



Northern
California

June 24, 2019

David A. Silberman
Chief Deputy County Counsel
San Mateo County Counsel's Office
400 County Center, Sixth Floor
Redwood City, California 94063

Re: Revised Draft of San Mateo Sheriff's Use of Force and Taser Policies

Dear Mr. Silberman:

I am writing to you on behalf of the American Civil Liberties Union of Northern California in response to your May 30 email and the draft revision of the San Mateo County Sheriff's Office Use of Force Policy ("the Policy"). We appreciate your department's efforts to address some of the shortcomings in the Policy, and your consideration of the April 4 letter from Alan Schlosser that includes some of our recommended changes. Although several of Mr. Schlosser's suggestions appear to have been addressed in the revised policy, we are concerned that many other deficiencies remain unchanged or have only been partially resolved, particularly regarding the Taser policy.

Additionally, when revising the Policy, we urge you to take into account the anticipated passage of AB 392 (Weber), regarding deadly force by law enforcement, which is currently before the California legislature. The bill was passed unanimously by the state Assembly on May 29, 2019, and unanimously by the state Senate Committee on Public Safety on June 18, 2019. Governor Newsom has committed to signing the legislation.¹ If signed into law, the bill will replace California's current "reasonableness" standard with a more stringent standard that appropriately authorizes officers to use deadly force *only when necessary to defend against an imminent threat of death or serious bodily injury*. This standard is consistent with the recommendations by the state and federal Departments of Justice,² as well as other legal and policing experts.³ We

¹ Chabria A and T Luna, "Police use-of-force bill advances after California law enforcement agrees to changes," *Los Angeles Times* (May 23, 2019). At: <https://www.latimes.com/politics/la-pol-ca-police-use-of-force-bill-392-20190523-story.html>.

² California Department of Justice, *Sacramento Police Department, Report and Recommendations* (2019); US Department of Justice, *Collaborative Reform Initiative: An Assessment of the San Francisco Police Department* (October 2016).

³ See American Law Institute, *Principles of the Law: Policing, Revised Tentative Draft No. 1* (2017); Police Executive Research Forum, *Use of Force: Taking Policing to a Higher Standard, 30 Guiding Principles* (Jan. 29, 2016); Police Executive Research Forum, *An Integrated Approach to De-Escalation and Minimizing Use of Force* (Aug. 2012).

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recommend the Policy incorporate this standard, which is not only based on best practices but appears to be on the verge of becoming state law.

We have reviewed your revised draft use of force policies and write to offer our feedback. We are concerned that unless these suggestions are incorporated into the department's Policy, there will continue to be unnecessary deaths in San Mateo County resulting from use of force.

Taser use: While we appreciate that the revisions now limit Taser activations to three cycles of a maximum of five-seconds each, the draft Policy continues to fall far short of what is necessary to prevent deaths from uses of Tasers. The following are our primary areas of concerns with this section of the Policy:

1. The Policy continues to instruct officers to use Tasers against persons “who demonstrate an intent to cause immediate harm to individuals” or who are “potentially violent” and show “active resistance.” These standards are too vague to serve as appropriate guidelines for the use of such a dangerous weapon. By identifying appropriate targets as persons who show “an intent to cause immediate harm” or are “potentially violent”, the Policy permits Taser use based on the subjective assessment of the deputy as to what the subject is thinking, and this subjectivity opens the door to racial stereotypes and implicit bias. A similar provision is also in the section authorizing uses of “control devices.”

In addition, the Policy continues to allow Taser use to “overcome active resistance,” a term which is not defined. Active resistance could include resisting arrest by grabbing onto a lamppost, going limp, grabbing onto a car steering wheel, or engaging in strong verbal resistance. Under this policy, it's possible that these non-assaultive, non-violent actions could justify an officer using a Taser on a person, if the officer determines that the active resister is “potentially violent.” Deputies should not be authorized to use Tasers as compliance measures unless there is an actual threat of immediate physical harm. As recommended by the Police Executive Research Forum and the Community Oriented Policing Services of the U.S Department of Justice, Tasers “should be used as a weapon of need, not a tool of convenience,” and “Officers should not over-rely on [Tasers] in situations where more effective and less risky alternatives are available.”⁴

⁴ U.S. Department of Justice, Community Oriented Policing Services and Police Executive Research Forum, “2011 Electronic Control Weapon Guidelines” (2011). At: <https://www.policeforum.org/assets/docs/Free Online Documents/Use of Force/electronic%20control%20weapon%20guidelines%202011.pdf>.

In authorizing the use of Tasers, we recommend the following language, from the San Francisco Police Department:⁵

“Officers shall determine the reasonableness of [electronic control weapon] use based upon the totality of the circumstances, including but not limited to, the subject’s level of resistance; the subject’s apparent age and size; and the feasibility of lesser force options. Officers shall use the minimum number of ECW cycles necessary to accomplish a lawful objective.

“An officer may activate the ECW when a subject is:

“1. Armed with a weapon other than a firearm, such as an edged weapon or blunt object, and the subject is causing immediate physical injury to a person or threatening to cause physical injury when there is a reasonable belief that the subject has the intent and capability of carrying out the threat; or

“2. Causing immediate physical injury to a person or threatening to cause physical injury when there is a reasonable belief that the subject has the intent and capability of carrying out the threat; or

“3. Violently resisting an officer’s attempt to lawfully detain or arrest a subject.”

2. The Policy still fails to provide any guidance for officers when they are dealing with a person they know suffers from a serious mental health concern or who exhibits behaviors that could reasonably lead to such a conclusion. Given that 25 percent of people killed by Tasers in the U.S. had a mental illness⁶ – including all three people recently killed by Tasers in San Mateo County – we strongly encourage the department to provide more guidance to officers about this population. Best practices in this regard include:

- a. Using de-escalation tactics;
- b. Setting up a perimeter;
- c. Calling in officers and other professionals trained in crisis intervention;
- d. Recognizing that it may take time for a person to understand what is happening;

⁵ San Francisco Police Department, Department General Order 5.02: Use of Electronic Control Weapon (March 2018). At:

<https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/SFPD%20draft%20ECW%20policy%20031418%20FINAL%20%28clean%20copy%29.pdf>

⁶ Tim Reid et al., “As death toll keeps rising, U.S. communities start rethinking Taser use,” Reuters (February 4, 2019). At: <https://www.reuters.com/article/us-usa-taser-deaths-insight/as-death-toll-keeps-rising-u-s-communities-start-rethinking-taser-use-idUSKCN1PT0YT>.

- e. Creating a calm environment in which one person is communicating simple instructions and giving time for a response.

The Policy should warn officers that there is a higher risk of death in subjects with mental illness and should only authorize the use of Tasers against people with mental illness when there are no less intrusive alternatives.

3. Similarly, the Policy still fails to provide any guidance for officers when they are dealing with a person they know or could reasonably conclude to have any other number of pre-existing conditions that make them especially vulnerable to the risks of Tasers. The 2018 Axon warnings state that Tasers can “cause or contribute to sudden death” for persons who are “physiologically or metabolically compromised,” including persons with “heart conditions, asthma or other pulmonary conditions, and people suffering from excited delirium, profound agitation, severe exhaustion, drug intoxication or chronic drug abuse and/or over-exertion from physical struggle.”⁷ As with subjects with mental illness, the policy should warn officers that there is a higher risk of sudden death in subjects under the influence of drugs and/or presenting any of these pre-existing conditions. The policy should only authorize the use of Tasers against such persons when there are no less intrusive alternatives.
4. To reduce serious bodily injury and deaths, we suggest that the Policy include required targeting considerations, in line with the recommendations from Axon. For example: “Officers shall, when feasible, make reasonable efforts to target lower center mass or if available, the back, which is the preferred target area. Officers shall not intentionally target sensitive areas, including the head, face, neck, chest or groin. The use of a Taser to these areas has a likelihood of causing serious bodily injury or death, and the intentional use of a Taser to these areas shall only be used in exigent circumstances.”
5. The Policy should make it clear that the authorization to use Tasers does not in any way supersede or dilute the commitment that officers first use de-escalation and crisis intervention techniques to try and avoid the use of force. We recommend adding the following language: “The use of a Taser is not intended to replace tactics or training that can be utilized to calm or control a person, or to de-escalate a situation and avoid the use of force.”

⁷ Axon Enterprise, Inc., Taser Handheld CEW Warnings, Instructions, and Information: Law Enforcement (2018). At: https://axon.cdn.prismic.io/axon/1f0a5585-a423-4adf-aed7-3f5f1578ff96_law-enforcement-warnings-8-5x11.pdf (last visited Apr 4, 2019).

6. We were heartened to learn that the Sheriff's Office is working to have Automated External Defibrillators in each patrol car.⁸ We recommend that this commitment be reflected in your revised policy.

Purpose and Scope: The policy states that “No policy can anticipate every conceivable situation or exceptional circumstance which a deputy may face.” We appreciate that policies may not specifically describe all of the particular factual circumstances in which officers may use force, as policies are written in terms of general principles. However, the assertion that polices cannot “anticipate” all factual circumstances suggests the very different – and dangerous – idea that polices are not designed to apply to all situations, and implies there may be exceptions to an agency’s use of force policy in extraordinary circumstances. The point of use of force policies is to regulate use of force by officers at all times. This same concerning provision is repeated under “Use of Force” in the Definitions section. The Policy should be amended to remove this highly problematic language as follows:

“No policy can specifically address ~~anticipate~~ every conceivable situation or exceptional circumstance which a deputy may face. In all circumstances, deputies are expected to exercise sound judgment and critical decision making and to apply use of force policies reasonably when using force options.”

Safeguarding human life and dignity: We appreciate the inclusion of two separate references to the principle of safeguarding the life and dignity of all persons, and the manner in which that value is highlighted as a central component of the Policy.

De-escalation: The new requirement that deputies “shall, when feasible, employ de-escalation techniques” is a significant improvement that directly addresses one of our primary concerns with the current policy. However, the policy continues to quote Penal Code § 835a, which assures officers that they “need not retreat or desist from their efforts by reason of resistance or threatened resistance on the part of the persons being arrested.” This provision could be interpreted to conflict with a requirement to de-escalate. If signed into law, AB 392 would amend this section of the Penal Code to make it clear that “‘retreat’ does not mean tactical repositioning or other de-escalation tactics.” We recommend that, if the policy continues to quote this antiquated statute, this clarifying sentence be added.

Proportionality: While we appreciate the inclusion of the concept of proportionality, we are concerned with this portion of the Policy as currently drafted, as it misstates the appropriate

⁸ San Mateo County Sheriff's Office News Release, March 1, 2019. At: <https://www.smcsheriff.com/sites/default/files/articles/DA%20PC%20Response.pdf>.

considerations of that test.⁹ Specifically, the Policy notes that “deputies shall, when feasible, balance *the severity of the offense committed* and the level of resistance known to or perceived by the deputy at the time” (emphasis added). Although the severity of the offense is an important consideration when considering the strength of the government’s interest in enforcement (e.g., in the context of searches or extradition), it is not appropriate in the use of force context as an independent consideration. The severity of the offense should only impact the amount of force the deputy uses if it impacts the threat that the deputy perceives or the need to overcome resistance. We recommend amending the language as follows:

“When determining the appropriate level of force, deputies shall only use a level of force that they reasonably believe is proportional to, ~~when feasible, balance the severity of the offense committed and~~ the level of threat or need to overcome resistance ~~known to or perceived by the deputy at the time.~~”

Definition of imminent: The definition of “imminent” – particularly the assertion that “imminent does not mean immediate or instantaneous” – is not only inconsistent with state criminal law, but also contrary to any reasonable or dictionary definition of the word.¹⁰ The International Association of Chiefs of Police recommends that “imminence” should incorporate ability, opportunity, and apparent intent: “An immediate, or imminent, threat can be described as danger from an individual whose *apparent intent* is to inflict serious bodily injury or death and the individual has the *ability* and *opportunity* to realize this intention.”¹¹ Although the proposed definition in the Policy incorporates intent, it is more ambiguous and speculative in addressing ability and opportunity. This ambiguity could lead to unnecessary deaths. Opportunity, in particular, refers to the subject’s proximity to the potential target(s) in light of the type of threat they present. For example, a subject with a knife who is standing a block away from officers may have the intent and ability to cause death or great bodily harm, but lacks the opportunity to do so;

⁹ See Police Executive Research Forum, *Guiding Principles on Use of Force* (March 2016) <https://www.policeforum.org/assets/30%20guiding%20principles.pdf>

¹⁰ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1307. “In *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187, 264 Cal.Rptr. 167 (Aris), disapproved on another ground in *People v. Humphrey*, *supra*, 13 Cal.4th at page 1089, 56 Cal.Rptr.2d 142, 921 P.2d 1, the appellate court approved of the trial court’s defining “imminent peril” as meaning that “the peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with.” This definition has been quoted with approval by the California Supreme Court (see, e.g., *In re Christian S.*, *supra*, 7 Cal.4th at p. 783, 30 Cal.Rptr.2d 33, 872 P.2d 574), and was incorporated into CALJIC Nos. 5.12 and 5.17, the counterparts of CALCRIM Nos. 505 and 571. ... Webster’s Third New International Dictionary (1986) page 1130 defines “imminent” as “ready to take place: near at hand: impending.”

¹¹ International Association of Chiefs of Police, National Consensus Policy and Discussion Paper on Use of Force (2017). At: https://www.theiacp.org/sites/default/files/all/n-o/National_Consensus_Policy_On_Use_Of_Force.pdf (emphasis added)



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therefore, there is no imminent threat to officers in that moment. We recommend the Policy adopt the following definition:

“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.”

Carotid holds and shooting at moving vehicles: The Policy continues to authorize these two uses of force that the state and federal Departments of Justice have recommended be prohibited, and that many law enforcement agencies have already prohibited. In its report to the Sacramento Police Department, the California DOJ recommended banning carotid holds and other maneuvers “that are designed to or may foreseeably cut off blood or oxygen to an individual’s head... By prohibiting or significantly limiting these kinds of force, SPD may be able to decrease the likelihood of unnecessary and accidental serious bodily injuries.”¹² The US DOJ issued a similar recommendation to the San Francisco Police Department, which subsequently banned carotid holds.¹³ The US DOJ also recommended to SFPD a prohibition on shooting at moving vehicles unless deadly physical force is being used against an officer or another person by means other than the moving vehicle itself.

We thank you for this opportunity to provide feedback on your revised Use of Force Policy and appreciate that you have incorporated some of the recommendations from Mr. Schlosser. We hope that the San Mateo County Sheriff’s Office gives further consideration to the suggestions in this letter, which will modernize the Policy, bring it in line with best practices, and help prevent unnecessary deaths by law enforcement.

Sincerely,

Lizzie Buchen
Criminal Justice Project Director
ACLU of Northern California

¹² California Department of Justice, *Sacramento Police Department: Report and Recommendations* (2019). At: <https://oag.ca.gov/system/files/attachments/press-docs/spd-report.pdf>.

¹³ US Department of Justice, *Collaborative Reform Initiative: An Assessment of the San Francisco Police Department* (October 2016). (“This ‘carotid restraint’ technique poses a significant risk in the community and is not a routinely adopted force option in many law enforcement agencies.”)

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