

Schoharie County Law Enforcement Review

December 1, 2020

Attendees: see attached list

Meeting called to order at 5:30 pm.

Next meeting will be December 15, 2020 at 3:00 pm here in the Board of Supervisors Room. Please call ahead to reserve a seat.

Mr. Lape – Referred to correspondence from Wendy Cook (attached) regarding concerns and questions from the last meeting as well as possible items to consider in policies.

Mr. Federice – Reminder to please talk into the microphone when speaking to ensure that folks watching the Live-Stream can hear. I also want to touch on scheduling again to make the deadline. I think that by January 31, 2021 we should be wrapped up with investigations and testimony. During the month of February this committee can develop a report/recommendations to be presented to the full Board of Supervisors at the March 2021 Board meeting. There will also need to be either a resolution or Local Law passed with these recommendations and it all needs to be submitted to the state by March 31, 2021.

Sheriff Stevens – Before we begin our presentation, I want to introduce Sgt. McCoy, Sgt. Reinhart and Deputy Minton. These 3 are certified trainers at the Zone 5 Academy. For the size of our department, to have 3 certified trainers in our ranks has been recognized by the state and many other departments.

Sgt. Reinhart presented the **DRAFT** Use of Force policy and read it out loud. Open dialog with questions/answers. The DRAFT policy, as well as other supporting documents that were handed out, are all attached.

Meeting adjourned at 7:22 pm.

Law/Radio/Law Review Meeting December 1, 2020 (Board Chambers)

	<u>NAME</u>	<u>PHONE NUMBER</u>	<u>AGENCY/DEPT/VISITOR</u>
1	Bill Federice	607-353-2110	Chairman of the Board
2	Dick Lape	518-231-3084	Chair of Law Committee
3	Steve Weinhofer	518-231-6681	Committee member
4	John Leavitt	518-295-8300	BOS Committee member
5	Sheriff Ron Stevens	518-295-2266	Sheriff's Dept.
6	Duane Tilipaugh	518-295-2266	Sheriff's Dept.
7	Sgt. McCoy	518-295-2266	Sheriff's Dept.
8	Sgt. Reinhart	518-295-2266	Sheriff's Dept.
9	Deputy Minton	518-295-2266	Sheriff's Dept.
10	C.J. Smith	518-295-8300	BOS
11	Scott Haverly/Jordan	518-295-8465	I.T. Director
12	Steve Wilson	518-295-8303	County Administrator
13	Patsy Nicosia		Times Journal
14	Carl Walthers		SchoPeg
15	Suzanne Graulich	518-295-8740	LDI
16	Pastor Ray Richards		Committee member
17	Peter Harrison	917-449-4512	Community member
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Use of Force

300.1 PURPOSE AND SCOPE

This policy provides guidelines on the reasonable use of force. Every member of this office is expected to use these guidelines to make such decisions in a professional, impartial, and reasonable manner (Executive Law § 840).

In addition to those methods, techniques, and tools set forth below, the guidelines for the reasonable application of force contained in this policy shall apply to all policies addressing the potential use of force, including but not limited to the Control Devices and Conducted Energy Device policies.

300.1.1 DEFINITIONS

Definitions related to this policy include:

Deadly force - Force reasonably anticipated and intended to create a substantial likelihood of causing death or very serious injury. This includes force that, under the circumstances, is readily capable of causing death or serious physical injury (Executive Law § 840).

Feasible - Reasonably capable of being done or carried out under the circumstances to successfully achieve the arrest or lawful objective without increasing risk to the deputy or another person.

Force - The application of physical techniques or tactics, chemical agents, or weapons to another person. It is not a use of force when a person allows him/herself to be searched, escorted, handcuffed, or restrained.

Imminent - Ready to take place; impending. Note that imminent does not mean immediate or instantaneous.

Totality of the circumstances - All facts and circumstances known to the deputy at the time, taken as a whole, including the conduct of the deputy and the subject leading up to the use of force.

300.2 POLICY

The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Deputies are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force in carrying out their duties.

Deputies must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Schoharie County Sheriff's Office recognizes and respects the value of all human life and dignity without prejudice to anyone. Vesting deputies with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation, and a careful balancing of all interests.

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300.2.1 DUTY TO INTERCEDE AND REPORT

It is imperative to this office that our reputation and legitimacy in the community be safeguarded. There is no greater detriment to the public trust than use of excessive force. It is the duty of every member of this office to defend our reputation and legitimacy by aggressively combating use of excessive force.

Any deputy present and observing another law enforcement officer or a member using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force.

Any deputy who observes another law enforcement officer or a member use force that is beyond that which is objectively reasonable under the circumstances should report these observations to a supervisor as soon as feasible.

300.2.2 PERSPECTIVE

When observing or reporting force used by a law enforcement officer, each deputy should take into account the totality of the circumstances and the possibility that other law enforcement officers may have a different vantage point or additional information regarding the threat posed by the subject.

300.3 USE OF FORCE

Deputies shall use only that amount of force that reasonably appears necessary given the facts and circumstances perceived by the deputy at the time of the event to accomplish a legitimate law enforcement purpose.

The reasonableness of force will be judged from the perspective of a reasonable deputy on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that deputies are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving.

Given that no policy can realistically predict every possible situation a deputy might encounter, deputies are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident.

It is also recognized that circumstances may arise in which deputies reasonably believe that it would be impractical or ineffective to use any of the tools, weapons or methods provided by this office. Deputies may find it more effective or reasonable to improvise their response to rapidly unfolding conditions that they are confronting. In such circumstances, the use of any improvised device or method must nonetheless be reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

While the ultimate objective of every law enforcement encounter is to avoid or minimize injury, nothing in this policy requires a deputy to retreat or be exposed to possible physical injury before applying reasonable force.

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300.3.1 USE OF FORCE TO EFFECT AN ARREST

A police officer or a peace officer may use reasonable physical force to effect an arrest, prevent escape of a person from custody, or in defense of self or others from imminent physical force (Penal Law § 35.30).

Force shall not be used by an deputy to (Executive Law § 840):

- (a) Extract an item from the anus or vagina of a subject without a warrant, except where exigent circumstances are present.
- (b) Coerce a confession from a subject in custody.
- (c) Obtain blood, saliva, urine, or other bodily fluid or cells from an individual for scientific testing in lieu of a court order where required.

300.3.2 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE

When determining whether to apply force and evaluating whether a deputy has used reasonable force, a number of factors should be taken into consideration, as time and circumstances permit. These factors include but are not limited to:

- (a) Immediacy and severity of the threat to deputies or others.
- (b) The conduct of the individual being confronted, as reasonably perceived by the deputy at the time.
- (c) Deputy/subject factors (e.g., age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of deputies available vs. subjects).
- (d) The effects of suspected drug or alcohol use.
- (e) The individual's mental state or capacity.
- (f) The individual's ability to understand and comply with deputy commands.
- (g) Proximity of weapons or dangerous improvised devices.
- (h) The degree to which the individual has been effectively restrained and his/her ability to resist despite being restrained.
- (i) The availability of other reasonable and feasible options and their possible effectiveness.
- (j) Seriousness of the suspected offense or reason for contact with the individual.
- (k) Training and experience of the deputy.
- (l) Potential for injury to deputies, suspects, and others.
- (m) Whether the individual appears to be resisting, attempting to evade arrest by flight, or is attacking the deputy.
- (n) The risk and reasonably foreseeable consequences of escape.
- (o) The apparent need for immediate control of the individual or a prompt resolution of the situation.

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- (p) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the deputy or others.
- (q) Prior contacts with the individual or awareness of any propensity for violence.
- (r) Any other exigent circumstances.

300.3.3 PAIN COMPLIANCE TECHNIQUES

Pain compliance techniques may be effective in controlling a physically or actively resisting individual. Deputies may only apply those pain compliance techniques for which they have successfully completed office-approved training. Deputies utilizing any pain compliance technique should consider:

- (a) The degree to which the application of the technique may be controlled given the level of resistance.
- (b) Whether the individual can comply with the direction or orders of the deputy.
- (c) Whether the individual has been given sufficient opportunity to comply.

The application of any pain compliance technique shall be discontinued once the deputy determines that compliance has been achieved.

300.3.4 ALTERNATIVE TACTICS - DE-ESCALATION

Deputies regularly respond to tense or emotionally charged incidents. It is the mission of this office to bring these such situations to the most peaceful resolution possible. Research and experience have shown us that Deputies are more likely to accomplish this goal if the individual(s) or situation can be de-escalated. De-escalation is always preferable to use of physical force and de-escalation techniques should be employed whenever possible and practicable to help achieve compliance or to help resolve a situation. When circumstances reasonably permit, deputies should use non-violent strategies and techniques to decrease the intensity of a situation, improve decision-making, improve communication, reduce the need for force, and increase voluntary compliance (e.g., summoning additional resources, formulating a plan, attempting verbal persuasion). Deputies should receive continuing training in these areas whenever practicable.

300.3.5 CAROTID CONTROL HOLD

A carotid control hold is a technique designed to control an individual by temporarily restricting blood flow through the application of pressure to the side of the neck and, unlike a chokehold, does not restrict the airway. The proper application of the carotid control hold may be effective in restraining a violent or combative individual. However, due to the potential for injury, the use of the carotid control hold is limited to those circumstances where deadly force is authorized and is subject to the following:

- (a) A carotid control hold may only be utilized by office members trained to properly do so.
- (b) At all times during the application of the carotid control hold, the response of the individual should be monitored. The carotid control hold should be discontinued when circumstances indicate that the application no longer reasonably appears necessary.

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- (c) Any individual who has had the carotid control hold applied, regardless of whether he/she was rendered unconscious, shall be promptly examined by paramedics or other qualified medical personnel and should be monitored until such examination occurs.
- (d) The deputy shall inform any person receiving custody, or any person placed in a position of providing care, that the individual has been subjected to the carotid control hold and whether the individual lost consciousness as a result.
- (e) Any deputy attempting or applying the carotid control hold shall promptly notify a supervisor of the use or attempted use of such hold.
- (f) The use or attempted use of the carotid control hold shall be thoroughly documented by the deputy in any related reports.

300.3.6 STATE RESTRICTIONS ON THE USE OF OTHER RESTRAINTS

Any application of pressure to the throat, windpipe, neck, or blocking the mouth or nose of a person in a manner that may hinder breathing or reduce intake of air is strictly prohibited unless deadly physical force is authorized (Exec. Law § 840).

300.3.7 USE OF FORCE TO SEIZE EVIDENCE

In general, deputies may use reasonable force to lawfully seize evidence and to prevent the destruction of evidence. In the instance when force is used, deputies should not intentionally use any technique that restricts blood flow to the head, restricts respiration, or which creates a reasonable likelihood that blood flow to the head or respiration would be restricted.

300.4 DEADLY FORCE APPLICATIONS

When reasonable and practicable, the deputy shall, prior to the use of deadly force, make efforts to identify him/herself as a peace or police officer and to warn that deadly force may be used, unless the deputy has objectively reasonable grounds to believe the person is aware of those facts.

Use of deadly force is justified in the following circumstances involving imminent threat or imminent risk:

- (a) A deputy may use deadly force to protect him/herself or others from what he/she reasonably believes is an imminent threat of death or serious bodily injury.
- (b) A deputy may use deadly force to stop a fleeing subject when the deputy has probable cause to believe that the individual has committed, or intends to commit, a felony involving the infliction or threatened infliction of serious bodily injury or death, and the deputy reasonably believes that there is an imminent risk of serious bodily injury or death to any other person if the individual is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

Imminent does not mean immediate or instantaneous. An imminent danger may exist even if the suspect is not at that very moment pointing a weapon at someone. For example, an imminent danger may exist if a deputy reasonably believes that the individual has a weapon or is attempting to access one and intends to use it against the deputy or another person. An imminent danger may

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also exist if the individual is capable of causing serious bodily injury or death without a weapon, and the deputy believes the individual intends to do so.

300.4.1 MOVING VEHICLES

Shots fired at or from a moving vehicle involve additional considerations and risks.

When feasible, deputies should take reasonable steps to move out of the path of an approaching vehicle instead of discharging their firearm at the vehicle or any of its occupants.

A deputy should only discharge a firearm at a moving vehicle or its occupants when the deputy reasonably believes there are no other reasonable means available to avert the imminent threat of the vehicle, or if deadly force other than the vehicle is directed at the deputy or others.

Deputies should not shoot at any part of a vehicle in an attempt to disable the vehicle.

300.5 REPORTING THE USE OF FORCE

Any use of force by a member of this office shall be documented promptly, completely, and accurately in an appropriate report, depending on the nature of the incident. The deputy should articulate the factors perceived and why he/she believed the use of force was reasonable under the circumstances.

To collect data for purposes of training, resource allocation, analysis, and related purposes, the Office may require the completion of additional report forms, as specified in office policy, procedure, or law (Executive Law § 840).

See the Report Preparation Policy for additional circumstances that may require documentation.

300.5.1 NOTIFICATIONS TO SUPERVISORS

Supervisory notification shall be made as soon as practicable following the application of force in any of the following circumstances:

- (a) The application caused a visible injury.
- (b) The individual subjected to the force complained of injury or continuing pain.
- (c) Any application of the TASER (TM) or control device.
- (d) Any application of a restraint device other than handcuffs, shackles, or belly chains.
- (e) The individual subjected to the force was rendered unconscious.
- (f) An individual was struck or kicked.

300.6 MEDICAL CONSIDERATIONS

Once it is reasonably safe to do so, medical assistance shall be obtained for any person who exhibits signs of physical distress, has sustained visible injury, expresses a complaint of injury or continuing pain, or was rendered unconscious. Any individual exhibiting signs of physical distress after an encounter should be continuously monitored until he/she can be medically assessed. Individuals should not be placed on their stomachs for an extended period, as this could impair their ability to breathe.

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Based upon the deputy's initial assessment of the nature and extent of the individual's injuries, medical assistance may consist of examination by an emergency medical services provider or medical personnel at a hospital or jail. If any such individual refuses medical attention, such a refusal shall be fully documented in related reports and, whenever practicable, should be witnessed by another deputy and/or medical personnel. If a recording is made of the contact or an interview with the individual, any refusal should be included in the recording, if possible.

The on-scene supervisor or, if the on-scene supervisor is not available, the primary handling deputy shall ensure that any person providing medical care or receiving custody of a person following any use of force is informed that the person was subjected to force. This notification shall include a description of the force used and any other circumstances the deputy reasonably believes would be potential safety or medical risks to the subject (e.g., prolonged struggle, extreme agitation, impaired respiration).

Individuals who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond their physical characteristics, and imperviousness to pain (sometimes called "excited delirium"), or who require a protracted physical encounter with multiple deputies to be brought under control, may be at an increased risk of sudden death. Calls involving these persons should be considered medical emergencies. Deputies who reasonably suspect a medical emergency should request medical assistance as soon as practicable and have medical personnel stage away.

See the Medical Aid and Response Policy for additional guidelines.

300.6.1 ADDITIONAL STATE REQUIREMENTS

A deputy should take steps to obtain medical attention for a person who reasonably appears to be mentally ill and is behaving in a manner that is likely to result in serious harm to the person or to others.

Deputies should document requests for medical or mental health treatment as well as efforts to arrange for such treatment.

300.7 SUPERVISOR RESPONSIBILITIES

A supervisor should respond to a reported application of force resulting in visible injury, if reasonably available. When a supervisor is able to respond to an incident in which there has been a reported application of force, the supervisor is expected to (Executive Law § 840):

- (a) Obtain the basic facts from the involved deputies. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.
- (b) Ensure that any injured parties are examined and treated.
- (c) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs and/or videos have been taken of any areas involving visible injury or complaint of pain, as well as overall photographs and/or video of uninjured areas.

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1. These photographs and/or video should be retained until all potential for civil litigation has expired.
- (d) Identify any witnesses not already included in related reports, including any deputies present at the incident.
- (e) Review and approve all related reports.
 1. Supervisors should require that deputies who engaged in the use of force submit the appropriate reports and forms.
- (f) Evaluate the circumstances surrounding the incident and initiate an administrative investigation if there is a question of policy noncompliance or if for any reason further investigation may be appropriate.
 1. Disciplinary actions will be consistent with any applicable disciplinary guidelines and collective bargaining agreements.

In the event that a supervisor is unable to respond to the scene of an incident involving the reported application of force, the supervisor is still expected to complete as many of the above items as circumstances permit.

300.7.1 SHIFT SUPERVISOR RESPONSIBILITIES

The Shift Supervisor shall review each use of force by any personnel within his/her command to ensure compliance with this policy and to identify any training needs.

300.7.2 ADDITIONAL SHIFT SUPERVISOR RESPONSIBILITIES

The Shift Supervisor should ensure that the Records Clerk is provided with enough information to meet the use of force reporting requirements for the DCJS (Executive Law § 837-t; 9 NYCRR 6058.3). See the Records Division Policy for additional guidelines.

300.8 TRAINING

Deputies will receive periodic training on this policy and demonstrate their knowledge and understanding.

Subject to available resources, deputies should receive periodic training on:

- (a) Guidelines regarding vulnerable populations, including but not limited to children, elderly, pregnant persons, and individuals with physical, mental, or intellectual disabilities.
- (b) De-escalation tactics, including alternatives to force.
- (c) Applications of use of force and conflict strategies as required by the state Use of Force Model Policy (Executive Law § 840).

300.9 POLICY AVAILABILITY

This policy shall be readily available to the public upon request and shall be posted on the office website (Executive Law § 840).

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300.10 USE OF FORCE ANALYSIS

Office Use of Force reporting forms should be periodically reviewed to identify any use of force trends that exist within the agency and/or to identify potential training needs.



Bill Federice <federicebill@gmail.com>

Law enforcement review

Bill Federice <federicebill@gmail.com>

Mon, Nov 23, 2020 at 11:07 AM

To: Bruce Baker <bruce.baker@co.schoharie.ny.us>, Candace Ellis <candacee@ccalbany.org>, Dick Lape <lapelspc@midtel.net>, Duane Tillapaugh <duane.tillapaugh@co.schoharie.ny.us>, Harold Vroman <haroldvroman@aol.com>, John Leavitt <john.leavitt@co.schoharie.ny.us>, Pastor Ray Richards <pastorray@cagcobleskill.org>, Peggy Hait <jeffersontownsup@gmail.com>, Ron Stevens <ronald.stevens@co.schoharie.ny.us>, Steve Weinhofer <stephen.weinhofer@co.schoharie.ny.us>
Cc: Patricia Hults <Hultsp@outlook.com>

----- Forwarded message -----

From: **Wendy Cook** <wcook001@luthersem.edu>

Date: Mon, Nov 23, 2020 at 11:02 AM

Subject: Law enforcement review

To: Bill Federice <federicebill@gmail.com>, <Ronald.stevens@co.schoharie.ny.us>

November 21, 2020

To: Sheriff Stevens, Mr. Federice, and Law Enforcement Review Committee Members

I would like to follow up on the Committee meeting of Tuesday, the 17th. (I apologize for my tardiness. I mistakenly went to the Howes Cave facility first.) Please note that this letter represents only my own personal views and suggestions.

I greatly appreciate the professionalism, pride and care evidenced by the law enforcement officers at the meetings I have attended. Your job is not easy. I have great respect for and confidence in the care and commitment you bring to it every day. At the meeting last week I especially appreciated hearing your forthright perspectives, such as on the mostly law-abiding community you serve, the challenges of hiring academically and personally qualified officers, holding officers accountable, distinctions between large urban and small rural departments, and your sincere desire to be the best agency you can be. That's what we all want!

I would like to offer some concerns for consideration as the Committee moves forward on implementing EO203. The first concerns regard Lexipol. Lexipol pitches its policy products as successfully protecting law enforcement departments and governing bodies (i.e. Schoharie County) from lawsuits. One strategy Lexipol uses is to write policies that describe legal standards without providing specific operational guidance. Officers cannot then be held accountable because there is no specific behavior to hold them accountable to; it's all subjective interpretation.

Additionally, I am concerned about research that indicates Lexipol policies do not support de-escalation strategies and regulation of use of force. It seems to me that these are precisely the tools needed to prevent life-threatening situations. I fear it is naive to assume that officers will know, remember and use these tools if that is not an explicit policy. Related to that, I also do not think 3-minute quickie training bites can provide the necessary focus for keeping officers sharp.

The last Lexipol concern I will mention is administrative. I have been told that local departments can "tweak" the Lexipol standard policy. However, the updates that Lexipol issues do not take local changes into account and instead simply replace, and therefore lose, the locally devised clauses.

Secondly, Sheriff Stevens, I believe you asked for specific use of force policy concerns from the public. I invite you to check out the website useofforceproject.org. This project studied policies and correlations to police violence. It found eight components that were effective in reducing occurrences of police-involved killings. To the local community's credit, Cobleskill Police General Orders already include five of the eight. I have not seen Sheriff's Department policies, but I will presume the protocols are similar.

The most imperative use of force component missing from local written policies is a defined force continuum that instructs officers on best practices. This sets a higher standard than the long-held *Graham v. Connor* "objective reasonableness". I believe a higher standard is not only possible, but necessary in these more enlightened times. I therefore suggest for consideration the attached policy (adapted from NAACP and Campaign Zero sources) at the end of this letter.

I offer use of force as a starting point but there are also other policy subjects of concern, including but not limited to:

1. Transparency, including the prompt release of body cam footage, electronic records, reports and officer files, when/if there are incidents of police violence.
2. Officers must be meaningfully trained on department policies and the policies must be enforced by leadership from the top-down, thus establishing a culture of accountability.

In closing, let me repeat that I believe the Sheriff's Department is, on the whole, hardworking, conscientious, and honest, not to mention NEEDED. With the community input mandate of EO203, we have a golden opportunity now to ensure that we have the best possible Department policies, especially given that the previous policy manual was lost in the flood of 2011. Thank you for your attention to my concerns set forth here.

Sincerely,

Wendy Cook
612-554-7295
wcook001@luthersem.edu
109 Anthony Circle, Cobleskill

Use of Force Policy

A. *Minimal Reliance on Force.* Law enforcement officers shall only use physical force when no other viable option is available and when all non-physical options are exhausted. In all cases where force is used, only the minimum degree of force necessary shall be employed. The minimum degree of force is the lowest level of force necessary to effect an arrest or achieve a lawful objective. To further the aim of minimal reliance on force, all law enforcement officers must carry on their person at all times at least one less likely to be lethal weapon.

B. *Continuum of Use of Force.*

1. De-escalation options –
 - Placing barriers between an uncooperative subject and a law enforcement officer
 - Containing a threat
 - Moving from a position that exposes law enforcement officers to potential threats to a safer position
 - Decreasing the exposure to potential threat by using:
 - distance
 - cover
 - concealment
 - Communication from a safe position intended to gain the subject's compliance, calm an agitated subject, and promote rational decision-making:
 - verbal persuasion
 - advisements
 - warnings
 - Avoidance of physical confrontation, unless immediately necessary (e.g., to protect a bystander or witness, or stop dangerous behavior)
 - Calling extra resources to assist or law enforcement officers to assist
 - Any other tactics and approaches that attempt to achieve law enforcement objectives by gaining the compliance of the subject through less likely to be lethal means
2. Empty-hand control using bodily force to gain control of a situation –
 - Soft technique: grabs, holds and joint locks to restrain an individual

- Hard technique: punches and kicks to restrain an individual
- 3. Less likely to be lethal methods –
 - Blunt impact: use of a baton or projectile to immobilize a combative individual
 - Chemical: use of chemical sprays or projectiles embedded with chemical to restrain an individual (e.g., pepper spray)
 - Conducted energy devices: use of a device discharging a high-voltage, low-amperage jolt of electricity at a distance
- 4. Lethal force – a measure of last resort that is permissible only if a suspect poses an immediate threat to life or great bodily injury or to prevent an arrest from being defeated by resistance or escape and the person poses an immediate threat of death or great bodily harm unless arrested without delay
 - Serious bodily injury means bodily injury that involves a substantial risk of death; protracted and obvious disfigurement; or protracted loss or impairment of the function of a body part, organ, or mental faculty.

C. *Factors to Consider in Use of Force.*

1. The seriousness of the crime or suspected offense. It will be presumptively unreasonable for a law enforcement officer to use serious physical force against an individual who the law enforcement officer believes or has reason to believe committed a traffic or ordinance violation, misdemeanor, or non-violent felony. That presumption may be rebutted with evidence that the use of force was justified in light of other factors listed here, among others.
2. The level of threat or resistance presented by the individual. It will be presumptively unreasonable to use serious physical force against an individual that does not pose a current, active, and immediate threat of death or serious bodily injury [defined at B.4. above] to an officer or bystanders, or to use force against an individual that is engaged in passive resistance only.
 - Compliant – subject offers no resistance.
 - Passive resistance – subject does not respond to verbal commands but also offers no physical form of resistance. Expressing an intent to resist is not considered resistance.
 - Active resistance – subject makes physically evasive movements to defeat, avoid, or prevent an officer's attempt at apprehension. Expressing an intent to resist an officer's attempt at control is not considered active resistance.
 - Assaultive – subject is aggressive or combative, actively attempting to assault the officer or another person. Expressing an intent to assault an officer or another person is not considered assaultive.
 - Life-threatening – any action likely to result in serious bodily injury [defined at B.4. above] or death of the officer or another person.
3. The risk of escape. It will be presumptively unreasonable to use physical force against an individual who the officer believes or has reason to believe committed a traffic or ordinance violation, misdemeanor, or non-violent felony.
4. The conduct of the individual being confronted by the officer. Serious physical force may only be used if the individual acts in a manner that poses a current, active, and immediate threat of death or serious bodily injury to the officer or bystanders. Under no circumstances may serious physical force be used to apprehend an individual engaged in passive resistance only.
5. Whether the officer is using force against an individual who appears to be having a behavioral or mental health crisis, a person with a mental illness or a person who is otherwise in distress.
6. The time available to an officer to evaluate the situation and decide on a course of action.
7. The availability of other feasible, less intrusive force options.
8. The ability of the officer to provide a meaningful warning before using force.
9. Whether the officer believes the individual to be in close proximity to a deadly weapon, or a weapon that can inflict serious bodily injury [defined at B.4. above] on the officer or bystanders.
10. The tactical conduct and decision made by the law enforcement officer preceding the use of force.

Use of Force

Model Policy

September 2020



**Municipal Police
Training Council**

New York State Division of Criminal Justice Services
80 South Swan Street, Albany, New York 12210

www.criminaljustice.ny.gov



**Municipal Police
Training Council**

Use of Force Model Policy



**STATE OF NEW YORK
Division of Criminal Justice Services
Office of Public Safety**

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Use of Force Model Policy

At the forefront of the national discussion involving policing in America is the way in which police use force. Agency policies regarding the use of force are facing increased scrutiny and agencies are seeking to ensure that their Use of Force policies are well-reasoned. Agencies are increasingly concerned with providing their officers with the best direction possible as they are tasked with making split-second judgements under circumstances that are tense, uncertain, and rapidly evolving.

The Council sought to address these concerns with the attached policy. The MPTC Use of Force model policy is firmly rooted in the 4th Amendment jurisprudence that governs police use of force, while remaining broad enough to serve as a framework for any agency in New York to build upon. This version of the policy has been promulgated pursuant to Executive Law §840(4)(d)(3) and adopted by the Municipal Police Training Council in September of 2020.

Acknowledgements

The New York State Division of Criminal Justice Services (DCJS) acknowledges the extensive work done by the following associations and agencies:

District Attorney's Association of the State of New York

Law Enforcement Training Directors Association of New York State

New York State Association of Chiefs of Police

New York State Police

New York City Police Department

New York State Sheriff's Association

New York State University Police

New York State Department of Corrections and Community Supervision

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I. PURPOSE

Law enforcement officers around the country and here in New York State are authorized to use reasonable and legitimate force in specific circumstances. Federal constitutional and state statutory standards dictate when and how much force can be used. This policy is founded in these standards but is not intended to be an exhaustive recitation of state and/or federal legal framework governing use of force. The policy is designed to provide guidance to individual agencies as they develop their own use of force policies in accordance with Executive Law §840(4)(d)(3).

This policy is not intended to endorse or prohibit any particular tactic, technique, or method of employing force. Separate policy guidance and training should be provided for each of the available force instrumentalities made available to officers.

II. POLICY

The federal and state standards by which use of force is measured are both founded in the basic premise of objective reasonableness.¹ The amount of force that is used by the officers shall be the amount of force that is objectively reasonable under the circumstances for the officer involved to effect an arrest, prevent an escape, or in defense of themselves or others. The standard of objective reasonableness, established by the United States Supreme Court in *Graham v. Connor*, is used in this policy and is intended to provide officers with guidelines for the use of force, including deadly physical force.

As the Supreme Court has recognized, this reasonableness inquiry embodies “allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.”²

This policy is written in recognition of the value of all human life and dignity without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires a careful balancing of all interests.

¹ Force which is objectively reasonable is insulated from criminal liability through Article 35 of the NYS Penal Law and civil liability by the 4th Amendment standard of objective reasonableness.

² *Graham v. Connor*, 490 U.S. 386 at 396 (1989).

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III. DEFINITIONS

- A. **Objectively Reasonable** – An objective standard used to judge an officer's actions. Under this standard, a particular application of force must be judged through the perspective of a reasonable officer facing the same set of circumstances, without the benefit of 20/20 hindsight, and be based on the totality of the facts that are known to that officer at the time that the force was used.³
- B. **Deadly Physical Force** - Physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.⁴
- C. **Physical Injury** – Impairment of physical condition or substantial pain.⁵
- D. **Serious Physical Injury** – Physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.⁶

IV. USE OF FORCE

- A. In general terms, force is authorized to be used when reasonably believed to be necessary to effect a lawful arrest or detention, prevent the escape of a person from custody, or in defense of one's self or another.⁷
- B. Under the 4th Amendment, a police officer may use only such force as is "objectively reasonable" under the circumstances. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene.⁸

V. DETERMINING THE OBJECTIVE REASONABLENESS OF FORCE

- A. When used, force should be only that which is objectively reasonable given the circumstances perceived by the officer at the time of the event.

³ *Graham*, 490 U.S. 396 (1989)

⁴ NY Penal Law § 10 (11) (McKinney 2013)

⁵ NY Penal Law § 10 (9) (McKinney 2013)

⁶ NY Penal Law § 10 (10) (McKinney 2013)

⁷ NY Penal Law and § 35.30(1) (McKinney 2013)

⁸ *Graham*, 490 U.S. at 396 (1989)

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- B. Factors that may be used in determining the reasonableness of force include, but are not limited to:
1. The severity of the crime or circumstance;⁹
 2. The level and immediacy of threat or resistance posed by the suspect;¹⁰
 3. The potential for injury to citizens, officers, and suspects;¹¹
 4. The risk or attempt of the suspect to escape;¹²
 5. The knowledge, training, and experience of the officer;¹³
 6. Officer/subject considerations such as age, size, relative strength, skill level, injury or exhaustion, and the number of officers or subjects;¹⁴
 7. Other environmental conditions or exigent circumstances.¹⁵

VI. DUTY TO INTERVENE

- A. Any officer present and observing another officer using force that he/she reasonably believes to be clearly beyond that which is objectively reasonable under the circumstances shall intercede to prevent the use of unreasonable force, if and when the officer has a realistic opportunity to prevent harm.
- B. An officer who observes another officer use force that exceeds the degree of force as described in subdivision A of this section should promptly report these observations to a supervisor.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Scott v. Harris*, 550 U.S. 372 (2007)

¹² *Graham*, 490 U.S. at 396 (1989)

¹³ Analysis of cases under the 4th Amendment require the focus to be on the perspective of a reasonable officer on the scene which includes the training and experience of the officer. *Graham v. Connor*, 490 U.S. 386 (1989), *Terry v. Ohio*, 392 U.S. 1 (1968)

¹⁴ *Sharrar v. Felsing*, 128 F. 3d 810 (3rd Cir. 1997) (numbers of officers or subjects)

¹⁵ Courts have repeatedly declined to provide an exhaustive listing of factors. *Chew v. Gates*, 27 F. 3d 1432, 1475 n.5 9th Cir. (1994)

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VII. USE OF DEADLY PHYSICAL FORCE

- A. Deadly physical force may be used by an officer to protect themselves or another person from what the officer reasonably believes is an imminent threat of serious physical injury or death.¹⁶
- B. Deadly physical force may be used to stop a fleeing suspect where:
 - 1. The officer has probable cause to believe the suspect has committed a felony involving the infliction or threat of serious physical injury or death; and,
 - 2. The officer reasonably believes that the suspect poses an imminent threat of serious physical injury to the officer or to others.
 - 3. Where feasible, some warning should be given prior to the use of deadly physical force.¹⁷
- C. Chokeholds and Obstruction of Breathing or Blood Circulation
 - 1. Any application of pressure to the throat, windpipe, neck, or blocking the mouth or nose of a person in a manner that may hinder breathing, reduce intake of air or obstruct blood circulation, is prohibited unless deadly physical force is authorized.¹⁸

VIII. PROHIBITED USES OF FORCE

- A. Force shall not be used by an officer for the following reasons:
 - 1. To extract an item from the anus or vagina of a subject without a warrant, except where exigent circumstances are present;
 - 2. To coerce a confession from a subject in custody;

¹⁶ NY Penal Law and § 35.30(1)(c)(McKinney 2013)

¹⁷ NY Penal Law and § 35.30(1), as restricted by *Tennessee v. Garner*, 471 U.S. 1 (1985) (restricting the use of deadly physical force as it relates to fleeing felons) In *Garner*, the Supreme Court uses "significant threat of serious physical harm, either to the officer or others" in describing the limited circumstances under which deadly force can be used to prevent the escape of a felon.

¹⁸ NY Penal Law § 121.13-a establishes the crime of Aggravated Strangulation.

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3. To obtain blood, saliva, urine, or other bodily fluid or cells, from an individual for the purposes of scientific testing in lieu of a court order where required;
4. Against persons who are handcuffed or restrained unless it is used to prevent injury, escape, or otherwise overcome active or passive resistance posed by the subject.

IX. REPORTING & REVIEWING THE USE OF FORCE

- A. A police or peace officer or other law enforcement entity who has custody of a person must provide attention to the medical and mental health needs of a person in their custody and obtain assistance and treatment of such needs, which are reasonable and provided in good faith.¹⁹
 1. This includes appropriate and timely medical attention being provided to a party injured as a result of a use of force incident.
 2. The immediate mental health needs of a person shall be based upon the reasonable cause to believe that a person, who appears to be mentally ill, is conducting themselves in a manner which is likely to result in a serious harm to themselves or others.²⁰
- B. Members involved in use of force incidents as described below shall notify their supervisor as soon as practicable and shall complete a departmental use of force report.
 1. Use of force that results in a physical injury.
 2. Use of force incidents that a reasonable person would believe is likely to cause an injury.
 3. Incidents that result in a complaint of pain from the suspect except complaints of minor discomfort from compliant handcuffing.
 4. Incidents where a conducted energy device (CED) was intentionally discharged or accidentally discharged after being displayed.

¹⁹ NY Civil Rights Law § 28

²⁰ NY Mental Hygiene Law § 9.41

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5. Incidents where a firearm was discharged at a subject.²¹

C. A standardized use of force form should be used to document any reportable use of force incident.²²

D. Officers should document any requests for necessary medical or mental health treatment as well as efforts of police to arrange for such treatment.

X. PROCEDURES FOR INVESTIGATING USE OF FORCE INCIDENTS

A. Where practicable, a supervisor should respond to the scene to begin the preliminary force investigation.

B. A supervisor that is made aware of a force incident shall ensure the completion of a use of force report by all officers engaging in reportable use of force and, to the extent practical, make a record of all officers present.

C. Photographs should be taken which sufficiently document any injuries or lack thereof to officers or suspects.

D. The [applicable person, unit, or bureau] will receive the supervisor's report and conduct an investigation.

E. Consistent with agency disciplinary protocols and any applicable collective bargaining agreements, agency policy should establish standards for addressing the failure to adhere to use of force guidelines.²³

XI. TRAINING

A. All officers should receive training and demonstrate their understanding on the proper application of force.

B. Training topics will include use of force, conflict prevention, conflict resolution and negotiation, and de-escalation techniques and strategies,

²¹ NY EXC § 837-v requires that any discharge of a weapon, while either on duty or off duty, in the direction of a person be verbally reported to the involved officer's supervisor within six hours and a written report prepared within forty-eight hours of occurrence.

²² Chiefs of police departments, County Sheriffs, and the Superintendent of State Police should consider utilizing these forms to ensure compliance with the administrative reporting requirement of EXC §837-t.

²³ NY EXC § 840(4)(d)(2)(vi)

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including, but not limited to, interacting with persons presenting in an agitated condition as well as duty to intervene and prohibited conduct.²⁴

- C. This policy is not intended to be a substitute for proper training in the use of force. Comprehensive training is the key to the real-world application of the concepts discussed within this policy.

²⁴ EXC § 840(4)(d)(2)(vii)

Schoharie County Sheriff's Office

Subject: Provisions BODYCAM "Body-Worn Cameras" Recording System		Policy: BC120
References/Standards:		
Effective: January 14, 2020	Distribution: All Personnel	Amends:
Prepared by: Sheriff Ronald R. Stevens	Revised:	Rescinded:
Reviewed Date:		

PURPOSE:

To establish uniform guidelines for the use of the Provisions BODYCAM "Body-Worn Cameras" recording system. The system will be used to document various events and at the end of the Deputies and Investigators tour of duty, the captured data will be preserved, downloaded and stored on Sheriff's Office terra bite hard drives. Once captured, these recording cannot be altered in any way

POLICY:

The Schoharie County Sheriff's Office has adopted the use of the Provisions BODYCAM "Body-Worn Cameras" recording system to accomplish the following policy goals:

- A. To enhance Deputy and Investigators safety.
- B. To accurately capture statements and events during the course of an incident.
- C. To enhance the Deputies and Investigators ability to document and review statements and actions for both internal reporting requirements and for courtroom presentation.
- D. To provide an impartial measurement for self-critique and field evaluation for new Deputy training.
- E. To capture visual and audio information for use in current and future investigations.
- F. To enhance the public trust by preserving factual representation of Deputy/Investigator-citizen interactions in the form of audio and video recording.

All Deputies and Investigators that have been issued a Provisions BODYCAM "Body-Worn Cameras" recording system shall wear it on their uniform at all times, with the exception of training days, funerals, award ceremonies, or other events approved by a supervisor. The use of personal cell phones or electronics to view or categorize data is PROHIBITED.

TRAINING:

- A. Deputies and Investigators will not utilize the "Body-Worn Cameras" recording system until they have received the proper training.
- B. Training will consist of, but not limited to:
 - 1. A review of the system, its functions, proper usage, activation and deactivation.
 - 2. A review of the user manual and SCSO policy governing its use.
 - 3. A hands-on review of the "On Deputy" video recording system.
 - 4. The retention and storage features and procedures for placing data into evidence.
- C. Normal (Buffering) Mode — The Provisions BODYCAM "Body-Worn Cameras" recording system will be set at a continuous 30 second loop at which time video only (No audio) will be recorded while buffering.
- D. Event Mode — Once activated, the Provisions BODYCAM "Body-Worn Cameras" video recording system saves the buffered video and continues recording audio and video for up to eight (8) hours. Pressing the function button places markers on the media segment for later viewing in EVIDENCE.com,

OPERATIONAL PROTOCOLS:

- A. If assigned a Provisions BODYCAM "Body-Worn Cameras" recording system it shall stay in normal buffering mode during your shift. Whenever it is possible to do so, it shall be the policy of the SCSO to activate the Provisions BODYCAM "Body-Worn Cameras" recording system in the scope of his/her duties.
- B. It will be the responsibility of each Deputy or Investigator that once the Provisions BODYCAM "Body-Worn Cameras" recording system has been activated; it shall not be deactivated until the law enforcement activity is completed, the deputy has left the scene, or the citizen contact is complete.
- C. There will be times when, due to the nature of law enforcement work, exigent circumstances prevent the Deputy or Investigator from activating the "Body-Worn Cameras" video recording system.
 - 1. In those types of events the Deputy or Investigator will document the reason for not activating the "On Deputy" video recording system.
- D. Deputy or Investigator will avoid recording a *child victim* of any sex offense.
 - 1. In the event that the report of a sexual offense is disclosed following a Deputy or Investigator initiating video recording, every effort will be made to discontinue recording promptly in accordance with policy.
- E. To respect the dignity of others, Deputies *should advise persons who are nude or whose sensitive human areas are exposed of recording.*

- F. The Provisions BODYCAM "Body-Worn Cameras" recording system will not be used to record personal activity.
- G. The Provisions BODYCAM "Body-Worn Cameras" recording system will be turned off for any courtroom testimony, this does not apply to Deputy Sheriff's assigned as court security.
- H. The Provisions BODYCAM "Body-Worn Cameras" recording system shall not be intentionally activated to record conversations of fellow employees without their knowledge during routine, non-law enforcement related activities.
- I. Deputies and Investigators will avoid recording any interactions with informants or undercover Officers.
- J. Deputies and Investigators will test the "Body-Worn Cameras" recording equipment according to training and manufacturer's guidelines upon beginning their respective tour of duty. If any problems are encountered with any component of the system the Provisions BODYCAM "Body-Worn Cameras" recording system will not be used and the Deputy will immediately notify their supervisor, document the malfunction and the supervisor is responsible to notify the Undersheriff, or their designee.
- K. Deputies and Investigators will immediately report any loss or missing part of the "Body-Worn Cameras" recording system to their supervisor and will prepare a report outlining such loss or missing part. The supervisor is responsible for making immediate notification to the Undersheriff, or their designee.
- L. Corrections Division Shift Supervisors will wear the Provisions BODYCAM during each respective tour of duty. Supervisors will test the "Body-Worn Cameras" recording equipment according to training and manufacturer's guidelines upon beginning their respective tour of duty. If any problems are encountered with any component of the system the Provisions BODYCAM "Body-Worn Cameras" recording system will not be used and the supervisor will immediately document the malfunction and the supervisor is responsible to notify the Jail Administrator, Undersheriff, or their designee.
- M. Corrections Division Shift Supervisors will activate the BODYCAM recording system at anytime there is disruption, use of force, inmate disciplinary interviews or hearings, search of the facility for contraband, or other criminal act within the facility. Such recording will continue until the incident has been deemed concluded and the facility has been made safe.

EVIDENTIARY PROTOCOLS:

- A. At the end of their shift, or periodically during shift, deputies and Investigators will place the Provisions Camera and battery into a designated slot of the Docking Station, which will allow the data to be transferred from the Provisions camera through the ETM to a terra bite storage hard drive. If a deputy chooses to leave the Provisions camera in a Docking Station at end of shift, he/she must immediately retrieve it at beginning of their next shift, unless there is an emergency call requiring immediate response.
- B. Deputies and Investigators will not allow citizens to review any recordings.

C. The release of audio/video data requested through a public records release request will be subject to the same statutory exemptions from disclosure as any other departmental records.

D. Deputies and investigators will not make copies of any recording for their personal use and are prohibited from using a recording device (such as a telephone, camera or secondary video camera) to record any media stored on Sheriff's Office evidence hard drive or the Provisions Camera unit.

E. Deputies and Investigators will have the ability to review their recordings to ensure accurate written reports but will not be able to alter the contents of any audio/video recording that has been recorded.

A 710.30 Notice must be prepared, or the District Attorney's Office notified that the Deputy or Investigator intends to use any of the defendant's recorded audio or video recorded statements for prosecution.

F. All digital media collected using the Provisions BODYCAM "Body-Worn Cameras" recording system is considered an official record of the Schoharie County Sheriff's Office. Accessing, copying or releasing any media for other than official law enforcement purposes is strictly prohibited, except as required by law.

G. In the event that a particular recording is required for any court proceeding it is the Deputies or Investigators responsibility to notify the Undersheriff, or their designee, in writing requesting a copy of the stored data for that purpose. The Undersheriff or their designee, will make a notation in the case report that a copy of the video recording was made and was turned over to whoever requested such recording.

a **attached Property/Evidence Pull Request Form*

ADMINISTRATOR RIGHTS:

The Undersheriff, Sheriff or their designee(s), shall be the only person(s) within the SCSO to have administrator rights to all recordings stored on the Sheriff's Office Evidence hard drives or their back systems.

New York Laws

New York State Law

Penal Law

Consolidated Laws of New York's Penal code

Search Penal Laws

Penal Law Search

PEN Search Term

Article 35 - NY Penal Law

NY Laws › Penal Law › Part 1 › Title C › Article 35

DEFENSE OF JUSTIFICATION

Section	Description
35.00	Justification; a defense.
35.05	Justification; generally.
35.10	Justification; use of physical force generally.
35.15	Justification; use of physical force in defense of a person.
35.20	Justification; use of physical force in defense of premises and in defense of a person in the course of burglary.
35.25	Justification; use of physical force to prevent or terminate larceny or criminal mischief.
35.27	Justification; use of physical force in resisting arrest prohibited.

Section	Description
35.30	Justification; use of physical force in making an arrest or in preventing an escape.

S 35.00 Justification; a defense.

In any prosecution for an offense, justification, as defined in sections 35.05 through 35.30, is a defense.

S 35.05 Justification; generally.

Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute an offense is justifiable and not criminal when:

1. Such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions; or
2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense.

S 35.10 Justification; use of physical force generally.

The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

1. A parent, guardian or other person entrusted with the care and

supervision of a person under the age of twenty-one or an incompetent person, and a teacher or other person entrusted with the care and supervision of a person under the age of twenty-one for a special purpose, may use physical force, but not deadly physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person.

2. A warden or other authorized official of a jail, prison or correctional institution may, in order to maintain order and discipline, use such physical force as is authorized by the correction law.

3. A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under his direction, may use physical force when and to the extent that he reasonably believes it necessary to maintain order, but he may use deadly physical force only when he reasonably believes it necessary to prevent death or serious physical injury.

4. A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself may use physical force upon such person to the extent that he reasonably believes it necessary to thwart such result.

5. A duly licensed physician, or a person acting under a physician's direction, may use physical force for the purpose of administering a recognized form of treatment which he or she reasonably believes to be adapted to promoting the physical or mental health of the patient if (a) the treatment is administered with the consent of the patient or, if the patient is under the age of eighteen years or an incompetent person, with the consent of the parent, guardian or other person entrusted with the patient's care and supervision, or (b) the treatment is administered in an emergency when the physician reasonably believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

6. A person may, pursuant to the ensuing provisions of this article, use physical force upon another person in self-defense or defense of a third person, or in defense of premises, or in order to prevent larceny of or criminal mischief to property, or in order to effect an arrest or prevent an escape from custody. Whenever a person is authorized by any

such provision to use deadly physical force in any given circumstance, nothing contained in any other such provision may be deemed to negate or qualify such authorization.

S 35.15 Justification; use of physical force in defense of a person.

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

- (a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or
- (b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or
- (c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

- (a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is:
 - (i) in his or her dwelling and not the initial aggressor; or
 - (ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to section 35.30; or
- (b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery; or
- (c) He or she reasonably believes that such other person is committing

or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized by subdivision three of section 35.20.

S 35.20 Justification; use of physical force in defense of premises and in defense of a person in the course of burglary.

1. Any person may use physical force upon another person when he or she reasonably believes such to be necessary to prevent or terminate what he or she reasonably believes to be the commission or attempted commission by such other person of a crime involving damage to premises. Such person may use any degree of physical force, other than deadly physical force, which he or she reasonably believes to be necessary for such purpose, and may use deadly physical force if he or she reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of arson.

2. A person in possession or control of any premises, or a person licensed or privileged to be thereon or therein, may use physical force upon another person when he or she reasonably believes such to be necessary to prevent or terminate what he or she reasonably believes to be the commission or attempted commission by such other person of a criminal trespass upon such premises. Such person may use any degree of physical force, other than deadly physical force, which he or she reasonably believes to be necessary for such purpose, and may use deadly physical force in order to prevent or terminate the commission or attempted commission of arson, as prescribed in subdivision one, or in the course of a burglary or attempted burglary, as prescribed in subdivision three.

3. A person in possession or control of, or licensed or privileged to be in, a dwelling or an occupied building, who reasonably believes that another person is committing or attempting to commit a burglary of such dwelling or building, may use deadly physical force upon such other person when he or she reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of such burglary.

4. As used in this section, the following terms have the following meanings:

(a) The terms "premises," "building" and "dwelling" have the meanings prescribed in section 140.00;

(b) Persons "licensed or privileged" to be in buildings or upon other premises include, but are not limited to:

(i) police officers or peace officers acting in the performance of their duties; and

(ii) security personnel or employees of nuclear powered electric generating facilities located within the state who are employed as part of any security plan approved by the federal operating license agencies acting in the performance of their duties at such generating facilities. For purposes of this subparagraph, the term "nuclear powered electric generating facility" shall mean a facility that generates electricity using nuclear power for sale, directly or indirectly, to the public, including the land upon which the facility is located and the safety and security zones as defined under federal regulations.

S 35.25 Justification; use of physical force to prevent or terminate larceny or criminal mischief.

A person may use physical force, other than deadly physical force, upon another person when and to the extent that he or she reasonably believes such to be necessary to prevent or terminate what he or she reasonably believes to be the commission or attempted commission by such other person of larceny or of criminal mischief with respect to property other than premises.

S 35.27 Justification; use of physical force in resisting arrest prohibited.

A person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a police officer or peace officer when it would reasonably appear that the latter is a police officer or peace officer.

S 35.30 Justification; use of physical force in making an arrest or in preventing an escape.

1. A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he or she reasonably

believes to have committed an offense, may use physical force when and to the extent he or she reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force; except that deadly physical force may be used for such purposes only when he or she reasonably believes that:

(a) The offense committed by such person was:

(i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or

(ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

2. The fact that a police officer or a peace officer is justified in using deadly physical force under circumstances prescribed in paragraphs (a) and (b) of subdivision one does not constitute justification for reckless conduct by such police officer or peace officer amounting to an offense against or with respect to innocent persons whom he or she is not seeking to arrest or retain in custody.

3. A person who has been directed by a police officer or a peace officer to assist such police officer or peace officer to effect an arrest or to prevent an escape from custody may use physical force, other than deadly physical force, when and to the extent that he or she reasonably believes such to be necessary to carry out such police officer's or peace officer's direction, unless he or she knows that the arrest or prospective arrest is not or was not authorized and may use deadly physical force under such circumstances when:

(a) He or she reasonably believes such to be necessary for

self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of deadly physical force; or

(b) He or she is directed or authorized by such police officer or peace officer to use deadly physical force unless he or she knows that the police officer or peace officer is not authorized to use deadly physical force under the circumstances.

4. A private person acting on his or her own account may use physical force, other than deadly physical force, upon another person when and to the extent that he or she reasonably believes such to be necessary to effect an arrest or to prevent the escape from custody of a person whom he or she reasonably believes to have committed an offense and who in fact has committed such offense; and may use deadly physical force for such purpose when he or she reasonably believes such to be necessary to:

(a) Defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of deadly physical force; or

(b) Effect the arrest of a person who has committed murder, manslaughter in the first degree, robbery, forcible rape or forcible criminal sexual act and who is in immediate flight therefrom.

5. A guard, police officer or peace officer who is charged with the duty of guarding prisoners in a detention facility, as that term is defined in section 205.00, or while in transit to or from a detention facility, may use physical force when and to the extent that he or she reasonably believes such to be necessary to prevent the escape of a prisoner from a detention facility or from custody while in transit thereto or therefrom.

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NOTE: Penal Law code reviewed as of 01/01/2019. Several corrections/updates were made.

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9 CRR-NY 6058.3
NY-CRR

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
TITLE 9. EXECUTIVE DEPARTMENT
SUBTITLE U. DIVISION OF CRIMINAL JUSTICE SERVICES
CHAPTER II. IDENTIFICATION AND INFORMATIONAL SERVICES
PART 6058. USE OF FORCE DATA COLLECTION, ANALYSIS AND REPORTING

9 CRR-NY 6058.3
9 CRR-NY 6058.3

6058.3 Employer reporting requirements.

(a) Each employer shall, in the form and manner set forth in section 6058.4 of this Part, submit or cause to be submitted any instance or occurrence where a police or peace officer employed by it employs use of force.

(b) Each employer shall, in the form and manner set forth in section 6058.4 of this Part, with respect to each use of force event reported, submit or cause to be submitted the following:

- (1) the type of use of force;
- (2) the date of the event;
- (3) village, town, or city, and county location of the event;
- (4) the law enforcement agencies involved;
- (5) a description of the circumstances of the event;
- (6) the race, sex, ethnicity, and age (or, if unknown, approximate age) of all persons engaging in the use of force; and
- (7) the race, sex, ethnicity, and age (or, if unknown, approximate age) of all persons suffering an injury from the use of force.

(c) Each employer shall, in the form and manner set forth in section 6058.4 of this Part, submit or cause to be submitted any additional information the commissioner may require the employer to report, including, but not limited to, use of force events and incident information, subject information, and officer information related to each event as required by the FBI in coordination with the FBI's Uniform Crime Reporting (UCR) Program.

9 CRR-NY 6058.3
Current through April 15, 2020

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Functions, powers and duties of council

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1. The council may recommend to the governor rules and regulations with respect to:

- (a) The approval, or revocation thereof, of police training schools administered by municipalities;
- (b) Minimum courses of study, attendance requirements, and equipment and facilities to be required at approved municipal police training schools;
- (c) Minimum qualifications for instructors at approved police training schools;
- (d) The requirements of minimum basic training which police officers appointed to probationary terms shall complete before being eligible for permanent appointment, and the time within which such basic training must be completed following such appointment to a probationary term;
- (e) The requirements of minimum basic training which police officers not appointed for probationary terms but appointed on other than a permanent basis shall complete in order to be eligible for continued employment or permanent appointment, and the time within which such basic training must be completed following such appointment on a non-permanent basis;
- (f) The requirements of minimum basic training which peace officers must complete before being eligible for certification as peace officers, pursuant to [section 2.30 of the criminal procedure law](https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000066&refType=LQ&originatingDoc=126e1de80ccaf11e8964de4) (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000066&refType=LQ&originatingDoc=126e1de80ccaf11e8964de4>);
- (g) Categories or classifications of advanced in-service training programs and minimum courses of study and attendance requirements with respect to such categories or classifications; and

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(h) Exemptions from particular provisions of this article in the case of any city having a population of one million or more, or in the case of the state department of corrections and community supervision if in its opinion the standards of police officer or peace officer training established and maintained by such city or department are higher than those established pursuant to this article; or revocation in whole or in part of such exemption, if in its opinion the standards of police officer or peace officer training established and maintained by such city or department are lower than those established pursuant to this article.

(i) The establishment, in cooperation with the division of state police, of a formalized consumer product tampering training program for all law enforcement personnel.

(j) (1) Development, maintenance and dissemination of written policies and procedures pursuant to title six of article six of the social services law and applicable provisions of article ten of the family court act, regarding the mandatory reporting of child abuse or neglect, reporting procedures and obligations of persons required to report, provisions for taking a child into protective custody, mandatory reporting of deaths, immunity from liability, penalties for failure to report and obligations for the provision of services and procedures necessary to safeguard the life or health of the child; (2) establishment and implementation on an ongoing basis, of a training program for all current and new police officers regarding the policies and procedures established pursuant to this paragraph; and (3) establishment of a training program for police officers whose main responsibilities are juveniles and the laws pertaining thereto, which training program shall be successfully completed before such officers are accredited pursuant to [section eight hundred forty-six-h \(https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000078&refType=LQ&originatingDoc=l26e22ca0ccaf11e8964de4](https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000078&refType=LQ&originatingDoc=l26e22ca0ccaf11e8964de4) of this chapter.

(k) Development, maintenance and dissemination, in consultation with the department of agriculture and markets, of written policies and procedures pursuant to animal cruelty and protection laws, including, but not limited to, article twenty-six of the agriculture and markets law, [section 352.3 of the family court act \(https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000093&refType=LQ&originatingDoc=l26e253b0ccaf11e8964de4](https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000093&refType=LQ&originatingDoc=l26e253b0ccaf11e8964de4) as it applies to companion animals, and applicable provisions of the penal law, regarding the investigation and prevention of any act of cruelty to animals. The council shall make provisions in such policies and procedures for the education and training in enforcement of such animal cruelty and protection laws.

(l) Exemptions from particular provisions of this article in the case of peace officers appointed by the superintendent of state police if in its opinion the standards of peace officer training provided by the division of state police exceed those established pursuant to this article.

(m) Establishment and implementation on an ongoing basis, of a training program for all current and new police officers and peace officers regarding the policies and procedures established pursuant to paragraph (k) of this subdivision.

2. The council shall promulgate, and may from time to time amend, such rules and regulations prescribing height, weight and physical fitness requirements for eligibility of persons for provisional or permanent appointment in the competitive class of the civil service as police officers of any county, city, town, village or police district as it deems necessary and proper for the efficient performance of police duties.

2-a. The council, in consultation with the state commission of correction, shall promulgate rules and regulations with respect to:

(a) The approval, or revocation thereof, of basic and other correctional training programs administered by municipalities;

(b) Minimum courses of study, attendance requirements, and equipment and facilities to be required at approved basic and other correctional training programs;

(c) Minimum qualifications for instructors at approved basic and other correctional training programs; and

(d) The requirements of a minimum basic correctional training program required by [subdivision nine of section eight hundred thirty-seven-a \(https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000078&refType=SP&originatingDoc=l26e2eff0ccaf11e8964de43](https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000078&refType=SP&originatingDoc=l26e2eff0ccaf11e8964de43) of this article.

3. The council shall, in addition:

- (a) Consult with, advise and make recommendations to the commissioner with respect to the exercise of his or her functions, powers and duties as set forth in section eight hundred forty-one (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000078&refType=LQ&originatingDoc=l26e31700ccaf11e8964de4>) of this article;
- (b) Recommend studies, surveys and reports to be made by the commissioner regarding the carrying out of the objectives and purposes of this section;
- (c) Visit and inspect any police training school and correctional training programs approved by the commissioner or for which application for such approval has been made;
- (d) Make recommendations, from time to time, to the commissioner, the governor and the legislature, regarding the carrying out of the purposes of this section;
- (e) Perform such other acts as may be necessary or appropriate to carry out the functions of the council;
- (f) Develop, maintain and disseminate, in consultation with the state office for the prevention of domestic violence, written policies and procedures consistent with article eight of the family court act and applicable provisions of the criminal procedure and domestic relations laws, regarding the investigation of and intervention by new and veteran police officers in incidents of family offenses. Such policies and procedures shall make provisions for education and training in the interpretation and enforcement of New York's family offense laws, including but not limited to:
- (1) intake and recording of victim statements, and the prompt translation of such statements if made in a language other than English, in accordance with subparagraph three of this paragraph, on a standardized "domestic violence incident report form" promulgated by the division of criminal justice services in consultation with the superintendent of state police, representatives of local police forces and the state office for the prevention of domestic violence, and the investigation thereof so as to ascertain whether a crime has been committed against the victim by a member of the victim's family or household as such terms are defined in section eight hundred twelve of the family court act (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000093&refType=LQ&originatingDoc=l26e38c30ccaf11e8964de>) and section 530.11 of the criminal procedure law (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000066&refType=LQ&originatingDoc=l26e38c31ccaf11e8964de>) and
- (2) the need for immediate intervention in family offenses including the arrest and detention of alleged offenders, pursuant to subdivision four of section 140.10 of the criminal procedure law (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000066&refType=SP&originatingDoc=l26e3b340ccaf11e8964de>) and notifying victims of their rights, in their native language, if identified as other than English, in accordance with subparagraph three of this paragraph, including but not limited to immediately providing the victim with the written notice required in subdivision six of section 530.11 of the criminal procedure law (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000066&refType=SP&originatingDoc=l26e3b341ccaf11e8964de>) and subdivision five of section eight hundred twelve of the family court act (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000093&refType=SP&originatingDoc=l26e3b342ccaf11e8964de>)
- (3) determine, in consultation with the superintendent of state police and the office for the prevention of domestic violence, the languages in which such translation required by subparagraph one of this paragraph, and the notification required by subparagraph two of this paragraph, shall be provided. Such determination shall be based on the size of the New York state population that speaks each language and any other relevant factor. Such written notice required pursuant to subparagraph two of this paragraph shall be made available to all local law enforcement agencies throughout the state. Nothing in this paragraph shall prevent the council from using the determinations made by the superintendent of state police pursuant to subdivision (c) of section two hundred fourteen-b (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000078&refType=SP&originatingDoc=l26e3da50ccaf11e8964de>) of this chapter;

(f-1) Develop, maintain and disseminate, in consultation with the office of temporary and disability assistance and the division of criminal justice services, written policies and procedures regarding human trafficking victims. Such policies and procedures shall include, but not be limited to the following: (1) the identification of potential victims of human trafficking, as defined under section four hundred eighty-three-aa of the social services law (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000136&refType=LQ&originatingDoc=126e40160ccaf11e8964de4>); and (2) information and/or referral to appropriate social and legal services for victims of human trafficking in accordance with section four hundred eighty-three-bb of the social services law (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000136&refType=LQ&originatingDoc=126e40161ccaf11e8964de4>);

(g) Develop, maintain and disseminate, in consultation with the state division of human rights and the state civil service department, written policies and procedures to enhance police and correctional officer recruitment efforts and to increase police and correctional officer awareness of racial, ethnic, religious and gender differences, and other diversity issues, in communities served by such police and in correctional facilities; and

(h) Consult with the state commission of correction regarding correctional training programs.

4. The council shall, in addition:

(a) Develop, maintain and disseminate, in consultation with rape crisis centers experienced in assisting victims in this state, written policies and procedures consistent with applicable provisions of the family court act, domestic relations law, criminal procedure law and the penal law, regarding the investigation of and intervention by new and veteran police officers in crimes involving sexual assault. Such policies and procedures shall make provisions for education and training of new and veteran police officers in the investigation and enforcement of crimes involving sexual assault under state law, including but not limited to:

- (1) techniques for interviewing sexual assault victims,
- (2) fair treatment standards for crime victims pursuant to article twenty-three of this chapter,
- (3) evidence gathering and evidence preservation, and
- (4) dissemination of information concerning availability of local services for the victims of such crimes; and

(b) Recommend to the governor, rules and regulations with respect to establishment and implementation on an ongoing basis of a training program for all current and new police officers regarding the policies and procedures established pursuant to this subdivision, along with recommendations for periodic retraining of police officers.

(c) Disseminate the written policies and procedures promulgated in accordance with subdivision twenty-one of section eight hundred thirty-seven (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000078&refType=SP&originatingDoc=126e4c4b0ccaf11e8964de4>) of this article to all police departments in this state and implement a training program for all current and new police officers regarding the policies and procedures established pursuant to such subdivision.

5. The council shall, in addition:

(a) Develop, maintain and disseminate, in consultation with the commissioner of the office for people with developmental disabilities, written policies and procedures consistent with section 13.43 of the mental hygiene law (<https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000105&refType=LQ&originatingDoc=126e4ebc0ccaf11e8964de4>); regarding the handling of emergency situations involving individuals with autism spectrum disorder and other developmental disabilities. Such policies and procedures shall make provisions for the education and training of new and veteran police officers on the handling of emergency situations involving individuals with autism spectrum disorder and other developmental disabilities; and

(b) Recommend to the governor, rules and regulations with respect to the establishment and implementation on an ongoing basis of a training program for all current and new police officers regarding the policies and procedures established pursuant to this subdivision, along with recommendations for periodic retraining of police officers.

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Bruce Baker

From: [REDACTED] (DCJS) [REDACTED]@dcjs.ny.gov>
Sent: Monday, November 30, 2020 9:42 AM
To: [REDACTED] (DCJS); Bruce Baker
Subject: RE: Use of Force Question

Hi Bruce,

Thanks for reaching out. We stopped using the continuum as a training aid a few years ago with the adoption of the new *Use of Physical Force and Deadly Physical Force* lesson plan in the Basic Course for Police Officers which was required to be taught beginning in 2018. If you recall, previously the section was much shorter and essentially consisted of a restatement of Article 35. We determined that this was the wrong approach for several reasons, not the least of which is that Article 35 is a defense to criminal liability and not a decision-making tool for police officers and the fact that Article 35 excuses conduct that would clearly be unconstitutional. The continuum was actually in the Defensive Tactics program, but we dropped it there too.

Your reference to the continuum as a "standard" illustrates one of the problems with the continuum. Use of force use of force continuums were developed as *training tools* – many before the current controlling case law was even decided. Prior to the effective use of 42 U.S.C. §1983 to address police use of excessive force in the 70's & 80's, agencies were left to train officers on use of force using state justification statutes like Article 35. Many states didn't (and still don't) have similar statutes and the current case law hadn't yet been decided. What was seen as controlling was the *Glick* decision which, relying on a test devised in 1952(!), was widely interpreted to require that a plaintiff claiming excessive force show that an officer acted with malice in applying force "for the purpose of causing harm." Since the constitutional standard could not be trained to (how do you train cops not to act sadistically or maliciously?), agencies devised use of force continuums to assist officers in understanding what was expected of them. Again, during this time, the case law was not instructive, because the substantive due process analysis that existed provide no guidance to officers. So LAPD came up with their thermometer style and other agencies came up with pyramids, step-ladders, and eventually circular shapes.

In 1989, the United States Supreme Court, in a 9-0 decision, declared that use of force by law enforcement officers was a question not of the 14th Amendment's Due Process clause, but of the 4th Amendment's protection against unreasonable searches and seizures. In doing so, they made the question one of *objective reasonableness* and removed the requirement that a plaintiff show that an officer's use of force "shocks the conscience." Additionally, they declared that this standard required a careful balancing of the rights of the individual with the legitimate interest of government and required an analysis of the "totality of the circumstances" of the situation. They also cautioned that the standard was not capable of "precise definition or mechanical application." But law enforcement already had their continuums and law enforcement trainers were already training with them, so police training went largely unchanged.

But the standard *had* changed. And here's where I want to stress that continuums were never a standard... they were a training tool to be used in the *absence* of a workable standard, which is what we had before under the hodgepodge of state laws and the substantive due process standard under the constitution. But 31 years ago, SCOTUS gave us a standard that is workable and is trainable and takes into account the rights of citizens and balances them with the legitimate interest of government, again in a unanimous Court decision. And the courts – SCOTUS and the lower courts – kept giving them to us. We've got decision after decision that

can be used to training police officers in the lawful use of force. Of course, there are policy provisions that an agency may choose to enact that are not necessarily constitutionally unreasonable... shooting at moving vehicles or banning of neck restraints. There's nothing preventing an agency from adopting those provisions within policy and training to them.

Continuums are not a standard but have become to be viewed as such; they are the attempt at a mechanical application that SCOTUS warned us about. No matter how complex they become or what shape they take, they cannot allow for a consideration of the totality of the circumstances which is what's required by the constitution. They don't, for instance, tell an officer that a 35 year old man with a baseball bat is not the same as a 10 year old armed with one or that a Taser on a fire escape is a different amount of force than a Taser in the grass. They don't differentiate between closed fist strikes to a person who is against a wall vs a person who is not. They can't account for the relevance of the number of officers or suspects or the size, age, or physical condition of those suspects. They can't account for mental condition, known physical abilities, or known violent history of a suspect. All of these things (and more) are required to be considered by the constitution.

One final critique of continuums (but I have more)... the argument that a color-coded chart can be used to help an officer make a decision is laughable to anyone who's ever made a decision under time compressed, rapidly evolving, and uncertain circumstances – the very definition of the police decision-making environment. That's simply not how human beings make decisions and that rational decision-making model has been rejected by those that study decision-making of the type engaged in by police officers. If you'd like to talk further, I'd be happy to. Additionally, I might suggest keeping an eye out for our 2-day Use of Force Refresher course where we going into the constitutional standard in great detail and discuss methods to train it too. There are none currently scheduled, but that should change soon!

Best,

[REDACTED]
[REDACTED]
Senior Training Technician - Police, Office of Public Safety

NYS Division of Criminal Justice Services
80 South Swan Street
Albany, New York 12210
(518) 457-4917 | (518) 457-0145 | [REDACTED]@dcjs.ny.gov
<http://www.criminaljustice.ny.gov/>

P.S. - Here's a webinar that Daigle Law Group recently conducted on use of force continuums: <https://dlglearningcenter.com/free-webinar-use-of-force-continuum/>

From: [REDACTED] (DCJS) [REDACTED]@dcjs.ny.gov>
Sent: Friday, November 27, 2020 10:48 AM
To: Bruce Baker <bruce.baker@co.schoharie.ny.us>
Cc: [REDACTED] (DCJS) [REDACTED]@dcjs.ny.gov>
Subject: RE: Use of Force Question

Bruce,

I am copying [REDACTED] in my response, as he is best to answer the questions regarding the continuum. I have attached a copy of the MPTC model policy for your review in case you have not had a chance to review it. It may help with some of your questions until [REDACTED] is able to respond.

[REDACTED] will get back to you early next week.

Thank you,

[REDACTED]
Associate Training Technician (Police)
Office of Public Safety

New York State Division of Criminal Justice Services
80 South Swan Street, Albany, NY 12210
(518) 485-[REDACTED] F(518) 457-0145 [REDACTED]@dcjs.ny.gov

From: Bruce Baker <bruce.baker@co.schoharie.ny.us>
Sent: Friday, November 27, 2020 10:39 AM
To: [REDACTED] <[REDACTED]@dcjs.ny.gov>
Subject: Use of Force Question

Good morning-

As part of the Governors reform order, I have been assigned to the Sheriff's Office task force. As such, our community representatives have been pursuing input with regards to our use of force policy. They frequently sight Campaign Zero and similar groups that seek a use of force continuum rather than NYS's objective reasonableness approach. As such, we have tried to explain the fact that NYS has determined the standard and as such trains officers to that standard. I am wondering if you could possibly tell me 1) When did NYS discontinue following the continuum standard? And 2) is there a specific document (outside of Graham v. Connor, or the training manual that would indicate the NYS reasoning? We have completed our newest policy in accordance with the 2019/2020 legal updates and wish to roll it out, however we want to ensure the community we are not making an arbitrary decision to overlook the continuum ideal. Any help would be greatly appreciated. Thank you

*Investigator Bruce Baker
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157 Steadman Way
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Desk 518.295.2209.
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Schoharie County Sheriff's Office

USE OF FORCE		Subject:	Policy: UF120
References/Standards:			
Effective: January 14, 2020	Distribution: All Personnel	Amends:	
Prepared by: Sheriff Ronald R. Stevens	Revised:	Rescinded:	
Reviewed Date:			

SCHOHARIE COUNTY SHERIFF'S OFFICE – POLICY ON USE OF FORCE

The following content is derived from the Use of Force Model Policy (06/2019) produced by and used with the permission of the New York State Department of Criminal Justice Services and has been approved by the Municipal Police Training Council.

I. PURPOSE

Law enforcement officers around the country and here in New York State are authorized to use reasonable and legitimate force in specific circumstances. Federal constitutional and state statutory standards dictate when and how much force can be used. This policy is founded in these standards, but is not intended to be an exhaustive recitation of state and/or federal legal framework governing use of force. The policy is designed to provide guidance to individual agencies as they develop their own use of force policies in accordance with Executive Law §840(4)(d)(3).

This policy is not intended to endorse or prohibit any particular tactic, technique, or method of employing force. Separate policy guidance and training should be provided for each of the available force instrumentalities made available to officers.

II. POLICY

The federal and state standards by which use of force is measured are both founded in the basic premise of objective reasonableness.¹ The amount of force that is used by the officers shall be the amount of force that is objectively reasonable under the circumstances for the officer involved to effect an arrest, prevent an escape, or in defense of themselves or others. The standard of objective reasonableness, established by the United States Supreme Court in *Graham v. Connor*, is used in this policy and is intended to provide officers with guidelines for the use of force, including deadly physical force.

As the Supreme Court has recognized, this reasonableness inquiry embodies "allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation."²

This policy is written in recognition of the value of all human life and dignity without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires a careful balancing of all interests.

III. DEFINITIONS

- A. Objectively Reasonable – An objective standard used to judge an officer's actions. Under this standard, a particular application of force must be judged through the perspective of a reasonable officer facing the same set of circumstances, without the benefit of 20/20 hindsight, and be based on the totality of the facts that are known to that officer at the time that the force was used.³
- B. Deadly Physical Force - Physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.⁴
- C. Physical Injury – Impairment of physical condition or substantial pain.⁵
- D. Serious Physical Injury – Physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.⁶

IV. USE OF FORCE

- A. In general terms, force is authorized to be used when reasonably believed to be necessary to effect a lawful arrest or detention, prevent the escape of a person from custody, or in defense of one's self or another.⁷
- B. Under the 4th Amendment, a police officer may use only such force as is "objectively reasonable" under the circumstances. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene.⁸

V. DETERMINING THE OBJECTIVE REASONABLENESS OF FORCE

- A. When used, force should be only that which is objectively reasonable given the circumstances perceived by the officer at the time of the event.
- B. Factors that may be used in determining the reasonableness of force include, but are not limited to:
 1. The severity of the crime or circumstance;⁹
 2. The level and immediacy of threat or resistance posed by the suspect;¹⁰
 3. The potential for injury to citizens, officers, and suspects;¹¹
 4. The risk or attempt of the suspect to escape;¹²
 5. The knowledge, training, and experience of the officer;¹³
 6. Officer/subject considerations such as age, size, relative strength, skill level, injury or exhaustion, and the number of officers or subjects;¹⁴
 7. Other environmental conditions or exigent circumstances.¹⁵

VI. DUTY TO INTERVENE

- A. Any officer present and observing another officer using force that he/she reasonably believes to be clearly beyond that which is objectively reasonable under the circumstances shall intercede to prevent the use of unreasonable force, if and when the officer has a realistic opportunity to prevent harm.
- B. An officer who observes another officer use force that exceeds the degree of force as described in subdivision A of this section should promptly report these observations to a supervisor.

VII. USE OF DEADLY PHYSICAL FORCE

A. Deadly physical force may be used by an officer to protect themselves or another person from what the officer reasonably believes is an imminent threat of serious physical injury or death.¹⁶

B. Deadly physical force may be used to stop a fleeing suspect where:

1. The officer has probable cause to believe the suspect has committed a felony involving the infliction or threat of serious physical injury or death; and,
2. The officer reasonably believes that the suspect poses an imminent threat of serious physical injury to the officer or to others.
3. Where feasible, some warning should be given prior to the use of deadly physical force.¹⁷

VIII. PROHIBITED USES OF FORCE

A. Force shall not be used by an officer for the following reasons:

1. To extract an item from the anus or vagina of a subject without a warrant, except where exigent circumstances are present;
2. To coerce a confession from a subject in custody;
3. To obtain blood, saliva, urine, or other bodily fluid or cells, from an individual for the purposes of scientific testing in lieu of a court order where required;
4. Against persons who are handcuffed or restrained unless it is used to prevent injury, escape, or otherwise overcome active or passive resistance posed by the subject.

IX. REPORTING & REVIEWING THE USE OF FORCE

A. Any injuries resulting from a use of force incident shall result in the appropriate and timely medical attention being provided to the injured party.

B. Members involved in use of force incidents as described below shall notify their supervisor as soon as practicable and shall complete a departmental use of force report.

1. Use of force that results in a physical injury.
2. Use of force incidents that a reasonable person would believe is likely to cause an injury.
3. Incidents that result in a complaint of pain from the suspect except complaints of minor discomfort from compliant handcuffing.
4. Incidents where a conducted energy device (CED) was intentionally discharged or accidentally discharged after being displayed.
5. Incidents where a firearm was discharged at a subject.

C. A standardized use of force form should be used to document any reportable use of force incident.¹⁸

X. PROCEDURES FOR INVESTIGATING USE OF FORCE INCIDENTS

A. Where practicable, a supervisor should respond to the scene to begin the preliminary force investigation.

B. A supervisor that is made aware of a force incident shall ensure the completion of a use of force report by all officers engaging in reportable use of force and, to the extent practical, make a record of all officers present.

- 1 Force which is objectively reasonable is insulated from criminal liability through Article 35 of the NYS Penal Law and civil liability by the 4th Amendment standard of objective reasonableness.
- 2 *Graham v. Connor*, 490 U.S. 386 at 396 (1989).
- 3 *Graham*, 490 U.S. 396 (1989)
- 4 NY Penal Law § 10 (11) (McKinney 2013)
- 5 NY Penal Law § 10 (9) (McKinney 2013)
- 6 NY Penal Law § 10 (10) (McKinney 2013)
- 7 NY Penal Law and § 35.30(1) (McKinney 2013)
- 8 *Graham*, 490 U.S. at 396 (1989)
- 9 *Ibid.*
- 10 *Ibid.*
- 11 *Scott v. Harris*, 550 U.S. 372 (2007)
- 12 *Graham*, 490 U.S. at 396 (1989)
- 13 Analysis of cases under the 4th Amendment require the focus to be on the perspective of a reasonable officer on the scene which includes the training and experience of the officer. *Graham v. Connor*, 490 U.S. 386 (1989), *Terry v. Ohio*, 392 U.S. 1 (1968)
- 14 *Sharrar v. Felsing*, 128 F. 3d 810 (3rd Cir. 1997) (numbers of officers or subjects)
- 15 Courts have repeatedly declined to provide an exhaustive listing of factors. *Chew v. Gates*, 27 F. 3d 1432, 1475 n.5 9th Cir. (1994)
- 16 NY Penal Law and § 35.30(1)(c)(McKinney 2013)
- 17 NY Penal Law and § 35.30(1), as restricted by *Tennessee v. Garner*, 471 U.S. 1 (1985) (restricting the use of deadly physical force as it relates to fleeing felons) In *Garner*, the Supreme Court uses "significant threat of serious physical harm, either to the officer or others" in describing the limited circumstances under which deadly force can be used to prevent the escape of a felon.
- 18 Chiefs of police departments, County Sheriffs, and the Superintendent of State Police should consider utilizing these forms to ensure compliance with the administrative reporting requirement



Division of Criminal Justice Services

MEMORANDUM

TO: New York State Police Departments and Sheriffs' Offices

FROM: Mary Schmitt, New York State Crime Reporting Program

DATE: October 26, 2020

SUBJECT: REPORTING ALERT: IJ Portal Use of Force reporting interface to go live on
December 1, 2020

Beginning December 1, 2020, all police departments and sheriffs' offices and the New York State Police must submit use of force incidents that occur ***on or after November 1, 2020***, through a new Use of Force Reporting Interface accessible through the eJustice New York Integrated Justice Portal (IJ Portal).

Police departments and sheriffs' offices must use the existing data collection tool to report use of force incidents occurring ***prior to November 1, 2020***. Agencies will have until **December 15, 2020** to submit new or update incidents that they have already reported. The existing data collection tool will be discontinued as of that date.

Agencies are expected to submit use of force incidents to the state Division of Criminal Justice Services (DCJS) no later than 30 days after a month ends (i.e. January data no later than the end of February).

Use of Force Data Reporting Requirements

As a reminder, state law (Executive Law 837-t) requires the chief of every police department, each county sheriff, and the superintendent of state police to report to DCJS any instance in which a police officer or a peace officer (Criminal Procedure Law 1.20.34 and 2.10) uses force.

The following Use of Force incidents must be reported:

Display a chemical agent - To point a chemical agent at a person or persons.

Use/Deploy a chemical agent - The operation of the chemical agent against a person or persons in a manner capable of causing physical injury as defined in Penal Law Article 10.

Brandishes a firearm - To point a firearm at a person or persons.

Uses/Discharges a firearm - To discharge a firearm at or in the direction of a person or persons.

Brandishes an electronic control weapon - To point an electronic control weapon at a person or persons.

Uses/Deploys electronic control weapon - The operation of an electronic control weapon against a person or persons in a manner capable of causing physical injury as defined in Penal Law Article 10.

Brandishes an impact weapon - To point an impact weapon at a person or persons.

Uses/deploys an impact weapon - The operation of an impact weapon against a person or persons in a manner capable of causing physical injury as defined in Penal Law Article 10.

Uses a chokehold or other similar restraint - Any application of sustained pressure to the throat or windpipe of a person in a manner that may hinder breathing or reduce intake of air.

Conduct which results in the death or serious bodily injury of another person - Serious bodily injury includes bodily injury that creates or causes:

- a substantial risk of death; or
- unconsciousness; or
- serious and protracted disfigurement; or
- protracted loss or impairment of the function of any bodily member, organ or mental faculty.

Please contact DCJS at useofforce@dcjs.ny.gov for more information and/or questions about the use of force reporting process.

Accessing the Use of Force Reporting Interface

The Use of Force Reporting Interface is accessible through the [IJ Portal](#), a secure site that requires a username and password to access. All new requests for IJ Portal accounts must be coordinated through an agency's designated Terminal Agency Coordinator (TAC). TACs can use the "Feedback" link in the IJ Portal or email portalhelpdesk@ejusticenyny.gov with any questions about access.

Instructions for accessing the Interface and submitting monthly Use of Force incidents are attached and available on the DCJS website:

<https://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/use-of-force.htm>

BREAKING | Jun 16, 2020, 12:44pm EDT

Trump Signs Executive Order Banning Choke Holds 'Unless An Officer's Life Is At Risk'



Jack Brewster Forbes Staff
Business
I'm a news reporter for Forbes.

Updated Jun 16, 2020, 02:26pm EDT

TOPLINE President Trump signed an executive order Tuesday on police reform that bans choke holds “unless an officer’s life is at risk,” increases federal oversight of police departments and encourages departments to move toward better practices on use of force, though the order falls short of what activists are pushing for and ties its mandates to incentives.





Surrounded by members of law enforcement, President Trump signs an executive order on "Safe Policing ... [+] ALEX WONG/GETTY IMAGES

KEY FACTS

- Under the order, the federal government will require police departments to ban chokeholds, the police maneuver used by the Derek Chauvin in the killing of George Floyd, to receive certification that will allow them to access federal grants.
- It will also create a database to track police officers with several misconduct violations and push for departments to involve mental healthcare workers on calls dealing with homelessness, mental illness and addiction.
- Activist groups are expected to criticize the order as not doing enough: in the wake of George Floyd's death, protest groups, including Black Lives Matter, have pushed for sweeping reform, including "defunding the police."
- Trump decried the "radical and dangerous efforts to dissolve our police" during prepared remarks in the Rose Garden before he—surrounded by law enforcement—signed the order Tuesday, adding "without police, there is chaos."
- After discussing the policy details of his executive order, the president dedicated much of his remarks Tuesday toward decrying protesters and attacking the record of his predecessor, former president Barack Obama, and former vice president and presumptive Democratic nominee Joe Biden.

CRUCIAL QUOTE

Trump has rallied to the defense of police officers and argued Tuesday that police misconduct was the the work of a small percentage of police officers: "They're very tiny. I use the word tiny. It's a very small percentage. But you have them. But nobody wants to get rid of them more than the really good and great police officers."

KEY BACKGROUND

Trump said Tuesday that his executive order would go "hand in hand" with the bill Senate Republicans are working on—and implored GOP leadership to get a bill done quickly. Led by Sen. Tim Scott (R-S.C.), Republican senators are working to put together a bill that would increase training to focus on de-escalation tactics and lessen the potential for choke holds, among other measures. House Democrats are debating a bill that would ban choke holds outright, and no-knock warrants in drug cases, as was used in the fatal shooting of Breonna Taylor in Louisville, Kentucky, in March, and increase police accountability, among other reform measures.

CHIEF CRITIC

Democrats criticized the order for not going far enough: "While the president has finally acknowledged the need for policing reform, one modest executive order will not make up for his years of inflammatory rhetoric and policies designed to roll back the progress made in previous years," Senate Minority Leader Charles Schumer (D-N.Y.) said in a statement.

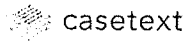
FURTHER READING

Trump To Sign Executive Order On Police Reform (NPR)

Trump Plans Executive Order To 'Encourage' Police Reform (Forbes)

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N.Y. Penal Law § 121.13-A

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Current through 2020 NY Law Chapter 286

Section 121.13-A - Aggravated strangulation

Aggravated strangulation. A person is guilty of aggravated strangulation when, being a police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law or a peace officer as defined in section 2.10 of the criminal procedure law, he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article, or uses a chokehold or similar restraint, as described in paragraph b of subdivision one of section eight hundred thirty-seven-t of the executive law, and thereby causes serious physical injury or death to another person. Aggravated strangulation is a class C felony.

N.Y. Penal Law § 121.13-A

Added by New York Laws 2020, ch. 94, Sec. 2, eff. 6/12/2020.

Previous Section
Section 121.13 -
Strangulation in the first
degree

Next Section
Section 121.14 - Medical or
dental purpose