HOFFMAN ESTATES POLICE DEPARTMENT IN-SERVICE TRAINING

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USE OF FORCE INCIDENTS

and

CIVIL LIABILITY ISSUES

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I USE OF FORCE CASES - GOVERNED BY FOURTH AMENDMENT STANDARDS

A. *Graham v. Connor*, 109 S.Ct. 1865 (1989). In determining whether force used to affect particular seizure is "reasonable" under Fourth Amendment, question is whether officer's actions are "objectively reasonable" in light of facts and circumstances confronting officer, without regard to his underlying intent or motive.

- The subjective intentions of the officer are not relevant in Fourth Amendment analysis. The fact that officer may not have "liked" subject is not relevant in analysis.

(Notes)

B. Use of deadly force is a "seizure" that is subject to the reasonableness requirement of the Fourth Amendment.

- Was it objectively reasonable based on all facts known to the officer to use deadly force?

- Courts recognize officers are required to make split-second decisions; courts will generally not second guess judgment of officer.

- Courts will thus not hold officer who uses deadly force liable for making a mistake; i.e., for negligent conduct.

(Notes)

- *Tennessee v. Garner*, 471 U.S. 1 (1985). Deadly force may not be used to prevent an unarmed felony suspect from escaping unless the officer has probable cause to believe that the subject poses a threat of death or serious bodily injury to the officer or others.

  - Supreme Court's seminal case on use of deadly force.

  - Officer can't shoot unarmed fleeing felon if he poses no serious threat!

  - Federal Courts are sympathetic to officers' predicament in deadly force cases. Seventh Circuit oversees your conduct!

(Notes)

II. FEDERAL COURTS RECOGNIZE THAT POLICE OFFICERS ARE OFTEN FORCED TO MAKE SPLIT-SECOND JUDGMENTS IN DETERMINING WHETHER TO USE DEADLY FORCE

- *Scott v. Edinburg*, 2003 WL 22309242 (7th Cir., Decided Oct 9, 2003). Court held police officer was justified in shooting fleeing car thief where suspect's driving posed serious risk to several bystanders in parking lot of gas station. The Court found that deadly force may be exercised if the felon's actions place the officer or those in the immediate vicinity in imminent danger of death or serious bodily injury.

    - Off-duty Glenwood officer goes to buy gas. Sees subject stealing his car. Pulls weapon. Subject takes off in crowded parking lot. Shoots subject who dies.

        - Court found officer could use deadly force to protect citizens.

(Notes)

- *Pena v. Leombruni*, 200 F.3d 1031 (7th Cir. 1999). Court held that officer had the right to defend himself against shoplifting subject who was advancing toward officer with a chunk of concrete in his hand. Officer shot and killed subject after he ignored officer's command to put the concrete down and after subject was within five to ten feet of him.

(Notes) Discuss *Fulkerson* case

- *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999). Court held that it was reasonable for officer to shoot subject whom officer believed was pointing a shotgun at him and after the officer had told the subject to drop the gun. The court stated that "The Fourth Amendment prohibition against unreasonable seizure does not require an officer to use all feasible alternatives to avoid situations where deadly force can be justifiably used."

(Notes)

- *Frayne v. Kijowski*, 992 F. Supp. 985 (N.D.Ill. 1998). Court found that officer did not use excessive force by shooting husband who was pointing gun at his wife in couple's kitchen, even though gun turned out to be a B-B gun; it appeared to officers that husband posed a serious threat to wife's safety, and officers had to act quickly.

- *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988). Federal court overturned $1.6 million verdict in favor of decedent's estate. Court found jury should not have been told that the decedent (subject) was unarmed. Rather, jury only should have received evidence bearing on the reasonableness of the officer's belief that the subject was armed.

    - Officers pulled over subject wanted for robbery. Two officers exit squad with weapons drawn. Officer sees driver quickly reach for something in his coat; officer thought it was a gun. Officer shot him. (There was no gun, but cop didn't know it at the time.)

      Conclusion: Courts sympathetic to officers having to make quick decisions in dangerous situations.

III. EXCESSIVE FORCE LAWSUITS AGAINST POLICE OFFICERS

A. Suits against police officers typically in federal court.

- You are public official who gets sued under § 1983 of Civil Rights Act because you act under color of state law.
- Use of deadly force = excessive force claims under Fourth Amendment.
- State claims for battery - Intentional Infliction of Emotional Distress.

B. Fact Disputes = Classic Jury Cases.

- Excessive force cases often go to trial because cases involve questions of fact. Comes down to credibility of police officers v. arrestee and any witnesses.

C. Indemnification for off-duty conduct.

- Just because you were off duty at time of incident does not mean that you weren't acting within the scope of your employment. If you are acting within your scope as a police officer, you should be indemnified by employer for conduct. (i.e., *See Scott* case).

    - Key: Are you acting in your own personal interest?

(Notes)

D. Rigors of Jury Trial.

Your integrity is being attacked ➟ hot seat!

- Federal cases and trial are emotionally draining.

- Psychological impact of being a defendant (trying to help and now you're a defendant).

- Is department watching you and the result of trial?

- Media coverage in deadly force cases! Your name is in the newspaper ➟ reputation at stake.

IV. HOW TO PROTECT AGAINST EXCESSIVE FORCE LAWSUIT - PRE-SUIT CONSIDERATIONS

A. Exercise Proper Judgment and Training in Use of Force.

- Follow your training, i.e., defensive tactics.

- Keep updated training file ➟ shows you have been trained on use of force.

- We use experts - those who train you - to support your conduct.

- City can be held liable for failing to train officers.

(Notes)

B. Treat Injuries - Always Offer Medical Treatment.

- Document injuries accurately. Plaintiffs often exaggerate their injuries and how obtained, i.e., *Buck & Burt* case ➟medical documentation can prove the injuries alleged are exaggerated and plaintiff is lying!

- Don't turn no case into claim for failure to provide medical attention.

(Notes)

C. Report Writing.

1. Legible and Timely Reporting.

   - Take the time to prepare readable and accurate police reports. Plaintiff's attorney will use report to impeach you.

   - If you are uncertain about particular fact, take time to investigate and obtain answer.

   - Don't be lazy with report writing.

(Notes)

2. Document Arrestee's Injuries.

   - If subject is injured during arrest, put it in report even if subject does not receive medical treatment.

(Notes)

3. Document Alcohol or Drug Use.

- Include facts in report when alcohol is involved.
- Juries look down on drunk plaintiff.
- Example *Wiard* case (off-duty cop!): Drunk plaintiff who broke wrist. Jury didn't like him - no recovery even though injured

(Notes)

4. Document Officer Injuries. ➟Document if you're injured even if you don't get medical treatment.

- Possible counterclaim.
  - If you are injured, ask attorney about filing counterclaim for battery against subject. If jury doesn't like plaintiff, you may be benefactor. Send message to plaintiff.!

(Notes)

D. Booking Photos and Videotapes.

- Make sure you take booking photo at time of incident.
- *Miedema* case: "Picture tells a thousand words." (muddy large woman with Three Stooges shirt).
- Plaintiffs like to clean themselves up for trial. Booking photo doesn't lie. Can disprove a claimed injury.
- Video evidence ➟ check lockup footage ➟ Save it!
- Save video and audio tapes when incident involves use of force.

(Notes)

E. Determine Appropriate Criminal Charges.

- Make sure you have the right criminal charges; consult with your supervisor and State's Attorney on charges.
- Make sure the criminal charges match what offenses are described in your police report..

F. Importance of Criminal Trial Testimony

- Force state's attorney to prepare for your case.
- Follow your case ➟ Avoid SOL! Happens too often!
- Your criminal testimony can be used against you in civil case.

(Notes)

V. DEFENDING AGAINST THE EXCESSIVE FORCE LAWSUIT

A. Importance of Deposition Testimony.

- Like your testimony at criminal trial, your deposition testimony in civil case can be used at trial to impeach you.
- Consistency in testimony is important.
- Don't get caught in trick bag!
- Written discovery - sign the interrogatory answers ➟ take time to answer!

(Notes)

B. Teamwork With Legal Counsel.

- Make sure your attorney spends time with you in preparing for deposition and at trial.
- Ask a lot of questions - make your attorney accountable.
- Best client is the involved client!

(Notes)

C. Honesty is the Best Policy: The importance of truthful testimony during internal investigation, deposition and courtroom.

- Federal judges and juries are smart ➟ know when you are lying.
- Don't turn small problem into big one, i.e., perjury.
- No civil suit is worth your job -- Department will fire you for lying in federal court.
- Federal court issues written opinions -- you are in it!

(Notes)

D. Economic Effect of § 1988 Attorney Fees on Litigation.

- The prevailing plaintiff in § 1983 case is entitled to have his fees paid by the defendants. Federal lawsuits have huge fee exposure.
- Many police cases are fee driven -- small injury, but plaintiff's attorney looking for big fees.

1. Insurance/Risk Pool Considerations.

   - Some Villages are self-insured; other Villages have traditional insurance. If sued, make sure you understand what is covered under policy (i.e., § 1988 fees).
   - i.e, *Yang v. City of Chicago*: When city not a defendant, it is not responsible for paying § 1988 fee award for defendant officers!
   - Village should pass ordinance indemnifying officer for fee award.

(Notes)

2. Settlement/Judgments.

- Insurer generally has right to settle case. You may ask to be dismissed individually before settlement occurs.
- Rule 68 Offer of Judgment: Method to cut off § 1988 fees.
- Rule 68 offier requires your approval unlike settlement. All defendants must agree!

(Notes)

VI. THE PUBLIC OFFICIAL PUNITIVE DAMAGE CRISIS

A. Scope Of Punitive Damages Problem.

1. Damages Available in Civil Rights Cases.

   a. Compensatory damages - make plaintiff whole.

   b. Punitive damages - punish and deter future misconduct.

   - You must pay a punitive damage award. Can be big!
   - There can be a punitive damage award even if no compensatory damages awarded.

(Notes)

2. Punitive Damages Sought In Most Every Case - Usually Within Jury's Discretion.

- Intentional misconduct not necessary for punitive damages - *Smith v. Wade*, 461 U.S. 30 (1983).
- Did officer act with reckless disregard of subject's rights.

3. Large Punitive Awards Occurring with Greater Frequency.

   a. *Waits v. Chicago* ($15,000 in compensatory; $2 million in punitive [to $45,000 punitive on remittur]).

   b. *Martinez v. Mt. Prospect*, 92 F. Supp. 2d 780 (N.D. Ill. 2000) ($179,000 compensatory; $1 million punitive).

   c. *Comanda v. Country Club Hills*, No. 99 C 1708 (N.D. Ill. Jan. 12, 2001) ($3.5 million compensatory; $9 million punitive).

   d. *Bull v. City of Wheaton*, No. 98 CV 7583 (N.D. Ill. Jan. 12, 2001) ($67,420 compensatory; $400,000 total punitive [to $134,840 on remittur]).

(Notes)

4. Municipalities Cannot Pay Punitive Damage Awards - 745 Ill. Comp. Stat. 10/2-302 (Nov. 1986).

   - Pre-1987 - municipalities had to pay punitive damages assessed against officials - *Kolar v. Sangamon County*, 756 F.2d 564 (7th Cir. 1985).

   - Municipalities cannot be sued for punitives - *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981).

   - Only individuals can be sued for punitives in public sector lawsuits.

   - No caps on punitive damages available against public officials.

(Notes)

B. Issue of Separate Counsel.

- Insurance counsel assigns one attorney (for cost reasons) to represent you and the Village -- potential conflict problem if punitive damages are sought against you.

- You may want to settle a particular case because of fear of punitive damage exposure ➟ bad faith claims against insurer!

- Your attorney may want to submit evidence of your net worth at trial ➟ jury will know that you are poor person!

(Notes)

C. *Seibert v. Illinois Municipal League Risk Mgt Assoc.*, 223 Ill. App. 3d 864 (4th Dist. 1992) - "Presence of claim for punitive damages may entitle officer to separate counsel paid for by the City's insurance carrier due to potential conflict between City and officer."

- Controversial Appellate Court decision. Some insurers follow *Siebert* while others don't. Talk to your attorney.

- Each lawsuit must be anmalyzed for potential conflict issue. Some cases where punitives are sought are bullshit ➟don't require separate counse.

(Notes)

D. How To Protect Yourself Against Punitive Damages Judgment.

1. Consult Business Lawyer - Protect Assets - Do It Before Being Sued.

a. House can be held in tenancy by the entirety.

- Put one-half of house in spouse's name ➟ creditors can't get it!

b. Consider transfer of property to spouse or other family member (certain downsides - not for everyone).

- Must transfer property or assets before you are sued to avoid being accused of fraudulent conveyance.

(Notes)

VII. RECENT U.S. SUPREME COURT CASES AFFECTING POLICE OFFICERS

A. Sixth Amendment *Miranda* Cases.

1. *Fellers v. United States*, 124 S.Ct. 1019 (January 26, 2004).

   Facts: A suspect was indicted for conspiracy to distribute methamphetamine. Officers went to the suspect's home with an arrest warrant and spent about 15 minutes discussing the suspect's involvement in methamphetamine distribution, without giving *Miranda* warnings, before taking the suspect to jail. At jail, the suspect was given *Miranda* warnings, signed a waiver form, and reiterated the statements he had made at his home. The suspect later sought to suppress both the statements made at his home and the statements made at the county jail on the grounds that they were obtained in violation of his Sixth Amendment right to counsel. The court of appeals upheld the admission of the suspect's statements at the jail, holding that the questioning at the suspect's home did not constitute a "custodial interrogation."

   Held: The Supreme Court held that the court of appeals erred in concluding that the discussion between the officers and the suspect at his home did not violate his rights under the Sixth Amendment. Because the discussion took place after the suspect was indicted, outside the presence of counsel, and without any waiver of the suspect's right to counsel, the discussion violated the suspect's rights under the Sixth Amendment.

(Notes)

2. *Yarborough v. Alvarado*, 124 S.Ct. 2140 (June 1, 2004).

   Facts: A 17-year old suspect attempted to steal a truck, which ultimately resulted in the shooting death of the truck's driver. About a month later, the police contacted the suspect's parents, who brought the suspect to the station to be interviewed. The suspect was not given *Miranda* warnings, and the suspect's parents were allegedly not allowed to be present during the interview. The interview with the suspect lasted approximately two hours and was recorded. The suspect was arrested a few months later for murder and attempted robbery arising from the incident. The suspect sought to suppress the statements made during the interview, on the

grounds that he was not given *Miranda* warnings. The trial court denied the motion, holding that the interview was non-custodial and, therefore, *Miranda* warnings were not required.

Held: The state court's conclusion that the suspect was not in custody was reasonable, and it was therefore not error to admit the suspect's statements from the interview. In determining whether a person is in custody during an interview, thereby triggering the requirement of *Miranda* warnings, courts are to consider the circumstances surrounding the interrogation and determine whether a reasonable person would have felt at liberty to leave. Furthermore, the Court held that courts do not have to consider factors such as the suspect's age or the suspect's prior experience with law enforcement in making the objective determination of whether a reasonable person would have felt free to leave.

(Notes)

3. *Missouri v. Seibert*, 124 S.Ct. 2601 (June 28, 2004).

Facts: A police officer conducted a custodial interrogation of a woman suspected of murdering a mentally ill teenager. The suspect was not initially given *Miranda* warnings. After the suspect confessed, she was then given *Miranda* warnings and signed a waiver. The interrogation was continued after a 15 to 20 minute break, and the suspect repeated the confession. The suspect sought to exclude both the pre-warning and post-warning statements.

Held: In a plurality opinion, the Court held that both the pre-warning statements and the post-warning statements were obtained in violation of *Miranda*, and were therefore inadmissable. Under the circumstances surrounding the interrogation, the delivering of *Miranda* warnings in the middle of the interrogation did not render the statements made post-warning admissible. In cases where *Miranda* warnings are given in the middle of questioning, courts will look at the circumstances of the questioning to determine whether the warnings were sufficient to render the post-warning statements admissible. Courts should consider the amount of time between the rounds of questioning and whether the content of the rounds of questioning overlaps or otherwise appears to be one continuous interrogation.

(Notes)

4. *United States v. Patane*, 124 S.Ct. 2620 (June 28, 2004).

Facts: A suspect was arrested for violating a temporary restraining order. The officer attempted to give the suspect *Miranda* warnings, but was interrupted by the suspect and did not complete the warnings. Under subsequent questioning, the suspect told the officer of a pistol in his bedroom, which was then seized by the officer. The suspect was indicted for illegal possession of a firearm. The suspect sought to exclude the gun as evidence, arguing that it was obtained in violation of *Miranda*.

Held: The failure to give *Miranda* warnings did not require exclusion of the pistol that was discovered as a result of those statements. Though any unwarned statements would have been excluded, the exclusion of the statements themselves is a sufficient remedy for *Miranda* violations. The failure to give *Miranda* warnings did not require the exclusion of the physical fruits of those unwarned statements.

(Notes)

B. Fourth Amendment Cases.

5. *United States v. Banks*, 124 S.Ct. 521, (December 2, 2003).

Facts: Law enforcement officers went to an apartment to execute a search warrant for cocaine. The police knocked on the door and announced "police search warrant," waited 15 to 20 seconds with no response, and then broke down the door. The search produced weapons, crack cocaine and other evidence of drug dealing. The suspect sought to suppress the evidence, arguing that the unreasonably short time before forcing an entry violated the Fourth Amendment.

Held: The entry by the officers satisfied the requirements of the Fourth Amendment. The Court held that, once the officers announced their presence, there was a growing risk of the possible destruction or disposal of the drug evidence. Given the exigency of the situation, the officers were not required to wait any longer than the 15-20 seconds before forcibly entering the premises.

(Notes)

6. *Illinois v. Lidster*, 124 S.Ct. 885 (January 13, 2004).

Facts: The Village of Lombard Police Department set up a highway checkpoint in an attempt to obtain information about a hit-and-run accident that had occurred approximately one week earlier at the same location at the same time of night. A vehicle approaching the checkpoint swerved, and an officer smelled alcohol on the driver and administered a sobriety test. The driver was arrested and convicted for DUI. The driver sought to challenge his arrest on the grounds that the evidence obtained by use of the checkpoint stop violated his rights under the Fourth Amendment.

Held: The checkpoint stop was both reasonable and constitutional. The Supreme Court has previously held that checkpoint stops of vehicles to determine whether occupants of the vehicle had or were committing a crime, without individualized suspicion, violated the Fourth Amendment. *See Indianapolis v. Edmond*, 121 S.Ct. 447 (2000) (police checkpoint at which police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles was unconstitutional). However, the purpose of the checkpoint in *Lidster* was only to gain *information* from the occupants of the vehicle, and the stop only minimally interfered with the public's liberty interest. As such, the checkpoint stop was constitutional and the evidence obtained from the stop was admissible.

(Notes)

7. *Groh v. Ramirez*, 124 S.Ct. 1284 (February 24, 2004).

Facts: An agent for the Bureau of Alcohol, Tobacco and Firearms prepared and signed an application to search a suspect's ranch for specified weapons, explosives and records. However, the actual warrant did not specify the items to be seized, instead only stating that the warrant was for the suspect's house. No illegal weapons or explosives were found during the search. The suspect then brought a civil suit against the officer that obtained and executed the warrant, alleging that the search violated the Fourth Amendment.

Held: Because the search warrant failed to identify on its face that it was issued to search for weapons, the warrant was so lacking in

particularity that it was facially invalid, and the search pursuant to the warrant was therefore unconstitutional. The fact that the warrant *application* particularly identified what was to be searched for did not serve to validate the warrant. The officer responsible for conducting the search was not entitled to qualified immunity because the warrant was so facially deficient that the officer could not reasonably presume that it was valid.

(Notes)

8. *Thornton v. United States*, 124 S.Ct. 2127 (May 24, 2004).

Facts: An officer became suspicious of a vehicle and discovered that the vehicle's identification tags did not match the vehicle in question. Before the officer could pull over the vehicle, the driver parked and exited the vehicle. The officer questioned the driver outside of the vehicle and eventually discovered crack cocaine in the driver's pocket. The driver was handcuffed and placed in the back seat of the patrol car. The officer then searched the vehicle and discovered a handgun. The driver sought to suppress the gun as the fruit of an unconstitutional search under the Fourth Amendment.

Held: The search of the vehicle following the driver's arrest did not violate the Fourth Amendment. The fact that the driver had already exited the vehicle when the officer first encountered him did not prohibit the officer's subsequent search of the vehicle. Officers are allowed to search a vehicle's passenger compartment incident to an arrest, even when the officer does not make contact with the person arrested until after the person has left the vehicle.

(Notes)

9. *Hiibel v. Sixth Judicial District Court of Nevada*, 124 S.Ct. 2451 (June 21, 2004).

Facts: The sheriff's department received a report of an assault and an officer went to the scene to investigate. The officer encountered a man whose truck matched the description in the report. The officer asked the man to produce identification and the suspect refused to comply. The suspect was arrested and ultimately convicted for violating Nevada's "stop and identify" statute, which requires that persons subjected to an investigative stop (a *Terry* stop) must identify himself to the officer. Specifically, the statute states that "[a]ny person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer." The suspect appealed the conviction, arguing that it violated his rights under the Fourth and Fifth Amendments to the Constitution.

Held: Nevada's "stop and identify" statute, and plaintiff's conviction pursuant to the statute, did not violate the Fourth or Fifth Amendments to the Constitution. The Court stated that the "principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop." The court found that "[a] state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures." Moreover, requiring the person to provide his identity did not violate the Fifth Amendment's prohibition against self-incrimination. The Court based its opinion on the narrow scope of the disclosure requirement (i.e., the suspect was only required to disclose his name) and the minimal likelihood that a person's identity would be used to incriminate him or "furnish a link in the chain of evidence" needed to prosecute him.

(Notes)

- Illinois has a statute similar to the Nevada statute at issue in *Hiibel*. *See* 725 Ill. Comp. Stat. 55/107-14. However, Illinois' statute allows for a broader inquiry of the person than the Nevada statute. Specifically, 725 Ill. Comp. Stat. 5/107-14 provides that "[a] peace officer . . . may stop a person in a public place for a reasonable period of time when the officer reasonable infers from the circumstances that the person is committing, is about to commit, or has committed an offense . . . and *may demand the name and address of the person and an explanation of his actions.*" Based upon the reasoning of the court in *Hiibel* and particularly because of the importance it

placed on the narrowness of Nevada's statute, it is doubtful that the Court would uphold the Illinois' statute requirement that the person provide an explanation of his actions.