Reduction in Complaints (Better Behavior)
- Objective Evidence of Encounter

– **Challenges:**

- Written Standards
- Officer Discretion
- Privacy Concerns
- Retention and Production
- Chain of Custody
- Inconsistency with Memory
 - In Critical Incident when should the Video be viewed?
- CPRA, FOIA.

QUESTIONS?