

STATE OF NEW YORK

1308

2023-2024 Regular Sessions

IN ASSEMBLY

January 17, 2023

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

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

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1 resources and techniques if reasonably safe and feasible to an objec-
2 tively reasonable officer.

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

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

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

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

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

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

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

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

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

55 6. For purposes of this section, the following definitions shall
56 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.