

Use of Force Legal Update Video

Closed Caption Transcript

KEY:

Note: For any content of specific concern, the video should be reviewed to confirm transcript content.

Time Stamps = Approximate times the noted speaker begins and ends segment

Bold text = Narrator voice-over ***Bold Italics*** = Words spoken by narrator with emphasis

Changes from the current program are indicated as follows:

~~Red Strikethrough~~ = draft deletion

Blue Underscore = draft addition

[Opening disclaimer 00.00.000-00.08.000]

00:00:08.748 --> 00:01:06.446

On August 19th, 2019, Assembly Bill 392 was signed into law. Aware of the impending revisions to law, California POST gathered a small group of staff and district attorneys to review the legal changes, answer questions, provide insight, and assess how the use of force standard may be shifting. The following short informational video steps through the new language in the law and provides analysis of how it might affect law enforcement and the way they will view use of force cases. Assembly Bill 392 effectively moves the use of force requirement from Penal Code 196 to Penal Code 835 A. This program will walk through each new sub-section of 835 A in the Penal Code and highlight meaningful changes that become law on January 1st, 2020.

00:01:06.522 --> 00:01:34.600 Alvarez

Our intent is to educate California law enforcement on the new use of force standard that has recently been signed into law and will be utilized throughout the state of California. To make sure that officers are confident in what that law says and comfortable with it. We want them to apply the law, apply it safely for themselves so that they are safe, we want the communities to be safe and we want to just alleviate as many concerns as possible, as early as possible.

00:01:34.600--> 00:02:00.560

Prior to alleviating them concerns first need to be identified understood and then addressed. At the conclusion of the meeting each District Attorney sat for a one on one interview to provide their professional advice on the new law. At times, they gave examples and follow those with their opinions as to the legality of using deadly force. If the facts were changed, even slightly their legal analysis would be different.

00:02:00.560 -->00:02:14.243 Hestrin

Think that the Legislature, with this law, is trying to codify an emphasis that's been happening in law enforcement towards de-escalation and the use of less lethal force.

00:02:14.317 --> 00:02:45.020

To begin, the first four subdivisions of subsection A of 835 A makes several declarations regarding the gravity perspective evaluation of and alternatives to use of force. The 5th and final subdivision of subsection 8 stands out for the first four in that it centers on individuals with disabilities and their encounters with peace officers. The laws focus on this raises the question "what has the law changed with regard to those who have disabilities?"

00:02:45.020 --> 00:03:05.403 Dudley

It just points out, something every law enforcement officer knows which is people with disability are going to be in these situations and respond differently than someone without those disabilities. So, they may not comprehend what's going on as carefully and they may not be able to respond as they would want to.

00:03:05.465 --> 00:03:25.790 Hestrin

Peace Officers know that they have to deal with the mentally ill and it's fraught with peril, it is. Because sometimes the mental ill don't understand their situation and they present a danger to police officers. A danger that could result in loss of life to the officer or someone else that those officers have to deal with immediately.

00:03:25.790 --> 00:03:40.482

The circumstances, allowing for a peace officer's use of force contained in subsection B existed previously in 835 A with the exception of the insertion of one additional word. What does the addition of this word mean?

00:03:40.547 --> 00:03:46.000 Dudley

They added the word "objectively" to the term "objectively reasonable." Prior to this the law just said reasonable.

00:03:47.444--> 00:03:54.750 Hestrin

And that might seem like a small nuance, but essentially what it does is it creates an objective third person standard.

00:03:54.750 --> 00:04:08.709 Dudley

The California law enforcement officers have long been using the objectively reasonable standard. That's a standard in Graham versus Connor. And that's the federal standard and that's what they were all raised with.

00:04:08.775 --> 00:04:20.100 Hestrin

It injects common sense into the decision-making process. So, what would objectively reasonable police officer do in that situation given the same set of facts.

00:04:20.100 --> 00:04:34.000

As opposed to Subsection B, which dealt with the amount of force used to effect an arrest, subsection C focuses on the justified use of deadly force specifically. How does this new subsection change the standard for using deadly force?

00:04:35.000--> 00: 05:02.602 Dudley

The standard is slightly different in it's articulated differently in this new provision. ~~So, it has to be reasonable belief based upon the totality of the circumstances. That such force is necessary to defend against an imminent threat of death or serious bodily injury to the officer or another person.~~

[Narrator with Penal Code graphic showing] "Subsection (c)(1) states a peace officer is justified in using deadly force *only* when the officer *reasonably believes*, based on the *totality of the circumstances*, that such force is *necessary* for *either* of the following circumstances: First, when needed to defend against an *imminent* threat of death or serious bodily injury to the officer or to another person *or*, second, when apprehending a fleeing felon under certain conditions listed in the subsection."

00:05:02.078--> 00:05:36.440 Hestrin [\[Confirm correctly stated and remains\]](#)

It does make some changes in the way that police officers look at say a fleeing felon or someone who's not posing an imminent threat or danger to hurt someone or kills someone. The law changes it from reasonable to necessary and that's an important change that the law made. I think what the law contemplates is that in situations where it's more gray where it's closer call I think what the law is pushing officers to do is use deadly force only when necessary.

00:05:36.440 --> 00:05:54.367

This new law has brought significant changes to a situation where an officer is trying to apprehend a fleeing person suspected of committing a felony. To that end officers need to ask, "what conditions are required in order for deadly force to be justifiable when apprehending a fleeing person for a felony?"

00:05:55.020 --> 00:06:17.657 Dudley (VO only)

It must be for a felony that threatened or resulted in death or serious bodily injury and the officer must reasonably believe that the person will cause death or serious bodily injury to another unless immediately apprehended. [\[continue with 00:07:14 below\]](#)

~~00:06:17.657 --> 00:06:28.000 Hestrin~~

~~A fleeing felon, a police officer, is justified to use deadly force now only when a fleeing felon is posing a threat to someone's life.~~

~~00:06:28.657 --> 00:06:43.529 Dudley~~

~~Law enforcement officers should not consider future harm, no matter how great when we're talking about a fleeing felon. So, it's really important that they understand that this standard has changed in that way. It has to be about imminent harm.~~

~~00:06:43.529 --> 00:07:14.760 Hestrin~~

~~So when I think of imminent, I think of someone who is armed or someone who's already tried to hurt somebody trying to get into someone's home. Where the police officer knows there are people inside. So that, that's an imminent threat that someone is going to hurt someone else. On the other hand, though, if someone is a threat or tried to hurt someone and then all of a sudden, they're not armed anymore and they are just running, then I think that that's not a situation where deadly force would be justified any longer.~~

00:07:14.760 --> 00:07:37.712 Dudley (VO & on screen)

Additionally, when feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has (Dudley on screen) objectively reasonable grounds to believe the person is aware of those facts.

00:07:37.712 --> 00:08:03.000 Hestrin

I think in the vast majority of cases, it's going to be apparent, police officers wear uniforms and badge. So, I think most of the time, unless you're talking about an officer that's undercover, and really kind of a very specific situation it's saying that the person should know that you're a police officer and that you're about to use deadly force if it's not obvious from the circumstances.

00:08:03.396 --> 00:08:11.559

Subdivision 2 of subsection C is a note in that it specifically points out the circumstances when officers shall not use deadly force.

00:08:11.620 --> 00:08:56.810 Dudley (VO & on screen)

When the danger is just to the subject only, the officer believes the subject does not pose an imminent threat of death or serious bodily injury to the peace officer or another person. An example of when the only person that could experience death or serious bodily injury, would be in a situation something like this. Somebody's in their own home they are only person in the home, and they have a knife and they're threatening to kill themselves. Law enforcement officers are outside surrounding all the exits, and entrances into the house. And so, the only person threatened is the person themselves. That would be an example of when deadly force wouldn't be appropriate.

00:08:56.810 --> 00:09:08.971

In judging these situations, the term objectively reasonable officer found in this subdivision is key to understanding the type of standard officers face when making decisions regarding using force.

00:09:08.971 --> 00:09:34.688 Dudley

First of all, there's the average reasonable person and the average reasonable person is deemed to have X number of experiences and knowledge. You up the standard when you say the average reasonable law enforcement officer because you assume that they've had training and experience as law enforcement officers. So, when we're talking about a reasonable law enforcement officer, it is not that particular officer in that situation that would be subjective versus objective.

00:09:35.688 --> 00:09:49.762 Hestrin

Still a very practical common-sense standard that we're going to be using to look at these cases and I should say that's the change, I think that's, that's been among the most important.

00:09:49.762 --> 00:10:07.960

The introduction of this new law may create questions regarding whether there are now scenarios where officers must retreat. Subsection D of 835 A addresses this with language that should dispel concerns of officers who may think they are now obligated to retreat in certain situations.

00:10:07.960 --> 00:10:23.955 Otero

The bottom line, if an officer has to decide "Oh, do I have to retreat or not?" I think it becomes an officer safety issue. And so why am I going to, or why do we want to put that officer in harm's way when, from the beginning, they need to know you don't have to retreat.

00:10:23.955 --> 00:10:29.568 Hestrin

They don't have a duty to retreat. They have to confront that danger, that doesn't change.

00:10:29.628 --> 00:10:47.000

The key to becoming educated on all aspects of this law is the comprehension of specific terms that are used throughout. Subsection E contains definitions for 3 important terms. The deadly force definition is one that relies on an understanding of the concept of substantial risk.

00:10:47.000 --> 00:11:09.360 Hestrin

Introducing the word "substantial" just sort of raises the level of risk that's required. Substantial is greater than, than regular risk and that's the best I can do in defining it. When you're making these decisions, you've gotta be confronted with the substantial likelihood or substantial threat that someone's going to be hurt.

00:11:09.360 --> 00:11:20.0

A clear understanding of the ~~meaning for the word~~ legal definition of "imminent" as it relates to the use of deadly force in defending against the threat of death or serious bodily injury is critical. ~~to this law will help clarify an officers answer to the question, when is a threat of death or serious bodily injury imminent?~~

00:11:21.220 --> 00:11:55.160 Dudley

When the person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury. So all of those things, and I'll say them again: When a person has the present ability, the opportunity, and apparent intent to immediately cause great bodily injury or death. So, there are a couple of keywords there. How does it appear and must it be immediately confronted?

00:11:55.160 --> 00:12:06.413

The totality of the circumstances is a relatively simple, but often overlooked concept. It is one that is both employed by officers and their contacts and by DAs in their reviews.

00:12:07.030 --> 00:12:21.700 Dudley

It's a great term, and it's a human term, and what it tells a District Attorney and what it tells law enforcement officers, taking everything into consideration, given everything in that situation that you are aware of at that time.

00:12:22.700 --> 00:12:39.500 Hestrin

That means all the facts known to the officer, all the facts surrounding the situation. Everything leading up to it, and every single fact that the officer was confronted with at that moment, we're going to take all that into consideration.

00:12:39.500 --> 00:12:54.830

The second part of the definition of "Totality of the Circumstances" refers to the officer and subject conduct prior to the use of deadly force. This may raise questions regarding how long prior to the use of force is the conduct considered?

00:12:54.830 --> 00:13:00.977 Dudley

The way I interpret that, the conduct of the officer, is how the officer is conducting themselves during that event.

00:13:01.977 --> 00:13:30.489 Hestrin

We're going to look at everything that the suspect did leading up to the use of deadly force. But we're also going to look at everything the officer did. One of the things that I do when I look at these cases, is I want to know what dispatch said to the officer as the officers approaching the scene. So, to me that takes into account what the officer knows, what the officer says, what the officer did leading up to this encounter that led to someone's death.

00:13:30.489 --> 00:14:02.490 Dudley

The only time I would add on to that would be if the suspect or the subject has had an encounter with this law enforcement officer in the past. And therefore, that subject, that suspect, may be considering that as well. In most cases law enforcement officers will be meeting somebody for the first time under those circumstances. So, an officer can't be held accountable to know what he doesn't know or couldn't know. But if he's had an encounter with that person in the past, then that should be considered as well.

00:14:02.490 --> 00:14:14.230

Understanding the new law as it relates to the actions of peace officers in use of force situations is one thing. Having a perspective on how DAs look at cases in the context of these changes is another.

00:14:16.230 --> 00:14:36.14 Hestrin

I'm going to use the necessary standard and I'm going to ask you know was the use of force necessary in this situation given everything the officer knew. I'm going to use the objectively reasonable standard. It's a common-sense standard, but we're going to have to use that standard and look at the use of force and consider the legality of that particular action.

00:14:37.141 --> 00:14:46.841 Otero

When the decision is made that if a shooting was justified or not, and I can't do it based on what the public wants. I have to do what, based what the law is.

00:14:47.841 --> 00:15:05.451 Hestrin

That what I want to say to police officers is be able and ready to articulate what you did, and why. And that and that I think is going to help everybody sort of when we look at it in retrospect, it helps us understand what was the real situation was at that moment.

00:15:05.451 --> 00:15:25.040 Dudley

One of the things that hasn't changed is that law enforcement officers still have a duty to protect the public, they want to do the right thing for the right reason, they're engaged on a constant basis, with public safety and justice. It's why they put on the uniform.

00:15:25.040 --> 00:15:47.990

California POST and the group of experts who worked on this are hopeful that this program is provided clear straightforward answers to some of the questions that have arisen since this law was passed. Law enforcement officers are encouraged to contact their local district attorneys for their professional perspective. Additional resources are also available on the POST website.

00:15:47.990 --> 00:16:07.750 Alvarez

POST is always there to make sure that they receive, the proper training. They can always rely on their training. POST has a number of different resources, either on our website or through a simple phone call to POST, to help them further their mission. And I would like to just thank them for everything that they do day in and day out.

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