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What You Need to Tell The Prosecutor in Your Next Use-of-Force Case

By Joe Weeg

"Cop Shots Victim in Back!"

"Victim Reaching for ID when Shot By Police!"

"Fleeing Juvenile Shot by Cop!"

"INNOCENT PASSENGER GUNNED DOWN BY POLICE FIRE!"

It seems we're bombarded daily with headlines of another police-involved shooting. I'd bet that you've all talked with your fellow officers about the consequences of getting into a shooting. Those of you who haven't are clearly off your meds. The consequences of all police-involved shootings are tremendous — it doesn't take your standard police sensitivity class to understand why. First, for the victim (good or bad) the ramifications are stark — someone is dead! Children, wives, mothers and fathers have lost a beloved family member. Second, for the police officer, even if exonerated by every review, his life has just gone down the toilet. Statistics demonstrate that no matter how skilled that officer is, he will probably leave law enforcement within a short time. If he is in a relationship, the odds are good that it will end. There will be an administrative investigation, a criminal investigation, and possibly a civil suit. On top of all of that, there may be media sensationalism and community unrest In the terms of my 13 year-old daughter, "This sucks!"

A PEACE OFFICER ... IS JUSTIFIED IN THE USE OF ANY FORCE WHICH HE REASONABLY BELIEVES TO BE NECESSARY TO EFFECT THE ARREST OR TO DEFEND ANY PERSON FROM BODILY HARM WHILE MAKING THE ARREST.

Yes, Virginia, it does suck. But under all the hoopla comes the recent seminal work of Dr. Bill Lewinski, which appears to turn the legal playing field upside down. To understand the import of the good doctor's work, you need to hang with me for a short excursion through the legal jargon in use-of-force cases. In a police-involved shooting, usually two legal principles are at play: 1) use-of-*force by police officers in making an* arrest; and 2) defense of self or another. Under the "use-of-force" principle, the grand jury or other decision-making body examines the following: A peace officer, while making a lawful arrest, is justified in the use of any force which he reasonably believes to be necessary to effect the arrest or to defend any person from bodily harm while making the arrest. However, the use of deadly force is only justified when a person cannot be captured any other way and either: 1) The person has used or threatened to use deadly force in committing a felony; or

2) The peace officer reasonably believes the person would use deadly force against any person unless immediately apprehended.

Notice that the analysis under the use-of force principle is two-part: first, the subjective belief of the officer – did he truly believe that force was necessary; and second, an objective test – would a neutral person in the officer's shoes believe the force was necessary. What does that mean for those of us who can't yet figure out if we should do the high protein diet or the high carbohydrate diet? An officer can believe that he was going to be shot, so he shoots first. However, if that belief does not make sense to a reasonable outsider, then the officer violated the use-of-force principle.

The "defense of self" principle is different in that it is an actual defense to a criminal charge with usually several statutorily mandated hurdles attached. For example, self-defense examines who is the first aggressor, alternative options to the victim, retreat into the home or in a public place, etc. However, in practice, the issue under "defense of self" is identical to the issue in the "use of force" principle For example, a typical "defense of self" instruction reads as follows: "A person is justified in the use of reasonable force when he reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force." Again, both an objective and subjective test are required: the police officer must believe it is true, and a person in the officer's shoes must believe it is true. So what? Why shouldn't you at this point go back to watching Oprah? Here's the catch. Assuming that the police officer subjectively believed that he had to use deadly force, the trier of fact is left with the question whether that makes objective sense — that "neutral person in the shoes of the police officer" bit. The typical grand juror, like the typical civilian on the street, will make certain assumptions:

NO LONGER CAN A GRAND JUROR ASSUME THAT A SHOT IN THE BACK MEANS THAT THE OFFICER GUNNED DOWN THE VICTIM IN COLD BLOOD.

1. If a victim is shot in the back, the police officer's use of deadly force or defense of self appears irrational. It is common sense, according to the typical grand juror, that there is no danger to the officer if the victim has turned or is turning away.
2. If, in fact, the victim did not have a gun and the officer testifies that he thought the victim was reaching for a gun in the waistband, it is objectively irrational for the police officer not to wait to verify whether a gun was in the waistband. This is particularly true to the typical grand juror where the officer has his gun drawn and finger on the trigger.
3. If the victim was involved in a high-speed chase and is shot after reaching toward the console (where it is later discovered there is no gun), the officer should have waited to see whether the victim was reaching for something in the console or merely showing his hands. This scenario is further complicated by multiple officers having their guns drawn and pointed at the victim.
4. Finally, a victim is shot by a police officer and the victim's body is found 15 yards from the spot where the officer said the victim was located at the time the officer decided to fire. Obviously, the typical grand juror will conclude that the officer is lying about everything that happened because he is lying about the location of the victim. Again, the objective test is failed by the officer.

Here is the clinker: Each of these assumptions are not supported by scientific evidence.

Dr. Bill Lewinski, a professor at Minnesota State University, Mankato, has lectured, testified as an expert, and taught use-of-force issues for many years. He began his exploration of these issues not with a nap and a glass of milk, as I would have, but with two axioms that are accepted in the scientific community: 1) it takes an average police officer, with his finger on the trigger of the gun, one-fourth to one-third second to fire his gun; and 2) action always beats reaction in a time test.

Armed with these two axioms, Dr. Lewinski went into the laboratory and conducted experiments. What he did seems obvious, as are most interesting discoveries. He examined common use-of-force situations and recreated them in a measurable way in the lab And he put it all to a clock. His conclusions were not obvious:

1. A subject, who is running and shot in the back by a police officer, could have fired a weapon from the running position and been hit while the subject was still firing — or the subject could have been hit immediately after firing. No matter the scenario, the shot in the back does not allow

the conclusion that the subject was disengaged from the fight. Experiments by Dr. Lewinski appear to demonstrate that shots in the subject's back should be the norm rather than the exception for a shooting and fleeing subject because of the relatively quick body dynamics of the subject (from 00/100ths of a second to 14/100ths of a second to turn, fire, and disengage) and the relatively slow reaction by the police officer (25/100ths of a second to 33/100ths of a second).

2. A subject (driver or passenger) can take a gun from the console of the car, point it at the officer and pull the trigger either before or, at best, at the same time as the officer can fire with a drawn weapon and his finger on the trigger.
3. A subject whose hand is on his waistband can pull and fire a weapon from the waistband before the officer can fire with a drawn weapon and his finger on the trigger. In fact, this experiment indicated that the subject, in many cases, could fire three times faster than the officer could react to the subject's movement.
4. Finally, Dr. Lewinski noted: "The implications of studying the 'dynamic' rotation by the subjects in this study, while the subjects were doing a 90, 180 or 360 degree turn, is that not only can we see that the subject would be shot in the back if they actually were in a street encounter and the officer was to really 'react,' but the subjects also would be shot at quite a distance from where the officer said they were when the officer made the decision to fire." Dr. Lewinski noted that some subjects traversed 15 yards while completing the motion of firing, turning 360 degrees, and running — for a total elapsed time of under three seconds.

My oh my! Where does this leave us? Without a doubt, factors such as the location of the shot, the lack of any gun by the subject, and the observations of the officer, are all still relevant concerns. Dr. Lewinski's studies, however, draw into question our common assumptions regarding those facts and shape the training that must be given to officers. No longer can a grand juror assume that a shot in the back means that the officer gunned down the victim in cold blood. Moreover, all the other facts that shape the officer's decision-making process, in light of the no-win situation for the officer facing a furtive movement from the waist or the console, should become paramount to the grand juror trying to objectively determine reasonable conduct. Finally, officers are going to have to resort to even better approaches to dangerous situations. As stated by Dr. Lewinski: "If there is one primary lesson for the officer to take away from this study, it is the value of good basic officer survival skills such as decision making, visual and mental alertness, tactical positioning and always having the suspects keep their hands in plain view." And, as underscored by the study, a bit of luck.

So, here's the real problem: Don't Keep These Findings a Secret!!!!! Tell your prosecutor, administrator, training officer, and grandmother about Dr. Lewinski's studies. If we are about doing the right thing, ignorance of credible, scientific studies won't win us the gold star — and, more importantly, may endanger your safety. We all know the golden rule: You have to come home at the end of the day. However, come home wrapped in the flag of justice, instead of under the flag of ignorance. ☆

About the Author

Joe Weeg is an Assistant Polk County Attorney in Des Moines, Iowa. He has prosecuted criminal cases for over 20 years with an emphasis in recent years on police-involved shootings and the accompanying grand juries A majority of his present duties involves training police officers in all aspects of criminal law and procedure, crime scene investigation from a lawyer's perspective, and testifying.