Maryland Chiefs of Police Association

Maryland Sheriffs' Association

MEMORANDUM

TO: The Honorable Luke Clippinger, Chairman and
Members of the Judiciary Committee

FROM: Chief David Morris, Co-Chair, MCPA, Joint Legislative Committee
Sheriff Darren Popkin, Co-Chair, MSA, Joint Legislative Committee
Andrea Mansfield, Representative, MCPA-MSA Joint Legislative Committee

DATE: March 3, 2020

RE: **HB 166 – Criminal Procedure – Law Enforcement Procedures – Use of Force**
HB 1090 – Criminal Procedure – Law Enforcement – Complaints and Investigations and Use of Force (Anton's Law)
HB 1309 – Criminal Procedure – Law Enforcement Procedures – Use of Force

POSITION: **OPPOSE**

The Maryland Chiefs of Police Association (MCPA) and the Maryland Sheriffs' Association (MSA) OPPOSE HB 166, HB 1090 and HB 1309. These bills propose to regulate the circumstances under which a Maryland law enforcement officer is justified in using force and deadly force.

These bills are flawed in numerous ways, are contrary to established law and, if enacted, will create havoc and safety risks in police operations. First, each of the bills seeks to create standards that are inconsistent with the constitutional holdings of the United States Supreme Court regarding the use of deadly force by law enforcement officers.

Police use of force is subject to the reasonableness requirement of the Fourth Amendment. In *Graham v. Connor*, the Supreme Court held that determining the "reasonableness" of a seizure "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake…[and noted] "Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," the test's "**proper application requires careful attention to the facts and circumstances of each particular case**." (emphasis added)

The Court then explained that, "As in other Fourth Amendment contexts... the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." The Court also cautioned "The "reasonableness" of a

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particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," but, rather, at the moment that force was used.

The Court stated that, "The test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." Allowance must be made for the fact that '…**police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving'** – about the amount of force … in a particular situation." (emphasis added)

These bills seek to apply precise definitions and mechanical rules to constrain police officers from effectively and safely taking persons into custody. This is an unworkable construct and will inure to the detriment of public safety.

Each of these bills, in different ways, are both under-inclusive of the allowances of the Supreme Court and over-inclusive of the actions that officers can lawfully undertake. For instance, HB 166 proposes that officer's use force is only proper when there is probable cause to believe a crime has been committed. This would prevent an officer from using reasonable force to stop and detain someone who he reasonably suspects may be engaged in criminal activity. This provision also prevents an officer from using reasonable force in taking other legal actions such as enforcing a child custody order, detaining someone for an emergency mental health evaluation or arresting a probation violator.

The bills also, variously, propose that officers be required to engage in de-escalation measures before resorting to use of force. While an officer's tactical error or inability to de-escalate may be part of the totality of an incident, it is contrary to constitutional law to require an officer to take lesser measures (as viewed in hindsight) – the requirement is that the force used be *reasonable* – such as whether the officer reasonably feared for his life at the time the force was used.

The second significant flaw with each of these bills is that they consider neither the realities of potential deadly encounters that an officer may have with a suspect nor the limits of the officer's human performance under stress. It is impossible for this Committee to pre-imagine situations that law enforcement officers will encounter and dictate permissible responses. When an officer is called on to use force, the circumstances are chaotic, unpredictable and influenced by numerous factors such as body size, weather and lighting conditions, intoxication of the subject, if weapons are displayed – the list of possible conditions that an officer must evaluate goes on and on. An officer's neurological and physical abilities are stressed to the limit and to expect detached reflection allowing for a checklist of options to be explored is simply unrealistic, unfair and dangerous. It is not possible or necessary to legislate these matters.

Tactical errors, policy violations and misjudgments do not render police officer conduct unreasonable. The law prohibits judging an officer's actions after the fact scrutinizing whether it was "necessary," "proportional" or "the least intrusive means." Such standards allow for second-guessing an officer who must react in a split-second to a volatile situation where he fears for his life or the lives of others at the time he used force.

Third, these bills seek to impose standards on undefined court proceedings to the detriment of law enforcement officers. For instance, HB 166 requires the "trier of fact" to assess whether the officer "increased the risk of a confrontation" – a consideration that is specifically disavowed by the recent

Supreme Court case of *LA County v. Mendez.* ("The 4th Amendment provides no basis for a "Provocation Rule" as stated by the 9th Circuit. A different 4th Amendment violation cannot transform a later reasonable use of force into an unreasonable seizure.")

HB 1090 deems that an officer "shall be found guilty of voluntary manslaughter," apparently usurping the role of judge and jury in a case involving an officer's use of force. HB 1309 would command that the prosecuting party (either criminal or civil – although the law purports to be placed in the Criminal Procedure Article) bears the burden of proving that the officer violated its standards – standards that are themselves unconstitutional.

Last, should any of these proposals be enacted, extensive policy and training changes would be necessary, a costly endeavor. Operational management will also be complex since it appears that these standards would apply only to State and not federal law enforcement officers.

The MCPA/MSA further opposes HB 1090 proposed amendments to the Law Enforcement Officers' Bill of Rights. There is no justification for changing the definition of "investigator" since sworn law enforcement officers are the most qualified to conduct misconduct investigations. There is no empirical evidence to show that any of the State's law enforcement agencies utilize incompetent or ineffective internal affairs investigators.

These bills demonstrate the highest degree of legislative overreach that, if enacted, would risk public safety and officer safety, disrupt long-established law and practices, create different State and federal standards, be very costly to implement and represent deficient public policy.

For these reasons, MCPA and MSA OPPOSE HB 166, HB 1090 and HB 1309 and urge an UNFAVORABLE Committee report for each.

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