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# 2014-2015 MSBA High School Mock Trial Case & Competition

STATE OF MD V. OFFICER DARREN GRAY



In cooperation with the  
Maryland Judicial Conference Public Awareness Committee,  
Executive Committee on Law Related Education,  
University of Maryland Francis King Carey School of Law,  
& Maryland State Department of Education.

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for the 2014-15 Maryland State Bar Association High School Mock Trial Competition.  
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provided invaluable assistance.



**Important Contacts for the Mock Trial Competition**

Please call your local coordinator for information about your county/circuit schedule.

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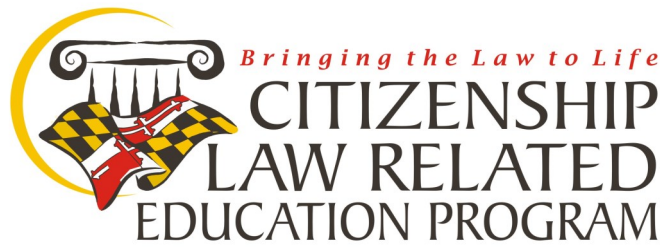
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November 12, 2014

Dear Students & Coaches:

**W**elcome to the 32nd annual Maryland State Bar Association Statewide High School Mock Trial Competition. We are pleased that you are joining in this exciting opportunity.

Over recent months, there has been a great deal of debate and discussion regarding the Michael Brown, Trayvon Martin, Eric Garner and Renisha McBride tragedies. Beyond these headline cases, however, are hundreds of incidents each year where the use of force by police is called into question. It is arguably one of the most volatile areas of law enforcement, and an issue about which all citizens should be concerned and informed.

Our four primary objectives for the MSBA Mock Trial competition are:

- To further understanding and appreciation of the rule of law, court procedures, and the legal system;
- To increase proficiency in basic life skills such as listening, speaking, reading, and critical thinking;
- To promote better communication and cooperation between the school system, the legal profession, and the community at large;
- To heighten enthusiasm for academic studies as well as career consciousness of law-related professions.

Mock Trial works best when the primary goal of all involved is to become better educated about the law. Mock Trial provides opportunities to increase your understanding of the law and its applicability, through case preparation with your attorney advisor, teacher coach, and teammates, as well as during each of the competitions. It instills and perpetuates skills that serve you well for the rest of your lives.

Please remember that Mock Trial parallels the real world in terms of proceedings, interpretations, and decisions by the Bench. Decisions will not always go your way and you will not always prevail. Judges may offer suggestions based on their own preferences—use these as guidelines rather than as “right” or “wrong” ways of doing things. The next judge who presides over your competition may prefer things just the opposite (and that, by the way, is very real-world!)

We ask that you read carefully through this entire book. Do not assume that everything is the exact same as previous years, as even small modifications can be significant during the course of competition. We wish you a very successful year and a rewarding learning experience.

Best Regards,

Ellery M. Rick Miller, Jr.  
Executive Director

Shelley Brown  
Associate Director

## TABLE OF CONTENTS

Organizational Rules	1
Hints on Preparing for a Mock Trial Competition	3
Trial Procedures	4
Simplified Rules of Evidence & Procedure	7
Statement of Facts	13
Jury Instructions	14
<b>Witnesses for the Prosecution</b>	
Dorian Smith	17
Leslee Parker	19
Jean Carpenter	21
<b>Witnesses for the Defense</b>	
Chriss Lee	24
Dr. Rousey Voight	27
Able Morgan	30
<b>Evidence &amp; Exhibits</b>	
EXHIBIT A: Crime Scene Sketch	31
EXHIBIT B: Medical Examiner's Report	32
EXHIBIT C: Police Report	33
EXHIBIT D: Internal Affairs Report	34
EXHIBIT E: Bullet Diagram	35
EXHIBIT F: DNA Analysis Report	36
EXHIBIT F1: DNA/ Allele Report	37
EXHIBIT G: Use of Force Continuum	38
EXHIBIT H: Use of Force Policy – Springfield Police Department	39
<b>Selected Case Law - Addendum</b>	N/A
<b>Appendices</b>	
Guidelines for Competition Judges	51
Sample Score Sheet	52
Calendar	Inside Back
State Champions	Back Cover

**2014-2015  
MSBA HIGH SCHOOL MOCK TRIAL COMPETITION**

**PART I: ORGANIZATIONAL RULES**

1. Forfeits are prohibited. As a registered team, you agree to attend all scheduled competitions. If a team does not have an adequate number of students (i.e. due to illness, athletics, or other conflicts), it is still expected to attend and participate in the competition. In these instances, a team will “borrow” students from the opposing team. While this is treated as an automatic win for the opposition, both teams still gain the practice. Further, it maintains the integrity of the competition and is respectful of the Court, Presiding Judge, attorneys and the other team that has prepared for, and traveled to, the competition. If this occurs, coaches should make every effort to notify the local coordinator AND the other coach in advance of the competition. When an opposing team does not have enough students to assist the other team, students may depict two or more of the roles (i.e. they may depict 2 witnesses or play the part of 2 attorneys).
2. **Time limits.** Student attorneys are expected to keep their presentations limited to the times noted below. (Please see #3 for additional information.) **The “clock” should be stopped during objections.** Teams should NOT object, however, if they perceive a violation of these guidelines.
  - Opening statements—5 minutes each;
  - Direct examination—7 minutes per witness;
  - Voir Dire, if necessary— 2 minutes per expert witness (in addition to the time permitted for direct and cross examination)
  - Cross-examination—5 minutes per witness;
  - Re-Direct and Re-Cross Examination—3 minutes and a maximum of 3 questions per witness.
  - **Closing Arguments – 7 minutes each.**
3. **The use of a Bailiff. Each team is encouraged to have a Mock Trial team member, who is not scheduled to compete during the match, serve as Bailiff during the course of each competition. Each Bailiff will keep time for opposing counsel; or, in the event that only one team brings a Bailiff, that person shall keep time for both sides. The Bailiff(s) will also announce the Judge, call the case, and swear in each witness. (Please see Trial Procedure #2 for additional information.) While the use of a bailiff is discretionary (by circuit) during local competitions, it will be mandated in state competitions.**
4. Local competitions must consist of enough matches that each participating high school presents both sides of the Mock Trial case at least once.
5. A team must be comprised of no fewer than eight (8) but a maximum of twelve (12) student members from the same high school, with the exception of high schools with a Maryland State Department of Education inter-scholastic athletics designation of Class 2A or Class 1A, which may combine with any other schools in the LEA in those classifications to field a team. Two “alternate” students are permitted during the local competition only. If a team advances beyond the local competition, an official roster must be submitted not exceeding 12 students.
6. A team may use its members to play different roles in different competitions. For any single competition, all teams are to consist of three attorneys and three witnesses, for a total of six (6) different students. (Note: In Circuits 1 and 2, where teams typically participate in two competitions per evening – once as prosecution and once as defense – students may change roles for the second competition.)
7. Any high school that fields two or more teams may NEVER allow, under any circumstances, students from Team A to compete for Team B or vice-versa. Each team must have its own teacher coach and attorney advisor, separate and apart from the other team. Additionally, if a high school has multiple teams, then those teams MUST compete against one another in the local competition.

8. A.) Areas of competition coincide with the eight Judicial Circuits of Maryland. Each circuit must have a minimum of four teams. However, in order to provide the opportunity for as many teams to participate as possible, if a circuit has two or three teams, they may compete in a “Round Robin” to determine who will represent the circuit in the circuit playoff. The runner-up team from another circuit would be selected to compete based upon their winning record and average points scored during local competition rounds. This team would compete with the circuit representative in a playoff prior to the Regional Competition. When a circuit has only one registered team, CLREP may designate another circuit in which this team may compete.

B.) OR, under the discretion of a circuit coordinator and CLREP, if a circuit so chooses, it may combine with the “un-official” circuit to increase the number of opportunities to compete. In this case, a “circuit opening” arises and will be filled by the following method. To create the most equity, a sequential rotation of circuits will occur. If willing, the second place team from the specified circuit will advance to the regional competitions to fill the opening. If that team is unable to advance, the opportunity will move to the next circuit, and so on, until the opening is filled. In the event that all circuits are officially comprised of a minimum of four teams, the designated circuit will remain the next in-line to advance in future years.

2014-2015	Circuit 4	2018-2019	Circuit 8
2015-2016	Circuit 5	2019-2020	Circuit 1
2016-2017	Circuit 6	2020-2021	Circuit 3
2017-2018	Circuit 7		

9. Each competing circuit must declare one team as Circuit Champion by holding local competitions based on the official Mock Trial Guide and rules. That representative will compete against another Circuit Champion in a single elimination competition on April 13 or 14, 2015.
10. The dates for the Regionals, the Semi-Finals, and the Finals will be set and notice given to all known participating high schools by November 12, 2014. Changes will only occur due to conflicts in judicial schedules.
11. District Court judges, Circuit Court judges, and attorneys may preside and render decisions for all matches. If possible, a judge from the Court of Appeals or Court of Special Appeals will preside and render a decision in the Finals.
12. Any team that is declared a Regional Representative must agree to participate on the dates set for the remainder of the competition. Failure to do so will result in their elimination from the competition and the first runner-up in that circuit will then be the Regional Representative under the stipulations.
13. Winners in any single round should be prepared to switch sides in the case for the next round. Circuit Coordinators will prepare and inform teams of the local circuit schedule.
14. CLREP encourages Teacher Coaches of competing teams to exchange information regarding the names and gender of their witnesses at least 1 day prior to any given round. The teacher coach for the plaintiff/prosecution should assume responsibility for informing the defense teacher coach. A physical identification of all team members must be made in the courtroom immediately preceding the trial.
15. Members of a school team entered in the competition—including Teacher Coaches, back-up witnesses, attorneys, and others directly associated with the team’s preparation—are NOT to attend the enactments of ANY possible future opponent in the contest.
16. Every effort should be made for teams to work with an attorney advisor to prepare for competition. It is suggested that they meet with their Attorney Advisor at least twice prior to the beginning of the

competition. For some suggestions regarding the Attorney Advisor's role in helping a team prepare for the tournament, see PART II: Hints on Preparing for Mock Trial and Appendix A.

17. **THERE IS NO APPEAL TO A JUDGE'S DECISION IN A CASE.** CLREP retains the right to declare a mistrial when there has been gross transgression of the organizational rules and/or egregious attempt to undermine the intent and integrity of the Mock Trial Competition. **Upon the coaches' review of, and signature on the score sheet, THE OUTCOME IS FINAL.**
18. There shall be **NO** coaching of any kind during the enactment of a mock trial: i.e. student attorneys may not coach their witnesses during the other team's cross examination; teacher and attorney coaches may not coach team members during any part of the competition; members of the audience, including members of the team who are not participating that particular day, may not coach team members who are competing; and team members must have their cell phones and all other electronic devices turned off during competition as texting may be construed as coaching. Teacher and Attorney Coaches **MAY NOT** sit directly behind their team during competition as any movements or conversations may be construed as coaching.
19. It is specifically prohibited before and during trial to notify the judge of students' ages, grades, school name or length of time the team has competed.
20. The student attorney who directly examines a witness is the only attorney who may raise objections when that same witness is being cross-examined. The student attorney who raises objections on direct examination must be the same attorney who then cross-examines that same witness. This same principle applies if a student attorney calls for a bench conference; i.e., it must be the attorney currently addressing the Court. The student attorney who handles the opening statement may not perform the closing argument.
21. Judging and scoring at the Regional, Semi-Final and Statewide Final Competitions are distinct from judging and scoring in some local competitions. As in a real trial, the judge will preside, hear objections and motions, instruct counsel, and determine which team prevailed based on the merits of the law. Two attorneys will independently score team performance at the trial, using the score sheet from the official Mock Trial Guide. At the conclusion of the trial and while in chambers, the judge will award the tie point without informing the attorney scorers. The Tie Point will only be added into the final score only in the case of a tie. The attorneys will meet and work out any differences in scoring so that the two attorneys present one score sheet to the judge, and eventually, the two teams. The judge retains the right to overrule any score on the score sheet. Both teams shall receive a copy of this score sheet, signed by the judge. Teams will **not** have access to the original, independent score sheets of the attorneys.
22. Evidentiary materials that have been modified for use during trial (e.g., enlarged), must be made available during the trial for the opposing team's use. During witness identification exchanges, please alert the other team if you plan to use modified materials.

## **PART II: HINTS ON PREPARING FOR A MOCK TRIAL COMPETITION**

*The following tips were developed by long-time Mock Trial Coaches.*

1. Every student, teacher and attorney participating in a team's preparation should read the entire set of materials (case and guide) and discuss the information, procedures and rules used in the mock trial competition. Students: you are ultimately responsible for all of this once Court is in session.
2. Examine and discuss the facts of the case, witness testimony and the points for each side. Record key information as discussion proceeds so that it can be referred to in the future.

3. Witness' credibility is very important to a team's presentation of the case. Witnesses: move into your roles and attempt to think as the person you are portraying. Read over your affidavits many times and have other members of your team ask you questions about the facts until you know them.
4. Student attorneys: you should have primary responsibility for deciding what possible questions should be asked of each witness on direct and cross-examination. Questions for each witness should be written down and/or recorded. Write out key points for your opening statements and closing arguments before trial; then, incorporate any important developments that occurred during the trial. Concise, summary, pertinent statements which reflect the trial that the judge just heard are the most compelling and effective. **Be prepared for interruptions by judges who like to question you, especially during closing arguments.**
5. The best teams generally have student attorneys prepare their own questions, with the Teacher and Attorney Coaches giving the team continual feedback and assistance. Based on these practice sessions, student attorneys should continue revising questions and witnesses should continue studying their affidavits.
6. As you approach your first round of competition, you should conduct at least one complete trial as a dress rehearsal. All formalities should be followed and notes should be taken by everyone. Evaluate the team's presentation together. Try to schedule this session when your Attorney Coach can attend.
7. **Some of the most important skills for team members to learn are:**
  - Deciding which points will prove your side of the case and developing the strategy for proving those points.
  - Stating clearly what you intend to prove in an opening statement and then arguing effectively in your closing that the facts and evidence presented have proven your case.
  - Following the formality of court; e.g., standing up when the judge enters or exits the courtroom, or whenever you address the Bench, and appropriately addressing the judge as "Your Honor," etcetera.
  - Phrasing direct examination questions that are not leading (carefully review the rules of evidence and watch for this type of questioning in practice sessions).
  - Refraining from asking so many questions on cross-examination that well-made points are lost. When a witness has been contradicted or otherwise discredited, learn to limit additional questions, as they often lessen the impact of previously made points.
  - Thinking quickly on your feet when a witness gives you an unexpected answer, an attorney asks unexpected questions, or a judge throws questions at you.
  - Recognizing objectionable questions and answers, offering those objections quickly and providing the appropriate basis for the objection.
  - Paying attention to all facets of the trial, not just the parts that directly affect your presentation. All information heard is influential! Learn to listen and incorporate information so that your presentation, whether as a witness or an attorney, is the most effective it can be.
  - The Mock Trial should be as enjoyable as it is educational. When winning becomes your primary motivation, the entire competition is diminished. Coaches and students should prepare AT LEAST as much for losing as they do for winning/advancing. Each member of the team—student or coach—is personally responsible for his/her behavior prior to, during, and at the close of the trial. There are



schools and individuals across the state that are no longer welcome to participate based on previous behavior.

### **Part III: TRIAL PROCEDURES**

Before participating in a mock trial, it is important to be familiar with the physical setting of the courtroom, as well as with the events that generally take place during the competition and the order in which they occur. This section outlines the usual steps in a “bench” trial—that is, without a jury.

#### 1. Courtroom Set-Up

- a. Plaintiff/Prosecution will sit closest to the jury box.
- b. Defense – will sit on the side of the courtroom that is farthest from the jury box. This is based on the premise that the defendant is innocent until proven guilty, and so is removed (as far as possible) from the scrutiny of the court.
- c. **The Bailiff will sit in either i) the jury box ii) the court reporter’s seat or iii) in another seat so designated by the Judge, that is equally visible to both parties.**

#### 2. The Opening of the Court & Swearing of Witnesses

- a. **The Bailiff for the Prosecution/Plaintiff will call the Court to order through the following steps:**
  - i. **In a loud voice, say, “All rise.” (When the judge enters, all participants should remain standing until the judge is seated.)**
  - ii. **The Bailiff should call the case; i.e., “The Court will now hear the case of \_\_\_\_\_ v. \_\_\_\_\_.” And announce the judge: “The Honorable \_\_\_\_\_ presiding.”**
- b. The judge will permit those in the Court to be seated; then ask the attorneys for each side if they are ready.
- c. **During the course of the trial, the Bailiff for the Defense shall administer the Oath, and ask the witness to raise his or her right hand: “Do you affirm to tell the truth, the whole truth, and nothing but the truth under the pains and penalties of perjury?”**

#### 3. Opening Statements (5 minutes maximum)

- a. Prosecution (criminal case)/ Plaintiff (civil case)  
After introducing oneself and one’s colleagues to the judge, the prosecutor or plaintiff’s attorney summarizes the evidence for the Court which will be presented to prove the case. The Prosecution/ Plaintiff statement should include a description of the facts and circumstances surrounding the case, as well as a brief summary of the key facts that each witness will reveal during testimony. The Opening Statement should avoid too much information. It should also avoid argument, as the statement is specifically to provide facts of the case from the client’s perspective.
- b. Defense (criminal or civil case)  
After introducing oneself and one’s colleagues to the judge, the defendant’s attorney summarizes the evidence for the Court which will be presented to rebut the case (or deny the validity of the case) which the plaintiff has made. It includes facts that tend to weaken the opposition’s case, as well as key facts that each witness will reveal during testimony. It should avoid repetition of facts that are not in dispute, as well as strong points of the plaintiff/ prosecution’s case. As with the Plaintiff’s statement, Defense should avoid argument at this time.

#### 4. Direct Examination by the Plaintiff/Prosecutor (7 minutes plus 2 minutes for Voir Dire)

The prosecutor/ plaintiff’s attorney conducts direct examination (questioning) of each of its own witnesses. At this time, testimony and other evidence to prove the prosecution’s/plaintiff’s case will be presented. The purpose of direct examination is to allow the witness to relate the facts to support the prosecution/plaintiff claim and meet the required burden. It also allows counsel for each side to establish the credibility of each of their witnesses. (If opposing counsel chooses to voir dire a witness, 2 minutes are permitted, in addition to the 7 minutes allowed for direct examination.)

General Suggestions:

- Ask open-ended questions, rather than those that draw a “yes” or “no” response. Questions that begin with “who,” “what,” “where,” “when,” and “how” or “explain...” and “describe...” are helpful during direct examination.
- Questions should be clear and concise, and should help guide your witness through direct examination. Witnesses should not narrate too long, as it will likely draw an objection from opposing counsel.
- Do not ask questions that “suggest” a specific answer or response.

4. Cross-Examination by the Defendant’s Attorneys (5 minutes)

After the attorney for the prosecution/plaintiff has completed the questioning of a witness, the judge then allows the defense attorney to cross-examine the witness. The cross-examiner seeks to clarify or cast doubt upon the testimony of the opposing witness. Inconsistency in stories, bias, and other damaging facts may be pointed out to the judge through cross-examination. (If an attorney chooses to voir dire a witness, 2 minutes are permitted, in addition to the 5 minutes allowed for cross examination. These 2 minutes are typically allotted during the witness’ direct examination.)

General Suggestions:

- Use narrow, leading questions that “suggest” an answer to the witness. Ask questions that require “yes” or “no” responses.
- In general, it is never a good idea to ask questions to which you do not know the answer – unexpected responses can be costly and may leave you unprepared and off-guard.
- Never ask “why.” You do not want to give a well-prepared witness an opportunity to expand upon a response.
- Avoid questions that begin with “Isn’t it a fact that...”, as it allows an opportunistic witness an opportunity to discredit *you*.

5. Direct Examination by the Defendant’s Attorneys (7 minutes plus 2 minutes for Voir Dire)

Direct examination of each defense witness follows the same pattern as above which describes the process for prosecution’s witness. (See #3 above for suggestions.)

6. Cross-Examination by the Prosecution/ Plaintiff (5 minutes)

Cross-examination of each defense witness follows the same pattern as above for cross-examination by the defense. (See #4 above for suggestions.)

7. Re-Direct Examination by the Plaintiff/ Prosecution (3 minutes and/or 3 questions)

The Plaintiff’s/Prosecution’s attorney may conduct re-direct examination of the witness to clarify any testimony that was cast in doubt or impeached during cross-examination. (Maximum of three minutes or three questions.)

8. Re-Cross Examination by the Defense Attorneys (3 minutes and/or 3 questions)

The defense attorneys may re-cross examine the opposing witness to impeach previous testimony. (Maximum of three minutes or three questions.)

9. Voir Dire Examination by Either the Plaintiff/ Prosecution or the Defense Attorneys (2 minutes)

Voir Dire is the process of asking questions to determine the competence of an alleged expert witness. Before giving any expert opinion, the witness must be qualified by the court as an expert witness. The court must first determine whether or not the witness is qualified by knowledge, skills, experience, training or education to give the anticipated opinion. After the attorney who called the witness questions him/her about his/her qualifications to give the opinion, and before the court qualifies the witness as an expert witness, the opposing counsel shall, if he/she chooses to do so, have the opportunity to conduct a brief cross-examination (called “voir dire”) of the witness’ qualifications. **Voir dire is to be limited to the fair scope of the expert’s report.**

#### 10. Closing Arguments (Attorneys) (7 minutes)

For the purposes of the Mock Trial Competition, the first closing argument at all trials shall be that of the Defense.

a. Defense

A closing argument is a review of the evidence presented. Counsel for the defense reviews the evidence as presented, indicates how the evidence does not substantiate the elements of a charge or claim, stresses the facts and law favorable to the defense, and asks for a finding of not guilty (or not at fault) for the defense.

b. Prosecution/ Plaintiff

The closing argument for the prosecution/plaintiff reviews the evidence presented. The prosecution's/plaintiff's closing argument should indicate how the evidence has satisfied the elements of a charge, point out the law applicable to the case, and ask for a finding of guilt, or fault on the part of the defense. Because the burden of proof rests with the prosecution/plaintiff, this side has the final word.

#### 11. The Judge's Role and Decision

The judge is the person who presides over the trial to ensure that the parties' rights are protected and that the attorneys follow the rules of evidence and trial procedure. In mock trials, the judge also has the function of determining the facts of the case and rendering a judgment, just as in actual bench trials.

### **PART IV: SIMPLIFIED RULES OF EVIDENCE AND PROCEDURE**

In American trials, elaborate rules are used to regulate the admission of proof (i.e., oral or physical evidence). These rules are designed to ensure that both parties receive a fair hearing and to exclude any evidence deemed irrelevant, incompetent, untrustworthy or unduly prejudicial. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge. The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the evidence will probably be allowed by the judge. **The burden is on the attorneys to know the rules, to be able to use them to present the best possible case, and to limit the actions of opposing counsel and their witnesses.**

Formal rules of evidence are quite complicated and differ depending on the court where the trial occurs. For purposes of this Mock Trial Competition, the rules of evidence have been modified and simplified. Not all judges will interpret the rules of evidence or procedure the same way, and you must be prepared to point out the specific rule (quoting it, if necessary) and to argue persuasively for the interpretation and application of the rule you think proper. No matter which way the judge rules, attorneys should accept the ruling with grace and courtesy!

#### **1. SCOPE**

RULE 101: SCOPE. These rules govern all proceedings in the mock trial competition. The only rules of evidence in the competition are those included in these rules.

RULE 102: OBJECTIONS. An objection which is not contained in these rules shall not be considered by the Court. However, if counsel responding to the objection does not point out to the judge the application of this rule, the Court may exercise its discretion in considering such objections.

#### **2. RELEVANCY**

RULE 201: RELEVANCY. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. It is that which helps the trier of fact decide the issues of the case. However, if the relevant evidence

is unfairly prejudicial, confuses the issues, or is a waste of time, it may be excluded by the Court.

Objection:

*"I object, Your Honor. This testimony is irrelevant to the facts of the case."*

RULE 202: CHARACTER. Evidence about the character of a party or witness (other than his or her character for truthfulness or untruthfulness) may not be introduced unless the person's character is an issue in the case.

Objection:

*"Objection. Evidence of the witness' character is not proper given the facts of the case."*

### 3. WITNESS EXAMINATION

#### A. DIRECT EXAMINATION (attorney calls and questions witness)

RULE 301: FORM OF QUESTION. Witnesses should be asked direct questions and may not be asked leading questions on direct examination. Direct questions are phrased to evoke a set of facts from the witnesses. A leading question, on the other hand, is one that implies, suggests or prompts the witness to answer in a particular manner -- typically a "yes" or "no" answer.

Objection:

*"Objection: Counsel is leading the witness."*

NARRATION. While the purpose of direct examination is to get the witness to tell a story, the questions must ask for specific information. The questions must not be so broad that the witness is allowed to wander or narrate an entire story. Narrative questions are objectionable.

Objection:

*"Objection. Question asks for narration."*

At times, a direct question may be appropriate, but the witness' answer may go beyond the facts for which the question was asked. Such answers are subject to objection on the grounds of narration.

RULE 302: SCOPE OF WITNESS EXAMINATION. Direct examination may cover all facts relevant to the case of which the witness has first-hand knowledge. Any factual areas examined on direct examination may be subject to cross-examination.

RULE 303: REFRESHING RECOLLECTION. If a witness is unable to recall a statement made in an affidavit, the attorney on direct may show that portion of the affidavit that will help the witness to remember.

#### B. CROSS EXAMINATION (questioning the other side's witness)

RULE 304: FORM OF QUESTION. An attorney may ask leading questions when cross-examining the opponent's witnesses. Questions that tend to evoke a narrative answer should be avoided in most instances.

RULE 305: SCOPE OF WITNESS EXAMINATION. Attorneys may only ask questions that relate to matters brought out by the other side on direct examination or to matters relating to the credibility of the witness. This includes facts and statements made by the

witness for the opposing party. Note that many judges allow a broad interpretation of this rule.

Example: On direct examination, a witness is not questioned about a given topic, and the opposing attorney asks a question about this topic on cross examination.

Objection:

*"Objection. Counsel is asking the witness about matters which did not arise during direct examination."*

RULE 306: IMPEACHMENT. On cross-examination, the attorney may impeach a witness (show that a witness should not be believed) by (1) asking questions about prior conduct that makes the witness' credibility (truth-telling ability) doubtful, or (2) asking questions about previous contradictory statements. These kinds of questions can only be asked when the cross-examining attorney has information that indicates that the conduct actually happened.

**C. RE-DIRECT EXAMINATION**

RULE 307: LIMIT ON QUESTIONS. After cross-examination, up to three (3), but no more than three (3), questions may be asked by the direct examining attorney, and such questions are limited to matters raised by the attorney on cross-examination. (The presiding judge has considerable discretion in deciding how to limit the scope of the re-direct.)

**NOTE:**

If the credibility or the reputation for truthfulness of the witness has been attacked on cross-examination, the attorney whose witness has been damaged may wish to ask several more questions. These questions should be limited to the damage the attorney thinks has been done and should be phrased so as to try to "save" the witness' truth-telling image in the eyes of the court. Re-direct examination is limited to issues raised by the attorney on cross-examination. Please note that at times it may be more appropriate NOT to engage in re-direct examination.

**D. RE-CROSS EXAMINATION**

RULE 308: LIMIT ON QUESTIONS. Three (3) additional questions, but no more than three (3), may be asked by the cross-examining attorney, and such questions are limited to matters on re-direct examination and should avoid repetition. (The presiding judge has considerable discretion in deciding how to limit the scope of the re-cross.) Like re-direct examination, at times it may be more appropriate not to engage in re-cross examination.

Objection:

*"Objection. Counsel is asking the witness about matters that did not come up on re-direct examination."*

**4. HEARSAY**

**A. THE RULE**

RULE 401: HEARSAY. Hearsay is a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted made outside of the courtroom. Statements made outside of the courtroom are usually not allowed as evidence if they are offered in court to show that the statements are true. The most common hearsay problem occurs when a witness is asked to repeat what another person stated to him or her. **For the purposes of the Mock Trial Competition, if a document is stipulated, you may not raise a hearsay objection to it.**

Objection: *“Objection. The statement is hearsay, Your Honor.”*

Possible Response to the Objection: *“Your Honor, the testimony is not offered to prove the truth of the matter asserted, but only to show....”*

## **B. EXCEPTIONS**

- RULE 402: ADMISSION AGAINST INTEREST. A judge may admit hearsay evidence if it was said by a party in the case and contains evidence which goes against the party’s side.
- RULE 403: STATE OF MIND. A judge may admit hearsay evidence if a person’s state of mind is an important part of the case and the hearsay consists of evidence of what someone said which described that particular person’s state of mind.
- RULE 404: BUSINESS RECORDS. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method of circumstances of preparation indicate lack of trustworthiness, shall be admissible. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and callings of every kind, whether or not conducted for profit.
- RULE 405: EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

## **5. OPINION AND EXPERT TESTIMONY**

- RULE 501: OPINION TESTIMONY BY NON-EXPERTS. Witnesses who are not testifying as experts may give opinions which are based on what they saw or heard and are helpful in explaining their story. A witness may NOT testify to any matter of which the witness has no personal knowledge, nor may a witness give an opinion about how the case should be decided.

Objections:

*“Objection. The witness has no personal knowledge that would enable him/her to answer this question/ make this statement.”*

*“Objection. The question asks the witness to give a conclusion that goes to the finding of the Court.”*

- RULE 502: OPINION TESTIMONY BY EXPERTS. Only persons qualified as experts may give opinions on questions that require special knowledge or qualifications. An expert may be called as a witness to render an opinion based on professional experience. An expert must be qualified by the attorney for the party for whom the expert is testifying. This means that before the expert witness can be asked for expert opinion, the questioning attorney must bring out the expert’s qualifications, education and/or experience.

Objection: *“Objection. Counsel is asking the witness to give an expert opinion for which the witness has not been qualified.”*

- RULE 503: VOIR DIRE. (“To speak the truth.”) After an attorney who has called a witness questions him/her about his/her qualifications, and before the court qualifies the

witness as an expert, the opposing counsel shall have the opportunity, if he/she chooses, to conduct voir dire. After the voir dire examination has been conducted, the cross-examining attorney should advise the court as to whether there are any objections to the witness being qualified as an expert witness and/or whether there are any objections to the witness' expertise to give the specific opinion the opposing counsel is trying to elicit from this witness.

Example:

(after questioning by an attorney to create a foundation for his/her witness to be qualified by the Court as an expert witness): "At this time, your Honor, I request that the Court accept and qualify the witness as an expert in the field of ...."

Objection:

"Your Honor, we would like permission to voir dire the witness." (Oftentimes, the judge will already be looking your way to see if you wish to voir dire.)

## 6. PHYSICAL EVIDENCE

**RULE 601:** INTRODUCTION OF PHYSICAL EVIDENCE. Physical evidence may be introduced only **if it is contained within the casebook** and relevant to the case. Physical evidence will not be admitted into evidence until it has been identified and shown to be authentic or its identification and/or authenticity has been stipulated. That a document is "authentic" means only that it is what it appears to be, not that the statements in the document are necessarily true.

Physical evidence need only be introduced once. The proper procedure to use when introducing a physical object or document for identification and/or use as evidence is (for example):

- a. Show the exhibit to opposing counsel.
- b. Show the exhibit and have it marked by the clerk/judge. "Your Honor, please have this marked as Plaintiff's Exhibit 1 for identification."
- c. Ask the witness to identify the exhibit. "I now hand you what is marked Plaintiff's Exhibit 1. Would you identify it, please?"
- d. Ask the witness about the exhibit, establishing its relevancy.
- e. Offer the exhibit into evidence. "Your Honor, we offer Plaintiff's Exhibit 1 into evidence at this time."
- f. The Judge will ask opposing counsel whether there is any objection, rule on the objection if there is one, and admit or not admit the exhibit into evidence.
- g. If the exhibit is a document, hand it to the clerk/judge.

**NOTE:** After an affidavit has been marked for identification, a witness may be asked questions about it without its introduction into evidence.

## 7. INVENTION OF FACTS (Special Rules for the Mock Trial Competition)

**RULE 701:** DIRECT EXAMINATION. On direct examination, the witness is limited to the facts and evidence provided in the casebook. If a witness testifies in contradiction of a fact given in the witness' statement, opposing counsel should impeach (prove untrue) the witness' testimony during cross-examination. If the witness goes beyond the facts given, such that they directly conflict with the stipulated facts or witness affidavits, a bench conference may be requested by opposing counsel, at which time the counsel may object to invention of facts. (It should be noted that the granting of a bench conference is a discretionary decision of the judge. A request for a bench conference might not be granted.)

Objections:

"Objection, your honor, the witness is creating facts which are not in the record."

*"Objection. The witness is inventing facts that directly contradict case material."  
"Your Honor, the witness is intentionally creating facts which could materially alter the outcome of the case."*

RULE 702: CROSS-EXAMINATION. Questions on cross-examination should not seek to elicit information that is not contained in the fact pattern. If on cross-examination a witness is asked a question, the answer to which is not contained in the witness' statements of the direct examination, the witness may respond with any answer which does not materially alter the outcome of the trial. An answer which is contrary to the witness' affidavit may be impeached by the cross-examining attorney. If the witness invents facts material to the case, a bench conference may be called and, if granted, an objection made to the invention of facts.

## 8. SPECULATION

RULE 801: Speculation, or someone's idea about what *might* have occurred, is generally not permitted. A witness may not jump to conclusions that are not based on actual experiences or observations, as this is of little probative value. Some leeway is allowed for the witness to use their own words, and greater freedom is allowed with expert witnesses.

*Objection:*

*"Objection. This calls for speculation on part of the witness."*

## 9. PROCEDURE RULES

RULE 901: PROCEDURES FOR OBJECTIONS. An attorney may object anytime the opposing attorney has violated the Rules of Evidence.  
NOTE: The attorney who is objecting should stand up and do so at the time of the violation. When an objection is made, the judge will usually ask the reason for it. Then the judge will turn to the attorney who asked the question and that attorney will usually have a chance to explain why the objection should not be accepted ("sustained") by the judge. The judge will then decide whether to discard a question or answer because it has violated a rule of evidence ("objection sustained"), or whether to allow a question or answer to remain on the trial record ("objection overruled").

RULE 902: MOTIONS TO DISMISS. Motions for dismissal at the end of the prosecution's case are NOT permitted.

RULE 903: CLOSING ARGUMENTS. Closing arguments must be based on the evidence and testimony presented during the trial. Offering new information at this point is prohibited.



IN THE CIRCUIT COURT FOR THE STATE OF MARYLAND  
IN AND FOR SPRINGFIELD COUNTY

State of Maryland

v.

Darren Gray,

**STATEMENT OF THE PROBLEM**

The events of Ferguson, Missouri during the summer of 2014 have energized the country in a debate about police tactics and race in America. If we are to move forward as a nation, then having open discussions about these topics is important. However, one issue that seems to have been ignored is the use of force and whether or not the shooting of an unarmed individual is appropriate. This fact pattern is based upon the known facts of the shooting at the time this problem was created; however many of the facts are still unknown. The focus here is whether or not the shooting was justified. This will surely evoke discussions from all of the teams that the drafters believe are important, and will test the ability to separate facts from emotions. While race can be argued to have been or not been a factor, this part of the story is left out. This is not because we wish to shy away from the issue. Instead, we simply want to focus on one aspect—whether the shooting of an unarmed individual is justified based on law. A unique County and City were used for this year’s problem, along with experts and witnesses so not to associate this incident with any jurisdiction within our State. This “Statement of the Problem” is not part of the case problem and may not be used by either party during the course of the trial.

**STATEMENT OF STIPULATED FACTS**

On August 9, 2014, eighteen-year-old Michael Case was walking with his friend Dorian Smith on the travel portion of the roadway of Cranfield Drive, in Springfield City, Springfield County. Cranfield Drive is a two-lane, east/west residential street with sidewalks on both sides of the street. The street is lined with residential units at the west most end of the street and apartment buildings throughout the remainder of the street. The entire length of the street is approximately 2000 feet long and 40 feet wide including the full width of the sidewalks. The east/west lanes are divided by a double yellow line.

At approximately 12:01 pm, Officer Darren Gray was patrolling the same neighborhood and saw Michael Case with Dorian Smith walking in the roadway. Gray drove up to the two young people, and from inside of his patrol car, Gray told them to get out of the street. A few moments later, Michael Case was shot by Officer Gray and Michael Case died at the scene. At the time of the shooting, the weather was warm and clear without any precipitation and there were no obstructions between Officer Gray and Michael Case. An autopsy was performed on August 17, 2014 which showed Michael Case died from the gunshot wounds and that he was shot nine times by Officer Gray. All nine shots were fired while Michael Case was facing Officer Gray.

It is at this point in the events that State and the Defense allege different facts.

The State and the defense have agreed that if the Medical Examiner was called as a witness, [he] [she] would testify that Michael Case was shot nine times, that all nine shots entered the front side of Michael Case’s body and that he died from the gunshot wounds. The State and the defense have agreed that this is what the medical examiner would say, and the Parties agree that the Medical Examiner’s testimony is true and accurate. You should consider this stipulated testimony together with the other evidence, and give it the weight and value you believe it deserves.

**WITNESSES TO APPEAR BEFORE THE COURT**

<u>Prosecution</u>	<u>Defense</u>
Dorian Smith	Dr. Chriss Lee
Leslee Parker	Dr. Rousey Voight
Capt. Jean Carpenter	Able Morgan

## **Substantive Matters**

1. All exhibits are stipulated as authentic and genuine for purposes of trial. Teams are still permitted to argue admissibility beyond authenticity issues. In addition, each exhibit contained in the file is the original of that document unless otherwise noted on the exhibit.
2. Counsel for both Parties participated in a pre-trial hearing to discuss the admissibility of Exhibit A, B, C, D, E, F and G and it is hereby stipulated that the following exhibits are the only exhibits that may be used at trial:
  - a. Exhibit A – A sketch of the crime scene was conducted by a member of the Springfield Police Department Crime Lab. The sketch is not to scale; however, it properly depicts the scene of the incident on August 9, 2014. This exhibit is admissible and may be entered into evidence by either party at any time during trial.
  - b. Exhibit B – One page from the Medical Examiner’s final report. This report was created at or near the time of the incident at the Medical Examiner’s office and properly depicts the entry point of each round.
  - c. Exhibit C – Incident Report written by Officer Gray. This report was written by Officer Gray after being ordered to do so. It is the policy of the Springfield Police Department to require officers to complete a report within 24 hours of an incident. Failure to do so is cause for disciplinary measures, up to and including dismissal. Officer Gray submitted the report in accordance with policy and after being ordered to do so by the Chief of Police.
    - i. The Parties stipulate that this is the only written report submitted by Officer Gray.
    - ii. The report is kept in the ordinary course of business practices.
    - iii. The report is authentic.
    - iv. The Parties do not stipulate to the report’s admission into evidence.
    - v. The Parties may argue the rules of evidence for admission or non-admission of the police report. The Court will render a decision based upon the weight of the arguments.
  - d. Exhibit D – Internal Affairs Report. This report was generated at the request of the Prosecution as part of discovery.
  - e. Exhibit E – copy of a Diagram created by Dr. Lee in preparation of his/her expert report. It is not a picture of an actual round. The exhibit may be used for demonstrative purposes only with the Court’s permission and after satisfying the foundation requirements for such an exhibit.
  - f. Exhibit F – DNA Analysis Report (F & F1) performed by Crime Lab Director Leslee Parker. The results of the DNA Analysis come from this report. This is inclusive of Exhibit F & F1.
  - g. Exhibit G – Copy of the Use of Force Continuum taught at the Springfield County Police Academy. Parties have stipulated this Use of Force Continuum has been adopted by the Springfield City Police Department. The document is authentic and a copy of the document was received by the Defendant during his initial training and at in-service each year thereafter.
3. The Springfield City Police Department conducted an internal investigation of this incident which remains open. The Department’s investigation concluded the shooting was justified and did not pursue any criminal charges.
4. The City Prosecutor presented the case to the Grand Jury. The Grand Jury indicted Officer Gray on September 15, 2014 with Murder and several underlying charges. The defendant turned himself in on September 19, 2014 and was released the same day on Personal Recognizance.

## Criminal Offenses

**MPJI-Cr 4:17.8 HOMICIDE — SECOND DEGREE DEPRAVED HEART MURDER AND INVOLUNTARY MANSLAUGHTER (GROSSLY NEGLIGENT ACT AND UNLAWFUL ACT)** - The defendant is charged with the crime of murder. This charge includes second degree murder and involuntary manslaughter.

- A. SECOND DEGREE DEPRAVED HEART MURDER** - Second degree murder is the killing of another person while acting with an extreme disregard for human life. In order to convict the defendant of second degree murder, the State must prove:
- (1) that the defendant caused the death of (name);

- (2) that the defendant's conduct created a very high degree of risk to the life of (name); and
- (3) that the defendant, conscious of such risk, acted with extreme disregard of the life endangering consequences.

**MPJI-Cr 4:17.9 HOMICIDE — INVOLUNTARY MANSLAUGHTER (GROSSLY NEGLIGENT ACT AND UNLAWFUL ACT)**

**A. INVOLUNTARY MANSLAUGHTER — GROSSLY NEGLIGENT ACT** - The defendant is charged with the crime of involuntary manslaughter. In order to convict the defendant of involuntary manslaughter, the State must prove:

- (1) that the defendant acted in a grossly negligent manner; and
- (2) that this grossly negligent conduct caused the death of (name).

“Grossly negligent” means that the defendant, while aware of the risk, acted in a manner that created a high degree of risk to, and showed a reckless disregard for, human life.

**B. INVOLUNTARY MANSLAUGHTER — UNLAWFUL ACT** - The defendant is charged with the crime of involuntary manslaughter. In order to convict the defendant of involuntary manslaughter, the State must prove:

- (1) that [the defendant] [another participating in the crime with the defendant]] [[committed] [attempted to commit]] (unlawful act(s));
- (2) that [the defendant] [another participating in the crime] killed (name); and
- (3) that the act resulting in the death of (name) occurred during the [ [commission] [attempted commission] [escape from the immediate scene] of the (unlawful act(s)).

**MPJI-Cr 4:23 MISCONDUCT IN OFFICE (MALFEASANCE, MISFEASANCE, AND NONFEASANCE)** - The defendant is charged with the crime of misconduct in office. Misconduct in office is corrupt behavior by a public official in the exercise of [his] [[her] duties of office or while acting under color of office. In order to convict the defendant, the State must prove:

- (1) that the defendant was a public officer;
- (2) that the defendant [[acted in [his] [her] official capacity]] [took advantage of [his] [her] public office]]; and
- (3) that the defendant [corruptly did an unlawful act] [[corruptly failed to do an act required by the duties of [his] [her] office]] [corruptly did a lawful act]

Defenses

**MPJI-Cr 5:01 DEFENSE OF OTHERS** - You have heard evidence that the defendant acted in defense of himself and others. Defense of others is a defense, and you are required to find the defendant not guilty if all of the following four factors are present:

- (1) the defendant actually believed that the person he was defending was in immediate and imminent danger of bodily harm;
- (2) the defendant's belief was reasonable;
- (3) the defendant used no more force than was reasonably necessary in light of the threatened or actual force; and
- (4) the defendant's purpose in using force was to aid the person he was defending.

In order to convict the defendant, the State must prove that the defense of others does not apply in this case. This means that you are required to find the defendant not guilty unless the State has persuaded you, beyond a reasonable doubt, that at least one of the four factors of defense of others was absent.

**IMPERFECT SELF DEFENSE** - The defendant acted in (imperfect self-defense/ [or] imperfect defense of another) if:

- (1) The defendant actually believed that he/she/ [or] someone else was in imminent danger of being killed or suffering great bodily injury; AND
- (2) The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; BUT
- (3) At least one of those beliefs was unreasonable.

**MPJI-Cr 5:07 SELF-DEFENSE** - You have heard evidence that the defendant acted in self-defense. Self-defense is a complete defense and you are required to find the defendant not guilty if all of the following four factors are present:

- (1) the defendant was not the aggressor [[or, although the defendant was the initial aggressor, [he] [she] did not raise the fight to the deadly force level]];
- (2) the defendant actually believed that [he] [she] was in immediate and imminent danger of bodily harm;
- (3) the defendant's belief was reasonable; and
- (4) the defendant used no more force than was reasonably necessary to defend [himself] [herself] in light of the threatened or actual harm.

[Deadly force is that amount of force reasonably calculated to cause death or serious bodily harm. If you find that the defendant used deadly-force, you must decide whether the use of deadly-force was reasonable. Deadly force is reasonable if the defendant actually had a reasonable belief that the aggressor's force posed an immediate and imminent threat of death or serious bodily harm.]

[[In addition, before using deadly-force, the defendant is required to make a reasonable effort to retreat. The defendant does not have to retreat if [the defendant was in [his] [her] home], [retreat was unsafe], [the avenue of retreat was unknown to the defendant], [the defendant was being robbed], [the defendant was lawfully arresting the victim]. [If you find that the defendant did not use deadly-force, then the defendant had no duty to retreat.]

In order to convict the defendant, the State must prove that self-defense does not apply in this case. This means that you are required to find the defendant not guilty, unless the State has persuaded you, beyond a reasonable doubt, that at least one of the four factors of complete self-defense was absent.

**MPJI-Cr 5:06 MISTAKE OF FACT** - You have heard evidence that the defendant's actions were based on a mistake of fact. Mistake of fact is a defense. You are required to find the defendant not guilty if:

- (1) the defendant actually believed (alleged mistake);
- (2) the defendant's belief and actions were reasonable under the circumstances; and
- (3) the defendant did not intend to commit the crime of (crime) and the defendant's conduct would not have amounted to the crime of (crime) if the mistaken belief had been correct, meaning that, if the true facts were what the defendant thought them to be, the [defendant's conduct would not have been criminal] [defendant would have the defense of (defense)].

In order to convict the defendant, the State must prove beyond a reasonable doubt that at least one of the three factors was absent.

**NOTE:**

**Imperfect Self-Defense:** "A proper instruction when such evidence is present would enable the jury to reach one of several verdicts: (1) if the jury concluded the defendant did not have a subjective belief that the use of deadly force was necessary, its verdict would be murder; (2) if the jury concluded that the defendant had a reasonable subjective belief, its verdict would be not guilty; and (3) if the jury concluded that the defendant honestly believed that the use of force was necessary but that this subjective belief was unreasonable under the circumstances, then its verdict would be guilty of voluntary manslaughter." *State v. Faulkner*, 301 Md. 482, 500-01 (1984).

**Standard for "Reasonable Person" is Replaced with "Reasonable Police Officer" When a Police Officer is the Criminal Defendant:** "As the Court of Special Appeals correctly noted in its opinion, however, where the accused is a police officer, the reasonableness of the conduct must be evaluated not from the perspective of a reasonable civilian but rather from the perspective of a reasonable police officer similarly situated." *Pagotto v. State*, 127 Md. App. 271, 297 (1999).

1 **Summary of Grand Jury Testimony of: DORIAN SMITH - Witness for Prosecution**

2  
3 My full name is Dorian Smith. I was born on January 14, 1996. I reside at 1414 Winchester Road, Apt.  
4 14 in Springfield, Maryland. I am currently unemployed. I have had a hard time finding a job because I was  
5 previously arrested for theft. The charges were dropped, but since the arrest is still on my record, I have had a  
6 hard time finding a job. Employers do not want to hire someone that has a record.

7 Recently I had been hanging out with my friend Michael Case a lot. He was a positive influence on me  
8 because he had not been in trouble with the police before. We have lived in the same neighborhood together  
9 since we were 5 years old. He was a good person and had a lot of friends. Michael was getting ready to start  
10 college soon at Maryland Community College and wanted to take classes to learn business. Michael said once  
11 he graduated and opened a business, I could get a job there even though I have the prior theft charge on my  
12 record. Now that Michael was shot by the police, I am not sure how I am ever going to find a job.

13 The day of the shooting, Michael and I were just walking through the neighborhood minding our own  
14 business. I remember that day like it was yesterday. We were walking across the street in the neighborhood  
15 to head over to Michael's apartment from the building where my apartment is. Neither one of us had any  
16 weapons or drugs on us. As we were crossing the street, a police officer came driving down the street. This is  
17 when things went horribly wrong.

18 When the cop pulled up to us, he yelled out the window for us to get out of the street because we  
19 were not in a crosswalk. We laughed and thought this was pretty funny since people in our neighborhood  
20 walked across the middle of the street all the time. There were only a few crosswalks in our neighborhood  
21 and they were pretty far away from each other. No other cars were driving on the street at the time Michael  
22 and I were crossing, so we weren't holding up traffic or anything. We were just walking across the street  
23 talking about our favorite new songs. We quickly moved out of the street in order to do what the cop said. The  
24 cop drove past us for a second, but then he decided to put his car in reverse and back up to where we were.  
25 This is when the tragedy happened.

26 When the cop backed up in the street, the cop pulled up alongside us and tried to get out of his car.  
27 Because he had pulled so close to where we were standing on the sidewalk, he was not able to open his door  
28 to get out because we were blocking it. Before we had a chance to move so the cop could get out of the car, the  
29 cop reached out of the car and grabbed Michael. He started choking Michael, and Michael was trying to pull  
30 away from the officer to catch his breath. As Michael was trying to pull away, the officer pulled out his  
31 weapon and threatened to shoot Michael. This is when the first shot went off. At this point we both took off  
32 running from the police car because we were scared for our lives. Michael, who had been shot, was running  
33 away from the police car into the street. I ran up the sidewalk and hid behind another car that was parked so  
34 that I could see what was happening. I marked that spot on this map with my initials "DS".

35 As we were running away, the officer then got out of the car and started chasing Michael. The officer  
36 did not come after me because I was hiding behind a car and he probably couldn't see me. As Michael was still  
37 running away, the cop shot him again while Michael had his back to the cop. Once Michael was shot again, he

1 turned around to face the officer and put his hands in the air. Michael did not say anything to the officer but  
2 started to get down on the ground, with his hands still up in the air. At this point, the cop shot Michael  
3 several more times while Michael had his hands up and was facing the officer. My friend died from these  
4 gunshots.

5 I can tell you that Michael did not do anything wrong. Michael was a great person and he was a  
6 positive influence on many of the kids from the neighborhood. I didn't see Michael do anything wrong. That  
7 cop shot him when Michael had his hands up and was getting down on the ground. The cop took advantage of  
8 his position and killed my friend.

9 When I was first interviewed by the police, I was terrified for my life. The cop had just killed one of  
10 my childhood friends right in front of me. All I could think about was that it could have been me the cop shot. I  
11 didn't trust the other police officers that were interviewing me. I told them what I thought they wanted to  
12 hear.

13 In my original interview, I told the officer that Michael was running toward the cop and that is why  
14 the cop shot him. I told the interviewer that, when the cop pulled up to us, Michael charged the cop as the cop  
15 was trying to get out of his car and that Michael tried to grab the gun from the cop while the cop was trapped  
16 in his car. This is when Michael was shot the first time by the cop. After Michael was shot the first time, he  
17 started to run away from the cop car. After running away from the cop car for a short time, Michael turned  
18 around and started running back toward the cop car. At this point, the cop had his gun drawn and was yelling  
19 at Michael to stop and get down on the ground or he would shoot. Michael continued to run towards the cop.  
20 Michael was yelling that he was going to "take it from him" and this is when the cop shot him several times.  
21 Michael fell to the ground and died right there.

22 I only gave this statement to the police because I was scared for my own life. I had just seen my friend  
23 get shot and didn't want the police to come after me. It is always the same police that patrol our  
24 neighborhood and I thought that if I told the police what really happened they may target me. I didn't want to  
25 die like my friend did—for no reason.

26  
27 *Dorian Smith*

28 Dorian Smith

1 **Summary of Grand Jury Testimony of: LESLEE PARKER – Crime Scene Technician for Prosecution**  
2

3 My full name is Leslee Parker. I work for the Springfield County Police Department as a Crime Scene  
4 Technician. I graduated from the University of Maryland Baltimore County with a Bachelor of Science in  
5 Police Forensics in 2005. I have completed my studies for a Ph.D. in Criminal Forensics and am currently  
6 writing my thesis on gunfire residue left on clothing. My expected thesis presentation and doctoral  
7 appointment is May 2015. I have been working for the past nine years as a Crime Scene Technician for the  
8 Springfield County Police Department and the past two years as the Director of the Crime Lab. I have received  
9 certifications in latent fingerprint collection and analysis, as well as DNA Collection and Analysis. I have been  
10 admitted as an expert in these two areas several hundred times in District, Circuit and Federal Courts in  
11 Maryland. I have been published at least 12 times in the past two years alone on the collection and analysis of  
12 fingerprints and DNA in crime scenes. I have also been the featured speaker at several conferences including  
13 the International Association of Crime Lab Technicians annual conference in Copenhagen, Denmark. I have  
14 received the highest award possible for my field by the same organization for integrity in the field of  
15 forensics. I am also trained on gunfire residue, and as I stated before, this is the basis of my Ph.D. thesis.

16 I first became involved in this case after hearing the radio call for a police involved shooting in  
17 Springfield City. While this is not our primary jurisdiction, I know from prior history that cases involving  
18 officers are often given to the County to investigate. Because of this, I self-dispatched myself along with two  
19 other technicians. We arrived approximately 20 minutes after the shooting. There was a lot of confusion at  
20 the scene about who was in charge. Springfield City Police Chief was there, along with the Chief of Operations  
21 for Springfield County Police and a Captain from the State Police. I was not aware of what they were talking  
22 about, but after three hours, my team and I were permitted to start processing the scene.

23 I supervised the forensics gathering for the entire scene and was present for the collection of  
24 everything about which I am testifying. I also conducted all of the analysis of the items to which I am  
25 testifying to. The following items were processed while at the scene:

- 26 • The interior and exterior of Officer Gray's patrol car was first tested for latent fingerprints. Dozens of  
27 fingerprints were recovered and preserved by me for later analysis.
- 28 • The interior and exterior of Officer Gray's patrol car was then tested for the presence of DNA  
29 evidence by swabbing the surface areas. This evidence was then collected and preserved by me.
- 30 • Officer Gray's duty belt was recovered by me in the presence of Officer Gray's supervisor and union  
31 representative which is protocol. The entire belt, including his holstered weapon was removed from  
32 the officer and placed into a single evidence bag.
- 33 • I collected the shell casings I found on the ground at the scene.
- 34 • I followed the medical examiner to his office and recovered the clothes from Michael Case.

35  
36 During this time, I maintained custody of all of the evidence and transported everything to the crime lab  
37 where it was checked in by me pending processing. I followed all of the established local protocols. The  
38 results of my analysis are as follows:

- 39 • Exterior of the car – No evidence was recovered from the exterior of the car that will show Michael  
40 Case had contact with the car. This does not mean contact was not made, only that there is no  
41 evidence that contact was made.
- 42 • Interior of the car –
  - 43 ○ DNA Evidence was recovered from the inside, driver's door panel. The DNA was analyzed  
44 and it was determined the DNA belonged to Michael Case. This does not prove that Michael  
45 Case was inside of the patrol car, only that at some point in time, some part of his body made  
46 contact with the door panel.
  - 47 ○ No fingerprints were recovered from the interior of the patrol car.

- 1 • Duty Belt – The duty belt was tested inside of the crime lab for the presence of DNA. This included all  
2 of the items on the duty belt, including the officer’s service weapon.
  - 3 ○ DNA evidence belonging to Officer Gray was located on all items on the duty belt.
  - 4 ○ DNA evidence found on the hammer of the service weapon and along the slide yielded a  
5 multiple source profile. The DNA evidence found on the service weapon was compared  
6 against the DNA profile of Officer Gray and we were able to conclude there was a match—  
7 Officer Gray’s DNA was located on the service weapon.
  - 8 ○ We discovered evidence of another, unknown contributor to the DNA profile found on the  
9 service weapon. The DNA profile on the service weapon was compared against the DNA  
10 profile of Michael Case, but the results were inconclusive.
  - 11 ○ We can conclude neither that Michael Case’s DNA is included in the DNA profile found on the  
12 service revolver, nor can we conclude that his DNA is excluded from the DNA profile found  
13 on the service revolver.
- 14 • Michael Case Clothing –
  - 15 ○ I conducted a gunfire residue (GFR) test of the clothing worn by Michael Case. Based on my  
16 analysis, I determined lead residue to be on his clothing.
  - 17 ○ Lead is one component in GFR and can travel farther than other residues. The fact that no  
18 other component associated with GFR was present shows that Michael Case was at least 18  
19 feet, and possibly up to 30 feet away, at the time of the shooting.
  - 20 ○ I did not conduct a GFR test on Michael Case’s skin.

21 Based on additional questions from members of the Grand Jury, I offer the following responses.

22  
23 Gunfire residue is detectable on clothing and skin. I did not test Michael Case’s skin for GFR because I  
24 did not have a GFR kit with me when I first went to the Medical Examiner’s office. The presence of GFR is  
25 dependent on where a person is at the time of the shooting in comparison with the weapon, the type of  
26 weapon fired, the time of test in comparison to the effects wearing off and environmental conditions. The  
27 ability to test the distance is not exact; however there are normal distances GFR may travel.

28  
29  
30 

31 Leslie Parker



1 **Summary of Grand Jury Testimony of: CAPT. JEAN CARPENTER – Prosecution’s Expert Witness**  
2

3 Good morning, my name is Jean Carpenter. I am a Captain with the Springfield County Police  
4 Department. I have been active in law enforcement for over 29 years. The last eight years, I have been the  
5 commander of the Education and Training Division for the Springfield County Police Department. I currently  
6 hold a Bachelor’s degree from the University of Maryland in Criminal Justice and I have a Master’s degree  
7 from the Johns Hopkins University Police Executive Leadership Program (PELP). I am also a graduate of the  
8 FBI National School. Throughout my career, I have been assigned to all areas of the Department including  
9 patrol, criminal investigations and special operations. Prior to starting with the police department, I served  
10 five years in the United States Marine Corps. A little more than three of those years I was assigned to our  
11 American embassies overseas. While I was assigned to the embassy in Tel Aviv Israel from 1983-1985, I  
12 trained with the Israeli Army on a fighting technique called Krav Maga. I was able to continue my training and  
13 received instructor status in 1987. Because of that, I was introduced into the Education and Training Division  
14 as a use of force instructor. I have since become a Level 3 Expert Black Belt. There are 5 levels of black belt  
15 and a Master’s level.

16 Over time, I attended certification courses with the FBI, the State Police and other organizations  
17 across the United States, and I travel twice a year to Israel for recertification and testing. I am the chair of the  
18 Use of Force Committee for the International Chiefs of Police Group (ICPG). I helped develop our  
19 Department’s policy on the Use of Force and the Use of Force Continuum. As the Division Commander, it is my  
20 responsibility to oversee the training of every police officer on the use of force, which includes anything from  
21 de-escalation, seeking cover, talking, open hand, compliance and come-along techniques, to the use of force  
22 such as strikes with body parts, batons, take-downs, electric shock and ultimately the firing of the service  
23 weapon. I am on the Department’s “SHOT” Team. This is a team comprised of highly trained individuals who  
24 review any instance of police use of force to determine if policy and procedures were followed. I am on a  
25 statewide team and have been for the past three years.

26 The Springfield County Police Department trains all of the officers in the County and Sheriff  
27 Departments as well as all of the city, town and municipalities in our County. In total, we train officers from all  
28 15 departments within our County, including Springfield City police officers. The training includes use of  
29 force and annual recertification in firearms.

30 I became involved in this case almost immediately after it took place. On August 9, 2014 at  
31 approximately 12:03pm, the Springfield City dispatch supervisor sent a text to my SHOT team alerting us to  
32 the police involved shooting. While SHOT teams are not always dispatched to every use of force scene, they  
33 are dispatched to every police involved shooting in our County. My team was on-call on August 9. I was the  
34 SHOT team leader. My team consisted of Sergeant Wells from the State Police, Sergeant Cooper from the  
35 Springfield Sheriff’s Department and Lieutenant Riggs from the Springfield City Police Department. Per SHOT  
36 protocol, Lieutenant Riggs was relieved as soon as we realized the shooting involved an officer from her  
37 department.

38 The SHOT team does not interview witnesses or take any statements. First and foremost, the role of  
39 the team is to ensure the integrity of the crime scene is maintained and to witness the collection of evidence,  
40 including the removal of the service weapon from the officer involved as well as review all documentation  
41 from the case, including, but not limited to forensic, medical examiner and police incident reports and witness  
42 statements. Our next role is to determine whether the officer’s use of force, if any was used, was justified,  
43 unjustified, inconclusive, or demonstrates a need for a change in protocol or training. When making our  
44 determination, we review the entire incident from the officer’s perspective and consider all of the  
45 surrounding circumstances as the officer perceived them. We view it this way because case law requires that  
46 we consider any shooting based on what the officer knew and was experiencing at the time the use of force  
47 was taking place. Some use of force incidents require officers to go through re-training, or in other cases, like

1 the case we have here, our recommendation is to charge the officer with a crime if the officer failed to adhere  
2 to use of force protocols.

3 The reason why I recommended that Officer Gray face charges is because he used force that was  
4 greater than necessary for the incident and because he did not follow the use of force continuum policy for his  
5 department. I would like to explain the reasoning for my recommendation:

6 • Initial Contact with Michael Case:

- 7 ○ From the very beginning of this incident, Officer Gray failed to conduct himself in a proper way  
8 and started the encounter in an adversarial fashion. This escalated the situation right from the  
9 beginning.
- 10 ○ From day one of the academy, police officers are taught that they are part of the community.  
11 Getting respect from others starts with respecting them first. Based upon what I learned from  
12 Dorian Smith's statement, Officer Gray should have known that the way he spoke with Michael  
13 Case would not achieve compliance, much less garner respect. Jaywalking is a low level offense  
14 that is rarely, if ever, enforced. Simply saying something like "do me a favor guys and walk on the  
15 sidewalk" would have increased the probability of citizen compliance than would an order to  
16 move out of the street.
- 17 ○ I understand that Officer Gray stated in his police report that he was respectful; however he did  
18 not remember what words he used, therefore, we relied on Dorian Smith's statement.

19 • Second Contact: The second contact was made when Officer Gray backed up his patrol car:

- 20 ○ Once again, Jaywalking is a low level offense. Once the officer gave his order, he started to drive  
21 away. Apparently Michael Case and Dorian Smith were not moving in the right direction quick  
22 enough for Officer Gray. Officer Gray's actions can be described as reckless from this point  
23 forward.
- 24 ○ Instead of going up the street and giving the two teenagers a chance to comply, Officer Gray  
25 traveled a short distance, then put his car in reverse and backed up so that Michael Case and  
26 Dorian Smith were on the driver's side of the patrol car. That is a tactical mistake. Officer Gray  
27 should have gone up the street, giving room and time to comply. Then, if they didn't comply, he  
28 could have turned around and put the two teens between himself and the car.
- 29 ○ Officer Gray further placed the car so close to Michael Case, that he could not open his door. This  
30 shows that Officer Gray was not thinking clearly and was upset that they did not move quickly  
31 enough for his liking.

32 • Third Contact – Grabbing Michael Case through the door or window:

- 33 ○ Here, the stories between Dorian Smith, Officer Gray and the evidence collected differ. In his  
34 written report, Officer Gray stated that he tried to get out of his patrol car; however Michael Case  
35 would not let him open the door far enough to get out. There was no DNA or fingerprint evidence  
36 on the outside of the car door to support that Michael Case did anything to prevent Officer Gray  
37 from exiting his patrol car.
- 38 ○ Officer Gray's action then far exceeded the use of force continuum when he grabbed Michael Case  
39 by or near his throat. This was another tactical error and a complete misuse of force. This action  
40 by Officer Gray escalated the incident well beyond any use of force continuum. At this point, the  
41 most action that could have been taken against Michael Case would have been the issuance of a  
42 traffic citation for Jaywalking. The level of the offense (accepted as true) did not rise to any use of  
43 force on the force continuum. At most, Officer Gray would have been permitted to use forceful  
44 verbal commands to deescalate the situation. To put this simply, Officer Gray did not have the  
45 right to arrest Michael Case at this point and should never have placed his hands on Michael  
46 Case, much less grab him.

47 • Fourth Contact - Shot fired inside of the patrol car:

- 1           ○ From the evidence, it is clear Officer Gray was being assaulted by Michael Case inside of the  
2 patrol car, after Michael Case was grabbed. Because Officer Gray was using force that was not  
3 authorized, Michael Case was permitted to use force in return to prevent an unlawful arrest. If  
4 Officer Gray at this point believed his life was in jeopardy or was in fear of serious bodily harm,  
5 he also had a right to use force, up to and including deadly force.
- 6           ○ The problem here is that Officer Gray was still holding Michael Case, preventing him from  
7 backing away to a safe distance. Officer Gray created a situation for himself where the use of  
8 deadly force was the only option. He cannot, and should not, be rewarded for his lack of  
9 judgment or failure to take a lesser tactical approach such as simply letting Michael Case go.  
10 Because of that, Officer Gray should not have fired his weapon while inside the patrol car.
- 11 • Fifth Contact – Shots fired outside of the patrol car:
- 12           ○ Officers are trained to fire their weapons when use of force is justified within the use of force  
13 continuum and to do so to stop the threat. Once the threat is over, officers must stop or reduce  
14 their use of force.
- 15           ○ I need to be clear, I do not believe the use of force was justified at all in this situation and the  
16 firing of the weapon was 100% unnecessary. Keeping that in mind, assuming for a moment that  
17 it was justified, once Michael Case separated from Officer Gray and started running away, all use  
18 of force should have stopped.
- 19           ○ In this situation, Michael Case ran away from Officer Gray and stopped only after being  
20 commanded to do so. This is called compliance. When an officer observes a subject complying  
21 with the officer’s commands, all use of force must stop. By all accounts, Michael Case was  
22 following directions.
- 23                 ▪ Michael Case stopped running;
- 24                 ▪ Michael Case turned around, adhering to police orders;
- 25                 ▪ Michael Case put his hands up.
- 26           ○ Officer Gray failed to note that Michael Case was following instructions. Even if we accept the  
27 written report filed by Officer Gray stating that Michael Case was walking towards the officer,  
28 Michael Case was a significant distance away. We know this because the forensics report noted a  
29 lack of gunshot residue on Michael Case’s clothing.
- 30           ○ Officers are taught that a threat can close in and attack from 18 feet before a shot can be fired by  
31 an officer. However, the evidence shows that Michael Case was 30 or more feet away.
- 32           ○ It is in my expert opinion that Officer Gray was not authorized to fire his weapon and should  
33 have sought cover while waiting for back-up. Had he done so, the outcome would have been  
34 completely different.

35 Capt. Jean Carpenter

36 Capt. Jean Carpenter

1 **Summary of Expert Report: DR. CHRISS LEE – Witness for Defense**  
2

3 I am Doctor Chriss Lee. I am a world renowned expert and leader in forensics. This includes, but is  
4 not limited to, crime scene protocols, DNA collection and analysis, fingerprint collection and analysis and  
5 gunshot residue (GSR) collection and analysis. I have my own forensics laboratory that was established  
6 nearly 40 years ago at University Western Sky, Hawaii. I was a police commander in my native country before  
7 immigrating to the United States more than 50 years ago. I have analyzed thousands of cases and testified all  
8 over the world. I hold three Ph.D.'s in several forensic fields; I teach, write and testify forensics 365 days a  
9 year. I have traveled the world helping investigate the most notorious crimes. I have been admitted as an  
10 expert in every state of the United States, in state courts as well as federal courts, and I have been admitted as  
11 an expert in twenty-six countries. I am being compensated for my time plus expenses, not for my opinion –  
12 that is not for sale. I dedicate less than five percent of my time to my expert qualifications and spend most of  
13 my time teaching and writing about forensics. I have published more than 50 journals and a dozen books in  
14 the field of forensics and have personally conducted over 2,000 DNA comparisons.

15 I became involved in this case two days after the shooting of Michael Case. I was asked to participate  
16 as an expert bystander in the analysis of the evidence by the Springfield County Police Department Crime Lab.  
17 I was hired by the police union that represents officers of the Springfield City Police Department. They were  
18 worried that the officer would be tried in the media instead of the courts and wanted to ensure a fair process.  
19 The Springfield City State's Attorney approved my presence as long as I did not touch anything and remained  
20 silent during the forensic examinations. I have since been hired by the defense legal team as a forensics  
21 expert for this case. My fee for each day is \$5,000.00. So far, I have provided 6.3 days of my service. I have  
22 capped my service at ten days, meaning that if I were needed to anything beyond ten days, I would not charge  
23 for the additional service.

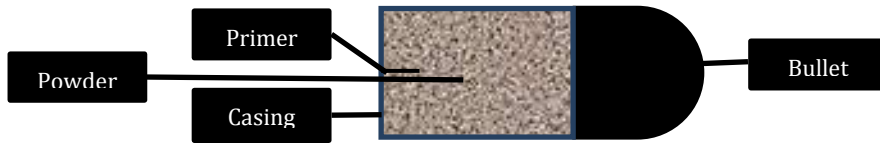
24 There are parts of the examination by the crime lab where the crime lab failed to follow proper  
25 forensic techniques. In my opinion, the failure of the crime lab to exact these techniques caused the evidence  
26 to be tainted and therefore unreliable. This includes:

- 27 • Latent Fingerprints of Patrol Car–
  - 28 ○ The first test conducted by Mr./Ms. Parker was dusting for latent fingerprints. The process  
29 of dusting for prints includes the use of a fingerprint powder that attaches itself to largely  
30 invisible impressions left by a person's fingerprints. Fingerprint powders, or dust, are a  
31 chemical mixture used to bring out invisible prints to the eye. When a technician uses the  
32 dust, it causes the entire area to be contaminated by the fingerprint powders, causing all  
33 other types of analysis to be compromised.
  - 34 ○ The proper method would have been to secure the patrol car and take it to a clean  
35 environment. Once there, less intrusive methods should have been used such as ultraviolet  
36 reflection techniques. Had this been done first, fingerprints from anyone in the driver's  
37 compartment of the patrol car could have been located.
  - 38 ○ It is in my expert opinion that the use of fingerprint powders in this case compromised the  
39 investigation from further fingerprint analysis of the patrol car and one cannot rule out  
40 whether Michael Case was inside of the patrol car.
- 41 • DNA Evidence of Patrol Car –
  - 42 ○ By starting with latent fingerprints, the use of fingerprint powder inside and outside the  
43 patrol car further compromised the investigation. Because of the contamination of the scene  
44 by the fingerprint powder, any chance to recover DNA has been compromised.
  - 45 ○ The Crime Lab Technician stated that this was a conclusive match, however a cursory  
46 review of the Crime Lab Report (Exhibit F1) will show that it is not an exact match and  
47 therefore, completely unreliable.

- 1           ○ It is in my expert opinion that the lack of DNA evidence inside or outside of the car is a cause  
2           of contamination and does not exclude the possibility that Michael Case was inside of the  
3           patrol car.
- 4       • Duty Belt-
  - 5           ○ The Crime Lab technician placed the entire duty belt and service weapon in the same  
6           evidence bag. Proper protocol would be to place each item into a separate bag. By including  
7           all of the items together, steps were not taken that would have precluded cross-  
8           contamination or destruction of evidence.
  - 9           ○ It is logical to have obtained DNA evidence belonging to Officer Gray. He wears the duty belt  
10          every day he goes to work and would clearly have his DNA on the items.
  - 11          ○ The fact that there was DNA evidence on the hammer and slide of the service weapon and  
12          that it was contaminated, shows that improper procedures were taken by the crime lab. It is  
13          in my expert opinion that if the duty belt and service weapon were properly separated at  
14          the time of collection, the unknown DNA may have been matched and serves as a possibility  
15          that a second person, including but not limited to Michael Case, had their hand on Officer  
16          Gray's service weapon.
- 17       • Gunshot Residue Testing –
  - 18          ○ It is in my opinion that this testimony should not be accepted. Mr./Ms. Parker is not certified  
19          in this field and there are several indicators that he/she does not have a proper  
20          understanding of this type of evidence.
    - 21           ▪ GSR not GFR –
      - 22               • In nearly 40 years heading my laboratory, I have never heard of “gunfire”  
23               residue or “GFR”. The mere use of this term instead of “gunshot” residue or  
24               “GSR” should give pause to any technician’s analysis.
    - 25           ▪ GSR Evidence is inconclusive –
      - 26               • The fact that GSR was not located on the clothing worn by Michael Case is  
27               not unusual regardless of the distance between Michael Case and the  
28               handgun at the time it was fired.
        - 29                   ○ Looking at the diagram provided in the autopsy report, only 3 of the 9  
30                   shots fired could have struck Michael Case on an area covered by  
31                   clothing.
        - 32                   ○ The Crime Lab did not collect GSR swabs before Michael Case was  
33                   removed from the scene. This is forensics 101 and should have been  
34                   done while still at the scene.
        - 35                   ○ Even if not at the scene, the test should have been conducted while at  
36                   the Medical Examiner’s Office before the clothing was removed. This  
37                   should have been done even if they were delayed by having to wait for  
38                   a test kit.
      - 39               • Any analysis of distance between Officer Gray and Michael Case at the time  
40               of the shooting is not reliable and requires additional analysis.

41  
42       Before one can understand GSR fully, one must first understand what a technician should be looking  
43       for. A round is a set of components that is placed inside of a weapon and fires a projectile or bullet. The round  
44       contains a casing, a primer, powder and a bullet. The casing holds the bullet in place until the primer is struck.  
45       This causes a spark that ignites the powder. Once the powder is ignited, an internal combustion within the  
46       casing takes place that moves the bullet away from the casing and in the direction the weapon is pointed  
47       towards. See Diagram below.

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The residue from the powder and the primer being ignited is called GSR and may have burned and unburned parts. Primer and powder elements may consist of lead (Pb), barium (Ba), or antimony (Sb) and may also contain aluminum (Al), sulfur (S), tin (Sn), calcium (Ca), potassium (K), chlorine (Cl), copper (Cu), strontium (Sr), zinc (Zn), titanium (Ti) or silicon (Si). There are other components of course, with certain powders containing more than 23 elements depending on the individual manufacturer. The importance here is that there are several elements present in a proper GSR analysis.

Lead residue by itself is often times confused as GSR because it mimics GSR; however it is easily detectable because there are no other elements associated with GSR. Any analysis containing lead only is not GSR and can only be attributed to the lead bullet.

In this case, had a proper GSR been conducted at the scene of the incident - to include the skin areas - GSR may have been detected on Michael Case's person. This would have allowed a proper analysis of all of the elements present. Because it was not done, it is impossible to tell how far Michael Case was from Officer Gray at the time he was shot.

*Chriss Lee*

Chriss Lee

1 **Summary of Expert Report: DR. ROUSEY J. VOIGHT - Defense Witness - Use of Force Expert**  
2

3 This is the summary of my findings as a Use of Force Expert. This report is submitted under oath and  
4 is the entirety of my intended testimony at trial.

5 My name is Rousey J. Voight. I am the CEO of Rousey Force Experts, LLC. My company is located out  
6 of Santa Monica, California. I am a mixed martial arts international champion and hold a 4<sup>th</sup> degree Black Belt  
7 in Judo. I graduated from Stanford University with a dual bachelor and master's degree in Justice  
8 Administration in 1989. I then attended Pepperdine Law School where I graduated *Summa Cum Laude* in  
9 1992. After that I became an FBI agent and spent most of my career in Washington, DC. While I was in  
10 Washington, I attended a Ph.D. program from John Jay College in New York and received my doctorate in  
11 Criminal Justice in 2004. Sometime in 1998, I was assigned to the Department of Justice and participated on a  
12 team designed to investigate civil rights violations by police officers and departments. Over the course of my  
13 career with the FBI, I have either testified in trial or provided reports that were used to settle matters in over  
14 250 cases. In all of those cases, I testified or wrote reports that were against the officer or department. My  
15 expertise was in use of force standards and application. I retired in 2011 from the FBI and started my own  
16 company. I have 23 employees, mostly retired agents, and we investigate use of force incidents around the  
17 country.

18 Since 2011, my company has investigated 127 use of force incidents. We determined in 101 of them  
19 that the officer or the department was in violation of use of force protocols. In the remaining 26 cases, we  
20 determined that the officer's actions were proper and I testified in all 26 cases either in State or Federal  
21 courts throughout the United States. Between my time with the FBI and my time with my company, I have  
22 been accepted and testified as an expert a total of 73 times. We charge a flat fee for our services which is  
23 \$10,000 per case plus expenses. This covers our investigation and report. Any time spent in court is an  
24 additional \$1,000.00 per day plus expenses. I was hired on September 1, 2014 by the defense attorneys to  
25 review this case. I personally conducted the evaluation of this case and had my team review my findings. I  
26 conducted my investigation as a neutral party, just letting the evidence take me to my expert opinions.

27 The first thing I did was review the grand jury testimony of all of the witnesses for the prosecution. I  
28 reviewed all of the evidence produced in discovery and I read all of the police reports, witness statements,  
29 medical reports, forensic reports, and video tapes. I also traveled to Springfield City and personally viewed  
30 the area of the incident.

31 The death of a teenager is a tragedy and the matter must be fully investigated to determine whether  
32 someone needs to be held accountable. Based upon all of the evidence presented thus far in this case, it is in  
33 my expert opinion that Officer Gray was in fear for his life and acted in accordance with all use of force  
34 standards. His actions were not only justified, it is my opinion that they were necessary.

35 The easiest way to explain my reasoning is to look at the actions of the officer on the day of the  
36 incident as described by Captain Carpenter.

- 37
- 38 • Initial Contact with Michael Case:
    - 39 ○ Captain Carpenter takes issue with the manner in which Officer Gray first interacted with Mr.  
40 Case. If true, I agree. Officer Gray did not approach Mr. Case and Dorian Smith in a manner that  
41 was appropriate. His dialogue, taken at face value as true was rude and unprofessional. However,  
42 that has nothing to do with the use of force in this case. In less serious scenarios, Officer Gray  
43 would have been subjected to a written counseling form – a low level type of punishment.
    - 44 ○ There is no reason to believe Officer Gray was rude or inappropriate. In fact, I reviewed Officer  
45 Gray's personnel file and his disciplinary record. In six years of service, Officer Gray has not  
46 received a single citizen complaint for anything. This is highly unusual for an officer with six  
47 years on any police department.

- 1           ○ Officer Gray has received twelve letters of appreciation from citizens during his first six years.  
2           This is remarkable and speaks volumes about this officer. Complaint letters come easy, but he  
3           has none; compliment letters are rare, yet he has twelve.
- 4           ○ Dorian Smith is the only person who is claiming Officer Gray acted rudely. However, this is  
5           completely different from his/her original statement to police. Moreover, this did not happen  
6           until after the family hired an attorney and that attorney then spoke with Dorian Smith before  
7           he/she gave his/her second statement.
- 8           ○ Based on the evidence presented, Dorian Smith's statements are not credible and therefore  
9           should not have any bearing in this case.
- 10       ● Second Contact: The second contact was when Officer Gray backed up his patrol car:
  - 11           ○ Once again, I agree with Captain Carpenter to a certain level - jaywalking is a low level offense.  
12           However, officers are charged with enforcing the law and Officer Gray was well within his  
13           authority to enforce this provision. Officer Gray gave an order, he moved on and he was ignored.  
14           He had a duty to go back and make sure the two people complied with the order. Look at it this  
15           way: if these young people would have been run over, the officer would have been negligent in  
16           his duties if he did not go back. This second contact is not only justified, but necessary.
  - 17           ○ Captain Carpenter complains that Officer Gray made a tactical error for backing up his patrol car.  
18           In reality, the fact that Officer Gray backed up his car shows Officer Gray's state of mind. Clearly  
19           Captain Carpenter believed a tactical response was necessary; however, Officer Gray did not  
20           perceive a threat and was doing just as he noted in his written report. All he wanted was the two  
21           teens to comply. He did not know his life was in danger; therefore, there was no need to make a  
22           tactical driving maneuver.
  - 23           ○ Dorian Smith claimed that Officer Gray drove his car to the sidewalk right up against them. This  
24           is clearly not the case as the patrol car was parked in the travel portion of the roadway. There is  
25           no evidence the car was moved after the confrontation. Furthermore, even if Officer Gray drove  
26           close to them, this did not provide Dorian Smith or Michael Case a legal or reasonable  
27           justification for assaulting a police officer.
  - 28           ○ Lastly, none of this matters. Based on case law, the actions of the officer are supposed to be  
29           judged at the time the officer decides to use force. Anything the officer does before that time  
30           simply does not matter. What I mean by this is that the first and second contacts have no bearing  
31           on the officer's use of force. It is my expert opinion that these two contacts are being used to  
32           inflame the jury to lay some basis for the charges.
- 33       ● Third Contact & Fourth Contact – Protecting himself against an attack:
  - 34           ○ What happened here is in dispute; however, a few things are clear. Michael Case was striking  
35           Officer Gray. His strikes caused Officer Gray to sustain injuries that warranted a trip to the  
36           hospital. While nothing was broken, a person can only sustain a few head shots before they  
37           become unconscious. Officers are trained to repel attacks and to use force, including deadly force  
38           if they are in fear of their life or serious bodily injury. Being hit in the face and head are  
39           legitimate concerns for the use of deadly force.
  - 40           ○ For whatever reason, Officer Gray and Michael Case were involved in a physical altercation  
41           inside of the patrol car. We know the crime lab failed to follow proper protocol. However we  
42           have Dorian Smith's statement, we have DNA evidence belonging to Michael Case from inside the  
43           patrol car, and Officer Gray has injuries.
  - 44           ○ Because Michael Case and Dorian Smith ran away at some point, the only way the officer could  
45           have been injured would have been during a confrontation inside of the patrol car.
  - 46           ○ Because we know Officer Gray was assaulted inside of the patrol car, we also know that Officer  
47           Gray's actions were within the use of force continuum. He had a right and an obligation to use the  
48           force necessary to repel the attack, including the use of deadly force.



- 1 • Fifth Contact – Shots fired outside of the patrol car:
  - 2 ○ Once again, I agree with Captain Carpenter - Officers are trained to fire their weapons when use
  - 3 of force is justified within the use of force continuum and to do so to stop the threat. Once the
  - 4 threat is over, officers must stop or reduce their use of force.
  - 5 ○ Captain Carpenter is also correct that once Michael Case ran away from the car, the use of force
  - 6 should have stopped. From all accounts, Officer Gray fired a couple of shots while Michael Case
  - 7 had his back turned and then stopped firing. None of these shots struck Michael Case. We know
  - 8 this because the Medical Examiner’s report shows us that all of the entrance wounds were to the
  - 9 front portion of Michael Case’s body. There are a few instances when an officer is permitted to
  - 10 fire at a fleeing felon. In this case, Officer Gray could have been justified in firing those shots, but
  - 11 that is not why we are here. We are here to determine if the remaining nine shots were justified.
  - 12 ○ At this point in the confrontation, Michael Case turned around. Instead of complying with orders
  - 13 to stop, he started walking towards Officer Gray. It is very important to understand what the
  - 14 officer knew at the time of the shooting:
    - 15 ▪ Officer Gray already had a confrontation with Michael Case;
    - 16 ▪ Michael Case was aggressive and caused injuries to Officer Gray;
    - 17 ▪ Michael Case failed to comply with the reasonable orders of a police officer; and
    - 18 ▪ Michael Case was now approaching Officer Gray.
  - 19 ○ According to the first statement from Dorian Smith and the written report of Officer Gray, the use
  - 20 of force that followed was justified because:
    - 21 ▪ Michael Case started running towards Officer Gray;
    - 22 ▪ Michael Case most likely had his hands in the air—however, saying that you are giving
    - 23 up and giving up are two different things;
    - 24 ▪ Michael Case did not give up. Instead, he was running towards the officer and yelled that
    - 25 he was going to take the gun away from the officer; and
    - 26 ▪ Fearing for his life, Officer Gray used deadly force firing nine rounds until he perceived
    - 27 the threat to stop, consistent with his training and the use of force continuum.
  - 28 ○ It is clear from the facts of this case, that while not a popular position, the use of force was
  - 29 necessary. There is no requirement for an officer to endure additional punishment and fight for
  - 30 his life before using force. While unpopular, this was the only remaining avenue for this officer to
  - 31 take, and the use of deadly force was absolutely necessary.
  - 32 ○ Captain Carpenter notes that Michael Case was a significant distance away. First and foremost,
  - 33 we do not know how far Michael Case and Officer Gray were from one another because of the
  - 34 stumbling job performed by the crime lab technician. However, we do know from the location of
  - 35 the shell casing and the body of Michael Case when he hit the ground, there was less than 30 feet
  - 36 between the officer and the victim.
  - 37 ○ Officers are not required to wait until a suspect is within 18 feet. This distance is the time it will
  - 38 take the average person to close the distance between himself and his target from a standing
  - 39 position. In this situation, Michael Case is not average. He was a healthy 18 year old man with a
  - 40 running head start. Officer Gray would most likely not be alive today if he waited for Michael
  - 41 Case to be inside of 18 feet before firing his first round.
  - 42 ○ Based on all of the evidence presented, it is in my expert opinion that Officer Gray did the only
  - 43 thing he could do and his use of deadly force was well within the use of force continuum. Officer
  - 44 Gray was authorized and well within his right to fire his weapon and did so until the threat
  - 45 stopped.

46 

47 Rousey J. Voight Ph.D.

1 **Summary of Grand Jury Testimony of: ABLE MORGAN - Witness for Defense**

2  
3 My full name is Able Morgan. I was born on February 14, 1976. I reside at 101 Cranfield Drive,  
4 Springfield City, Maryland. I am currently working for Cranfield Apartments as a maintenance mechanic III.  
5 As part of my salary, I live in one of the units and I am in charge of the maintenance for two of the eight  
6 buildings located on Cranfield Drive. I have lived in this neighborhood all of my life. The neighborhood goes  
7 up and down, but it is a good place to live. Good people live here, but we have our share of folks that like to  
8 test the boundaries. The police around here tend to treat people as if they are always doing something wrong.  
9 We don't see them that often, but when we do, they usually try to mix things up. They leave me alone, but I  
10 have seen how they do things around here. They rile people up, then lock them up when they get out of hand.  
11 It is a shame really. Police should care more about the people they are supposed to protect.

12 I was working on August 9, 2014. I did not see or hear everything, but I could see most of it. I was  
13 coming around the northern building seen on the picture the prosecutor showed me. I was coming from the  
14 north, and I marked the picture with a capital A to show where I was standing. I was looking into a complaint  
15 of water seeping into the building. I was thinking the mortar needed to be replaced. I was checking out the  
16 building when I heard tires making some noise. It was abrupt, so it grabbed my attention and I turned around.  
17 A patrol car had just backed up to where two young people were standing. The passenger side of the car was  
18 facing me, so I could not see the entire thing.

19 From the looks of it, one of them was arguing with the officer. I could not hear what they said, but all  
20 of a sudden, the young man is inside of the patrol car. You can tell they were fighting or struggling with each  
21 other. I have since been shown a picture, and I recognize the person arguing with the officer is Michael Case.  
22 The second person was Dorian Smith. They both live in the apartments and they don't give me any trouble.

23 All of a sudden, I heard a large boom and Dorian Smith ran away to the apartment complex and hid  
24 down behind some cars. At the same time, Michael Case was running away from the car. I thought the officer  
25 was hurt because he did not emerge right away - it took him a moment. Michael had gotten about 40-50 feet  
26 away when the officer was out of his car screaming. I could not tell what he was saying, but I could hear him  
27 screaming.

28 All of a sudden, Michael stopped running and he turned around, putting his hands up above his head.  
29 It seemed like he and the officer were talking to each other as the officer was closing the distance between the  
30 two. Michael then started walking towards the officer and the officer stopped walking. I could hear him yell  
31 "Stop" "Stop" a couple of times, but Michael kept coming. It seemed like the officer was yelling for him to get  
32 down, but I could not tell exactly what he was saying. I heard him yelling and I saw him pointing to the  
33 ground with his left hand. Michael did not stop and the officer seemed like he got real low, just like I was  
34 taught when I was in the service and he started firing his gun. Michael just kept coming towards the officer  
35 and then after what seemed like a dozen shots, he fell to the ground. The officer was frozen for a minute, and  
36 then you could see him walking up to Michael. Officer Gray looked at Michael and then started talking on the  
37 radio. It took about another minute for a bunch of police to arrive and another 15 minutes for an ambulance  
38 to get there. They just left Michael on the street without giving him any first aid. They all just watched him die.

39 The entire thing took about 30-45 seconds. It was very fast. I am sure it felt like a long time to  
40 everyone else, but I am sure how long this took. I keep track of my time all day for the work I do. I am sure it  
41 did not take any longer than that.

42  
43 *Able Morgan*

44 Able Morgan



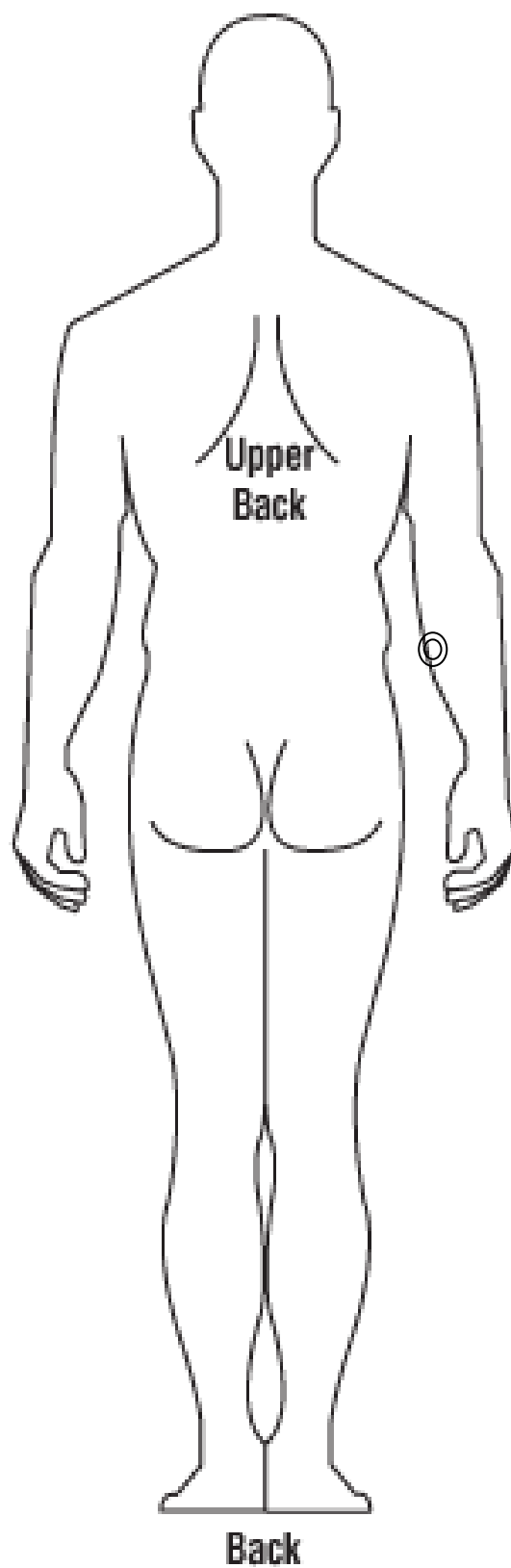
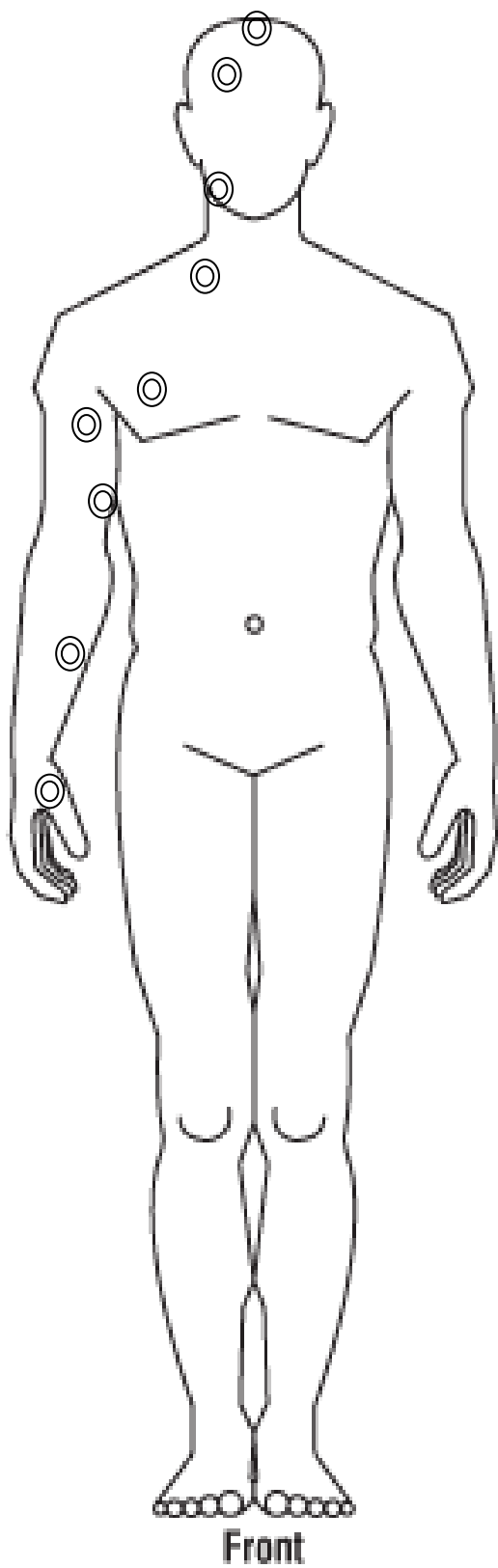
A= Able Morgan

DS= Dorian Smith

X = Michael Case

CASE NO: 2014-0809-2

NAME: MICHAEL CASE



Medical Examiner: *Louis Bader*

Date: 8/19/2014

# EXHIBIT C

## Springfield Police Department Incident Report

Date of Offense: August 9, 2014	Time: 1150 Hrs	Officer: PII Darren Gray	Arrest #: N/A	Case #: 14-084395
Victim: PII Darren Gray	D.O.B.: 08/30/1986	A.K.A. 1: N/A	Height: 5'10"	Weight: 185 lbs
Location of Arrest: 300 blk Cranfield Drive	City: Springfield	County: Springfield	State: Maryland	Zip: 11011
Type of Incident: Disorderly Conduct	Complainant: On View	Suspect(s): Michael Case/ Dorian Smith	Court Date: N/A	Case Disposition: Open – CID Investigating

**Narrative:**

I am writing this police report under orders. I reserve the right to modify this report at some time in the future. My attorney and I have discussed this and I am not willing to waive my rights towards self incrimination.

On August 9, 2014, I was assigned to Beat 1A. This includes the area of Cranfield Drive in Springfield City, Maryland. I was on my way to visit with the neighborhood liaison about recent incidents of graffiti on neighborhood playgrounds. When I was driving east in the 300 block of Cranfield Drive, I had to slow down because two people later identified as Dorian Smith and Michael Case were walking in the travel portion of the roadway. This road is separated by a double yellow line and there are sidewalks on both sides of the street.

Because I was on my way to visit my liaison, I decided to just ask the two people to move along onto the sidewalk. I was able to slowly move my marked patrol car to the right and come up next to the pair with my window rolled down. They seemed startled to see me and one of them used some profanity. At that time I said something to the effect of "hey guys do me a favor and move to the sidewalk." Michael Case used more profanity stating that he was just going up the street and I asked him to go up the street using the sidewalk.

I started pulling away and I heard one or both of them yelling at me to mind my own business while once again using profanity. I was not that far off, so I stopped my car and backed up with the intention of telling them to just walk on the sidewalk. When I did, Michael Case closed the distance between himself and the car and held the door with his body while he was yelling something at me. I tried to open the door, but I could not and Michael Case reached into the car and grabbed me. I move to my right while inside the car and Michael Case came into the police car and just started hitting me. Because of the equipment in the car, I could not strike back. Michael Case was just in a rage and continued hitting me.

I reached up with my left hand and grabbed Case below his neck trying to push him away from me. This only made Case more upset and he started hitting me on my face and head. He was pretty strong and some of the blows were making me blackout a little. I realized that Case was then reaching down for my gun. I do not know if he grabbed my gun, but it seemed to me he did. At this point, I was in fear that I would lose consciousness and Case would have my gun. I was in fear for my life, so I reached for my gun and started yelling that he back away or I would shoot. I was able to get my gun out of the holster and he was grabbing my hand, while still hitting me. I yelled several times I was going to shoot and then managed to fire a round.

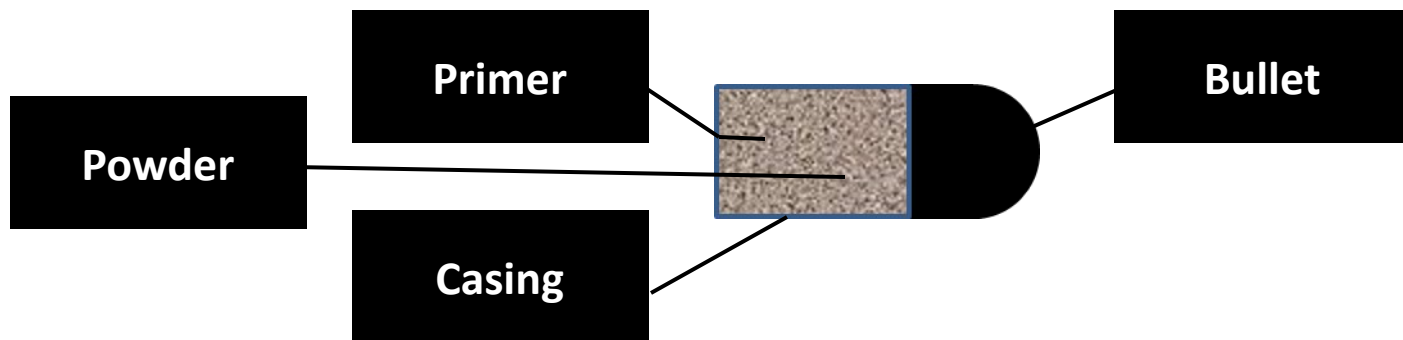
Case let go and started running away. I have no idea where Smith was at this point, but I was able to get out of my car and yelled at the fleeing felon to stop. I was in fear that Case was a threat to injure others, so I tried to prevent his escape and fired two or three rounds while yelling all the while that he stop. Case did stop and turn around. I was yelling at him to get down on the ground but he did not comply. At this point, he was about 30 feet away. I yelled several more times for him to get on the ground. Case raised his arms and then yelled that he was going to take my gun away from me and started coming towards me. I yelled for him to stop but he kept coming and started coming faster. He then reached down with his right arm as if he was reaching for a gun. Fearing again for my life, I crouched down into a shooting position and started firing my service weapon. I continued firing at center mass until the threat was stopped. As soon as the threat was over, I stopped firing and contacted dispatch immediately. I then complied with all orders. I was also transported to Springfield General Hospital where I was treated for my injuries. Luckily, I do not have anything broken.

I will state with certainty that I only used the force that was necessary to stop the attack and I hate that I had to shoot my gun at all. I was in fear for life and this was the only reason why I fired my service weapon. This was the first and only time I ever fired my weapon while on-duty. I did so in accordance with the training I received in the police academy and in in-service annual certifications. **NFI at this time.**

Officer Signature <i>Darren Gray</i>	Date Signed: Aug 10, 2014	Supervisor Review: <i>MDH</i>	Date Reviewed: Aug 10, 2014
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**City of Springfield Police Department  
Internal Affairs Disciplinary Report**

<b>Name of Officer:</b> Darren Gray		<b>ID No:</b> 10147	
<b>Type of Incident:</b> Line of Duty Shooting	<b>Date of Incident:</b> 08092014	<b>Complainant:</b> Insight	<b>Disposition:</b> Pending
This matter remains under investigation.			
<b>Type of Incident:</b>	<b>Date of Incident:</b>	<b>Complainant:</b>	<b>Disposition:</b>
<b>Type of Incident:</b>	<b>Date of Incident:</b>	<b>Complainant:</b>	<b>Disposition:</b>
<b>Type of Incident:</b>	<b>Date of Incident:</b>	<b>Complainant:</b>	<b>Disposition:</b>
<b>Type of Incident:</b>	<b>Date of Incident:</b>	<b>Complainant:</b>	<b>Disposition:</b>
<b>Type of Incident:</b>	<b>Date of Incident:</b>	<b>Complainant:</b>	<b>Disposition:</b>
<b>Comments:</b>			
Prior to the shooting that occurred on August 9, 2014, Officer Gray does not have any complaints internally or by citizens for any reason. A review of personnel records indicates 12 citizen letters complimenting Officer Gray.			
<b>Reviewed For Accuracy:</b> Lieutenant Michelle Burns – IAD Commander		<b>Date Reviewed:</b> 09/12/2014	



**SPRINGFIELD COUNTY  
POLICE DEPARTMENT  
Crime Laboratory**

B14-0821 8.21.14  
CC#14-084395\_\_

**DNA Analysis Report**  
Date Prepared: August 19, 2014

**To:** Detective Frank Franks  
**Unit:** SD/DDU  
**Offense:** Homicide

**CC#:** 14-084395  
**Biology#:** B14-0821  
**Victim:** Michael Case

The following samples were received for DNA analysis.

1- <b>(C) Buccal Swab</b> –Michael Case	<b>Property# 12028331.1V1A</b>
2- <b>(D) Buccal Swab</b> – Darren Gray	<b>Property# 12028332.1DIA</b>
3- <b>(E) Swab</b> – Service Revolver	<b>Property# 12028337.1G1A</b>
4- <b>(F) Swab</b> – Driver Door Panel	<b>Property# 12028372.1G9B</b>

The DNA profiles reported were determined by procedures, which have been validated according to the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories. Polymerase Chain Reaction (PCR) testing was performed using DNA extracts isolated from the items listed above. The short tandem repeat (STR) loci D3S1358, TH01, D21S11, DI8S51, Penta E, D5S818, D13S317, D7S820, D16S539, CSF1PO, Penta D, vWA, DS1179, TPOX, FGA, and amelogenin (gender indicator) were tested and the following conclusions are based on the data.

**Sample #1:**

Buccal Swab from Property# **12028331.1V1A** yielded a single source profile. The DNA identity of Michael Case is the source of this profile<sup>1</sup>.

**Sample #2:**

Buccal Swab from Property# **12028332.1DIA** yielded a single source profile. The DNA identity of Darren Gray is the source of this profile<sup>1</sup>.

**Sample #3:**

Swab from Service revolver, Property# **12028337.1G1A**, yielded a multiple source profile. The DNA identity of Darren Gray is the source of this profile<sup>1</sup>. Other minor indeterminate contributors are possible comparison to DNA profile of Michael Case, Property# 12028331.1V1A rendered inconclusive results.

**Sample #4:**

Swab from Driver Door Panel Property# **12028372.1G9B** yielded a single source profile. The DNA identity of Michael Case is the source of this profile<sup>1</sup>. DNA profile of Darren Gray, Property# **12028332.1A.1-2**, can be excluded as a contributor to this profile.

The above evidence samples have been retained in the Trace/Biology Unit. The DNA extracted from the portion of the samples used in this test will be retained as required by Subtitle 2, Section 8-201 of the Annotated Code of Midlands.



Leslee Parker – DNA Examiner

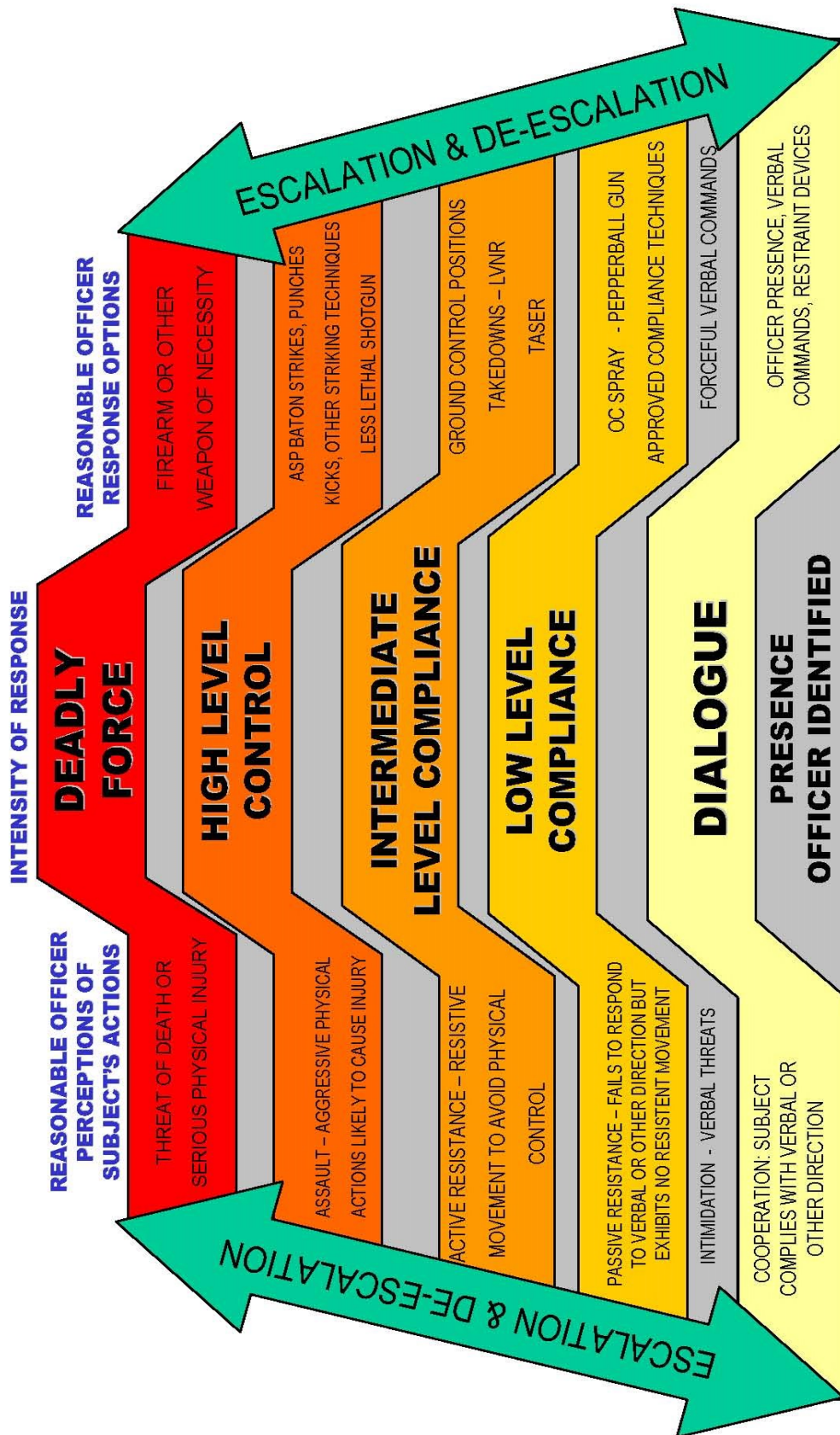
<sup>1</sup> Based on an estimated US population of approximately 330 million (330,000,000) people, random match probabilities of greater than in 330 billion (330,000,000,000) will show at least a 99.9% confidence that the profile is unique in the population.



**ALLELE TABLE**  
 CC#: 14-084395 – B14-0821

<b>LOCI</b>	<b>MICHAEL CASE BUCCAL SWAB PROPERTY# 12028331.1V1A</b>	<b>PROPERTY# 1205732874.1A Revolver Slide &amp; Hammer</b>	<b>Property# 12028372.1G9B Driver Door Panel</b>
CSF1PO	15, 17	7, 9, 15	15, 17, 20
FGA	11, 12	12	11, 12
TH01	6, 8	6, --	6, 8, 9
TPOX	6, 8	8, --	6, 8
VWA	10, 11	10, 11, 32, 34	10
D3S1358	18, 22	20, 24, 29	18, 22
D5S818	30, 30	19, 20	30
D7S820	12, 14	14, 16	12, 15
D8S1179	11, 22	24	11, 22
D13S317	28, 31	18, 30	19, 31
D16S539	9, 13	9, 13, 14	9, 13, 14, 17
D18S51	12, 12	12, 20, 22	12, 13
D21S11	7, 24	11, 19, 29	7, 24
	Comparison	Inconclusive	Conclusive - Match

<b>LOCI</b>	<b>DARREN GRAY BUCCAL SWAB PROPERTY# 12028332.1A.1-2</b>	<b>PROPERTY# 1205732874.1A Revolver Slide &amp; Hammer</b>	<b>Property# 12028372.1G9B Driver Door Panel</b>
CSF1PO	7, 9	7, 9, 15	15, 17, 20
FGA	12, 13	12	11, 12
TH01	6, 7	6, --	6, 8, 9
TPOX	8, 8	8, --	6, 8
VWA	11, 34	10, 11, 32, 34	10
D3S1358	20, 24	20, 24, 29	18, 22
D5S818	19, 20	19, 20	30
D7S820	14, 16	14, 16	12, 15
D8S1179	24, 24	24	11, 22
D13S317	18, 30	18, 30	19, 31
D16S539	9, 15	9, 13, 14	9, 13, 14, 17
D18S51	20, 22	12, 20, 22	12, 13
D21S11	19, 29	11, 19, 29	7, 24
	Comparison	Conclusive - Match	Conclusive - No Match



VERSION 7.0 4/5/07

## Springfield Police Manual: Section 8.0/ Use of Force

### USE OF FORCE – CORE PRINCIPLES

- 1. Every member of the Springfield Police Department is committed to upholding the Constitution and laws of the United States and the State of Maryland, and defending the civil rights and dignity of all individuals, while protecting human life and property and maintaining civil order.**

It is the policy of the Springfield Police Department to accomplish the police mission with the cooperation of the public and as effectively as possible, and with minimal reliance upon the use of physical force.

The community expects and the Springfield Police Department requires that officers use only the force necessary to perform their duties and that such force be proportional to the threat or resistance of the subject under the circumstances.

An officer's commitment to public safety includes the welfare of members of the public, the officer, and fellow officers, with an emphasis on respect, professionalism, and protection of human life, even when force is necessary.

Officers who violate those values by using objectively reasonable force degrade the confidence of the community, violate the rights of individuals upon whom reasonable force is used, and may expose the Department and fellow officers to legal and physical hazards.

Conversely, officers who fail to use timely and adequate force when it is necessary fail in their duty to act as public guardians and may endanger themselves, the community and fellow officers.

- 2. When time, circumstances, and safety permit, officers will take steps to gain compliance and deescalate conflict without using physical force**

When safe under the totality of circumstances and time and circumstances permit, officers shall use advisements, warnings verbal persuasion, and other tactics in order to reduce the need to use force.

Officers should consider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on factors including, but not limited to:

- Medical conditions
- Mental impairment
- Developmental disability
- Physical limitation
- Language barrier
- Drug interaction
- Behavioral crisis

- 3. Sometimes the Use-of-Force is unavoidable, and an Officer must exercise physical control of a violent assaultive, or resisting individual to make an arrest, or to protect members of the public or officers from risk of harm**

In doing so:

- Officers should recognize that their conduct prior to the use of force, including the display of a weapon, may be a factor which can influence the level of force necessary in a given situation.
- Officers should take reasonable care that their actions do not precipitate an unnecessary, unreasonable, or disproportionate use of force, by placing themselves or others in jeopardy, or by not following policy or training.
- Officers should continually assess the situation and changing circumstances, and modulate the use-of-force appropriately

- 4. An officer shall use only the degree of force that is objectively reasonable, necessary under the circumstances, and proportional to the threat or resistance of a subject**

Objectively reasonable: The reasonableness of a particular use of force is based on the totality of circumstances known by the officer at the time of the use of force and weighs the actions of the officer against the rights of the subject, in light of the circumstances surrounding the event. It must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second decisions – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

The reasonableness inquiry in an excessive-force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Necessary: Officers will use physical force only when no reasonably effective alternative appears to exist, and only then to the degree which is reasonable to effect a lawful purpose.

Proportional: The level of force applied must reflect the totality of circumstances surrounding the situation including the presence of imminent danger to officers or others. Proportional force does not require officers to use the same type or amount of force as the subject. The more immediate the threat and the more likely that the threat will result in death or serious physical injury, the greater the level of force that may be objectively reasonable and necessary to counter it.

**5. Each officer is responsible for explaining and articulating the specific facts, and reasonable inferences from those facts, which justify the officer's use of force**

The officer's justification will be reviewed to determine whether or not the force used was in or out of policy.

Failure to adequately document and explain the facts, circumstances, and inferences when reporting force may lead to the conclusion that the force used was out of policy.

**6. The department is committed to upholding lawful, professional, and ethical standards through assertive leadership and supervision before, during, and after every force incident.**

The Springfield Police Department recognizes the magnitude of the responsibility that comes with the constitutional authority to use force. This responsibility includes maintaining vigorous standards and transparent oversight systems to ensure accountability to the community in order to maintain their trust. This includes:

- Force prevention efforts,
- Effective tactics, and
- Objective review and analysis of all incidents of reportable force

**7. A strong partnership between the Department and the Community is essential for effective enforcement and public safety**

Uses of force, even if lawful and proper, can have a damaging effect on the public's perception of the Department and the Department's relationship with the community.

Both the Department and individual officers need to be aware of the negative effects of use-of-force incidents and be empowered to take appropriate action to mitigate these effects, such as:

- Explaining actions to subjects or members of the public
- Offering reasonable aid to those affected by a use-of-force
- Treating subjects, witnesses, and bystanders with professionalism and courtesy
- Department follow-up with neighbors or family to explain police actions and hear concerns and feedback

**USE OF FORCE - DEFINITIONS**

**Deadly Force:** The application of force through the use of firearms or any other means reasonably likely to cause death, Great Bodily Harm, or serious physical injury.

When reasonably likely to cause death or serious physical injury, Deadly Force includes:

- Shooting a firearm at a person
- A hard strike to a person's head, neck or throat with an impact weapon
- Striking a person's head into a hard, fixed object
- Examples include, but are not limited to:
  - Street surfaces
  - Solid metal structures, such as bars or guardrails
  - Shooting a person in the head or neck with a beanbag shotgun round
  - Using stop-sticks on a moving motorcycle
- Neck and carotid restraints may only be used when deadly force is authorized.

**De-escalation:** Taking action to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources are available to resolve the situation. The goal of de-escalation is to gain voluntary compliance of subjects, when feasible and reduce or eliminate the necessity to use physical force.

**De-escalation Techniques:** Actions used by officers, when safe and without compromising law-enforcement priorities, which seek to minimize the likelihood of the need to use force during an incident, and increase the likelihood of gaining voluntary compliance from a subject.

**Force:** Force means any physical coercion by an officer in performance of official duties, including the following types of force.

- **De Minimis Force-** Physical interaction meant to separate, guide, and /or control without the use of control techniques that are intended to or are reasonably likely to cause any pain or injury. Includes:
  - Use of control holds or joint manipulation techniques in a manner that does not cause any pain, and are not reasonably likely to cause any pain.
  - Using hands or equipment to stop, push back, separate or escort a person without causing any pain, or in a manner that would reasonably cause any pain.
- **Type I** – Force that causes transitory pain, the complaint of transitory pain, disorientation, or intentionally pointing a firearm or bean bag shotgun.
- **Type II** – Force that causes or is reasonably expected to cause physical injury greater than transitory pain but less than great or substantial bodily harm, and/or the use of any of the following weapons or instruments: CEW, OC spray, impact weapon, bean bag shotgun, deployment of K-9 with injury or complaint of injury causing less than Type III injury, vehicle, hobble restraint.
- **Type III** – Force that causes or is reasonably expected to cause great bodily harm, substantial bodily harm, loss of consciousness, or death, and/or the use of neck or carotid holds, stop sticks for motorcycles, impact weapon strikes to the head.

**FIT (Force Investigation Team):** The Department personnel tasked with conducting Officer-Involved Shootings and Type III use-of-force investigations.

**Injury Classifications:**

- **Physical or Bodily Injury** (also "Injury"): Physical pain or injury, illness, or an impairment of physical condition greater than transitory pain but less than great or substantial bodily harm.
- **Serious Physical Injury:** Physical injury which creates a substantial risk of death or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ or structure or involves serious concussive impact to the head.
- **Substantial Bodily Harm:** Bodily injury which involves:
  - Temporary but substantial disfigurement

- Temporary but substantial loss or impairment of the function of any bodily part or organ
- Fracture of any bodily part
- **Great bodily harm:** Bodily injury which either:
  - Creates a probability of death
  - Causes significant serious permanent disfigurement
  - Causes a significant permanent loss or impairment of the function of any bodily part or organ

### **Less Lethal Devices:**

Devices designed and intended to apply force that the outcome is not intended nor likely to cause the death of the subject or Great Bodily Harm. Includes: TASER, Impact weapons, Beanbag shotgun, OC spray.

**Necessary Force:** “Necessary” means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended.

**Objectively Reasonable Force:** Objectively reasonable force is based on the totality of circumstances known by the officer at the time of the use of force and weighs the actions of the officer against the rights of the subject, in light of the circumstances surrounding the event. It must be judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight.

**Reportable Force:** All uses of force other than de minimis are reportable. Reportable force includes the intentional pointing of a firearm at a subject.

**Use of Force:** See “Force.”

### **Weapons:**

- **Approved Weapon:** A tool used to apply force that is both specified and authorized by the Department
- **Approved Use of a Weapon:** Use of an approved weapon by an officer who has been properly trained and certified in the use of that weapon.
- **Impact Weapon:** Any authorized intermediate weapon or object used to strike a subject and inflict pain or injury through blunt force
- **Improvised Weapon:** An object used to apply force other than those approved and authorized by the Department. Also, any Department-approved weapon used by an officer who has not received required training or certification to use the weapon.

## **USE OF FORCE - USING FORCE**

### **1. Use of Force – When Authorized**

An officer shall use only the force reasonable, necessary, and proportionate to effectively bring an incident or person under control, while protecting the lives of the officer or others.

In other words, Officers shall only use objectively reasonable force, proportional to the threat or urgency of the situation, when necessary, to achieve a law-enforcement objective. The force used must comply with federal and state law and Seattle Police Department policies, training, and rules for specific instruments and devices. Once it is safe to do so and the threat is contained, and/or the subject complies with the officer’s orders, the force must stop. When determining if the force was objectively reasonable, necessary and proportionate, and therefore authorized, the following guidelines will be applied:

**Reasonable:** The reasonableness of a particular use of force is based on the totality of circumstances known by the officer at the time of the use of force and weighs the actions of the officer against the rights of the subject, in light of the circumstances surrounding the event. It must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Factors to be considered in determining the objective reasonableness of force include, but are not limited to:

- The seriousness of the crime or suspected offense;
- The level of threat or resistance presented by the subject;
- Whether the subject was posing an immediate threat to officers or a danger to the community;

- The potential for injury to citizens, officers or subjects;
- The risk or apparent attempt by the subject to escape;
- The conduct of the subject being confronted (as reasonably perceived by the officer at the time);
- The time available to an officer to make a decision;
- The availability of other resources;
- The training and experience of the officer;
- The proximity or access of weapons to the subject;
- Officer versus subject factors such as age, size, relative strength, skill level, injury/exhaustion and number of officers versus subjects; and
- The environmental factors and/or other exigent circumstances.

The assessment of reasonableness must embody allowance for the fact that police officers are often forced to make split-second decisions—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

The reasonableness inquiry in an excessive-force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

**Necessary:** Officers will use physical force only when no reasonably effective alternative appears to exist, and only then to the degree which is reasonable to effect a lawful purpose.

**Proportional:** To be proportional, the level of force applied must reflect the totality of circumstances surrounding the immediate situation, including the presence of an imminent danger to officers or others. Officers must rely on training, experience, and assessment of the situation to decide an appropriate level of force to be applied. Reasonable and sound judgment will dictate the force option to be employed. Proportional force does not require officers to use the same type or amount of force as the subject. The more immediate the threat and the more likely that the threat will result in death or serious physical injury, the greater the level of force that may be proportional, objectively reasonable, and necessary to counter it.

## 2. Use of Force: When Prohibited

An Officer may not use physical force:

- To punish or retaliate
- Against individuals who only confront them unless vocalization impedes a legitimate law enforcement function or contains specific threats to harm the officers or others
- On handcuffed or otherwise restrained subjects except in exceptional circumstances when the subject's actions must be immediately stopped to prevent injury, escape, or destruction of property. Use-of-force on restrained subjects shall be closely and critically reviewed. Officers must articulate both:
  - The exceptional circumstances, and
  - Why no reasonably effective alternative to the use-of-force appeared to exist.
- To stop a subject from swallowing a substance, such as a plastic bag containing a controlled substance or other evidence.
- To extract a substance or item from inside the body of a suspect without a warrant.

## 3. When safe under the totality of the circumstances and time and circumstances permit, officers shall use de-escalation tactics in order to reduce the need for force

De-escalation tactics and techniques are actions used by officers, when safe and without compromising law enforcement priorities, which seek to minimize the likelihood of the need to use force during an incident.

When safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options, and resources are available for incident resolution.

When time and circumstances reasonably permit, officers shall consider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on factors including, but not limited to:

- Medical conditions
- Mental impairment
- Developmental disability
- Physical imitation
- Language barrier
- Drug interaction
- Behavioral crisis

An officer's awareness of these possibilities, when time and circumstances reasonably permit, shall then be balanced against the facts of the incident when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.

Mitigating the immediacy of threat gives officers time to utilize extra resources, and increases time available to call more officers or specialty units.

The number of officers on scene may increase the available force options and may increase the ability to reduce the overall force used.

Other examples include:

- Placing barriers between an uncooperative subject and an officer
- Containing a threat
- Moving from a position that exposes officers to potential threats to a safer position
- Decreasing the exposure to potential threat by using
  - Distance
  - Cover
  - Concealment
  - Communication from a safe position intended to gain the subject's compliance, using:
    - Verbal persuasion
    - Advisements
    - Warnings
- Avoidance of physical confrontation, unless immediately necessary (for example, to protect someone, or stop dangerous behavior)
- Using verbal techniques, such as Listen and Explain with Equity and Dignity (LEED) Training, to calm an agitated subject and promote rational decision making
- Calling extra resources to assist or officers to assist:
  - More officers
  - CIT officers
  - Officers equipped with less-lethal tools
  - Any other tactics and approaches that attempt to achieve law enforcement objectives by gaining the compliance of the subject

#### **4. Officers should assess and modulate the use-of-force as resistance decreases**

For example, as resistance decreases, the use of force may decrease.

#### **5. Use of deadly force**

Deadly force may only be used in circumstances where threat of death or serious physical injury to the officer or others is imminent. A danger is imminent when an objectively reasonable officer would conclude that:

- A suspect is acting or threatening to cause death or serious physical injury to the officer or others, and
- The suspect has the means or instrumentalities to do so, and



- The suspect has the opportunity and ability to use the means or instrumentalities to cause death or serious physical injury.
- 6. Deadly force may be used to prevent the escape of a fleeing suspect only when an objectively reasonable officer would conclude that it is necessary and the officer has probably cause to believe that:**
- The suspect has committed a felony involving the infliction or threatened infliction of serious physical injury or death; and
  - The escape of the suspect would pose an imminent danger of death or serious physical injury to the officer or to another person unless the suspect is apprehended without delay; and
  - The officer has given a verbal warning to the suspect, if time, safety, and circumstances permit.
- 7. Following a use-of-force, officers shall render or request medical aid, if needed or if requested by anyone, as soon as reasonably possible**

Following a use-of-force, officers will request a medical aid response, if necessary, for suspects and others and will closely monitor subjects taken into custody.

Absent exigent circumstances, prone subjects will be placed on their side in a recover position. Officers shall not restrain subjects who are in custody and under control in a manner that compromises the subject's availability to breathe.

**8. Officers shall automatically request medical aid in certain situations**

Any use-of-force greater than De Minimis force on subjects who are reasonably believed or known to be:

- Pregnant
- Pre-adolescent children
- Elderly
- Physically frail

Any subjects or officers who:

- Sustain a CEW application
- Are struck by a beanbag shotgun round
- Sustain an impact weapon strike to the head
- Sustain a strike of their head against a hard, fixed object

**9. Consistent with timelines (noted in 8.3), officers and supervisors shall ensure that the incident is accurately and properly reported, documented, and investigated**

### **USE OF FORCE - TOOLS**

This policy addresses the use and deployment of all force tools that are available to sworn Department employees.

The following force options are governed by this policy:

- Beanbag shotgun
- Canine deployment
- CEW/Conducted Electrical Weapons (TASER)
- Firearms
- Impact weapons
- Oleoresin Capsicum (OC) spray
- Vehicle-related force tactics
- Specialty unit weaponry
- Hobble restraint
- Neck and carotid restraint

### **The Intended purpose of less-lethal devices**

Less lethal devices are used to interrupt a subject's threatening behavior so that officers may take physical control of the subject with less risk of injury to the subject or officer than posed by greater force applications. Less-lethal devices alone cannot be expected to render a suspect harmless.

Support officers should be prepared to take immediate action to exploit the brief opportunity created by the less-lethal device and take control of the subject if safe to do so.

- 1. Officers Will Only Carry and Use Weapons That Have Been Approved by the Department and That the Officer has Been Properly Trained and Certified to Use, Except Under Exigent Circumstances**  
Intentional or reckless violations of policy or training standards will result in discipline. Negligent violations of policy or training standards may result in discipline.
- 2. Uniformed Officers Are Required to Carry at Least One Less-Lethal Tool**  
Uniformed officers who have been issued a CEW shall carry it.
- 3. Sergeants and Lieutenants Will Ensure That Each Officer in Their Command is Trained and Certified on the Tools They Carry, as Required**
- 4. Officers Are Prohibited From Using Less-Lethal Tools as a Form of Punishment or for Retaliation**
- 5. Officers Are Prohibited from Using Less-Lethal Tools or Other Techniques in the Following Circumstances, Absent Active Aggression by the Suspect That Cannot be Reasonably Dealt With in Any Other Fashion:**
  - When the suspect is visibly pregnant, elderly, pre- adolescent, visibly frail, or known or suspected to be disabled unless deadly force is the only other option
  - When the suspect is in an elevated position where a fall is likely to cause substantial injury or death
  - When the suspect is in a location where the suspect could drown
  - When the suspect is operating a motor vehicle or motorcycle and the engine is running or is on a bicycle or scooter in motion
  - When an individual is handcuffed or otherwise restrained
  - To escort, prod, or jab individuals
  - To awaken unconscious or intoxicated individuals
  - To prevent the destruction of evidence
  - Against passive or low-level resisting subjects
  - When the suspect is detained in the police vehicle

### **BEANBAG SHOTGUN**

A beanbag shotgun is designed to temporarily interrupt the behavior of a suspect or dangerous individual, so that law enforcement officers can subdue and arrest that person with less danger of injury or death to themselves and others.

- 1. Firearms Training Squad (FTS) Manages the Beanbag Shotgun Program**  
FTS will maintain the beanbag shotgun operator's manual, develop curriculum, and conduct training and qualifications.
- 2. FTS Will Train and Certify Operators Annually**  
Only officers who have been trained and certified are allowed to use beanbag shotguns. Beanbag rounds may only be used in a manner consistent with training provided by this Department.
- 3. Officers Who Have Been Trained and Certified to Use a Beanbag Shotgun and Have Been Issued One Must Deploy With It During Their Shift**
- 4. Officers Shall Only Use the Beanbag Shotgun When Objectively Reasonable**

### 5. Officers Shall Issue a Verbal Warning to the Subject and Fellow Officers Prior to Deploying the Beanbag Shotgun

Officers shall issue a verbal warning to the subject, other officers, and other individuals present, that a beanbag shotgun will be used and defer using the beanbag shotgun a reasonable amount of time to allow the subject to comply with the warning.

**Exception:** A verbal warning is required if feasible and unless giving the warning would compromise the safety of the officer or others.

### 6. Officers Shall Consider the Risk of the Beanbag Shotgun Round Causing Serious Harm When Determining Whether to Deploy

### 7. Officers Shall not Target a Subject's Head, Neck or Genital Area

Officers shall not target the head or neck unless deadly force is justified.

In circumstances where deadly force is not justified, officers should direct the beanbag round toward the following areas:

- Lower abdomen, at belt level
- Buttocks
- Arms below the elbows
- Thigh
- Legs below the knee

### 8. Authorized Use, Prohibitions, and Cautions

- Beanbag rounds may only be used on an individual engaged in active aggression, or to prevent imminent physical harm to the officer or another person.
- Beanbag rounds should not be shot through glass or a chain link fence due to the likelihood of rupturing the beanbags and having the contents injure others.
- All less lethal shotguns must be stored in the trunk or rear storage area of patrol vehicles.
- Officers are cautioned that the target area for a beanbag round substantially differs from a deadly force target area. Instead of aiming for the center mass of the body, beanbag shotguns are aimed at the lower abdomen, thighs or forearms.
- Officers should be aware that targeting the chest has on occasion proven lethal when beanbag round is fired at a close range of less than 21-30 feet.
- Officers are further cautioned that the accuracy of the rounds decreases significantly after approximately 45 feet and their flight becomes erratic, striking objects to the right, left, or below the target, increasing the risk to innocent bystanders.

### 9. Tactical Considerations

- The optimal distance for a beanbag is between 21-45 feet. The beanbag rounds present a risk of death or serious physical injury when fired at the chest, head, neck, and groin.
- Officers should also be prepared to employ other means to control the individual — including, if necessary, other force options consistent with Department policy—if the individual does not respond sufficiently to the beanbag and cannot otherwise be subdued.

### 10. Officers are prohibited from using beanbag rounds on an individual in a crowd without the approval of a supervisor

Officers are prohibited from using beanbag rounds against an individual in a crowd unless the officer has the approval of a supervisor and can:

- Target a specific individual who poses an immediate threat of causing imminent physical harm; and
- Reasonably assure that other individuals in the crowd who pose no threat of violence will not be struck by the weapon.

### 11. Officers must justify each separate beanbag shotgun use in their use-of-force statement

12. **Officers are required to report each use of the beanbag shotgun, (e.g. each time the beanbag shotgun is aimed at a subject and each round fired) regardless of whether a subject is struck.**
13. **All shotguns firing beanbag rounds must be painted in a bright color or otherwise marked clearly so as to make them instantly distinguishable from a shotgun firing live rounds**
14. **Officers shall summon medical aid for all subjects who have been struck by a beanbag round**
15. **Beanbag shotguns inspections will be conducted on a semiannual basis to ensure that all are operable and perform any necessary maintenance or repairs**

### **FIREARMS**

1. **Officers shall only shoot firearms in situations where deadly force is justified.**
2. **Officers shall only carry and use department-approved firearms, except in exigent circumstances.**
3. **Officers must pass an annual Firearms Qualification.**
4. **Officers shall not use firearms as impact weapons.**
5. **An officer may draw or exhibit a firearm in the line of duty when the officer has reasonable cause to believe it may be necessary for his or her own safety or for the safety of others.**

When an officer determines that the threat is over, the officer shall holster his or firearm.

Unnecessarily or prematurely drawing or exhibiting a firearm may limit an officer's alternatives in controlling a situation, may create unnecessary anxiety on the part of citizens, and may result in an unwarranted or accidental discharge of the firearm.

Officers shall not draw or exhibit a firearm unless the circumstances surrounding the incident create a reasonable belief that it may be necessary to use the firearm in conformance with this policy on the use of firearms.

6. **Officers shall not fire warning shots**
7. **Officers shall issue a verbal warning to the subject and fellow officers prior to shooting a firearm.**  
Officers shall issue a verbal warning to the subject, other officers, and other individuals present, that a firearm will be shot and defer shooting the firearm a reasonable amount of time to allow the subject to comply with the warning.  
**Exception:** A verbal warning is required if feasible and unless giving the warning would compromise the safety of the officer or others.
8. **Officers Shall Not Fire at or From a Moving Vehicle**  
Firing at a moving vehicle is generally prohibited because doing so is often ineffective and may cause significant safety risks to the driver, passengers, and bystanders. Firearms shall not be discharged at a moving vehicle unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle. The moving vehicle itself shall not presumptively constitute a threat that justifies an officer's use of deadly force.

An officer threatened by an oncoming vehicle shall, if feasible, move out of its path instead of discharging a firearm at it or any of its occupants.

Officers shall not discharge a firearm from a moving vehicle unless a person is immediately threatening the officer or another person with deadly force.

**Note:** It is understood that the policy in regards to discharging a firearm at or from a moving vehicle may not cover every situation that may arise. In all situations, Department members are expected to act with intelligence and exercise sound judgment, attending to the spirit of this policy. Any deviations from the provisions of this policy shall be examined rigorously on a case-by-case basis. The involved officers must be able to articulate clearly the reasons for the use of deadly force.

Factors that may be considered include:

- Whether the officer's life or the lives of others were in immediate peril
- And if there was no reasonable or apparent mean of escape

### **9. Pointing a Firearm at a Person is Reportable Force**

Officers shall document all incidents where they point a firearm at a person.

Unholstering or displaying a firearm –including in a low-ready position –without pointing it at a person is not reportable force.

### **IMPACT WEAPONS**

The baton is capable of delivering powerful blows to interrupt or incapacitate an aggressive subject. It is also capable of delivering lethal or permanently disabling blows.

#### **1. Education & training section (ETS) will train and certify Officers on Department-approved impact weapons every two years**

Officers will be trained and certified to use Department-approved impact weapons before being authorized to carry these weapons.

#### **2. Officers shall only use impact weapons when objectively reasonable.**

#### **3. Officers will not use impact weapons on subjects who are restrained and under control, or complying with police direction**

#### **4. A hard strike to the head with any impact weapon, including a baton, is prohibited unless deadly force is justified**

The head, throat, neck, spine, groin, or kidneys shall not be targeted unless deadly force is justified. Unintentional or mistaken blows to these areas must be reported to ensure that all reasonable care was taken to avoid them.

Preferred target areas include arms, legs and torso.

#### **5. Officers shall not use flashlights as impact weapons, except in exigent circumstances**

The improvised use of weapons, such as flashlights, may present a greater risk of injury than batons. Use of another object in place of the baton, including flashlights, is prohibited unless there is an immediate need to strike and an officer is precluded from using or cannot feasibly use the CEW, baton, or OC spray.

The failure to carry a baton, in and of itself, does not justify the regular use of a flashlight as an impact weapon. Routine reliance on flashlights as an impact weapon is prohibited.

#### **6. Officers must justify each separate impact weapon application in their use-of-force report**

- a. Officers are required to report the use of an impact weapon to their Sergeant, regardless of whether a subject is struck.**

## Guidelines for Competition Judges

### I. Procedures for Scoring Competitions

Rankings are determined by both wins and points. Therefore, it is essential that the presiding judge carefully rate each team on all elements listed on the Performance Score Sheet.

#### A. Tie Point

Always award the Tie Point immediately after the close of the trial, and before adding the scores. This point will be used only in the event of a tie.

#### B. Decorum

Please be sure to score each team's overall performance in decorum in the space provided.

#### C. Announcing Your Decision

1. After awarding, tallying and double-checking the rest of the scores, your first announcement to the teams should focus on the general student performance, decorum, and legal understanding that you just witnessed.
2. Your second announcement should be which team prevailed, based on the merits of the case.
3. Your last announcement should declare who prevailed based on the score sheet.

#### D. Providing Feedback to the Team

**Please be mindful that students have often traveled considerable distance for the competition, and still have other obligations (E.G. HOMEWORK). Feedback should be limited to a maximum of 10 minutes.**

### II. Time Limitations

Students have been asked to limit their presentations to the timeframes listed in #2 of the Organizational Rules (page 1). It is particularly helpful for teams to know in advance how you will handle the time guidelines. Some judges prefer to give a warning, for instance, when there is one minute left; others expect students to mind the time on their own. Your jurisdiction may also incorporate a student bailiff(s); in this case, the bailiff will keep time throughout the match.

**Competitions will last approximately 2 hours INCLUDING your deliberation and feedback!**

### III. Mock Trial Simplified Rules of Evidence

The rules of evidence governing trial practice have been modified and simplified for the purposes of mock trial. Other more complex rules are NOT to be raised during the trial enactment.

Attorneys and witnesses may neither contradict the Statement of Facts or Affidavits, nor introduce any evidence that is not included in this packet of materials. As with any perceived violation of a rule of evidence, opposing team members should object or request a bench conference if this occurs.

### IV. Trial Procedures

#### A. Motions to Dismiss

The purpose of the competition is to hear both sides; therefore, motions to dismiss are not allowed. There shall be no sequestration of witnesses at any time during the trial. If such a motion is made, the motion MUST be denied.

#### B. Opening/ Closing Arguments

Competition procedures permit only one opening statement and one closing argument for each team. In Mock Trial Competition, the Defense Team will always make the first closing argument, followed by the Prosecution/Plaintiff. There is no rebuttal in Mock Trial.

#### C. Direct and Cross Examinations

Each attorney (three for each side) must engage in the direct examination of one witness and the cross-examination of another.

### Mock Trial Performance Rating Sheet

Schools: \_\_\_\_\_ vs. \_\_\_\_\_  
Plaintiff/Prosecution Defense

**1=Fair                      2=Satisfactory                      3=Good                      4=Very Good                      5=Excellent**

Please note that you are asked to give each attorney a composite score for their overall presentation: direct and re-direct or cross and re-cross. If re-direct or re-cross is NOT used, the attorney should NOT be penalized for not using this technique if there was nothing to be gained by using re-direct or re-cross.

**\*\*Please do not use fractions in scoring.\*\***

		Prosecution/ Plaintiff	Defense
<b>Opening Statements</b>			
<u>PLAINTIFF/PROSECUTION</u> First Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
<u>PLAINTIFF/PROSECUTION</u> Second Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
<u>PLAINTIFF/PROSECUTION</u> Third Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
<u>DEFENSE</u> First Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
<u>DEFENSE</u> Second Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
<u>DEFENSE</u> Third Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
<b>Closing Arguments</b>			
<b>Decorum/ Use of Objections:</b> Students were courteous, observed courtroom etiquette, spoke clearly, demonstrated professionalism, and <b>utilized objections appropriately.</b>			
<b>TOTAL</b>			
<b>Tie Point</b> (Before totaling score sheet, please award one point to the team you think gave the best overall performance. This point will be used ONLY in a tie.)			
<b>TOTAL WITH TIE POINT (provide this score only in a tie)</b>			

*I have checked the scores and tallies, and by my signature, certify they are correct:*

Presiding Judge: \_\_\_\_\_ Date: \_\_\_\_\_

Teacher Coach, Defense: \_\_\_\_\_ Teacher Coach, P: \_\_\_\_\_

**Maryland State Bar Association/ CLREP  
2014-2015  
Statewide High School Mock Trial Competition**

Registration Deadline.....	Friday, November 7, 2014
Case Mailed to Paid/ Registered Teams.....	Wednesday, November 12, 2014
Circuit Competitions (1st Level of Competition).....	January 6—March 25, 2015
CIRCUIT CHAMPIONS MUST BE DECLARED BY MARCH 26, 2015.	
Regional Competitions (2nd Level of Competition)..... (The eight Circuit Champions compete in single eliminations.)	Monday, April 6 and Tuesday, April 7, 2015
Semi-Final Competitions: Anne Arundel Circuit Court, 4pm.....	Thursday, April 23, 2015
State Championship: Maryland Court of Appeals, Annapolis, 10am* .....	Friday, April 24, 2015
*LIVE WEBCAST* - <a href="http://www.mdcourts.gov/coappeals/webcast.html">http://www.mdcourts.gov/coappeals/webcast.html</a>	

**Note: All competition dates are final.  
A change by the Chief Judge of the State of Maryland is the only exception.**

**Organizing Local Competitions**

**The Citizenship Law-Related Education Program will:**

- provide Mock Trial Guides and rules for each State competition;
- disseminate information to each circuit;
- provide technical assistance to Circuit Coordinators;
- provide certificates to all registered participants who compete for the season;
- assist in recruitment of schools;
- act as a liaison in finding legal professionals to assist teams;

**The role of the Bar Association is:**

- to advocate involvement of local attorneys in preparing teams and hearing trials;
- to provide support to schools;
- to assist the Circuit Coordinator.

**The role of the Circuit Coordinator is:**

- to make decisions/ mediate at the local level when problems or questions arise;
- to establish the circuit competition calendar;
- to arrange for courtrooms, judges, and attorneys for local competitions;
- to inform and attempt to recruit all schools in the circuit;
- to work with the local Bar Associations to set court dates, recruit attorney advisors, and establish local guidelines;
- to arrange general training sessions if necessary.

**The role of the individual school/teacher coach is:**

- to DEMONSTRATE that winning is secondary to learning;
- to coach and mentor students about the “real-world” aspect of judging in competitions;
- to teach sportsmanship, team etiquette and courtroom decorum;
- to recruit students for the team;
- to arrange training sessions and scrimmages;
- to arrange transportation to and from competitions
- to supervise the team during practices and competitions;
- to work with partners to recruit attorney advisors;
- to ensure that the team arrives at all scheduled mock trial competitions.



## Mock Trial State Champions

2013-2014  
Richard Montgomery High School, Montgomery County

2012-2013  
Annapolis High School, Anne Arundel County

2011-2012  
The Park School, Baltimore County

2010-2011  
The Park School, Baltimore County

2009-2010  
Severna Park High School, Anne Arundel County

2008-2009  
Allegany High School, Allegany County

2007-2008  
Severna Park High School, Anne Arundel County

2006-2007  
Severn School, Anne Arundel County

2005 – 2006  
Severna Park High School, Anne Arundel County

2004-2005  
Richard Montgomery High School, Montgomery County

2003-2004  
The Park School, Baltimore County

2002-2003  
Elizabeth Seton High School, Prince George's County

2001-2002  
Towson High School, Baltimore County

2000-2001  
DeMatha Catholic High School, Prince George's County

1999-2000  
Broadneck High School, Anne Arundel County

1998-1999  
Towson High School, Baltimore County

1997-1998  
Pikesville High School, Baltimore County

1996-1997  
Suitland High School, Prince George's County

1995-1996  
Towson High School, Baltimore County

1994-1995  
Pikesville High School, Baltimore County

1993-1994  
Richard Montgomery High School, Montgomery County

1992-1993  
Elizabeth Seton High School, Prince George's County

1991-1992  
Oxon Hill High School, Prince George's County

1990-1991  
Westmar High School, Allegany County

1989-1990  
Bishop Walsh High School, Allegany County

1988-1989  
Lake Clifton/Eastern High School, Baltimore City

1987-1988  
Pikesville High School, Baltimore County

1986-1987  
Thomas S. Wootton High School, Montgomery County

1985-1986  
Old Mill High School, Anne Arundel County

1984-1985  
High Point High School, Prince George's County

1983-1984  
Worcester County Team

**TENNESSEE v. GARNER, etc., et al.**  
Supreme Court of the United States  
Argued October 30, 1984, Decided March 27, 1985  
105 S.Ct. 1694 – Nos. 83-1035, 83-1070

Father, whose unarmed son was shot by police officer as son was fleeing from the burglary of an unoccupied house, brought wrongful death action under the federal civil rights statute against the police officer who fired the shot, the police department and others. The United States District Court for the Western District of Tennessee, Harry W. Wellford, J., after remand, 600 F.2d 52, rendered judgment for defendants, and father appealed. The Court of Appeals for the Sixth Circuit, 710 F.2d 240, reversed and remanded. Certiorari was granted. The Supreme Court, Justice White, held that: (1) apprehension by use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement; (2) deadly force may not be used unless 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; (3) Tennessee statute under authority of which police officer fired fatal shot was unconstitutional insofar as it authorized use of deadly force against apparently unarmed, nondangerous fleeing suspect; and (4) the fact that unarmed suspect had broken into a dwelling at night did not automatically mean that he was dangerous.

Judgment of Court of Appeals affirmed and case remanded.

Justice O'Connor, with whom the Chief Justice and Justice Rehnquist joined, dissented, with opinion.

**\*\*1696 Syllabus\***

A Tennessee statute provides that if, after a police officer has given notice of an intent to arrest a criminal suspect, the suspect flees or forcibly resists, "the officer may use all the necessary means to effect the arrest." Acting under the authority of this statute, a Memphis police officer shot and killed appellee-respondent Garner's son as, after being told to halt, the son fled over a fence at night in the backyard of a house he was suspected of burglarizing. The officer used deadly force despite being "reasonably sure" the suspect was unarmed and thinking that he was 17 or 18 years old and of slight build. The father subsequently brought an action in Federal District Court, seeking damages under 42 U.S.C. § 1983 for asserted violations of his son's constitutional rights. The District Court held that the statute and the officer's actions were constitutional. The Court of Appeals reversed.

*Held:* The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against, as in this case, an apparently unarmed, nondangerous 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. Pp. 1699–1707.

(a) 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. Pp. 1699–1701.

(b) The Fourth Amendment, for purposes of this case, should not be construed in light of the common-law rule allowing the use of whatever force is necessary to effect the arrest of a fleeing felon. Changes in the legal and technological context mean that that rule is distorted almost beyond recognition when literally applied. Whereas felonies were formerly capital crimes, few are now, or can be, and many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Also, the common-law rule developed at a time when weapons were rudimentary. And, in light of the varied rules adopted in the States indicating a long-term movement away from the common-law rule, particularly in the police departments themselves, that rule is a dubious indicium of the constitutionality of the Tennessee statute. There is no indication that holding a police practice such as that authorized by the **\*\*1697** statute unreasonable will severely hamper

effective law enforcement. Pp. 1701–1706.

(c) While burglary is a serious crime, the officer in this case could not reasonably have believed that the suspect—young, slight, and unarmed—posed any threat. Nor does the fact that an unarmed suspect has broken into a dwelling at night automatically mean he is dangerous. Pp. 1706–1707. 710 F.2d 240 (CA6 1983), affirmed and remanded.

## Opinion

Justice WHITE delivered the opinion of the Court.

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless 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.

### I

At about 10:45 p.m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a “prowler inside call.” Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house. She told them she had heard glass breaking and that “they” or “someone” was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was appellee-respondent’s decedent, Edward Garner, stopped at a 6-foot-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner’s face and hands. He saw no sign of a weapon, and, though not certain, was “reasonably sure” and “figured” that Garner was unarmed. App. 41, 56; Record 219. He thought Garner was 17 or 18 years old and about 5’5” or 5’7” tall. While Garner was crouched at the base of the fence, Hymon called out “police, halt” and took a few steps toward him. Garner then began to climb over the fence. Convinced that if Garner made it over the fence he would elude capture, Hymon shot him. The bullet hit Garner in the back of the head. Garner was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body.

**\*\*1698** In using deadly force to prevent the escape, Hymon was acting under the authority of a Tennessee statute and pursuant to Police Department policy. The statute provides that “[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.” Tenn.Code Ann. § 40–7–108 (1982). The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. App. 140–144. The incident was reviewed by the Memphis Police Firearm’s Review Board and presented to a grand jury. Neither took any action. *Id.*, at 57.

Garner’s father then brought this action in the Federal District Court for the Western District of Tennessee, seeking damages under 42 U.S.C. § 1983 for asserted violations of Garner’s constitutional rights. The complaint alleged that the shooting violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. It named as defendants Officer Hymon, the Police Department, its Director, and the Mayor and city of Memphis. After a 3-day bench trial, the District Court entered judgment for all defendants. It dismissed the claims against the Mayor and the Director for lack of evidence. It then concluded that Hymon’s actions were authorized by the Tennessee statute, which in turn was constitutional. Hymon had employed the only reasonable and practicable means of preventing Garner’s escape. Garner had “recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon.” App. to Pet. for Cert. A10.

The Court of Appeals for the Sixth Circuit affirmed with regard to Hymon, finding that he had acted in good-faith reliance on the Tennessee statute and was therefore within the scope of his qualified immunity. 600 F.2d 52 (1979). It remanded for reconsideration of the possible liability of the city, however, in light of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, which had come down after the District Court’s decision. The District Court was directed to consider whether a city enjoyed a qualified immunity, whether the use of

deadly force and hollow point bullets in these circumstances was constitutional, and whether any unconstitutional municipal conduct flowed from a “policy or custom” as required for liability under *Monell*. 600 F.2d, at 54–55.

The District Court concluded that *Monell* did not affect its decision. While acknowledging some doubt as to the possible immunity of the city, it found that the statute, and Hymon’s actions, were constitutional. Given this conclusion, it declined to consider the “policy or custom” question. App. to Pet. for Cert. A37–A39.

The Court of Appeals reversed and remanded. 710 F.2d 240 (1983). It reasoned that the killing of a fleeing suspect is a “seizure” under the Fourth Amendment, and is therefore constitutional only if “reasonable.” The Tennessee statute failed as applied to this case because it did not adequately limit the use of deadly force by distinguishing between felonies of different magnitudes—“the facts, as found, did not justify the use of deadly force under the Fourth Amendment.” *Id.*, at 246. Officers cannot resort to deadly force unless they “have probable cause ... to believe that the suspect [has committed a felony and] poses a threat to the safety of the \*\*1699 officers or a danger to the community if left at large.” *Ibid.*

The State of Tennessee, which had intervened to defend the statute, see 28 U.S.C. § 2403(b), appealed to this Court. The city filed a petition for certiorari. We noted probable jurisdiction in the appeal and granted the petition. 465 U.S. 1098.

## II

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878. While it is not always clear just when minimal police interference becomes a seizure, see *United States v. Mendenhall*, 446 U.S. 544, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

### A

A police officer may arrest a person if he has probable cause to believe that person committed a crime. *E.g.*, *United States v. Watson*, 423 U.S. 411. Petitioners and appellant argue that if this requirement is satisfied the Fourth Amendment has nothing to say about *how* that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure “[w]e must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” We have described “the balancing of competing interests” as “the key principle of the Fourth Amendment.” Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out. (internal citations omitted).

Applying these principles to particular facts, the Court has held that governmental interests did not support a lengthy detention of luggage, *United States v. Place*, *supra*, an airport seizure not “carefully \*\*1700 tailored to its underlying justification,” *Florida v. Royer*, 460 U.S. 491, 500 (plurality opinion), surgery under general anesthesia to obtain evidence, *Winston v. Lee*, 470 U.S. 753 (1985), or detention for fingerprinting without probable cause, *Davis v. Mississippi*, 394 U.S. 721 (1969); *Hayes v. Florida*, 470 U.S. 811 (1985). On the other hand, under the same approach it has upheld the taking of fingernail scrapings from a suspect, *Cupp v. Murphy*, 412 U.S. 291 (1973), an unannounced entry into a home to prevent the destruction of evidence, *Ker v. California*, 374 U.S. 23 (1963), administrative housing inspections without probable cause to believe that a code violation will be found, *Camara v. Municipal Court*, *supra*, and a blood test of a drunken-driving suspect, *Schmerber v. California*, 384 U.S. 757 (1966). In each of these cases, the question was whether the totality of the circumstances justified a particular sort of search or seizure.

### B

The same balancing process applied in the cases cited above demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect’s fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. “Being able to arrest such individuals is a

condition precedent to the state's entire system of law enforcement." Brief for Petitioners 14.

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. Cf. *Delaware v. Prouse*, *supra*, 440 U.S., at 659. The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion. And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence **\*\*1701** does not support this thesis. The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. See *infra*, at 1704–1705. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases. See *Schumann v. McGinn*, 307 Minn. 446, 472 (1976) (Rogosheske, J., dissenting in part). Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life.

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. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster.

### III

#### A

It is insisted that the Fourth Amendment must be construed in light of the common-law rule, which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanor. As stated in Hale's posthumously published *Pleas of the Crown*:

"[I]f persons that are pursued by these officers for felony or the just suspicion thereof ... shall not yield themselves to **\*\*1702** these officers, but shall either resist or fly before they are apprehended or being apprehended shall rescue themselves and resist or fly, so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony." 2 M. Hale, H. Placitorum Coronae 85 (1736).

Most American jurisdictions also imposed a flat prohibition against the use of deadly force to stop a fleeing misdemeanor, coupled with a general privilege to use such force to stop a fleeing felon. (internal citations omitted).

The State and city argue that because this was the prevailing rule at the time of the adoption of the Fourth Amendment and for some time thereafter, and is still in force in some States, use of deadly force against a fleeing felon must be "reasonable." It is true that this Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity. (internal citations omitted). On the other hand, it "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton v. New York*, 445 U.S. 573, 591 (1980). Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.

## B

It has been pointed out many times that the common-law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death. “Though effected without the protections and formalities of an orderly trial and conviction, the killing of a resisting or fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspected.” American Law Institute, Model Penal Code § 3.07, Comment 3, p. 56 (hereinafter Model Penal Code Comment). Courts have also justified the common-law rule by emphasizing the relative dangerousness of felons. (internal citations omitted).

Neither of these justifications makes sense today. Almost all crimes formerly punishable by death no longer are or can be. See, *e.g.*, \*\*1703 (internal citations omitted). And while in earlier times “the gulf between the felonies and the minor offences was broad and deep,” 2 Pollock & Maitland 467, n. 3; *Carroll v. United States*, *supra*, 267 U.S., at 158, today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Wilgus, 22 Mich.L.Rev., at 572–573. These changes have undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life. They have also made the assumption that a “felon” is more dangerous than a misdemeanant untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.

There is an additional reason why the common-law rule cannot be directly translated to the present day. The common-law rule developed at a time when weapons were rudimentary. Deadly force could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk. Handguns were not carried by police officers until the latter half of the last century. L. Kennett & J. Anderson, *The Gun in America* 150–151 (1975). Only then did it become possible to use deadly force from a distance as a means of apprehension. As a practical matter, the use of deadly force under the standard articulation of the common-law rule has an altogether different meaning—and harsher consequences—now than in past centuries. See Wechsler & Michael, *A Rationale for the Law of Homicide*: I, 37 Colum.L.Rev. 701, 741 (1937).

One other aspect of the common-law rule bears emphasis. It forbids the use of deadly force to apprehend a misdemeanant, condemning such action as disproportionately severe. (internal citations omitted).

In short, though the common-law pedigree of Tennessee’s rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied.

## C

In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions. (internal citations omitted). The rules in the States are varied. See generally Comment, 18 Ga.L.Rev. 137, 140–144 (1983). Some 19 States have codified the common-law rule, though in two of these \*\*1704 the courts have significantly limited the statute. Four States, though without a relevant statute, apparently retain the common-law rule. Two States have adopted the Model Penal Code’s provision verbatim. Eighteen others allow, in slightly varying language, the use of deadly force only if the suspect has committed a felony involving the use or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested. Louisiana and Vermont, though without statutes or case law on point, do forbid the use of deadly force to prevent any but violent felonies. The remaining States either have no relevant statute or case law, or have positions that are unclear.

It cannot be said that there is a constant or overwhelming trend away from the common-law rule. In recent years, some States have reviewed their laws and expressly rejected abandonment of the \*\*1705 common-law rule. Nonetheless, the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States.

This trend is more evident and impressive when viewed in light of the policies adopted by the police departments themselves. Overwhelmingly, these are more restrictive than the common-law rule. C. Milton, J. Halleck, J. Lardner, & G. Abrecht, *Police Use of Deadly Force* 45–46 (1977). The Federal Bureau of

Investigation and the New York City Police Department, for example, both forbid the use of firearms except when necessary to prevent death or grievous bodily harm. *Id.*, at 40–41; App. 83. For accreditation by the Commission on Accreditation for Law Enforcement Agencies, a department must restrict the use of deadly force to situations where “the officer reasonably believes that the action is in defense of human life ... or in defense of any person in immediate danger of serious physical injury.” Commission on Accreditation for Law Enforcement Agencies, Inc., *Standards for Law Enforcement Agencies* 1–2 (1983) (italics deleted). A 1974 study reported that the police department regulations in a majority of the large cities of the United States allowed the firing of a weapon only when a felon presented a threat of death or serious bodily harm. Boston Police Department, Planning & Research Division, *The Use of Deadly Force by Boston Police Personnel* (1974), cited in *Mattis v. Schnarr*, 547 F.2d 1007 (CA8 1976), vacated as moot *sub nom. Ashcroft v. Mattis*, 431 U.S. 171 (1977). Overall, only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon; 86.8% explicitly do not. K. Matulia, *A Balance of Forces: A Report of the International Association of Chiefs of Police* 161 (1982) (table). See also Record 1108–1368 (written policies of 44 departments). See generally W. Geller & K. Karales, *Split-Second Decisions* 33–42 (1981); Brief for Police Foundation et al. as *Amici Curiae*. In light of the rules adopted by those who must actually administer them, the older and fading common-law view is a dubious indicium of the constitutionality of the Tennessee statute now before us.

#### D

Actual departmental policies are important for an additional reason. We would hesitate to declare a police practice of long standing “unreasonable” if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today. *Amici* noted that “[a]fter extensive research and consideration, [they] have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies.” *Id.*, at 11. The submission is that the obvious state interests in apprehension are not sufficiently served to warrant the use of lethal weapons against all fleeing felons. See *supra*, at 1700–1701, and n. 10.

Nor do we agree with petitioners and appellant that the rule we have adopted requires the police to make impossible, split-second evaluations of unknowable facts. See Brief for Petitioners 25; Brief for Appellant 11. We do not deny the **\*\*1706** practical difficulties of attempting to assess the suspect’s dangerousness. However, similarly difficult judgments must be made by the police in equally uncertain circumstances. See, e.g., *Terry v. Ohio*, 392 U.S., at 20, 27. Nor is there any indication that in States that allow the use of deadly force only against dangerous suspects, see nn. 15, 17–19, *supra*, the standard has been difficult to apply or has led to a rash of litigation involving inappropriate second-guessing of police officers’ split-second decisions. Moreover, the highly technical felony/misdemeanor distinction is equally, if not more, difficult to apply in the field. An officer is in no position to know, for example, the precise value of property stolen, or whether the crime was a first or second offense. Finally, as noted above, this claim must be viewed with suspicion in light of the similar self-imposed limitations of so many police departments.

#### IV

The District Court concluded that Hymon was justified in shooting Garner because state law allows, and the Federal Constitution does not forbid, the use of deadly force to prevent the escape of a fleeing felony suspect if no alternative means of apprehension is available. See App. to Pet. for Cert. A9–A11, A38. This conclusion made a determination of Garner’s apparent dangerousness unnecessary. The court did find, however, that Garner appeared to be unarmed, though Hymon could not be certain that was the case. *Id.*, at A4, A23. See also App. 41, 56; Record 219. Restated in Fourth Amendment terms, this means Hymon had no articulable basis to think Garner was armed.

In reversing, the Court of Appeals accepted the District Court’s factual conclusions and held that “the facts, as found, did not justify the use of deadly force.” 710 F.2d, at 246. We agree. Officer Hymon could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. Indeed, Hymon never attempted to justify his actions on any basis other than the need to prevent an escape. The District Court stated in passing that “[t]he facts of this case did not indicate to Officer Hymon that Garner was ‘non-dangerous.’” App. to Pet. for Cert. A34. This conclusion is not explained, and seems to be based solely on the fact that Garner had

broken into a house at night. However, the fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. Hymon did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

The dissent argues that the shooting was justified by the fact that Officer Hymon had probable cause to believe that Garner had committed a nighttime burglary. *Post*, at 1711, 1712. While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a “property” rather than a “violent” crime. See Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States 1 (1984).<sup>22</sup> Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. See also *Solem v. Helm*, 463 U.S. 277, 296–297. In fact, the available statistics demonstrate that burglaries only rarely involve physical violence. During the 10-year period from 1973–1982, only 3.8% of all burglaries involved violent crime. Bureau of Justice Statistics, **\*\*1707** Household Burglary 4 (1985). (internal citations omitted)

#### V

We wish to make clear what our holding means in the context of this case. The complaint has been dismissed as to all the individual defendants. The State is a party only by virtue of 28 U.S.C. § 2403(b) and is not subject to liability. The possible liability of the remaining defendants—the Police Department and the city of Memphis—hinges on *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, and is left for remand. We hold that the statute is invalid insofar as it purported to give Hymon the authority to act as he did. As for the policy of the Police Department, the absence of any discussion of this issue by the courts below, and the uncertain state of the record, preclude any consideration of its validity.

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

*So ordered.*

Justice O’CONNOR, with whom THE CHIEF JUSTICE and Justice REHNQUIST join, dissenting.

The Court today holds that the Fourth Amendment prohibits a police officer from using deadly force as a last resort to apprehend a criminal suspect who refuses to halt when fleeing the scene of a nighttime burglary. This conclusion rests on the majority’s balancing of the interests of the suspect and the public interest in effective law enforcement. *Ante*, at 1699. Notwithstanding the venerable common-law rule authorizing the use of deadly force if necessary to apprehend a fleeing felon, and continued acceptance of this rule by nearly half the States, *ante*, at 1703–1704, the majority concludes that Tennessee’s statute is unconstitutional inasmuch as it allows the use of such force to apprehend a burglary suspect who is not obviously armed or otherwise dangerous. Although the circumstances of this case are unquestionably tragic and unfortunate, our constitutional holdings must be sensitive both to the history of the Fourth Amendment and to the general implications of the Court’s reasoning. By disregarding the serious and dangerous nature of residential burglaries and the longstanding practice of many States, the Court effectively creates a Fourth Amendment right allowing a burglary suspect to flee unimpeded from a police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape. I do not believe that the Fourth Amendment supports such a right, and I accordingly dissent.

#### I

The facts below warrant brief review because they highlight the difficult, split-second decisions police officers must make in these circumstances. Memphis Police Officers Elton Hymon and Leslie Wright responded to a late-night call that a burglary was in progress at a private residence. When the officers arrived at the scene, the caller said that “they” were breaking into the house next door. App. in No. 81–5605 **\*\*1708** (CA6), p. 207. The officers found the residence had been forcibly entered through a window and saw lights on inside the house. Officer Hymon testified that when he saw the broken window he realized “that something was wrong inside,” *id.*, at 656, but that he could not determine whether anyone—either a burglar or a member of the household—was within the residence. *Id.*, at 209. As Officer Hymon walked behind the house, he heard a door slam. He saw Edward Eugene Garner run away from the house through the dark and cluttered backyard.



Garner crouched next to a 6-foot-high fence. Officer Hymon thought Garner was an adult and was unsure whether Garner was armed because Hymon “had no idea what was in the hand [that he could not see] or what he might have had on his person.” *Id.*, at 658–659. In fact, Garner was 15 years old and unarmed. Hymon also did not know whether accomplices remained inside the house. *Id.*, at 657. The officer identified himself as a police officer and ordered Garner to halt. Garner paused briefly and then sprang to the top of the fence. Believing that Garner would escape if he climbed over the fence, Hymon fired his revolver and mortally wounded the suspected burglar.

Appellee-respondent, the deceased’s father, filed a 42 U.S.C. § 1983 action in federal court against Hymon, the city of Memphis, and other defendants, for asserted violations of Garner’s constitutional rights. The District Court for the Western District of Tennessee held that Officer Hymon’s actions were justified by a Tennessee statute that authorizes a police officer to “use all the necessary means to effect the arrest,” if “after notice of the intention to arrest the defendant, he either flee or forcibly resist.” Tenn.Code Ann. § 40–7–108 (1982). As construed by the Tennessee courts, this statute allows the use of deadly force only if a police officer has probable cause to believe that a person has committed a felony, the officer warns the person that he intends to arrest him, and the officer reasonably believes that no means less than such force will prevent the escape. See *Johnson v. State*, 173 Tenn. 134. The District Court held that the Tennessee statute is constitutional and that Hymon’s actions as authorized by that statute did not violate Garner’s constitutional rights. The Court of Appeals for the Sixth Circuit reversed on the grounds that the Tennessee statute “authorizing the killing of an unarmed, nonviolent fleeing felon by police in order to prevent escape” violates the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. 710 F.2d 240, 244 (1983).

The Court affirms on the ground that application of the Tennessee statute to authorize Officer Hymon’s use of deadly force constituted an unreasonable seizure in violation of the Fourth Amendment. The precise issue before the Court deserves emphasis, because both the decision below and the majority obscure what must be decided in this case. The issue is not the constitutional validity of the Tennessee statute on its face or as applied to some hypothetical set of facts. Instead, the issue is whether the use of deadly force by Officer Hymon under the circumstances of this case violated Garner’s constitutional rights. Thus, the majority’s assertion that a police officer who has probable cause to seize a suspect “may not always do so by killing him,” *ante*, at 1700, is unexceptionable but also of little relevance to the question presented here. The same is true of the rhetorically stirring statement that “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.” *Ante*, at 1701. The question we must address is whether the Constitution allows the use of such force to apprehend a suspect who resists arrest by attempting to flee the scene of a nighttime burglary of a residence.

## II

For purposes of Fourth Amendment analysis, I agree with the Court that Officer **\*\*1709** Hymon “seized” Garner by shooting him. Whether that seizure was reasonable and therefore permitted by the Fourth Amendment requires a careful balancing of the important public interest in crime prevention and detection and the nature and quality of the intrusion upon legitimate interests of the individual. *United States v. Place*, 462 U.S. 696, 703. In striking this balance here, it is crucial to acknowledge that police use of deadly force to apprehend a fleeing criminal suspect falls within the “rubric of police conduct ... necessarily [involving] swift action predicated upon the on-the-spot observations of the officer on the beat.” *Terry v. Ohio*, 392 U.S. 1, 20. The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances. Moreover, I am far more reluctant than is the Court to conclude that the Fourth Amendment proscribes a police practice that was accepted at the time of the adoption of the Bill of Rights and has continued to receive the support of many state legislatures. Although the Court has recognized that the requirements of the Fourth Amendment must respond to the reality of social and technological change, fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when the Fourth Amendment was adopted are now constitutionally impermissible. (internal citations omitted- noting “impressive historical pedigree” of statute challenged under Fourth Amendment).

The public interest involved in the use of deadly force as a last resort to apprehend a fleeing burglary suspect relates primarily to the serious nature of the crime. Household burglaries not only represent the illegal entry into a person’s home, but also “pos[e] real risk of serious harm to others.” *Solem v. Helm*, 463 U.S. 277, 315–

316 (BURGER, C.J., dissenting). According to recent Department of Justice statistics, “[t]hree-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars.” Bureau of Justice Statistics Bulletin, Household Burglary 1 (January 1985). During the period 1973–1982, 2.8 million such violent crimes were committed in the course of burglaries. *Ibid.* Victims of a forcible intrusion into their home by a nighttime prowler will find little consolation in the majority’s confident assertion that “burglaries only rarely involve physical violence.” *Ante*, at 1707. Moreover, even if a particular burglary, when viewed in retrospect, does not involve physical harm to others, the “harsh potentialities for violence” inherent in the forced entry into a home preclude characterization of the crime as “innocuous, inconsequential, minor, or ‘nonviolent.’” *Solem v. Helm, supra*, at 316, (BURGER, C.J., dissenting). See also Restatement of Torts § 131, Comment *g* (1934) (burglary is among felonies that normally cause or threaten death or serious bodily harm); R. Perkins & R. Boyce, *Criminal Law* 1110 (3d ed. 1982) (burglary is dangerous felony that creates unreasonable risk of great personal harm).

Because burglary is a serious and dangerous felony, the public interest in the prevention and detection of the crime is of compelling importance. Where a police officer has probable cause to arrest a suspected burglar, the use of deadly force as a last resort might well be the only means of apprehending the suspect. With respect to a particular burglary, subsequent investigation simply cannot represent a substitute for immediate apprehension of the criminal suspect at the scene. See President’s Commission \*\*1710 on Law Enforcement and Administration of Justice, Task Force Report: The Challenge of Crime in a Free Society 97 (1967). Indeed, the Captain of the Memphis Police Department testified that in his city, if apprehension is not immediate, it is likely that the suspect will not be caught. App. in No. 81–5605 (CA6), p. 334. Although some law enforcement agencies may choose to assume the risk that a criminal will remain at large, the Tennessee statute reflects a legislative determination that the use of deadly force in prescribed circumstances will serve generally to protect the public. Such statutes assist the police in apprehending suspected perpetrators of serious crimes and provide notice that a lawful police order to stop and submit to arrest may not be ignored with impunity. (internal citations omitted).

The Court unconvincingly dismisses the general deterrence effects by stating that “the presently available evidence does not support [the] thesis” that the threat of force discourages escape and that “there is a substantial basis for doubting that the use of such force is an essential attribute to the arrest power in all felony cases.” *Ante*, at 1701. There is no question that the effectiveness of police use of deadly force is arguable and that many States or individual police departments have decided not to authorize it in circumstances similar to those presented here. But it should go without saying that the effectiveness or popularity of a particular police practice does not determine its constitutionality. Cf. *Spaziano v. Florida*, 468 U.S. 447, 464 (“The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws”). Moreover, the fact that police conduct pursuant to a state statute is challenged on constitutional grounds does not impose a burden on the State to produce social science statistics or to dispel any possible doubts about the necessity of the conduct. This observation, I believe, has particular force where the challenged practice both predates enactment of the Bill of Rights and continues to be accepted by a substantial number of the States.

Against the strong public interests justifying the conduct at issue here must be weighed the individual interests implicated in the use of deadly force by police officers. The majority declares that “[t]he suspect’s fundamental interest in his own life need not be elaborated upon.” *Ante*, at 1700. This blithe assertion hardly provides an adequate substitute for the majority’s failure to acknowledge the distinctive manner in which the suspect’s interest in his life is even exposed to risk. For purposes of this case, we must recall that the police officer, in the course of investigating a nighttime burglary, had reasonable cause to arrest the suspect and ordered him to halt. The officer’s use of force resulted because the suspected burglar refused to heed this command and the officer reasonably believed that there was no means short of firing his weapon to apprehend the suspect. Without questioning the importance of a person’s interest in his life, I do not think this interest encompasses a right to flee unimpeded from the scene of a burglary. Cf. *Payton v. New York*, 445 U.S. 573, 617, n. 14 (WHITE, J., dissenting) (“[T]he policeman’s hands should not be tied merely because of the possibility that the suspect will fail to cooperate with legitimate actions by law enforcement personnel”). The legitimate interests of the suspect in these circumstances are adequately accommodated by the Tennessee statute: to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the

valid order to halt.

A proper balancing of the interests involved suggests that use of deadly force as a last resort to apprehend a criminal suspect fleeing from the scene of a nighttime **\*\*1711** burglary is not unreasonable within the meaning of the Fourth Amendment. Admittedly, the events giving rise to this case are in retrospect deeply regrettable. No one can view the death of an unarmed and apparently nonviolent 15-year-old without sorrow, much less disapproval. Nonetheless, the reasonableness of Officer Hymon's conduct for purposes of the Fourth Amendment cannot be evaluated by what later appears to have been a preferable course of police action. The officer pursued a suspect in the darkened backyard of a house that from all indications had just been burglarized. The police officer was not certain whether the suspect was alone or unarmed; nor did he know what had transpired inside the house. He ordered the suspect to halt, and when the suspect refused to obey and attempted to flee into the night, the officer fired his weapon to prevent escape. The reasonableness of this action for purposes of the Fourth Amendment is not determined by the unfortunate nature of this particular case; instead, the question is whether it is constitutionally impermissible for police officers, as a last resort, to shoot a burglary suspect fleeing the scene of the crime.

Because I reject the Fourth Amendment reasoning of the majority and the Court of Appeals, I briefly note that no other constitutional provision supports the decision below. In addition to his Fourth Amendment claim, appellee-respondent also alleged violations of due process, the Sixth Amendment right to trial by jury, and the Eighth Amendment proscription of cruel and unusual punishment. These arguments were rejected by the District Court and, except for the due process claim, not addressed by the Court of Appeals. With respect to due process, the Court of Appeals reasoned that statutes affecting the fundamental interest in life must be "narrowly drawn to express only the legitimate state interests at stake." 710 F.2d, at 245. The Court of Appeals concluded that a statute allowing police use of deadly force is narrowly drawn and therefore constitutional only if the use of such force is limited to situations in which the suspect poses an immediate threat to others. *Id.*, at 246–247. Whatever the validity of Tennessee's statute in other contexts, I cannot agree that its application in this case resulted in a deprivation "without due process of law." Cf. *Baker v. McCollan*, 443 U.S. 137. Nor do I believe that a criminal suspect who is shot while trying to avoid apprehension has a cognizable claim of a deprivation of his Sixth Amendment right to trial by jury. See *Cunningham v. Ellington*, 323 F.Supp. 1072, 1075. Finally, because there is no indication that the use of deadly force was intended to punish rather than to capture the suspect, there is no valid claim under the Eighth Amendment. See *Bell v. Wolfish*, 441 U.S. 520. Accordingly, I conclude that the District Court properly entered judgment against appellee-respondent, and I would reverse the decision of the Court of Appeals.

### III

Even if I agreed that the Fourth Amendment was violated under the circumstances of this case, I would be unable to join the Court's opinion. The Court holds that deadly force may be used only if the suspect "threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Ante*, at 1701. The Court ignores the more general implications of its reasoning. Relying on the Fourth Amendment, the majority asserts that it is constitutionally unreasonable to *use* deadly force against fleeing criminal suspects who do not appear to pose a threat of serious physical harm to others. *Ibid.* By declining to limit its holding to the use of firearms, the Court unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk. Cf. *Los Angeles v. Lyons*, 461 U.S. 95.

Although it is unclear from the language of the opinion, I assume that the majority intends the word "use" to include only those circumstances in which the suspect is actually apprehended. Absent apprehension of the suspect, there is no "seizure" for Fourth Amendment purposes. I doubt that the Court intends to allow criminal suspects who successfully escape to return later with § 1983 claims against officers who used, albeit unsuccessfully, deadly force in their futile attempt to capture the fleeing suspect. The Court's opinion, despite its broad language, actually decides only that the shooting of a fleeing burglary suspect who was in fact neither armed nor dangerous can support a § 1983 action.

The Court's silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances. Cf. *Payton v. New York*, 445 U.S., at 619 (WHITE, J., dissenting). Police are given no guidance for determining which objects,

among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope, will justify the use of deadly force. The Court also declines to outline the additional factors necessary to provide “probable cause” for believing that a suspect “poses a significant threat of death or serious physical injury,” *ante*, at 1697, when the officer has probable cause to arrest and the suspect refuses to obey an order to halt. But even if it were appropriate in this case to limit the use of deadly force to that ambiguous class of suspects, I believe the class should include nighttime residential burglars who resist arrest by attempting to flee the scene of the crime. We can expect an escalating volume of litigation as the lower courts struggle to determine if a police officer’s split-second decision to shoot was justified by the danger posed by a particular object and other facts related to the crime. Thus, the majority opinion portends a burgeoning area of Fourth Amendment doctrine concerning the circumstances in which police officers can reasonably employ deadly force.

#### IV

The Court’s opinion sweeps broadly to adopt an entirely new standard for the constitutionality of the use of deadly force to apprehend fleeing felons. Thus, the Court “lightly brushe[s] aside,” *Payton v. New York, supra*, at 600, 100 S.Ct., at 1387, a long-standing police practice that predates the Fourth Amendment and continues to receive the approval of nearly half of the state legislatures. I cannot accept the majority’s creation of a constitutional right to flight for burglary suspects seeking to avoid capture at the scene of the crime. Whatever the constitutional limits on police use of deadly force in order to apprehend a fleeing felon, I do not believe they are exceeded in a case in which a police officer has probable cause to arrest a suspect at the scene of a residential burglary, orders the suspect to halt, and then fires his weapon as a last resort to prevent the suspect’s escape into the night. I respectfully dissent.

**Dethorne GRAHAM, Petitioner v. M.S. CONNOR et al.**

Supreme Court of the United States

Argued February 21, 1989, Decided May 15, 1989

109 S.Ct. 1865 – No. 87-6571

Diabetic brought § 1983 action seeking to recover damages for injuries allegedly sustained when law enforcement officers used physical force against him during course of investigatory stop. The United States District Court for the Western District of North Carolina, 644 F.Supp. 246, directed verdict for defendants. On appeal, the Court of Appeals, 827 F.2d 945, affirmed, and certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that claim that law enforcement officials have used excessive force in course of arrest, investigatory stop or other “seizure” of a person are properly analyzed under Fourth Amendment’s “objective reasonableness” standard.

Vacated and remanded.

Justice Blackmun concurred in part and concurred in the judgment and filed opinion in which Justices Brennan and Marshall joined.

**\*\*1866 Syllabus**

Petitioner Graham, a diabetic, asked his friend, Berry, to drive him to a convenience store to purchase orange juice to counteract the onset of an insulin reaction. Upon entering the store and seeing the number of people ahead of him, Graham hurried out and asked Berry to drive him to a friend’s house instead. Respondent Connor, a city police officer, became suspicious after seeing Graham hastily enter and leave the store, followed Berry’s car, and made an investigative stop, ordering the pair to wait while he found out what had happened in the store. Respondent back-up police officers arrived on the scene, handcuffed Graham, and ignored or rebuffed attempts to explain and treat Graham’s condition. During the encounter, Graham sustained multiple injuries. He was released when Connor learned that nothing had happened in the store. Graham filed suit in the District Court under 42 U.S.C. § 1983 against respondents, alleging that they had used excessive force in making the stop, in violation of “rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.” The District Court granted respondents’ motion for a directed verdict at the close of Graham’s evidence, applying a four-factor test for determining when excessive use of force gives rise to a § 1983 cause of action, which inquires, *inter alia*, whether the force was applied in a good-faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm. *Johnson v. Glick*, 481 F.2d 1028. The Court of Appeals affirmed, endorsing this test as generally applicable to all claims of constitutionally excessive force brought against government officials, rejecting Graham’s argument that it was error to require him to prove that the allegedly excessive force was applied maliciously and sadistically to cause harm, and holding that a reasonable \*\*1867 jury applying the *Johnson v. Glick* test to his evidence could not find that the force applied was constitutionally excessive.

*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. Pp. 1869–1873.

a) The notion that all excessive force claims brought under § 1983 are governed by a single generic standard is rejected. Instead, courts must identify the specific constitutional right allegedly infringed by the challenged application of force and then judge the claim by reference to the specific constitutional standard which governs that right. Pp. 1870–1871.

(b) Claims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other “seizure” of a free citizen are most properly characterized as invoking the protections of the Fourth Amendment, which guarantees citizens the right “to be secure in their persons ... against unreasonable seizures,” and must be judged by reference to the Fourth Amendment’s “reasonableness” standard. P. 1871.

(c) 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. Pp. 1871–1872.

(d) The *Johnson v. Glick* test applied by the courts below is incompatible with a proper Fourth Amendment analysis. The suggestion that the test’s “malicious and sadistic” inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances is rejected. Also rejected is the conclusion that because individual officers’ subjective motivations are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment, it cannot be reversible error to inquire into them in deciding whether force used against a suspect or arrestee violates the Fourth Amendment. The Eighth Amendment terms “cruel” and “punishments” clearly suggest some inquiry into subjective state of mind, whereas the Fourth Amendment term “unreasonable” does not. Moreover, the less protective Eighth Amendment standard applies only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. Pp. 1872–1873.

827 F.2d 945, (CA4 1987), vacated and remanded.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, STEVENS, O’CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. \_\_\_.

#### Opinion

Chief Justice REHNQUIST delivered the opinion of the Court.

This case requires us to decide what constitutional standard governs a free citizen’s claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other “seizure” of his person. We hold that such claims are properly analyzed under the Fourth Amendment’s “objective reasonableness” **\*\*1868** standard, rather than under a substantive due process standard.

In this action under 42 U.S.C. § 1983, petitioner Dethorne Graham seeks to recover damages for injuries allegedly sustained when law enforcement officers used physical force against him during the course of an investigatory stop. Because the case comes to us from a decision of the Court of Appeals affirming the entry of a directed verdict for respondents, we take the evidence hereafter noted in the light most favorable to petitioner. On November 12, 1984, Graham, a diabetic, felt the onset of an insulin reaction. He asked a friend, William Berry, to drive him to a nearby convenience store so he could purchase some orange juice to counteract the reaction. Berry agreed, but when Graham entered the store, he saw a number of people ahead of him in the check outline. Concerned about the delay, he hurried out of the store and asked Berry to drive him to a friend’s house instead.

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

In the ensuing confusion, a number of other Charlotte police officers arrived on the scene in response to Officer Connor’s request for backup. One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry’s pleas to get him some sugar. Another officer said: “I’ve seen a lot of people with sugar diabetes that never acted like this. Ain’t nothing wrong with the M.F. but drunk. Lock the S.B. up.” App. 42. Several officers then lifted Graham up from behind, carried him over to Berry’s car, and placed him face down on its hood. Regaining consciousness, Graham asked the officers to check in his wallet for a diabetic decal that he carried. In response, one of the officers told him to “shut up” and shoved his face down against the hood of the car. Four officers grabbed Graham and threw him headfirst into the police car. A friend of Graham’s brought some orange juice to the car, but the officers refused to let him have it. Finally,

Officer Connor received a report that Graham had done nothing wrong at the convenience store, and the officers drove him home and released him.

At some point during his encounter with the police, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day. He commenced this action under 42 U.S.C. § 1983 against the individual officers involved in the incident, all of whom are respondents here, alleging that they had used excessive force in making the investigatory stop, in violation of “rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.” Complaint ¶ 10, App. 5. The case was tried before a jury. At the close of petitioner’s evidence, respondents moved for a directed verdict. In ruling on that motion, the District Court considered the following **\*\*1869** four factors, which it identified as “[t]he factors to be considered in determining when the excessive use of force gives rise to a cause of action under § 1983”: (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) “[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.” 644 F.Supp. 246, 248 (WDNC 1986). Finding that the amount of force used by the officers was “appropriate under the circumstances,” that “[t]here was no discernable injury inflicted,” and that the force used “was not applied maliciously or sadistically for the very purpose of causing harm,” but in “a good faith effort to maintain or restore order in the face of a potentially explosive situation,” *id.*, at 248–249, the District Court granted respondents’ motion for a directed verdict.

A divided panel of the Court of Appeals for the Fourth Circuit affirmed. 827 F.2d 945 (1987). The majority ruled first that the District Court had applied the correct legal standard in assessing petitioner’s excessive force claim. *Id.*, at 948–949. Without attempting to identify the specific constitutional provision under which that claim arose, the majority endorsed the four-factor test applied by the District Court as generally applicable to all claims of “constitutionally excessive force” brought against governmental officials. *Id.*, at 948. The majority rejected petitioner’s argument, based on Circuit precedent, that it was error to require him to prove that the allegedly excessive force used against him was applied “maliciously and sadistically for the very purpose of causing harm.” *Ibid.* Finally, the majority held that a reasonable jury applying the four-part test it had just endorsed to petitioner’s evidence “could not find that the force applied was constitutionally excessive.” *Id.*, at 949–950. The dissenting judge argued that this Court’s decisions in *Terry v. Ohio*, 392 U.S. 1, and *Tennessee v. Garner*, 471 U.S. 1, required that excessive force claims arising out of investigatory stops be analyzed under the Fourth Amendment’s “objective reasonableness” standard. 827 F.2d, at 950–952. We granted certiorari, 488 U.S. 816, and now reverse.

In *Johnson v. Glick*, 481 F.2d 1028, cert. denied, the Court of Appeals for the Second Circuit addressed a § 1983 damages claim filed by a pretrial detainee who claimed that a guard had assaulted him without justification. In evaluating the detainee’s claim, Judge Friendly applied neither the Fourth **\*\*1870** Amendment nor the Eighth, the two most textually obvious sources of constitutional protection against physically abusive governmental conduct. Instead, he looked to “substantive due process,” holding that “quite apart from any ‘specific’ of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.” 481 F.2d, at 1032. As support for this proposition, he relied upon our decision in *Rochin v. California*, 342 U.S. 165, which used the Due Process Clause to void a state criminal conviction based on evidence obtained by pumping the defendant’s stomach. 481 F.2d, at 1032. If a police officer’s use of force which “shocks the conscience” could justify setting aside a criminal conviction, Judge Friendly reasoned, a correctional officer’s use of similarly excessive force must give rise to a due process violation actionable under §1983. *Ibid.* Judge Friendly went on to set forth four factors to guide courts in determining “whether the constitutional line has been crossed” by a particular use of force—the same four factors relied upon by the courts below in this case. *Id.*, at 1033.

In the years following *Johnson v. Glick*, the vast majority of lower federal courts have applied its four-part “substantive due process” test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard. Indeed, many courts have seemed to assume, as did the courts below in this case, that there is a generic “right” to be free from excessive force, grounded not in any particular constitutional provision but rather in “basic principles of § 1983

jurisprudence.”

We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard. As we have said many times, § 1983 “is not itself a source of substantive rights,” but merely provides “a method for vindicating federal rights elsewhere conferred.” *Baker v. McCollan*, 443 U.S. 137, 144, n. 3. In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. See *id.*, at 140 (“The first inquiry in any § 1983 suit” is “to isolate the precise constitutional violation with which [the defendant] is charged”).<sup>2</sup> In most instances, **\*\*1871** that will be either the Fourth Amendment’s prohibition against unreasonable seizures of the person, or the Eighth Amendment’s ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized “excessive force” standard. See *Tennessee v. Garner*, *supra*, 471 U.S., at 7–22 (claim of excessive force to effect arrest analyzed under a Fourth Amendment standard); *Whitley v. Albers*, 475 U.S. 312, 318–326 (claim of excessive force to subdue convicted prisoner analyzed under an Eighth Amendment standard).

Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right “to be secure in their persons ... against unreasonable ... seizures” of the person. This much is clear from our decision in *Tennessee v. Garner*, *supra*. In *Garner*, we addressed a claim that the use of deadly force to apprehend a fleeing suspect who did not appear to be armed or otherwise dangerous violated the suspect’s constitutional rights, notwithstanding the existence of probable cause to arrest. Though the complaint alleged violations of both the Fourth Amendment and the Due Process Clause, see 471 U.S., at 5, we analyzed the constitutionality of the challenged application of force solely by reference to the Fourth Amendment’s prohibition against unreasonable seizures of the person, holding that the “reasonableness” of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out. *Id.*, at 7–8. Today we make explicit what was implicit in *Garner*’s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the Fourth Amendment and its “reasonableness” standard, rather than under a “substantive due process” approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of “substantive due process,” must be the guide for analyzing these claims.

Determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires 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. *Id.*, at 8, quoting *United States v. Place*, 462 U.S. 696, 703. Our Fourth Amendment jurisprudence **\*\*1872** has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. See *Terry v. Ohio*, 392 U.S., at 22–27. Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” *Bell v. Wolfish*, 441 U.S. 520, 559, however, its proper application 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 officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee v. Garner*, 471 U.S., at 8–9. (the question is “whether the totality of the circumstances justifie[s] a particular sort of ... seizure”).

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Terry v. Ohio*, *supra*, 392 U.S., at 20–22. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, *Hill v. California*, 401 U.S. 797, nor by the mistaken execution of a valid search warrant on the wrong premises, *Maryland v. Garrison*, 480 U.S. 79. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” *Johnson v. Glick*, 481 F.2d, at 1033, violates the Fourth Amendment. The calculus



of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. As in other Fourth Amendment contexts, however, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *Scott v. United States*, 436 U.S. 128, 137–139; see also *Terry v. Ohio*, *supra*, 392 U.S., at 21 (in analyzing the reasonableness of a particular search or seizure, “it is imperative that the facts be judged against an objective standard”). An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional. See *Scott v. United States*, *supra*, 436 U.S., at 138, citing *United States v. Robinson*, 414 U.S. 218.

Because petitioner’s excessive force claim is one arising under the Fourth Amendment, the Court of Appeals erred in analyzing it under the four-part *Johnson v. Glick* test. That test, which requires consideration of whether the individual officers acted in “good faith” or “maliciously and sadistically for the very purpose of causing harm,” is incompatible with a proper Fourth Amendment analysis. We do not agree with the Court of Appeals’ suggestion, see 827 F.2d, at 948, that the “malicious and sadistic” inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances. Whatever the empirical correlations between “malicious and sadistic” behavior and objective unreasonableness may be, the fact remains that the “malicious and sadistic” factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is “unreasonable” under the Fourth **\*\*1873** Amendment. Nor do we agree with the Court of Appeals’ conclusion, see *id.*, at 948, n. 3, that because the subjective motivations of the individual officers are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment, see *Whitley v. Albers*, 475 U.S., at 320–321, it cannot be reversible error to inquire into them in deciding whether force used against a suspect or arrestee violates the Fourth Amendment. Differing standards under the Fourth and Eighth Amendments are hardly surprising: the terms “cruel” and “punishments” clearly suggest some inquiry into subjective state of mind, whereas the term “unreasonable” does not. Moreover, the less protective Eighth Amendment standard applies “only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.” *Ingraham v. Wright*, 430 U.S. 651, 671, n. 40. The Fourth Amendment inquiry is one of “objective reasonableness” under the circumstances, and subjective concepts like “malice” and “sadism” have no proper place in that inquiry. Because the Court of Appeals reviewed the District Court’s ruling on the motion for directed verdict under an erroneous view of the governing substantive law, its judgment must be vacated and the case remanded to that court for reconsideration of that issue under the proper Fourth Amendment standard.

*It is so ordered.*

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, concurring in part and concurring in the judgment.

I join the Court’s opinion insofar as it rules that the Fourth Amendment is the primary tool for analyzing claims of excessive force in the prearrest context, and I concur in the judgment remanding the case to the Court of Appeals for reconsideration of the evidence under a reasonableness standard. In light of respondents’ concession, **\*\*1874** however, that the pleadings in this case properly may be construed as raising a Fourth Amendment claim, see Brief for Respondents 3, I see no reason for the Court to find it necessary further to reach out to decide that prearrest excessive force claims are to be analyzed under the Fourth Amendment *rather than* under a substantive due process standard. I also see no basis for the Court’s suggestion, *ante*, at 1871, that our decision in *Tennessee v. Garner*, 471 U.S. 1, implicitly so held. Nowhere in *Garner* is a substantive due process standard for evaluating the use of excessive force in a particular case discussed; there is no suggestion that such a standard was offered as an alternative and rejected.

In this case, petitioner apparently decided that it was in his best interest to disavow the continued applicability of substantive due process analysis as an alternative basis for recovery in prearrest excessive force cases. See Brief for Petitioner 20. His choice was certainly wise as a matter of litigation strategy in his own case, but does not (indeed, cannot be expected to) serve other potential plaintiffs equally well. It is for that reason that the Court would have done better to leave that question for another day. I expect that the use

of force that is not demonstrably unreasonable under the Fourth Amendment only rarely will raise substantive due process concerns. But until I am faced with a case in which that question is squarely raised, and its merits are subjected to adversary presentation, I do not join in foreclosing the use of substantive due process analysis in prearrest cases.

**STATE of Maryland v. Stephen PAGOTTO, 361 Md. 528**

Court of Appeals of Maryland

Nov. 16, 2000

No. 99, Sept. Term, 1999

Defendant police officer was convicted after jury trial in the Circuit Court, Baltimore City, John C. Byrnes, J., of involuntary manslaughter and reckless endangerment in connection with incident in which a bullet from his handgun killed a motorist who was driving a vehicle that defendant was attempting to stop. Defendant appealed. The Court of Special Appeals reversed, 127 Md.App. 271, 732 A.2d 920. On grant of state's petition for a writ of certiorari, the Court of Appeals, Raker, J., held that evidence was insufficient to support convictions.

Court of Special Appeals affirmed.  
dissenting opinion.

Bell, C.J., filed a

**Opinion**

RAKER, Judge.

Respondent, Stephen Pagotto, a sergeant with the Baltimore City Police Department, was convicted of involuntary manslaughter and two counts of reckless endangerment in violation of Maryland Code (1957, 1992 Repl.Vol.) Article 27, § 120(a) following a jury trial in the Circuit Court for Baltimore City. Pagotto noted a timely appeal to the Court of Special Appeals, contending that the State presented legally insufficient evidence at trial to sustain his convictions. The Court of Special Appeals agreed with Pagotto and reversed the judgment of conviction. *See Pagotto v. State*, 127 Md.App. 271. We granted the State's petition for a writ of certiorari. We shall hold that the evidence was insufficient to support Pagotto's convictions. Accordingly, we shall affirm the judgment of the Court of Special Appeals.

**I.**

We are mindful that, in an appeal based upon insufficiency of evidence, it is not the function of the appellate court to undertake a review of the record that would amount to a retrial of the case. *See State v. Albrecht*, 336 Md. 475, 478. Rather, we must view the evidence in the light most favorable to the prosecution, and the judgment can be reversed only if we find that no rational trier of fact could have found the essential elements of the crime. *See* \*534 *Jackson v. Virginia*, 443 U.S. 307, 319; *Albrecht*, 336 Md. at 478. Fundamentally, our concern is not with whether the trial court's verdict is in accord with the weight of the evidence, *see Jackson*, 443 U.S. at 319, but only with whether the verdict was supported by sufficient evidence—evidence which could fairly convince a rational trier of fact of the defendant's guilt beyond a reasonable doubt. *See Albrecht*, 336 Md. at 479.

In other words, in a sufficiency of the evidence challenge, the appellate court is not to ask whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Rather, the court only asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. (internal citations omitted).

**II.**

The facts of this case are undisputed until the critical moments leading up to the discharge of Respondent's weapon. Sergeant Pagotto and his partner, Officer Stephen Wagner, were both assigned to the Gun Recovery Unit of the Baltimore City Police Department (hereinafter "Department"). The mission of the Gun Recovery Unit was to remove guns from the streets of Baltimore City. Each officer assigned to this unit was trained to look for people with certain characteristics that police profiles indicated were more likely to carry guns. The Gun Recovery Unit frequently used pretextual traffic stops to accomplish their mission. *See Whren v. United States*, 517 U.S. 806, 813, (holding no Fourth Amendment violation if police have probable cause to believe driver of automobile is violating traffic regulation, but the stop is to accomplish some other investigative purpose). \*535 The incident in question occurred on the night of February 7, 1996. Officers Pagotto and Wagner were assigned to the Northeastern District of Baltimore in an area called "Little Eastern." This area was selected because it has a high concentration of narcotics trafficking and gun related violence. Pagotto and Wagner were dressed in plain clothes that evening, although they were driving a "marked Tracker," making

them easily identifiable as police officers.

At approximately 8:30 p.m., the two officers spotted a white Subaru in the 2600 block of Kirk Avenue. Although the officers stopped the car because the license was displayed improperly, they both testified that their subjective motive in stopping the car was to look for guns.<sup>3</sup> According to Sergeant Pagotto, they decided to stop this particular car because it was in a high drug and gun area and looked suspicious. Officer Pagotto explained the significance of the license tag:

A lot of times people who are going to conceal what they are doing like dealing narcotics or doing a drive-by shooting or even if it is a stolen car, guns and narcotics are synonymous with each other, and they just ... [remove the tag] to conceal their identification.

In response to the officers' signal to stop, the Subaru pulled over on the 2700 Block of Kirk Avenue. Sergeant Pagotto stopped the Tracker about ten feet behind the Subaru. Both officers left the Tracker and began to approach the Subaru. Officer Pagotto approached the driver's side and Officer Wagner approached the passenger's side. Three people were in the Subaru: Preston Barnes, Damien Jackson, and Ali Austin. Officer Wagner testified that, as they approached the car, he noticed that all three persons were "very excited and moving." \*536 Officer Pagotto testified that, when he was about five feet from the back of the car, he saw the driver of the car, Preston Barnes, tilt his head back and drop his shoulder. As part of his training for the Gun Recovery Unit, Pagotto had been instructed that movements such as these were consistent with the picking up of a weapon or the placing of one under the seat. It was at this time that Pagotto withdrew from his holster his police weapon, a Glock 17 automatic.

Damien Jackson, testifying for the prosecution, stated that, earlier that evening, the three men in the car had stopped to pick up ten bags of "Ready Rock," a form of cocaine. He further testified that, when the police signaled for them to pull over, Preston Barnes exclaimed, "Oh shit, I'm dirty," referring to the fact that he was carrying drugs. Barnes was on probation for a drug conviction, and Jackson testified that Barnes knew that any new convictions would constitute a violation of probation and could result in a minimum of five years in prison.

Jackson also explained an escape plan that he and Barnes had worked out in case they were ever caught in such a situation. The plan was that, if they were stopped while carrying drugs, they would pull the car over and bring it to a stop. The officers would then presumably stop their vehicle and begin to approach the car. When the officers came close to the car, Barnes would "rev up" the engine and take off. The two figured that they would be able to make a clean getaway by the time that the officers made it back to their vehicle, started it, and began pursuit. It appears that it was this plan that Barnes was attempting to implement on the night in question.

As the two officers approached the car, it began drifting forward slightly. Officer Wagner originally believed that it was drifting because the car had parked on a downslope along Kirk Avenue. Both officers were yelling orders at the driver of the car "to stop, put on the brake, put the car in park." Sergeant Pagotto then arrived at the driver's side door with his weapon drawn in his right hand. Two separate versions of \*537 the precise events from this point forward were provided by Sergeant Pagotto, on the one hand, and Damien Jackson and Ali Austin, on the other hand.

Damien Jackson testified that, when Sergeant Pagotto arrived at the driver's side door, Pagotto opened the door and then stepped back two or three feet from the car. He further testified that, as Pagotto stepped back from the door, Pagotto was yelling at Barnes to "[s]top the car, stop the car, or I am going to shoot." It was at this point that Barnes shifted from park to drive and pressed down on the gas pedal. Because there was a car parked in front of the Subaru, Barnes had to move the car toward the center of Kirk Avenue and Sergeant Pagotto. As he did so, Jackson and Austin heard a shot, then heard Barnes exclaim, "Oh shit," and slump over. The car proceeded to crash into a parked car down the street. When it did so, both Jackson and Austin fled the scene.

Sergeant Pagotto's testimony differed slightly. He testified that, as he approached the car, he withdrew his

gun from the holster, holding it in his right hand with his finger on the slide of the gun.<sup>4</sup> He then took another two or three steps, and, when he neared the door, the driver opened the door slightly. Sergeant Pagotto had seen a training video that instructed officers to be cautious when a car door opens slightly because many officers had been killed in similar situations. Fearing that he was about to be ambushed by Barnes, he instinctively moved forward to attempt to grab Barnes's arm. Pagotto testified that he had been trained to go into an ambush because it draws other fire towards the attacker.

Pagotto struggled with Barnes with his left hand while his police weapon remained outside the vehicle in his right hand, along his side. Barnes managed to rip his arms away from Pagotto and toward the console. Fearing that Barnes was going for a gun, Pagotto attempted to disengage himself from \*538 the car. Pagotto testified that, at this point, he was stuck halfway in the car with his feet outside of the car while the car was rolling forward. When Pagotto heard the engine start, he yelled to Wagner to "get the Tracker," meaning the police vehicle. Pagotto testified that he was then able to free himself of the Subaru just before Barnes put the car into gear. When the Subaru moved out toward him, his hand struck the side of the car, knocking him to the ground, and causing his gun to discharge. Officer Wagner testified that it was while he was getting the Tracker that he heard the shot. He turned around to see Sergeant Pagotto's body falling forward from a position against the car.

The bullet entered the left rear passenger window through the lower left hand corner. It passed between the post that separates the front and rear door and the driver's seat. It then struck the body of Preston Barnes just under his left armpit and continued through his chest, piercing his heart and lung. The trajectory of the lethal bullet was consistent with Sergeant Pagotto's testimony.

### III.

The chief question in this case is whether Pagotto's conduct on that night, "considering all of the factors of the case, was such that it amounted to 'wanton or reckless disregard for human life.'" (internal citations omitted). As such, we must determine if the State produced sufficient evidence from which a rational trier of fact could conclude that Pagotto had not acted as "a reasonable police officer, similarly situated." *Albrecht*, 336 Md. at 501.

The State argues that Pagotto was grossly negligent by violating Baltimore City Police Department guidelines in three respects: (1) closing on the victim with his gun drawn; (2) \*539 attempting a one-armed vehicular extrication with his gun in the other hand; and (3) placing his trigger finger on the slide of the gun, rather than under the trigger guard as he approached the decedent's car. Pagotto contends that each of these acts was reasonable under the circumstances.

Each side presented several expert witnesses. The State called four key witnesses as experts on police procedure. They were Major Francis Melcavage, a former instructor at the Baltimore City Training Academy and an expert in defense tactics and use of force; Sergeant Craig Meier, a member of the Firearms Training Unit of the Baltimore City Police Education and Training Division and an expert in the use of force and firearms; Sergeant Timothy Vittetoe of the Maryland State Police, an expert in use of force, defense tactics, police training, and police procedures; and John L. Meiklejohn, an expert in defense tactics, training points and procedures, standards of police conduct, and use of force. We shall review the evidence presented at trial, in the light most favorable to the State, to determine if any rational trier of fact could have convicted the defendant of the crimes charged.

### A.

The first alleged grossly negligent act is that Pagotto closed on the victim with his gun drawn. It is first important to note that three of the State's experts stated that they did not feel that it was inappropriate for Pagotto to draw his gun when he did; the only problem was that he should not have closed with his gun drawn. Sergeant Meier testified that an officer is justified in drawing his weapon anytime that he has a reasonable belief that there is a threat of death or serious injury to himself or others and that Sergeant Pagotto was, therefore, justified in drawing his weapon when he did. He testified, however, that it is inappropriate for an officer to close with his weapon drawn and that it is a violation of general police \*540 guidelines. Once Pagotto perceived a threat, he should have returned to his car and called for backup, rather than closing on Barnes. He explained that the rationale for the policy is the concern that, should the officer come too close to a suspect, he could become engaged in a struggle and accidentally discharge his weapon.

John Meiklejohn corroborated Sergeant Meier's testimony, stating that Pagotto was justified in drawing his weapon, but should have retreated to his vehicle upon perceiving a threat. Sergeant Vittetoe's testimony differed only slightly. He testified that, once Pagotto perceived a threat, he should not have drawn his weapon, should not have continued to close, and should have sought cover:

THE COURT: [H]e should have stopped closing as soon as he determined or apprehended a danger, correct?

[VITTETOE]: As he approached and he made the determination that the actions of the driver could either put his life in jeopardy and/or his partner's, indicated in his report, his actions of closing should have ceased at that point. Two things he should have done: disengaged making greater distance and also sought an area of cover or concealment for his protection and also notify his partner of what he was dealing with at that point so his partner could better defend himself.

The one State witness with a different opinion was Major Francis Melcavage. He testified that, while it is inadvisable for an officer to close with a weapon in hand, it is inadvisable only because of the danger that it poses to the officer and that an officer may, therefore, do so if he chooses:

[DEF. ATT'Y]: So it would be in your mind a violation of a policy or guideline to come within five or six feet of a subject with your gun drawn if you suspected they had a weapon?

[MELCAVAGE]: I don't think that policy has even been delineated. I wouldn't say it was a violation of policy, I would say it was probably inadvisable action.

\*541 [DEF. ATT'Y]: Well, but there is a policy that you are familiar with that you should not close with your weapon in your hand, right? Isn't that what you are saying?

[MELCAVAGE]: No, not that I am aware of.

[DEF. ATT'Y]: All right. So you can close with a weapon in your hand?

[MELCAVAGE]: Yes.

The defense presented several witnesses addressing the question whether Sergeant Pagotto was reasonable in closing with his weapon drawn. Detective Jeffries, an original member of the Gun Recovery Unit and an expert in defensive strategies and Gun Recovery Unit practices, testified that, while the Department has a guideline to the contrary, an officer must determine if it is appropriate to close with a drawn gun on a case-by-case basis and that it is within the officer's discretion to do so if he deems it appropriate. In addition, he testified that he has been in twenty-five to fifty situations in which he or someone that he was working with had closed with a drawn gun. Lieutenant Charles J. Key, author of the guidelines that Pagotto had allegedly violated, also testified for the defense. He stated that Pagotto had violated the guideline against closing with a drawn gun. He went on to state, however, that guidelines are discretionary and that Pagotto had acted reasonably under the circumstances.

## B.

The second alleged violation is that Pagotto attempted a one-armed vehicular extrication with his gun in the other hand. The only testimony that described any contact between Preston Barnes and Sergeant Pagotto was from Sergeant Pagotto. He characterized this confrontation in a far different light than that in which the State had characterized it. According to Sergeant Pagotto, he did not attempt to extricate Preston Barnes; rather, he was attempting to defend himself from what he felt was an oncoming attack. Pagotto's testimony on direct examination was as follows:

\*542 [DEF. ATT'Y]: What was the next thing you did after pulling the gun from the holster?

[PAGOTTO]: I took about two or three more steps toward the car, and got to about the back door on the driver's side.... [T]hat is when the door sprung open.

[DEF. ATT'Y]: What were you thinking when that door sprung open?

[PAGOTTO]: I was thinking I was going to get shot.

[DEF. ATT'Y]: Why?

[PAGOTTO]: Because I have had training and saw videos where a ... door would open up ... and there would be a shotgun right inside the door ... the shotgun goes off and kills the officer. I also saw a video showing officers being **\*\*105** killed as they approached. I just thought at that point in time, I was going to get killed.

\*\*\*\*\*

[DEF. ATT'Y]: Why didn't you turn and run back to the Tracker?

[PAGOTTO]: I didn't think of it at the time.

[DEF. ATT'Y]: What did you do instead?

[PAGOTTO]: I went towards the driver.

[DEF. ATT'Y]: And why did you do this?

\* \* \* \* \*

[PAGOTTO]: It was the best plan of attack that way to go in and get ahold of him.

[DEF. ATT'Y]: And what are you basing that on when you say it was the best plan of attack?

[PAGOTTO]: Years of experience, and all the time in a possible ambush situation, I was always trained to go into the ambush, drawing any fire towards that person. It was just instinct, I mean, I pushed the door out of the way and grabbed his hand.

Major Melcavage's testimony was most critical of Sergeant Pagotto's attempted extrication. Major Melcavage, who \*543 teaches control tactics and vehicular extrications at the police academy, stated that an officer should always holster his weapon before attempting to remove a driver. He testified:

[STATE'S ATT'Y]: If you have a gun in your hand and you intend to remove a driver from a vehicle through the use of a control tactic, what should you do with the weapon?

[MELCAVAGE]: You would have to holster the weapon.

[STATE'S ATT'Y]: And why is that?

[MELCAVAGE]: Because you need two hands to gain control of an individual or to apply a technique as taught at the academy as I taught. And by keeping the gun in the situation, you are unnecessarily endangering yourself. They can take the gun from you just as well, the subject could take the gun from you just as well as you using it on them, or the gun could go off and you could injure innocent bystanders, yourself, or the subject.

[STATE'S ATT'Y]: Okay. Would that fact change whether the vehicle was stationary or moving?

[MELCAVAGE]: No, sir.

[STATE'S ATT'Y]: If you have your weapon drawn and it is not safe to holster it in order to use the control tactic, what should you do?

[MELCAVAGE]: It is not safe to holster them, you need to seek cover and call for assistance, call for other officers. You have to disengage.

Sergeant Vittetoe testified on this subject as well. He stated that an officer should always holster his weapon before struggling with a suspect because two hands are needed to control a suspect. In addition, the holstered weapon protects against the eventuality that the weapon could be used against the officer. He was, therefore, of the opinion that Sergeant Pagotto should not have attempted to reach into the car with a gun in one of his hands. On cross examination, however, Sergeant Vittetoe testified that, prior to 1994, Maryland State Police Officers were permitted to grab a suspect with one hand while the officer had the service weapon in the other hand. \*544 Detective Kenneth Jeffries, testifying for the defense, stated that it is within an officer's discretion whether to attempt to extricate a suspect with a drawn gun. Lieutenant Key testified that the guidelines are designed for departmental use only and are not to be used as a basis for criminal charges. He further testified that, in evaluating officers, the Department gives the officers wide discretion in applying the guidelines.

### C.

The final alleged violation is that Sergeant Pagotto had his finger on the slide of the gun rather than below the trigger guard as required by Baltimore City Police guidelines. Major Melcavage testified that the current Baltimore City Police Department guidelines require an officer to place his trigger finger below the trigger guard. He further testified, however, that, when Sergeant Pagotto was trained in 1980, the Department issued revolvers. The guidelines at that time did not address the location or placement of the officer's trigger finger. He also stated that the Department first issued a guideline with respect to the trigger finger in 1990, when the Department switched to the Glock 17. He testified that, in 1990, police officers were taught to keep their trigger finger on the slide of the gun. According to Major Melcavage, this standard was changed to the current one sometime in 1993 or 1994. Sergeant Meir essentially corroborated the testimony of Major Melcavage in this respect and also stated that Baltimore City is the only police department in Maryland that has this particular requirement.

Captain Meiklejohn testified that Montgomery County officers, unlike the officers in Baltimore City, are still trained to keep their trigger finger on the slide of the weapon. He further testified that the reason that Montgomery County officers are taught to keep their finger on the slide is because keeping the finger below

the trigger guard can slow reaction time in a critical situation. Sergeant Vittetoe also testified as to the Maryland State Police Department's practices in this regard:

\*545 [DEF. ATT'Y]: And isn't it true that the Maryland State Police Department trains their officers to also keep their finger in a ready position along the slide of the gun as opposed to under the trigger guard, correct?

[VITTETOE]: That is correct, ma'am.

Lieutenant Key, author of the Baltimore City Police Department guidelines requiring the placement of the trigger finger below the trigger guard, testified for the defense. He testified that Baltimore City is the only police department in the State that requires the placement of the trigger finger below the guard. He further testified that, because Sergeant Pagotto had originally been trained to keep his trigger finger on the slide of the gun, his "muscle memory" would have caused him, in a stress situation, to go back to his original training and past experience. He testified:

Your body trains itself to do certain things. That applies in this situation because if over the years, and in this case 13 years, your finger is alongside the slide, you cannot eradicate this muscle memory in ... 20 or 30 minutes worth of training. It just won't happen. He's going to go back and do what he did in a stress situation, what he's trained himself to do most frequently.

He continued that, due to these circumstances, Sergeant Pagotto's placement of his finger along the slide of the weapon was reasonable.

#### D.

Based on this testimony, the trial judge, in denying the motion for judgment of acquittal, concluded that the evidence was sufficient to send the case to the jury on the charges of involuntary manslaughter and reckless endangerment. The trial judge stated:

I think the evidence that has been submitted so far has been strong, certainly permissible to conclude beyond a reasonable doubt that there was gross negligence and recklessness in the defendant's conduct.

\*546 The intermediate appellate court found that the State had failed to meet its burden of production with respect to gross negligence and reversed the judgment. The court held:

[T]he evidence shows three or four possible deviations from or violations of departmental guidelines of the Baltimore City Police Department. It shows that the actions of Sergeant Pagotto may well have contributed to the creation of a dangerous confrontation between himself and Preston Barnes. It shows what may be a case of actionable civil negligence. We hold that it does not show, however, such a departure from the norm of reasonable police conduct that it may fairly be characterized as "extraordinary and outrageous." We hold that it does not show on the part of the law enforcement officer, even if guilty of some negligence in the performance of his duties, a *mens rea* that qualifies as a "wanton and abandoned disregard of human life." The burden of production with respect to gross criminal negligence was not satisfied. *Pagotto*, 127 Md.App. at 357.

The court based this conclusion, in part, on the fact that the prosecution had failed to present evidence that the violation of a police guideline amounted to an action that was not that of a "reasonable police officer similarly situated" or evidenced a "wanton or reckless disregard of human life." The court stated:

All of the testimony of all of the experts, save one, made no mention of a key link in the chain of logic that was an indispensable but unspoken part of the State's case. Even granting, *arguendo*, the failure of an officer to follow a departmental guideline, what is the significance of such a failure? The missing premise was vital to the validity of the State's ultimate syllogism of guilt. *Id.* at 325.

The only witness to testify as to the significance of an officer's failure to follow departmental guidelines was Lieutenant Charles Key, an expert for the defense and author of the relevant guidelines. Judge Moylan, \*547 writing for the intermediate appellate court, pointed out that Key testified that the police guidelines are used for internal evaluations of the officer only and are highly discretionary.

The Court of Special Appeals also found, in the alternative, that Preston Barnes had removed Sergeant Pagotto from the field of proximate cause by attempting his getaway. The court stated:



As a completely alternative holding, we also conclude that when Preston Barnes put into motion his predetermined tactic of attempting a vehicular getaway from the detention scene, that criminal act on his part constituted an independent intervening cause that resulted in his own death. *Id.* at 358.

We turn now to determine if the evidence was legally sufficient to convince a rational trier of fact of Officer Pagotto's guilt of involuntary manslaughter and reckless endangerment beyond a reasonable doubt.

#### IV.

Upon our independent review of the record in this case, we conclude that the Court of Special Appeals was correct in its determination that there was insufficient evidence to support Pagotto's convictions. Specifically, we conclude that Pagotto's actions on the night of February 7, 1996, when viewed in their totality, were neither grossly negligent nor reckless.

At the close of the State's case, the trial court granted Pagotto's motion for judgment of acquittal with respect to the charge of voluntary manslaughter. The trial court found that the State had presented no evidence from which a rational jury could find that Pagotto had intentionally killed Preston Barnes. Thus, the case went to the jury on the charge of involuntary manslaughter. \*548 Involuntary manslaughter is a common law felony in Maryland. It is defined as:

an unintentional killing done without malice, (1) by doing some unlawful act endangering life but which does not amount to a felony, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty. *Albrecht*, 336 Md. at 499.

The charge in this case is predicated upon the negligent doing of some lawful act. For the conviction to lie, however, the State must prove more than mere negligence. The State must show a greater degree of negligence or "gross" negligence. (internal citations omitted).

In order for the accused's conduct to constitute gross negligence, "the conduct must manifest 'a wanton or reckless disregard of human life.'" (internal citations omitted). In other words, the accused's conduct, under the circumstances, must manifest such a gross departure from what would be the conduct of an ordinary and prudent person so as to amount to a disregard of the consequences and an indifference to the rights of others. (internal citations omitted).

The defendant was also charged with two counts of reckless endangerment of the two passengers in the car: Damien Jackson and Ali Austin. While involuntary manslaughter requires the death of a person, reckless endangerment does not require that any actual harm occur to another. (internal citations omitted). Maryland's reckless endangerment statute, codified at the time of this incident as Maryland Code (1957, 1992 Repl.Vol.) Article 27, § 120(a), provided, in pertinent part, as follows:

Any person who recklessly engages in conduct that creates a substantial risk of death or serious physical injury to \*549 another person is guilty of the misdemeanor of reckless endangerment and on conviction is subject to a fine not exceeding \$5,000 or imprisonment not exceeding 5 years or both.

This statute is aimed at deterring the commission of potentially harmful conduct before an injury or death occurs. *See Minor*, 326 Md. at 442. The statute was enacted "to punish, as criminal, reckless conduct which created a substantial risk of death or serious physical injury to another person. It is the reckless conduct and not the harm caused by the conduct, if any, which the statute was intended to criminalize." *Id.* at 441. Thus, the focus is on the conduct of the accused. The test to determine whether a defendant's conduct was reckless is whether the appellant's misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish. *Id.* at 443.

A defendant's conduct is typically measured against the conduct of an ordinarily prudent citizen similarly situated. Where the accused is a police officer, however, the reasonableness of the conduct must be evaluated not from the perspective of a reasonable civilian but rather from the perspective of a reasonable police officer similarly situated. As the intermediate appellate court explained:

Under almost all circumstances, the gratuitous pointing of a deadly weapon at one civilian by another

civilian would almost certainly be negligence *per se*, if not gross negligence *per se*. A police officer, on the other hand, is authorized and, indeed, frequently obligated to threaten deadly force on a regular basis. The standard of conduct demanded of a police officer on duty, therefore, is the standard of a reasonable police officer similarly situated. \*550 *Albrecht*, 336 Md. at 501 (citations omitted).

The theory of the prosecution was that the conduct at issue was identical for the charges of involuntary manslaughter and reckless endangerment. The prosecution was predicated upon the theory that Sgt. Pagotto's conduct, i.e., the alleged violations of departmental guidelines, was both a gross departure from the standard of conduct that a reasonable police officer similarly situated would observe, thereby creating a substantial risk of death or serious physical injury to the two passengers, as well as such grossly negligent conduct that manifested a wanton or reckless disregard of human life. Therefore, under the circumstances presented herein, if we find that the evidence provided by the State was legally insufficient to sustain a conviction for manslaughter, then the evidence was also insufficient to sustain a conviction for reckless endangerment.

#### V.

We emphasize again that, in reviewing for legal sufficiency of the evidence, we are not sitting as the trier of fact. Rather, we only determine if any rational trier of fact could have found Pagotto guilty. The Court of Special Appeals found that each of the State's alleged violations of departmental guidelines, at best, amounted to an actionable case in civil negligence. We agree.

With respect to Pagotto's placement of his trigger finger on the slide of the gun, the Court of Special Appeals found that the evidence presented was insufficient to support a charge of involuntary manslaughter. The court stated:

We hold that Sergeant Pagotto's placement of his trigger finger along the "slide" of his Glock automatic, whether considered alone or in combination with any other factor, does not remotely generate a *prima facie* case of gross criminal negligence. We are not substituting our weighing of the evidence for that of the jury. We are holding, as a matter of law, that the burden of production as to gross \*551 criminal negligence was not satisfied so as even to permit the jury to consider such a charge. Although Sergeant Pagotto may not have followed a recently imposed and geographically unique guideline, his action in that regard was not inherently wrong or of a *malum-in-se* character.

Had a Maryland State Trooper or a Baltimore County Officer, for instance, ridden along with Sergeant Pagotto on February 7, 1996, and engaged in precisely the same conduct that Sergeant Pagotto did, that State Trooper or County Officer would have been acting with complete propriety with respect to the placement of the trigger finger on a weapon. Had Sergeant Pagotto himself placed his trigger finger on the "slide" of his weapon on February 7, 1993, instead of on February 7, 1996, he would then have been acting with complete propriety. Except for a criminal violation of a local municipal or county ordinance, precisely the same act under precisely the same circumstances cannot be a crime in Baltimore City but not a crime in Baltimore County. *Pagotto*, 127 Md.App. at 310–11, 732 A.2d at 941.

The State's logic leads to the conclusion that a police officer placing his finger on the slide of the weapon is criminally negligent behavior if committed by a Baltimore City Police Officer in Baltimore City, but acceptable, non-criminal behavior if committed by any other police officer anywhere else in the State. The Court of Special Appeals was correct in concluding that this result is illogical.

We also agree with the Court of Special Appeals' conclusion that Sergeant Pagotto's act of closing with a drawn gun was not criminally negligent. The intermediate appellate court held:

Even assuming that "closing" to within a few feet of Preston Barnes constituted ordinary civil negligence, there was nothing in the appellant's behavior to suggest "a wanton or reckless disregard for human life." He approached an inherently dangerous confrontation with his weapon in hand. \*552 Hindsight, indeed, revealed that Sergeant Pagotto's suspicions and fears were well-grounded. Although Sergeant Pagotto did not know it at the time, Preston Barnes was almost certainly committing a felony in his presence—the possession of cocaine with intent to distribute. Rather than risk a violation of probation, Preston Barnes was poised, just as the Sergeant drew near, to initiate a high speed getaway, wantonly running down Sergeant Pagotto in the process if need be. If in a stress-laden situation and for his own self-protection

Sergeant Pagotto violated a departmental guideline, he did not thereby commit an act of gross negligence. *Id.* at 318.

The final alleged violation of Department guidelines was Sergeant Pagotto's so-called one-armed vehicular extrication. The Court of Special Appeals found that Sergeant Pagotto had not violated this guideline and, even if he had, it was not behavior that could legally rise to the level necessary to sustain a conviction of involuntary manslaughter. The court stated in this regard:

The testimony of both Major Melcavage and Sergeant Vittetoe dealt with the subject of vehicular extrication as an abstract academic or training exercise. Self-evidently, one can wrestle with an opponent more effectively with two hands than with one. That's the school situation. They analyzed the problem as if Sergeant Pagotto had moved forward *ab initio* with a pre-formed and deliberate plan to perform a one-armed vehicular extrication. Their opinions had no pertinence to an instinctive, split-second reaction, actual or hypothetical, where the right hand is already holding a weapon and where a car door suddenly opens, a foot or two away, in front of one's face. The instantaneous reaction either to "move into the ambush" or to attempt to retreat to the cover of the police cruiser is something that is not concerned with the schoolroom paradigm of a model vehicular extrication. \*553 The appellant's version of this part of the encounter does not permit a finding that the Baltimore City Police Department guideline as to vehicular extrication had been violated. Even assuming, *arguendo*, that there had been a violation, however, that would be, at most, a *prima facie* case of ordinary civil negligence. Assuming that this is a case in which an officer might be civilly liable for negligence, there was insufficient evidence of the type of wanton and abandoned indifference to human life required to meet the incremental burden of production that must be satisfied before a jury can consider the issue of gross criminal negligence. *Id.* at 320-22.

We agree with the Court of Special Appeals that the evidence presented at trial, as a matter of law, was insufficient to support a conviction of involuntary manslaughter or reckless endangerment. Sergeant Pagotto's behavior simply did not evidence a "wanton or reckless disregard for human life."

In arguing for legal sufficiency, the State relies heavily on *State v. Albrecht*, 336 Md. 475. The State contends that *Albrecht* is dispositive of the instant case because "[l]ike *Albrecht*, Pagotto's case involves issues of: a police officer's use of his service firearm; the officer's placement of his finger with respect to that service weapon; the officer's aiming of his service weapon at the victim; and, the officer's resort to use his service weapon under circumstances in which the victim presented no threat to the officer." In *Albrecht*, a Montgomery County Police officer was convicted of involuntary manslaughter and two counts of reckless endangerment when the shotgun he was holding accidentally discharged, killing one woman. This Court held that the evidence was sufficient to warrant a conviction for both involuntary \*554 manslaughter and reckless endangerment. We conclude, however, that *Albrecht* is distinguishable.

While these two cases are facially similar, there are several key factors present in *Albrecht* that are not present in this case. In *Albrecht*, we noted five factors which elevated Albrecht's behavior from ordinary civil negligence to gross criminal negligence. We stated:

The State adduced sufficient testimony from which the trial court could have concluded that a reasonable Montgomery County police officer would not have acted as Albrecht did on this occasion, in drawing and racking a shotgun fitted with a bandolier and bringing it to bear, *with his finger on the trigger*, on an unarmed individual who did not present a threat to the officer or to any third parties, in a situation where nearby bystanders were exposed to danger. *Id.* at 505.

Not one of the five factors that we specifically identified in *Albrecht* is present in this case. The first factor we noted in *Albrecht* was the drawing and racking of a shotgun fitted with a bandolier. Sergeant Pagotto, however, drew a standard issue police handgun with no alterations. The second factor in *Albrecht* was bringing the gun to bear on the victim. The State produced no evidence that Officer Pagotto was aiming his gun at Preston Barnes when it discharged.<sup>3</sup> The third factor we found of particular importance in *Albrecht* was Albrecht's placement of his trigger finger on the almost universally prohibited position of directly on the trigger of the gun. Officer Pagotto, in contrast, had his finger on the almost universally accepted position of

the slide of the gun. The fourth factor was the fact that Officer Albrecht had ascertained that the victim, Rebecca Garnett, was not armed and no longer presented a threat to him at the time his gun discharged. Preston Barnes, however, still presented a substantial \*555 threat to Officer Pagotto. Barnes was inside a car with his hands hidden from view, and was in the midst of an escape attempt when Officer Pagotto's gun discharged. The final key factor we noted in *Albrecht* was that several adults and children were standing directly behind the victim when she was shot. The confrontation in this case, by contrast, took place at night on an empty city street. Based on these distinctions, the Court of Special Appeals concluded:

This case, key factor by key factor, is the diametric opposite of *Albrecht*. The contrast, moreover, highlights the deficiency of the evidence of gross negligence in this case. Even in *Albrecht* the evidence was close. Here, it did not get close. *Pagotto*, 127 Md.App. at 334. We agree with the intermediate appellate court and find that the State's reliance on *Albrecht* to sustain its convictions against Officer Pagotto is misplaced.

The Supreme Court has explained, albeit in the context of a 42 U.S.C. § 1983 action, but equally apposite herein, the proper prospective from which we must view a police officer's use of force:

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the <sup>20</sup>/<sub>20</sub> vision of hindsight....With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *Graham v. Connor*, 490 U.S. 386, 396–97 (internal citations omitted).

In hindsight, perhaps Sergeant Pagotto should have acted differently on the night of February 7, 1996. His actions "in \*556 circumstances that are tense, uncertain, and rapidly evolving" may even amount to ordinary civil negligence, but they are not such a gross deviation from the actions of an ordinary police officer similarly situated so as to evidence the "wanton or reckless disregard for human life" necessary to support a conviction in this case. We hold, therefore, that Sergeant Pagotto's conduct cannot, as a matter of law, rise to the level of gross negligence. His convictions for involuntary manslaughter and reckless endangerment must be reversed.

*JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED.*

BELL, Chief Judge, dissenting.

The majority today decides that evidence pertaining to an incident, in which Preston Barnes was killed allegedly as the result of the violation, by police officer Stephen Pagotto ("the respondent"), of three police departmental guidelines; was legally insufficient to sustain the jury verdict convicting the respondent of involuntary manslaughter and two counts of reckless endangerment. To reach its decision, the majority purports not to have weighed the evidence, but to have neutrally concluded that the respondent's conduct, judged from the perspective of a reasonable police officer, similarly situated, was neither grossly negligent nor reckless. *See* 361 Md. 528, 555–56.

The respondent's conduct as a police officer is directly in question here. On the night of February 7, 1996 the respondent conducted a vehicle stop of a car being driven by Preston Barnes. The respondent testified that he thought the car may have been stolen because of the placement of the license plate \*557 tag. The respondent also testified that, at about five steps from the vehicle, he saw activity that caused him to fear for his safety and therefore draw his weapon. Thus, he approached Preston Barnes, with his service weapon drawn, and instructed Mr. Barnes to stop the now drifting vehicle. This method of approach was referred to as "closing on the suspect."

Subsequently, when Preston Barnes ignored the respondent's instructions to stop the vehicle, the respondent then reached into the vehicle and attempted to extricate Mr. Barnes with his free hand. This method of extrication was referred to as a "control tactic."

At some point during the control tactic, the respondent's weapon discharged and Mr. Barnes was fatally wounded. An autopsy revealed that Mr. Barnes was wounded while either placing his hands up defensively to protect his face from an onslaught, or placing them on the steering wheel in plain view of the respondent.

The respondent was charged with violation of three police departmental guidelines: closing on a suspect with a drawn weapon; attempting to control a suspect with one hand, with his weapon drawn; and improper placement of his finger on the weapon's trigger, rather than its trigger guard. In Maryland, a violation of police guidelines *may* be the basis for a criminal prosecution, which may, in turn, result in a criminal conviction. *See State v. Albrecht*, 336 Md. 475, 502–03 (holding that police officer could be held criminally liable for conduct not in compliance with standard police guidelines, procedures or practices). Thus, to be sure, while a violation of police guidelines is not negligence *per se*, it is a factor to be considered in determining the reasonableness of police conduct. (internal citations omitted)\*558

As to the first violation, it was alleged that closing on a suspect could result, as it did in this case, in a discharge of the weapon, thereby killing the suspect. The second alleged violation was charged because officers were taught to control suspects with two hands and moreover, in a vehicle situation, attempting a control tactic with a drawn weapon unnecessarily endangered all passengers in the vehicle. Finally, Baltimore City Police Department guidelines specifically mandate that a police officer's trigger finger be placed under the trigger guard, in order to prevent an "accidental" discharge and, consequently, the possibility of an unnecessary killing.

The majority quickly dismisses each of alleged violations of police guidelines. Regarding closing with a drawn weapon, the majority adopts the view of the Court of Special Appeals that the respondent approached an inherently dangerous situation and if, "in a stress-laden situation and for his own self-protection Sergeant Pagotto violated a departmental guideline, he did not thereby commit an act of gross negligence." *Pagotto v. State*, 127 Md.App. 271, 318. As to the one-armed vehicular extrication attempt, the majority again embraces the intermediate appellate court's position:

\*559 "The testimony of both Major Melcavage and Sergeant Vittetoe dealt with the subject of vehicular extrication as an abstract academic or training exercise. Self-evidently, one can wrestle with an opponent more effectively with two hands than one. That's the school situation. They analyzed the problem as if Sergeant Pagotto had moved forward *ab initio* with a pre-formed and deliberate plan to perform a one-armed vehicular extrication. Their opinions had no pertinence to an instinctive, split-second reaction, actual or hypothetical, where the right hand is already holding a weapon and where a car door suddenly opens, a foot or two away, in front of one's face. The instantaneous reaction either to 'move into the ambush' or to attempt to retreat to cover of the police cruiser is something that is not concerned with the schoolroom paradigm of a model vehicular extrication." *Pagotto*, 127 Md.App. at 320–22.

On the last issue, the respondent's placement of his trigger finger on the slide of his service weapon—and ultimately the trigger, the majority concludes that because some police departments permit that finger placement, then the conduct cannot be reckless or negligent. \*560 I cannot agree with the majority. Rather than review the sufficiency of the evidence as it is charged with doing, it improperly weighs the evidence considered by the jury. Although appellate courts have the power and are now expected to "pass upon [review] the sufficiency of the evidence to sustain a conviction," *Md. Const. art. 23*, that review does not involve \*561 weighing the evidence. When an appellate court reviews the sufficiency of the evidence needed to sustain a conviction obtained as the result of a criminal trial, rather than measuring the weight of the evidence to ascertain whether the State has proved its case beyond a reasonable doubt, it determines whether there was *any* relevant evidence considered by the jury which would sustain a conviction. (internal citations omitted). Indeed, as even the majority acknowledged, review by the appellate court is limited to viewing the evidence in the light most favorable to the State, to ascertain whether "*any* rational trier of fact could have found the essential elements of the crime beyond a \*562 reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319; *Bedford v. State*, 293 Md. 172, 175. Quite recently, this Court noted that, in reviewing the sufficiency of the evidence to sustain a criminal conviction, "[w]e do not measure the weight of the evidence; rather, our concern is only whether the verdict was supported by sufficient evidence,

direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Taylor v. State*, 346 Md. 452, 457.

In a review of the sufficiency of evidence, it is not the place of this Court to weigh the finder of facts—the jury's—credibility determination or any of the reasonable inferences flowing therefrom. Indeed, this Court should only *measure*, and not weigh, the evidence to ensure it is based on more than a scintilla of evidence. As such, the evidence on which a conviction rests is sufficient if it measures to "more than surmise, possibility, or conjecture ... [where] such evidence [is] of legal probative force and evidential value." (internal citations omitted).

Neither does an appellate court weigh a witness' expert testimony where the "facts upon which an expert bases his opinion ... permit reasonably accurate conclusions as distinguished from mere conjecture or guess." (internal citations omitted). It is then, according to *Simmons v. State*, 313 Md. 33, 42:

"proper to lay before the jury all the facts, which are necessary to enable them to form a judgment on the matters in issue; and when the subject under investigation requires special skill and knowledge, they may be aided by the opinion of persons whose pursuits or studies or experience, \*563 have given them a familiarity with the matter in hand."

Therefore, if a jury's judgment of conviction is supported by the testimony of a qualified expert, ordinarily the evidence is sufficient. (internal citations omitted).

Once a jury has performed its task and deliberately decided to convict, appellate courts should be slow to second guess that decision. To be sure, a jury verdict that is based on insufficient evidence may be overturned, but the case is rare indeed, usually involving jury instructions that are inadequate. *See, e.g., Richmond v. State*, 330 Md. 223, 237 (failing to instruct jury that prosecution was required to prove specific intent, "resulted in a guilty verdict that otherwise would not have been rendered"); *Franklin v. State*, 319 Md. 116 (overturning conviction because jury instruction that specific intent to kill was not required to establish crime of assault with intent to murder, was clearly erroneous); *State v. Hutchinson*, 287 Md. 198, 205 (reversing conviction because jury \*564 not instructed it could find defendant not guilty where "the error was likely to unduly influence the jury and thereby deprive the defendant of a fair trial").

There are instances, of course, where this Court has overturned a criminal conviction because of insufficient evidence. In *Taylor v. State*, 346 Md. 452, a conviction was reversed because, "any finding that [defendant] was in possession of marijuana could be based on no more than speculation or conjecture." *Id.* at 459. Judge Raker, for the court, further opined that:

"Circumstantial evidence may support a conviction if the circumstances, taken together, do not require the trier of fact to resort to speculation or conjecture, but '[c]ircumstantial evidence which merely arouses suspicion or leaves room for conjecture is obviously insufficient. It must do more than raise the possibility of guilt or even the probability of guilt. [I]t must ... afford the basis for an inference of guilt beyond a reasonable doubt.'" *Id.* at 458, 697 A.2d at 465 (internal citation to treatise omitted).

*Conyers v. State*, 345 Md. 525, is another example of this Court's rare reversal of a jury verdict on the basis of the insufficiency of criminal evidence. There, the Court reversed the defendant's conviction for burglary, concluding that the State failed to produce any evidence of an actual breaking and there was "even less [constructive] evidence upon which a jury could base an inference that Appellant's entrance into the house was gained by 'artifice, fraud, conspiracy or threats.'" *Id.* at 558; *see also Oken v. State*, 327 Md. 628, 663, (reversing conviction because evidence of breaking was insufficient). Plainly put, in a determination of "insufficiency of evidence it is necessary to show that there was *no* legally sufficient evidence or inferences drawable therefrom on which the jury could find a defendant guilty beyond a reasonable doubt." *Wilson v. State*, 261 Md. 551, 563 (emphasis added). This is so because, as we pointed \*565 out in *Gore v. State*, 309 Md. 203, 214, *citing Talley v. Dept. of Correction*, 230 Md. 22, 28–29, " the individual and total weight assigned to the evidence is within the exclusive province of the jury."

The majority correctly points out that, for an accused police officer's conduct to amount to gross negligence, it must manifest, under the circumstances, such a departure from that of a reasonable police officer similarly

situated, so as to amount to a disregard of the consequences and an indifference to the rights of others. (internal citations omitted). In this case, viewed in the light most favorable to the prosecution, the evidence, consisting of expert testimony and inferences drawable therefrom, clearly is legally sufficient. This simply is not a case in which the jury was left to speculate or guess either as to the respondent's conduct or the quality of that conduct. The evidence clearly addressed both issues, and a jury could have found the respondent grossly negligent in failing to comply with the guidelines of the Baltimore City Police Department.

At trial, no less than thirteen witnesses, with six of them, *i.e.*, Major Melcavage, Major France, Sergeant Meier, Mr. Vittetoe, Mr. Meiklejohn and Mr. Key, qualified and testifying as experts, provided evidence regarding the alleged violations of the police guidelines. On the basis of that testimony alone, \*566 the jury could fairly have been convinced that the respondent's conduct was grossly negligent and that he recklessly endangered the lives of Preston Barnes and the passengers in the car Mr. Barnes was driving.

The record is replete with testimony supporting the jury's verdict convicting the respondent on the basis that closing on Mr. Barnes with his service weapon drawn, was a violation, recklessly done, of police department guidelines. Sgt. Vittetoe testified, on direct examination:

\*567 "If [Pagotto] says that he stopped [the car] for suspicion of being stolen, this elevates the stop from not a routine, unknown risk stop, but this is now a high risk stop because you don't know the other components involved in this, exactly how was the car taken. To me [closing] is reckless because if this is not a routine or unknown risk traffic stop, Sergeant Pagotto should have never left his vehicle or the area surrounding his vehicle.

\* \* \* \* \*

"His closing as we've heard in here, the closing of the distance, should have ceased when Sergeant Pagotto felt that something was wrong with this traffic stop.... I thought that Sergeant Pagotto was reckless in closing the distance, in having his gun out."

Sgt. Vittetoe was corroborated by the following testimony elicited from Major France on cross examination:

"[DEF. ATT'Y]: All right, and what is the training of Baltimore City police officers on closing with a gun in your hand?

"[MAJ. FRANCE]: Closing with a gun in your hand is not good training. It's not part of our training.

"[DEF. ATT'Y]: Why not?

"[MAJ. FRANCE]: I believe for a couple of reasons. One it limits your mobility. Two, you have nowhere else to go if you need the other hand and it's a situation where there's lethal force required, and, three, the gun can be taken from you and used against you."

Several other witnesses, *i.e.*, Officer Wagner, Major Melcavage, Sergeant Meier, Mr. Key, and the respondent himself, provided further corroboration. Officer Wagner testified that an officer is not supposed to close with a gun in hand because "the assailant is close enough he can take that gun away from you and use it on you ... you can struggle, whatever." Major Melcavage testified that if a handgun is introduced into a closing situation, then you "*unnecessarily* endanger the police officer, the subject you are trying to control, or anyone else." Sergeant Meier testified that closing with the suspect with the \*568 weapon drawn may end up in a "struggle over that weapon, a discharge of that weapon which may injure or kill the police officer, or may injure and kill the suspect or any innocent bystanders that are around." Mr. Key, the defense witness, even stated that the respondent should not have closed with his weapon drawn because it was "not consistent with guidelines."

Moreover, there was testimony, including that of the respondent, indicating that the respondent was familiar with the applicable guideline. Sergeant Meier testified that on the 1994 in-service training test, the respondent correctly answered the question of whether an officer should close on a suspect with a drawn weapon. Mr. Meiklejohn testified that on the 1995 in-service training test, the respondent again correctly answered the question regarding closing on a suspect. The respondent himself conceded his actual knowledge of the applicable guideline:

"[OFFICER PAGOTTO] (reading): An officer should not close with or tackle a running suspect but should direct other units to contain him or her.... If possible, officers should not close with suspects to frisk or handcuff until backup officers arrive to assist.... Maintain a safe reactionary distance-ten feet or more

when the pistol is drawn.... If the suspects run, pursue them but do not close with or tackle them.

"[STATE'S ATT'Y]: Okay. Now, are you familiar with those concepts?"

"[OFFICER PAGOTTO]: Yes, sir.

\*\*\*\*\*

"[OFFICER PAGOTTO] (reading from 1995 in-service training test): Closing with a suspect with your weapon drawn could very likely result in the suspect grabbing the officer's weapon?"

"[STATE'S ATT'Y]: And the answer to that is what?"

"[OFFICER PAGOTTO]: True.

"[STATE'S ATT'Y]: And you answered it correctly?"

\*569 "[OFFICER PAGOTTO]: Yes, sir."

There was also evidence that supported the jury's finding that the respondent attempted a one-armed vehicular extrication in violation of police regulations. Major Melcavage, on direct examination, testified why a one-armed vehicular extrication was, and is, improper:

"[STATE'S ATT'Y]: Was part of the training [you provided to defendant] ever to use or hold a handgun in one hand while applying a defense tactic?"

"[MAJ. MELCAVAGE]: No, sir.

"[STATE'S ATT'Y]: Why is that?"

"[MAJ. MELCAVAGE]: No. Because all the techniques I know that I taught required two hands. Plus, if you enter the handgun into the equation, you unnecessarily endanger the police officer, the subject you are trying to control, or anyone else.

"[STATE'S ATT'Y]: Now would this training be altered in that aspect whether the person who the defense tactic is being applied to is either on the street or in a vehicle?"

"[MAJ. MELCAVAGE]: No, sir.

"[STATE'S ATT'Y]: If you have a gun in your hand and you intend to remove a driver from a vehicle through the use of a control tactic, what should you do with the weapon?"

"[MELCAVAGE]: You should holster your weapon.

"[STATE'S ATT'Y]: And why is that?"

"[MELCAVAGE]: Because you need two hands to gain control of an individual or to apply a technique as taught at the academy as I taught. And by keeping the gun in the situation, you are unnecessarily endangering yourself. They can take the gun from you just as well, the subject could take the gun from you just as well as you using it on them, or the gun could go off and you could injure innocent bystanders, yourself, *or the subject*.

"[STATE'S ATT'Y]: Okay. Would that fact change whether the vehicle was stationary or moving?"

"[MELCAVAGE]: No, sir.

\*570 "[STATE'S ATT'Y]: If you have your weapon drawn and it is not safe to holster it in order to use the control tactic, what should you do?"

"[MELCAVAGE]: It [sic] is not safe to holster them, you need to seek cover and call for assistance, call for other officers. You have to disengage."

There was more testimony which a reasonable trier of fact could have relied upon in finding that the respondent's conduct was grossly negligent. Sgt. Vittetoe added:

"At one point in time in Sergeant Pagotto's report he had indicated that he reached in for a control tactic on [Preston Barnes]. That goes beyond modern police standards. There is nothing that I know of today where a police officer controls someone with one hand and with a gun in the other. And this is for a reason. First of all, it's difficult to control somebody with one hand. You don't know of their physical size, strength, abilities, or anything else, and it generally requires two hands. Also, for the protection of the firearm, once you take it out and are dealing with a suspect, you don't want to present that gun to that person because that weapon can now be used against you. If an altercation were to occur at that point in time, it could not only deal in injuries involving the person you are dealing with or other innocent parties that may not be in that conflict, for example, passengers in the vehicle or innocent civilians standing away from this particular scene...."

Major Melcavage testified, on cross examination, that approaching an open car door with a gun in hand and reaching into that car as a defense tactic is a violation of the standard and "is not in keeping with the training



of the police academy.” Major France agreed:

“[DEF. ATT’Y]: In other words, that door opens and he can’t see everything going on and he makes a decision for his own protection to get that guy—and to reach in and get that guy for his own protection, you really think that’s a problem?”

“[MAJ. FRANCE]: I have a problem with that.”

**\*571** Mr. Meiklejohn opined that the respondent “should have never been up to that vehicle close enough to where he’s reaching in. I believe that reaching in is extremely reckless on his part.”

One of the passengers, a Mr. Jackson, testified on direct examination:

“[MR. JACKSON]: The only reason why Preston was scared, [Officer Pagotto] hopped out of the car with the gun in his hand.

“[DEF. ATT’Y]: The car was drifting?

“[MR. JACKSON]: He had to hold his hands on the steering wheel.

“[DEF. ATT’Y]: The car was drifting because he wanted it to drift?

“[MR. JACKSON]: No, it was something with the automatic.

“[DEF. ATT’Y]: Are you telling me that he couldn’t put his foot on the brake and stop that car?

“[MR. JACKSON]: Yeah, it was on the brake.

“[DEF. ATT’Y]: Well, then why was the car moving if he didn’t want it to move?

“[MR. JACKSON]: It wasn’t in park.

“[DEF. ATT’Y]: I understand—the car—you understand—

“[MR. JACKSON]: He was nervous. In the car he was nervous.

“[DEF. ATT’Y]: I understand he was nervous, but if the car is in drive and his foot is off the gas and on the brake won’t the car stop?

“[MR. JACKSON]: Maybe because he thought the car was in park.”

Adding a moving vehicle to the equation, testimony revealed, makes what the respondent did more dangerous and reckless. Sergeant Vittetoe addressed the issue on direct examination:

**\*572** “[STATE’S ATT’Y]: Sergeant Vittetoe, would [your opinion that Officer Pagotto was reckless the night in question] be altered in any way or influenced if there were evidence in the case that Preston Barnes was fleeing from the police at the time of the shooting?

“[SGT. VITTETOE]: Yes, sir, it would change.

“[STATE’S ATT’Y]: And how’s that?

“[SGT. VITTETOE]: First of all, it would worsen. I would feel that his actions would be more so reckless and against his agency policy. His policy or guidelines do indicate that they are not supposed to chase after someone fleeing. Yes, they are to observe them and do certain things but not to chase them, particularly with your gun out. So I would look at that as being even more so reckless than my previous statement.”

Nor is there evidence that Mr. Barnes did anything justifying the respondent’s actions. Mr. Barnes’ hands were visible at all times after the respondent approached the car. Mr. Jackson testified that even when the respondent opened the car door, Mr. Barnes only placed his hands near his face in a defensive gesture. On cross examination, Mr. Jackson continued to assert that Preston Barnes’ hands were visible.

**\*573** This testimony was corroborated by that of the Deputy Chief Medical Examiner. Regarding the location of Mr. Barnes’ hands just prior to being shot to death, he testified that the wound path was both consistent with Preston Barnes’ hands being on the steering wheel and with his hands up to protect his face.

The testimony of Officer Wagner regarding his actions during the traffic stop, that he never drew his gun and neither received any communication from the respondent indicating the need to do so, is both relevant and telling. In particular, Officer Wagner testified:

“[STATE’S ATT’Y]: Was there any activity in the vehicle that you could observe that would cause you to draw your weapon?

“[OFFICER WAGNER]: There [sic] were very excited and moving, but none to make me draw my weapon, no....

“[STATE’S ATT’Y]: At any time during the course of this car stop did you receive any communication from

the defendant that would indicate you should be concerned or draw your weapon?

"[OFFICER WAGNER]: No.

\*\*\*\*\*

"[STATE'S ATT'Y]: Is there any practice or protocol that should kick in when a—one officer in a team of two makes observations on the street that would be important to the other officer?

"[OFFICER WAGNER]: The officers should communicate to what they see and observe in the vehicle.

"[STATE'S ATT'Y]: All right. So if one officer sees activity that he believes is suspicious of an armed individual in the vehicle such that he draws his weapon, that should be communicated to the partner?

**\*574** "[OFFICER WAGNER]: Should be."

The jury also heard testimony, which it could have believed, and obviously did, regarding the third allegation, the placement of the respondent's trigger finger on his weapon's slide, and how that violation of the guidelines amounted to gross negligence. Major Melcavage testified as to why there is a requirement that the finger be placed under the trigger guard: to avoid "an accidental discharge, shooting the weapon off, unnecessarily injuring somebody." He explained on cross examination, the reason for the change of the requirement from placing the finger on the slide, *i.e.*, "at times at the Police Academy, there were accidental discharges with them, with them like this (indicating placement)."

The State also elicited testimony from Sergeant Meier regarding his expert opinion that the violation of the finger placement regulation was the cause of death of Mr. Barnes:

"[STATE'S ATT'Y]: Sergeant Meier, do you have an opinion, based on the statement rendered by the defendant in this case, whether his actions caused the death of Preston Barnes?

"[SGT MEIER]: Yes.

"[STATE'S ATT'Y]: What is it?

"[SGT. MEIER]: I believe his actions did cause the death of Preston Barnes by having his finger on the trigger of a weapon when he shouldn't have, for one thing, and closing with an individual that he felt could bring great harm or even death to him."

And from Mr. Meiklejohn, the following testimony was elicited:

"[STATE'S ATT'Y]: Mr. Meiklejohn, if the defendant had his finger where it was supposed to be according to his training, this discharge never would have taken place?

"[MR. MEIKLEJOHN]: It's my opinion that your statement is correct."

**\*575** Finally, it is significant that there was evidence from which the jury could conclude that the respondent's life was not in immediate danger. Mr. Meiklejohn testified to reading the respondent's statement and seeing "nothing that shows that his life is in immediate danger of death or serious bodily injury."

Thus, the State produced evidence, which, if accepted, proved that the respondent initiated the vehicle stop in question on an admittedly pre-textual basis. Having made the stop, he left his police cruiser and closed on the "suspects" with his service weapon drawn. When the driver of the car failed to come to a complete stop and, in fact, attempted to flee, the respondent, with gun still in hand and his finger on the trigger, opened the door of the drifting car in an effort to effect an one-armed vehicular extrication. Certainly the respondent's conduct—closing with a drawn weapon, attempting a one-armed vehicular extrication and placing his finger on the trigger slide rather than the under the trigger guard—violated departmental guidelines and, based on expert testimony, was reckless and criminally negligent. As a result of that conduct, Mr. Barnes was shot and killed. The jury accordingly was presented with ample evidence on the basis of which it could, and obviously did, convict the respondent.

**\*576** As the majority and I agree, the conduct of the respondent must be viewed from the eyes of a reasonable similarly situated police officer. In this case, we need look no further than the respondent's partner. Officer Wagner, who was present on the night in question, testified that had he observed dangerous activity then he would have "discarded my **\*577** flashlight, pulled my weapon and used the radio that I had to call for additional units or a uniform backup." Thus, he would not have closed on the "suspects" with a drawn police weapon, and in fact, saw no need to ever draw his weapon. Neither would he have opened the vehicle door, or had his finger on the trigger of his weapon while attempting a one-armed vehicular extrication.

The latest statement of Maryland law in this area is *Albrecht, supra*. In *Albrecht*, this Court, with Judge Raker also writing for the majority, upheld the conviction of a police officer who killed a civilian during a vehicle stop, following however, a chase, concluding that the record was “replete with evidence from which the trial court could have concluded that Albrecht did not comply with Montgomery County departmental guidelines, procedures or practices.” *Id.* at 502–03. As in *Albrecht*, “[u]ltimately, deadly force was used, without justification, and [Mr. Barnes] was killed. [I] conclude that sufficient evidence was presented from which a rational trier of fact could have found that [the respondent’s] actions on [February 7, 1996], in their totality, were both grossly negligent and reckless.” *Id.* at 486.

To be sure, the facts and circumstances surrounding the police shooting in *Albrecht* differ significantly from those in this case. There, Officer Albrecht and Officer Thomas responded to the scene of a stabbing. When they arrived, they learned that the suspects, one whom Albrecht knew by name, might be armed and had fled the scene in a green Chevrolet driven by Rebecca Garnett. The officers spotted the green Chevrolet and gave chase. Although they lost the vehicle, further searching revealed it parked in a neighborhood parking lot. Exiting his cruiser, Albrecht yelled “Stop! Freeze!” and, at that time, removed his customized shotgun from its rack inside his vehicle, immediately placed a shotgun shell in the chamber and “racked” the shotgun into its final stage of firing capability. He then aimed the shotgun directly at Garnett, who at that time posed no threat or danger to any other person. Taking account of the facts and circumstances in that case, Albrecht’s drawing and racking of a shotgun \*578 fitted with a bandolier and bringing it to bear, with his finger on the trigger, on an unarmed individual who did not present a threat to the officers or any third parties and in a situation where nearby bystanders were exposed to danger, we rejected Albrecht’s argument that the shooting was unintentional and thus not reckless. We reasoned, 336 Md. at 486:

“[T]he evidence was sufficient to establish that, notwithstanding the fact that Rebecca Garnett did not pose any danger to either Albrecht himself or to third parties, Albrecht took substantial steps to use deadly force against her—to wit, racking his shotgun and aiming it, with his finger on the trigger, at Garnett. Ultimately, deadly force was used, without justification, and Rebecca Garnett was killed. We conclude that sufficient evidence was presented from which a rational trier of fact could have found that Albrecht’s actions ... in their totality, were both grossly negligent and reckless.”

The majority notes that, although “the two cases are facially similar, there are [five factors specifically identified in *Albrecht* ] that are not present in this case.” 361 Md. at 554. That is true, of course; however, that is also to be expected. These cases are fact specific and therefore must be decided on their unique facts and circumstances. Consequently, simply because all of the same facts and circumstances that informed the Court as to the actions of Albrecht, in that case, do not exist in this case, does not mean that the reasoning underlying *Albrecht* does not apply here. In point of fact, the relevant facts and circumstances of the instant case include the placement of the respondent’s trigger finger, whether the victim posed a threat to the officer, and whether the officer’s actions exposed others to danger, factors also present in *Albrecht*. Analyzing the facts and circumstances of this case, the jury could have concluded, and obviously did, that the respondent had his finger on the trigger of his service weapon, in violation of departmental guidelines; that, while so holding the weapon, he closed on the stopped car and all “suspects,” in violation of another departmental guideline; and \*579 that he tried to extricate one “suspect” from the car with one hand, while continuing to hold the weapon, with finger on the trigger, in violation of yet another departmental guideline. Because there was evidence that Mr. Barnes’ hands were not hidden from view, and, in fact, were on the steering wheel or the dashboard, the jury could have and in all probability did, conclude that the two passengers in the car driven by Mr. Barnes were exposed to danger, thereby rejecting the “finding” made by the majority that the confrontation “took place at night on an empty street.” 361 Md. at 555.

The dissenter in *Albrecht* focused on the aiming of the gun and not the actual discharge thereof, to assert that in the split second before the gun went off the officer was not criminally liable. *Id.* at 507 (Murphy, C.J., dissenting). The rationale, in other words, was that we should “freeze in time the split second before the gun went off and inquire as to whether, at that instant Officer Albrecht could have been found guilty of gross criminal negligence and reckless endangerment or not.” *Id.* at 508. We rejected that argument, *id.* at 505; it was wrong then, and it is wrong now. As we pointed out in *Albrecht*, that approach ignores the facts and

circumstances that inform the defendant's actions. *Id.* As related to that case, we said, it "ignores the testimony at trial ... and particularly that on the day in question, considering the facts and circumstances facing Albrecht, he should not have had his finger on the trigger, but rather it should have been on the trigger guard." *Id.*

Judge Chasanow, concurring, while also rejecting the freeze frame approach, took the analysis a step further, requiring an analysis of the very act that caused the ultimate injury, the pulling of the trigger, "[b]ut we should not freeze frame and stop our analysis before the trigger was pulled. We cannot access Albrecht's culpability in taking Rebecca Garnett's life and, in doing so, exclude the ultimate act that took her life-pulling the trigger." *Id.* at 506. He went on to explain:

**\*580** "The trial judge found that the act of pulling the trigger was unintentional; he did not find that it was reasonable. The intermediate appellate court assumes the unintentional shooting is a non-negligent shooting. Albrecht did not intentionally pull the trigger, but the trial judge was justified in finding he negligently, carelessly or even recklessly pulled the trigger. There was no external cause for the shotgun discharge, and the fact that Albrecht may have been 'startled into pulling the trigger' of a loaded, racked, and aimed shotgun need not, as a matter of law, excuse his carelessness in doing so. The pulling of the trigger could be found to be a careless act that, when considered along with all the antecedent acts, at least tips the scale to permit a finding of gross negligence."

*Id.* This applies equally well to the facts *sub judice*. Particularly in this case, when one considers that the respondent's service weapon was equipped with three safeties that prevented it from firing unless the trigger was pressed with 10 ½ pounds of pressure, making it almost impossible to discharge if dropped or struck against an object.

I dissent.