



Use of Force by Police Service Dogs is a Critically Important Tool for Law Enforcement When Used Thoughtfully and Appropriately by Properly Trained PSD Teams

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On July 5, 2020, San Diego police had arrested a suspect and transported him to the sally port of the county jail. As they prepared to remove him from the police SUV, one officer realized that the suspect had slipped his handcuffs, broken through a plexiglass barrier and was in possession of the original officer's back up weapon from the officer's gear bag. The suspect did not obey any orders given by law enforcement at any time during this encounter. Instead, the suspect fired a round out the back window of the law enforcement SUV. Two officers fired on the SUV. The suspect was able to reach out of the back side window to let himself out of the SUV. He appeared to be bleeding; no information was released in the media as of July 10 as to the mechanism of that injury. The suspect exited the SUV with the handgun in his waistband. As the suspect reached back into the SUV, additional shots were fired. A Police Services Dog (PSD) is called for and arrived on scene, barking. Warnings were given that the PSD will be released and suspect will be bitten unless he complied with commands. Suspect started moving toward officers; the PSD is released and bites the suspect on the arm that is on the side closest to the gun in suspect's waistband. The hand gun is then secured and suspect given first aid. San Diego Police has launched an officer involved shooting investigation and has notified the US Attorney's Office and the FBI who will be reviewing the investigation. (Information taken from video and article in the Times of San Diego, "Video Shows SD Police Warning, Shooting Man with Gun at Downtown Station", dated July 8, 2020.)

It is clear from this video that the intervention of a PSD was the determining factor in all parties being able to survive this frightening and rapidly evolving situation alive. The officers were hampered in firing on the suspect as the sally port was a concrete parking area with many vehicles; the risk of cross fire and ricochet was great. However, releasing the PSD to quickly apprehend the suspect and prevent suspect from using the gun he had in his possession endangered no one's life in this situation. Indeed, all officers and the suspect are alive because of the appropriate release of the PSD.

The use of force by police has been dominating the news recently; the most notable case is, of course, George Floyd's death while in the custody of Minneapolis police officers. The videos that surfaced quickly after Mr. Floyd's death are extremely disturbing and the public outrage in response has swept the nation. Politicians have also moved swiftly, calling for wholesale change in policing. While the need for change is warranted for at least Minneapolis (other responsible law enforcement agencies should always be reviewing policies and behavior to continually improve), it is critical that any legislative or policy changes are carefully thought out prior to implementation, so as to address the legitimate concerns raised in recent days, but do not further endanger lives, both civilian and police.



California's Attorney General Xavier Becerra recently sent out a press release which stated he intends to promulgate new recommended policies for policing. One of the areas he intends to address is the deployment of police service dogs (PSDs). It is imperative that we, as an industry and as individual

handlers and trainers, get out in front of this movement and demonstrate that each and every PSD deployment is thoughtful and appropriate to the situation at hand and are lawful under the law that exists and applies.

The United States Supreme Court addressed the excessive use of force first in *Tennessee v. Garner* (1985) 471 U.S. 1. In *Garner*, the Supreme Court said, "To determine the constitutionality of a seizure '[we] must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' *United States v. Place* (1983) 462 U.S. 696, 703; see *Delaware v. Prouse* (1979) 440 U.S. 648, 654; *United States v. Martinez-Fuerte* (1976) 428 U.S. 543, 555. The Court thus held the following which forms the basis for the standard today; "Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Garner, supra*, at 12.

Moving to the concept of PSD deployment as a use of force, no case has yet held that use of a PSD is use of deadly force. See *Robinette v. Barnes* (1988) 854 F.2d 909, 912, where court held that "the use of a properly trained police dog to apprehend a felony suspect does not carry with it a "substantial risk of causing death or serious bodily harm;" and *Cruz v. City of Escondido* (9th Cir. 1997) 139 F.3d 659, 663, where the court concluded that the use of police dogs trained in the "bite and hold" technique generally does not constitute deadly force, absent some demonstration by the plaintiff "that properly trained police dogs are reasonably capable of causing death." (Overruled on other grounds in *Smith v. Hemet* (9th Cir.2005) 394 F.3d 686).

However, the courts have reserved that possibility. "While we have not in any of our prior cases found that the use of police dogs constituted deadly force, we have never stated that the use of such dogs cannot constitute such force." *Smith v. Hemet* (9th Cir.2005) 394 F.3d 686, 707. "[W]e leave open the question of whether the use of a police dog could constitute deadly force in other circumstances." *Thomson v. Salt Lake County* (10th Cir. 2009) 584 F.3d 1304, 1315. But see *Robinette v. Barnes* (1988) 854 F.2d 909, 912, where court held that "the use of a properly trained police dog to apprehend a felony suspect does not carry with it a "substantial risk of causing death or serious bodily harm;" and *Cruz v. City of Escondido* (9th Cir. 1997) 139 F.3d 659, 663, where the Ninth Circuit concluded that the use of police dogs trained in the "bite and hold" technique generally does not constitute deadly force, absent some demonstration by the plaintiff "that properly trained police dogs are reasonably capable of causing death."



Since deployment of a PSD is not considered deadly force, it is appropriate to determine under what circumstances the deployment of a PSD could be an excessive use of force. The seminal case giving direction on the use of force, deadly and non-deadly, is *Graham v. Connor* (1989) 490 U.S. 386. There are 3 factors that will be considered:

1. The severity of the crime at issue;
2. Whether the suspect poses an immediate threat to the safety of LE or others; and
3. Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

Graham at 396. In addition, the *Graham* factors will be assessed using a "totality of the circumstances" test from the perspective of a reasonable LE officer in that same situation, recognizing that the analysis must allow for the fact that law enforcement must make split second decisions in tense, uncertain and rapidly evolving situations. *Graham, supra*, at 397.

Finally, it is clear that law enforcement cannot continue to use force once a subject is subdued and complying with law enforcement's orders. As soon as subject is under control, the PSD must be released. (See *Graham* factor number 3; suspect must be actively resisting or fleeing arrest.) But consider *Johnson v. Scott* (7th Cir. 2009) 576 F.3d 658. Fleeing shooting suspect surrendered just as PSD got close enough to bite; law enforcement grabbed suspect at the same time and believed suspect was fighting law enforcement and PSD when suspect said he was trying to get away from PSD. Five to ten seconds later, PSD was recalled. The *Johnson* court held this was reasonable use of force.

Reviewing, then, it is clear that there are four important take-aways. First, it is clear that no court has held that deployment of a PSD is deadly force as a matter of law. However, the courts have left that question open. Second, the deployment of a PSD must be analyzed using the reasonableness test as set out in *Graham v. Connor, supra*, as applied to the three factors set forth; 1. The severity of the crime at issue; 2. Whether the suspect poses an immediate threat to the safety of LE or others; and 3. Whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Third, verbal warning(s) must be given unless said warning would place law enforcement in additional danger. Fourth, a PSD must be disengaged as soon as the subject is subdued or surrenders.

Implementing these concepts in practice is, of course, the tricky part. Trainers and handlers must apply the *Graham* factors to any possible deployment prior to deployment. For example, if the suspect is suspected of a non-violent felony crime, a PSD deployment is probably not appropriate, even if it means the suspect will evade capture. In addition, when the situation, after analyzing the facts under *Graham*, calls for deployment, it is imperative that handlers maintain positive control of the PSD by utilizing leads and keeping the PSD in sight if possible. Handlers should be giving warnings in all cases except those in which police or other individuals are likely to be harmed. Handlers also need to make



sure through adequate and consistent training that the PSD will quickly and efficiently release the suspect upon command (as well as being trained in physically "outing" the PSD if necessary). For example, Meyer's K9 Training teaches that a PSD should be recalled as soon as the subject complies, is subdued or actually surrenders. If that situation changes (subject stops complying or is no longer subdued), the PSD may be deployed again if the situation again meets the *Graham* criteria set forth above.

The discussion of the use of PSDs in apprehension work also debates the policy of bite and hold PSDs v. bark and hold (or circle and bark) policy. Most PSDs working now have been trained under the bite and hold policy, in which the PSD locates and bites the suspect until the PSD is released by his handler. The bark and hold policy has been described as locating the suspect, then barking and/or circling to hold the suspect in place and only biting when the suspect makes a move to attack or flee. This technique has been widely criticized by trainers and handlers as creating a situation where the PSD is in greater danger of the suspect to attack the PSD. It is also criticized as basically substituting the PSDs discretion for the handler's discretion; that is, the PSD only bites if the PSD correctly interprets the behavior of the suspect to be a behavior of fleeing or attacking. This is a goal that is a moving target; it requires that the suspect behave in a specific fashion for the PSD to react appropriately. Law enforcement will argue that every contact with a violent suspect is completely different and completely unpredictable from any that have come before or follow. Neither the bite and hold policy or the bark and hold policy has been found to be unconstitutional as a matter of law. In fact, in *Robinette v. Barnes* (6th Cir. 1988) 854 F.2d 909, the appellate court upheld the lower court's ruling that "the use of a properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial risk of causing death or serious bodily harm.'" *Robinette, supra*, at 912. This was a case in which the PSD bit the neck of the hiding felon causing death.

Proper implementation of PSDs in the field can be done and is done on a daily basis across the United States and other nations. It should be acknowledged that PSDs are the one less-than-lethal tool possessed by the police that can be 1) recalled once deployed and 2) cannot be used against its handler should the suspect obtain control of the PSD. In addition, just the presence of a PSD and/or the sound of a PSD barking are often the factor that persuades the suspect to surrender or at least follow instructions by law enforcement, deescalating the situation without any use of physical force. In fact, many handlers indicate that just the presence of a PSD such that a suspect is aware of its presence has a de-escalation effect on up to 95% percent of their cases. While as a prosecutor I saw fewer cases involving PSDs (not every case an officer is involved in is sent to the prosecutor's office), I personally never had one that involved a bite, but had several where the barking presence of a PSD changed the suspect's behavior from threatening and defiant to immediately cooperative. This is obviously the goal of good police work; obtaining compliance by voluntary action on the part of the suspect, rather than having to use force of any kind. PSDs are invaluable tools that should not be taken from law enforcement; instead, efforts



should be made to train handlers about the rules governing deployment so that a handler can make an appropriate choice in the field that will save lives, not take them.

(The author of this paper is M. Elizabeth Norton, a recently retired Supervising Deputy District Attorney with over 26 years of experience. This paper contains the opinions of M. Elizabeth Norton and is not intended as legal advice. I do not represent any police agency and do not intend for this paper to be legal advice. Police agencies must always confer with their retained or appointed counsel for legal advice.)