USE OF FORCE:
SHOOT—DON'T SHOOT, HOW LAW ENFORCEMENT OFFICERS ARE TRAINED, FIREARMS AND TASERS

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CHAPTER 9

MGT OF AMERICA, INC.

MARGO FRASIER
SENIOR ASSOCIATE

RANGE OF EXPERIENCE

Margo Frasier has over 30 years experience in the corrections and law enforcement field. Ms. Frasier served as the sheriff of Travis County, Texas from 1997 through 2004, the first woman to hold the office where she started as a deputy more than two decades earlier. As sheriff, she oversaw 1,350 officers and other employees with a budget of more than $90 million and earned praise for her leadership of the jail system, which housed 2,400 inmates. Since leaving office, Ms. Frasier has worked as an assistant professor in the College of Criminal Justice at Sam Houston State University in Huntsville, Texas. Over the years, as a consultant and an attorney, she has provided expert testimony in matters involving criminal justice including civil rights, employment law, law enforcement practices, and corrections practices.

Ms. Frasier served as treasurer, vice-president, and president of the Major County Sheriffs' Association. She also served on the boards of the National Sheriff's Association, National Center for Women and Policing, Texas Institute for Public Problem Solving, and the Children's Advocacy Center of Central Texas. In addition, she was recognized twice by the Combined Law Enforcement Association of Texas as Administrator of the Year. She also received a Lifetime Achievement Award from the National Center on Women in Policing.

YEARS OF EXPERIENCE:
30+

EDUCATION:

Bachelor of Science in Criminology & Corrections, Graduated with Honors, Sam Houston State University, 1974

Juris Doctor, Graduated with High Honors, Florida State University College of Law Tallahassee, Florida, 1984

Additional Information Available on Request

PROFESSIONAL AND BUSINESS HISTORY

MGT of America, Inc., Senior Associate, July 2008 – present.

Sam Houston State University, Assistant Professor, January 2005 – July 2008.

Travis County Sheriff's Office, Austin, Texas, Sheriff, January 1997 – December 2004.

St. Edward's University, Instructor, January 1997 – December 2004.

Margo L. Frasier, J.D., Consultant, January 1997 – July 2008.

Bickerstaff, Heath LLP, Partner, January 1991 – December 1996.

Brown Maroney (Now Brown McCarroll), Associate, January 1985 – December 1991.

U.S. District Court, Tallahassee, Florida, Law Clerk, September 1984 – December 1984.

Florida Senate Committee on Criminal Justice, Legislative Analyst, August 1983 – July 1984.

PROFESSIONAL AND BUSINESS HISTORY (Continued)

Travis County Sheriff's Office, Austin, Texas, Captain, October 1975 – August 1982.

Austin Community College, Austin, Texas, Instructor, September 1980 – May 1982.

Texas Department of Corrections, Huntsville, Texas, Corrections Officer, May 1974 – May 1975.

PROFESSIONAL AND BUSINESS EXPERIENCE

Directed a comprehensive assessment of staffing needs for the Detention Command of the Harris County Sheriff's Office. MGT determined the number of staff required to operate the Detention Command including the Detention Bureau, Health Services Bureau, Public Services Bureau, and Support Services Bureau. MGT determined the appropriate level of staffing of the three main jail facilities and inmate processing center (IPC) to insure compliance with contemporary standards for professional correctional administration, and more specifically, the regulations of the Texas Commission on Jail Standards. The MGT team also reviewed all program and services, including medical, mental health, transportation, education, and other required functions as they related to inmate supervision and staffing needs.

Consultant on a criminal justice system assessment and jail population study for Hays County. MGT reviewed the current jail population, developed a forecast of future population levels, reviewed the jail to determine current and projected levels of crowding, and assessed alternative programs to manage the workload of the criminal justice system, including jail population growth. The assessment produced recommendations and proposed program modifications designed to enhance the effectiveness and efficiency of the county's criminal justice system and enabled Hays County to more accurately plan for the future.

Directed a project for the city of Austin, Texas. Provided legal assistance in the investigation of employee complaints at Austin Water Utility.

Consultant on an Immigration and Customs Enforcement contract with MGT to provide support in administering and conducting the Detention Compliance Management Plan. MGT conducted annual and pre-occupancy inspections of designated detention facilities to ascertain compliance with federal standards. MGT also provided focused inspections, expert input, and testimony on detention issues. MGT also performed related research, and programmatic support to support ICE functions.

Consultant on a comprehensive assessment of the Umatilla Tribal Police Department. MGT examined the Department's operations and customer satisfaction, identified strengths and opportunities, and recommended policy and operational improvements.

Consultant on a jail system needs assessment for the County of Santa Clara, California. MGT reviewed the operational and organizational efficiency of the correctional system, which reports directly to the County and is independent of the Sheriff's Office. The assessment also included a comprehensive review of current jail facilities, detailed staffing analysis, program review, and a population forecast of the county's inmates and the resulting capacity requirements of the county's correctional facilities for a 20-year period. The assessment examined resource needs for both the facility and operational aspects of the jail system.

PROFESSIONAL AND BUSINESS EXPERIENCE (Continued)

Consultant on a jail facility utilization assessment for Lubbock County, Texas. MGT reviewed potential future uses of the current jail complex. MGT provided an overall assessment of the condition of the current jail complex, identified potential projects that might be required to allow continued use of the facility, and analyzed alternative uses for the current jail complex that might be in the county's interest.

Consultant on a justice system review for Tyler County, Texas. MGT assessed the county's jail population, developed a forecast of future population levels, identified policies to help manage jail population growth, and accurately assessed jail capacity needs. MGT's review produced recommendations and proposed program modifications enhance the effectiveness and efficiency of the county's criminal justice system.

Directed a project to provide the Board of Police Commissioners (BOPC), Kansas City, Missouri Police Department with a study of the mandatory retirement policy regarding sworn police officers that currently requires such officers to retire at 30 years of service. The study thoroughly examined the reasons that supported retention of the 30-year retirement policy, as well as reasons that supported changes to the policy. MGT studied the effect of whether increasing the tenure of police officers increased the level of police service to the community as well as the satisfaction level of citizens and the officers.

Provided consultation on criminal justice issues to CSIdentity Corporation.

Conducted a training session on Collaborative Partnering for the National Jail Leadership Command Academy at Sam Houston State University.

Assistant Professor in the College of Criminal Justice at Sam Houston State University. Undergraduate courses taught include Fundamentals of Criminal Law, Legal Aspects of Corrections, Professionalism and Ethics, and Criminal Investigation. Graduate courses taught include Seminar in Organization and Administration and Legal Aspects of Criminal Justice Management.

Sheriff of Travis County, Texas. Assumed office as the first female sheriff in Travis County history in January 1997. Served as the Chief Law Enforcement Officer and Chief Corrections Officer of Travis County. The Travis County Sheriff's Office is an agency of over 1,350 employees with a 2004 budget of over $90 million. It is a full service sheriff's office which patrols over 700 square miles and operates a jail system which houses over 2,400 inmates.

Instructor in the College of Behavioral Sciences at St. Edward's University on a part-time basis. Courses taught included American Policing and Corrections.

Provided consultation and expert testimony in matters involving criminal justice including civil rights, employment law, law enforcement practices, and corrections practices.

Partner at the law firm of Bickerstaff, Heath LLP. Primary practice involved the representation of local government clients, including school districts, police departments, and sheriff's offices in civil rights and employment law matters.

Associate at the law firm of Brown Maroney (Now Brown McCarroll). Primary practice was general litigation with an emphasis in litigation involving sheriff's offices.

PROFESSIONAL AND BUSINESS EXPERIENCE (Continued)

Interned as a law clerk for U.S. District Judge Maurice Paul.

Interned as a legislative analyst for the Florida Senate Committee on Criminal Justice. Drafted and analyzed legislation in the area of criminal justice.

Served as Captain for the Travis County Sheriff's Office, Texas. Progressed through the ranks from deputy sheriff and corrections officer to captain with five years of service as captain. Main duties included management of jail system and coordination with Commissioners' Court.

Adjunct Instructor at Austin Community College. Adjunct Instructor in criminal justice on a part-time basis. Classes taught included Introduction to Criminal Justice and Corrections.

Corrections officer for the Texas Department of Corrections. Duties included maintenance of security and supervision of inmates in a maximum security prison.

EXPERT WITNESS EXPERIENCE

Provided expert witness services and litigation support to Crenshaw, Dupree & Milam, L.L.P. in association with Ceballos v. William Bridgwater.

Provided expert witness services and litigation support to the Law Offices of Charles S. Frigerio in association with Rosas v. Webb County.

Provided expert witness services and litigation support to the Law Offices of Charles S. Frigerio in association with Short v. Hudspeth County.

Provided litigative consulting services to the U.S. Department of Justice for the United States Attorney, Eastern District of New York. Served as a consultant in police administration and practices to assist discriminatory policy investigation.

Provided expert witness services and litigation support to P. McKinney & Associates, P.C. in association with Castaneda v. Gillespie County.

Provided expert witness services and litigation support to Willette & Guerra, L.L.P. in association with Muniz v. Cameron County.

Provided expert witness services and litigation support to Royston Rayzor in association with Ramirez v. Jim Wells County.

Provided expert witness services and litigation support to Jackson Walker L.L.P. in association with Marley v. Crockett County.

Provided expert witness services and litigation support to Crenshaw, Dupree & Milam, L.L.P. in association with Nottingham v. Wheeler County.

EXPERT WITNESS EXPERIENCE (Continued)

Provided expert witness services and litigation support to Triona, Calderhead and Lockemeyer, Ltd. in association with McCullum v. Tepe.

Provided expert witness services and litigation support to Haley & Olson, P.C. in association with Watson v. Whitney.

Provided expert witness services and litigation support to Blaies & Hightower, L.L.P. in association with Whitley v. City of Brownwood.

Provided expert witness services and litigation support to Ritcheson, Lauffer, Vincent & Dukes, P.C. in association with Sowell v. Waldon.

Provided expert witness services and litigation support to Ritcheson, Lauffer, Vincent & Dukes, P.C. in association with Brown v. Keith.

Provided expert witness services and litigation support to Potter County, Texas in association with Dick v. Potter County.

Provided expert witness services and litigation support to Flowers & Davis, PLLC in association with Morrow v. Tenaha.

Provided expert witness services and litigation support to Jackson Walker L.L.P. in association with Landreth v. Midland.

Provided expert witness services and litigation support to Wright & Greenhill, P.C. in association with Williams v. Round Rock.

Provided expert witness services and litigation support to Bexar County, Texas in association with Garcia vs. Bexar County.

Provided expert witness services and litigation support to the Bexar County District Attorney's Office in association with Connolly v. Bexar County District Attorney et al.

Provided expert witness services and litigation support to Blaies & Hightower, L.L.P. in association with Mays, et al v. Johnson County, Texas.

Provided expert witness services and litigation support to Willette & Guerra, L.L.P. in association with Moreno v. Brownsville Police Department.

Provided expert witness services and litigation support to the Pinkerton Law Firm, PLLC.

Provided expert witness services and litigation support to Chamberlain, Hrdlicka, White, Williams & Martin in association with Martinez , et al. v. Maverick County.

Provided expert witness services and litigation support to Flowers & Davis, PLLC in association with Hernandez v. Nacogdoches, Texas, et al.

EXPERT WITNESS EXPERIENCE (Continued)

Provided expert witness services and litigation support to Royston Rayzor in association with Torres, et al. v. Hidalgo County, Texas.

Provided expert witness services and litigation support to Wright & Greenhill, P.C. in association with Perez v. Killeen Independent School District, Texas.

Provided expert witness services and litigation support to Allison Bass & Associates, L.L.P. in association with Forbes v. Caldwell County, Texas.

Provided expert witness services and litigation support to Allison Bass & Associates, L.L.P. in association with Craig v. Burnet County, Texas.

Provided expert witness services and litigation support to Adams & Graham, L.L.P. in association with Tamez v. the city of Harlingen, Texas.

Provided expert witness services and litigation support to Hunter & Handel, P.C. in association with Aguilera v. Maverick County, Texas.

Provided expert witness services and litigation support to Nueces County, Texas. in association with Campos v. Nueces County, Texas.

Provided expert witness services and litigation support to Haley & Olson, P.C. in association with Bradshaw v. McLennan County, Texas.

Provided expert witness services and litigation support to Cantrell, Ray, Maltsberger & Barcus, L.L.P. in association with Davis v. Montgomery County, Texas.

Provided expert witness services and litigation support to Matthews, Stein, Sheils, Pearce, Knott, Eden & Davis, L.L.P. in association with Wallis v. The City of Irving.

Provided expert witness services and litigation support to Germer Gertz L.L.P. in association with Davis v. Brazos County, Texas.

Provided expert witness services and litigation support to Allison Bass & Associates, L.L.P. in association with Gayton v. Milam County, Texas.

AWARDS

Lifetime Achievement Award, National Center on Women in Policing, 2003

Community Service Award, NAACP, Austin Chapter, 2000

Recognition for Being Outstanding Role Model, Austin Area Urban League, 2000

Breaking the Glass Ceiling Award, National Center on Women in Policing, 1999

Administrator of the Year, Combined Law Enforcement Association of Texas, 1998

AWARDS (Continued)

Bridge Builder of the 21st Century, National Women of Achievement, Inc., 1997

Administrator of the Year, Combined Law Enforcement Association of Texas, 1997

Correctional Officer of the Year, National Jail Association, 1981

PROFESSIONAL ACCOMPLISHMENTS

Major County Sheriffs' Association (President, 2004; Vice-President, 2002-2003; Treasurer, 1998-2001)

National Sheriff's Association (Board of Directors, 2002-2004)

SafePlace Foundation, Board of Trustees

Big Brothers/Big Sisters of Central Texas, Board Member

Children's Advocacy Center of Central Texas, Advisory Board Member (1997-2004)

National Center for Women and Policing, Board Member

Texas Institute for Public Problem Solving, Executive Board Member

PUBLICATIONS

Frasier, Margo L., The Use of Conducted Energy Devices (Tasers), *Telemasp Bulletin,* Texas Law Enforcement Management and Administrative Statistics Program, (2005) Vol. 12, No. 6, pp. 1-11.

Frasier, Margo L., Search and Seizure, *Suing and Defending Governmental Entities Seminar 2005,* Texas Bar CLE, Vol. 17, Chapter 12, pp. 1-8.

CONFERENCE PRESENTATIONS

New County Judges and Commissioners School, LBJ School of Public Affairs, University of Texas at Austin, Austin, Texas, January 2005. Presentation on Jail and Law Enforcement Liability

American Jail Association, Annual Conference, Kansas City, Kansas, May 2005. Presentation of paper entitled: Legal Consequences of Prison Rape

17th Annual Suing and Defending Government Entities Seminar, San Antonio, Texas, July 2005 Presentation of paper entitled: Search and Seizure

Oregon Jail Managers' Association, Ontario, Oregon, August 2005. Two day presentation on the Prison Rape Elimination Act; sponsored by the National Institute of Corrections

CONFERENCE PRESENTATIONS (Continued)

South Dakota Jail Administrators' Association, October 2005. Two day presentation on the Prison Rape Elimination Act; sponsored by the National Institute of Corrections

Oregon Sheriffs' Association, December 2005. Presentation on the Prison Rape Elimination Act; sponsored by the National Institute of Corrections

Women in Criminal Justice Seminar, Corrections Management Institute of Texas, Dallas, Texas, April 2006. Presentation on "Managing and Being Managed"

American Jail Association, Annual Conference, Salt Lake City, Utah, May, 2006. Presentation of paper entitled: Prison Rape Elimination Act, Investigating Sexual Assault Allegations in Jail Settings

Utah Sheriff's Association, Annual Conference, Salt Lake City, Utah, September 2006. Presentation on the Prison Rape Elimination Act; sponsored by the National Institute of Corrections

Virginia Sheriff's Association, Annual Conference, Virginia Beach, Virginia, April 2007. Presentation on the Prison Rape Elimination Act; sponsored by the National Institute of Corrections

Michigan Sheriff's Association, Annual Conference, Thompsonville, Michigan, June 2007. Presentation on the Prison Rape Elimination Act; sponsored by the National Institute of Corrections

National Sheriffs' Association, Annual Conference, Salt Lake City, Utah, June 2007. Participation as panelist of experts on the Prison Rape Elimination Act

Women in Criminal Justice Seminar, Corrections Management Institute of Texas, San Antonio, Texas, May 2008. Presentation on "Women as Leaders"

Texas Association of Counties' Leadership Reunion, Bandera, Texas, May 2008. Presentation on "Leading with Ethics"

SERVICE

Faculty Advisor, Sam Houston State University Chapter, National Association of Blacks in Criminal Justice (2005-2008)

Faculty Advisor, Sam Houston State University Chapter, Lambda Alpha Epsilon (2007-2008)

Sam Houston State University, College of Criminal Justice, Future Planning Committee (2005-2006)

Sam Houston State University, College of Criminal Justice, Distance Learning Committee (2005-2008)

Sam Houston State University, Faculty/Staff Annual Fund Campaign Committee (2005-2006, 2006-2007)

SERVICE (Continued)

Sam Houston State University, Convocations Committee (2006-2008)

Sam Houston State University, Underrepresented Minority Faculty Populations Committee (2006-2008)

Sam Houston State University, Student Development Committee (2007-2008)

Sam Houston State University, American Democracy Project (2007-2008)

Education Service Center, Region VI, Safe and Drug Free Schools Advisory Committee (2005-present)

TABLE OF CONTENTS

I. DISCLAIMER 1

II. SUPREME COURT DECISIONS 1
A. *Graham v. Connor (1989)* 1
B. *Tennessee v. Garner (1985)* 2
C. *Scott v. Harris (2007)* 2

III. USE OF FORCE TRAINING 3
A. Training for Prospective Officers and Certified Officers 3

IV. THE STATUTORY PROVISIONS CADETS ARE TAUGHT REGARDING USE OF FORCE 4
A. Code of Criminal Procedure 4
B. Penal Code 4
C. Case law 6
D. Deciding Factors on Level of Force 7

V. SCENARIO TRAINING 7

VI. INTERMEDIATE WEAPONS AND FIREARMS 7

USE OF FORCE: SHOOT—DON'T SHOOT, HOW LAW ENFORCEMENT OFFICERS ARE TRAINED, FIREARMS AND TASERS

I. DISCLAIMER

Don't you just love someone who starts off with a disclaimer? At the Suing and Defending Governmental Entities Seminar, there are speakers who produce massive articles covering every case known to man and woman regarding qualified immunity, sovereign immunity, land regulations, and the like. This article is not intended to be one of those. It is intended to be an article which provides attorneys with some insight on the training of law enforcement officers in the area of use of force.

The author has also been so bold as to include some "practice hints" for those who are new to litigating Section 1983 cases.

II. SUPREME COURT DECISIONS

The Supreme Court has issued very few opinions which deal directly with the use of force by law enforcement officers. The three main cases are highlighted within this article before the discussion on the training of prospective and current law enforcement officers on the use of force so as to provide the background against which the training should be judged.

A. *Graham v. Connor (1989)*

In the majority of the lawsuits filed against law enforcement officers alleging excessive use of force, the plaintiff is an arrestee. When allegations of excessive use of force are made by an arrestee, it implicates the guarantee of freedom from "unreasonable seizures" found in the Fourth Amendment to the United States Constitution. *See Graham v. Conner,* 109 S.Ct. 1865 (1989). As such, claims that excessive force was used during an arrest are to be analyzed to determine whether the "reasonableness" standard of the Fourth Amendment has been violated as opposed to the due process standard of the Fourteenth Amendment. *Graham,* 109 S.Ct. at 1871.

To fully understand the holding in *Graham*, it is helpful to look at the facts underlying the decision. Graham was a diabetic who asked a friend to drive him to a convenience store to purchase some orange juice to counteract the onset of an insulin reaction. When Graham and his friend arrived at the store, it was crowded so Graham hurriedly went back outside and asked his friend to instead drive him to a friend's house. Connor, an officer, because suspicious after he saw Graham enter and leave the store in a hurry. Connor followed the vehicle and made an investigative stop and ordered Graham and his friend to wait while he determined what had happened at the convenience store. Other officers arrived and handcuffed Graham while ignoring his attempt to explain his medical condition. An encounter then ensued in which Graham sustained multiple injuries. While Graham and his friend apparently told the officers that Graham's strange behavior (stumbling around, stupor, not adhering to instructions) was the result of an insulin reaction, the officers assumed he was drunk. Graham was later released when Connor learned that no crime had been committed at the convenience store. Graham brought a Section 1983 lawsuit against the officers alleging a violation of the Fourth Amendment constitutional protection from excessive force. At trial, at the close of the plaintiff's case, the district court directed a verdict based on the four prong test of *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973) which is a detention case. *Johnson v. Glick* requires the plaintiff to prove that the allegedly excessive force was applied maliciously and sadistically to cause harm; a burden the district court felt the plaintiff had not met.

The Supreme Court held that the liability of a law enforcement officer must be judged under the Fourth Amendment's "objective reasonableness" standard rather than under a "substantive due process" standard. Additionally, the "reasonableness" of the particular use of force is to be judged from the perspective of a reasonable officer on the scene. That is, the court is to judge the officer's conduct at the moment as opposed to judging it "aided by 20/20 vision hindsight." The Supreme Court particularly cautioned that in judging the reasonableness of the officer's conduct that allowance must be made for the fact that 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." The Supreme Court vacated the judgment and remanded the case.

PRACTICE HINT: It is important for the jury to understand what the officer was seeing, feeling, and sensing at the moment of the decision to use force. Whether that is beneficial to the plaintiff or the defendant depends on the case. Whether it is done through the fact witnesses or an expert depends on the capability of the witness and the court. What appears to work best is to have someone explain to the jury what sort of training the officer had received, what the law says an officer is allowed to do (or what he/she has been trained the law says or the witness expects the judge will instruct the jury the law says), what the

officer was observing and feeling, and how the three mesh together.

B. *Tennessee v. Garner (1985)*

While the decision as to whether the use of force, including deadly force, is normally fact driven, the Supreme Court has placed limitations on the use of deadly force. In *Tennessee v. Garner*, 105 S.Ct. 1694 (1985), the Court held that officers may not use deadly force to prevent the escape of a suspect unless it is necessary 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 to others. In *Garner*, the officer was chasing a suspect fleeing from a home to which he had been dispatched on a prowler call. The suspect reached a fence at one point and the officer got close enough to see the suspect. Despite the officer having ordered the suspect to stop, the suspect then began to climb the fence. Realizing that if the suspect was successful in climbing the fence that he would likely elude officers, the officer fired a shot which resulted in the suspect's death. During discovery, the officer admitted that he was reasonably sure that the suspect was not armed and could tell that the suspect was a young man (a fact that appeared to weigh heavily with the Sixth Circuit). The officer also admitted that the reason he shot the suspect was to prevent him from eluding arrest as opposed to fearing that the suspect would harm him or others.

The Supreme Court held that it was not reasonable for an officer to use deadly force to prevent the escape of all suspects, regardless of the threat the suspect posed. To determine whether the level of seizure, i.e. force, is reasonable, the extent of the intrusion on the suspect's rights under the Fourth Amendment is to be balanced against the governmental interests in effective law enforcement. Applying that formula to the facts of *Garner*, in order for deadly force to be justified, the Supreme Court held that the suspect must pose an immediate threat of serious bodily harm or death to the officer or others.

It should be noted that the Tennessee statute provided that once an officer had given a fleeing suspect notice of intent to arrest the person and the person continued to flee or resist that the officer could use "all necessary means to effect the arrest." This included the use of deadly force. Additionally, the policy of the Memphis Police Department specifically authorized officers to use deadly force in such a situation. Once the case was remanded to the district court from the Supreme Court, the district court granted summary judgment to the defendants on a theory that the Supreme Court did not intend to apply the decision retroactively. The Sixth Circuit reversed as to the city and police department and held that the Supreme Court did intend for the decision to be retroactive. The Sixth Circuit went as far as to grant partial summary judgment (on the liability issue) to the plaintiffs based on the city and department having an unconstitutional policy. *See Garner v. Memphis Police Department*, 8 F.3d 358 (6th Cir. 1993). While the Sixth Circuit found that the city and police department were responsible due to the unconstitutional policy, the Sixth Circuit upheld the summary judgment granted to the officer involved on a theory of qualified immunity.

At the time of *Garner*, Texas had a similar statute. The changes to the statute are referenced further on in the article during the discussion of officer training.

C. *Scott v. Harris (2007)*

For the nearly twenty years that followed the Supreme Court's decision in *Garner*, courts routinely spoke of *Garner* as being the decision to be looked to when officers utilized deadly force. While some courts would also speak in terms of the test of objective reasonableness set forth in *Graham*, most often the discussion did not focus on the objective reasonableness of the officer's actions but instead on the "immediate threat" to the officer and/or others. The Supreme Court's holding in *Scott v. Harris*, 127 S.Ct. 1769 (2007) further emphasized how objective reasonableness was the key to judging an officer's conduct. Interestingly, the Supreme Court attempted to distinguish *Garner* based on the facts of the case.

In *Scott*, an officer "terminated a pursuit by applying his push bumper" to the rear of the speeding motorist's vehicle. In other words, the officer rammed the back of the speeding vehicle which caused the speeding vehicle to leave the roadway and crash. The driver (Harris) of the speeding vehicle was rendered a quadriplegic as a result of the crash and sued under Section 1983alleging excessive use of force under the Fourth Amendment. The district court denied the officer's motion for summary judgment based on qualified immunity. In upholding the district court's ruling, the Eleventh Circuit stated that the officer's actions could be found by a jury to constitute deadly force under *Garner* and that the use of deadly force under such a circumstance would violate the driver's right to free from excessive force during a seizure.

In reversing the court of appeals, the Supreme Court held that due to Harris (yes, the Supreme Court said Harris, the driver, initiated the chase, not the officer who turned on his lights and siren and attempted to stop Harris) initiating a chase that posed a substantial and immediate risk of injury to others, Scott was reasonable in terminating the pursuit by forcing Harris' vehicle off of the roadway. As the Supreme Court found Scott's actions reasonable, it did not need

to reach the issue of whether Scott was entitled to qualified immunity.

The Supreme Court also clarified that *Garner* did not establish rigid preconditions to an officer's use of deadly force, but merely required that the officer's conduct be judged to see if it is reasonable. In order to make that determination, what was to be weighed was the likelihood Scott's (the officer) actions would cause serious bodily injury or death to Harris (the driver) against the "actual and imminent threat" that Harris' actions posed to others. One didn't have to be a constitutional scholar or have a crystal ball to figure out where the case was going given the language of the decision.

There are two very interesting aspects of *Scott*. One, Scott was not using an approved maneuver when he used his push bumper. Policy required Scott to get permission to use the approved maneuver and was given permission by his sergeant to "take him out." Problem was that while there is a driving technique referred to as a PIT (Precision Intervention Technique) maneuver, Scott had not been trained in the maneuver and decided he was going too fast to safely perform the PIT. Therefore, he rammed the rear of Harris' vehicle in an effort to make him lose control and wreck. The Supreme Court did not seem at all bothered by the failure to train Scott or that he rammed the vehicle in a manner which would almost certainly result in a crash given the speed of the vehicle (90 m.p.h.). Two, the Supreme Court relied on the videotape from the officer's vehicle to determine the dangerous of Harris' conduct and the reasonable of Scott's actions. Harris had filed summary judgment evidence claiming that he was driving in a manner that did not endanger others. Harris' theory was that the any danger there was could have been eliminated by Scott discontinuing the chase. Instead of adhering to the long standing principle of viewing summary judgment evidence in the light most favorable to the nonmoving party, as the Court of Appeals had done, the Supreme Court held there was no "genuine" dispute as to the facts based on the videotape. As there had been no fact finding by the district court or court of appeals as to dangerousness of the actions of either Harris or Scott (other than the court of appeals had found that Scott's actions could have resulted in a jury finding that Scott had used deadly force), he Supreme Court viewed the tape and made the decision that Scott's actions were reasonable.

For those readers who are old enough to remember the days when the Supreme Court would adjourn to watch films to determine whether they met the definition of pornography, one has to wonder whether viewing of videos from police vehicles will become standard practice.

PRACTICE HINT: Make sure there is summary judgment evidence based on the review of any video and/or audio tapes of the incident. An expert should review the tapes and opine, if possible, on the unreasonableness or reasonableness of the officer's actions.

III. USE OF FORCE TRAINING

A. Training for Prospective Officers and Certified Officers

The Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) is the agency charged with establishing the training requirements for those seeking certification as law enforcement officers and for officers who are already certified. The course for prospective officers is called the Basic Peace Officer Course (BPOC). During the BPOC, prospective officers (cadets) are taught about the use of force and firearms. The training of cadets in the use of force is normally accomplished as a two step process. First, cadets are given classroom training on the various statutory and constitutional limits on the use of force along with some training on how to control situations without the use of force. Second, cadets apply what they have learned through scenario and role-play training. Training on self-defense tactics and how to use firearms and the various intermediate weapons is normally included with the scenario training.

As far as certified officers, TCLEOSE requires certified officers to qualify with their firearms once a year; although many departments require semi-annual or quarterly firearms qualification. Additionally, all certified officers have a two year training cycle during which they are required to complete forty hours of training. TCLEOSE does not mandate use of force training be contained within that forty hours. There is requirement that as part of mandatory training those officers take a course which updates them on changes to state and federal laws. This court usually consists of revisions to the penal code and code of criminal procedure. However, if there was a significant court case dealing with use of force it would most likely be included. The only other time that certified officers are required to take a course on use of force is if they are seeking their intermediate certificate. The Intermediate Use of Force class is an eight hour course which covers more of the research regarding the use of force.

All officers in the State of Texas must receive the training contained in the BPOC; therefore, that training will be emphasized in this article. The main chapters pertaining to the use of force in the BPOC are chapters 17-19. It should be noted that TCLEOSE tends to provide instructors with an outline of the issues to be

covered and the instructor is responsible for developing the lesson plan.

PRACTICE HINT: Except for larger agencies, most officers receive their BPOC training through regional academies. If the content of that specific training is an issue, the lesson plans can be subpoenaed. Although it is doubtful that an academy would willingly allow a plaintiff's expert to view the training, a defense expert might be allowed to view the actual training. In most cases it is not an issue of how officers were trained, but how they apply the training.

IV. THE STATUTORY PROVISIONS CADETS ARE TAUGHT REGARDING USE OF FORCE

The following is a summary of most of the statutory provisions that TCLEOSE sets out in its training materials on use of force.

A. Code of Criminal Procedure

The Code of Criminal Procedure contains both the granting of permission for officers to use force and the setting of the outward limit on that use of force. Section 15.24 of the Texas Code of Criminal Procedure (CCP) provides that in making an arrest, "all reasonable means are permitted to be used to effect it. No greater force, however, shall be resorted to than is necessary to secure the arrest and detention of the accused."

The statutory language does not speak in terms of using the "least amount of force" or "minimal force." While one can argue that "reasonable" force is the same thing as force that is "no greater" than what is necessary to arrest and detain, the "least amount of force" or "minimal force" is quite different. Least amount of force/minimal force versus reasonable force is not just semantics. According to the Merriam-Webster's Dictionary, reasonable can be defined as "being in accordance with reason; not extreme or excessive," which is the same way the courts define reasonableness. Minimal however, is defined as "relating to or being a minimum; the least possible; barely adequate; very small or slight." Thus an officer could use a reasonable amount of force and it is more than minimal or the least amount of force required in the situation. It is often difficult for cadets and officers to distinguish between the two concepts and they will often use them interchangeably.

Compounding the situation is that some law enforcement agencies will use the term "least amount of force" or "minimal force" in their policies. When asked, law enforcement administrators will often state that they intended to mimic the language of the statute and did not appreciate the difference.

PRACTICE HINT: If you are defending an officer, explain to him/her the difference between the two concepts and have him/her be aware of which phrase is being used by a plaintiff's counsel in a deposition. If you are a plaintiff's counsel, you pose the questions of whether the officer used the least amount of force possible and receive a "no" answer. If that is what you were after, fine. But know that such an answer does not equate to an admission that the officer used an unreasonable amount of force so as to denote liability.

B. Penal Code

A great deal of an officer's training concentrates on the Texas Penal Code. The ability of instructors to explain the statutory language differs significantly. For instance, Section 9.02 of the Texas Penal Code (PC) states that it is a "defense to prosecution that the conduct in question is justified under this chapter." This phrase has little meaning to officers (and may even lawyers) as written. However, when it explained that almost every use of force would be considered an assault if not for this provision, it makes more sense.

Section 9.03 of the PC provides that confinement is "justified when force is justified by this chapter if the actor takes reasonable measures to terminate the confinement as soon as he safely can unless the person confined has been arrested for an offense." Again, an officer might look at this provision and wonder why it is important. The explanation is that confinement without consent is a crime called unlawful restraint.

Section 9.04 of the PC provides that the "threat of force is justified when the use of force is justified by this chapter. For purposes of this section, a threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force." In other words, while under the holding of *Garner* an officer cannot shoot a fleeing suspect who does not pose an immediate threat of serious bodily injury or death to the officer or others, the officer can lawfully threaten to shoot the same suspect if he continues to flee and can lawfully point a weapon at the suspect to get the suspect to comply with the officer's order.

Section 9.05 of the PC provides that even if an officer is "justified under this chapter in threatening or using force or deadly force against another, if in doing so he also recklessly injures or kills an innocent third person, the justification afforded by this chapter is unavailable in a prosecution for the reckless injury or killing of the innocent third person." Note that this provision does not provide that the justification is unavailable in a civil matter. However, section 9.06 of

the PC states that the "fact that conduct is justified under this chapter does not abolish or impair any remedy for the conduct that is available in a civil suit." In other words, an officer cannot rely solely on the words of the statute in a civil case; his/her conduct must be reasonable. Officers are trained that they are to be aware of their surroundings and act accordingly. One of the scenarios often used to train officers put officers in a situation where an individual is firing at an officer (clearly would justify the use of deadly force by the officer), but behind the suspect are innocent bystanders. The scenario is intended to lead to the discussion of how the officer balances the need to defend himself/herself with the requirement that he/she not recklessly injure an innocent third person. This situation also often comes up in high speed chases where the person injured at the end of the chase is not the person who initiated the chase like in *Scott*, but a person who just happened to be on the roadway at the same time.

Section 9.51 of the PC is the section on arrest and search and contains the most specific provisions regarding the use of force. It provides that an officer is justified in using force against another when and to the degree the officer reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest, if: (1) the officer reasonably believes the arrest or search is lawful or, if the arrest or search is made under a warrant, the officer reasonably believes the warrant is valid; and (2) before using force, the officer manifests his/her purpose to arrest or search and identifies himself/herself as an officer unless he/she reasonably believes his/her purpose and identity are already known by the person to be arrested or cannot reasonably be made known to the person to be arrested. One question that sometimes comes up is whether "reasonably believes" is to be measured objectively or subjectively. Most officers are trained that it is subjective reasonableness; would a reasonable officer observing the same facts and circumstances believe that there was grounds for arrest or search. As to the issue of identification, officers are trained that being in an identifiable uniform is sufficient, but that verbal notification is even better. An example often given of when an officer is justified in not manifesting his/her purpose is when the element of surprise is crucial; i.e., using force to disarm a suspect who might otherwise harm a hostage.

PRACTICE HINT: There is a difference between an investigatory stop, a detention, and an arrest. For instance, an officer who is making an investigatory stop, commonly referred to as a *Terry* stop, might frisk the person for weapons. However, officers often get confused when asked about the probable cause for the arrest. Reality is, there was no arrest and no probable cause was required; just reasonable suspicion.

PC 9.51 further provides that an officer is justified in using deadly force against another when and to the degree the officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest, if the use of force would have been justified and: (1) the officer reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force; or (2) the officer reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the officer or another if the arrest is delayed. In other words, under (1), the offense must be one that in and of itself contains a substantial risk of death or serious bodily injury. Under (2), the original offense does not have to involve substantial risk of death or serious bodily injury, but the person's conduct must be such as to pose such a risk. A perfect example is the behavior in *Scott.* Initially, the conduct for which arrest was authorized consisted of traffic violations (most likely a Class C or B misdemeanor under Texas law). However, the officer had reason to believe that if he did not get the vehicle stopped that there was a substantial risk that the driver's behavior would result in death or serious bodily injury.

PRACTICE HINT: The focus is not only on the offense for which the officer was trying to arrest the person. The focus is equally on the behavior of the person. Either one can result in an officer being justified in using deadly force, but one has to exist.

Officers are also trained that, in addition to the special provisions regarding use of force to affect an arrest, they are entitled to use force similarly to other persons in the State of Texas. In fact, there are specific provisions which limit what an ordinary persons can do if an officer is involved.

Section 9.31 of the PC provides that, unless the statue provides otherwise, "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." The statute contains some situation in which it is assumed that the other person was using or attempting to use unlawful force. The one applicable to officers is that it is presumed that the force was immediately necessary if the person against whom the force is used was committing or attempting to commit aggravated kidnapping, murder,

sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

This section also limits a person's ability to use force if the "unlawful" force is being used by an officer. Section 9.31 provides that the use of force against another is not justified "to resist an arrest or search that the actor knows is being made by a peace officer, or by a person acting in a peace officer's presence and at his direction, even though the arrest or search is unlawful." The one exception where the use of force to resist an arrest or search is justified is if, before the actor offers any resistance, the officer uses or attempts to use greater force than necessary to make the arrest or search, but only to the degree the person reasonably believes the force is immediately necessary to protect himself against the officer's use or attempted use of greater force than necessary.

Deadly force is not justified under PC 9.31, but Section 9.32 of the PC provides when deadly force can be used in the defense of person and applies to officers. It provides that an officer is justified in using deadly force against another if the officer would be justified in using force against the other under Section 9.31when and to the degree the officer reasonably believes the deadly force is immediately necessary to protect the officer against the other's use or attempted use of unlawful deadly force; or to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. The difference between PC 9.31 and PC 9.32 is that the commission of the offense must be "imminent" to justify the use of deadly force.

Applying Section 9.33 of the PC to an officer's conduct means that an officer is justified in using force or deadly force against another to protect a third person if under the circumstances as the officer reasonably believes them to be, the officer would be justified under PC 9.31 or PC 9.32 in using force or deadly force to protect himself/herself against the unlawful force or unlawful deadly force he/she reasonably believes to be threatening the third person he/she seeks to protect; and the officer reasonably believes that his/her intervention is immediately necessary to protect the third person.

PRACTICE HINT: An officer will often be asked what his/her probable cause was for arrest that justified the use of force. An officer who is otherwise justified under the penal code to use force, including deadly force, does not have to gone through the mental exercise of determining probable cause for arrest to use force. He/she is entitled to protect himself/herself and others from someone's unlawful use of force. For instance, an officer who comes upon an aggravated robbery in progress is entitled to use deadly force if he/she reasonably believes it is necessary to protect the life of the store clerk. The officer does not have to determine there is probable cause to make a warrantless arrest or advise the person the officer believes to be a robber that he/she is under arrest; if reasonable, the officer could just shoot the person.

An officer is also justified to use force under the penal code to prevent escape. Section 9.52 of the PC provides that the use of force to prevent the escape of an arrested person from custody is "justifiable when the force could have been employed to effect the arrest under which the person is in custody, except that a guard employed by a correctional facility or a peace officer is justified in using any force, including deadly force, that he reasonably believes to be immediately necessary to prevent the escape of a person from the correctional facility." Given the Supreme Court holding in *Garner*, there is some consternation about using deadly force to prevent escape from a correctional facility if the officer knows that the person escaping is charged/convicted solely of a misdemeanor. The other question is what constitutes an escape from a correctional facility. For instance, an inmate is being escorted to court and bolts. Is that an escape from a correctional facility or is the officer bound by the limitations of *Garner*?

C. Case law

Officers are given limited training on the various court decisions involving different types of force such as canine, hog-tying, pepper spray, batons, and Tasers. *Garner* is one of the cases that are specifically outlined in the BPOC training materials. The extent to which cases are discussed in detail depends on the academy the officer attends.

PRACTICE HINT: An attorney should not assume that an officer will be able to explain the holding of any case, including the leading Supreme Court cases. He/she may well know and apply the concepts upon which the holding is based, but will often not know the names. If you are representing an officer, it is suggested that you remind the officer that the words "I don't know" are often the best answer. As a word of caution to attorneys on both sides, law enforcement experts often know just enough to get themselves in trouble. Most are not attorneys, but many of them believe that they have intimate knowledge of the various holdings and the constitutional principles for which the cases stand.

D. Deciding Factors on Level of Force

Officers are trained that in deciding what level of force to use, the officer should consider: (1) whether the suspect is submitting peacefully or is resisting, (2) whether the suspect is armed, (3) does the suspect have a previous record or history showing a pattern of violence, (4) the number of suspects involved, (5) how much support from other officers is available, (6) the physical size and strength of the arrestee and (7) what is the risk that the force chosen might cause injury to a bystander or other officers. Officers are cautioned not to let the age, gender, or small stature of a suspect lull them into thinking force will not be necessary, but that it may be a factor in the reasonableness of the officer's conduct. For instance, an infamous case out of Travis County involved a deputy constable using his Taser on a woman during a traffic stop. While the video showed the woman to be using foul language as she refused to sign her citation and then somewhat physically resisting the officer when he tried to arrest her, she came to be described by the media (and the video portrayed her to be) as an "elderly petite woman."

Additionally, officers are trained that using too little force results in ineffective control while excessive control has the potential of causing preventable injury. Thus, to a bystander, an officer might appear to be using greater force than is necessary when in fact the force is reasonable. Also, when dealing with suspects with mental health issues, the suspect's behavior may appear to be aggressive while it viewed as "normal" by the suspect's family members and friends.

PRACTICE HINT: If you are defending an officer and a bystander states that the officer used excessive force, question the bystander as to whether he/she (1) could tell for certain the amount of force the other person was using to resist the officer and/or (2) knows how officers are trained to react in such a situation. Watch out for the "television factor" in that a lot of people are influenced by what they see on television.

Officers are also trained to use their communication skills to try and control a situation without the use of force or a lesser amount of force. However, officers are trained there comes a point when it is clear that words are not working. For instance, officers are trained to be alert to a person becoming aggressive (or more aggressive) either in words or actions. If a person words and actions conflict (the suspect is approaching an officer with a knife while telling the officer "I'm not hurting anybody"), officers are trained to be ready to use force. Although officers are trained to repeat commands if possible, they are also trained that at some point they should conclude the person is not going to comply.

V. SCENARIO TRAINING

Scenario training is intended to allow officers to utilize the knowledge they have learned in the classroom setting. The amount of scenario training and the sophistication of the training will vary greatly by the academy. Some departments go as far as to bring in people to act out the various roles while other academies will simply read through a scenario and get students to respond as a group. The most effective use of scenarios is to have the cadets go through them and then critique their behavior referring back to the training materials.

PRACTICE HINT: Many of the academies adhere to using scenarios in a manner where the cadets "never win." By that is meant that the end result of the scenario is invariably that the cadet gets shot or stabbed. This tends to be particularly true if the cadet opts not to use force. Explore with the officer involved what he/she remembers about the scenarios used in training.

VI. INTERMEDIATE WEAPONS AND FIREARMS

The only types of weapons for which training is mandatory in the BPOC are handcuffs and firearms. Training on other intermediate (or less than lethal) weapons is optional. Officers are trained as to when the use of the various weapons is appropriate, how to use the various weapons, and how to retain the weapon.

Most departments require officers to be trained or "certified" before they can carry a particular intermediate weapon. Again, the level of the training will vary according to the academy, but almost all of the academies will cover the basics.

Taser training is specified by Taser International. Taser International requires instructors to go through the training sponsored by the company and provides a great deal of training material. There are two caveats that the author would point out about most Taser training. One, as it highly scripted by Taser International, it tends to over emphasize the positive aspects of a Taser and does not emphasize what an officer should do when the Taser does not result in compliance. In a study conducted by the author on Taser use by the Houston Police Department it was found that in roughly 30% of the incidents that the Taser did not have the desired result. Officers need to have a backup plan. Two, in response to litigation, Taser International often distributes what it calls "training advisories." These appear to be attempts to limit Taser International's liability. For instance, Taser International recently sent out a training bulletin cautioning against deploying the Taser to the chest area

of a suspect. Since other training literature advises against deployed the Taser to the head, neck, and groin areas, it leaves the officer with trying to strike the 6-8" area between the chest and the groin and the legs. That is unless the officer can get the suspect to turn around.

Firearms' training also varies greatly by academy. While some academies use moving targets and "shoot, don't shoot" videos, most utilize a range in which the officers stand at a ready position and fire from the distance of 3 yards, 7 yards, and 15 yards. An officer is required to make a score of 70% in order to qualify. Officers are trained to shoot at the largest portion of the target or center mass.

PRACTICE HINT: Jury members often wonder when the officer did not shoot the suspect in the leg or arm and why, in cases where the officer shot multiple times or multiple officers fired, it took more than one shot. It is helpful to explain that not all officers are expert shots and, that even if they are on the range, it is very different when fear comes into play and the officer is trying to hit a moving target.