

NO. 17 EAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA

V.

RYAN POWNALL

BRIEF FOR THE COMMONWEALTH AS APPELLANT

Commonwealth Appeal from the Judgment of the Superior Court entered on September 4, 2020 at No. 148 EDA 2020, quashing the Commonwealth's appeal from the Order entered on December 30, 2019 in the Court of Common Pleas at No. CP-51-CR-0007307-2018.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this direct appeal from the Order of the Superior Court pursuant to 42 Pa.C.S. § 724(a).

ORDER IN QUESTION

The order in question is a Judgment Order *Per Curiam* entered by the Superior Court (Judges Lazarus, Dubow and Ford Elliot) on September 4, 2020, which states “Appeal QUASHED” (Appendix C at 3).

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Interlocutory and collateral jurisdiction of the Superior Court is governed by statute and is therefore a matter of statutory interpretation. *Mercury Trucking, Inc. v. Pennsylvania Public Utility Com'n*, 55 A.3d 1056, 1067 (Pa. 2012). “The jurisdictional question is, therefore, subject to this Court's *de novo* review; the scope of review is plenary.” *Id.* (citing *Commonwealth, Dep't of Envtl. Prot. v. Cromwell Township*, 32 A.3d 639, 646 (2011)).

Likewise, the question surrounding the Superior Court's refusal to constitutionally interpret Pennsylvania law “is one of statutory interpretation, and as such, it is a pure question of law. Questions of law are subject to *de novo* review and the scope of review is plenary.” *Commonwealth v. Bortz*, 909 A.2d 1221, 1223 (Pa. 2006) (citing *Commonwealth v. Bradley*, 834 A.2d 1127, 1131 n. 2 (Pa. 2003)).

STATEMENT OF THE QUESTIONS PRESENTED

I. Did the Superior Court err when it held that it did not have jurisdiction over the Commonwealth's appeal under the collateral order doctrine where the appeal raised only the facial constitutionality of a broadly applicable statute that in no way implicated the question of defendant's guilt or innocence?

- Answered in the negative by the court below.

II. Did the Superior Court improperly depart from this Court's precedent by holding that the Commonwealth may invoke its right to an interlocutory appeal under Pa.R.A.P. 311(d) only where it arises from an order that excludes, suppresses, or precludes the Commonwealth's evidence?

- Answered in the negative by the court below.

III. Did the Superior Court improperly depart from this Court's precedent and the General Assembly's Rules of Statutory Construction by stating that it could not properly construe a statute to give effect to legislative intent?

- Answered in the negative by the court below.

STATEMENT OF THE CASE

The Commonwealth charged former Philadelphia Police Officer Ryan Pownall with third-degree murder, recklessly endangering another person, and possessing an instrument of crime based on an unsealed presentment from the Twenty-Ninth County Investigating Grand Jury. The charges arose from defendant's shooting of David Jones during the course of defendant's duties as a Philadelphia Police Officer. The Commonwealth alleges that Mr. Jones was unarmed and fleeing when defendant shot him.

Prior to trial, defendant signaled that he would present a justification defense under 18 Pa.C.S. § 508(a)(1), which addresses the allowable use of force by law enforcement. The Commonwealth filed a Motion *in Limine*, offering a Section 508(a)(1) jury instruction that would comport with the Constitution, i.e., not permit the use of deadly force in violation of the Fourth Amendment. The Commonwealth's proposed instruction tracked the language employed by the United States Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985). *Garner* held that a police officer may not use deadly force absent a reasonable belief that such force is necessary to prevent death or serious bodily injury. Furthermore, the Commonwealth's proffered jury instruction remedied Section 508(a)(1)'s failure to restrict deadly force to objectively reasonable situations as required by *Graham v. Connor*, 490 U.S. 386 (1989). Defendant responded that the Commonwealth's proposed instruction would

violate his due process rights and argued that United States Supreme Court civil-rights precedent cannot apply to state criminal law. *See* Brief in Opposition to Motion in Limine, 12/4/19 (R.R. 42a-49a).

The Honorable Barbara A. McDermott denied the Commonwealth's motion. In its 1925(a) opinion, the court asserted that the Commonwealth's proposed jury instruction called for it to "usurp the legislative function of the Pennsylvania General Assembly and rewrite Section 508 out of whole cloth." Opinion, McDermott, J., 12/30/19 at 3 (attached as Appendix B). The Commonwealth filed an interlocutory appeal to the Superior Court under both the collateral order doctrine and Pa.R.A.P. 311(d), certifying that the order terminated or substantially handicapped its prosecution.

The Superior Court directed the Commonwealth to show cause why its appeal should not be quashed and the Commonwealth filed a timely response. The court then discharged the Rule to Show Cause and referred the jurisdictional issue to the merits panel.

After full merits briefing, the Superior Court quashed the Commonwealth's appeal in a 3-page *per curiam* judgment order. On the collateral order issue, the court stated only that it agreed "with the trial court's assessment that the necessity and propriety of defendant's justification defense depends on consideration of the evidence presented at trial and therefore cannot be severed from the ultimate issue –

defendant's guilt or innocence." *Commonwealth v. Pownall*, No. 148 EDA 2020 at *2 (Pa. Super. Ct. September 4, 2020) (attached as Appendix C). As for Rule 311(d), the court stated simply that the Commonwealth "has not established that the order hinders its prosecution" because "[t]he order does not exclude, suppress or preclude the Commonwealth's evidence." *Id.* Finally, although the court quashed the appeal, it expressed in a footnote its view on the merits that a constitutional interpretation of Section 508(a)(1) "would infringe on legislative action and violate the doctrine of separation of powers." *Id.* at 2 n.1.

The Commonwealth filed a petition for *allocatur*, raising three issues: (1) the Superior Court's asserted lack of jurisdiction under the collateral order doctrine; (2) the Superior Court's asserted lack of jurisdiction under Rule 311(d); and (3) the court's statement that it could not interpret state law in the manner the Commonwealth advanced without violating separation of powers. This Court granted *allocatur* on the three issues. The Commonwealth now submits this brief on the merits.

SUMMARY OF ARGUMENT

The Superior Court had jurisdiction over this appeal as one taken from a collateral order under Pa.R.A.P. 313(b). The Commonwealth's appeal is separable from and collateral to the main cause of action because it involves only the pure legal question of the constitutionality of 18 Pa.C.S. § 508(a)(1), requiring no consideration of defendant's potential guilt or innocence. The issue involved is too important to be denied review because the constitutionally-permissible use of deadly force by law enforcement is deeply rooted in public policy and impacts society at large, not just the individuals involved in this case. The Commonwealth's claim would be lost forever if denied collateral review because the Commonwealth may not appeal an adverse ruling once a jury is empaneled, and a defense appeal would not provide an avenue to present the claim for this Court's review.

In addition, the Superior Court had jurisdiction under Pa.R.A.P. 311(d) because the trial court's failure to constitutionally instruct the jury "terminates or substantially handicaps" the Commonwealth's prosecution. The Superior Court's refusal to exercise jurisdiction because trial court's order did not "exclude, suppress or preclude the Commonwealth's evidence" is contrary to the precedent of this Court applying Rule 311(d) outside of that limited context.

The Superior Court should have exercised jurisdiction and reversed the trial court's ruling that it would not ensure Section 508(a)(1)'s compliance with the

Constitution. A police officer may employ deadly force against a fleeing suspect only where “it is necessary to prevent the 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.” *Garner*, 471 U.S. at 3. In spite of this, Section 508(a)(1) as adopted by the trial court permits an officer to take the life of (1) a fleeing, nondangerous felon, as well as (2) a misdemeanant who, while in possession of a deadly weapon, has otherwise demonstrated no immediate danger to life and limb. It also ignores fundamental Fourth Amendment jurisprudence requiring the fact finder to consider the objective reasonableness of a seizure based on the totality of the circumstances. This does not comply with the limitations on the use of deadly force articulated by the United States Supreme Court in *Garner* and *Graham*, which permit a police officer to use deadly force only where he or she possesses an objectively reasonable belief that the suspect poses a significant threat to the life and safety of the officer and others unless seized without delay.

This Court should interpret Section 508(a)(1) in accordance with the Constitution. So interpreting the statute does not infringe on the role of the legislature, particularly where individual rights are at stake. The General Assembly requires that its enactments be construed in a constitutional manner, and the doctrine of constitutional avoidance similarly mandates that a constitutional interpretation of a statute be adopted where two are fairly possible. Such an interpretation is possible

here, because Section 508(a)(1)(ii) can be construed conjunctively to permit the use of deadly force only in situations where such force is necessary to prevent death or serious bodily injury.

Interpreting Section 508(a)(1) in this manner does not infringe on defendant's due process rights or the state's police power. Defendant had fair notice of his inability to rely on this unconstitutional defense where it was contrary to decades of constitutional law and his own department's use of force policies. Furthermore, it is axiomatic that a state is not permitted to exercise its police power where doing so violates the federal constitution. Regardless of whether the state is imposing laws on some or exempting others, it cannot do so unconstitutionally without undermining the rights guaranteed to its citizens.

ARGUMENT

I. The Superior Court erred by holding that it lacked collateral order jurisdiction over an appeal raising only the facial constitutionality of a statute that in no way implicated the question of defendant's guilt or innocence.

The Superior Court held that it did not have jurisdiction over the Commonwealth's appeal under the collateral order doctrine because "the necessity and propriety of defendant's justification defense depends on consideration of the evidence presented at trial and therefore cannot be severed from the ultimate issue – defendant's guilt or innocence." *Pownall*, No. 148 EDA 2020 at *2. The Superior Court erred in so holding.

The collateral order doctrine allows interlocutory appellate review where three requirements are met:

1. the issue is separable from and collateral to the main cause of action;
2. the right involved is too important to be denied review; and
3. the question presented is such that if review is postponed until final judgment of the case, the claim will be irreparably lost.

Pa.R.A.P. 313(b).

Each of these requirements is met here. The second and third are straightforward. As to the second, the question of whether Pennsylvania law permits police officers to take a life in violation of the Fourth Amendment is, without a doubt, an issue too important to be denied review. Not only does this involve the

most fundamental of rights – to be free from government sanctioned deadly force – it is currently at the height of public discourse. *See Commonwealth v. Shearer*, 882 A.2d 462, 469 (Pa. 2005) (an issue is too important to be denied review where it “implicates rights ‘deeply rooted in public policy going beyond the particular litigation at hand’ and does not merely affect the individuals involved in the case at hand.”). The Commonwealth thus satisfied what this Court has deemed “perhaps [the] most critical prong of the collateral order doctrine” *Id.*

As to the third requirement, the Commonwealth’s claim would be irreparably lost if review were postponed until final judgment. This is because if defendant is acquitted, the Commonwealth may not appeal. *See Commonwealth v. Gordon*, 673 A.2d 866, 869 (Pa. 1996) (“Once the jury is empaneled, jeopardy has attached and the Commonwealth may not appeal, with few exceptions, from any rulings or verdicts which occur after empanelment.”). If defendant is convicted, the Commonwealth likewise could not appeal because it would not be an aggrieved party. *See Commonwealth v. Dellisanti*, 831 A.2d 1159, 1163 n.7 (Pa. Super. 2003) (*en banc*), *reversed on other grounds*, 876 A.2d 366 (2005). Nor would defendant argue on appeal from a conviction that the statute permits the use of deadly force in narrower circumstances than those under which he was convicted. Thus, an interlocutory appeal is the only possible way for the constitutionality of Section 508(a)(1) to ever receive appellate review.

As for the first requirement (the court’s stated basis for quashal), an issue is separable and collateral where it “is capable of review without consideration of the main issue in the case.” *Shearer*, 882 A.2d at 468 (citing *Ben v. Schwartz*, 729 A.2d 547, 551 (Pa. 1999)). In the criminal context, separability exists where an appellate court “need not consider [the defendant’s] potential guilt or innocence of the crimes charged in resolving [the] appellate issue.” *Shearer*, 882 A.2d at 469. Notably, however, this Court has recognized that separability need not always be complete:

The Court has taken a practical approach when reviewing separability, recognizing that some interrelatedness with the main issue is tolerable. So long as the issue is conceptually distinct from the merits . . . , that is, where, even if practically intertwined with the merits, [it] nonetheless raises a question that is significantly different from the questions underlying [the party’s] claim on the merits, it is separable from the main cause of action.

Commonwealth v. Williams, 86 A.3d 771, 781 (Pa. 2014) (citations and internal quotation marks omitted) (alterations in original).

An appellate court may therefore consider issues on collateral review even where they will inevitably impact the ultimate issue at trial. *See, e.g., Commonwealth v. Kennedy*, 876 A.2d 939, 943 (Pa. 2005) (“In our view, there is no question that resolution of [whether the Commonwealth could *call as a trial witness* defendant’s DNA technician] can be achieved independent from an analysis of whether Appellant is guilty of criminal homicide”); *Williams, supra* (considering on collateral review the disclosure of pre-trial notes ordered by PCRA court that

allegedly contained *Brady* material). *See also Commonwealth v. Wright*, 78 A.3d 1070, 1077 (Pa. 2013); *Shearer, supra*, at 469; *Commonwealth v. Minich*, 4 A.3d 1063, 1067-68 (Pa. Super. 2010). Cf. *Plumhoff v. Rickard*, 572 U.S. 765, 773 (2014) (defendant officers’ appeal under collateral order doctrine that “their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law” were pure “legal issues” distinct from the type of “purely factual issues that the trial court might confront if the case were tried”).

The Commonwealth acknowledges that the trial court’s instructions on defendant’s justification defense will likely impact the outcome of trial. But no more so than the prosecution’s ability to call as a witness defendant’s own independent DNA technician, *see Kennedy, supra*, or the accused’s ability to impeach the victim’s testimony based on the statutory interpretation of the rules of evidence. *See Minich, supra*. That the outcome of trial may hinge on these questions does not mean they concern the issue of guilt itself. As this Court has put it: “While our disposition of the PCRA Petition may ultimately turn on the decision [on collateral appeal] whether or not to grant discovery, the threshold issue of entitlement to discovery does not turn on the resolution of the Petition.” *Commonwealth v. Dennis*, 859 A.2d 1270, 1278 (Pa. 2004). Similarly, while defendant’s conviction or acquittal might turn on the outcome of this appeal, the constitutionality of Section 508(a)(1) does not turn on, or even consider, whether or not defendant is guilty. The latter question

is a purely legal one – an issue of statutory construction that is separable from and agnostic to defendant’s guilt or innocence.

The bottom line is this: the vital question of whether police officers may use lethal force against Pennsylvania citizens in violation of the United States Constitution will never receive appellate consideration if not reviewed collaterally. This is the only issue on appeal, and it is a purely legal one distinct from the underlying merits of the case. The Superior Court erred in ruling that it lacked jurisdiction.

II. The Superior Court erred by reasoning that the Commonwealth may invoke its right to an interlocutory appeal under Pa.R.A.P. 311(d) only where it arises from an order that excludes, suppresses, or precludes the Commonwealth’s evidence.

The Superior Court also had Rule 311(d) jurisdiction over this appeal. In stating to the contrary, the panel commented only that the trial court’s order did not “exclude, suppress, or preclude Commonwealth evidence.” *Pownall*, 148 EDA 2020, at *2. To the extent the court believed that Rule 311(d) appeals are permitted only in those specified circumstances, its belief is directly contrary to this Court’s majority opinion in *Commonwealth v. White*, 910 A.2d 648 (Pa. 2006). Furthermore, the trial court’s order in fact substantially hinders the Commonwealth’s prosecution because it would enable defendant to evade conviction through the use of a defense that violates constitutional rights.

We briefly review this Court’s Rule 311(d) jurisprudence. In *Commonwealth v. Bosurgi*, 190 A.2d 304 (Pa. 1963), this Court first considered whether the Commonwealth could appeal pretrial suppression of evidence under *Mapp v. Ohio*, 367 U.S. 643 (1961). This Court permitted the Commonwealth’s appeal, acknowledging that “the practical effects of an order granting the suppression of evidence give to the order such an attribute of finality as to justify the grant of the right of appeal to the Commonwealth” *Id.* at 308, In reaching that conclusion, this Court noted that “[w]ithout a right of appeal . . . the Commonwealth is completely deprived of any opportunity to secure an appellate court evaluation of the validity of the order of suppression which forces the Commonwealth to trial without *all* of its evidence.” *Id.* (emphasis in original).¹

This Court extended the scope of Rule 311(d) to other evidentiary rulings in *Gordon, supra*, holding that “[t]here is no essential difference between suppression motions and rulings on motions *in limine* to admit or exclude evidence” that would prohibit the Commonwealth from appealing the latter. 673 A.2d at 868. Then, in *Commonwealth v. Matis*, 710 A.2d 12 (Pa. 1998), this Court rejected the notion that

¹ As described above, this requirement that the question evade review is also a consideration of the collateral order doctrine. The fact that it is found in two of the exceptions permitting interlocutory appeals by the Commonwealth further emphasizes its importance and renders the Superior Court’s summary refusal to consider the evasive question of whether police officers may kill suspects unconstitutionally particularly troublesome.

Rule 311(d) appeals must be tied to rulings on the Commonwealth's evidence at all, concluding that “[a]n order denying a motion for a continuance to secure the presence of a necessary witness has the same practical effect of an order suppressing or excluding evidence.” *Id.* at 18.

In *Commonwealth v. Cosnek*, 836 A.2d 871 (Pa. 2003), this Court considered for the first time whether the Commonwealth's right to interlocutory appeal extended to trial court rulings on the admissibility of *defense* evidence. The *Cosnek* Court held that an interlocutory Commonwealth appeal was not proper in that limited circumstance, because it would force a defendant to choose between presenting his desired evidence and enjoying a speedy trial uninterrupted by interlocutory appellate review. *Id.* at 876-77. The *Cosnek* Court concluded that both the Commonwealth's and defendant's interests “are protected when we limit the application of Rule 311(d) to those ‘circumstances provided by law’ in which a pretrial ruling results in the suppression, preclusion or exclusion of Commonwealth evidence.” 836 A.2d at 877.

This statement should not, however, be read as limiting Rule 311(d) appeals to orders involving suppression, preclusion or exclusion of Commonwealth evidence. That the rule is not so limited was made clear shortly after *Cosnek* in *Commonwealth v. Karetny*, 880 A.2d 505 (Pa. 2005), where this Court held that the Commonwealth could appeal under Rule 311(d) from the pretrial dismissal of some,

but not all, of its charges: an order that plainly does not involve the suppression, preclusion, or exclusion of Commonwealth evidence. *Id.* at 512-13.²

Furthermore, to the extent that *Cosnek* can be read as limiting the Commonwealth's right of appeal to the suppression or exclusion of its evidence, it was effectively overruled by *White*, *supra*. The Superior Court in *White* held that the Commonwealth "without question" could appeal the trial court's denial of its request for a jury trial because "[p]recluding the Commonwealth from appellate review on this issue *would permit the trial court to override a constitutional provision based on its own interpretation of that provision.*" *Commonwealth v. White*, 818 A.2d 555, 560-61 (Pa. Super. 2003) (emphasis added) (reversed on other grounds). Employing reasoning equally applicable here, a majority of this Court agreed with the Superior Court:

[I]f jurisdiction were not present, **this constitutional issue might never reach the appellate courts**; in the event of an acquittal, the Commonwealth would have no right to appeal because it is precluded from challenging a not guilty verdict . . . in the event of a conviction, the Commonwealth would have no right of appeal since it was not an aggrieved party.

² Further evidence of *Cosnek*'s limited scope is found in *Shearer*, *supra*, where this Court cited the Superior Court's reasoning that "this Court has **not** limited the Commonwealth's right to certify an appeal pursuant to Rule 311(d) to only those circumstances in which the order at issue suppresses Commonwealth evidence." 882 A.2d at 465 (emphasis added). Moreover, although this Court in *Shearer* adopted *Cosnek*'s reasoning because *Shearer* also happened to involve an evidentiary issue, it clarified that "[t]here are, of course, other types of orders that *Cosnek* did not address, but which may also be appealable under Rule 311(d)." *Id.* at 466 n.6.

White, 910 A.2d at 658-59 (citing *White*, 818 A.2d at 561 n.6) (emphasis added).

A plurality of this Court went further, adopting an even broader reading of Rule 311(d) and granting the Commonwealth interlocutory review of the denial of its motion to recuse the allegedly partial trial judge. The plurality reasoned that being forced to go to trial before that judge would substantially handicap the prosecution and leave the Commonwealth with no appellate recourse if there were an acquittal. *Id.* at 655. In so ruling, the plurality made explicit the limited scope of *Cosnek* that the majority necessarily assumed:

The limited question in *Cosnek* was the proper application of Rule 311(d) in light of the specific challenge forwarded . . . Thus, *Cosnek's* language that “we limit the application of Rule 311(d) to those ‘circumstances provided by law’ in which a pretrial ruling results in the suppression, preclusion or exclusion of Commonwealth evidence,” should not be read as undoing Rule 311(d), which simply provides the Commonwealth may appeal an order, not just certain types of orders, which terminates or substantially handicaps the prosecution. This is the plain language of the Rule, and to the extent *Cosnek* may be understood differently, it is hereby overruled.

Id. at 654-655 (citations omitted).

Three conclusions are evident from these cases, each of which supports interlocutory review under the rule here. First, Rule 311(d) is based on the Commonwealth’s burden to prove its case beyond a reasonable doubt. The only time this Court has limited Rule 311(d) is where the appeal infringes on defendant’s own right to present evidence, which raises countervailing interests. See *Cosnek*, 836 A.2d at 877 (describing the balance between these interests). For the reasons

discussed in Section III, *infra*, jury instructions based on Section 508(a)(1) would force the Commonwealth to disprove three elements, two of which are constitutionally invalid, rather than one constitutional element. *See Commonwealth v. Houser*, 18 A.3d 1128, 1135 (Pa. 2011) (“If a defendant introduces evidence of self-defense, the Commonwealth bears the burden of disproving the self-defense claim beyond a reasonable doubt.”). This appeal therefore directly concerns the Commonwealth’s burdens of proof at trial, which are not offset by any infringement on defendant’s right to present the same evidence he otherwise would, regardless of the instructions given to the jury to consider it.

The second conclusion is that the exercise of Rule 311(d) jurisdiction is appropriate when the issue would otherwise evade review. *See, e.g., White*, 910 A.2d at 659 (agreeing with the lower court that “if jurisdiction were not present, this constitutional issue might never reach the appellate courts”); *Bosurgi*, 190 A.2d at 308 (“the Commonwealth is completely deprived of *any opportunity* to secure an appellate court evaluation of the validity of the order of suppression”) (emphasis in original). This concern is front and center where, in the absence of jurisdiction under Rule 311(d) or the collateral order doctrine (both of which focus on the issue’s evasiveness), there is no way for this Court to ever consider this issue.

Finally, contrary to what the Superior Court seemed to think, this Court’s caselaw makes clear that Rule 311(d) is *not* limited to the suppression, exclusion, or

preclusion of Commonwealth evidence. *See White, supra; Karetny*, 880 A.2d 505 (appeal from dismissal of charges); *Matis*, 710 A.2d 12 (Pa. 1998) (appeal from denial of continuance to secure witness); *Commonwealth v. Johnson*, 669 A.2d 315 (Pa. 1995) (appeal from order transferring case to juvenile court). That the Commonwealth's appeal does not challenge an evidentiary ruling does not preclude review.

For all these reasons, the Superior Court erred in quashing this appeal. This Court should exercise jurisdiction and reach the merits of this important case.

III. The Superior Court erred by stating that it could not construe a statute to comport with constitutional requirements.

Because it quashed the appeal, the Superior Court had only this to say about the merits: "The Commonwealth suggests that this Court rewrite the statute, using conjunctive over disjunctive language. This suggestion would infringe on legislative action and violate the doctrine of separation of powers. Pa. Const. art.5, § 10. The Commonwealth's recourse lies with the General Assembly." *Pownall*, 148 EDA 2020, at *1 n.1.

The Commonwealth begins its argument on the merits with the foundational point that, unless construed conjunctively as the Commonwealth proposes, Section 508(a)(1) would permit the use of deadly force in unconstitutional situations. Specifically, it would allow the use of deadly force against (1) all fleeing "forcible felons" with no definition of that term and with no requirement that the felon pose

any risk of death or serious bodily injury, and (2) any suspect fleeing with a “deadly weapon,” again with no limitation on that broadly defined term or requirement that the weapon be used to threaten imminent death or serious bodily injury. Furthermore, in contravention of the Fourth Amendment, the statute’s mechanical list of circumstances warranting death forgoes any independent requirement that the officer possess an objectively reasonable belief that such extreme action is required to prevent death or serious bodily injury.

With this baseline principle established, the Commonwealth will next explain how the statute can be read to correct these constitutional infirmities by construing two uses of the word “or” in subsection (a)(1)(ii) conjunctively. Such a construction is proper both as a matter of plain English and an accepted method of statutory interpretation. Doing so would comply with the stated preference of the General Assembly and this Court for constitutional avoidance, which requires the use of the constitutional reading of a statute where multiple interpretations are possible.

Finally, the Commonwealth will explain that its proposed conjunctive interpretation of Section 508(a)(1)(ii) is not foreclosed by any of defendant rights or power of the legislature. This interpretation does not violate defendant’s due process rights where his own department enforces a similar standard based on over 30 years of settled law following *Garner*. Furthermore, requiring Pennsylvania law to adhere to *Garner* and *Graham* is not an infringement on the state’s police power where all

state law must adhere to constitutional rights incorporated into the Fourteenth Amendment. While the Constitution cannot force a state to criminalize what it has not already, it can prohibit a state from unconstitutionally exempting a class of individuals from conduct that is already criminal.

A. Section 508(a)(1) permits law enforcement officers to use deadly force in situations that would violate a person's constitutional rights.

The starting – and foundational – point of the Commonwealth's argument is this: Section 508(a)(1) permits the use of deadly force in situations that violate a person's constitutional rights by allowing law enforcement officers to employ it absent (1) a need to prevent death or serious bodily injury and (2) consideration of whether such use of force is objectively reasonable.

The United States Supreme Court has established that a police officer may not employ deadly force absent probable cause to believe that the suspect poses a threat of death or serious bodily injury to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).³ Furthermore, the use of deadly force by a government actor is a “seizure” under the Fourth Amendment, *id.* at 7; *Graham v. Connor*, 490 U.S. 386, 395 (1989), and is therefore subject to the guarantees of the Fourth Amendment and Pennsylvania's corresponding Article I, Section 8, which must at least meet federal

³ The Commonwealth explains in Section B(4), *infra*, why defendant is incorrect in arguing that *Garner* is inapplicable here because it was a civil lawsuit.

protections against unreasonable searches and seizures. *Commonwealth v. Jackson*, 698 A.2d 571, 572-73 (Pa. 1997).

Fourth Amendment seizures call for “a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8) (internal quotations omitted). “Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application . . . its proper application requires careful attention to the facts and circumstances of each particular case[.]” *Graham*, 490 U.S. at 396 (internal citations, quotations, and alterations omitted).

Section 508(a)(1) does not meet these basic Fourth Amendment requirements, both because (1) it permits the use of deadly force in situations where such force is not necessary to prevent death or serious bodily injury; and (2) it does not require the factfinder to consider the objective reasonableness of the officer’s actions.

1. *Section 508(a)(1) allows deadly force absent a reasonable belief such force is necessary to prevent death or serious bodily injury.*

The Supreme Court held in *Garner* that a police officer may employ deadly force against a fleeing suspect only where “it is necessary to prevent the 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.” *Garner*, 471 U.S. at 3. In a 42 U.S.C. § 1983 suit brought by the family of a fleeing, unarmed burglary suspect

shot dead by police, the Supreme Court found unconstitutional a Tennessee statute authorizing the use of deadly force against a felon if, “after notice of the intention to arrest [him], he either flee or forcibly resist[.]” *Garner*, 471 U.S. at 4 (citing Tenn.Code Ann. § 40-7-108 (1982)).

The *Garner* Court rejected the common-law rule that “allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant,” instead holding that:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. *Where the 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.* It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. *A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.*

Id. at 11-12 (emphases added).

If interpreted as the trial court intends, Section 508(a)(1) violates *Garner* because it would allow for the use of deadly force to prevent escape even where the suspect does not pose a threat to others. The text of the statute, with the relevant language in bold, is as follows:

(a) Peace officer’s use of force in making arrest.--

- (1) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He

is justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes **both** that:

- (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and
- (ii) the person to be arrested has committed or attempted a forcible felony **or** is attempting to escape and possesses a deadly weapon, **or** otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

18 Pa.C.S. § 508(a)(1) (emphasis added).

The statute provides two broad justifications for the use of deadly force by a police officer. The first is encapsulated entirely by Subsection (1), without reference to paragraph (i) or (ii), and states that the officer “is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person [summoned or directed to assist him] . . .” 18 Pa.C.S. § 508(a)(1). This portion of the statute, which in essence codifies for police officers the same right to self-defense described in *Garner*, is not at issue here.

What is at issue is Section 508(a)(1)’s second justification, referred to as the “escape justification” due to its requirement that “[deadly] force is necessary to prevent the arrest from being defeated by resistance or escape.” 18 Pa.C.S. § 508(a)(1)(i). This becomes problematic when combined with the subsequent

paragraph permitting the use of deadly force where “the person to be arrested has committed or attempted to commit a forcible felony **or** is attempting to escape and possesses a deadly weapon, **or** otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.” 18 Pa.C.S. § 508(a)(1)(ii) (emphases added). This results in three situations where a police officer may use deadly force against a fleeing or resisting suspect:

- 1) Deadly force is necessary to prevent the arrest from being defeated by resistance or escape and the person to be arrested has committed or attempted a forcible felony. (Referred to as the “forcible felony” justification.)
- 2) Deadly force is necessary to prevent the arrest from being defeated by resistance or escape and the person to be arrested is attempting to escape and possesses a deadly weapon. (Referred to as the “deadly weapon” justification.)
- 3) Deadly force is necessary to prevent the arrest from being defeated by resistance or escape and the person to be arrested indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

See 18 Pa.C.S. § 508(a)(1). Only the third of these three escape justification scenarios complies with the constitutional requirement for the use of deadly force – that “it is necessary to prevent the 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 other.” *Garner*, 471 U.S. at 3. For the reasons next explained, the first “forcible felony” justification and second “deadly weapon” justification do not.

i. *The forcible felony justification.*

Section 508(a)(1)(ii)'s first justification permits the use of deadly force where the escaping or resisting suspect has "committed or attempted a forcible felony," but fails to define what constitutes such a crime. In doing so, it permits deadly force outside of situations where "the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3.

The term "forcible felony" is not defined by statute. The only attempt at definition resides in the Subcommittee Note to the Pennsylvania Suggested Standard Criminal Jury Instructions for "Use of Deadly Force to Prevent Escape of Arrested Person In Custody." The note suggests that the trial judge "specify the particular crime involved . . . depending on the evidence," before noting that the term "'forcible felony' . . . appears to be limited to the felonies involving some element of force that are enumerated in the note to Instruction 9.508E." Pa.S.S.Crim.J.I. § 9.508(B) at cmt.

The crimes listed in the referenced note to Instruction 9.508(E) are too broad to comply with *Garner*, as they include not only crimes "involving or threatening bodily injury," but also those involving "damage to or loss of property or . . . threatening a breach of the peace." Pa.S.S.Crim.J.I. § 9.508(E). Burglary, for example, would qualify as a "forcible felony" under the current suggested jury

instructions, meaning that flight from a burglary would permit deadly force under Section 508(a)(1) even though that was the precise justification *Garner* rejected.

Regardless, even if the term “forcible felony” included only crimes with elements of public endangerment, it would still fail to meet *the only requirement* for deadly force: “a significant threat of death or serious physical injury to the officer or others.” *Garner*, 471 U.S. at 3. Even a fleeing murder suspect does not necessarily pose an “*immediate* threat to the officer [or others].” *Id.* (emphasis added).

Ultimately, Section 508(a)(1) is too broad and vague to provide any meaningful guidance on when the use of deadly force is appropriate. *Cf. Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015) (striking down as vague Armed Career Criminal Act sentencing enhancement for “violent felonies,” including “burglary, arson, or extortion, [or any crime that] involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another”). Lack of clarity in such a situation can only result in arbitrary or discriminatory enforcement depending on different officers’ guesses at what is meant by a “forcible felony.” Furthermore, even if it clearly defined the felonies permitting deadly force, the statute would not ensure compliance with *Garner’s* prohibition on such force absent a need to prevent imminent death or serious bodily injury. This is constitutionally intolerable.

ii. The deadly weapon justification.

Section 508(a)(1)'s second scenario also violates *Garner* by allowing for the use of deadly force where the escaping or resisting suspect "is attempting to escape and possesses a deadly weapon." 18 Pa.C.S. § 508(a)(1)(ii). The Crimes Code defines "deadly weapon" as:

Any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury.

18 Pa.C.S. § 2301. While encompassing objects traditionally understood to be weapons such as firearms and knives, this definition also includes more common items, the possession of which alone would not necessarily require the immediate use of deadly force. See *Commonwealth v. Chambers*, 188 A.3d 400, 405 (Pa. 2016) (mace), *Commonwealth v. Prenni*, 55 A.2d 532, 533 (Pa. 1947) (broom handle), *Commonwealth v. Solomon*, 151 A.3d 672, 678 (Pa. Super. 2016) (vehicle), *Commonwealth v. Rhoades*, 8 A.3d 912, 917 (Pa. Super. 2010) (glass bottle), *Commonwealth v. Raybuck*, 915 A.2d 125, 129 (Pa. Super. 2006) (mouse poison), *Commonwealth v. Scullin*, 607 A.2d 750, 753 (Pa. Super. 1992) (tire iron), *Commonwealth v. Brown*, 587 A.2d 6 (Pa. Super. 1991) (dry-wall saw), *Commonwealth v. Cornish*, 589 A.2d 718, 721 (Pa. Super. 1991) (fireplace poker).

As so defined, possession of a weapon does not by itself invite a fair inference that a suspect creates the requisite danger demanded by the Supreme Court in *Garner*. While many of the above referenced “deadly weapons” were only so considered because they were, in the specific circumstances of the case, used or intended to be used in a manner “calculated or likely to produce death or serious bodily injury,” 18 Pa.C.S. § 2301, that does not satisfy *Garner’s* requirement of an *objectively reasonable belief* that the suspect threatens the life or limb of the officer or others unless arrested *without delay*. 471 U.S. at 11.

Furthermore, firearms and other objects “designed as a weapon” require no proof of the possessor’s intent to fall within the “deadly weapon” classification; mere possession suffices. 18 Pa.C.S. § 2301. Notably, this Court has recently held that the mere possession of a weapon alone does not necessarily provide even a *reasonable suspicion* of criminal activity – a lower threshold than the “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others” required for use of deadly force. *Garner*, 471 U.S. at 3. See *Commonwealth v. Hicks*, 208 A.3d 916, 936 (Pa. 2019). However, unless Section 508(a)(1) is interpreted in the conjunctive, an officer would be justified in shooting to death a person licensed to carry a firearm who was fleeing from a summary offense. Such a broad justification defense exceeds the limitations placed on the use of deadly force by the Supreme Court, and cannot stand.

2. Section 508(a)(1) is unconstitutional because it permits the use of deadly force with no reference to objective reasonableness.

In addition to permitting deadly force in circumstances where the Constitution forbids it, Section 508(a)(1) is unconstitutional because it does not require that the use of force be objectively reasonable under the totality of the circumstances. Shortly after its decision in *Garner*, the Supreme Court again had the opportunity to define the bounds of law enforcement’s use of force in *Graham*. The *Graham* Court held that the amount of force permissible to effectuate an arrest, whether deadly or not, is determined based on the totality of the circumstances. 490 U.S. at 396. While recognizing that “the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion,” the Court emphasized that the “proper application” of that coercion “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* (citations omitted). The Court then confirmed that, “[a]s in other Fourth Amendment contexts . . . 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” *Id.* at 397.⁴

When faced with the task of determining whether an officer’s actions were “reasonable,” the Supreme Court has consistently disapproved of “mechanical applications” designed to codify permissible conduct. *See Graham*, 490 U.S. at 396 (“the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.”) (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). For example, when deciding whether an officer acted reasonably in forcing a fleeing motorist off the road, the Court noted that “*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’ *Garner* was simply an application of the Fourth Amendment’s reasonableness test to the use of a particular type of force in a particular situation.” *Scott v. Harris*, 550 U.S. 372, 382 (2007) (internal citations omitted).

⁴ As the Third Circuit has summarized:

Combining the standards announced in *Garner* and *Graham*, [the] inquiry for the use of deadly force is as follows: Giving due regard to the pressures faced by the police, was it objectively reasonable for the officer to believe, in light of the totality of the circumstances, that deadly force was necessary to prevent the suspect’s escape, and that the suspect posed a significant threat of death or serious bodily injury to the officer or others?

Abraham v. Raso, 183 F.3d 279, 289 (3d Cir. 1999).

Rather than allow for the use of deadly force only where objectively reasonable based on the factors enunciated by the Supreme Court, Section 508(a)(1) instead creates the very type of formulaic *per se* test that the Court has repeatedly disavowed. The two impermissible scenarios of the escape justification contain nothing more than “rigid preconditions,” a checkmark beside each of which will permit an officer to take the suspect’s life, without any consideration of the objective reasonableness of that action. For this reason, too, the statute permits the use of deadly force in situations that violate a person’s constitutional rights.

B. A court is obligated to construe a statute to comport with the Constitution, and Section 508(a)(1) can be so construed.

This Court can correct the unconstitutional aspects of Section 508(a)(1). Doing so is the fundamental duty of the judiciary as a co-equal branch of government and is what the legislature requires through its Rules of Statutory Construction. Furthermore, applying a constitutional interpretation to defendant does not offend due process where he could reasonably foresee it based on settled law and his own training. And multiple states have held that state law must comply with *Garner*, an undoubtably correct conclusion given the federal constitution’s binding power.

1. *The courts are bound to interpret legislation to comport with constitutional requirements; doing so does not violate separation of powers.*

This Court has repeatedly recognized that the power of the courts to determine the requirements of legislative enactments “is not a radical proposition in American

law.” *Robinson Tp., Washington County v. Commonwealth*, 83 A.3d 901, 928 (Pa. 2013) (citing *Marbury v. Madison*, 5 U.S. 137 (1803)). Indeed, this Court has well established that, “[o]rdinarily, the exercise of the judiciary’s power to review the constitutionality of legislative action does not offend the principle of separation of powers.” *Hopsital & Healthsystem Ass’n of Pa. v. Commonwealth*, 77 A.3d 587, 596 (Pa. 2013) (quoting *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977)). To the contrary, “[t]he duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation.” *Robinson Tp.*, 83 A.3d at 929 (quoting *Smyth v. Ames*, 169 U.S. 466, 527-28 (1898)).

Moreover, this Court has emphasized that “the need for courts to fulfill their role of enforcing constitutional limitations is particularly acute where the interests or entitlements of individual citizens are at stake.” *Robinson Tp.*, 83 A.3d at 928 (quoting *Hopsital & Healthsystem Ass’n of Pa.*, 77 A.3d at 597)). Accord *Gondelman v. Commonwealth*, 554 A.2d 896, 899 (Pa. 1989) (“Any concern for a functional separation of powers is, of course, overshadowed if the classification impinges upon the exercise of a fundamental right . . .”). At stake here was the most fundamental of individual rights imaginable – that to one’s own life. Far from infringing on the legislature, properly interpreting Section 508(1)(1) is inherent in the duty of the judiciary.

2. Section 508(a)(1) can be read to comply with constitutional requirements by construing its references to the word “or” as conjunctive, rather than disjunctive.

The Rules of Statutory Construction provide that the General Assembly intends neither “a result that is absurd, impossible of execution or unreasonable,” nor “to violate the Constitution of the United States or of this Commonwealth.” 1 Pa.C.S. § 1922(1), (3). This rule codifies the canon of constitutional avoidance, which dictates that “if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, [this Court] adopt[s] the latter construction.” *Wolf v. Scarnati*, 233 A.3d 679, 696 (Pa. 2020) (quoting *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017)). In other words, when “the validity of [a statute] is drawn in question, and if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.” *Commonwealth v. Veon*, 150 A.3d 435, 455 (Pa. 2016) (bracketed portions in original) (quoting *Commonwealth v. Monumental Props., Inc.*, 329 A.2d 812, 827 (Pa. 1974)).

A disjunctive interpretation of Section 508(a)(1)(ii) unquestionably infringes on Fourth Amendment rights established by the United States Supreme Court. This Court can avoid that constitutional violation, however, because it is “fairly possible” to construe the state in a constitutional manner – by reading the two “ors” in

subsection (ii) in a conjunctive manner. Interpreting those two “ors” as being conjunctive would permit officers to use deadly force against a suspect where:

(i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(ii) the person to be arrested has committed or attempted a forcible felony **and** is attempting to escape and possesses a deadly weapon, **and** otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

18 Pa.C.S. § 508(a)(1) (emphasis added). This would make the statute constitutional as it would limit the use of deadly force to forcible felons fleeing with a deadly weapon while requiring some additional indicia that they will cause death or serious bodily injury.

Interpreting the “ors” conjunctively in subsection (ii) is more than a “fairly possible” reading of Section 508(a)(1), *see Veon*, 150 A.3d at 455 – it is a settled interpretation in both plain English and statutory construction. Although the term “or” is typically read as a disjunctive, it may also be used conjunctively. Bryan A. Garner, Garner’s Modern English Usage, 997 (2016, Oxford University Press) (defining conjunction as “a particle (such as and, or, or since) that joins words, phrases, clauses, or sentences, and that indicates their relationship to one another.”).

Likewise, conventions surrounding statutory interpretation, such as those in the Rules of Construction, do not require that courts mechanically interpret every “or” disjunctively, but rather interpret the term according to its context. *See, e.g.*,

Union Ins. Co. v. United States, 73 U.S. 759, 764 (1867) (construing a statute and holding that “when we look beyond the mere words to the obvious intent we cannot help seeing that the word ‘or’ must be taken conjunctively”); *United States v. Hodge*, 321 F.3d 429, 436 (3d Cir. 2003) (holding that proper construction of term “or” in federal criminal statute was “and” based on its context and relevant legislative intent); *Willis v. United States*, 719 F.2d 608, 612-13 (2d Cir. 1983) (“It is settled that ‘or’ may be read to mean ‘and’ when the context so indicates.”).

This Court also recognizes that “courts are often compelled to construe ‘or’ as meaning ‘and’ and again ‘and’ as meaning ‘or.’” *In re Petrash*, 229 A.2d 878, 879-80 (Pa. 1967) (quoting *Pennsylvania Labor Relations Board v. Martha Co.*, 59 A.2d 166 (Pa. 1948). This method is employed “when to give the word ‘or’ its ordinary meaning would be to produce a result that is absurd or impossible of execution or highly unreasonable or would manifestly change or nullify the intention of the legislative body.” *Garratt v. City of Philadelphia*, 127 A.2d 738, 740 (Pa. 1956). See, e.g., *Wilson v. Wilson*, 191 A. 666, 669 (Pa. Super. 1937) (holding “the word ‘or’ to mean ‘and’” in a statute permitting divorce where a spouse was “naturally and incurably impotent, or incapable of procreation” to make it consistent with “the whole course of common law, the uniformity in the construction of statutes . . . and public policy”).

In fact, courts have already assumed that the conjunctive meaning of “or” is Section 508(a)(1)(ii)’s proper construction. In *Johnson v. Rosemeyer*, 117 F.3d 104 (3d Cir. 1997), for example, an officer was convicted of aggravated assault in state court and appealed, arguing that the trial court erred in failing to instruct the jury that Section 508(a)(1) provides three separate and distinct circumstances in which he was permitted to use deadly force. In an unpublished opinion, the Superior Court affirmed the conviction, holding that the trial court correctly instructed the jury that *each element* of Section 508(a)(1)’s escape justification was a necessary condition for deadly force in order to ensure it was used only against one posing a threat to human life and safety.⁵ *Johnson*, 117 F.3d at 107. The Third Circuit ultimately agreed with the District Court that it could not re-examine the Superior Court’s decision because it was a plausible interpretation of state law that did not give rise to “extraordinary and compelling circumstances” justifying departure. *Id.* at 115. While the Circuit Court sitting in habeas did not itself opine on the propriety of the jury instruction, *Johnson* is an example (in an area largely devoid of case law) of a trial court instructing the jury using a conjunctive reading of Section 508(a)(1). *See*

⁵ The Commonwealth recognizes that this Court does not permit the citation to unpublished decisions rendered prior to May 1, 2019. Pa.R.A.P. 126. The Commonwealth refers to the Superior Court’s unpublished decision here only to provide background context to the Third Circuit’s discussion in *Johnson*. Should this Court find review of the unpublished memorandum necessary and appropriate, the Commonwealth has attached a copy for this Court’s review as Appendix D.

also Africa v. City of Philadelphia, 809 F. Supp. 375, 379-80 (E.D. Pa. 1992) (emphasizing the prevention of death or serious bodily injury element in both *Garner* and Section 508(a)(1) before concluding that *both* required it with no noted exceptions).⁶

In short, relying on well-established precedent allowing the courts to construe the word “or” conjunctively to avoid an absurd and unconstitutional result, this Court should hold that the two “ors” in Section 508(a)(1)(ii) should be so construed and that the jury here should be instructed under that constitutional interpretation.

⁶ This interpretation is not limited to judicial authority. When asked to testify on a House bill proposing a change to the statute similar to what the Commonwealth requests here, the Pennsylvania State Police (PSP) also argued that Section 508(a)(1) required a threat of death or serious bodily injury *in all cases*:

The sponsor of the bill claimed that police officers are currently authorized to utilize deadly force on a fleeing person who merely possesses a deadly weapon, regardless of any expressed intent to use it in a manner threatening to life or the infliction of serious bodily injury of another. It has been asserted that simply the fear of a weapon has led to the deaths of unarmed individuals.

The PSP believes this interpretation to be flawed. **The current statute is clear that an individual must pose a threat of death or serious bodily injury to a peace officer or another person in order for the peace officer to be authorized to apply the use of deadly force upon the individual.**

Use of Force: Hearing on HB1664 Before the House Democratic Policy Committee, Pennsylvania 201st General Assembly, August 27, 2017, (statement of Captain Beth A. Readler, Director, Policy and Legislative Affairs Office, Pennsylvania State Police) (Attached as Appendix E).

3. Use of the Commonwealth’s proposed construction of Section 508(a)(1) would not violate defendant’s right to due process because it was foreseeable at the time he acted.

Defendant claimed below that Commonwealth’s proposed jury instruction would violate the *ex post facto* clause and his due process right to adequate notice. This argument fails because (1) the *ex post facto* clause does not apply to a court’s interpretation of previously enacted legislation, and (2) due process is not offended because the Commonwealth’s proposed construction of Section 508(a)(1) was foreseeable at the time of defendant’s conduct.

Defendant’s argument that the Commonwealth’s requested relief would violate the *ex post facto* clause is unfounded because that principle does not apply to judicial decisions. *See Rogers v. Tennessee*, 532 U.S. 451, 458-59 (2001) (judicial decision overturning “year and a day rule” in effect at the time Rogers committed murder did not implicate the *ex post facto* clause because extending it to judicial decisions “would circumvent the clear constitutional text . . . [and] evince too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other.”). As this Court has explained, “the [United States] Supreme Court rejected the . . . suggestion that . . . the strictures of the Ex Post Facto Clause should be extended to the context of judicial construction.” *Commonwealth v. Rose*, 127 A.3d 794, 799 (Pa. 2015). Because it involves only the judicial construction of a pre-existing statute, the relief

sought in this appeal therefore does not fall within the domain of *ex post facto* protections.

Nor does interpreting Section 508(a)(1) to comport with the Constitution deprive defendant of due process for lack of notice. For due process purposes, “[a] lack of fair warning can result . . . from an *unforeseeable* judicial interpretation of statutory language that appeared to be facially narrow and precise.” *Commonwealth v. Magliocco*, 883 A.2d 479, 487 (Pa. 2005) (emphasis added). In other words, “due process prohibits the retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue.” *Id.*

Given these principles, a judicial decision interpreting a statute in a way that would have prohibited a defendant’s conduct at the time of his offense does not violate due process where (as here) prior judicial decisions have “fairly disclosed” the proper construction of the statute such that the interpretation was foreseeable, expected, and defensible. *See United States v. Lanier*, 520 U.S. 259, 271 (1997) (affirming former judge’s conviction for criminal violation of Sixth Amendment rights through sexual harassment because “general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with

obvious clarity to the specific conduct in question, even though ‘the very action in question has [not] previously been held unlawful.’”) (emphasis added).

The Supreme Court’s decision in *Garner* is a general constitutional rule that applies with obvious clarity to killing a fleeing suspect. The Court clearly stated that “[w]here the 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.” *Garner*, 471 U.S. at 11. The Court refined this standard four years later, confirming that, as in all Fourth Amendment seizures, an officer’s use of force must be objectively reasonable. *Graham*, 490 U.S. at 395. *Garner* and *Graham* put law enforcement officers on notice that unlawful use of force during the course of their official duties may subject them to criminal penalties, as prior Sixth Amendment doctrine did for the defendant in *Lanier*. See also *United States v. Ramos*, 537 F.3d 439, 458 (5th Cir. 2008) (rejecting border patrol agents’ argument that charging them criminally with using a firearm during a crime of violence after they shot a fleeing suspect violated their due process rights because “the Supreme Court of the United States has firmly established that the conduct with which [the former agents] were charged . . . violates the Fourth Amendment rights of the fleeing felon if he poses no physical threat to the officers or danger to others.”).

In addition to being on notice from the case law itself, defendant’s own police department’s directives put him on notice that Section 508(a)(1) does not override

Garner and *Graham*. Philadelphia Police Department’s Directive 10.1 governing “use of force – involving the discharge of firearms,” issued almost two years prior to defendant’s shooting, expressly states that:

Police Officers shall not use deadly force against another person, unless they have an objectively reasonable belief that they must protect themselves or another person from death or serious bodily injury.

Philadelphia Police Department Directive 10.1(1)(C), <https://www.phillypolice.com/accountability/index.html>. In other words, since 2015, the official policy of defendant’s own department codified the proper standard for the use of deadly force as set forth in *Garner* and *Graham*, *not* the unconstitutional construction of Section 508(a)(1) upon which defendant now seeks to rely.⁷ Given this fact, defendant’s claim that he could not foresee that his conduct would be held to a constitutional standard is simply not tenable.

⁷ This Court may take judicial notice of the directive because it is publicly available from the Philadelphia Police Department’s website. *See Commonwealth v. Casper*, 392 A.2d 287, 296-97 (Pa. 1978) (allowing for the “exercise of judicial notice by an appellate court” where permitted by Rule 201(b) of the Federal Rules of Evidence, which is “in accord with Pennsylvania law” and provides: “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”). The Commonwealth attaches the public Directive 10.1 as Appendix F for this Court’s convenience.

4. A state legislature may not create an exception to existing criminal conduct that permits a law enforcement officer to use deadly force in excess of that allowed under the Fourth Amendment.

Defendant also argued below that the constitutional standards of *Garner* and *Graham* do not apply to state criminal law. This is a treacherous – and wrong – proposition. While states have inherent discretion to police conduct within their borders, they may not wield it in ways offensive to the Constitution. This includes the circumstance here, where unless interpreted as the Commonwealth asserts, Pennsylvania law would exclude from criminal liability police officers who infringe on personal liberties in ways that would otherwise call for prosecution under the crimes code. While the federal government cannot force the states to criminalize conduct, it can prohibit them from allowing government actors to unconstitutionally escape liability for conduct that the state has already chosen to criminalize in all other circumstances. This is not to say that a state cannot grant law enforcement officers a more robust justification defense than that afforded to ordinary citizens – but rather that the more robust defense must comport with the Constitution.

Police power is the state’s “inherent power of a body politic to enact and enforce laws for the protection of the general welfare, and thus, it is both one of the most essential powers of the government and its least limitable power.” *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 886 (Pa. 2020) (internal quotation marks omitted). In general, a state may choose what conduct to criminalize under this

power, “and the reasonableness of such measures is largely at the discretion of the legislature.” *Commonwealth v. Waddle*, 61 A.3d 198, 207 n.20 (Pa. Super. 2012).

However, a state’s police power is not unlimited. It may not, for example, violate federal constitutional rights applicable to the states via incorporation into the Fourteenth Amendment. *See Loving v. Virginia*, 388 U.S. 1, 7 (1967) (“While the state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power . . . the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so . . .”). One such incorporated right is the one at issue here – protection against unreasonable searches and seizures guaranteed by the Fourth Amendment. *Commonwealth v. Kohl*, 615 A.2d 308, 311 (Pa. 1992) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985)). Accordingly, a Pennsylvania law that violates the Fourth Amendment is invalid notwithstanding the General Assembly’s broad discretion to regulate conduct within the state. *See, e.g., Kohl, supra*, (finding 75 Pa.C.S. § 1547(a)(2) unconstitutional because it authorized unreasonable searches and seizures in violation of the Fourth Amendment).

Defendant based his argument that *Garner* and *Graham*, as federal civil rights decisions, do not require states to criminalize offensive conduct on *People v. Couch*,

461 N.W.2d 683 (Mich. 1990). In *Couch*, the Michigan Supreme Court held the following:

[T]he prosecution’s argument that *Garner* applies directly to change this state’s fleeing-felon rule fails because it is premised upon the notion that the United States Supreme Court can require a state to criminalize certain conduct. Clearly, the power to define conduct as a state criminal offense lies with the individual states, not with the federal government or even the United States Supreme Court. While the failure to proscribe or prevent certain conduct could possibly subject the state to civil liability for its failure to act, or for an individual’s actions, if that state, for whatever reason, chooses not to criminalize such conduct, it cannot be compelled to do so.

Id. at 416.

Couch’s holding that “the power to define conduct as a state criminal offense lies with the individual states” is flatly wrong. Is criminalizing interracial marriage not “defining conduct as a state criminal offense?” Or criminalizing abortion? In both of these instances, a state defined certain criminal conduct pursuant to its broad and inherent police power, yet the Supreme Court limited the state’s discretion to do so where it violated its own interpretation of federal constitutional rights. *See Loving, supra; Roe v. Wade*, 410 U.S. 113 (1973). In these cases, the Supreme Court sat in the same position currently occupied by this Court, applying constitutional rights previously identified in *civil* contexts to the *criminal* statute at hand. Defendant’s attempt to distinguish *Garner* as a civil lawsuit therefore misses the point. *Garner* is simply the authority that previously identified the Fourth Amendment standard for

deadly force and must be used in any context, including by this Court applying it to a criminal statute.

The asserted distinction that, while the Supreme Court can prohibit states from criminalizing certain protected activities, it cannot *compel* them to criminalize what they have not already, is meaningless. All would agree that a state could not pass a law criminalizing only African-Americans with murder. However, under *Couch*'s reasoning, that same state could pass a law granting only white citizens a defense to murder without recourse because federal civil rights standards supposedly cannot require states to criminalize conduct. *Couch* would simply substitute the unconstitutional *imposition* of criminality with the different but no lesser evil of unconstitutionally *exempting* favored parties from existing crimes.

Furthermore, the concern about “forcing” states to criminalize conduct that caused so much hand-wringing in *Couch* does not even exist. That state-created use of force justifications must comply with *Garner* does not require the states to criminalize anything; murder is already a crime. The Pennsylvania legislature could decriminalize murder should it so choose. Once murder is made a crime, however, the legislature cannot then pass a law excluding only government actors from its ambit based on criteria that are indisputably contrary to United States Supreme Court authority. It is at this point – the affirmative passage of a law justifying police

conduct – that legislative power must comply with the Fourth Amendment that binds the states under the Fourteenth Amendment. *See Kohl, supra.*

Indeed, multiple state appellate courts have disagreed with *Couch* and held that *Garner* and *Graham* frame an officer’s justification defense in a state criminal prosecution. For example, in *State v. White*, 29 N.E.3d 939 (Ohio 2015), the Supreme Court of Ohio considered the application of those decisions to the state prosecution of a police officer who claimed to be justified in shooting a reckless motorcyclist. The Court held:

Here, it is not disputed that [the officer] used deadly force in the line of duty, and therefore the jury charge should have been tailored to instruct the jury on when a police officer is justified in using deadly force.

Because a police officer’s justification to use deadly force is limited by the Fourth Amendment, the appropriate instruction on deadly force is taken from *Tennessee v. Garner*, 471 U.S. 1 [(1985)]. *Garner* establishes that “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others,” the officer does not act unreasonably by using deadly force. *Id.* at 11.

White, 29 N.E.3d at 290.⁸ *See also State v. Mantelli*, 42 P.3d 272, 279 (N.M. Ct. App. 2002) (*Garner* “wrought a change in New Mexico law on the use of deadly

⁸ The Commonwealth recognizes that it was the charged officer in *White* who requested an instruction based on *Garner* because the original instruction *understated* his right to use deadly force. However, this does not mean that *Garner* does not also define the upper limits of that justification. The government’s inability to appeal an acquittal combined with the rarity of criminal prosecutions against police officers naturally results in a dearth of case law interpreting jury instructions that *overstate* a police officer’s right to use deadly force.

force” requiring the use of a modified jury instruction in prosecution of police officer); *State v. Smith*, 807 A.2d 500, 518-19 (Conn. App. Ct. 2002) (jury instructions in the trial of a police officer for manslaughter must comply with *Graham*’s objectively reasonable requirement); *People v. Martin*, 214 Cal.Rptr. 873, 882 (Cal. Ct. App. 1985) (“*Garner* necessarily limits the scope of the justification for homicide . . . and other similar statutes from the date of that decision.”).

In short, American citizens would be guaranteed no constitutional rights at all if their home state could evade them simply by framing the offensive law as an exemption from criminal penalty rather than an imposition of it. The Commonwealth urges this Court to exercise jurisdiction over this appeal and interpret Section 508(a)(1) to ensure that law enforcement officers are permitted to use deadly force only in constitutionally permissible situations.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court reverse the lower court's order and remand for trial.

Respectfully submitted,

/s/
MATTHEW H. DAVIS
Assistant District Attorney
LAWRENCE J. GOODE
Supervisor, Appeals Unit
NANCY WINKELMAN
Supervisor, Law Division
CAROLYN ENGEL TEMIN
First Assistant District Attorney
LAWRENCE S. KRASNER
District Attorney of Philadelphia

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully Submitted,

/s/
MATTHEW H. DAVIS
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 2135(a)(1)

I certify that this filing complies with the word count limitation of Pa.R.A.P. 2135(a)(1) because it contains 12,988 words.

/s/
MATTHEW H. DAVIS
Assistant District Attorney

Appendix A

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 363 EAL 2020
Petitioner	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
RYAN POWNALL,	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 20th day of April, 2021, the Petition for Allowance of Appeal is **GRANTED**. The issues, as stated by petitioner are:

- (1) Did the Superior Court err when it held that it did not have jurisdiction over the Commonwealth's appeal under the collateral order doctrine where the appeal raised only the facial constitutionality of a broadly applicable statute that in no way implicated the question of [Respondent's] guilt or innocence?
- (2) Did the Superior Court improperly depart from this Court's precedent by holding that the Commonwealth may invoke its right to an interlocutory appeal under Pa.R.A.P. 311(d) only where it arises from an order that excludes, suppresses, or precludes the Commonwealth's evidence?
- (3) Did the Superior Court improperly depart from this Court's precedent and the General Assembly's Rules of Statutory Construction by stating that it could not properly construe a statute to give effect [to] legislative intent?

Appendix B

**IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0007307-2018

v. :

RYAN POWNALL :

ORDER AND OPINION

McDermott, J.

December 30, 2019

On September 4, 2018, the Defendant, Ryan Pownall, was arrested and charged with Murder and related offenses after allegedly shooting the decedent David Jones while acting in his capacity as an on-duty police officer on June 8, 2017. On November 25, 2019, anticipating the Defendant's assertion of a peace officer justification defense under 18 Pa.C.S. § 508(a), the Commonwealth filed a *Motion in Limine*, seeking to preclude this Court from instructing the jury on justification, pursuant to Pa.S.S.Crim.J.I. § 9.508(B). This Court held the motion under advisement on the grounds that the Commonwealth's motion presented an evidentiary issue which would have to be determined upon hearing the evidence presented at trial. The factual offering the Commonwealth makes at this time is limited to its allegation that the Defendant shot the decedent in the back as the decedent sought to avoid detention.

On December 23, 2019, counsel for both the Commonwealth and the Defendant made an unscheduled appearance before this Court, wherein the Commonwealth requested that this Court grant its *Motion in Limine* pre-trial. In addition, the Commonwealth expressed its intention to

file an interlocutory appeal in the event that the motion was denied. Given the current posture of the parties in this matter, this Court has elected to rule on the Commonwealth's *Motion in Limine* and explain its reasoning herein.

In its November 25, 2019 *Motion in Limine*, the Commonwealth argues that this Court should refrain from providing the justification jury instruction based upon Section 508's statutory definition of the lawful parameters of a peace officer's use of force in making an arrest. The Commonwealth contends that Section 508, as currently written, fails to meet constitutional muster under the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution. The challenged statute reads as follows:

(1) A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself . . . , or when he believes both that:

(ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

18 Pa.C.S. 508(a)(1)(ii). The Commonwealth argues that, based on the statutory construction of Subsection (ii), a peace officer would be permitted to kill any individual who attempts to escape from arrest and possesses a deadly weapon. To cure this Constitutional infirmity, the Commonwealth requests that this Court adopt an alternative construction of the attendant jury instruction, replacing the disjunctive word "or" in Subsection (ii) with "and" to prevent unconstitutional interpretation. In the alternative, the Commonwealth recommends that this Court excise the offending section.

The Commonwealth's *Motion in Limine*, on its own, is insufficient to establish the unconstitutionality of Section 508, and its suggested remedies are inappropriate. Acts passed by the General Assembly are strongly presumed to be constitutional, and a statute will not be found unconstitutional unless it clearly, palpably, and plainly violates the Constitution. *Commonwealth v. Neiman*, 84 A.3d 603, 611 (Pa. 2013) (*citing Pennsylvania State Ass'n of Jury Comm'rs v. Com.*, 64 A.3d 611, 618 (Pa. 2013)). If there is any doubt as to whether a challenger has met this high burden, appellate courts resolve that doubt in favor of the statute's constitutionality. *Id.* Here, in lieu of arguing that the statute is plainly unconstitutional, the Commonwealth suggests that the conjunctions used in that statute gives rise to an unconstitutional interpretation, which could be remedied by simply altering the wording of the statute itself.

After reviewing the Commonwealth's argument and suggested remedy, it is clear that the Commonwealth is requesting that this Court judicially usurp the legislative function of the Pennsylvania General Assembly and rewrite Section 508 out of whole cloth. Irrespective of the constitutionality of the statute, this Court cannot take such a course of action. *See Robinson Township v. Commonwealth*, 147 A.3d 536, 583 (Pa. 2016) (*citing Heller v. Frankston*, 475 A.2d 1291, 1296 (Pa. 1984) ("where a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of this Court to determine an alternative scheme which may pass constitutional muster"). This Court has no authority to summarily rewrite portions of a criminal statute, for doing so would serve only to supersede the will of the people as placed into the hands of the legislature.¹ For that reason, the *Motion in Limine* is denied.

¹ The General Assembly is considering possible changes to Section 508. *See* 2019 Pennsylvania House Bill No. 1664, Pennsylvania Two Hundred Third General Assembly - 2019-2020. Any additional speculation of the legislature's position on the current law would be imprudent.

While this Court cannot prevent the Commonwealth from appealing this Order, any Commonwealth appeal filed before trial should be quashed. For criminal matters under Pennsylvania law, the Commonwealth is entitled to an appeal from a pre-trial order if it is an interlocutory order as of right or a collateral order. *Commonwealth v. Parker*, 173 A.3d 294, 296 (Pa. Super 2017).

The Commonwealth may take an appeal as of right from an order that does not end the entire case where the Commonwealth certifies in the Notice of Appeal that the order will terminate or substantially handicap prosecution. Pa.R.A.P. 311(d). Application of Rule 311(d) is generally limited to circumstances where a pretrial ruling results in the suppression, preclusion, or exclusion of Commonwealth evidence. *Commonwealth v. Shearer*, 882 A.2d 462, 467 (Pa. 2005) (*citing Commonwealth v. Cosnek*, 836 A.2d 871, 877 (Pa. 2003); *see also Commonwealth v. White*, 910 A.2d 648 (Pa. 2006) (permitting interlocutory review where possibility of judicial bias had practical effect of terminating some or all of the Commonwealth's case)).

The Commonwealth is not entitled to interlocutory review under Rule 311. The Commonwealth's request, and this Court's ruling, is limited only to the application of a jury instruction pertaining to the Defendant's possible affirmative defense. It in no way handicap's the prosecution's ability to present evidence or terminates the proceeding, as this Court is not preventing the Commonwealth from presenting its case in chief.

Any attempt to appeal this order as collateral must also fail. A collateral order is: (1) separable from and collateral to the main cause of action; (2) involves a right that is too important to be denied review; and, (3) presents a question, which is such that if review is postponed until final judgment in the case, the claim will be irreparably lost. Pa.R.A.P. 313(b).

The collateral order doctrine should be construed narrowly to avoid piecemeal determinations and protracted legislation. *Parker*, 173 A.3d at 297. The separability requirement is met where the subject issue may be decided without considering the main issue of the case, such as a defendant's guilt or innocence. *Commonwealth v. Minich*, 4 A.3d 1063, 1067 (Pa. Super. 2010).

The Commonwealth cannot demonstrate that the instant order is separable from and collateral to the main cause of action. The Commonwealth's *Motion in Limine* implicates the Defendant's ability to pursue a legislatively defined, affirmative defense. The evidentiary scenario present in the instant matter stands in stark contrast to the one reviewed in *Minich*, where the Superior Court deemed a witness' credibility determination as collateral because it was capable of review separate from the defendant's guilt, implicated the witness' privacy rights, and opportunity for review would be lost upon acquittal. By its very nature, the propriety and necessity of a self-defense instruction, if requested by the Defendant, cannot be decided without considering the evidence presented at trial and its relation to the Defendant's guilt. Because the Commonwealth's request is so intertwined with the ultimate issue to be decided at trial, the collateral review doctrine does not apply.

For the foregoing reasons, it is hereby ORDERED that the Commonwealth's *Motion in Limine* is DENIED. Any interlocutory or collateral appeal filed in response to this Order should be quashed. This Court intends to proceed to trial as scheduled on January 6, 2020.

BY THE COURT



Barbara A. McDermott, J.

Commonwealth v. Ryan Pownall, CP-51-CR-0007307-2018

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing filing upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa. R. Crim. P. 114:

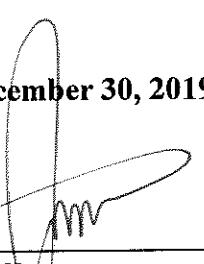
Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
Attn: Tracey Tripp, Esquire

Type of Service: **DA's Courthouse Assigned Box**

Fortunato N. Perri, Jr., Esq.
Charles M. Gibbs, Esq.
McMonagle, Perri, McHugh, Mischak & Davis P.C.
1845 Walnut Street
19th Floor
Philadelphia, PA 19103

Type of Service: **First Class Mail**

Dated: December 30, 2019


Joseph Duffy
Law Clerk to the
Honorable Barbara A. McDermott

Appendix C

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
	:	
	:	
V.	:	
	:	
	:	
RYAN POWNALL	:	No. 148 EDA 2020

Appeal from the Order Entered December 30, 2019
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0007307-2018

BEFORE: LAZARUS, J., DUBOW, J., and FORD ELLIOTT, P.J.E.

JUDGMENT ORDER PER CURIAM: **FILED SEPTEMBER 04, 2020**

The Commonwealth of Pennsylvania appeals from the order entered in the Court of Common Pleas of Philadelphia County denying its motion *in limine*. We quash.

The order denying the Commonwealth's motion *in limine*¹ is not a final order, **see** Pa.R.A.P. 341(b), and the Commonwealth, although certifying in

¹ The Commonwealth challenges the constitutionality of 18 Pa.C.S. § 508(a)(1)(ii), which reads:

(a) Peace officer's use of force in making arrest.--

(1) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or

its notice of appeal that the order "will terminate or substantially handicap the prosecution" under Pa.R.A.P. 311(d), has not established that the order hinders its prosecution. The order does not exclude, suppress or preclude the Commonwealth's evidence.² Additionally, the Commonwealth has failed to show that the order is a collateral order pursuant to Pa.R.A.P. 313(b). We agree with the trial court's assessment that the necessity and propriety of defendant's justification defense depends upon consideration of the evidence presented at trial and therefore cannot be severed from the ultimate issue—defendant's guilt or innocence.

another from bodily harm while making the arrest. *However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that:*

- (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and
- (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, *or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.*

18 Pa.C.S. § 508(a)(1) (emphasis added). The Commonwealth suggests that this Court rewrite the statute, using conjunctive over disjunctive language. This suggestion would infringe on legislative action and violate the doctrine of separation of powers. Pa. Const. art.5, § 10. The Commonwealth's recourse lies with the General Assembly.

² The trial court has made it very clear in her opinion that she is quite willing to listen to the arguments propounded by the Commonwealth once all the evidence is presented.

The Commonwealth's application for oral argument filed on August 13, 2020 is hereby denied as moot.

Appeal QUASHED. Motion for oral argument DENIED AS MOOT.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/4/20

Appendix D

588 A2d 561

J. A44028/90

COMMONWEALTH OF PENNSYLVANIA

v.

CURTIS JOHNSON,
Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 388 Philadelphia, 1990

Appeal from the Judgment of Sentence entered November
9, 1989, Court of Common Pleas, Philadelphia County,
Criminal Division at No. 8901-1132.

BEFORE: MONTEMURO, JOHNSON and CERCONE, JJ.

MEMORANDUM:

FILED DEC 19 1990

Curtis Johnson appeals from a conviction and sentence on a charge of aggravated assault. We affirm.

On November 27, 1988, Johnson, an off-duty police officer, was cleaning the cellar of the premises at 6759 Germantown Avenue, a building he owned and leased. Complainant James Cahill lived with his mother and sister in the third floor apartment which had been leased to Cahill's brother. Johnson knew Cahill, had spoken with him previously on several occasions, and had previously been at his place of employment to discuss a landlord-tenant grievance.

As a result of a dispute between Johnson and Cahill's mother the previous day, Cahill confronted Johnson in the basement of the building, and the two of them went to the first floor to address the matter. Eventually, Johnson picked up a

588 A2d 561

board and ordered Cahill from the building under threat of arrest. Cahill took a shovel handed to him by his sister.

Johnson testified that he attempted to place Cahill under arrest after Cahill began swinging the shovel at him. Cahill testified that he took the shovel from his sister to prevent her from attacking Johnson with it, but that he never used the shovel in an aggressive manner towards Johnson.

Cahill fled the building, dropping the shovel as he got outside. Johnson also left the building and began firing his weapon three or four times at Cahill, who had crossed the street. Cahill was struck once in the back and fell to the sidewalk where he stayed until medical assistance arrived. This incident has left Cahill paralyzed.

Following a two day jury trial before the Honorable Angelo A. Guarino, Johnson was convicted of Aggravated Assault. Johnson filed Post-Verdict Motions and Additional Post-Verdict Motions, all of which were denied on November 20, 1989, and the trial court sentenced Johnson to seven and one half to fifteen years' imprisonment. A Motion to Modify the Sentence was denied on December 5, 1989. Following an untimely Notice of Appeal, this Court denied Johnson's application to appeal out of time on January 8, 1990.

After acquiring new counsel, Johnson filed a petition for permission to appeal nunc pro tunc, pursuant to the Post Conviction Relief Act ("PCRA"), codified at 42 Pa.C.S. §9542 et. al.

seq. Permission to appeal nunc pro tunc was granted on January 30, 1990.

On appeal, Johnson presents six issues:

- I. Whether the trial court properly instructed the jury regarding the circumstances under which a police officer may justifiably use deadly force in making an arrest.
- II. Whether the trial court erred by permitting cross-examination of Johnson regarding the possibility of arresting Cahill at another time.
- III. Whether the trial court improperly restricted cross-examination of Cahill concerning a prior inconsistent statement and prior threats.
- IV. Whether the trial court properly instructed the jury as to reasonable doubt.
- V. Whether the sentence exceeded the statutory maximum, was improperly based upon an inapplicable mandatory provision, or grossly exceeded the guidelines so as to make the sentence illegal.
- VI. Whether the conviction is illegal where neither the verdict as stated nor as recorded identifies the count or degree of crime to which it relates.

Johnson contends that the trial court erred when it instructed the jury as to justification. The Commonwealth contends that, absent allegations of extraordinary circumstances, Johnson's failure to raise this objection at trial waived this issue. The issue is presented whether allegations of ineffectiveness made in a PCRA petition are sufficient, in and of themselves, to preserve an issue not

otherwise preserved. Our disposition of the substantive issue makes an investigation of waiver unnecessary.

Johnson argues that the trial court instructions to the jury improperly made "self-defense or the defense of others" a prerequisite to a finding of justification, and may have denied him his statutory defense. Johnson relies on the emphasized portions of the justification statute as stated herein:

A peace officer ... need not ... desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that:

- (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and
- (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

18 Pa.C.S. §508(a)(1)(emphasis added). Johnson argues that, while attempting to arrest Cahill, Cahill was escaping, thereby satisfying element (i) above, and that an attack on him by Cahill constituted a forcible felony, satisfying element (ii). Johnson contends that, if the facts as he alleged them were proven at trial, he was entitled to this defense. He argues

further that errors in the jury instructions denied him the opportunity for proper consideration of this defense.

Johnson's claim of insufficient jury instruction as to justification must fail for several reasons. Primarily, the defense of justification which he seeks is unavailable to him. Subsection (ii) of the justification statute requires that the person to be arrested "possess a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay."

Johnson would have us read § 508 disjunctively, thereby negating the element of endangerment where a "forcible felon" is pursued. This we cannot do. The phrase "committed or attempted a forcible felony or is attempting to escape" has, as a necessary condition, the requirement of "[possession of] a deadly weapon, or [other indication] that he will endanger human life or inflict serious bodily injury unless arrested without delay." The statute is not to be read to allow deadly force to be used against a person who poses no threat to human life or safety; therefore, a jury instruction which may have deprived the defendant of this defense would constitute harmless error.

In any event, a review of the record indicates that the jury instruction on the point of justification, was sufficient to allow a jury to conclude as Johnson would have asked. The jury was instructed as follows:

The Defendant has presented a defense of justification stating that he was justified in shooting the

individual because he was attempting to make an arrest, that's his defense. And true, a piece (sic) officer is justified in using any force which he believes to be necessary to effect an arrest. Any force, or course, that he believes necessary to defend himself from bodily injury. So a police officer generally has the right to use that force which he deems and believes to be necessary in order to effectuate the arrest, and he may use that kind of force that is necessary to effectuate for that purpose. However, he is justified using deadly force only when he believes that such force is necessary to prevent the death or serious bodily injury to himself or another or when he believes that both are present, these two factors are present and such force is necessary to prevent the arrest from being defeated by resistance or escape, and the person to be arrested has committed or attempted to commit a forcible felony under the act.

N.T., May 15, 1989, at 156. Johnson contends that this instruction prevented the jury from properly considering the defense of justification. He argues:

[T]he instruction is clearly and fundamentally erroneous since it demands that the force can be used only where the elements of self-defense are present. As the Trial Court described it, any use of deadly force is justified only where necessary to prevent death or serious bodily injury.

By converting the statutory "or" into an "and" the court effectively eliminated use of force in arrests and confined it solely to situations of self-defense. Inasmuch as defendant's entire case was based upon his right to shoot at a fleeing felon, the mis-instruction totally deprived him of his statutory defense.

Appellant's Brief at 9.

On this point, the Commonwealth argues that the instructions given the jury properly addressed either of two different justifications for the use of deadly force, self-defense or when necessary to arrest a fleeing felon who would otherwise escape.

"Our standard of review in determining whether a jury instruction is proper is well documented. A court's charge to the jury will be upheld if it adequately and accurately reflects the law and was sufficient to guide the jury properly in its deliberations." Commonwealth v. Person, 345 Pa.Super. 341, 498 A.2d 432 (1985). Appellate review of jury instructions for prejudicial and reversible error requires that we read the charge as a whole; error cannot be predicated upon an isolated excerpt. Commonwealth v. Woodward, 483 Pa. 1, 394 A.2d 508 (1978). We note that, in response to an inquiry by the jury, the trial court gave further instructions as follows:

All right, we said that an officer is justified in using any force which he believes to be necessary to effectuate an arrest, any force generally, that's the general rule but he must use only that amount of force that is necessary to accomplish the arrest. Now, when it comes to the use of deadly force, deadly force being force that is likely to cause serious bodily injury or death, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person or when he believes both, one, that such force is necessary to prevent the arrest from being defeated. An arrest being defeated meaning that, being not effectuated, that he could not make the arrest otherwise, and the person to be arrested has committed or attempted a forcible felony, and is fleeing therefrom.

N.T., May 15, 1989, at 182-3. This later clarification does not suffer from the ambiguity alleged to exist in the earlier instruction: The justifications of (1) defense of self or another, and (2) apprehension of a fleeing forcible felon, are clearly disjunctive. Therefore, even though Johnson was not entitled to the defense of justification, the charge, read as a

whole, would have allowed a jury to find justification on defendant's theory. The jury did not however find justification on the theory proffered by the defense, and no reversible error resulted.

Any issue regarding any possible impropriety of allowing questioning of Johnson regarding possible later arrest of Cahill is necessarily disposed of as a result of our resolution of the issue above. As we hold that the defense of justification was unavailable to Johnson, any testimony which was admitted which might have negated this defense would constitute harmless error. This issue, therefore, is without merit.

Johnson next argues that he was improperly restricted on cross-examination of Cahill while attempting to make use of Cahill's prior inconsistent statements. During cross-examination, defense counsel attempted to show inconsistencies between Cahill's trial testimony and what Cahill had told police regarding his awareness of Johnson's gun and several prior events. Where the witness could not recall making a particular statement to police or was otherwise unable to verify the accuracy of the police summary, Judge Guarino sustained objections to the use of a police summary as a prior inconsistent statement. Johnson contends that this was error.

Prior inconsistent statements may be used to impeach a witness, Commonwealth v. Hensley, 295 Pa.Super 225, 233, 441 A.2d 431, 435 (1982); however, in order to impeach a witness through the use of prior inconsistent statements, there must be

evidence that the statement sought to be introduced was made or adopted by the witness whose credibility is being impeached. Commonwealth v. Baez, 494 Pa. 388, 431 A.2d 909 (1981). The statement sought to be introduced in the instant case was not made by the witness, but by a police officer while filling out a report. There is no evidence that the information contained therein was, in fact, a statement by the witness. Indeed, the witness stated that he had no memory of making the statements which defense counsel sought to introduce as inconsistent.

We encountered this issue in Commonwealth v. Brown, 302 Pa.Super. 391, 448 A.2d 1097 (1982). There, the witness explicitly stated that she did not recall telling police whether or not appellant wore glasses during the robbery. Thus counsel had not yet presented evidence that the witness made or adopted a prior statement inconsistent with her trial testimony. Under these circumstances, the court properly disallowed the use of the statement in counsel's cross-examination of [the witness.] Id. at 302 Pa.Super. 400, 448 A.2d at 1102. We have stated similarly:

The police reports were not "statements" of the witnesses. They were summaries prepared by investigating police officers. They were not shown to be verbatim recordings of the victims' accounts and descriptions, and, except where a witness adopted and verified the reported statement during trial, there was no evidence that the victims had read, signed or approved the accuracy of the police summaries. "It would have been unfair to permit impeachment of the witnesses through use of an officer's interpretation of what they had said, not their own earlier recollections." Commonwealth v. Hill, 267 Pa.Super 264, 270, 406 A.2d 796, 799 (1979).

Commonwealth v. Pinder, 310 Pa.Super. 56, 456 A.2d 179 (1983).

We therefore conclude that the trial court properly ruled against the admission of the police reports for the purpose of impeachment as they did not constitute prior statements of the witness, inconsistent or otherwise. In any event, the substance of the reports was both read by defense counsel and incorporated into the questions asked of Cahill. Clearly, the jury was made aware of what defense counsel sought to show, and defense counsel cannot now be heard to contend that prejudicial error occurred.

Next, Johnson complains of the trial court's instruction as to reasonable doubt. He cites the following passage from the jury instructions in support of this argument.

I tried to conceptualize that thought for you when I gave to you the example when you were first inducted into jury service, you will recall the example about purchasing a home. It's not an exclusive example, it's just one of many, many examples, a problem of importance. You will recall that inquiry that we made, the agony of decision, what we evaluated, how we evaluated using our common sense and human experience. Did we buy that house? Even though we might have had some doubt here and there, then we didn't have a reasonable doubt. If we didn't buy it, then we had a reasonable doubt. So you see, you are familiar with the standard because the standard comes and is arrived at by law because it is a standard that you use whenever you are deciding matters of importance in your own affairs.

N.T., May 15, 1989, at 152-53. Johnson contends that the "court's clearest, indeed only, affirmative message as to reasonable doubt is contained in its example of the agonizing home-buyer," and that it was improper for the trial court to "devote its entire efforts to the negative aspects of reasonable

doubt ... [and] essentially defin[e] a standard of proof tantamount to a preponderance of evidence." Appellant's Brief at 16. This is simply wrong. The trial court's explanation to the jury of reasonable doubt, which preceded the above discussion, was at least as full and detailed as in cases within our jurisdiction have required on this point.

The trial court defined for the jury the meaning of a reasonable doubt as follows:

A reasonable doubt must arise out of the evidence or lack of evidence, not out of any extraneous matter. It must be more than a mere possible doubt because you can have a doubt about almost anything in life. It must be more than a fanciful doubt, a caprice or a whim that you would want to conjure up in your own mind in order to avoid the unpleasant task of determining guilt. So a reasonable doubt is a real doubt. It must be a doubt of such substance that if it occurred in connection with a matter of importance in your own affairs, it would restrain you from acting.

Briefly, a reasonable doubt is that kind of doubt that would restrain you, a reasonable person, from acting in a matter of importance in your own affairs. So it's a real doubt. It is that same doubt, or that same standard that you use whenever you are making decisions of importance in your own affairs. It is a human doubt, a doubt that experience has taught (sic) you. It's not just beyond all doubt.

N.T., May 15, 1989, at 151-52. We recognize that, where an omission of an essential portion of a charge on reasonable doubt deprives a defendant of a fair trial, the conviction must be reversed. Commonwealth v. Young, 456 Pa. 102, 317 A.2d 258 (1974). However, the instructions given in this case appear to us to fully comport with Commonwealth v. Donough, 377 Pa. 46, 103 A.2d 694 (1954). There, our Supreme Court approved of

the following language:

A reasonable doubt cannot be a doubt fancied or conjured up in the minds of the jury to escape an unpleasant verdict; it must be an honest doubt arising out of the evidence itself, the kind of doubt that would restrain a reasonable man (or woman) from acting in a matter of importance to himself (or herself)."

Id., 377 Pa. 46, 103 A.2d 694 (1954). The instruction given the jury in the instant case can not be said to differ from the language in Donough in any material way, and we therefore conclude that the instruction was proper.

We proceed to determine whether Johnson's conviction of Aggravated Assault was a legal conviction. A person is guilty of Aggravated Assault if he:

- (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; [or]
- (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon[.]

18 Pa.C.S. 2702(a). Johnson argues that, as § 2702(a)(1) is designated a felony of the first degree, and § 2702(a)(4) is a designated a felony of the second degree, the verdict slip was fatally flawed for failure to designate to which of the two counts in the indictment it referred. For this proposition, he relies on Commonwealth v. Dzvonick, 450 Pa. 98, 297 A.2d 912 (1972), Commonwealth v. Blatstein, 231 Pa. 306, 332 A.2d 510

(1974), and Commonwealth v. Huett, 462 Pa. 363, 341 A.2d 122 (1975).

In Dzvonick, our Supreme Court held that insufficient evidence supported a conviction of Assault with Intent to Maim where the accused did not "cut, stab, or wound" the victim. In dicta, the court stated that it would have been improper for the trial court to have "molded" the conviction of "Assault with Intent to Maim" to the inchoate offense of attempt, once the verdict was recorded and the jury dismissed. Even were we bound by the dicta of Dzvonick, it is inapposite to this case. Johnson was not found guilty of a crime other than Aggravated Assault. The trial court here has not altered the conclusion of the jury to fit the facts, as the trial court in Dzvonick was alleged to have done. Judge Guarino entered judgment of sentence for the crime of Aggravated Assault, a crime which, unlike Dzvonick, both appeared in the information and was addressed by the verdict slip.

In Blatstein, supra., our Supreme Court relied on Dzvonick to conclude that a trial court properly arrested judgment where an indictment charged the defendant with Extortion, and the jury so convicted, although an element of the crime, actual acceptance of a bribe, was never proven at trial. For the same reasons that the dicta of Dzvonick fails to support Johnson's position, Blatstein also fails. The trial court has not imposed a conviction for a crime not found by the jury.

In Huett, supra., a trial judge pronounced the defendant guilty of Murder in the Second Degree, and signed the indictment. The indictment, however, charged the defendant with Voluntary Manslaughter. At sentencing, a substitute judge was told by a clerk that the indictment for Voluntary Manslaughter could have been wrong, and the judge ordered the indictment "corrected" to read Murder in the Second Degree. He then sentenced the defendant. On appeal to our Supreme Court, the conviction was reversed. Noting that neither the trial judge nor the court stenographer had been called to testify, the court held that there was insufficient evidence in the record for the sentencing judge to have properly changed the verdict as signed. Again, we find this case fails to support Johnson's proposition that a crime charged in the information and considered by the jury cannot serve as the basis for a valid conviction.

As Johnson has failed to cite us to any authority for his position, and has failed to articulate any compelling reason for the result he seeks, we hold that the conviction of Aggravated Assault was proper and effective as to all those counts of Aggravated Assault found in the indictment. Commonwealth v. Grosso, 192 Pa.Super. 513, 162 A.2d 421 (1960), aff'd, 401 Pa. 543, 165 A.2d 73 (1960), cert. denied, 365 U.S. 835, 81 S.Ct. 747 (1961).

Finally, we consider whether the sentence of seven and one-half to fifteen years was illegal. Johnson argues that this

sentence was in excess of the sentencing judge's statutory authority; however, his position is premised upon the erroneous presumption that his conviction of Aggravated Assault constituted a felony of the second degree. As discussed above, it does not.

As properly stated by the Commonwealth, where a verdict of guilty on a multi-count indictment is recorded as a general verdict, the court may sentence upon any count in the indictment. Commonwealth v. Grosso, 192 Pa.Super. 513, 162 A.2d 421 (1960), aff'd, 401 Pa. 549, 165 A.2d 73 (1960), cert. denied, 365 U.S. 835, 81 S.Ct. 747 (1961). It is clear that Judge Guarino sentenced Johnson for the conviction under § 2702(a)(1), not § 2702(a)(4).

A conviction of Aggravated Assault under § 2702(a)(1), as it is a felony in the first degree, § 2702(b), permits a sentence of up to 20 years. 18 Pa.C.S. § 1103. For this reason alone, the sentence imposed by the trial court was permissible. Furthermore, under § 2702(a)(1), where a person visibly possesses a firearm during the commission of the crime, that person shall be sentenced to a minimum of at least five years. 42 Pa.C.S. § 9712(a). There is no merit to the contention that the sentence imposed in this case was beyond the statutorily permitted range.

For the foregoing reasons, we affirm the Judgment of Sentence imposed.

Judgment of Sentence Affirmed.

Montemuro, J. concurs in the result.

Appendix E

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HOUSE DEMOCRATIC POLICY COMMITTEE

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House of Representatives COMMONWEALTH OF PENNSYLVANIA

HOUSE DEMOCRATIC POLICY COMMITTEE HEARING Topic: Use of Police Force Hawkins Village – Rankin, PA August 27, 2019

AGENDA

- 2:00 p.m. Welcome and Opening Remarks
- 2:10 p.m. Michelle Kenney, Mother of Antwon Rose
- 2:15 p.m. *Questions & Answers*
- 2:20 p.m. Tim Komoroski, Millvale Police Chief
- 2:25 p.m. *Questions & Answers*
- 2:30 p.m. Panel One:
• Brandi Fisher, President, Alliance for Police Accountability
• Tim Stevens, Chairman/CEO, B-PEP
• Jasiri X, Co-Founder, 1Hood
- 3:20 p.m. *Questions & Answers*
- 3:40 p.m. Panel Two:
• Karen McLellan, Member, Citizen Police Review Board
• Elizabeth Randol, Legislative Director, ACLU-PA
• La'Tasha Mayes, Founder/Executive Director, New Voices Pittsburgh
- 4:10 p.m. *Questions & Answers*
- 4:30 p.m. Closing Remarks

Pennsylvania House of Representatives

<https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20190&cosponId=29033>

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House Co-Sponsorship Memoranda

House of Representatives Session of 2019 - 2020 Regular Session

MEMORANDUM

Posted: March 29, 2019 10:05 AM
From: [Representative Summer Lee](#) and [Rep. Ed Gainey](#)
To: All House members
Subject: Law Enforcement Deadly Use of Force

On June 19, 2018, 17-year-old Antwon Rose II was shot in the back and killed by East Pittsburgh police officer Michael Rosfeld. He was unarmed, afraid, and fleeing. Despite the clear facts of the case, the officer was acquitted of the murder charge in a ruling that exposed a major flaw in the Pennsylvania police use of force law.

Under current law [Title 18](#), an officer can deploy deadly force on a fleeing person who possesses a deadly weapon - whether or not that person indicates a threat to life or a desire to inflict a serious bodily injury. This can lead to death for possessing a firearm without any intent to use it at all. Additionally, the mere fear of a weapon has resulted in the murder of civilians who were unarmed.

Our legislation seeks to eliminate effectuating an arrest as a justification for the use of deadly force. Instead, our proposal would mandate that de-escalation and non-lethal force options be exhausted prior to lethal force being deployed and that lethal force only be used and justified to prevent imminent threat to life.

Our police officers must be able to exercise restraint and good judgment as they are tasked and sworn to protect and serve the people. Providing proper training, instituting morally sound legislation, and shifting the approach from aggressive and fear-based policing to life preservation and de-escalation of threats will elevate the professional conduct of officers, decrease the amount of injury and loss of life, and provide a mechanism for justice in the event of unnecessary use of force. Please join me in supporting this vital legislation as we improve professional standards while improving the safety of our communities, and upholding equity and justice for all.



Introduced as [HB1664](#)

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1664 Session of
2019

INTRODUCED BY LEE, GAINES, KINSEY, FRANKEL, FIEDLER, RABB,
A. DAVIS, KIRKLAND, YOUNGBLOOD, HILL-EVANS, McCLINTON,
KENYATTA, WEBSTER, BULLOCK, DAVIDSON, INNAMORATO, HARRIS,
OTTEN, WHEATLEY, CEPHAS, SIMS, D. MILLER, JOHNSON-HARRELL AND
KOSIEROWSKI, JUNE 24, 2019

REFERRED TO COMMITTEE ON JUDICIARY, JUNE 24, 2019

AN ACT

1 Amending Title 18 (Crimes and Offenses) of the Pennsylvania
2 Consolidated Statutes, in general principles of
3 justification, further providing for use of force in law
4 enforcement.

5 The General Assembly of the Commonwealth of Pennsylvania
6 hereby enacts as follows:

7 Section 1. Section 508(a) of Title 18 of the Pennsylvania
8 Consolidated Statutes is amended to read:

9 § 508. Use of force in law enforcement.

10 (a) Peace officer's use of force in making arrest.--

11 [§ 1] A peace officer, or any person whom he has summoned
12 or directed to assist him, need not retreat or desist from
13 efforts to make a lawful arrest because of resistance or
14 threatened resistance to the arrest. He is justified in the
15 use of [any] reasonable force which he believes to be
16 necessary to effect the arrest and of [any] reasonable force
17 which he believes to be necessary to defend himself or

1 another from bodily harm while making the arrest. However, he
2 is justified in using deadly force only when he reasonably
3 believes that such force is necessary to [prevent death or
4 serious bodily injury to himself or such other person, or
5 when he believes both that:

6 (i) such force is necessary to prevent the arrest
7 from being defeated by resistance or escape; and

8 (ii) the person to be arrested has committed or
9 attempted a forcible felony or is attempting to escape
10 and possesses a deadly weapon, or otherwise indicates
11 that he will endanger human life or inflict serious
12 bodily injury unless arrested without delay.

13 (2) A peace officer making an arrest pursuant to an
14 invalid warrant is justified in the use of any force which he
15 would be justified in using if the warrant were valid, unless
16 he knows that the warrant is invalid.] protect himself or
17 another from imminent death, serious bodily injury,
18 kidnapping or sexual intercourse compelled by force or
19 threat.

20 * * *

21 Section 2. This act shall take effect in 60 days.

PENNSYLVANIA STATE POLICE TESTIMONY

HB 1664

HOUSE DEMOCRATIC POLICY COMMITTEE

AUGUST 27, 2019



PREPARED BY

CAPTAIN BETH A. READLER

DIRECTOR, POLICY AND LEGISLATIVE AFFAIRS OFFICE

Good afternoon, Chairman Sturla, Vice Chairman Bizzarro, and members of the House Democratic Policy Committee. On behalf of the Pennsylvania State Police (PSP), I appreciate the opportunity to provide written testimony today on House Bill 1664.

According to the bill's sponsor, House Bill 1644 appears to originate from a sentiment that police officers are too often unjust in their application of deadly force and the current statute does not adequately hold police officers accountable for inappropriate behavior.

The bill amends Section 508 (a) relating to Use of Force in Law Enforcement. It retains current provisions which provide that "a peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest."

House Bill 1664 recommends the inclusion of the term "reasonable" instead of "any" when describing the force that may be used to effect arrests or when a peace officer believes it to be necessary to defend himself or others from bodily harm while effecting an arrest. PSP considers this language change to be unnecessary since Title 18, Section 501 already defines "believes" or "belief" as "reasonably believes" or a "reasonable belief".

The sponsor of the bill claimed that police officers are currently authorized to utilize deadly force on a fleeing person who merely possesses a deadly weapon, such as a firearm, regardless of any expressed intent to use it in a manner threatening to life or the infliction of serious bodily injury of another. It has been asserted that simply the fear of a weapon has led to the deaths of unarmed individuals.

The PSP believes this interpretation to be flawed. The current statute is clear that an individual must pose a threat of death or serious bodily injury to a peace officer or another person in order for the peace officer to be authorized to apply the use of deadly force upon the individual.

House Bill 1664 would remove current provisions related to a peace officer's use of deadly force that are consistent with the United States Supreme Court decisions contained in Tennessee v. Garner and Graham v. Connor that permit such force when necessary to prevent an arrest from being defeated by resistance or escape and where the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

Another portion of House Bill 1664 which the PSP believes is problematic is that it repeals all language related to a peace officer's use of necessary force pursuant to the service of an invalid warrant. Peace officers are required to rely upon information provided by others and may not have an opportunity to inspect an arrest warrant prior to its service. We feel it would be unreasonable to deem an officer's use of necessary force in these instances as unjust for the sole reason that the warrant was invalid, even though the officer may have acted under the assumption the warrant was valid.

House Bill 1664 provides that a peace officer would be justified in the use of deadly force only when he reasonably believes that such force is necessary to "protect himself or another from imminent death, serious bodily injury, kidnapping, or sexual intercourse compelled by force or threat." The quoted language is taken verbatim from Title 18, Section 505, which addresses the authorized use of force afforded to private

citizens for self-protection. PSP believes that due to the nature of police work, it would be highly irresponsible to hold a police officer to the same justification standards that apply to a private citizen's authorized use of force application. Furthermore, this standard would not be in accord with those already established in Tennessee v. Garner.

The Pennsylvania State Police does not believe House Bill 1664 will provide citizens with further protections. Instead, House Bill 1664 appears to be based on a flawed interpretation of the existing statute governing use of deadly force for peace officers and would limit an officer's use of deadly force to that currently authorized to private citizens in defense of oneself. Recent events in Philadelphia highlight the dangerous nature of police work and an ability for officers to exercise restraint and good judgment. To limit our authorized application of deadly force in the proposed manner would place peace officers in greater danger than they already accept on a daily basis in the performance of their duties to protect the citizens of this Commonwealth.

It is for these reasons that the Pennsylvania State Police cannot support House Bill 1664, but we would be more than willing to continue to engage in discussions with members of the General Assembly on matters that would increase public trust with the law enforcement community.

Pennsylvania Chiefs of Police Association

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*Scott Bohn
Chairman
Chief of Police
West Chester Borough*

*Albert Walker
President
Chief of Police
Hanover Township*

*John English
1st Vice President
Chief of Police
Edgeworth Borough*



*David Steffen
2nd Vice President
Chief of Police
Northern Lancaster
County Regional*

*Fred Harran
3rd Vice President
Director of Public Safety
Bensalem Township*

*Royce Engler
4th Vice President
Chief of Police
Wright Township*

*William Richendrfer
Secretary - 2020
Chief of Police
South Centre Township*

*Joseph C. Blackburn
Executive Director*

*David DiSanti
Treasurer-2020
Chief of Police
Town of McCandless*

August 13, 2019

Mr. Jim Dawes
Executive Director
House Democratic Policy Committee
Mike Sturla, Chairman
414 Main Capitol Building
Harrisburg, PA

Dear Mr. Dawes:

Thank you for the opportunity to comment on the proposed changes to Title 18, section 508, amending Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes, in general principles of justification, further providing for use of force in law enforcement.

As the primary agency representing law enforcement executives in Pennsylvania, the Pennsylvania Chiefs of Police Association is working tirelessly to foster the delivery of professional, high quality, community-based police services in the Commonwealth.

We believe two key elements to achieving this goal are training and policy . We have concerns on the wording of the amendments contained within House Bill No. 1664, Session of 2019, having been referred to the Committee on the Judiciary, June 24, 2019.

In order to fully understand the impact of the proposed changes, the framework of existing case law must be applied to the constitutional use of force. The United States Supreme Court has provided several rulings which provide a "bright line" for police conduct in the use and application of force. Two of the most impactful cases in establishing the "reasonableness standard" are identified as:

*Ken Truver – 2022
Chief of Police
Castle Shannon Borough*

*James Sabath – 2022
Chief of Police
Newtown Borough*

*Thomas Gross – 2022
Chief of Police (Ret.)
York Area Regional Police*

*Larry Palmer – 2022
Chief of Police
Palmer Township*

*Mark Toomey – 2021
Chief of Police
Upper Providence Township*

*James Adams – 2021
Chief of Police
Upper Allen Township*

*Michael Vogel – 2021
Chief of Police
Allegheny County Housing
Authority*

*Jason Loper - 2022
Chief of Police
Fairview Township*

*Tim Trently - 2022
Chief of Police
Archbald Borough*

*David Splain - 2022
Chief of Police
Nether Providence Township*

U.S. Supreme Court *Graham v. Connor*, 490 U.S. 386 (1989) *Graham v. Connor* No. 87-6571 Argued February 21, 1989 Decided May 15, 1989 490 U.S. 386 -Held: All claims that law enforcement officials have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard.

The Fourth Amendment "reasonableness" inquiry 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. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.

U.S. Supreme Court *Tennessee v. Garner*, 471 U.S. 1 (1985) *Tennessee v. Garner* No. 83-1035 Argued October 30, 1984 Decided March 27, 1985* 471 U.S. 1 -Held: The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against, as in this case, an apparently unarmed, non-dangerous fleeing suspect; such force may not be used unless necessary to prevent the 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.

Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. To determine whether such a seizure is reasonable, the extent of the intrusion on the suspect's rights under that Amendment must be balanced against the governmental interests in effective law enforcement. This balancing process demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.

An area of concern is training and re-training requirements and impacts. Professional police service delivery requires specific policy provisions followed by development of comprehensive training designed to instill policy requirements, understanding of case law, and clear understandings of the requirements embedded within the policy.

The policy development process is critical to law enforcement in providing outcomes that are consistent with the law, best practices, and assurance of meeting community standards and expectations. The Pennsylvania Chiefs of Police Association strongly supports this essential aspect of professional law enforcement.

The existing policy standard presents an absolute requirement for those agencies seeking accreditation by the Pennsylvania Law Enforcement Accreditation Commission (PLEAC) that the exact wording under the standard as it applies contain:

- A written directive stating that a "peace officer" (law enforcement officer) as defined in Chapter 5 of the Pennsylvania Crimes Code (18 Pa. C.S.A. §501) shall only utilize deadly force when reasonable and justified to effect lawful objectives in conformance to the provisions of the Pennsylvania Crimes Code, other Pennsylvania statutory provisions, and Pennsylvania and Federal Court decisions. Narrative: Section 508, Subsection (a) of the Pennsylvania Crimes Code (18 Pa.C.S.A.), provides provisions for the lawful and justified use of deadly force by a "peace officer". The use of force and deadly force may also be justified under the provisions of Section 505, "Use of force in self-protection" and Section 506, "Use of force for the protection of other persons" of the Pennsylvania Crimes Code.
- The issue of the utilization of force and deadly force by law enforcement officers is continually being addressed in Pennsylvania and Federal court decisions. It is vitally important that every law enforcement agency have a clearly defined and easily understood policy, which complies with the law, regarding the use of deadly force by its law enforcement officers.

We appreciate the committee seeking comments on the amendment and therefore allowing us the opportunity to voice our concerns surrounding H.B. 1664 as it presents. We strongly support efforts to assure police agencies have use of force policies and have developed and implemented the PLEAC Law enforcement accreditation program as the pathway to clear policy requirements.

Accreditation is a progressive and time-proven way of helping institutions evaluate and improve their overall performance. The cornerstone of this strategy lies in the promulgation of standards containing a clear statement of professional objectives. Participating administrators then conduct a thorough analysis to determine how existing operations can be adapted to meet these objectives. When the procedures are in place, a team of independent professionals is assigned to verify that all applicable standards have been successfully implemented. The process culminates with a decision by an authoritative body that the institution is worthy of accreditation.

The Pennsylvania Law Enforcement Accreditation Program was designed and developed by professional law enforcement executives to provide a reasonable and cost-effective plan for the professionalization of law enforcement agencies within the Commonwealth. The underlying philosophy of the program is to have a user-friendly undertaking for the departments that will result in a "success" oriented outcome.

The Pennsylvania Chiefs of Police Association introduced the Pennsylvania Law Enforcement Accreditation Program to the Commonwealth in July 2001. Since then, over 300 agencies have enrolled and 117 agencies currently have attained accredited status. While this is an impressive number of agencies, it sadly represents approximately ten percent of the total number of agencies in the Commonwealth. The good news is that this provides guidance to over 17,301 law enforcement professionals

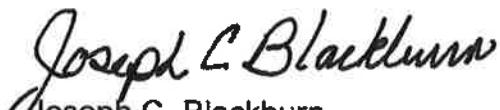
in the Commonwealth. We respectfully suggest that efforts to require critical policy development by law enforcement agencies occur to minimize, reduce, and eliminate the failures we have identified.

Thank you for the opportunity to comment. We remain open to engaging with the committee to offer our perspective to legislators and we are available to discuss the issues we have highlighted in this response or other topics covered by the act while it is being finalized.

Sincerely,



Chief Albert Walker
President
Pennsylvania Chiefs of Police Association



Joseph C. Blackburn
Executive Director
Pennsylvania Chiefs of Police Association

**Statement of the Fraternal Order of Police, PA State Lodge
Before Pennsylvania House Democratic Policy Committee
August 27, 2019 – Use of Police Force**

This statement is submitted by the Fraternal Order of Police, Pennsylvania State Lodge, on behalf of over 40,000 law enforcement officers and their families throughout the Commonwealth of Pennsylvania.

First, we would like to extend our thanks to Democratic Policy Committee members for your work on matters of concern to Pennsylvania's Police Officers. Second, considering the nature of this meeting, we offer general comments on the stated topic of "Use of Police Force," as opposed to commenting on any specific piece of legislation.

As the Committee members know (or should know), Pennsylvania is fortunate in that our police officers routinely exercise restraint and good judgment as they are tasked and sworn to protect and serve the people, oftentimes at great risk to their own personal safety. Because of the restraint and good judgment of our officers, Pennsylvania has among the lowest rates of police shooting deaths in the entire country, ranking 43rd out of 50 states in deadly shootings per 100,000 population.

Pennsylvania's record of success reflects in part the stability in the laws governing police uses of force. Title 18's police use-of-force standards have remained consistent for decades, and they have accurately reflected the standards handed down by the U.S. Supreme Court in the seminal 1980's decisions of Tennessee v. Garner (1985) and Graham v. O'Connor (1989). In Graham v. Connor (1989), the Court unanimously rejected the notion that we use "20/20 hindsight" in reviewing force decisions, instead instructing that the "reasonableness of a use of force must be judged from the perspective of a reasonable officer on the scene, *and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.*"

Police officers in our Commonwealth have trained to the standards set by the Supreme Court and reflected in Title 18 for decades. And the result is that Pennsylvania has one of the lowest rates of deadly police shootings in the country. Any legislation intended to "move the target" by setting new and possibly unconstitutional legal standards for police uses of force risks upsetting a system that has worked successfully for Pennsylvanians for many years. Because of this, the PA FOP opposes any legislation that will disrupt the longstanding legal rules governing police use of force.

While Pennsylvania's extraordinary record of successful policing is something to be celebrated and appreciated, this does not mean that we cannot improve on our mission. The Pennsylvania FOP has long-supported legislative initiatives to fund enhanced training for our police departments, and we will continue to do so. Police departments throughout our Commonwealth regularly train officers on issues related to life preservation and de-escalation of threats, increasing professional conduct of officers, decreasing injury and loss of life. But we can and should do more. Let's build on our record of success.

The PA FOP supports efforts to fund and to enhance professional training and standards while improving the safety of our communities, and upholding equity and justice for all. We look forward to continuing to partner with other stakeholders in legislative efforts to provide the best police services possible to Pennsylvania's citizens. Thank you for your continued support for the men and women in Pennsylvania's law enforcement community.



Hearing on Use of Force
House Democratic Policy Committee
August 27, 2019

Thank you for the opportunity to submit testimony related to use of force and officer involved shootings.

At the outset, we must first acknowledge the important and vital work by our police and the dangers they face every day. We need look no further than the recent shootings of six officers in Philadelphia, shootings that thankfully did not result in anyone's death or serious injury. This is the kind of danger so many officers face — officers who are often outgunned or are facing dangerous circumstances, such as responding to domestic violence situations. Nationally, there have been more than 70 line of duty deaths so far this year, and many more have been injured. Few of us literally put our lives on the line every day, and for those who do, like the police, we owe them enormous gratitude and admiration.

At the same time, we must acknowledge that there are a few within the rank and file who are less worthy of our admiration because they have violated the law, used excessive force, lied, or otherwise impugned the public trust. These few not only damage their own reputations, but they undermine public trust in law enforcement and do great harm to the brave and dedicated officers who risk their lives every day.

Moreover, we are well aware that some view police more suspiciously and believe that people of color are unfairly targeted, stopped, detained or arrested. Some also contend that police are too quick to shoot and must de-escalate more.

Law enforcement cannot ignore these serious criticisms and concerns. Whether we agree on particular policy proposals, it is incumbent on law enforcement to first acknowledge these serious criticisms and concerns and respond thoughtfully. When law enforcement is viewed negatively in particular communities, everyone suffers, and public safety and justice are diminished.

To that end, in November, 2016, the PDAA released a series of best practice recommendations related to officer-involved shootings. The PDAA recommended that officer-involved shootings be investigated by an independent police agency and that the local district attorney should provide the public with a written report following the completion of the investigation. The guidelines are believed to be the first statewide guidelines for prosecutors produced in the United States. Recognizing that officer-involved shootings are traumatic and complex, it is our duty to ensure that any police-related shooting is thoroughly reviewed in a manner that is objective and fair for everyone involved. Having an investigation led by an entity not affiliated with the shooting reassures the public that the investigation was conducted without bias or direct connection to the officer(s) involved. The recommendations do recognize that in some jurisdictions, particularly those in rural areas, it may not be possible to secure an outside department, and therefore that the district attorney must use his or her discretion to customize the process to fit the needs and resources of the individual counties.

We also recommend consideration of the following:

Officers should be trained to use de-escalation tactics in order to reduce the occurrences of use of force, including helping their fellow officers to avoid using unnecessary force. The Municipal Police Officers Education and Training Commission (MPOETC) could coordinate these efforts, and perhaps the Commonwealth could provide grant money to local departments to implement such training or further sustain it where it already exists. De-escalation training should not be something officers do only once. It should be a regular and repeated part of every officer's training.

Because training is an integral part of improving policing practices, we would be remiss if we did not acknowledge how difficult that is for some departments. There are nearly 1,200 municipal police departments in Pennsylvania, some of which are part-time with one or two officers on duty. To that end, the regionalization of police departments should be encouraged and incentivized by the state. With a regional force, more officers are freed for patrol because administrative functions are consolidated, and purchasing and administrative duplications are reduced or eliminated. Because of its size, a regional force makes it easier to ensure officers receive the training they need.

Consideration should also be given to requiring departments hiring new police officers to contact any prior police department for whom the applicant worked. The applicant could be required to list each prior department of employment. Pennsylvania already has similar requirements for teachers. When hiring an officer, a department should have all available prior employment information at its disposal.

With regard to amending use of force standards, the PDAA cannot support the legislation as written. We are concerned that completely eliminating the ability for an officer to use deadly force against a felon who is fleeing will have negative consequences both in terms of officer safety and in apprehending dangerous suspects. If the law were to be changed, we would, of course, enforce it – just as we enforce the law as currently written. With regard to adding the word or a derivative of “reasonable” in other parts of the use of force law, we would only point out that in the definition section of the statute, the “reasonable” element is built in where it modifies “belief.”

Every use of deadly force case is a tragedy, and no law enforcement officer wants to be in a position where deadly force is required. The analysis must recognize that officers regularly face dangerous circumstances that may require making quick, difficult decisions related to use of force and that the law comports with Supreme Court caselaw requiring that the officer employing deadly force have a reasonable belief either that (1) such force is necessary to prevent death or serious bodily injury; or (2) is necessary to prevent an escape of a suspect who has committed a forcible felony, is armed with a deadly weapon, or has threatened to inflict death or serious bodily injury.

With that said, the existing statute is hardly the model of clarity. In fact, it appears that “or” means “and” in some cases and vice-versa, and the phrase “endanger human life” is vague as

well. And the accompanying jury instruction carries forward the lack of clarity and, in fact, does not adequately explain in what circumstances a police officer is justified in using force or what defense elements must be disproven.

Thank you for the opportunity to submit our testimony on this difficult, but important topic. We look forward to continuing examining these issues with you and all the relevant stakeholders.

Appendix F



PHILADELPHIA POLICE DEPARTMENT

DIRECTIVE 10.1

Issued Date: 9-18-15

Effective Date: 9-18-15

Updated Date: 01-30-17

**SUBJECT: USE OF FORCE – INVOLVING THE DISCHARGE OF FIREARMS
(PLEAC – 1.3.2, 1.3.3, 1.3.5, 1.3.6, 1.3.7)**

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PHILADELPHIA POLICE DEPARTMENT

DIRECTIVE 10.1

Issued Date: 9-18-15

Effective Date: 9-18-15

Updated Date: 01-30-17

**SUBJECT: USE OF FORCE – INVOLVING THE DISCHARGE OF FIREARMS
(PLEAC – 1.3.2, 1.3.3, 1.3.5, 1.3.6, 1.3.7)**

1. POLICY

- A. It is the policy of the Philadelphia Police Department, that officers hold the highest regard for the sanctity of human life, dignity, and liberty of all persons. The application of deadly force is a measure to be employed only in the most extreme circumstances and all lesser means of force have failed or could not be reasonably employed.
- B. The most serious act in which a police officer can engage during the course of their official duties is the use of deadly force. The authority to carry and use firearms in the course of public service is an immense power, which comes with great responsibility.
- C. Police Officers shall not use deadly force against another person, unless they have an objectively reasonable belief that they must protect themselves or another person from death or serious bodily injury. Further, an officer is not justified in using deadly force at any point in time when there is no longer an objectively reasonable belief that the suspect is dangerous, even if deadly force would have been justified at an earlier point in time. (PLEAC 1.3.2)
- D. When feasible under the circumstances, police officers will give the suspect a verbal warning before using deadly force.
- E. Police officers using their professional judgment should not discharge their weapon when doing so might unnecessarily endanger innocent people.
- F. Subjects may be physically or mentally incapable of responding to police commands due to a variety of circumstances including but not limited to alcohol or drugs, mental impairment, medical conditions, or language and cultural barriers. Officers should be mindful of this when making use of force decisions.
- G. After using deadly force, officers shall immediately render the appropriate medical aid and request further medical assistance for the suspect and any other injured individuals when necessary and safe to do so and will not be delayed to await the arrival of medical assistance. (PLEAC 1.3.5)

- H. Officers who witness inappropriate or excessive force have a duty to report such violations to a supervisor and Internal Affairs.
-

2. DEFINITIONS

A. **Objectively Reasonable:** Is a Fourth Amendment standard whereby an officer's belief that they must protect themselves or others from death or serious bodily injury is compared and weighed against what a reasonable or rational officer would have believed under similar circumstances. This determination is made by reviewing all relevant facts and circumstances of each particular case, including, but not limited to, (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

NOTE: Resisting arrest or flight alone would not justify the use of deadly force. While the US Supreme Court identified three (3) factors that should be evaluated in determining whether an officer's use of force was objectively reasonable, this list was not intended to be all inclusive. The **TOTALITY OF THE CIRCUMSTANCES** that led an officer to believe force was needed is critical. Other factors such as, whether an individual is violent, the possibility that the individual is armed, and the number of persons with whom an officer must contend with at the time are all relevant factors to consider. **INDIVIDUAL FACTORS** alone would not give a reasonable officer the belief that deadly force is necessary.

B. **Resistance:** Is an act by an individual that opposes an officer's lawful commands. There are two types of resistance.

1. **Active Resistance:** Is defined as the use of physical force to defy an officer's lawful arrest or attempt to gain control of a situation that requires police action.

2. **Passive Resistance:** Is defying an officer's lawful order without the use of physical force. Behaviors may include not moving, going limp, locking of arms or tightening of the body.
- C. **Serious Bodily Injury:** is defined as bodily injury which creates a substantial risk of death, causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.
-

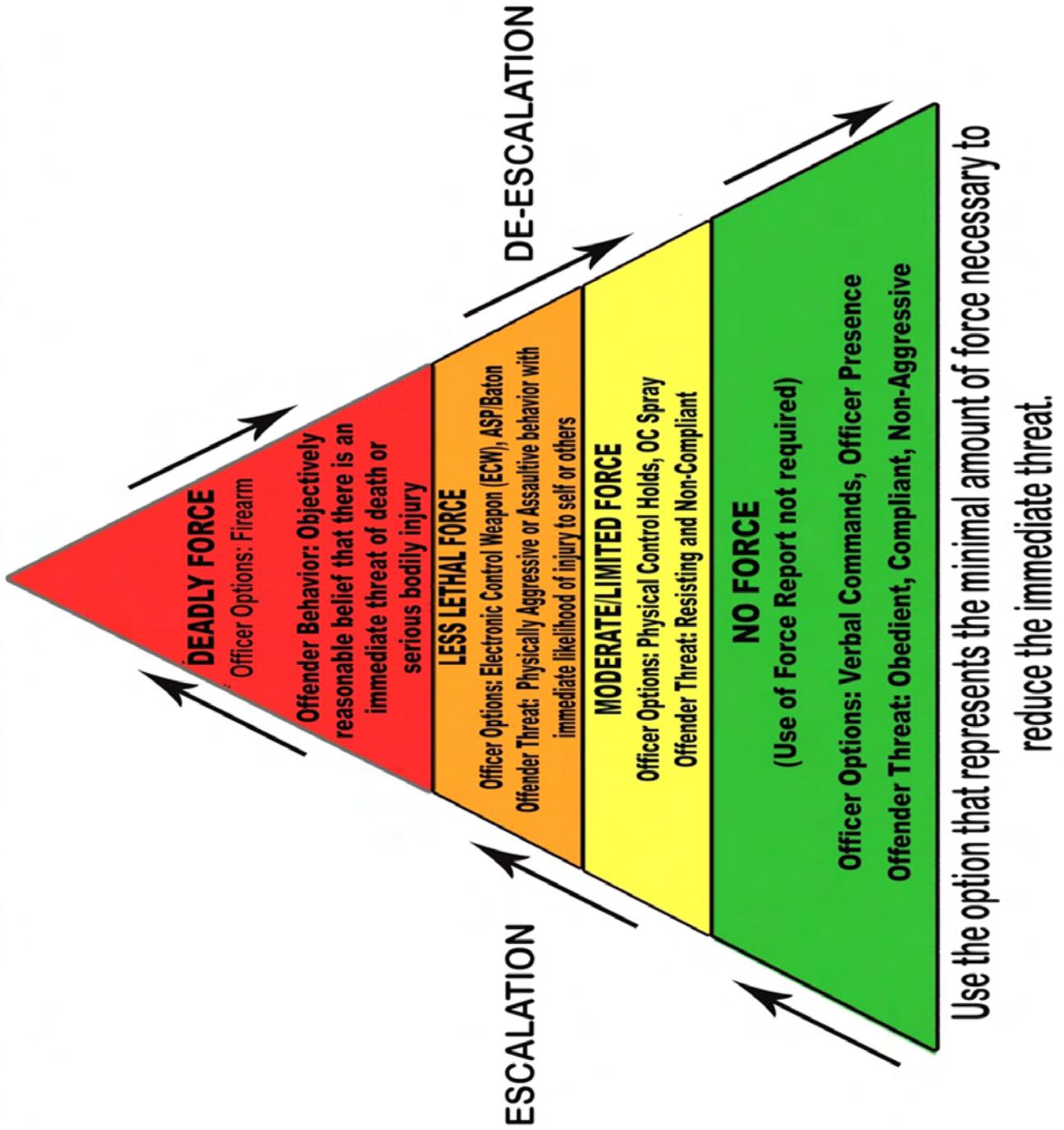
3. USE OF FORCE

- A. **GOAL:** To always attempt to de-escalate any situation where force may become necessary. In the event force becomes unavoidable, **to use only the minimal amount of force necessary to overcome an immediate threat or to effectuate an arrest.**

The amount of force, the continued use of any force, and the type of police equipment utilized, all depends upon the situation being faced by the officer. However, once the threat has been overcome, or a subject is secured in custody; it is an officer's responsibility to de-escalate and immediately address any injuries the suspect may have sustained.

- B. **USE OF FORCE DECISION CHART:** The following diagram illustrates the amount of force an officer should use based on the suspect's behavior and threat. It is the suspect's behavior that places the officer and/or others in danger. The suspect's threat is the primary factor in choosing a force option. However, the officer should also consider the totality of the circumstances to include, but not limited to, a suspect's altered state due to alcohol or drugs, mental impairment, medical conditions, or the proximity of weapons.

USE OF FORCE DECISION CHART



- C. The following are examples of how to interpret the Use of Force Decision Chart. These examples are for illustrative purposes and not intended as an exhaustive list.
1. No force is required or authorized when the offender is compliant non-aggressive and responds to verbal commands. Officers may need to handcuff such offenders but this is not considered use of force. No use of force report is required under these circumstances.
 2. Moderate/limited use of force may be required when the offender is non-compliant and is resisting the officer's commands. Such behaviors may include pushing or pulling away, locking arms, or tightening of the body. Force including control holds, and OC Spray is authorized under these circumstances. Verbal aggression by itself does not warrant the use of force.
- EXCEPTION:** Protestors/Demonstrators that are exercising their Constitutional Rights of Free Speech or Assembly and are non-compliant and passively resisting officer's commands, OC Spray **SHALL NOT BE USED** to overcome the resistance. Rather, officers will disengage and contact a supervisor. If necessary, additional officers will be used to overcome the resistance.
3. The use of the Electronic Control Weapon (ECW) and/or ASP/Baton is authorized when the offender is physically aggressive or assaultive and there is a immediate likelihood that they may injure themselves or others. Such behaviors may include punching, kicking, grabbing, or approaching with a clenched fist.
- EXCEPTION:** Protestors/Demonstrators that are exercising their Constitutional Rights of Free Speech or Assembly and are non-compliant and passively resisting officer's commands, ECW **SHALL NOT BE USED** to overcome the resistance. Rather, officers will disengage and contact a supervisor. If necessary, additional officers will be used to overcome the resistance.
4. Deadly force is authorized when the officer has objectively reasonable belief that they must protect themselves or another person from the immediate threat of death or serious bodily injury.
 5. An officer may address an offender's immediate threat with any option to the level of threat or lower. For example, an officer may use their ASP/Baton, OC Spray, or ECW on an offender displaying assaultive behavior with a likelihood of injury to themselves or others. They cannot use an ECW on an offender who is only non-compliant.

NOTE: The mere handcuffing of a compliant individual is not considered force.

4. SPECIFIC PROHIBITIONS

- A. Police officers shall not draw their firearms unless they reasonably believe an immediate threat for serious bodily injury or death to themselves or another person exists.
- B. Police officers shall not discharge their firearms in defense of property.
- C. Police officers shall not use a firearm as a club.
- D. Police officers shall not fire warning shots under any circumstances. (PLEAC 1.3.3)
- E. Police officers shall ensure their actions do not precipitate the use of deadly force by placing themselves or others in jeopardy by taking unnecessary, overly aggressive, or improper actions. It is often a tactically superior police procedure to withdraw, take cover or reposition, rather than the immediate use of force.
- F. Police officers shall not discharge their firearms to subdue a fleeing individual who presents no immediate threat of death or serious physical injury to themselves or another person.
- G. Police officers shall not discharge their firearms **FROM** a moving vehicle unless the officers are being fired upon. Shooting accurately from a moving vehicle is extremely difficult and therefore, unlikely to successfully stop a threat of another person.
- H. Police officers shall not discharge their firearms **AT** a vehicle unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle (e.g., officers or civilians are being fired upon by the occupants of the vehicle).
 - 1. A moving vehicle alone shall not presumptively constitute a threat that justifies an officer's use of deadly force.
 - 2. Officers shall not move into or remain in the path of a moving vehicle. Moving into or remaining in the path of a moving vehicle, whether deliberate or inadvertent, **SHALL NOT** be justification for discharging a firearm at the vehicle or any of its occupants. An officer in the path of an approaching vehicle shall attempt to move to a position of safety rather than discharging a firearm at the vehicle or any of the occupants of the vehicle.

NOTE: An officer should never place themselves or another person in jeopardy in an attempt to stop a vehicle.

3. The prohibitions regarding the discharge of a firearm at or from a moving vehicle exist for the following reasons:
 - a. To avoid unnecessarily endangering innocent persons, both when inside the vehicle and in the vicinity.
 - b. Bullets fired at a moving vehicle are extremely unlikely to disable or stop the vehicle.
 - c. Disabling the driver of a moving vehicle creates unpredictable circumstances that may cause the vehicle to crash and injure other officers or innocent bystanders.
 - d. Moving to cover in order to gain and maintain a superior tactical advantage maximizes officer and public safety while minimizing the need for deadly or potentially deadly force.

NOTE: Barring exigent circumstances, (e.g., the driver is unconscious and the motor is still running), an officer shall never reach into an occupied vehicle in an attempt to shut off the engine or to recover evidence, since this has been known to result in serious injury to officers.

- I. Police officers with revolvers shall not under any circumstances cock a firearm. Firearms must be fired double-action at all times.
-

5. REPORTING DISCHARGES OF FIREARMS

- A. The discharge of any firearm, whether accidental or intentional, by sworn personnel on duty or off duty (except test or target fire at a bona fide pistol range or lawfully hunting game) will be reported as follows:
 1. The officer who fired the weapon will:
 - a. Immediately notify Police Radio of the occurrence and provide pertinent information regarding the need for supervisory personnel and emergency equipment if required.
 - b. Inform the first Supervisor on the scene of the location(s) of the crime scene(s) and the general circumstances relative to the preservation and collection of physical evidence. State whether they were wearing a body-worn camera (BWC) and if so, was it activated during the incident.

2. Each officer at the scene of a discharge of a firearm by any police officer will:
 - a. Notify Police Radio of the discharge, unless the officer knows Police Radio has already received such a notification.
 - b. Inform the first Supervisor on the scene of the circumstances of the discharge and provide all relevant information concerning the incident.
 - c. Ensure the provisions of Directive 4.1, "Responsibilities at Crime Scenes" are followed.
 - d. Report to the first supervisor on the scene, whether they had a BWC and if it was on during the incident.

3. Police Radio will:

- a. Ensure that a district Supervisor is dispatched to the scene.
- b. Immediately make the following notifications:

- *2
- 1) Officer Involved Shooting Investigation Unit (OISI)
 - 2) Internal Affairs
 - 3) Detective Division of Occurrence
 - 4) District of Occurrence
 - 5) District or Unit to which officer is assigned
 - 6) Command Inspection Bureau (CIB), if applicable
 - 7) Crime Scene Unit (CSU)
 - 8) RTCC to identify all City owned or privately owned cameras
 - 9) Police Advisory Commission (PAC) Executive Director
- c. Notify the Commanding Officer, Employee Assistance Program (EAP) of the police discharge. The Commanding Officer, EAP, will have police radio notify the on-call peer counselor and they will contact police radio for details of the shooting.

4. First Supervisor on the scene will be responsible for the following:

- a. Ensure that Police Radio has been notified of the incident.
- b. Ensure that the provisions of Directive 4.1, "Responsibilities at Crime Scenes" are carried out and protect and secure the crime scene.
- c. Determine which officer(s) discharged their weapon(s) by examining the magazine/cylinder of the weapon of each officer present during the discharge.

- d. Ensure any officer having left the scene prior to the Supervisor's arrival will be recalled in order to have their weapon inspected.
- e. Determine if any officer at the scene had a BWC and whether it was on during the incident.
 - 1) Collect all BWCs with video of the incident.
 - 2) Ensure the videos are captured and stored as evidence.
 - 3) The involved officer may review only their BWC video prior to making any official statements to Internal Affairs or OISI Unit.
- *2 f. Prepare the Supervisor's Firearm Discharge Checklist (75-654) and remain at the scene with the involved officer/s until the arrival of the OISI Unit and IAD personnel. The involved officer/s will conduct a walk-through of the scene with the following personnel:
 - 1) OISI Supervisor and Investigator
 - 2) IAD Personnel
 - 3) CSU Personnel
 - 4) First Supervisor
 - 5) FOP Representative/Attorney

NOTE: No other personnel will be present for the walk-thru unless authorized by the OISI Unit Supervisor. If multiple officers discharge a firearm, a walk-through will be conducted with each officer individually.
- *2 g. The supervisor will take possession of the evidence bag containing the officers weapon and transport the weapon to the OISI Unit.
 - 1) Glock (semi-automatic) weapon inspection:

Instruct the officer(s) to remove the magazine for inspection and note the number of rounds. If the weapon has been fired, record the number of remaining rounds and take possession of the magazine. Supervisors, who are not Glock-trained, are prohibited from physically handling the weapon (excluding the magazine) during the inspection.

2) Revolver inspection:

Pay special attention to the cylinder position before ordering the officer to open their weapon's cylinder. Note the condition of each round in all chambers and what chamber was located under the firing pin when the cylinder was opened. If the weapon has been fired, take note of the number of spent cartridges and take possession of all six rounds of ammunition, live or spent.

3) Patrol Shotgun inspection:

In a situation where a police officer has discharged a patrol shotgun, a patrol supervisor will remove the remaining rounds from the magazine, open the action to make the weapon safe and make a note of the remaining rounds. Supervisors, who are not Patrol Shotgun/Patrol Rifle trained, are prohibited from physically handling the weapon (excluding the magazine) during the inspection.

4) Patrol Rifle inspection:

In a situation where a police officer has discharged a patrol rifle, a patrol supervisor will remove the magazine, make the weapon safe, remove the remaining rounds from the magazine and make a note of the remaining rounds. Supervisors, who are not Patrol Shotgun/Patrol Rifle trained, are prohibited from physically handling the weapon (excluding the magazine) during the inspection.

NOTE: In the event the responding patrol supervisor is not trained to handle the patrol shotgun/rifle, a trained supervisor from an adjoining district or a SWAT supervisor will be requested to respond to the location.

- *2
- h. Ensure information concerning the location(s) of the crime scene(s) and the general circumstances relative to the preservation and collection of physical evidence is provided by the involved officer(s) and disseminated to the assigned investigator by remaining at the scene until the arrival of OISI Unit personnel. The first supervisor on the scene will use the Supervisors Firearm Discharge Checklist (a copy is attached at the end of this directive) to determine required information.

NOTE: The Supervisors Firearms Discharge Checklist card will be carried by all patrol supervisors.

*2

- i. Will escort the involved officer, if not incapacitated, directly to the OISI Unit. When reasonable, discharging officers should be transported separately. If additional vehicles are needed; additional supervisors will be summoned to provide transportation.

NOTE: The first Supervisor on the scene (Corporal, Sergeant, or Lieutenant) will not delegate the responsibility of transporting officers to any other supervisor regardless of the district/unit assignment of the officer(s) involved. However, command-level personnel (Captain or above) may assign a subordinate Supervisor to transport involved officers in the event a commander is the first superior officer on the scene.

- j. Will brief the PAC Executive Director or designee on all the known facts of the discharge.
- k. Ensure they follow the replacement weapon protocol in Section 5-B.

NOTE: The responding PAC observer **WILL NOT** be given access to the crime scene.

5. The Operations Room Supervisor (ORS) of the district of occurrence will:

- a. Make notification via a computer terminal to Internal Affairs by accessing the Use of Force Notification Screen on the PPD Intranet homepage.
(PLEAC 1.3.6)

B. Replacement weapon protocol for Officer Involved Shootings (OIS).

1. This protocol will only be used when an officer discharges at a person, whether or not the person is struck, or in cases where the suspect may have handled the weapon (i.e., in a struggle for the weapon) resulting in touch DNA evidence.
2. The first supervisor on the scene will ensure Police Radio notifies the SWAT Unit assigned to the ROC Division where the discharge occurred. SWAT personnel will immediately respond to the location of occurrence to issue a replacement weapon, a paper evidence bag and protective gloves.
3. The officer who fired the weapon will remove the magazine, un-chamber the round and make the weapon safe by locking the slide to the rear. If the weapon is a revolver, the weapon will be unloaded and made safe. The firearm will be placed in the paper evidence bag, sealed, and the label will be filled out completely and turned over to the supervisor.

*2

- a. To preserve the integrity of DNA evidence, latex or non-latex, gloves will be worn when securing, rendering safe and packaging the weapon in the paper evidence bag.
4. The first supervisor on the scene will ensure that the paper evidence bag, with the label filled out completely and accurately, is delivered to the OISI Unit.

NOTE: All officers and supervisors should carry personal protection equipment (PPE) (i.e., latex or vinyl gloves) which are available at the Police Warehouse located at 660 East Erie Avenue.

5. SWAT Units assigned to each ROC Division will carry replacement weapons (8-10 firearms) comprised of 9MM, 40, 45, and 38 calibers. The weapons will be carried on all tours and accounted for daily.
6. In the event that SWAT is unavailable (i.e., training, barricade) the ORS at SWAT Headquarters will retrieve a replacement weapon from the vault and have it immediately delivered to the location of occurrence along with a paper evidence bag and protective gloves.
 - a. Personnel assigned to the SWAT Operations Room will ensure they monitor "J" Band on all tours.

C. Reporting Discharges of Firearms OUTSIDE Jurisdiction

1. The officer who fired the weapon will:
 - a. Call the local Emergency 9-1-1 to notify the jurisdiction of occurrence.
 - b. Comply with the directions given by the local investigating law enforcement officials.
 - c. Call the Philadelphia Police Radio Room at (215) XXX-XXXX so the proper notifications can be made.
2. Police Radio will:
 - a. Notify Command Inspection Bureau (CIB) or district/unit Commanding Officer depending on the time of occurrence.
 - b. Notify Internal Affairs and provide pertinent information regarding the discharge.

3. Internal Affairs will:

- a. Be immediately notified of any incident involving the discharge of a firearm by police. The Internal Affairs Shooting Team, will be notified of any incident involving the discharge of a firearm by Philadelphia Police personnel. In addition, the Shooting Team will be notified whenever a city issued or privately owned weapon of a Philadelphia Police Officer is discharged, intentionally or accidentally, by someone other than the respective officer.
- b. Notify the local investigative agency, speak to the assigned investigator, and request if Internal Affairs can respond to the scene or meet with the investigator.
- c. Respond to any discharge within reasonable driving distance (2-3 hours).
- d. If permissible, obtain any documents and/or interviews pertaining to the discharge.

D. Research and Analysis Unit will:

1. Report all crime through the online Pennsylvania Uniform Crime Reporting System as specified by the Federal Bureau of Investigation (FBI).
-

6. INVESTIGATION OF POLICE DISCHARGES

*2

A. The OISI Unit will:

1. Investigate all cases involving the discharge of firearms by law enforcement personnel occurring within the confines of Philadelphia.
2. In OIS incidents resulting in a fatality, ensure that all pertinent death notifications have been made.
3. Ensure that any video that captured the incident is obtained, stored and processed as evidence.
4. Be responsible for the preparation of the Investigation Report (75-49) which will be forwarded to Internal Affairs within seven (7) calendar days. (PLEAC 1.3.6)

B. Crime Scene Unit personnel will:

1. Process the scene after conferring with the assigned investigator.

C. The Discharging Officer's Commanding Officer will:

- *2
1. Ensure the Commanding Officer, OISI Unit is notified.
 2. Contact the Police Department's Employee Assistance Program (EAP), within five (5) business days, in order to arrange confidential counseling whenever an officer has discharged their firearm, except at an animal.

NOTE: Commanding Officers may use their discretion regarding required EAP counseling when the discharge is at an animal.

3. Be responsible for having the officer retrained at the Firearms Training Unit (FTU) before returning to duty (Exception: discharges at deer.)
4. Whether or not the discharge results in death or injury to any person, the officer shall be temporarily assigned to non-street duties. (PLEAC 1.3.7)

EXCEPTION: Officers who discharge at deer will be returned to duty immediately after arrival of OISI Unit personnel. OISI Unit personnel will not respond to the scene when SWAT has killed a deer or other wild animal, except canines.

- *2
5. An officer will return to active street duty as soon as possible after the officer has attended their scheduled visit with Employee Assistance Program (EAP), completed their required training at the FTU and based on the recommendation of Internal Affairs.

NOTE: Officers must be approved for return to active street duty by either the Police Commissioner or the First Deputy Commissioner.

D. Commanding Officer, Employee Assistance Program (EAP) will:

- *2
1. Have the assigned peer counselor respond to the OISI Unit to meet the discharging officer for an initial assessment. During the initial assessment, the peer counselor will explain the emotions that the officer might be experiencing and explain the procedures that will occur following their discharge (i.e. reporting to the FTU and EAP.).

NOTE: EAP peer counselors will only respond to police discharges where the suspect was fatally wounded or injured as a result of the discharge. The exception is when there is a request from the investigating shooting team, the officer's Commanding Officer, CIB or the Commanding Officer, EAP.

2. Have the peer counselor conduct a confidential follow-up assessment and provide referral information to the officer. The officer will be encouraged to contact Penn Behavioral Health (PBH).

*2

3. Have the peer counselor, upon the completion of the session with EAP or the Penn Behavioral Health provided counselor; fax a memorandum to the Commanding Officer, OISI Unit stating the officer has attended their appointment with EAP. All other information is prohibited from being released. All EAP sessions are **STRICTLY CONFIDENTIAL** and information pertaining to the session cannot be released without the officer's permission.

NOTE: EAP is a support service and is not involved in the investigation of the police shooting.

E. Internal Affairs will:

*2

1. Ensure a member of the IAD Shooting Team interviews the officer(s) that discharged their weapon, separately, within seventy-two hours of the incident.

*2

2. Prepare a memorandum to the Police Commissioner detailing the results of the Internal Affairs investigation. (PLEAC 1.3.6)

*2

NOTE: Upon completion of the memorandum, the Chief Inspector, Office of Professional Responsibility, will forward a complete report to the Deputy Commissioner, Office of Professional Responsibility, who will forward it to the Police Commissioner.

3. Notify the Commanding Officer of the discharging officer's status.

7. CUSTODY AND DISPOSITION OF ALL FIREARMS DISCHARGED BY POLICE PERSONNEL

*2

- A. The OISI Unit will prepare a Property Receipt (75-3) containing the following information: the firearm's make, model, caliber, and serial number. A second 75-3 will be prepared for the fired cartridge(s) and unfired ammunition. The OISI Unit case number will be indicated on both Property Receipts.
- B. In discharges of firearms not resulting in injury and in any discharge (accidental or intentional) resulting in the shooting of an animal, the discharged firearm (including patrol shotguns and/or patrol rifles) will be given to the transporting supervisor in accordance with the following guidelines:

NOTE: When transporting a patrol shotgun and/or patrol rifle, prior to leaving the scene, the transporting supervisor will secure the patrol shotgun and/or patrol rifle in the vehicle lock box after making the weapon safe.

- *2
1. When the firearm will be returned, the assigned OISI Unit personnel will designate, in the description section of the Property Receipt containing the firearm information, "**FIREARM IS TO BE TEST FIRED AND RETURNED.**" The assigned OISI Unit personnel's signature and date will follow. The OISI Unit will retain the white (control) copy of the Property Receipt for their records.
 2. The transporting supervisor will transport the firearm, fired cartridge(s), and unfired ammunition and both Property Receipts directly to the Firearms Identification Unit (FIU).

- a. When the Firearms Identification Unit (FIU), 843 North 8th Street, Room 022 is open, FIU will test fire and make every effort to expedite the examination and return the weapon to the involved officer. The test shots and firearm related materials (bullets, specimens, and/or fired cartridge cases) will be retained at FIU.

NOTE: Evidence Intake Unit is open 24 hours a day, weekends, and holidays.

- b. When FIU is closed, the Evidence Receiving Clerk - Laboratory Division will aid the officer in securing their firearm in the mobile firearm's storage box. A replacement firearm of the same caliber will immediately be issued to that officer. Subsequently, the FIU will contact the officer for return of their original firearm.
- c. The firearm will be unloaded and made safe, but not cleaned prior to examination.
- d. Upon completion of the FIU examination, a copy of the findings will be forwarded to the OISI Unit.

*2

- *2
- C. In all deliberate shootings (not involving animals) where an injury or death occurs and all accidental discharges of firearms resulting in injury or death, OISI Unit will:

1. Determine if the firearm can be returned to the officer.
2. If the firearm is to be returned to the officer, follow the procedure in Section 7-B-1 and 2 in this directive, except the actual transportation of the weapon to FIU will be done by the OISI Unit.
3. If the firearm is not to be returned, the assigned OISI Unit personnel will designate in the description section of the Property Receipt containing the firearm information one of the following:
 - a. FIREARM IS TO BE TEST FIRED AND RETAINED—ISSUE A REPLACEMENT WEAPON.

- b. FIREARM IS TO BE TEST FIRED AND RETAINED—DO NOT ISSUE REPLACEMENT WEAPON.
- *2 4. The assigned OISI Unit investigator's signature and date will follow. The OISI Unit will retain the white (control) copy of any Property Receipt.
- *2 5. The assigned OISI Unit personnel will transport the firearm, fired cartridge(s), and unfired ammunition, and both Property Receipts directly to the Firearms Identification Unit (FIU).
 - a. When the Firearms Identification Unit (FIU) is open, the FIU clerk will take possession of the weapon and other material.
 - b. When FIU is closed, the Evidence Receiving Clerk, Laboratory Division, will aid the OISI Unit personnel in properly securing the weapon and related material in the mobile firearm's storage box.
 - c. If a replacement firearm is to be issued, the involved officer, upon leaving the OISI Unit, will proceed to FIU or Evidence Receiving Clerk-Laboratory Division.
- *2 6. FIU will test fire the firearm in question, forward a copy of the findings to the OISI Unit and the pertinent Detective Division.

D. City or Privately Owned Firearms

- 1. Internal Affairs will determine the disposition of the City-owned firearm and notify FIU to transport the discharged firearm to the Firearms Training Unit. All other evidence, including fired cartridge(s) and unfired ammunition will be stored at FIU until released by Internal Affairs.
- 2. During the second week of January, a status review of City-owned firearms being retained under the above conditions will be conducted by the Commanding Officer, Firearms Training Unit. Internal Affairs will determine which weapons may be returned to inventory. The Commanding Officer, Firearms Training Unit will submit a final report to the Deputy Commissioner, Organizational Services, by February 28th of each year, detailing the status of all firearms being retained.

8. DISCHARGES INVOLVING ANIMALS

A. Destroying Injured Deer

- 1. Firearms should not be used to destroy injured deer when they are not presenting an immediate threat to the officer or another person. Attempt to contact the Pennsylvania Game Commission at (610) XXX-XXXX or (610) XXX-XXXX.

2. If the above agency is unavailable, and the severities of the injuries are such that the animal should be destroyed for humane reasons, officers will first request the assistance of the SWAT Unit, who will be responsible for its destruction.

3. SWAT personnel will:

a. Upon destroying an animal, be responsible for completing the preformatted memorandum and a 75-48.

- *2
- b. The memorandum and 75-48 will be submitted to the OISI Unit and Internal Affairs within 24 hours of the incident.
- c. If the SWAT Unit is unavailable, the officer may destroy the deer, but only in the presence and on the orders of a Supervisor.

NOTE: Usually one shot between the eyes or behind the ear of the animal should be sufficient to complete the task. However, in the event it becomes necessary for police personnel to destroy any animal suspected of being rabid by use of a firearm, it is preferred that the animal be shot in the body rather than the head. The head needs to be examined by the Philadelphia Department of Public Health.

- *2
4. Police Radio will notify the OISI Unit and the Internal Affairs Shooting Team. The discharging officer and the on-scene Supervisor will remain on the scene until their arrival. (Exception: When SWAT personnel have performed the task.)
5. Consideration should be given before discharging a weapon to destroy any animal (i.e., the close proximity of people and buildings, the type of back stop or ground).
6. The Streets Department will be notified, via Police Radio, to remove the carcass of deer or other animals found or destroyed by police personnel. Suspected rabid animals that are shot by police will be transported by Animal Care and Control Team (ACCT). Dogs that are shot by police will be transported by ACCT or to ACCT by police personnel. They will not be transferred to any veterinary hospital or private veterinarian even if, the animal is still alive.

B. Discharges Involving Other Animals

1. Police officers shall not discharge their firearms at a dog or other animal except to protect themselves or another person from physical injury and there is no other reasonable means to eliminate the threat, or when acting consistently with existing Department guidelines authorizing the humane destruction of deer.

- a. When on location with an injured animal which is not presenting an immediate threat to the officer or another person, every attempt should be made to confine or contain the animal and notify Police Radio to have them contact the Animal Care and Control Team (ACCT).
2. In all cases where a dog is shot and injured by the police, the animal will be transported directly to ACCT for examination by a veterinarian.

NOTE: Police personnel will not transport an injured dog shot by police to a veterinary hospital unless exigent circumstances exist and upon approval of a supervisor (ex. ACCT or SPCA is unavailable).

9. RELEASE OF INFORMATION REGARDING OFFICER INVOLVED SHOOTINGS (OIS)

- 1*
- A. A press conference will be held by the Police Commissioner or designee within 72 hours of an officer involved shooting in which an individual was killed or wounded. An official press statement will be released by the Police Commissioner or designee within 72 hours of an incident when an on duty accidental discharge occurs or when an individual was shot at but not struck as a result of a weapons discharge by a member of the Department. The information will include the officer's name, years of service, assignment and duty status.

*1 **NOTE:** The office of Public Affairs will issue a press release when a domestic animal is killed by an officer. In animal shootings the name of the officer will not be released.

1. The officer(s) will be placed on Administrative Duty Status pending the outcome of the investigation.
2. The release will contain a preliminary summary stating the circumstances of the incident known at the time and based on the facts collected and confirmed by the investigators. The release will provide a brief synopsis of the incident, condition (injuries) of the individual, charges (if applicable), and the proceeding steps of the investigation. Names of the individual suspect or the officer will be released unless there are public safety concerns.
3. A preliminary summary based on the facts collected and confirmed by the investigators will be placed on the Philadelphia Police Department's website in the OIS (Officer Involved Shooting) section of the site.
4. The summary on the Department's website may be updated based on the Department's further investigation of the incident.

B. The First Deputy will ensure the following steps are followed:

- *2 1. Ensure the OISI Unit provides the involved officer with a Safeguard Protocol memorandum when the officer makes their official statement.
 - *2 2. Ensure that the OISI Unit notifies the Deputy Commissioner, Patrol Operations, Criminal Intelligence, Police Radio and Public Affairs when the Safeguard Protocol is activated.
- C. The Commanding Officer, Criminal Intelligence in conjunction with DVIC Social Media Investigative Support Team (SMIST), will perform a threat assessment on the OIS within seventy two (72) hours prior to disclosure of the officer's identity and prepare a report.
- 1. The results of the threat assessment report will be forwarded to the First Deputy Commissioner Field Operations or his designee, who will review the threat assessment report with the involved officer and their Commanding Officer.
 - 2. Field Operations will offer to provide a security detail at the officer's residence, longer if needed, following the release of information in reference to the Officer Involved Shooting. If the officer(s) lives outside the city, patrol will work with the affected jurisdiction to provide coverage or provide the coverage necessary if the outside jurisdiction is unable to do so. The final decision to implement a security detail will be left to the officer's discretion.
 - a. If the involved officer resides within the boundaries of Philadelphia, the detail will be assigned to the district where the officer resides.
 - b. If the involved officer resides outside the boundaries of Philadelphia, the detail will be assigned to the officers district/unit of assignment if the outside jurisdiction is unable to provide coverage.
 - c. If any conflict arises as a result of detail assignments, the First Deputy will have the final decision on how to provide the manpower for the security detail.
 - 3. Police Radio will enter the officer's home address into CAD and give Priority 1 status to calls for help coming from that location.
 - 4. If the officer lives outside the boundaries of Philadelphia, Field Operations will make a request to the appropriate jurisdiction to enter the officer's home address into their CAD and respond accordingly to calls for help coming from that location.

- D. Commanding Officer, Criminal Intelligence in conjunction with the DVIC Social Media Investigative Support Team (SMIST) will contact the involved member and discuss ways they can review their social media footprint to minimize the amount of personal information posted on-line and discuss the steps they can take, if needed, to protect themselves against identity theft.
- E. A copy of the Officer Involved Shooting (OIS) Safeguard Protocol memorandum is attached at the end of this directive.
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10. ANNUAL REVIEW

- *2 A. Research and Planning in conjunction with Internal Affairs, the OISI Unit and the Training and Education Services Bureau shall review this directive annually and recommend any updates and changes through the appropriate chain of command to the Police Commissioner.

RELATED PROCEDURES:	Directive 3.14, Directive 3.20, Directive 4.1, Directive 4.10, Directive 4.16, Directive 6.15 Directive 10.2, Directive 10.3, Directive 10.4, Directive 10.6, Directive 10.7, Directive 10.9, Directive 10.10, Directive 12.14,	Hospital Cases Animal Control Responsibilities at Crime Scenes Foot Pursuits Media Relations and the Release of Information to the Public Employee Assistance Program (EAP) Use of Force/Less Lethal Force Use of the Electronic Control Weapon (ECW) Use of Force Review Board (UFRB) Firearms Policy: On or Off Duty Critical Response/Critical Incident Negotiations Severely Mentally Disabled Persons Off Duty Police Actions Injuries on Duty and Other Service Connected Disabilities
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BY COMMAND OF THE POLICE COMMISSIONER

PLEAC – Conforms to the standards according to the Pennsylvania Law Enforcement Accreditation Commission

<u>FOOTNOTE</u>	<u>GENERAL #</u>	<u>DATE SENT</u>	<u>REMARKS</u>
*1	6201	07-12-16	Addition/Change
*2	8427	01-30-17	Addition/Changes

SUPERVISOR'S FIREARM DISCHARGE CHECKLIST

1. Did you discharge your firearm?
 - a) If so, in what direction?
 - b) Approximately, where were you located when you fired?
 - c) How many shots do you think you fired?
 - d) Approximately, where was the suspect at when you fired?
2. Is anyone injured?
 - a) If so, where are they located?
3. Are there any outstanding suspects?
 - a) If so, what is their description?
 - b) What direction and mode of travel?
 - c) How long have they been gone?
 - d) What crime(s) have they committed?
 - e) What type of weapon do they have?
4. Is it possible the suspect fired rounds at you?
 - a) If so, what direction were the rounds fired from?
 - b) How many shots do you think the suspect fired?
 - c) Approximately, where was the suspect located when they fired?
5. Do you know if any other officer(s) discharged their firearms?
 - a) If so, who are they?
 - b) Approximately, where was the officer(s) located when they fired?
6. Are there any weapons or evidence that needs to be secured/protected?
 - a) If so, where are they located?
7. Are you aware of any witnesses?
 - a) If so, where are they located?
8. Were you wearing a body-worn camera?
 - a) If so, was the camera on during the incident?

POLICE

CITY OF PHILADELPHIA

DATE:

MEMORANDUM

TO : _____

FROM : Police Commissioner

SUBJECT: OFFICER INVOLVED SHOOTING (OIS) SAFEGUARD PROTOCOL

1. A member of the Internal Affairs Shooting Team will review the information contained within this memorandum with the Officer(s) involved in the shooting. This will ensure the Officer(s) understand that a press conference and/or official press release will be released by the Police Commissioner or his designee within 72 hours of an officer involved shooting. The information will include the officer's name, years of service, assignment and duty status.
2. The Commanding Officer, Criminal Intelligence in conjunction with DVIC Social Media Investigative Support Team (SMIST), will perform a threat assessment on the OIS within seventy two (72) hours prior to disclosure of the Officer's identity and prepare a report.
3. The results of the threat assessment report will be forwarded to the First Deputy Commissioner Field Operations or his designee, who will review the threat assessment report with the involved Officer and their Commanding Officer.
4. A security detail will be provided at the Officer's residence following the release of information in reference to the Officer Involved Shooting according to Directive 10.1 "Use of Force- Involving the Discharge of Firearms". The final decision to implement a security detail will be left to the involved Officer's discretion.
5. Police Radio will enter the Officer's home address into CAD and will give Priority One (1) status to any call for help coming from that location.
6. If the Officer lives outside the boundaries of Philadelphia, Field Operations will make a request to the appropriate jurisdiction to enter the Officer's home address into their CAD and respond accordingly to calls for help coming from that location.
7. Criminal Intelligence in conjunction with DVIC Social Media Investigative Support Team (SMIST), will discuss ways that the involved Officer(s) and their family members can review their social media footprint to minimize the amount of personal information posted on-line. In addition, Criminal Intelligence in conjunction with DVIC SMIST, will educate the involved Officer(s) on the necessary steps they can take to protect themselves against identity theft if needed.

Police Commissioner
Philadelphia Police Department