

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

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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.

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?

As lead counsel for several law enforcement labor associations throughout California, I have represented peace officers in dozens of critical incident investigations. 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.

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. ALWAYS Call Your Union**

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

### **2. Provide Only “Public Safety Information” Until Your Representative Arrives**

In the first moments after a critical incident, you should provide only that information necessary to allow supervisors to take steps to prevent further injury or escape and preserve evidence or maintain a possible crime scene. 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 the investigators 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, judgments and reasoning – at the time you discharged your firearm at a suspect is the key to determining whether your actions will be deemed justified. 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. You must be able to communicate why you acted as you did in the circumstances confronting you – whether it's a drawn weapon, an attempt to run you over, a vicious dog, or shots fired.

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

Second in importance only to your state of mind in a critical incident 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 your 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 have attended, and any on-the-job experience you have had 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.

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 knowing the suspect or the suspect’s surviving family members will file a federal lawsuit against you, your 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 and your agency generally are 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 counsel to represent you. 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. Our practice is to decline voluntary testing because there is a substantial risk of

false positive and there is usually no gain to you or your agency from a clean test.

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

The critical incident investigation conducted by homicide detectives is governed by different standards and legal requirements than are internal affairs investigations. Any statement you give to a critical incident team usually 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 union representative and legal counsel have 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.

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

Once a critical incident investigation is completed, your agency will forward the investigation to the District Attorney for review. 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 union or 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 questioning starts. The union and your attorneys likely have a good working relationship with the local investigating agency 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 should 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.

Critical incident investigations are a unique process, involving administrative, civil and

criminal interests in a way not involved in any other law enforcement event. The purpose of the investigation is to protect the county against civil liability and to evaluate the criminal liability of the suspect and the peace officer. Probation associations can be better prepared for critical incidents by providing training to members, establishing relationships with other law enforcement labor associations in the county, setting up a peer support network, and working with department trainers to increase training for armed officers.

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