

Use of Force 2-3

Deadly Force, Necessary, RCW 9a.16.040 and Case Reviews

1

$$PLUOF = \frac{TOC(Q :: GI) + p2}{RC}$$

A smaller version of the Criminal Justice Training Commission logo, centered on a white background. It features a central shield with a yellow border. Inside the shield, there are two yellow scales of justice at the top and three yellow stars at the bottom. The shield is set against a blue background. The words "CRIMINAL JUSTICE TRAINING COMMISSION" are written in yellow, bold, capital letters around the perimeter of the shield. Below the shield is a yellow banner with the word "WASHINGTON" in black, bold, capital letters.

2

$$\text{PLUOF} = \frac{\text{TOC}(Q :: \text{GI}) + p2}{\text{RC}}$$



- The police lawful use of force equals quantum of force that is both necessary and proportional to the governmental interest considering the totality of the circumstances, pace control, and probable cause undergirded by the duty of reasonable care.

3

Use of Deadly Force HB-1310 (1)(b)



- (b) A peace officer may use deadly force against another person **only when necessary** to protect against an imminent threat of serious physical injury or death to the officer or another person.

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Necessary



- "Necessary" means that, under the totality of the circumstances, a reasonably effective alternative to the use of deadly force does not exist, and that the amount of force used was a reasonable and proportional response to the threat posed to the officer and others. (HB-1310)

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House Bill Report E2SHB 1310 & Necessity for Deadly Force



Staff summary of Public Testimony (Public Safety) Paragraph 5

- "The bill establishes a new statewide standard that limits physical force to only certain circumstances, and limits deadly force to a last resort. Further, it establishes the requirement of reasonable care, including taking into account the unique characteristics of persons whom law enforcement officers interact. This is particularly important for persons with disabilities. These standards represent a shift toward a guardian and harm reduction model in policing."

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R.C.W. 9a.16.040 Use of Deadly Force



- Homicide or the use of deadly force is justifiable in the following cases:
- When a public officer applies deadly force in obedience to the judgment of a competent court; or
- (b) When necessarily used by a peace officer meeting the good faith standard of this section to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty; or
- (c) When necessarily used by a peace officer meeting the good faith standard of this section or person acting under the officer's command and in the officer's aid:

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R.C.W. 9a.16.040 Use of Deadly Force (c)



- To arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony;
- (ii) To prevent the escape of a person from a federal or state correctional facility or in retaking a person who escapes from such a facility;
- (iii) To prevent the escape of a person from a county or city jail or holding facility if the person has been arrested for, charged with, or convicted of a felony; or
- (iv) To lawfully suppress a riot if the actor or another participant is armed with a deadly weapon.

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R.C.W. 9a.16.040 (2)



- (2) In considering whether to use deadly force under subsection (1)(c) of this section, to arrest or apprehend any person for the commission of any crime, the peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others. Among the circumstances which may be considered by peace officers as a "threat of serious physical harm" are the following:
 - The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening; or
 - (b) There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.
 - Under these circumstances deadly force may also be used if necessary to prevent escape from the officer, where, if feasible, some warning is given, provided the officer meets the good faith standard of this section.
 - These are examples of when an officer may use deadly force

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R.C.W. 9a.16.040 (4) Good Faith

- Good Faith is an objective standard which shall consider....
-
- "Facts, circumstances, and information known to the officer at the time to determine whether a similarly situated reasonable officer would have believed that the use of deadly force was *necessary* to prevent death or serious physical harm to the officer or another individual."
- Good faith is predicated on facts and necessity.



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R.C.W. 9a.16.010 (2)



- Deadly Force means;
- “The intentional application of force through the use of firearms or any other means reasonably likely to cause death or serious physical injury.”

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Smith v. Hemet



- **Smith v. Hemet**
- The Ninth Circuit Court of Appeals had previously defined “deadly force” as “force reasonably likely to kill”. *Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1998). Now, the same court has overruled *Vera Cruz* deciding, instead, to adopt the definition of deadly force which it believes is being used by other circuit courts throughout the nation. The more mainstream definition of deadly force is “force that creates a ‘substantial risk’ of serious bodily injury”.
- The Hemet court has held that the Graham factors are not to be considered in a vacuum but only in relation to the amount of force used to affect a particular seizure. The Hemet court has also determined that it may consider a fourth factor: the availability of alternative methods of capturing or subduing a suspect when it held “In some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider”.
- Officers must be prepared to articulate any belief that there was an immediate danger to the officer or others and whether there was active resistance or flight.
- In addition, officers must consider the alternatives and determine whether there is a less lethal manner of making an arrest and be ready to articulate why he/she made the decision to act in a certain manner.

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Tennessee v. Garner, 471 U.S. 1 (1985)



- Tennessee v. Garner did not, does not, set or establish a hard, rigid standard for the use of deadly force.
- The Supreme Court's decision in Tennessee v. Garner provides *examples* of when a police officer may use a firearm to seize someone, specifically in flight, if certain criteria were met.
- The primary holding in Tennessee v. Garner was
- **Primary Holding:** Under the Fourth Amendment of the U.S. Constitution, a police officer may use deadly force to prevent the escape of a fleeing suspect only if the officer has a good-faith belief that the suspect poses a significant threat of death or serious physical injury to the officer or others.

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Tennessee v. Garner, 471 U.S. 1 (1985)



- The Garner case started with a complaint about a burglary-in-progress.
- Two police officers responded to the scene and one of them saw Garner, the suspect, run out of the house.
- The officer described Garner as a 17 or 18-year-old male and about 5'5" or 5'7" tall.
- The officer saw no sign that Garner was carrying a weapon and based on the facts, was "reasonably sure" he was not armed.

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Tennessee v. Garner, 471 U.S. 1 (1985)



- The officer yelled, “police, halt!” but Garner kept running away.
- When Garner began to climb-over a fence, the officer had two options. He could let Garner escape or,
- Use deadly force to stop him.
- Relying on a Tennessee statute that allowed police officers to use all necessary force to effect the arrest of a fleeing felon, the officer did what he deemed necessary - and shot Garner in the back of the head.
- Garner died on the operating table.

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Tennessee v. Garner, 471 U.S. 1 (1985)



- **“Deadly force is unmatched,”** stated the Court.
- The Court held that the Tennessee statute was unconstitutional in so far as it authorized the use of deadly force to stop a fleeing suspect who posed no immediate threat to the officer or others.
- **“It is not better that all felony suspects die than that they escape”** stated the Court.
- “We conclude that deadly force may not be used unless it is necessary to prevent the escape and the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or others.

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Tennessee State Statute Deemed Unconstitutional



- A Tennessee statute provides that, if, after a police officer has given notice of an intent to arrest a criminal suspect, the suspect flees or forcibly resists, "the officer may use all the necessary means to effect the arrest."
- *Held:* The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against, as in this case, an apparently unarmed, nondangerous fleeing suspect; such force may not be used unless necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

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~~R.C.W. 10.31.050 Officer May Use Force~~



If after notice of the intention to arrest the defendant, he or she either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

This R.C.W. no longer guides the use of force in Washington State, deadly or otherwise.

REPEALED

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Imminent Threat and Decision to Use Deadly Force

"Imminent Threat" means that, based on the totality of the circumstances, it is objectively reasonable to believe that a person has the *present and apparent ability, opportunity, and intent to immediately cause death or serious bodily injury to the peace officer or another person.*

Within the definition of imminent is "immediate." As such, the spirit and intent of the legislature appears as though "immediate" is how "imminent" is being defined.

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System 1/Back-Channel

Perception

Time Schema

Schema Theory

Heuristics

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Time:

Does time fluctuate?	Police tactics and events focus on "increasing" time through the use of proper patrol tactics...
Time is time. It is a constant. World time does not speed up or slow down...necessarily.	Based on an individual's skill level, and through the actions taking place in space and time, we can increase or decrease our <i>perception</i> of time available.
By utilizing distance and cover and employing communication skills, an officer can increase the perception of time available to respond.	This is why the management of pace through proper patrol tactics is so important and has a direct correlation to the use of force.

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Perception of Time Compression

The diagram illustrates a cycle of perception of time compression. It features a blue plus sign labeled "Threat Perception" on the left. A blue arrow points from this plus sign to the text "Unnecessarily Increasing Pace/Speed" at the top. On the right, a blue horizontal line is labeled "Force Options & Alternatives". Below this line, the text "Decreasing Distance" is positioned. A large blue arrow curves from the "Force Options & Alternatives" area back towards the "Threat Perception" area, completing the cycle.

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The 5 Overarching Principles of Patrol Tactics

Pace Management/De-Escalation



Legal Authority



Communication



Position & Movement



Threat Management

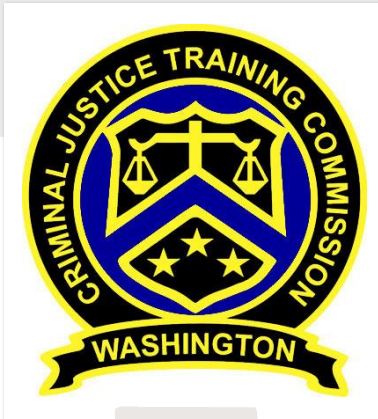
Recognition
Prioritization
Response



Equipment Management

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Glenn v. Washington County



- 18-year-old Lukus Glenn was shot and killed in his driveway by Washington County police officers.
- His mother called 911 for help with her distraught and intoxicated son after he began threatening to kill himself with a pocketknife and breaking household property.
- Within 4 minutes of their arrival, officers shot Lukus with a less-lethal beanbag shotgun and had fatally shot him 8 times with their service weapons.
- Lukus' mother filed suit against the officers and Washington County alleging a state law wrongful death claim and a 42 U.S.C. 1983 claim for excessive force under the 4th Amendment.

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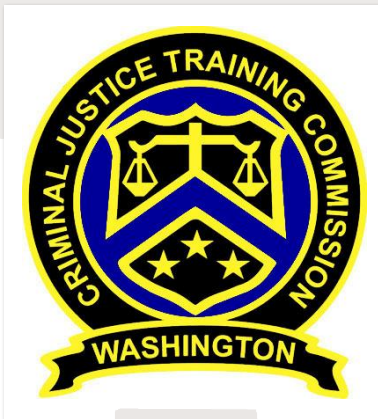
Glenn v. Washington County



- 09-15-2006 Lukus Glenn went to a football game at Tigard High School with his girlfriend;
- Lukus had no prior criminal history or history of violence;
- He returned home at 0300 hours, agitated and intoxicated;
- He wanted to ride his motorcycle and his parents said no. Lukus became angry and began to damage the front door and windows of cars parked in the driveway;
- Lukus' parents, having never seen him drunk and in this state before, first called two of his friends to attempt to calm him down.
- Lukus held a pocketknife to his own neck and threatened suicide;

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Glenn v. Washington County



- Frightened that Lukus would harm himself, Lukus' mother called 911, believing that officers would have the expertise to deal with an emotionally distraught teenager.
- Lukus' mother called 911 and advised that Lukus had a pocketknife and stated he would kill himself if the police responded and that he was not leaving until the cops shoot and kill him.
- Lukus' mother also requested paramedics due to Lukus' state. She also advised there were hunting rifles in the home but he did not have access to them.
- Deputy Mikhail Gerba was working an off-duty assignment, heard the call come out over the radio, and responded to the incident.
- Instead of responding to a pre-arranged staging area, Deputy Gerba responded directly to the scene at 0311 hours and was the first officer on scene;

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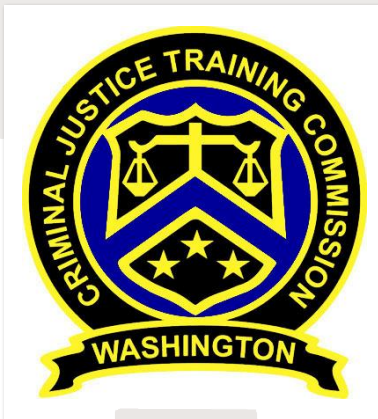
Glenn v. Washington County



- Deputy Gerba proceeded up the driveway and positioned himself 8-12 feet from Lukus, who was standing in the garage near his parents and one of his friends.
- Deputy Gerba had a clear and unobstructed view of Lukus who was not in a physical altercation with anyone, nor threatening anyone with the pocketknife. No one was trying to get away from him either. He was, however, holding the pocketknife to his own neck.

27

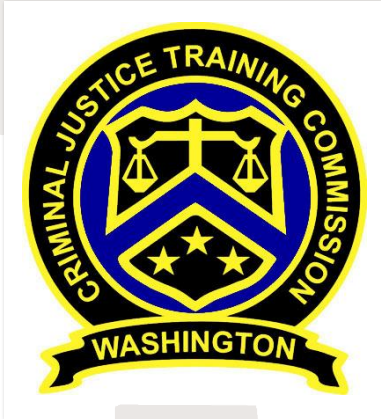
Glenn v. Washington County



- From the moment of his arrival, Deputy Gerba only screamed verbal commands such as; "Drop the knife or I'm going to kill you." There were no comments of persuasion or cajoling to drop the weapon.
- Witnesses described Deputy Gerba's behavior as "angry, frenzied, and jumpy." Witnesses noted that they were; "shocked by how he approached the situation."
- WCSO Deputy Timothy Mateski arrived second to Deputy Gerba approximately one minute after Deputy Gerba's arrival.

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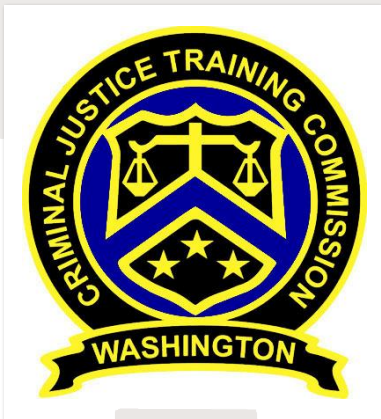
Glenn v. Washington County



- Deputy Mateski was initially heading to the staging area, however upon hearing Deputy Gerba's arrival, elected to respond to the scene.
- Upon his arrival, Deputy Mateski took a position 6-12 feet from Lukus and also had an unobstructed view of him in the garage.
- Mateski drew his firearm and also began to scream and yell expletives and commands such as; "drop the knife or you're going to die" and "drop the fucking knife."
- Witnesses also described Deputy Mateski's behavior similarly to Deputy Gerba as; "frantic and excited."
- Lukus' friends implored both the deputies to calm down, that Lukus was only threatening to hurt himself.
- Deputies ordered Lukus' friend to step behind them and Lukus' parents into the home, everyone complied.

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Glenn v. Washington County



- At approx. 0314 hours, Corporal Musser advised the deputies that back-up was en-route.
- Sgt. Wilkinson advised the deputies via radio to; remember your tactical breathing and that, if they had distance, the less-lethal option of a Taser may be appropriate.
- Neither deputy were carrying a Taser or less-lethal option such as an extended range impact weapon (Beanbag Shotgun).
- Officer Andrew Pastore of the Tigard Police Department responded with a beanbag shotgun and also had a Taser, however nobody requested the use or consideration of the Taser.
- Immediately upon Officer Pastore's arrival, Deputy Mateski ordered Officer Pastore to deploy the beanbag shotgun, and he did, 6 times.
- The beanbag rounds had effect and Lukus appeared; "surprised, confused and possibly in pain."

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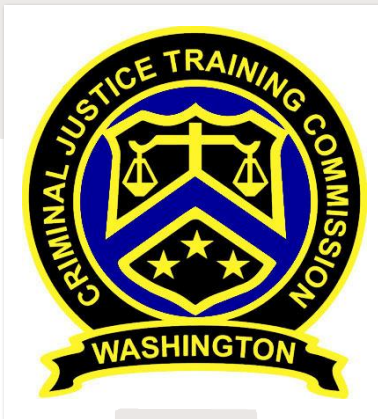
Glenn v. Washington County



- As a result of the beanbag rounds, Lukus dropped his hands, grabbed his pants, and began to move away from the beanbag shotgun fire.
- Both Deputy Mateski and Deputy Gerba independently determined that if Lukus made a move towards the house with his parents inside, they would use deadly force.
- After Lukus took one or two steps, both Deputies fired 11 shots, 8 of which struck Lukus in the back, chest, stomach, shoulder, and legs.
- All the lethal fire occurred before the last beanbag round was fired and less than 4 minutes after Deputy Gerba's arrival on scene.
- Initially, the officer's use of force was considered a non-violation of his 4th Amendment rights and therefore, the officers were entitled to qualified immunity...initially.

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Glenn v Washington County



- The U.S District Court of Appeals of the 9th Circuit has jurisdiction to review and did, and reversed that decision, stating that the material facts of the case that were in factual dispute were to be remanded for resolution to be determined by a jury.

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Outcome



- 2.575 Million Settlement in 2012
- Washington County implemented many policy and training changes as a result of the settlement
- All deputies issued Taser as a less-lethal force option
- The agency acquired the ability to utilize “sponge rounds” as a less lethal option/alternative
- The agency implemented additional training in mental health and crisis response, de-escalation skills, and de-escalation techniques prior to using force.