POLICE USE OF FORCE

BOONE COUNTY BAR ASSOCIATION
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Mr. Weaver is a full-time police officer with more than 11 years of experience. He has worked for the Columbia Police Department, the St. Joseph Police Department and the Los Angeles Police Department. His assignments have included patrol, street crimes, forensic evidence technician, SWAT, policy and procedure coordinator, and use of force/tactics instructor and advisor. Mr. Weaver earned his JD from the University of Missouri-Columbia and has maintained a part-time practice since graduation. Weaver & Associates provides traditional and 24-hour police legal advising by annual contract to small and mid-sized law enforcement agencies, and offers consulting services in the areas of training, use of force investigation and internal affairs. He has instructed police officers from many Missouri agencies in use of force, search and seizure, interview and interrogation, legislative update, and police civil liability.

Pretest: Could a reasonable juror conclude that the force used was excessive?

On November 12, 2010, Weaver, a diabetic, felt the onset of an insulin reaction. He asked a friend, William Berry, to drive him to a nearby convenience store so he could purchase some orange juice to counteract the reaction. Berry agreed, but when Weaver entered the store, he saw a number of people ahead of him in the checkout line. Concerned about the delay, he hurried out of the store and asked Berry to drive him to a friend's house instead.

Connor, an officer of the local police department, saw Weaver hastily enter and leave the store. The officer became suspicious that something was amiss and followed Berry's car. About one-half mile from the store, he made an investigative stop. Although Berry told Connor that Weaver was simply suffering from a "sugar reaction," the officer ordered Berry and Weaver to wait while he found out what, if anything, had happened at the convenience store. When Officer Connor returned to his patrol car to call for backup assistance, Weaver got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly.

In the ensuing confusion, a number of other police officers arrived on the scene in response to Officer Connor's request for backup. One of the officers rolled Weaver over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M. F. but drunk. Lock the S. B. up.". Several officers then lifted Weaver up from behind, carried him over to Berry's car, and placed him face down on its hood. Regaining consciousness, Weaver asked the officers to check in his wallet for a diabetic decal that he carried. In response, one of the officers told him to "shut up" and shoved his face down against the hood of the car. Four officers grabbed Weaver and threw him headfirst into the police car. A friend of Weaver's brought some orange juice to the car, but the officers refused to let him have it. Finally, Officer Connor received a report that Weaver had done nothing wrong at the convenience store, and the officers drove him home and released him.
At some point during his encounter with the police, Weaver sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day.

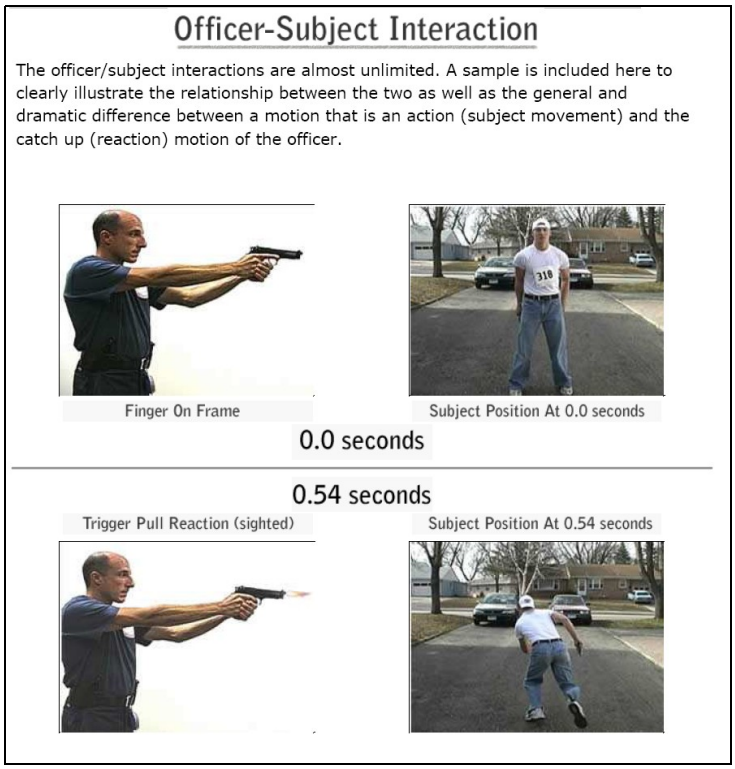
REALITIES OF LAW ENFORCEMENT

1. Police officers are often assaulted and injured.

2. There is no reliable way to conclude a particular person does not pose a threat.

3. There is no reliable way to conclude a particular person is unarmed without searching him/her; and even a seemingly innocuous item can be used as a weapon.

4. Action is always faster than reaction.



Force Science Institute, Ltd., www.forcescience.org

OFFICER SAFETY TACTICS

1. Officers are trained to maintain an advantage, including numerical advantage wherever possible, in order to establish and maintain control.

2. Officers are trained that they must sometimes be the aggressors in order to establish and maintain control.

3. Officers are trained to react to pre-attack indicators in order to protect themselves. Officers are specifically trained *not* to wait until an attack has been launched to respond.

4. Officers are trained to end a struggle and control an incident as quickly as possible.

I. AUTHORITY TO USE FORCE

A. Section 544.190, RSMo. (Supp. 2010).

"Officers may use all necessary means to overcome flight or forcible resistance to effect an arrest." (The statute is unconstitutional to the extent it permits the use of deadly force to prevent the escape of an unarmed and non-dangerous property crime suspect, see *Tennessee v. Garner*, 471 U.S. 1 (1985)).

B. *Graham v. Connor*, 490 U.S. 386 (1989).

"Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* at 396.

II. HOW MUCH FORCE

A. "Objective Reasonableness"

The constitutional standard for police use of force is the Fourth Amendment standard of "objective reasonableness." In *Graham*, the Court recognized that the test of reasonableness is not capable of precise definition or mechanical application but was based on the totality of circumstances known to the officer at the time. *Id.* at 396-397.

B. Range of Reasonableness – No Perfect Answer

The Supreme Court explained in *Graham* what standard courts should use to determine if the use of force was reasonable:

> Based on a totality of circumstances . . . the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight[.] . . . As in other Fourth Amendment contexts, however, the reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to underlying intent or motivation….
>
> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. 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. *Id.*

C. Totality of the Circumstances

In *Graham*, the Supreme Court emphasized four key factors that courts will examine when determining what level of force is justified in a use of force encounter.

1. Severity of the crime;
2. Whether the suspect is an immediate threat to the officer or others;
3. Whether the suspect is actively resisting arrest; or
4. Is attempting to evade arrest by flight. *Id.*

Since *Graham*, courts have used additional factors (known to the officer at the time) to determine whether use of force is reasonable in a particular case, including:

5. The number of suspects and officers involved;
6. The size, age, and condition of the officer and suspect;
7. The duration of the action;
8. The likely effects of the force;
9. Previous violent history of the suspect;
10. The use of alcohol or drugs by the suspect;
11. The suspect's mental or psychiatric history;
12. The presence of innocent bystanders;
13. The availability of other weapons (sprays, batons, Tasers).

D. Why Not Minimum Force?

Minimum force (or no force) may be a goal or aspiration but can not realistically be the standard for after-action review. Such a standard would cause officers to hesitate before using reasonable force may lead to more overall force being used and more injuries to officers and suspects.

> But, as the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. Requiring officers to find and **choose the least intrusive alternative would require them to exercise superhuman judgment**. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably **induce tentativeness** by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.
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> Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable. *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1992) (internal citations omitted).

III. "OBJECTIVE REASONABLENESS" – TOO MUCH LATITUDE?

A similar standard is used to evaluate the performance of criminal defense attorneys when convicts seek relief claiming ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686-687 (1984). The Missouri Supreme Court discussed this standard in *Worthington v. State*, 166 S.W.3d 566 (Mo. banc 2005).

> In order to be entitled to post-conviction relief, a movant is required to show by a preponderance of the evidence that: 1) counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances, and 2) counsel's deficient performance prejudiced him.
>
> [the movant] bears a heavy burden in attempting to satisfy the first prong of the *Strickland* test, for he must overcome a strong presumption that counsel provided competent representation by showing "that counsel's representation fell below an **objective standard of reasonableness**." This standard is met by identifying specific acts or omissions of counsel that, in **light of all the circumstances**, fell **outside the wide range** of professional competent assistance. It is presumed that counsel's conduct was reasonable and effective. "Reasonable choices of trial strategy, **no matter how ill fated they appear in hindsight**, cannot serve as a basis for a claim of ineffective assistance. It is also not ineffective to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy. *Id.* at 572-573 (internal citations omitted).