



SAN DIEGO COUNTY SHERIFF'S DEPARTMENT

LEGAL AFFAIRS
UPDATE

NUMBER: 2019-4 DATE: 12/12/19 BY: ROBERT FAIGIN & AMANDA LOMNICKY TOPIC: CRIMINAL LAW

A PEACE OFFICER "MAY USE OBJECTIVELY REASONABLE FORCE TO EFFECT THE ARREST, TO PREVENT ESCAPE, OR TO OVERCOME RESISTANCE."

On August 19, 2019, Governor Gavin Newsom signed Assembly Bill 392 (AB 392) into law. AB 392 takes effect on January 1, 2020 and amends Penal Code sections 196 and 835a.

Penal Code § 196

Penal Code § 196, enacted in 1872, defines justifiable homicide by peace officers. As it relates to law enforcement, PC 196 currently provides that homicide is justifiable "[w]hen necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or... [w]hen necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest."

In 1985, the U.S. Supreme Court decided the case of *Tennessee v. Garner*, holding that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."

AB 392 changes PC 196 by providing that *homicide is justifiable "[w]hen the homicide results from a peace officer's use of force that is in compliance with Section 835a."* This change to AB 392 removes the PC 196 language that allows a finding that a homicide is justifiable where a peace officer is arresting a person charged with a felony, even though the suspect poses no immediate threat to the officer.

Penal Code § 835a

a. Use of force

Penal Code § 835a, defines when a peace officer may use force to effect an arrest. PC 835a currently provides, in part, that "[a]ny peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance."

In 1989, the U.S. Supreme Court decided the case of *Graham v. Connor*, holding that "[a]ll claims that law enforcement officials have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard."

AB 392 changes PC 835a by providing, that *a peace officer "may use objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance."* The new language reflects the Supreme Court's

objective reasonableness standard for utilizing and evaluating force. Addendum F similarly states that "the force used shall only be that which is necessary and objectively reasonable to effect the arrest, prevent escape or overcome resistance."

b. Use of deadly force

As it relates specifically to the use of deadly force, Penal Code 835a now states that:

"[a] peace officer is justified in using **deadly force** upon another person only when the officer reasonably believes, based on the **totality of the circumstances**, that such force is necessary" to either:

- 1) "defend against an **imminent** threat of death or serious bodily injury to the officer or to another person"; or
- 2) "apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended."

Additionally, AB 392 modifies PC 835a to now require that when using deadly force to apprehend a fleeing person, "[w]here 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 objectively reasonable grounds to believe the person is aware of those facts."

Addendum F similarly states that "[i]n situations where any force used is capable of causing serious injury or death, there is a requirement that, whenever feasible, the deputy must first warn the suspect that force will be used if there is not compliance."

Finally, AB 392 provides that "[a] peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an *objectively reasonable officer* would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person." Thus, deadly force may not be used on a person who poses *only* a danger to themselves.

Definitions:

Deadly force: "means any use of force that creates a substantial risk of causing death or serious bodily injury."

Totality of the circumstances: "means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force."

Imminent: "A threat of death or serious bodily injury is 'imminent' when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed."

For questions regarding this training bulletin, please contact the Legal Affairs Unit at 858-974-2255.

WHAT THIS MEANS:

The Department is in the process of updating Addendum F to reflect the changes made to Penal Code §835a. Regardless of the changes to Addendum F, deputies are responsible for knowing and complying with Penal Code §835a, which takes effect on January 1, 2020.