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CLIENT BULLETIN

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NEW BILL WOULD IMPOSE SEVERE LIMITS ON USE OF DEADLY FORCE

State lawmakers in Sacramento announced on April 3, 2018 new legislation to restrict the use of deadly force by peace officers only to those situations where deadly force is deemed “necessary . . . given the totality of the circumstances” to prevent imminent death or serious bodily injury to the peace officer or another person. AB 931 would justify the use of deadly force only when there is no reasonable alternative, including retreating from the threat. The legislation criminalizes the use of deadly force if there is a finding the officer’s “gross negligence substantially contributed to making [the force] necessary.”

The current standard for using deadly force is whether the force is “reasonable under the circumstances”. As the U.S. Supreme Court put it in *Graham v. Connor* (1989) 490 U.S. 386, 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.” AB 931 would impose that 20/20 hindsight.

The legislation’s changes to existing law add up to dramatically increased individual civil and criminal liability for probation peace officers. The proposed statute –

- makes homicide by a peace officer justifiable only “[w]hen necessary given the totality of the circumstances” to prevent “imminent and serious bodily injury or death to the officer or a third party”
 - “necessary” is defined as the exhaustion of all “reasonable alternatives” to the use of deadly force, such as retreat, “de-escalation”, warnings, “verbal persuasion”, and any other tactic to avoid a shooting
 - “totality of the circumstances” is defined as the facts available to the officer at the time, “the conduct of the officer and the subject leading up to the use of deadly force”, and whether the officer was acting according to training and policy

- removes current Penal Code section 835a language stating the peace officer need not retreat based on the suspect's resistance or threatened resistance
- amends Penal Code section 835a to prohibit the use of deadly force against an individual who poses a danger only to himself
- limits the use of deadly force against a fleeing felon only to those situations where the felony involves serious bodily injury or death or there is an imminent threat of such injury

Legislation Would Increase Civil and Criminal Liability

AB 931 is a recipe for a dramatic increase in civil and criminal liability for peace officers. The legislation will open the door to even more second-guessing by prosecutors and federal court juries. Did the deputy probation officer confronted with a loaded firearm on a home visit exhaust every available alternative, including retreating from the scene? Did the "conduct of the officer" contribute to the subject bringing out a weapon and getting shot? Was the officer's assessment of the threat of serious bodily injury "reasonable"? These are the types of questions that will be asked, likely to the point that those officers who have a choice will no longer want to be armed.

Coupled with the current attacks on qualified immunity, this Monday-morning quarterbacking likely would lead to many more instances where punitive damages are levied against officers individually. Public agencies are not required to pay punitive damages. We also are likely to see more instances where agencies refuse to provide officers with a defense, so that once again legal defense plans become essential for union members.

Legal Responses to Proposed Legislation Likely to Follow Passage

There are at least two possible lines of attack on AB 931 should its provisions become law. One argument is that the statute is unconstitutional because the U.S. Supreme Court, in *Graham v. Connor*, already has defined the Fourth Amendment standard applicable to uses of deadly force. Another argument, applicable to criminal prosecutions and civil litigation, is that the Fourteenth Amendment's Equal Protection Clause prohibits California from treating peace officers differently than other citizens, whose use of deadly force is not subject to the new standards. Whether public safety officers and agencies respond to AB 931 with these or other arguments, the legislation is sure to change the legal landscape for California's probation peace officers.

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