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### **SURVIVING CRITICAL INCIDENT INVESTIGATIONS AS A PROBATION PEACE OFFICER**

**By Christopher W. Miller, General Counsel  
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A San Diego County deputy probation officer returns fire after a resident kills a San Diego police officer during an apartment entry . . . Sacramento County DPOs assigned to an auto theft task force fire shots when a suspect tries to run them down in a stolen vehicle . . . a deputy probation officer entering a house for a probation search is forced to shoot a vicious dog . . . a Los Angeles County deputy probation officer assigned to a gang task force fires at a fleeing suspect after he points a gun at the officer . . . and the list of critical incidents involving probation peace officers goes on and on.

I have represented peace officers in dozens of critical incident investigations throughout California. A “critical incident” is defined as any action or inaction by a peace officer that results in serious bodily injury or death and/or is likely to expose the officer or the employing agency to civil or criminal liability. Critical incidents may result from intentional and accidental discharge of a firearm; use of any dangerous or deadly weapon (e.g., knives, batons, Tasers); use of physical force to arrest, restrain or gain physical control of another person; suicide or other in-custody death; and vehicular collisions.

Your own tactical training will prepare you to survive a similar officer-involved shooting or other critical incident, but are you prepared for the investigation that will follow? While every incident is different, probation peace officers can be prepared to survive the post-incident investigation by remembering a few basic rules about the process.

**1. Call Your Union**

When you are involved in a critical incident, such as an officer-involved shooting, you or another employee should contact your union office or a board member immediately to facilitate a prompt response to the incident. You should not discuss the incident with anyone else until the union representatives and attorneys arrive. Keep the contact numbers of your union representative and law firm handy, as notification of the representative usually is your responsibility.

**2. Provide Only “Public Safety Information” Until Representatives Arrive**

In the first moments after a critical incident, you should provide only a “public safety statement” – the minimum information necessary to allow supervisors to take steps to prevent further injury or escape and preserve evidence. You should not provide further information until you have consulted with an attorney. You should refrain from “venting” to avoid making your co-workers witnesses.

**3. Your State of Mind is Your Most Important Defense**

In any case involving the use of deadly force, the most important question both the investigators and the District Attorney will ask is whether the peace officer’s actions were “reasonable.” Peace officers are entitled to use that force necessary to respond to an imminent threat of death or injury. (*Graham v. Connor* (1989) 490 U.S. 386, 397.) The officer’s actions must be “objectively reasonable” based on the facts and circumstances confronting the officer at the time he or she uses deadly force.

In *Graham v. Connor*, the U.S. Supreme Court held:

The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation. . . . [T]he question is whether the officers’ actions are ‘objectively reasonable’ in

light of the facts and circumstances confronting them,  
without regard to their underlying intent or motivation.

Translated into practical terms, the Court's holding simply means your "state of mind" – your perceptions, reasoning, and conclusions – at the time you discharged your firearm at a suspect is the key to surviving a critical incident investigation. Your state of mind in any incident involving the use of deadly force essentially will be *fear*; that is, you will have acted out of fear the suspect was going to kill or seriously injure you or someone else. Therefore, you must be prepared in any interview about the incident to convey in plain terms your true belief the suspect would have harmed you, other officers, or members of the public had you not used deadly force.

#### **4. Your Tactics and Training Must Support Your State of Mind**

Second in importance to your state of mind in a critical incident investigation are your tactics and training as a law enforcement officer. As a peace officer, you have been trained in everything from tactical decision-making and the use of firearms and other weapons to "verbal judo" and domestic violence response. Your entire range of training, and particularly your training in tactics, firearms, and communications, will be involved in your response to a critical incident.

The standard by which the courts and prosecutors review use of force – and the standard by which investigating agencies are required to review your conduct – is that of the "reasonable *officer*," not merely the "reasonable *person*." This means you must be prepared in the investigation to articulate your specialized training; e.g., when you last qualified with the weapon, tactics schools or courses you've attended, and other experience relevant to the incident.

#### **5. You are the Subject of a Homicide Investigation**

In any critical incident involving the suspect's death, the investigating agency is likely to treat you during its investigation as the victim or witness of a crime or attempted crime by the suspect. The District Attorney's Office, however, will review your conduct as though you are the *subject* of a homicide investigation. The homicide must be justified as an appropriate use of force based on your state of mind, the threat confronting you or others, and your tactical training.

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As the subject of a homicide investigation, you have the right not to incriminate yourself; i.e., you can invoke your *Miranda* rights. This means you can refuse - if so advised by legal counsel - to give a statement to the investigators. You cannot be disciplined or otherwise punished for refusing to give a statement.

#### 6. **Assume You Will Be Sued**

Given the current political and legal climate of “second-guessing” peace officers, you should approach any critical incident investigation with the presumption the decedent’s family members will file a federal lawsuit against you, the county, your chief probation officer, and anyone else associated with the incident. Government Code section 995 provides:

[U]pon request of any employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity.”

While your county generally is obligated to represent you in any civil action arising out of your employment, there are some situations, usually involving off-duty conduct, where you may be required to retain your own attorney. Approaching the critical incident investigation as though you will be sued over your actions - however justified your actions may be - should help you keep focused on relating the state of mind and tactical training that support your conduct.

#### 7. **Do Not Submit to a Voluntary Blood Test**

You may be asked to submit voluntarily to a blood test to determine if intoxicants are present. Under federal law, your employer may order you to submit to intoxicant testing only where there is reasonable suspicion you were under the influence of an intoxicant at the time of the incident. The best practice is to decline voluntary testing and submit to testing only upon a written administrative order.

**8. A Critical Incident Investigation is not an Internal Affairs Investigation**

The critical incident investigation is governed by different standards and legal requirements than are internal affairs investigations. Any statement you give to a critical incident team, usually composed of homicide detectives, is deemed voluntary. The statement is not protected as a compelled statement and therefore can be used against you in a subsequent criminal, civil or administrative proceeding.

Statements to internal affairs investigators, on the other hand, are compelled statements under both federal law and the Public Safety Officers Procedural Bill of Rights Act. By law, your I.A. statement is compelled under threat of discipline and therefore cannot be used against you in a civil or criminal proceeding, with some exceptions (e.g., impeachment, unavailability as a witness).

For critical incident investigations, this distinction means you should give a voluntary statement only after your legal counsel has advised you to do so. In most cases, a voluntary statement is appropriate because your conduct will have been consistent with your state of mind and your training; however, there are many situations where you should not give a statement voluntarily. You should consult with counsel before deciding whether or not to give a statement.

**9. Understand the Role of the District Attorney**

Officer-involved shooting investigations typically are investigated by the local District Attorney's Office. The incident will be reviewed by a prosecutor both to evaluate any surviving suspect's conduct for possible charges - such as assault with a deadly weapon or attempted murder or battery on a peace officer - and to review your conduct to determine whether your actions were justified. In most cases, your actions will be deemed justified; however, in a few cases, the District Attorney's Office may file charges based on your actions. Those charges can range from homicide to grossly negligent discharge of a firearm to assault under color of authority.

Your lawyer should monitor the D.A.'s review of the critical incident to facilitate the prosecutor issuing an opinion justifying your actions.

**10. Listen to Your Lawyer!**

Time and again, I have given an officer advice about how to proceed through an interview or interrogation, only to have the officer disregard that advice once

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questioning starts. The union and your attorneys often have a good working relationship with local investigating agencies and all parties understand the stakes in a critical incident investigation. The critical incident investigators, however, have a job to do, and that job is not necessarily to protect your rights. Listen to your lawyer - he or she will be an experienced attorney familiar with the critical incident investigation process. Your union dues pay for the attorney's advice - let the union and the attorney assist you in surviving the critical incident investigation.

*This article does not constitute legal advice. The reader should consult with an attorney or union representative before providing a statement or other information in a critical incident investigation.*