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STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: House Committee on Government Operations

From: Brynn Hare, Legislative Counsel

Date: February 13, 2020

Subject: H.808; constitutional parameters on law enforcement use of force

The committee asked me to provide some constitutional context for H.808, an act relating to the use of deadly force by law enforcement. This memo addresses the relevant constitutional law governing unreasonable use of force claims against law enforcement, and whether H.808 would measure law enforcement action using a different standard to determine the outcome of such claims.

The constitutional standard governing a claim that law enforcement used excessive force in the course of making an arrest, an investigatory stop, or other brief detainment of a person is the Fourth Amendment of the U.S. Constitution, which prohibits unreasonable searches and seizures.[1] *Graham v. Connor*, 109 S.Ct. 1865 (1989). The court in *Graham* held that all claims that law enforcement officers have used excessive force arising in the context of an arrest or investigatory stop of a free citizen, are "most properly characterized as involving the protections of the Fourth Amendment, which guarantees citizens the right to 'be secure in their persons…against unreasonable…seizures'". *Id*. at 1871.

Prior to the *Graham* case, federal courts reviewed claims of excessive force by police through diverse legal standards, often emphasizing the officer's subjective mental state; for example, courts would look to whether the force was applied in "good faith" or "for the purpose of causing harm." *Johnson v. Glick*, 481 F.2d 1028 (1973).

Since *Graham*, in deciding whether the force used was objectively reasonable under the Fourth Amendment, courts will conduct a balancing test between "the nature and quality of the intrusion of the individual's Fourth Amendment interests" and the governmental interests at stake. *Id.* The *Graham* court articulated a few guideposts in setting out the standard for determining objective reasonableness, including "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest

[1] Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

by flight." But the court also notes that reasonableness is difficult to characterize, and therefore "the 'reasonableness' of a 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." *Id*. at 1872.

Subsequent Supreme Court and lower federal court jurisprudence regarding what constitutes "reasonable" force by law enforcement has been similarly ambiguous. Many police departments have also created their own set of administrative rules on when force is appropriate. Federal court decisions sometimes reference the police agency policies regarding appropriate use of force in determining whether the force was reasonable. *See, e.g., Neiswonger v. Hennessey*, 89 F. Supp. 2d 766 (N.D.W. Va. 2000) (holding that because the officer acted reasonably to protect both Mr. Neiswonger and himself in accordance with the Morgantown City Police Department's Use of Force Policy, he did not violate Mr. Neiswonger's Fourth Amendment right to be free from unreasonable search and seizure.).

The Vermont Supreme Court has upheld the *Graham* court's approach to questions of whether law enforcement used excessive force. In *Coll v. Johnson*, the court held that the question of objective reasonableness is whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting the officer, without regard to the officer's underlying intent or motivation. 161 Vt. 163 (1993).

H.808 appears to reflect a shift away from the "objectively reasonable" standard, by instead directing officers to only use deadly force when "necessary in defense of human life." The necessary standard is not clearly defined in the bill. However, it is described in the bill in similar ways to the *Graham* court's explanation of what constitutes reasonable law enforcement action. For example, (b)(2) provides that "in determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case…"; (b)(4) provides that the decision to use force "shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight…"

The bill defines "totality of the circumstances" to mean all facts known to the law enforcement officer at the time, including the conduct of the officer and the subject leading up to the use of the deadly force. In this respect, the bill directs reviewers of law enforcement action to look at all of the actions leading up to a use of force, including, specifically, the officer's actions, not just the subject's actions. By requiring deadly force to be only used when "necessary," and guiding courts to determine what is necessary by looking at all facts known to the officer at the time, including the officer's own conduct, the bill may represent an incremental shift away from the "objective reasonableness" standard of the *Graham* decision.