STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

TO: ANDREW EVANS
Superintendent
Bureau of Criminal Apprehension

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FROM: ED STOCKMEYER
JULIANNA PASSE
Assistant Attorneys General
Office of the Minnesota Attorney General

PHONE: (651) 757-1247
FAX (651) 297-4348
TTY: (651) 282-2525

SUBJECT: **The objectively reasonable officer standard in Minn. Stat. § 609.066 (2020)**

~PRIVILEGED AND CONFIDENTIAL~

DPS asked AGO for legal advice regarding Minn. Stat. § 609.066 (2020). DPS requested "assistance in legal analysis of how the old and new laws compare and the implications of these distinctions on our operations," and referenced the development of use-of-force policies, trainings, and its responsibility to investigate officer-involved deaths.

I. CHANGES TO AUTHORIZED USE OF DEADLY FORCE BY PEACE OFFICERS.

Section 609.066 now has three main subdivisions[1]: First, § 609.066, subd. 1 defines "deadly force." If an officer has not used "deadly force," § 609.06 controls her claim that her use of force was justified, not § 609.066.[2] Although, the new version of § 609.066 did not change the definition of deadly force, an amendment to § 609.06 did. Section 609.06 now defines chokeholds, hogties, and facedown transport as deadly force, no matter the circumstances.[3]

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[1] There is a fourth subdivision that this memo does not address. Under Minn. Stat. § 609.066, subd. 3, "This section and sections 609.06, 609.065, and 629.33 may not be used as a defense in a civil action brough by an innocent third party." Subdivision 3 is not new and was not amended in 2020.

[2] Section 609.065 (self-defense for intentional killings) does not apply to peace officers because a peace officer's use of deadly force is subject to § 609.066, "notwithstanding the provisions of section 609.06 or 609.065." Minn. Stat. § 609.066, subd. 2(a). *See N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017) (defining "notwithstanding").

[3] A choke hold is the application of "pressure to a person to make breathing difficult or impossible, and includes but is not limited to any pressure to the neck, throat, or windpipe that may prevent or hinder breathing, or reduce intake of air. Choke hold also means applying pressure to a person's neck on either side of the windpipe, but not the windpipe itself, to stop the flow of blood to the brain via the carotid arteries." Minn. Stat. § 609.06, subd. 3(b). A hogtie is "tying all of a person's limbs together behind the person's back to render the person immobile." Minn. Stat. § 609.06, subd. 3(2). Facedown transport is "securing a person in any way that results in transporting the person face down in a vehicle." Minn. Stat. § 609.06, subd. 3(3)

Second, § 609.066, subd. 1a outlines the legislative findings and policies underlying the 2020 amendments. This subdivision is entirely new. As discussed below, there is ample reason to conclude these policies express the Legislature's intent to adopt the "reasonable officer" standard from *Graham v. Connor*, 490 U.S. 386 (1989).

Third, § 609.066, subd. 2 sets forth the elements of a peace officer's authorized use of deadly force defense in a criminal prosecution. These elements were substantially revised and can be broken-down into four parts:

1. The "objectively reasonable officer" standard

The Legislature added an "objectively reasonable officer" standard to § 609.066, subd. 2(a), which applies to any use of deadly force. Now, peace officers cannot use deadly force unless "an objectively reasonable officer would believe, based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight, that such force is necessary."

2. When deadly force may be used

The Legislature reduced the number of categories of justified deadly force, from three to two. Previously, deadly force was justified if necessary protect the officer or another from apparent death or great bodily harm, if necessary to arrest someone who had committed a felony which *involved* (past tense) the use or threat of deadly force, or if necessary to arrest someone who committed a felony whom the officer believes *will* (future tense) cause death or great bodily harm. Minn. Stat. § 609.066, subd. 2(1—3) (2018). In amending the statute, the Legislature eliminated the second category. Now, an officer may only use deadly force to arrest or apprehend a suspected felon if the officer "reasonably believes that the person *will* cause death or great bodily harm to another person . . . unless immediately apprehended." Minn. Stat. § 609.066, subd. 2(a)(2) (emphasis added).

3. The "threat criteria"

The Legislature added three "threat criteria" which must be met for an officer to use deadly force. Regardless of other circumstances, no officer may use deadly force unless the threat in question: "(i) can be articulated with specificity by the law enforcement officer; (ii) is reasonably likely to occur absent action by the law enforcement officer; and (iii) must be addressed through the use of deadly force without unreasonable delay." Minn. Stat. § 609.066, subd. 2(a)(1)(i—iii). *See also* Minn. Stat. § 609.066, subd. 2(a)(2) (incorporating "the threat criteria"). An easy way to summarize these requirements is that no officer may use deadly force unless the threat faced is reasonably articulable, reasonably certain to occur, and reasonably immediate.[4]

[4] The first threat criteria may be unconstitutional. It is unclear how "the law enforcement officer" suspected of a crime can be compelled to articulate anything without violating her right against self-incrimination. Courts could save this provision by construing it as meaning that an objectively reasonable officer would be able to articulate the threat with specificity.

4. Prohibition on deadly force to prevent self-harm

The Legislature added a prohibition against using deadly force when interacting with individuals threatening self-harm. Now, no officer may use deadly force against someone who poses a danger to herself, if a reasonable officer would not think she also poses a threat to the officer or to third parties. Minn. Stat. § 609.066, subd. 2(b).

II. THE OBJECTIVELY REASONABLE OFFICER STANDARD IN § 609.066.

Under the statutory changes outlined above, the objectively reasonable officer standard in the new version of § 609.066 is straightforward. According to the plain language of the statute, a peace officer may use deadly force only if the surrounding circumstances satisfy three elements:

1. The use of deadly force was necessary to protect the officer or another person from death or great bodily harm, *or* was necessary to arrest or seize a person suspected of committing a felony whom the officer believes *will* cause death or great bodily harm.

2. The use of deadly force must satisfy each of the three threat criteria—the threat faced must be reasonably articulable, reasonably certain to occur, and reasonably immediate.

3. The first two elements must be examined by determining what "an objectively reasonable officer would believe, based on the totality of circumstances known to the officer at the time and without the benefit of hindsight."

This objectively reasonable officer standard is a clear incorporation of the Fourth Amendment's excessive force standard as articulated by the Supreme Court. In *Graham v. Connor*, the Court held that "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." 490 U.S. 386, 397 (1989). *Graham's* Fourth Amendment standard and the objectively reasonable officer standard the Legislature enacted in § 609.066 share the same two primary features: (1) reasonableness is determined from the objective perspective of the generic reasonable officer and excludes the state of mind of the officer who used force; and (2) reasonableness takes account of all of the facts and circumstances known to the officer at the time she used force, without the benefit of hindsight.

The Legislature's statements of policy in § 609.066, subd. 1a reinforce the conclusion that the Legislature intended to adopt the *Graham* standard. In subdivision 1a, the Legislature outlined those same two primary features, stating that "the decision by a peace officer to use deadly 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 . . . ." Minn. Stat. § 609.066, subd. 1a(3). Additionally, the Legislature declared as its policy that "the totality of circumstances shall account for occasions when officers may be forced to make quick judgments about using deadly force," a concept taken directly from the *Graham* opinion. *Id.* *See also Graham*, 490 U.S. at 396-97 ("The calculus of reasonableness must embody allowance 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 force that is necessary in a particular situation."). While the Legislature did not incorporate this as a formal element of justified deadly force in subdivision 2, its inclusion as a declaration of policy in subdivision 1a demonstrates the Legislature's intentional incorporation of *Graham* into Minnesota's deadly force standard.

To be clear, the Legislature did not enact every aspect of the *Graham* opinion. For example, the three threat criteria control whether an officer's use of deadly force was necessary, rather than the factors the Court emphasized in *Graham*, 490 U.S. at 396 (stating that application of the reasonable officer standard "requires careful attention" to the totality of circumstances, "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 by flight"). But it is nevertheless clear that the Legislature intended to adopt *Graham's* objectively reasonable officer standard for determining whether the circumstances surrounding a particular use of deadly force satisfied the relevant statutory criteria.

III. DPS SHOULD TREAT THE LEGISLATURE'S STATEMENTS OF POLICY AS PART OF THE OBJECTIVELY REASONABLE OFFICER STANDARD.

DPS should treat the Legislature's statements of policy in § 609.066, subd. 1a as part of the objectively reasonable officer standard. Most of those declarations of policy are repeated in § 609.066, subd. 2 as the substantive law of a peace officer's authorized use of deadly force.[5] There are only two relevant statements of policy which have no analogue in subdivision 2:

1. The Legislature declared that in determining whether an objectively reasonable officer would have used deadly force, "the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using deadly force . . . ." Minn. Stat. § 609.066, subd. 1a(3).

2. The Legislature declared that "peace officers should exercise special care when interacting with individuals with known physical, mental health, developmental or intellectual disabilities as an individual's disability may affect the individual's ability to understand or comply with commands from peace officers." Minn. Stat. § 609.066, subd. 1a(4)

[5] *Compare* Minn. Stat. § 609.066, subd. 1a(2) (stating that deadly force should only be used "when necessary in defense of human life," determined "in light of the particular circumstances of each case"), *and* Minn. Stat. § 609.066, subd. 1a(3) (stating that justification for the use of deadly force "shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight"), *with* Minn. Stat. § 609.066, subd. 2(a)(1, 2) (each stating that the use of deadly force is limited to the prevention of "death or great bodily harm"), *and* Minn. Stat. § 609.066, subd. 2(a) (stating "the use of deadly force by a peace officer in the line of duty is justified only if an objectively reasonable officer would believe, based on the totality of circumstances known to the officer at the time and without the benefit of hindsight, that such force is necessary").

Minnesota's appellate courts routinely look to declarations of policy and legislative findings when interpreting or applying the state's substantive law. *E.g.*, *Jennissen v. City of Bloomington*, 913 N.W.2d 456, 460 (Minn. 2018); *In re: License of Thompson*, 935 N.W.2d 147, 151 (Minn. Ct. App. 2019). Those courts have not, however, applied a consistent rule for determining *when* to rely on the Legislature's policy declarations. Sometimes, courts only look to legislative findings and declarations of policy when necessary to construe a textually ambiguous statute. *See, e.g.*, *In re: Annexation of Certain Real Prop.*, 925 N.W.2d 216, 221 (Minn. 2019) (rejecting a party's reliance on a legislative finding that certain goals should be "encouraged" because encouragement from the Legislature does not override the statute's plain meaning); *Citizen's Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 828 (Minn. 2006) (finding the relevant statute ambiguous and then turning to Minn. Stat. § 116D.02 to identify the legislature's "belief"). But at other times, courts have considered Legislative findings or policies without finding ambiguity. *See, e.g.*, *State v. Ndikum*, 815 N.W.2d 816, 821 (Minn. 2012) (looking to Minn. Stat. § 624.711 to identify legislative intent); *Favors v. Kneisel*, 902 N.W.2d 92, 95 (Minn. Ct. App. 2017) (identifying the Legislature's intent by reference to a policy declaration to help determine whether the statute conferred a private right of action). Whatever the precise interpretive rule is or should be, there is a reasonable likelihood that courts tasked with interpreting the scope of an authorized use of deadly force defense under § 609.066, subd. 2 will seek guidance from the policy declarations in § 609.066, subd. 1a. Accordingly, DPS should treat Subdivision 1a as relevant factors in determining when peace officers are justified in using deadly force.

The text of the relevant policy declarations reinforces this conclusion:

1. <u>The quick-judgment factor</u>

Section 609.066, subd. 1a(3) states that the objectively reasonable officer standard "*shall*" account for the need to "make quick judgments about using deadly force." Minnesota courts have usually (though not always) held that the word "shall" is mandatory and imposes a strict legal obligation, duty, or directive. *See, e.g.*, *State v. Humes*, 581 N.W.2d 317, 319 (Minn. 1998) (concluding that a conditional release term must be imposed based on the word "shall"). *See also* Minn. Stat. § 645.44, subd. 16 ("'Shall' is mandatory"). *But see Handle with Care, Inc. v. Dep't of Human Servs.*, 406 N.W.2d 518, 520 (Minn. 1987) (finding the word "shall" ambiguous). The Legislature's use of the word shall indicates that any assessment of an officer's use of deadly force under the objectively reasonable officer standard must account for an officer's need to make quick judgments, particularly because the Legislature used the less mandatory word "should" elsewhere in the policy declarations. *See* Minn. Stat § 609.066, subd. 1a(4).

Bolstering this textual clue is the fact that, as discussed above, the Legislature clearly intended to incorporate the *Graham* standard, and accounting for an officer's need to make quick judgments is an element of the *Graham* standard. *See Graham*, 490 U.S. at 396-97. These are persuasive reasons for treating this statement of policy as part of the objectively reasonable officer standard in use of deadly force prosecutions.

2. Special care for individuals with disabilities

Unlike its quick-judgment policy statement, the Legislature declared that officers "should" exercise special care when interacting with individuals with a known disability. Minn. Stat. § 609.066, subd. 1a(4). The effect of this phrasing is uncertain. A court could treat the word "should" as evidence that this is not an element of the objectively reasonable officer standard because "the word 'should' in a rule or statute is not mandatory." *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 156 (Minn. 2014). But there are times when courts read the word "should" as meaning "shall," which could support treating a victim's known disability as an element of the objectively reasonable officer standard, requiring the officer to act with special care. *See U.S. v. Goldman*, 228 F.3d 942, 944 (8th Cir. 2000) (interpreting the word "should" as being mandatory).

Courts are likely to treat a victim's known disability as a substantive component of the objectively reasonable officer standard regardless of whether the word "should" is mandatory or merely directory. Section 609.066, subd. 2(a) clearly states that the objectively reasonable officer standard accounts for the "totality of circumstances known to the officer at the time." If an officer *knows* that a person has an intellectual or physical disability, that knowledge is part of the totality of relevant circumstances. Courts are likely to conclude that a reasonable officer who knows that a suspect suffers from autism or a severe psychological disorder must take that into account while interacting with that person. *See Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004) ("The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted."); *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) (holding that "where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed"). It is not a reasonable reading of § 609.066, subd. 2 to conclude that the objectively reasonable officer standard allows officers to simply disregard a suspect's known developmental, psychological, or emotional condition. DPS should train officers to take special care when interacting with individuals with known disabilities, not just because that is a policy enacted into law by the Legislature, but because the objectively reasonable officer standard examines the "totality of circumstances known to the officer at the time."

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