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Use of Deadly Force to Prevent Escape

By
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A recent article published in the *FBI Law Enforcement Bulletin* focused on police use of deadly force in the immediate defense of life.[1] That article discussed cases and concepts relating to the authority of police officers to use deadly force when there is reason to believe that such force is necessary to counter immediate lethal threats posed by criminal suspects.

In contrast, this article discusses the use of deadly force by police in a context that is less universally accepted or understood—the use of deadly force to "seize" or prevent the escape of criminal suspects. While the use of force in both contexts must be "objectively reasonable" under the fourth amendment to the U.S. Constitution,[2] there are distinctive issues raised by each that require separate analysis.

Consider, for example, a scenario in which an officer is confronted by a suspect who, armed with a handgun, fires several shots at the officer. The officer would be objectively reasonable in perceiving that the "immediate" threat to his life was sufficient to justify the use of deadly force in self-defense.

But, consider further that after firing the shots at the officer, the suspect turns and runs away. Can it still be said that an "immediate" threat to the officer exists when the suspect is simply trying to get away? And, if there is no "immediate" threat to the officer or to anyone else, is deadly force still a lawful option to prevent the suspect's escape? This article will assist in resolving these questions.

Constitutional Authority and Limitations

The constitutional authority to use deadly force to prevent escape

from arrest was defined by the U.S. Supreme Court in *Tennessee* v. *Garner*[3] in 1985. In reviewing the constitutionality of a State statute permitting the use of deadly force to prevent the escape of all felony suspects, the Court reasoned that if a criminal suspect "poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[4]

On the other hand, the Court held that deadly force may be used when "necessary to prevent escape and the officer has *probable cause* to believe that the suspect poses a *significant threat* of death or serious physical injury to the officer or others."[5] (emphasis added).

The Court explained the standard as follows:

> "...if the suspect threatens the officer with a weapon *or* there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used *if necessary to prevent escape*, and if, where feasible, some warning has been given."[6] (emphasis added)

The *Garner* decision explicitly recognizes constitutional authority for the use of deadly force to prevent escape and provides a two-prong test to guide the exercise of that authority. First, an officer must have probable cause to believe that the fleeing suspect is *dangerous*, and second, the use of deadly force must be necessary to effect the seizure.

The First Prong: A "Dangerous" Suspect

In the *Garner* decision, the Supreme Court rejected the notion that the legal terms traditionally used to classify crimes, e.g., felony and misdemeanor, provide an adequate basis for determining the reasonableness of using deadly force to effect the arrest of a suspect. The Court observed, for example, that while burglary is a felony in every State, "the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous."[7] The Court reasoned that burglary, standing alone, is commonly characterized by law enforcement agencies as a property crime.

The Court shifted the focus of the inquiry to the nature of the suspect's actions—i.e., whether there is probable cause to believe that the suspect's actions involved the infliction or threatened infliction of serious physical harm. It is noteworthy that a *threatened* infliction of physical harm is sufficient to satisfy this criterion and that probable cause, rather than certainty, is the requisite level of proof.

Both points are illustrated in *Ford* v. *Childers*.[8] An officer saw a masked person standing in a bank with his arm extended toward several people who had their arms raised above their heads. Because of an obstruction, the officer was unable to see what the masked man was holding in his hand but assumed it was a gun.

Shortly thereafter, the officer saw the same person fleeing the bank with a bag in his hand. When the fleeing suspect twice failed to comply with commands to stop, the officer and his partner each fired shots at him. He continued to flee, ran down another street, and was captured shortly thereafter—apparently unarmed at the time of his arrest, and suffering from a gunshot wound in the back. He recovered

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from his wound sufficiently to become a convicted prisoner and a plaintiff.

Following presentation of the plaintiff's case at trial, the district court directed a verdict for the defendant officers. On appeal, the appellate court held:

> "The uncontroverted evidence establishes that [the officer], after warning [the plaintiff] on two separate occasions, fired at [the plaintiff] because he reasonably believed that the suspect had committed a felony involving the threat of deadly force, was armed with a deadly weapon, and was likely to pose a danger of serious harm to others if not immediately apprehended...Even though [the officer] did not actually see a weapon in the suspect's hand...[he] reasonably concluded that the suspect was armed and dangerous."[9]

Although this language could be read as suggesting that a suspect must be viewed as armed in order to be viewed as dangerous, there is nothing in the *Garner* decision to support that view. Indeed, the *Garner* decision appears to recognize a presumption that one who has committed a crime involving infliction or threatened infliction of serious physical harm poses a continuing threat and that no further proof is needed to establish a reasonable belief that the suspect is dangerous.

The Second Prong: "Necessity" to Use Deadly Force

If, as suggested above, there is a presumption that "dangerous" suspects will continue to be dangerous, courts also appear to presume that their capture is "necessary." This is an important consideration, because it limits the issue of "necessity" to the consideration of *how*, as opposed to *whether*, a dangerous suspect will be seized.

In *Garner*, the Court held that whenever feasible, a suspect should be given a verbal warning and an opportunity to surrender before deadly force is used.[10] If verbal warnings are not feasible, or if the fleeing suspect ignores them, the officer must then consider other available options. In doing so, it is not necessary that *all* possible options be considered, only those that offer a reasonably safe means of seizing the suspect.

> ***"...whenever feasible, a suspect should be given a verbal warning and an opportunity to surrender before deadly force is used."***

The constitutionality of an officer's action does not turn on whether the officer chooses the least intrusive alternative; rather, it turns on whether the alternative chosen is "objectively reasonable."[11] It can undoubtedly be said that in virtually every case, there are less intrusive alternatives to the use of deadly force to prevent escape of a dangerous person. But they are not reasonable alternatives if they significantly increase the danger to the officers or to the public. Consider, for example, two often-suggested options—chasing or permitting the escape of dangerous suspects.

It is a common misconception that chasing a fleeing "dangerous" suspect is usually a reasonable option to using deadly force. In fact, foot pursuits of dangerous suspects are seldom "safe" alternatives for an officer. When weighing that alternative, several factors should be considered.

First, if the suspect is believed to possess a firearm, serious thought must be given to the vulnerability of a pursuing officer to a sudden, unexpected attack. The officer is placed in the distinctly disadvantageous position of having to react to a threatening action that is already underway. This threat is even more pronounced if the suspect has managed to reach cover from which to fire.

A second consideration is the threat of ambush, particularly when an officer is unable to keep the fleeing suspect in sight. Annual statistics disclose the number of officers killed as the result of ambush, frequently occurring during foot pursuits of fleeing suspects.[12]

Third, even in cases where a suspect is not believed to be armed with a deadly weapon, the potential threat of the suspect's gaining access to the officer's weapon cannot be discounted. Although officers are generally trained in defensive tactics and weapon retention, even well-trained officers can lose

control of their firearms in the course of a physical struggle.

A resisting suspect intent on seizing an officer's sidearm has a simpler task than does the officer, who faces the broader challenge of overcoming resistance while retaining the firearm. The number of officers killed each year with their own service weapons continues to highlight the gravity of the problem.[13]

If pursuing a fleeing, dangerous suspect is a high-risk option for police officers, the second most tempting option, i.e., permitting the suspect to escape, shifts the risks to the public. A dangerous suspect who evades capture today may very well be located and safely apprehended another day without further harm. Or, the suspect may, as one court put it, "continue his deadly doings."[14] The risks may be speculative, but they exist nonetheless, and should not simply be discounted.

Cases Applying the *Garner* Principles

In *Krueger* v. *Fuhr*,[15] an officer received a radio report of an assault that had just occurred, along with a description of the suspect and the fact that the suspect was armed with a knife. Among other reports received was one that stated the suspect was believed to be on drugs and "very high" and that he "had some type of knife" on him.

Responding to these reports, the officer drove to the area and saw a person matching the description of the suspect lying on his stomach between two parked cars. The officer got out of his police car, drew his revolver, identified himself as a police officer, and ordered the suspect to freeze. When the suspect suddenly jumped to his feet and began running away, the officer chased him on foot for about 70 yards, repeatedly calling for the suspect to stop. The officer stated that when he closed to within 3 to 4 yards of the suspect, he saw the suspect reach to the area of his right hip and "heard the sound of an object being pulled" from the waistband area. The officer then saw that the suspect had pulled a knife and was gripping it in his fist.

Believing that the suspect was going to turn and attack him with the knife, the officer fired four rounds, striking the suspect twice in the back and once in the base of the skull. Subsequent investigation by the police disclosed a knife approximately 43 feet from the suspect's body.

> ***"The constitutionality of an officer's action...turns on whether the alternative chosen is 'objectively reasonable.'"***

The parents of the deceased suspect filed a suit against the officer and his department pursuant to 42 U.S.C. sec. 1983, alleging violations of their son's 4th and 14th amendment rights. The defendants filed motions for summary judgment, which were denied by the trial court. Upon reconsideration, the court entered summary judgment for the department but again denied summary judgment for the officer.

Applying the *Garner* standard to the facts, the appellate court concluded that "it was objectively reasonable for [the officer] to believe that the individual he was chasing had committed a crime involving the infliction or threatened infliction of serious physical harm,"[16] i.e., assault. That reasonable belief, standing alone, satisfies the first prong of the *Garner* test—the assessment of a suspect's dangerousness.

Although the officer "also knew that the suspect probably had a knife and was inebriated," and those factors are undoubtedly relevant to a reasonable officer's concern for safety, they are not essential to establish a reasonable belief that the suspect is dangerous. For this particular case, they are perhaps more relevant to the second prong of the *Garner* test, i.e., whether deadly force was necessary. In that regard, the court concluded that the officer's "use of deadly force was necessary to prevent escape in accordance with the standards enunciated in *Garner*."[17]

The point is particularly instructive considering that the pursuing officer came within 3 to 4 yards of the fleeing suspect and could have conceiveably closed that distance. However, the officer's reasonable belief that the suspect was armed with a knife made that alternative unacceptably risky.

Another noteworthy point in the *Krueger* decision is the court's response to plaintiffs' contention that the suspect had been shot in the

back and the suggestion that "a wound in the back raises serious issues of material fact regarding the use of excessive force." The court responded:

> "In the instant case, there is no evidence that requires us to attribute special significance to the fact that [the officer] shot [the suspect] in the back....it is not remarkable that an escaping felony suspect would be shot in the back."[18]

A second case in which the court clearly focused on the "escape" issue is *Smith* v. *Freeland*.[19] An officer attempted to stop an automobile after observing traffic violations. A high-speed chase ensued, during which the suspect apparently tried to ram the police car and to evade the efforts of other officers to stop him. Finally, the suspect vehicle turned down a dead-end street, turned around, and came to a stop facing the pursuing police car.

As the officer got out of his car to approach the suspect, the suspect accelerated forward into the police car, then backed up and swerved around it to escape onto the main street. As the suspect sped past him, the officer fired one shot from his service weapon, which entered the passenger window, passed through the seat, and fatally wounded the suspect in the right side.

In the resulting lawsuit against the officer, the chief of police, and the department, the U.S. district court granted summary for the defendants, noting that the officer's actions were reasonable under the fourth amendment, even though the officer "was not in any immediate personal danger at the time he discharged his weapon...." The district court's conclusion is interesting in that the officer had originally attempted to justify the use of deadly force by claiming that he acted in self-defense.

The court's decision illustrates that such a claim is not necessary. The appellate court affirmed this judgment:

> "In an instant [the officer] had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably."[20]

The common element in these cases is the apparent presumption that the escape of a dangerous suspect poses a continuing threat to the public and that a suspect's actions in attempting to escape support a reasonable belief that those efforts will continue. Thus, in *Freland*, the court noted:

> "Even if there were a roadblock...[the officer] could reasonably believe that [the suspect] could escape the roadblock, as he had escaped several times previously... rather than confronting the roadblock, he could have stopped his car and entered one of the neighboring houses, hoping to take hostages. [He] had proven he would do almost anything to avoid capture; [the officer] could certainly assume he would not stop at threatening others."[21]

In neither *Krueger* nor *Freland* did the court require the officers to calculate the "probability" of future danger if the suspects were permitted to escape. This approach is not only consistent with the language of *Garner* but it is also realistic. Officers confronted with the need to make "split-second judgments—in circumstances that are tense, uncertain and rapidly-evolving..."[22] are hardly in a position to compute the statistical odds that a dangerous suspect will continue to do harm. Fortunately, the law does not require them to do so.

Conclusion

The use of deadly force by law enforcement officers under any circumstances is fraught with consequences. This is particularly true when deadly force is used for the sole purpose of preventing the escape of a criminal suspect.

The Supreme Court in *Tennessee* v. *Garner* observed that the use of deadly force not only impinges an individual's interests in his own life but it also "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment."[23] Accordingly, the Court concluded that it is not necessarily better that all felony suspects be shot than that they escape. At the same time, however, the Court struck the balance between the competing interests of the individual and society by holding that deadly force is constitutionally permissible, when necessary, to prevent escape of "dangerous" suspects, i.e., when there is probable cause to believe that the suspect committed a crime involving infliction or threatened infliction of serious physical harm.

The balance is undoubtedly a delicate one. The Constitution does not impose an affirmative duty on the police to use deadly force to prevent escape of dangerous suspects. Accordingly, officers, as a matter of discretion, and departments, as a matter of policy, are free to be more restrictive than the Federal constitutional standard. Indeed, there may be legitimate practical or policy reasons for doing so. However, when considering that choice, the need to maintain the balance of interests should not be forgotten. ✦

Endnotes

[1] *See*, Hall, "Deadly Force in Defense of Life," *FBI Law Enforcement Bulletin*, August, 1993, 27-32.

[2] In *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), the Supreme Court held that "...all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard...."

[3] 471 U.S. 1 (1985).

[4] *Id.* at. 9-10.

[5] *Id.* at 4.

[6] *Id.* at 10.

[7] *Id.* at 16.

[8] 855 F. 2d 1271 (7th Cir. 1988).

[9] *Id.* at 1275. Rather than suggesting that a suspect must be "armed" to be dangerous, it is more likely that the court in *Ford* viewed the issue as relevant to the officer's belief that the crime involved a threatened infliction of serious physical harm.

[10] *Garner, supra*, at 10.

[11] *See, Illinois* v. *Lafayette*, 462 U.S. 640, 647 (1983): "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."

[12] Uniform Crime Reports, Federal Bureau of Investigation, *Law Enforcement Officers Killed And Assaulted*, 1990. Of the 762 officers slain during the period 1981-1990, 72 officers were killed in ambush.

[13] *Id.* Of the 56 officers slain with firearms in 1990, 3 were shot with their own firearms; of the 57 officers shot to death in 1989, 10 were slain with their own weapons.

[14] *Daniels* v. *Terrell*, 783 F. Supp. 1211, 1213 (E.D.Mo.1992).

[15] 991 F. 2d 435 (8th Cir. 1993).

[16] *Id.* at 439.

[17] *Id.* at 440.

[18] *Id.* at 439-440. The court distinguished this case from *Samples on Behalf of Samples* v. *City of Atlanta*, 846 F. 2d 1328 (11th Cir. 1988), wherein a police officer stated that he shot the suspect who was advancing on him with a knife, and the court suggested that under those circumstances, a shot to the suspect's back could suggest a contradictory explanation. In *Krueger*, the officer's statement of facts was consistant with the wounds inflicted on the suspect.

[19] 954 F. 2d 343 (6th Cir. 1992).

[20] *Id.* at 347.

[21] *Id. See also, Daniels* v. *Terrell*, 783 F. Supp. 1211 (E.D.Mo. 1992).

[22] *Graham* v. *Connor*, 490 U.S. 386, 397 (1989).

[23] 471 U.S. 1, 8 (1985).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

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