

# STATE OF NEW YORK

9656

## IN ASSEMBLY

January 31, 2020

Introduced by M. of A. AUBRY -- read once and referred to the Committee on Codes

AN ACT to amend the penal law, in relation to the justification for the use of force in a homicide by a peace officer or police officer

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The penal law is amended by adding two new sections 35.35  
2 and 35.40 to read as follows:

3 § 35.35 Justification; use of force by a peace officer or police offi-  
4 cer.

5 Homicide is justifiable when committed by a peace officer or police  
6 officer and those acting by their command in their aid and assistance,  
7 under either of the following circumstances:

8 1. In obedience to any judgment of a competent court; or

9 2. When the homicide results from a peace officer's or police offi-  
10 cer's use of force that is in compliance with section 35.40 of this  
11 article.

12 § 35.40 Justification; use of force by a peace officer or police officer  
13 requirements.

14 1. The legislature finds and declares all of the following:

15 (a) That the authority to use physical force, conferred on peace offi-  
16 cers or police officers by this section, is a serious responsibility  
17 that shall be exercised judiciously and with respect for human rights  
18 and dignity and for the sanctity of every human life. The legislature  
19 further finds and declares that every person has a right to be free from  
20 excessive use of force by officers acting under color of law.

21 (b) As set forth in this section, it is the intent of the legislature  
22 that peace officers or police officers use deadly force only when neces-  
23 sary in defense of human life. In determining whether deadly force is  
24 necessary, officers shall evaluate each situation in light of the  
25 particular circumstances of each case and shall use other available  
26 resources and techniques if reasonably safe and feasible to an objec-  
27 tively reasonable officer.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 (c) That the decision by a peace officer or police officer to use  
2 force shall be evaluated carefully and thoroughly, in a manner that  
3 reflects the gravity of that authority and the serious consequences of  
4 the use of force by peace officers or police officers, in order to  
5 ensure that officers use force consistent with law and agency policies.

6 (d) That the decision by a peace officer or police officer to use  
7 force shall be evaluated from the perspective of a reasonable officer in  
8 the same situation, based on the totality of the circumstances known to  
9 or perceived by the officer at the time, rather than with the benefit of  
10 hindsight and that the totality of the circumstances shall account for  
11 occasions when officers may be forced to make quick judgments about  
12 using force.

13 (e) That individuals with physical, mental health, developmental or  
14 intellectual disabilities are significantly more likely to experience  
15 greater levels of physical force during police interactions, as their  
16 disability may affect their ability to understand or comply with  
17 commands from peace officers or police officers. It is estimated that  
18 individuals with disabilities are involved in between one-third and  
19 one-half of all fatal encounters with law enforcement.

20 2. Any peace officer or police officer who has reasonable cause to  
21 believe that the person to be arrested has committed a public offense  
22 may use objectively reasonable force to effect the arrest, to prevent  
23 escape or to overcome resistance.

24 3. Notwithstanding subdivision two of this section, a peace officer or  
25 police officer is justified in using deadly force upon another person  
26 only when the officer reasonably believes, based on the totality of the  
27 circumstances, that such force is necessary for either of the following  
28 reasons:

29 (a) To defend against an imminent threat of death or serious bodily  
30 injury to the officer or to another person.

31 (b) To apprehend a fleeing person for any felony that threatened or  
32 resulted in death or serious bodily injury, if the officer reasonably  
33 believes that the person will cause death or serious bodily injury to  
34 another unless immediately apprehended. Where feasible, a peace officer  
35 or police officer shall, prior to the use of force, make reasonable  
36 efforts to identify themselves as a peace officer or police officer and  
37 to warn that deadly force may be used, unless the officer has objective-  
38 ly reasonable grounds to believe the person is aware of those facts.

39 4. A peace officer or police officer shall not use deadly force  
40 against a person based on the danger that person poses to themselves, if  
41 an objectively reasonable officer would believe the person does not pose  
42 an imminent threat of death or serious bodily injury to the peace offi-  
43 cer or police officer or to another person.

44 5. A peace officer or police officer who makes or attempts to make an  
45 arrest need not retreat or desist from their efforts by reason of the  
46 resistance or threatened resistance of the person being arrested. A  
47 peace officer or police officer shall not be deemed an aggressor or lose  
48 the right to self-defense by the use of objectively reasonable force in  
49 compliance with subdivisions two and three of this section to effect the  
50 arrest or to prevent escape or to overcome resistance. For the purposes  
51 of this subdivision, "retreat" does not mean tactical repositioning or  
52 other de-escalation tactics.

53 6. For purposes of this section, the following definitions shall  
54 apply:

1     (a) "Deadly force" means any use of force that creates a substantial  
2 risk of causing death or serious bodily injury, including, but not  
3 limited to, the discharge of a firearm.

4     (b) A threat of death or serious bodily injury is "imminent" when,  
5 based on the totality of the circumstances, a reasonable officer in the  
6 same situation would believe that a person has the present ability,  
7 opportunity and apparent intent to immediately cause death or serious  
8 bodily injury to the peace officer or police officer or another person.  
9 An imminent harm is not merely a fear of future harm, no matter how  
10 great the fear and no matter how great the likelihood of the harm, but  
11 is one that, from appearances, shall be instantly confronted and  
12 addressed.

13     (c) "Totality of the circumstances" means all facts known to the peace  
14 officer or police officer at the time, including the conduct of the  
15 officer and the subject leading up to the use of deadly force.

16     § 2. This act shall take effect immediately.