WRITTEN TESTIMONY

TO: Maryland House Judiciary Committee

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RE: HB 956 Criminal Procedure - Law Enforcement Procedures - Use of Force

POSITION: Support HB 956

DATE: February 11, 2021

Chairman Clippinger, Vice Chair Atterbeary, and members of the Maryland House Judiciary Committee, I have been a professor at the George Washington University Law School where I teach Criminal Law, Criminal Procedure, Adjudicatory Criminal Procedure, and Professional Responsibility, for the past 20 years. I am also an 18-year resident of the District of Columbia but I live just a stone's throw from the Maryland border. Because of my proximity to Maryland, I do most of my grocery and other shopping in Maryland.

I respect the difficult and dangerous work that law enforcement officers across the nation do to protect our safety. I also recognize the pain and anger that many in the DMV (the District of Columbia, Maryland, and Virginia) and across the nation felt over the deaths of George Floyd, Breonna Taylor, Rayshard Brooks, and others at the hands of police.

I believe strong and fair laws that hold police accountable, in conjunction with other measures, have the potential to change the culture of policing and rebuild trust between community members and the police.

The use of deadly force provisions in Delegate Alonzo Washington's HB 956 borrow heavily from a model statute I proposed in a 2018 law review article entitled, *Reforming the Law on Police Use of Deadly Force: De-escalation, Pre-seizure Conduct and Imperfect Self-Defense*, 2018 U. Ill. L. Rev. 629. In this written testimony, I explain why I support the use of force provisions in HB 956.

Maryland is One of Only 7 States Without a Use of Force Statute

At this time last year, Maryland was one of less than a dozen states without a use of force statute. Washington, D.C., Virginia, and Massachusetts used to be among those jurisdictions without a use of force statute, but within the past 7 months, each of these jurisdictions has passed use of force legislation.

Today, Maryland is one of only seven states without a use of force statute in its Criminal Code.

Three Jurisdictions Have Recently Passed Use of Force Statutes Akin to HB 956

On July 22, 2020, the District of Columbia became the first jurisdiction in the nation to require that the beliefs *and actions* of an officer who uses deadly force against another must be reasonable in order for the officer's use of force to be considered justified. Requiring the officer's beliefs and actions to be reasonable was something I recommended in my 2018 law review article.

Prior to the passage of D.C.'s use of force legislation, all but a handful of state use of force statutes focused solely on the reasonableness of the officer's beliefs and did not separately require a finding that the officer's actions were reasonable. The few states that did not require a reasonable belief allowed an officer to escape liability based upon an honest belief. Even today, the vast majority of states only require that the officer's belief was reasonable and do not separately require a finding that the officer's actions were reasonable in their use of force statute.

D.C.'s use of force statute was also the first to require the jury to consider, as part of the totality of the circumstances, whether the officer engaged in de-escalation measures prior to using deadly force. It was also the first to require the jury to consider whether any conduct by the officer increased the risk of a deadly confrontation. These were also things I proposed in my 2018 law review article.

Today, D.C. is not the only jurisdiction with a use of force statute that replicates in large part the model statute I proposed in 2018. On July 31, 2020, Connecticut became the first *state* in the nation to adopt these three key provisions from my model statute. *See* Connecticut HB 6004 (An Act Concerning Police

Accountability). Virginia became the second state to enact similar use of force legislation in October 2020. *See* Virginia SB 5030.

HB 956 largely mirrors the use of force provisions in the police reform statutes recently enacted in these three jurisdictions.

Requiring Both the Officer's Beliefs *and Actions* to be Reasonable

In requiring a finding that both the officer's beliefs *and acts* must be reasonable, HB 956 is a modest change to the use of force law that exists in the vast majority of states where the sole focus is on whether the officer's *beliefs* were reasonable.

The problem with focusing solely on beliefs is that once the officer testifies that he feared for his life, the jury will focus on the victim's actions – Was he resisting arrest? Was he reaching for his waistband? Was he attempting to flee?

Requiring the jury to find that the officer's *conduct* was reasonable reminds the jury that the officer, not the victim of his use of deadly force, is the one on trial and that the ultimate question is whether the officer's use of deadly force was justified.

Moreover, in requiring a finding that the officer's actions were reasonable, HB 956 simply makes explicit what is implicit in other use of force statutes. The ultimate question in cases where an officer is criminally prosecuted for his use of deadly force is whether the officer's use of deadly force was reasonable or excessive.

Requiring the Jury to Consider Whether the Officer Engaged in De-escalation Measures Prior to Using Deadly Force

HB 956 provides more guidance to jurors than most use of force statutes by requiring the jury to consider whether the officer engaged in de-escalation measures and giving the jury some examples of de-escalation (taking cover, calling for backup, trying to calm the suspect, and using less deadly force before using deadly force).

By including de-escalation in the law, HB 956 seeks to influence police behavior before an encounter gets to the point where it is a do-or-die situation. The de-escalation provision also ensures that the jury considers de-escalation when the jury might not think to do so on its own.

Importantly, the law does not direct the jury to find an officer either guilty if the officer failed to engage in de-escalation measures or not guilty if the officer did engage in de-escalation. The law recognizes that each case will present different facts and circumstances and leaves the ultimate decision as to whether the officer's use of deadly force was justified in the hands of the jury.

De-escalation is already required in many police regulations, including the Baltimore County Police Department's regulations. For example, Baltimore Police Department Policy 1107 lists the following under "Core Principles":

> 4. De-escalation. Members shall use de-escalation techniques and tactics to reduce any threat or gain compliance to lawful commands without the use of force or with the lowest level of force possible. The goal of de-escalation is to gain the voluntary compliance of subjects, when feasible, and thereby reduce or eliminate the necessity to use physical force.
>
> 5. Avoiding Escalation. Members shall not do or say anything that escalates an encounter unless necessary to achieve a lawful purpose.

Having de-escalation in a police regulation or policy is a good first step but is not the same as having de-escalation in the law because an officer's violation of an internal policy or regulation is not enforceable in a court of law.

Moreover, having de-escalation in the law is more likely to encourage officers to engage in de-escalation than merely having it in a police regulation because officers will know that if their use deadly force ends up killing someone, the trier of fact (the jury or the judge) will consider whether they engaged in de-escalation measures prior to using deadly force.

Having de-escalation in the law can also benefit an accused officer who does engage in de-escalation measures. That officer will be able to argue in court that because he tried to diffuse the situation before using deadly force, the jury should find his actions reasonable.

Requiring the Jury to Consider Whether Any Conduct of the Officer Increased the Risk of a Deadly Confrontation

In addition to requiring the jury to consider whether the officer engaged in de-escalation measures prior to the use of deadly force, HB 956 requires the jury to

consider whether any conduct of the officer increased the risk of a deadly confrontation. This is an important provision.

Currently, there is a split in the lower federal courts over whether jurors in Section 1983 civil rights cases—where the issue often is the same as in criminal prosecutions of officers who used deadly force, i.e., whether the officer used reasonable or excessive force—should focus solely on the moments right before the officer used deadly force or whether the jury should be allowed to consider pre-seizure conduct[1] of the officer that increased the risk of a deadly confrontation. The U.S. Supreme Court had a chance to resolve this split in 2017, but explicitly left the question open.[2] There is a similar split in the state courts.[3]

Rather than leaving it up to the courts to decide whether a narrow or broad time frame is most appropriate, the Maryland legislature should specify through HB 956 that any conduct of the officer that increases the risk of an encounter turning deadly is relevant to whether the officer's conduct was reasonable. Allowing the jury to consider such conduct of the officer makes sense for several reasons.

First, in officer-involved shooting cases, the jury is allowed to consider the actions of the *victim* that increased the risk of a deadly confrontation. If the jury is allowed to consider the victim's actions, it should be allowed to consider the officer's actions as well as a matter of fundamental fairness.

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[1] Since a seizure of the person within the meaning of the Fourth Amendment occurs when an officer, by means by physical force or show of authority, has restrained the liberty of a citizen, California v.Hodari D., 499 U.S. 621 (1991), *pre-seizure* conduct refers to conduct of the officer that occurs prior to the moment that an officer uses deadly force against an individual and thereby restrains that individual's freedom of action. In other words, pre-seizure conduct refers to pre-shooting conduct or conduct of the officer that occurred before the officer pulled the trigger.

[2] *See County of Los Angeles v. Mendez*, 581 U.S. ___, n. * (2017). The Supreme Court explained:

> Respondents do not attempt to defend the provocation rule. Instead, they argue that the judgment below should be affirmed under *Graham* itself. *Graham* commands that an officer's use of force be assessed for reasonableness under the "totality of the circumstances." On respondent's view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. *We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here.* . . . All we hold today is that once a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation

Id. at n. * (emphasis added).

[3] Maryland state courts have applied a narrow time frame, focusing on the moment when the force was employed. *See* Pagotto v. State, 732 A.2d 920, 965 (Md. Spec. App. 1999), *aff'd* 762 A.2d 97 (Md. 2000) ("the claim that an officer has unreasonably used excessive force must be assessed as of the moment when the force is employed.").

Second, when a civilian uses deadly force and claims self-defense, the jury is allowed to consider the civilian-defendant's actions prior to the moments right before the civilian-defendant pulled the trigger. Since an officer's claim of justifiable force is akin to a civilian's claim of self-defense or defense of others, it makes sense to allow the jury to consider the officer-defendant's actions prior to moments right before the officer pulled the trigger.

Moreover, conduct of the officer that increased the risk of a deadly confrontation is simply part of the totality of the circumstances. It doesn't make sense to exclude such relevant conduct from the jury's consideration when the jury is being told to assess the reasonableness of an officer's beliefs and actions under the totality of the circumstances.

Importantly, HB 956 does not direct the jury to find the officer guilty if the officer's conduct contributed to the risk of a deadly confrontation. An officer's conduct could have increased the risk of a deadly confrontation in some ways and yet the officer's use of deadly force could be deemed reasonable. The law allows the jury to weigh all the facts and circumstances and come to its own conclusion about whether the officer's use of deadly force was or was not justified.

Why the Law Should Not Require Absolute Necessity

Some may be pushing the Maryland legislature to adopt a use of force statute that would require absolute necessity rather than reasonable necessity. Thse advocates would want the law to require the officer to be correct in his or her assessment of the threat. Under their view, if the officer is incorrect, then the officer should go to prison.

HB 956 does not require the officer to be correct in his or her assessment of the threat. If an officer believed the victim was armed and it turns out the victim was unarmed, this does not necessarily mean the officer was unjustified in using deadly force. The legislation requires a finding that the officer's beliefs and actions were reasonable, not that the officer was right. This makes sense because law enforcement officers are human beings and all human beings are fallible. Law enforcement officers are not omniscient or all-knowing.

An officer facing an individual with a gun in hand who waits until the individual raises his arm and starts to pull the trigger is likely to get shot. This is because

there is a time lag between perception of a threat and one's ability to act on that threat.

No use of force statute currently on the books requires absolute necessity. Even California's recently enacted use of force statute, which was publicized before and upon its passage in 2019 as requiring necessity as opposed to reasonableness for police use of deadly force, see Jorge L. Ortiz, *New California law tightens rules for police use of force to only when necessary*, USA Today (Aug. 19, 2019) ("Gov. Gavin Newsom on Monday signed Assembly Bill 392, which changes the standard for police officers' justified use of deadly force from instances when it's "reasonable'' to when it's "necessary''), does not require absolute necessity.

If one looks closely at California's use of force statute in Section 835a(a)(2) of the California Penal Code, the preface provides that "it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life," but later in subsection (c) where the actual requirements for the use of deadly force are set forth, the statute provides:

> Notwithstanding subdivision (b), 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* for either of the following reasons:
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> (A) to defend against an imminent threat of death or serious bodily injury to the officer or to another person.
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> (B) to 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. . . . (emphasis added).

In other words, California's use of force statute, like the vast majority of use of force statutes, requires only a reasonable belief that deadly force was necessary, not that the officer was correct in his or her assessment of the threat. The legislative intent is for officers to only use force when necessary, but the requirements for the use of force turn on a reasonable belief standard.

The Justice in Policing Act introduced by the U.S. House of Representatives (the Democrats' policing bill) last summer is another example of police reform

legislation that has been advertised as requiring absolute necessity but does not actually require necessity. Page 4 of the Explanatory Addendum to the Act prepared by Chair Karen Bass and Senators Cory Booker, Kamala Harris and Jerrold Nadler, states that under Section 364 - Police Exercising Absolute Care with Everyone Act ("PEACE Act"): "The bill would change the use of force standard from reasonableness to only when necessary to prevent death or serious bodily harm," which leads the reader to believe that the bill would require actual necessity. However, if one goes to Section 364 in the Justice in Policing Act, the word "necessary" is defined in such a way that requires a reasonable belief that the force used was necessary.

The word “necessary” is defined as follows in Section 364: "The term 'necessary' means that another reasonable Federal law enforcement officer would objectively conclude, under the totality of the circumstances, that there was no reasonable alternative to the use of force." In other words, even the Justice in Policing Act does not require necessity rather than reasonableness even though it has been promoted as requiring necessity. Given the definition of necessity is Section (b) (1) (E) on page 69 of the Act, the Act only requires that a reasonable law enforcement officer would objectively conclude that the force used was necessary, not that the officer who used the force was in fact correct about the need to use force.

Possible Objections to HB 956

HB 956 is likely to face objections from both the right and the left. Those who favor allowing law enforcement to have maximum discretion over when it is appropriate to use force against civilians may feel the bill goes too far in cabining the discretion of law enforcement officials to use deadly force. Those who feel law enforcement should have no discretion to use force against civilians than they currently have may feel the bill does not go far enough.

HB 956 is not a radical change to current law, but it markedly improves the law that exists in most states by (1) requiring separate consideration of whether the officer’s beliefs *and* actions were reasonable and whether the officer exhausted all other reasonable means of defense before using deadly force, (2) requiring consideration of whether the officer sought to use de-escalation measures prior

to using deadly force, and (3) broadening the time frame the law considers relevant when assessing the reasonableness of an officer's use of deadly force.

Possible Objection 1: HB 956 Encourages Jurors to Second Guess Police Officers

One objection that might be lodged against HB 956 is that it will encourage jurors to engage in Monday night quarterbacking or second-guessing of police officers. My response to this objection is that jurors in all cases involving a claim of self-defense or defense of others, which is essentially the defense that an officer claiming justifiable force is asserting, engage in an after-the-fact assessment of the facts. In requiring jurors to consider whether the officer engaged in de-escalation measures, HB 956 simply asks jurors to consider factors that are relevant to whether the officer's use of force was reasonable. Similarly, in requiring jurors to consider any conduct by the officer that increased the risk of a deadly confrontation, HB 956 simply asks jurors to broaden the time frame and consider the reasonableness of the officer's conduct in light of all of the relevant facts and circumstances.

To mitigate the possibility of unfair second-guessing, HB 956, like *Graham v. Connor*, specifies in subsection (G) that the trier of fact consider the reasonableness of the officer's use of deadly force from the perspective of a reasonable officer in the defendant officer's shoes.

Possible Objection2: HB 956 is Too Complicated and Will Confuse the Average Juror

A second objection that might be lodged against HB 956 is that it is too complicated and will confuse the average juror. HB 956 is not complicated. It tells the trier of fact that they must find three things before they can acquit the officer on the ground that the officer used justifiable force: (1) the officer honestly and reasonably believed that deadly force was necessary to protect the officer or another against a threat of death or serious bodily injury, (2) the officer's actions were reasonable under the totality of the circumstances, and (3) the officer exhausted all other reasonable means of defense. HB 956 then specifies that in assessing the reasonableness of the officer's beliefs and actions, the trier of fact shall consider just two factors: (1) whether the officer engaged in de-escalation measures, and (2) whether any conduct by the officer increased the risk of a deadly confrontation. These are relevant factors that jurors might not think to

consider on their own if just told to assess the reasonableness of the officer's beliefs and actions.

One problem with the *Graham v. Connor* standard and most use of force statutes is that they provide little to no guidance to jurors with regard to when an officer's use of force is reasonable, leaving it up to jurors to decide this difficult question on their own. HB 956 provides much-needed guidance to jurors in clear and simple language that the average layperson can understand.

Possible Objection 3: The Officer's Antecedent Conduct Should Not Be Considered Because the Supreme Court Has Foreclosed Such Consideration

Another possible objection to HB 956 is the argument that juries should not be allowed to consider the officer's conduct prior to the moment when the officer use deadly force since the Supreme Court has foreclosed such consideration. As discussed above, however, the Supreme Court has not foreclosed this argument. The Supreme Court had the chance to address this issue in *County of Los Angeles v. Mendez* in 2017 but declined to do so, ruling only that the Ninth Circuit's provocation rule was not in compliance with the Fourth Amendment.

If an officer who uses deadly force against a civilian, killing or severely injuring that civilian, took action or failed to act in a way that increased the likelihood of a deadly confrontation prior to the use of deadly force, this is a relevant factor in the totality of the circumstances that bears on the reasonableness of the officer's use of deadly force. In ordinary self-defense cases, we allow the jury to consider the defendant's conduct before the use of deadly force in assessing the reasonableness of the defendant's claim of self-defense. There is no reason to treat the officer-defendant in a state criminal law prosecution any differently than the ordinary civilian-defendant in this regard.

Additionally, in officer-involved shooting cases, we allow the jury to consider the conduct of the victim-suspect prior to the moment the officer used deadly force in assessing whether the officer's use of force was reasonable. It is only fair to allow the jury to consider the conduct of the officer-defendant prior to the moment the officer used deadly force as well.

Conclusion

Current law, or the lack thereof, has proven inadequate to discourage police use of deadly force in many situations where it appears deadly force was not appropriate. HB 956 would go a long way towards shaping police culture in a positive way by encouraging police officers to engage in the types of conduct many police chiefs recognize can help reduce the number of bad police shootings.

For all the foregoing reasons, HB 956 is sound policy and should be made part of the law of the state of Maryland.

Thank you for your consideration.