

## Use of Force Test: *Do You Know How You'll be Judged?*

Hi. I'm Tim Miller. I'm an instructor at the Legal Division for the Federal Law Enforcement Training Center and I'm responsible for the Use of Force lesson plan. With me today is Mr. Wilbert Colon. Wilbert has been working with the Legal Division as part of FLETC's college intern program. Wilbert is a student at the University of Puerto Rico and is studying criminal justice. Wilbert, does your family live in Puerto Rico?

- Yes

Wilbert has been studying the law of use of force. Today, we are going to test what he knows. Are you ready?

- I think so.

1. Miller: A law enforcement officer effects a *seizure* under the Fourth Amendment when she terminates a free citizen's movement by a means intentionally applied. What is a traffic stop, investigative detention, or arrest under the Fourth Amendment.
  - Colon: They are all considered to be seizures under the Fourth Amendment.
2. Miller: Great. To seize someone, the officer may yell, "Stop!" The officer may use handcuffs, a baton, or a firearm to make the suspect stop. In Graham v. Connor, the Supreme Court established the test for judging police officers accused of using excessive force to effect a seizure. How will an officer be judged if someone accuses the officer of using excessive force?
  - Colon: The Supreme Court stated in Graham that all claims that law enforcement officers used excessive force - - deadly or not - - in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment's objective reasonableness standard.
3. Miller: Good. A seizure triggers the Fourth Amendment's objective reasonableness standard. Whether force is objectively reasonable depends on the facts. The facts *paint the picture* so that a neutral party [like a district court judge] can visualize what happened and make an objective decision. The fact that "Jones grabbed a knife" begins to paint the picture, and support a conclusion that Jones was an immediate threat. But too often officers skip the facts and state mere conclusions. Absent the facts, "Jones threatened me" is a mere conclusion. True or False: A judge cannot make an objective decision based on mere conclusions.
  - Colon: True. *So what's a conclusion, and what's a fact.*
4. Miller: If a statement makes someone ask "*How?*" it's probably a mere conclusion. Consider this statement: "Jones threatened me." *How?* Using transitive verbs like "Jones *indicated, suggested, or implied* ... [something]" creates the same problem. Again, "*how* did Jones *suggest* what you want the judge to believe?" But using ordinary action verbs in a use of force report forces the officer to state the facts and paint a clearer picture. I *saw*, ... I *heard* ..., or ...I *said*

## Use of Force Test: *Do You Know How You'll be Judged?*

[something] – are good action verbs.

- A. Miller: Facts or Conclusion: Jones was *non-compliant*.
    - Colon: Conclusion. How was he non-compliant?
  - B. Miller: Facts or Conclusion: I *told* Jones to stay in the car. Instead, he got out.
    - Colon: Those are facts.
  - C. Miller: Facts or Conclusion: Jones made a furtive movement.
    - Colon: That makes me ask, “how?” Conclusion.
  - D. Miller: Facts or Conclusion: I *told* Jones to keep his hands on the steering wheel. Instead, I *saw* him reach under the seat.
    - Colon: Facts.
  - E. Miller: Facts or Conclusion: Jones implied that he was angry.
    - Colon: How? *Implied* is one of those transitive verbs. Conclusion.
  - F. Miller: Facts or Conclusion: I *saw* Jones clench his fists and I heard him scream.
    - Colon: Facts.
5. Miller: Great answers. The judge views the facts through the lens of a special person and only considers the facts that were reasonably known at the time. What am I referring to.
- Colon: The facts are viewed through the lens of a reasonable officer and without the vision of 20/20 hindsight.
6. Miller: Correct. The Supreme Court cautioned that officers are often forced to make split-second decisions in situations that are tense, uncertain, and rapidly evolving about the amount of force that is necessary. It follows that the “reasonable officer” will not demand a perfect answer, only a reasonable one. Why are officers not responsible for a perfect answer?
- Colon: Determining whether the officer used the perfect or minimal amount of force would require a 20/20 hindsight analysis.
7. Miller: Great. One officer’s decision may differ from another’s. The issue is whether each use of force fell within the *range of reasonableness*. Assume this: Officers Smith and Kelly went to arrest Jones. “You’re under arrest!” they said, but Jones grabbed a knife. Kelly shot Jones with an electronic control device; however, Officer Smith shot Jones with a firearm. Both weapons knocked Jones to the ground and stopped the threat. Jones sued Officer Smith claiming that the firearm was excessive force because the electronic control device was enough to stop the threat. How will officer Smith be judged?
- Colon: The reasonable officer does not require a perfect answer, only a reasonable one. One officer’s decision may differ from another’s. What matters is whether shooting Jones fell within the range of reasonableness based on the facts known at the time.

## Use of Force Test: *Do You Know How You'll be Judged?*

8. Miller: Great. Whether a force option falls within the range of reasonableness requires the judge to weigh the nature of the intrusion on the suspect's liberty against the countervailing governmental interest at stake. In short, what did the officer do to the suspect (or, what was the *nature of the intrusion* on the suspect's liberty) and why did the officer do it (or, what was the *governmental interest* at stake). The Graham factors are governmental interests for using force. What are the Graham factors?
- Colon: (1) The seriousness of the offense at issue;
  - (2) Whether the suspect posed an immediate threat to the officer or others;
  - And (3) whether the suspect was actively resisting arrest; or,
  - (4) Attempting to evade arrest by flight.
9. Miller: Good. After Graham, the lower courts established other factors to consider. Let's see if you can distinguish the Graham factors from other factors, and identify what is not a factor to consider at all under the objective standard.
- Miller: The severity of the crime at issue.
    - Colon: That's a Graham factor.
  - Miller: The suspect's prior history for violence known to the officer.
    - Colon: That's another factor established by the lower courts.
  - Miller: Whether the suspect was actively resisting arrest.
    - Colon: Graham factor.
  - Miller: Whether the facts suggest that there was time to consider other, less intrusive force options.
    - Colon: Another factor established by the lower courts.
  - Miller: Whether the officer honestly believed the force was reasonable.
    - Colon: That's not relevant under the objective test. The officer's beliefs, whether good or bad, are not relevant. Police officers are judged by the facts through the lens of a reasonable officer.

Miller: Let's take a break. When we come back, we'll test you on deadly force.

### Identify when deadly force is objectively reasonable.

Miller: I am back with Mr. Wilbert Colon. This is part II of Wilbert's use of force test. We are going to see what he knows about deadly force.

10. Miller: In Tennessee v. Garner, the Supreme Court held that shooting a fleeing, unarmed burglary suspect who posed *no articulable threat* was unconstitutional. The Court weighed the nature of the intrusion against the countervailing governmental interest at stake and stated that *it is not better that all felony suspects die than that they escape*. In short, what was the Supreme Court's opinion about shooting an unarmed burglary suspect who posed not articulable threat?

## Use of Force Test: *Do You Know How You'll be Judged?*

- Colon: That the force was excessive in light of the governmental interest at stake.
11. Miller. Good. Fortunately, the Garner Court provided some examples when shooting a fleeing suspect *does* fall within the range of reasonableness. It is not unreasonable to shoot a fleeing suspect when the officer has probable cause to believe the suspect committed a crime involving the infliction or threatened infliction of serious bodily harm, the force is necessary to stop him, and a warning is given if feasible. This example envisions someone who would pose an imminent or continuing threat to society if allowed to evade arrest by flight. Give me an example of someone who would pose a significant threat to society if allowed to evade arrest by flight.
- Colon: Timothy McVeigh, the guy that bombed the Alfred P. Murrah Federal Building in Oklahoma City.
12. Miller: Great example. Shooting a fleeing suspect who *does* pose a significant threat to society if allowed to evade arrest by flight is an example when deadly force may be reasonable according to Tennessee v. Garner. What do I mean by saying example?
- Colon: There may be other situations when shooting a suspect is reasonable.
13. Miller: Great. Let's talk about one. In Scott v. Harris, the Supreme Court explained the relationship between Tennessee v. Garner and Graham v. Connor. Victor Harris was exceeding the speed limit one night when a police officer activated the overhead lights on his cruiser, signaling for Harris to stop. Harris fled and a high-speed pursuit ensued. Officer Scott soon entered the chase. Harris reached speeds upwards of 100 mph that night. He raced down narrow, two lane roads and forced innocent motorists off the road. He even rammed Officer Scott's police car. To end the chase, Officer Scott used the push-bumper on his cruiser to push Mr. Harris' car off the road. At the speeds both cars were traveling, the *push* was likely to cause serious bodily harm and Harris was nearly killed in the crash. Harris later argued that pushing him off the road at such a high speed amounted to "deadly force" and that such force was constitutionally unreasonable to stop his flight. (In other words, Harris argued that deadly force was unreasonable to stop his flight because he was not someone who posed an imminent threat to society if left at large as in the example provided in Tennessee v. Garner.) What did the Court say about Harris' analysis.
- Colon: The Court disagreed with Harris analysis. While Officer Scott used a force option that was likely to cause serious bodily harm, the facts supported a very strong governmental interest for using it. Harris' flight, by means of a speeding vehicle, posed a significant threat of seriously injuring other people and terminating it by pushing him off the road was not unreasonable.
14. Miller. Great. How would you explain the relationship between Graham and Garner?
- According to Scott v. Harris, Tennessee v. Garner provides examples when deadly force is reasonable; however, there is no magical on/off switch that triggers rigid preconditions for using force. Each case requires the court to wade through the fact-

## Use of Force Test: *Do You Know How You'll be Judged?*

bound morass of reasonableness and to decide whether the force was objectively reasonable using the Court's analysis in Graham v. Connor.

15. Miller: Good. There is not an exact definition of what "deadly force" is or when it can be used. Shooting Edward Garner was certainly deadly. Pushing Victor Harris off the road - - maybe not so much, but it was still likely to cause serious injuries. In each case, the court will weigh the nature of the intrusion (what the officer did) against the countervailing governmental interest at stake (why the officer did it). True or False: While there may not be an exact definition of what deadly force is or when it can be used, the courts will require a very strong governmental interest for using force that is highly likely to have deadly effects.

- Colon: Very, very true.

16. Miller: Very, very good. Shooting a suspect with a firearm is highly likely to have deadly effects, but it is not unreasonable if the suspect poses a significant threat of serious bodily harm to the officer or others. *Significant threat?* The threat may be imminent, like someone who poses a continuing threat to society if allowed to remain at large. The threat may also be *immediate*, like someone who points a gun at a police officer. A warning adds to the objective reasonableness of any use of force, but is not always feasible. What's the determinative legal issue in most shooting cases?

- Colon: Could a reasonable officer believe that the suspect posed an immediate threat of serious bodily harm to the officer or others based on the facts reasonably known at the time?

17. Miller: Great. Assume that Officer Smith went to arrest Jones one night. To effect the seizure, Officer Smith shot Jones with her firearm. Assume further that Officer Smith can truthfully make all of these statements in her use of force report. As I read her report, tell me what are facts that support the objective reasonableness standard, ... *and what does not*.

- Miller: Officer Smith states, "*The day before the shooting, I received an arrest warrant for Jones. The warrant was for failure to pay child support. I interviewed Jones' X-wife, hoping that she might tell me where to find him. She said that Jones frequented the Long Branch Bar.*" Are those facts?

- Colon: Those are facts. But I sure hope there's more...

- Miller: There are. Smith states, "*The next night I was on surveillance at the Long Branch when I saw Jones get out of his car. I got out of my car and walked towards Jones. When I was about ten feet away from Jones I yelled, 'Jones! Police! Put your hands up!'*" *Instead, Jones reached to his waist, and with his right hand, pulled a gun from underneath his shirt.*" Are those facts?

- Colon: Yes; those are facts. Then what happened?

- Miller: Smith states, "*I shot Jones several times. The darkness and muzzle flash from my pistol prevented me from seeing whether Jones pointed his gun and where I was shooting him.*"

## Use of Force Test: *Do You Know How You'll be Judged?*

- Colon: Facts. Anything else?

- Miller: Smith states, "I learned later that Jones dropped his gun after I fired my first shot and that one bullet hit Jones in the back."

- Colon: Those facts were not reasonably known to the officer at the time. Considering them would be judging Officer Smith based on 20/20 hindsight.

18. Miller: Awesome. With the relevant facts, the court can decide whether the force was objectively reasonable. Assume that Jones sued Officer Smith. Jones argued that the force was unreasonable; Smith claimed that it was not. Answer each of Jones' arguments.

- Miller: Suppose Jones argued, "The force was unreasonable because I did not point the gun at Smith."

- Colon: Officer Smith does not have to wait for Jones to point the weapon. Waiting for him to point the gun may be too late. The determinative issue is whether a reasonable officer could believe that Jones posed an immediate threat of serious bodily harm based on the *facts known at the time*.

- Miller: Jones argued, "But I intended to surrender the gun to Smith, not shoot her."

- Colon: Jones present intent is not relevant. Determining whether Jones had the actual intent to harm Smith when he pulled the gun is not judging Officer Smith based on the facts known to her at the time.

- Miller: Jones argues, "But Smith shot me after I dropped the gun."

- Colon: But Smith did not see Jones drop the gun due to the muzzle flash from her own weapon and darkness. Jones' present ability to harm Smith is not relevant. What if Smith had learned later that the gun had been inoperable, unloaded, or a toy? Again, Smith is judged based on the facts known at the time.

- Miller: Jones argues, "But Smith shot me several times, and once in the back."

- Colon: Jones is not focusing on the determinative issue: Could a reasonable officer believe that Jones posed an immediate threat of serious bodily harm based on the facts known at the time. It is reasonable to shoot until the facts say the threat is over.

- Miller: Jones argues, "I was only suspected of failing to pay child support!"

- Colon: Jones is insinuating that Smith cannot defend herself [or possibly others] when investigating minor crimes. That is not true.

- Miller: Finally, Jones argues that Officer Smith did not use the minimal amount of force. "She should have used her baton. A baton would have stopped the threat."

- Colon: Smith is not responsible for using minimal force; she is responsible for using objectively reasonable force. Complaints about what Smith *should* have done, and what *would* have happened if she had, is another attempt to judge her based on 20/20 hindsight.

## Use of Force Test: *Do You Know How You'll be Judged?*

Miller: Let's take a break. When we come back, we'll talk about intermediate weapons.

### Identify legal issues associated with intermediate weapons.

Miller: I am back with Mr. Wilbert Colon. This is part III of Wilbert's use of force test. We are going to see what he knows about intermediate weapons.

19. Miller: The Supreme Court has not specifically addressed intermediate weapons; however, the lower courts have held that baton strikes, electronic control devices (ECDs), and oleoresin capsicum (OC) spray can be a significant intrusion on someone's liberty, and therefore, they require a commensurately strong governmental interest to use them. Whether an intermediate weapon is an objectively reasonable force option requires an application of the facts to the Graham factors. What's the determinative issue in using these intermediate weapons?

- Colon: After considering the severity of the crime at issue, could a reasonable officer believe that the intermediate weapon was necessary to stop an immediate threat, overcome the suspect's active resistance, or stop his flight?

20. Miller: Good; but what do you mean by "necessary?"

- Colon: "Necessary" does not mean that the intermediate weapon was the *only* option, but it must fall within the range of reasonableness?

21. Miller: Great. Whether the suspect poses an immediate threat to the officer or others is generally considered the most important Graham factor. Other factors help to *hone-in* on whether the threat was credible. One factor is the size, height, weight, and condition of the officer compared to the suspect. For example, Jones may square-off against Officer Smith. He may put one foot in front of the other like a boxer, clench his fists, and yell "I'm not going to be arrested!" *But, what if* Jones is 80 years old and frail. After comparing the condition of Smith and Jones, the threat may not be credible. What other factors make a threat more, or less credible? *This will make you think, Wilbert.* Tell me what would be a "Graham" factor, another factor used by the lower courts, and what is *not* a factor at all.

- Miller: The seriousness of the offense at issue.
  - Colon: Graham factor.
- Miller: Jones known criminal history.
  - Colon: Another factor used by the lower courts to hone in on whether the threat is credible.
- Miller: Whether Jones is male or female.
  - Colon: That's not a factor at all. We can consider the size, height, weight and condition of the officer versus the suspect; but gender is not relevant.
- Miller: The number of officers versus the number of suspects.
  - Colon: That's another factor to hone in on whether the threat is credible.

## Use of Force Test: *Do You Know How You'll be Judged?*

- Miller: The suspect's present intent and ability to hurt the officer.
  - Colon: That's not a factor at all. We can't know the suspect's actual intent or ability to hurt the officer until afterwards. Considering that would be judging the officer based on hindsight.
- Miller: The officer's honest belief that the force was reasonable.
  - Colon: Not a factor at all. The facts known at the time are viewed through the lens a reasonable officer.
- Miller: The suspect's known use of alcohol or narcotics.
  - Colon: That's a factor to consider. Over 80 percent of the assault on police officers are committed by people under the influence of alcohol or narcotics.

22. Miller: Those are great answers. Intermediate weapons have been used to overcome a suspect's active resistance. Active resistance may be assaultive or mechanical in nature. Assaultive resistance may pose a credible threat to the officer. Assume that Officer Smith received a 911 call about an intoxicated man inside a blue sedan parked in the ACME parking lot. She found Jones behind the wheel and ordered him out. When Jones remained seated behind the wheel, Smith physically pulled him out. She then sprayed him with OC and hit Jones with a baton. Officer Smith can truthfully make all of these statements in her use of force report. Identify facts that support the objective standard, and identify what is not relevant.

- Miller: Smith states, *"After arriving at the ACME parking lot I told Jones, Police! Step out of the car. Instead, Jones remained seated behind the wheel. I could also see the keys in the ignition of Jones' car."*
  - Colon: Facts.
- Miller: Smith states, *"I honestly believed that Jones was drunk."*
  - Colon: That's a mere conclusion. Why did she feel he was drunk?
- Miller: Good, but let's consider the rest of the report and we'll get back to this. Smith states, *"I opened the door, grabbed Jones' arm, and pulled him out. Jones began to flail his arms violently. Jones was a big man – about 6' tall, 200 pounds, and 35 to 40 years old. I am 5' 10", 150 pounds, and 35 years old."*
  - Colon: Facts.
- Miller: Smith states, *"I sprayed Jones in the face with OC, but he continued to swing his arms violently. I managed to get one arm cuffed, but he swung the other arm. Jones was strong. I struck Jones' arm with my baton and finally managed to get his other arm cuffed."*
  - Colon: Facts.
- Miller: Smith states, *"An emergency medical technician (EMT) arrived after I handcuffed and secured Jones. The EMT told me that Jones was not under the influence of alcohol, but having a diabetic seizure instead."*
  - Colon: The diabetic seizure is not relevant if it wasn't reasonably known at the time.



## Use of Force Test: *Do You Know How You'll be Judged?*

23. Miller: That Officer Smith "*honestly believed that Jones was drunk*" is a mere conclusion. That said, Officer Smith can render an opinion so long as she can support it based on her training and experience. She can opine that someone is intoxicated, angry, or driving recklessly. However, the objective test will require her to state the facts that support her opinion. What are facts that could support Officer Smith's opinion that Jones was under the influence of alcohol or narcotics?

- Miller: I told Jones to get out of the car; instead, he stared straight ahead like he did not hear me.
  - Colon: That could be a relevant fact.
- Miller: Jones' breath smelled sweet, like alcohol.
  - Colon: That's a strong fact.
- Miller: Jones' eyes were glassy.
  - Colon: That's another one.
- Miller: During a search incident to arrest, I found Jones' diabetic identification card.
  - Colon: No; not relevant. Smith did not know about the card at the time.

24. Miller: Great answers. This is a good place to pause for a moment and make a distinction between facts and just factors. "Jones known use of alcohol" is just factor to consider, *assuming* there are facts to support it. The Graham and other factors help an officer remember the relevant facts. Think back to Officer Smith's use of OC and a baton to remove Jones from the car. There is another factor that makes it reasonable to get Jones out of the car so forcibly: *Whether Jones posed a threat to other pedestrians or motorists if left behind the wheel of the car*. What facts support that factor?

- Colon: Jones was seated behind the wheel of the car in the ACME parking lot and Office Smith saw the keys in the ignition of Jones' car.

25. Miller. Awesome. Active resistance can also be mechanical. Mechanical resistance is a situation where the suspect's resistance is not directed at the officer, but is intended to thwart the officer's efforts by physically holding to another object. Assume that Jones grabbed the steering wheel and shouted, "I'm not getting out!" after Smith ordered him from the car. Smith then used an ECD in the stun-drive mode to make Jones release his grip on the wheel. Distinguish facts from factors that support using the ECD.

- Miller: The duration of the action.
  - Colon: That's a factor.
- Miller: I ordered Jones several times to, "Get out of the car!" but he continued to hold the steering wheel.
  - Colon: That's a fact that goes to the duration of the action.
- Miller: The size, height, and weight of the officer compared to the suspect.
  - Colon: Factor.

## Use of Force Test: *Do You Know How You'll be Judged?*

- Miller: I grabbed and pulled Jones arm, but he was strong. I could not make him release his grip on the wheel.
    - Colon: Those are facts that support the physical differences between the officer and suspect.
26. Miller. Really good. Intermediate weapons have been used to stop a suspect's flight from a serious offense. Now assume that Officer Smith had an arrest warrant for Jones for burglary. Smith told Jones, "Police! Put your hands up!" but Jones turned and ran. Officer Smith shot Jones with an ECD in the dart-mode. It caused neuromuscular incapacitation and Jones fell to the ground.
- Miller: True or False: Flight from a serious offense creates a commensurately strong governmental interest for using an ECD.
    - Colon: True.
27. Miller. Good. Each baton strike, application of the ECD, or OC spray must fall within the range of reasonableness. Assume that Smith stopped Jones' flight with the ECD. As Jones lay on the ground, Smith yelled, "Put your hands behind your back!" Instead, Jones used his hands to push-up off the ground. What factors might justify a second application of the ECD?
- Miller: The severity of the crime at issue.
    - Colon: Sure.
  - Miller: The size, height, weight, and condition of Smith compared to Jones.
    - Colon: Yes.
  - Miller: Whether Jones was resisting arrest.
    - Colon: Yes.
  - Miller: Whether Jones' attempt to push-up off the ground was just an involuntary reflex from being shocked and knocked to the ground.
    - Colon: That's not a reason to shock him again.
28. Miller. Great answers. Remember, the officer must be able to articulate facts that support each ECD application. After the second ECD application Smith yelled again, "Show me your hands!" But Jones still lay face-down on the ground with his hands curled under his chest. Then a back-up officer arrived. Moreover, the two officers had watched Jones roll around on the ground and did not see any bulges in Jones' pockets or waistband that might suggest that he had a weapon. Officer Smith shocked Jones a third time. Answer the following questions:
- Miller: True/False: The third application was reasonable if Officer Smith honestly believed that Jones was hiding a weapon underneath his chest.
    - Colon: False. Smith's honest beliefs are not relevant. If she believes Jones is hiding a weapon, she needs facts to support her opinion.
  - Miller: True/False: ECDs have been credited with reducing injuries to officers and suspects alike; therefore, they may be used *anytime* a suspect refuses to obey an officer's arrest commands.
    - Colon: That's not true. Each ECD application must be reasonable.

## Use of Force Test: *Do You Know How You'll be Judged?*

- Miller: True/False: Each application of the ECD must fall within the range of reasonableness.
    - Colon: That's true. And I think a third application would not fall within the range of reasonableness. The officers have no facts to believe that Jones has a weapon. Less intrusive options are reasonable, like the backup officer going in and physically removing Jones hands while Smith holds the ECD in the ready?
29. Miller. Great. Intermediate weapons are sometimes called *control tools*. They are used to control a suspect's active resistance, deter a threat, or stop his flight. They are not *compliance tools*. This problem is sometimes called passive resistance. Applying the facts to the Graham and other factors, the crime at issue is minor, the suspect is not attempting to flee and there is no articulable threat. The problem? The suspect simply refuses to obey the officer's arrest commands. Assume that Jones was trespassing on government property and refused to leave. "You're under arrest. Put your hands behind your back" Smith ordered. Instead, Jones sat down on the ground and said, "I'm not going!" Smith sprayed Jones with OC spray to make him get up. Answer the following questions:
- Miller: True/False: The pain caused by OC spray is only temporary; therefore, Smith may use it anytime Jones disobeys her arrest commands.
    - Colon: False.
  - Miller: True/False: The force may be excessive if Officer Smith has time to consider other, less intrusive force options.
    - Colon: True.
30. Miller: No subject is plagued with more myths than use of force. Distinguish some of those myths from *the law* of use of force:
- Colon: Myth/ or the Law: I can be successfully sued solely for violating my agency policy on use of force.
    - Myth. Agencies cannot make law. The Supreme Court and lower federal establish law through their interpretations of the Fourth Amendment.
  - Miller: Myth/ or the Law: Striking a suspect violently on the head with a baton is never reasonable.
    - Colon: Myth. It may be objectively reasonable if the suspect poses an immediate threat of serious bodily harm.
  - Miller: Myth/ or the Law: I never have to re-assess a suspect's behavior, reaction, and resistance after using an intermediate weapon so long as its initial use was reasonable.
    - Colon: Myth.
  - Miller: Myth/ or the Law: The law requires an officer to decontaminate a suspect after using OC spray even if the initial use was reasonable.
    - Colon: Not a myth; that's the law.

## Use of Force Test: *Do You Know How You'll be Judged?*

Great answers. Let's take a break and when we come back we'll talk about qualified immunity, the officer's defense to standing trial.

Qualified Immunity – The Officer's Defense to Standing Trial.

This is part IV of Wilbert Colon's use of force test. We're going to see what he knows about the defense of qualified immunity.

31. Miller: Law suits go along with a democracy that balances law enforcement with individual freedoms. However, the officer may not have to stand trial. She can request qualified immunity. Qualified immunity is the officer's defense to standing trial. The rationale behind qualified immunity is two-fold. First, it permits officers to perform their duties without fear of constantly defending themselves against insubstantial claims for damages. But it also allows people to recover damages when any reasonable officer would know that the officer violated a clearly established constitutional right. Answer the following questions:

- Miller: True/False: Qualified immunity is the employing agency's defense to standing trial.
  - Colon: False. The agency cannot request qualified immunity.
- Miller: True/False: Qualified immunity is the officer's defense to standing trial.
  - Colon: True.
- 

32. Miller: Great. Qualified immunity is obviously raised in advance of the actual trial. The judge will decide whether the officer violated *a clearly established constitutional right*. As a result, qualified immunity has two elements. The first element is whether a constitutional violation even occurred. This is a question of fact. Assume that Jones sued Officer Smith and that Smith requested qualified immunity. The judge would review the facts and ask, "Could a reasonable officer believe that the force was reasonable based on the facts known by Smith at the time?"

- Miller: True/False: If the judge finds the force constitutional, there is no basis for having a trial and the judge dismisses the case.
  - Colon: True.
- 

33. Miller: Good answer. What if the judge finds that there *was* a constitutional violation? That does not mean that the officer must be denied qualified immunity. The judge would review the second element: "Was the law clearly established?" As a result, an officer can receive qualified immunity either because the force was constitutional or the law was not clearly established. The courts are not required to go in any particular order, either. The judge may decide, "I don't know if the officer violated the constitution; however, I have reviewed the existing law and find that it did not clearly put the officer on notice that the force was excessive."

- Miller: True/False: The officer can receive qualified immunity either because the force was constitutional or because the law was not clearly established.
  - Colon: True.

## Use of Force Test: *Do You Know How You'll be Judged?*

- Miller: True/False: An officer must be denied qualified immunity if she violates agency policy and the policy is clearly established.
  - Colon: False. Agency policy is not the law.

34. Miller: Great. To deny the officer qualified immunity, the judge must find that the force was unconstitutional and that the existing law at the time also clearly put the officer on notice that the force was excessive. If the officer is denied qualified immunity, the case may proceed to trial. As a result, denying the officer qualified immunity *does not* mean that the officer is liable for a constitutional violation. It simply means that there is a triable issue for the jury. To understand this process, assume that Jones sued Officer Smith for using excessive force and that Smith requested qualified immunity. However, Jones and Smith disagree about the facts. Under Smith's version of what happened, the force was reasonable; under Jones' it was not constitutional. If there are material disputes about the facts, the judge is required to accept *Jones'* version about what happened and send the case to trial to resolve the dispute.

- Miller: True/False: Denying the officer qualified immunity could mean that there is a material dispute about the facts.
  - Colon: True. In that situation, the case would proceed to trial.

35. Miller. Very good. At trial, the burden of proof shifts back to Jones. Now Jones has the burden of proving by a preponderance of the evidence that a constitutional violation actually occurred.

- Miller: True/False: Denying the officer qualified immunity does not mean that the officer is liable for a constitutional violation.
  - Colon: True. It just means that there may be a triable issue for the jury.

Miller: Wilbert Colon, you passed with flying colors. Good luck at the University of Puerto Rico and I hope to see you again as one of our student/law enforcement officers here at FLETC.