12-16-1977

Use of Deadly Force By Law Enforcement Personnel

Assembly Committee on Criminal Justice

Assembly Subcommittee on Reform of the Penal Code

Assembly Subcommittee on Law Enforcement Specialized Training

Use Of Deadly Force By Law Enforcement Personnel

HEARING

ASSEMBLY SUBCOMMITTEES ON REFORM OF THE PENAL CODE

AND

LAW ENFORCEMENT SPECIALIZED TRAINING

December 16, 1977
San Francisco, California

MEL LEVINE, CHAIRMAN
PAUL T. BANNAI, CHAIRMAN

RICHARD ALATORRE
MICHAEL ROOS

JULIAN DIXON
BRUCE NESTANDE

PETER JENSEN, CONSULTANT
AGGIE JAMES, SECRETARY

No. 687

Assembly California Legislature

CONSULTANT
PETER JENSEN

SECRETARY
AGGIE JAMES

STATE CAPITOL
SACRAMENTO 95814
TELEPHONE: (916) 445-0965

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE
SUBCOMMITTEE ON LAW ENFORCEMENT
SPECIALIZED TRAINING

PAUL BANNAI
CHAIRMAN

HEARING

USE OF DEADLY FORCE BY LAW ENFORCEMENT PERSONNEL

December 16, 1977
San Francisco, California

PARTICIPANTS IN ORDER OF APPEARANCE — Page

78-11-202

USE OF DEADLY FORCE BY
LAW ENFORCEMENT PERSONNEL
DECEMBER 16, 1977
San Francisco, California

CHAIRMAN MEL LEVINE: These hearings will now come to order. My name is Mel Levine, and I'm the Chairman of the Criminal Justice Subcommittee on the reform of the Penal Code. To my far left is Assemblyman Paul Bannai who is the Chairman of the Assembly Criminal Justice Committee on Law Enforcement Specialized Training. I want to apologize to the people who have waited for this late start. The Chairman managed to miss his airplane in Los Angeles, but fortunately there was another one nearby so we aren't that late, but I'm sorry to start a little bit late.

Let me introduce the people who are here at this table for the benefit of any of you who do not know them. On my left between Assemblyman Bannai and myself is Patty Marchal who is Secretary to the Criminal Justice Committee, and on my immediate right is Peter Jensen, Consultant to the Criminal Justice Committee, and to my far right is Michael Ullman, Senior Consultant to the Criminal Justice Committee.

This is the second of two joint hearings of the subcommittees on the Revision of the Penal Code and Law Enforcement Specialized Training dealing with the standards by which law enforcement personnel may or may not use deadly force. This is a thorny problem, and one which has confronted civilized society for hundreds of years. It requires the balancing of the high regard for the sanctity of human life with the need to enforce the laws of our communities in order to permit the citizens of this state to live without fear of abuse or a threat from others.

without force situation, that is a serious felony, but no force was used such as with a little girl.

We feel that the law currently has appropriate sanctions should an officer misuse deadly force by negligence or state of fact or by accident. The department that he works for, or he himself possibly, can be held civilly responsible. There are not that many instances that do occur, however. Also, the officer that should he through some other motive, whether it's a wanton, malicious act in an appropriate manner, there are criminal sanctions that do exist now, and certainly the District Attorney would prosecute and I know of no situations where they would not. The departments themselves would actively go after the individual with investigation.

MR. MIKE ULLMAN: Captain Smith, do you know of any recent instances where the District Attorney has prosecuted police officers with misuse of deadly force?

CAPTAIN SMITH: Mr. Ullman, I don't know of any currently, no. There was one in another state recently, I believe the State of Texas.

MR. ULLMAN: There was a hearing in Los Angeles where it was actually brought up to the opposite point that the prosecutors don't prosecute and one of the reasons they don't prosecute is because of the law as being written in this general fashion that it would be very difficult to get a conviction. I just make that point.

CAPTAIN SMITH: Mr. Ullman, I would think that an officer with premeditation used his firearm in a situation where he should not have used it, in other words, it's a homicide. That's what we're talking about, murder, that the District Attorney would, in fact, prosecute. If he did not, certainly the public would go to

the grand jury which is on the judiciary side and have a grand jury investigation.

CHAIRMAN LEVINE: Excuse me, Captain, if I could interject at this point. I'm wondering whether the circumstances that we're concerned about are circumstances that really involve premeditation or if we're really trying to get at something that's a tougher question. I think that I agree with you that if we have a premeditation situation we have a likely prosecution situation, but one of the things that concerns me in holding these hearings and has started to concern me more after hearing the testimony in Los Angeles is the gray area where there's clearly no premeditation, but where the standards are such that the threshold at which the trigger can be pulled is lower than a tougher standard might require. If somebody is in a position to know that law enforcement officers are in a position to know when he is responding to a non-violent felon, that the statue under which he's operating allows him the right to pull the trigger, wouldn't he be more likely to pull the trigger than if the statute that he is operating within didn't allow him that right and required that he only respond with deadly force if he was dealing with a violent criminal?

CAPTAIN SMITH: Yes, I would have to agree with you, but then we get into a new area, Mr. Chairman. The officer then would allow the felon to escape if it was not a violent felony. At the time we may not know that it was, in fact, a violent felony, we respond to a lot of calls. They're not violent when we get there. The suspect is fleeing. We do let them go. Some of our policies throughout the State of California vary from agency to agency, and we do let the individual fleeing get away. Then we find out later that a more serious crime has occurred. This is a difficult area.

CHAIRMAN LEVINE: I understand that, and you were referring to that in your earlier testimony, and what I'm wondering is, and I don't know the answer to this question, I'm wondering if there is some middle ground that we can take between on the one hand the statute that's been on the books since 1872, and perhaps on the other hand the Kortum case or something like that where the officer at least has to have some reason to believe, and I'm not sure that's the relevant standard, but if there is some way to get at the possibility that a serious crime has been committed, something tougher than the statutory standard but perhaps a little clearer and more helpful to the officer than the language in the Kortum case. I don't know how you'd arrive at that middle ground or whether you believe it's appropriate to try to do so, but that is something that concerns me, some of the reasons that are underlying some of these questions that I'm asking you.

CAPTAIN SMITH: Yes, I would agree with you, Mr. Chairman. It certainly is not appropriate to shoot at a forger, for example, a woman who is fleeing and the officer couldn't catch her for some reason. Certainly that would be inappropriate.

CHAIRMAN LEVINE: And I think Kortum tells us that's inappropriate, but the statute doesn't. The statute says that an officer can shoot at a forger.

CAPTAIN SMITH: But in some cases you might want to. This is the problem.

CHAIRMAN LEVINE: But in those cases, wouldn't you have some reason to believe the forger had also done something more serious as far as violence is concerned? Couldn't you try to work the statutory language into defining those situations rather than just leaving it to the imagination of the officer?

CAPTAIN SMITH: Well, that sounds fine, and maybe it would be great if we could do it, but I think if we get a laundry list appointing one not to shoot in this situation, and then do we follow this little channel, yes or no, that type of thing, then we're going to put the officer in a position of jeopardy because he's trying to think of all of these things at the same time when his own life may be threatened or that citizen.

I appreciate what you're saying, Mr. Chairman, to this problem.

CHAIRMAN LEVINE: And I appreciate what you're saying. The other side of the coin, obviously, is where they were putting citizens in a situation of jeopardy when the criteria that is currently being applied allows for the use of deadly force in situations where it perhaps ought not to be used.

CAPTAIN SMITH: It comes back to the same issue in certain cases it's left up to the judgment of the officer, and his good judgment comes back to his training that he's had. Officers are humanistic today. We do have psychiatric examinations for our officers, potential candidates. They are screened out. In many departments, if officers begin acting strange, they are talked to, and well, I can speak within my own department, if we do have a problem, we have another way of handling it, getting the officer off the street, being talked to, things of that nature. Many departments do this. But I don't know of any officer today that personally would not use good judgment. It's a matter of trying to use that good judgment at the right time.

CHAIRMAN LEVINE: If I could leave that for a moment to the point that Mr. Ullman interrupted your testimony, and that was

the issue of the D.A.'s prosecuting. How would you feel about the method, a piece of legislation which would create a special prosecutor for the prosecution of uses of deadly force by law enforcement officers as opposed to having the D.A. be the prosecuting agency?

CAPTAIN SMITH: And you're saying is a criminal prosecutor, but it depends where the criminal sanctions would lie.

CHAIRMAN LEVINE: Regardless of the statute now. Say, for the point of argument, say the statute stays the same, and we don't tighten up the standard at all, but we remove the prosecutorial function from the District Attorney to a special prosecutor's office which would be independent of the District Attorney's office, so that at least the theory would have it that you don't have an agency that's required to work so closely with law enforcement personnel on a day-to-day basis whose independence might be compromised in prosecuting unlawful conduct regardless of what the statute was.

CAPTAIN SMITH: Such as the Attorney General's office?

CHAIRMAN LEVINE: Oh, something further removed than that. The Attorney General's office would obviously be further removed than a local prosecuting agency but so an independent special prosecuting agency whose job was a variety of things including the prosecution of unlawful uses of deadly force by police officers.

CAPTAIN SMITH: So long as they're qualified.

CHAIRMAN LEVINE: You wouldn't have any problem with that.

CAPTAIN SMITH: The FBI does that now also. I just wanted to make the point that if there are, criminal sanctions beyond what exists now would be placed. The officers are going to be very concerned in each situation, and I would suspect that many of them

are going to do as many citizens do today, turn their head, do nothing. They just don't want to become involved. With that you're going to find like a response in a sense of pro-active law enforcement in this state. Would there be an increase in crime, probably a lot of people that would have made good police officers would not want to come into the business, if there are too strict sanctions. As I've indicated before, if a doctor through mistake of fact, inadvertance, something of that nature, puts an error in his practice, and the same with an attorney, they are handled in a civil area without any big problem.

CHAIRMAN LEVINE: But the result normally from that type of negligence is not the loss of human life.

CAPTAIN SMITH: In the medical situation, it could be.

CHAIRMAN LEVINE: Okay. And there are criminal negligence statutes in the event. Okay, I think that's fair, but in the event there is loss of human life, there is the possibility of criminal prosecution.

CAPTAIN SMITH: That's correct, yes. Certainly.

CHAIRMAN LEVINE: I have one additional question. With regard to your argument that if the standards become tougher that the officer is likely to disengage, get less involved. I'd just like to explore that for a moment.

The Los Angeles Police Department recently has been guided by new regulations that were imposed by the L.A. Police Commission in response, as I understand it, to the Kortum case, and those regulations basically tapped the Kortum decision. I don't know if you had an opportunity yet to review them because they are new, and they have only been in effect for a very short time, but I wonder whether

those regulations which really are meaningfully tougher than the 1872 statute are likely, in your opinion, to create the same result as you're talking about, the disengagement or uninvolvement of a police officer.

CAPTAIN SMITH: Well, I haven't seen the Los Angeles standard making reference to that to the officers becoming less involved, pertains to what criminal sanctions might be placed on them.

CHAIRMAN LEVINE: But administration regulations are different.

CAPTAIN SMITH: Yes, they're totally different. The administrative regulations from that might be placed on the officer through statute.

CHAIRMAN LEVINE: How does an officer view it if there is a way to generalize about administrative regulations vs. statutory proscriptions? Does an administrative regulation mean that much on day-to-day conduct if the officer won't be as likely to respond to an administrative regulation as he will to a statute?

CAPTAIN SMITH: No, he'll respond. Generally, as far as I know from my own experience, they respond to the administrative regulation; if they do not, they can be suspended--that's within my own department, of course--be suspended or even terminated.

CHAIRMAN LEVINE: But they wouldn't be as likely to sort of turn their back if the sanction weren't a criminal sanction as they would if the sanction were a criminal sanction, is that what you're saying?

CAPTAIN SMITH: Yes.

CHAIRMAN LEVINE: Mr. Jensen.

MR. PETER JENSEN: Captain, could you briefly summarize for us the administrative regulations Oakland has for its officers? They are different from the state statute, aren't they? They're more restrictive?

CAPTAIN SMITH: Yes, they are.

MR. JENSEN: Could you summarize those?

CAPTAIN SMITH: Yes. We do not use our firearms for juveniles ell, the way it is now since the Kortum case? Or prior to the Kortum case?

MR. JENSEN: Currently.

CAPTAIN SMITH: Currently we're right down the line with Kortum. It's _____, and we will not shoot at moving vehicles and juveniles, ever known to be a juvenile. Again, unless an officer's life or another person's life is threatened. Unless we knew them to be violent at the time. Unless the juvenile is fleeing and the suspect is fleeing the vehicle.

CHAIRMAN LEVINE: I'd like to explore just one other area with you.

As I understand the thrust of your testimony with regard to your favoring the 1872 vs. a change, the principal concern is to allow the law enforcement officer enough leeway so that if he hasn't cooly committed a violent felony but still may be dangerous and has committed a felony, and it turns out later that he, in fact, has committed a violent felony and really is dangerous, you only give the law enforcement officer adequate leeway to go after that person, is that correct?

CAPTAIN SMITH: That's correct. It's that latitude that we're seeking.

CHAIRMAN LEVINE: If a statute could be drafted which would give you that latitude, but would require that the officer use deadly force only in situations such as that, however they get defined, but defined to give you that latitude and otherwise to shoot only a violent felon as opposed to a felon without defining violent vs. non-violent what problem do you have with that type of change in the law?

CAPTAIN SMITH: That's not a great problem, as long as there was not a longer list, which is of great concern to us.

CHAIRMAN LEVINE: Okay. I'm not sure that it can be so drafted, but I'm trying to get at the area that you have concern with. Thank you very, very much for your testimony.

Our next witness is Ed Royball from the Central Legal de la Raza.

MR. EDWARD ROYBALL: Ladies and gentelemen, members of the Assembly, I'm Edward Royball. I'm an attorney. I represent a family of a shooting victim in Oakland, California. And I'm here today to argue in favor for this notion which would be strict control in the use of firearms by police officers.

I think I just should point out that I did not receive the packet from the committee, and so I did not have specific proposed legislation to address, but I would like to speak about the issue of police crimes, police looters, and the family I represent.

CHAIRMAN LEVINE: May I interrupt you for one second and simply suggest this? If, after these hearings, you have the time to develop specific proposed legislation based upon your views, we'd very much appreciate receiving that in writing, and would encourage you to do that.

MR. ROYBALL: The family I represent is but one example in the family which is separated as the result of police lawlessness and the unreasonable and unnecessary use of force by a police officer, and in this case as in so many others, the act of this police officer remains unchecked. There was not so much as a reprimand against the officer involved. What I'm talking about is police crime, not a shoot-out between police officers and armed criminals, but rather situations in which police have killed unarmed civilians, persons who were at most mere suspects. I'm talking about a pattern of police over-reaction, of police excessive use of force, harassment, intimidation, a pattern which it primarily affects minority and low-income communities. Nothing has changed since 1968, when U.S. Commission on Civil Rights disclosed such a pattern as of finding the fact in its Mexican-Americans in the administration of justice in the Southwest. In fact, the statistics show that the incidence of police killings not only of Chicanos, but also against Blacks, Whites, and all persons in society had been on the rise in recent years. In Los Angeles in 1975, 75 unarmed suspects were shot by police. Of these 47 are Black, 18 Latin, and 10 were White. In the first 6 months of this year in 1977, 28 more unarmed civilians were killed by police officers. In fact, in Los Angeles, 50% of all police shootings result in death, and that is a figure which is much higher than the national average which is somewhere below one-third.

In Oakland, where I now work, within seven months of 1975, 5 unarmed civilians were killed by police officers. I'd like to bring to your attention, too, the most blatant examples. On August 19th, Floyd Calhoun, age 23, who was a suspect in 23 deaths, fled from police in his car. His car wrecked, he ran to a street near 85th

in Oakland. Police cars blocked off the street and at least 15 police were surrounding him when he was shot in the back, in the head and the legs. He was unarmed.

Earlier that year, February 3, Mr. Esther, age 34. Mr. Esther was mentally ill and his family had gone to the Oakland Police Department for help. When the police went to his home, Mr. Esther refused to allow him to enter. He would not leave the house, and policemen attacked with tear gas. The house caught fire. Mr. Esther lept out of the second story window, and he was killed by a volley of four shots. Also, in Emeryville, California in 1971, there's a case of Tyrone Geiten, a 14 year old boy. Three police officers pursued him as a suspect in a car theft. He was unarmed, 14 years old. He ran down the street. Two of the three officers turned and fired. He fell and these officers then went up to his body and shot him again at point blank range, and he was unarmed.

MR. ULLMAN: Are the police accounts of these shootings as you are stating them, or are they somewhat other than this?

MR. ROYBALL: Okay. I do not know the official police account in the Tyrone Geiten case, for example. That case has been in litigation for about five years. There's been no action taken in the case, but that suspect was 14 years old, unarmed, and was fleeing. These facts are established.

MR. ULLMAN: So what about in the Calhoun and Esther cases? Are the police accounts the same as you have stated?

MR. ROYBALL: In all honesty, I do not know the police accounts. This information I received from other persons through their research, and I do not know the police accounts in those cases.

In both of these cases, to my knowledge, the incident never became an issue, and in fact in my capacity as an attorney I'm always learning of incidents of police shootings, police brutality. I attempt to follow up on these. In most instances, these instances die without so much as a report in the newspaper or any action by the police department or the persons involved.

CHAIRMAN LEVINE: Mr. Royball, how would a change in the law affect these situations, and what change in the law in general, even though you don't have specific legislation in mind, do you believe would be constructive, and what result would it accomplish?

MR. ROYBALL: The problem is two-fold. In addition to the incidents of police accesses, and I guess the police motives are but an extreme example of other acts of police brutality which go on systematically, or at least are continuously occurring in the communities. But there is also the problem of the unwillingness of the local police departments to police themselves, and I feel that the need for legislative control stems from this fact. As I mentioned in these five Oakland cases, there was no action against the officers involved.

In the Barney Benevitus case, Officer Michael Cogney violated virtually every procedure established by the Oakland Police Department for one man felony car stops and also to the discharge of firearms. Step by step all the way down the line, Officer Cogney violated these procedures. Barney Benevitus was unarmed standing in a fixed position when Officer Cogney took a loaded and cocked shotgun and attempted to pat down, conduct a pat-down search and he shot him in the back of the head, literally blew his brains and half his head off at point blank range, and what followed then was not action by the

police department based on Officer Cogney's violation of procedures and the fact that a man was killed as a result, but rather a very obvious and blatant attempt by the Oakland Police Department to cover up the situation. Most notably a few days, I believe it was three days after Barney Benevitus was killed, the police department issued a statement to the press that since a felony had occurred Officer Cogney had merely followed routine procedures.

CHAIRMAN LEVINE: What I don't understand from your testimony is that if there is this type of local obstruction of justice going on, what type of state legislation would be of assistance in dealing with the problem?

MR. ROYBAL: Okay. Specifically, I would urge regulations from the outside by the Legislature restricting the situations in which officers can use firearms and realistically, I am not talking about straight jacketed law enforcement or the legitimate concerns of law enforcement but there are many situations in which case after case show firearms have been used and I would, more than that, urge that these legislative controls be, in fact, enforced and I think that is more of the problem than anything.

Also, the facts show that local district attorneys have not enforced statutes, criminal statutes, that stand now against police officers in the decade of the '60s - between 1960 and 1970, there were fifteen hundred killings of unarmed civilians. Only three resulted in any criminal sanctions against the officer involved. The Barney Benevitus case is another example and other cases with which I am familiar are examples of the fact that the district attorneys most often will not prosecute a police officer regardless

of the fact, regardless of how blatant the incident was, including, as in this case, the direct flagrant violation of procedures. In fact, following the Benevitus case, not only did the police department issue statements that procedures had been followed, they also said they found no grounds for disciplinary action whatsoever against the officer. It died right there in the police department. The district attorney in that case refused to prosecute the case himself. What he did was to convene the Alameda County Grand Jury to conduct two days of closed hearings, the transcripts of which are unobtainable, and the Grand Jury failed to indict. We cannot -- we can only speculate as to what happened inside, but I do know witnesses who testified, and I do know that the district attorney spent more time inquiring into the background of the victim than he did with the actual incident itself. Following the killing of Barney Benevitus, there have been repeated acts of harassment directed at the family. In each case, complaints have been filed with the internal affairs division of the police department. In every case, there has been no action taken. The most blatant of these incidents involved half a dozen officers appearing at the home of a man who was not an eyewitness but whom Barney Benevitus had stopped to visit when he was pulled over or stopped by Officer Cogney. Half a dozen officers appeared at 3:00 o'clock in the morning. His brother opened the door, they ordered him out, they had their weapons drawn, pointed at his head, they made mocking and taunting remarks about Barney's death. They threatened him when his brother also appeared, they repeated their threats and only when their mother appeared, who apparently they were not expecting to find, did they leave, but not before giving the brother involved a ticket for

spitting on the sidewalk. This was reported to the internal affairs division. Nothing happened. Others, just to pick one or two of the most blatant incidents, one of the sisters of Barney Benevitus was stopped allegedly for a dog leash violation, well, it was a warrant on a dog leash violation and she was stopped. She was arrested. She was searched by male officers who are not supposed to search a woman. She was detained for quite some time. Then she was driven to a parking lot where half a dozen patrol cars converged on the scene. She was searched again. She was threatened. She was put back into the patrol car, driven to another parking lot where the same thing happened again. This went on for 2½ hours before she was finally taken to the police department and booked. Again, nothing was done by the Internal Affairs Division by the Police Department. They certainly do not patrol themselves.

This is why I feel there's a need for outside controls to control the excesses and the abuses. This is also the reason why there is a need for an independent prosecution and for someone who is responsible for and willing to vigorously prosecute these cases where the police do act in a lawless fashion and do commit crimes against people and do act with flagrant disregard for the rights of the people that are supposedly protected.

ASSEMBLYMAN BANNAI: Mr. Roybal, evidently you're an attorney. You're saying outside groups. Would you think that the grand jury, and I am sure there are people that are chosen from this community, respectful people, and they fail to indict based upon facts which they collected which were not prejudiced by one side or the other, do you think that that kind of a decision that they reached was not acceptable to you? Is that your opinion?

MR. ROYBAL: My response to that would be indictment of the grand jury system basically.

ASSEMBLYMAN BANNAI: You'd do away with all grand juries then in the United States and say that there must be another system? What other system do you think you could get any better?

MR. ROYBAL: Okay. In other words, the grand jury is an antiquated mode of criminal prosecution which is almost never used in over 99% of all cases. The District Attorney routinely conducts his own investigations. Upon determining that he has sufficient evidence, he files some information and it's followed by a preliminary hearing at which the issue is whether there is sufficient evidence to bind the defendant over for trial. The preliminary hearing is an open court. It's an adversary proceeding. Both sides are represented by council, and you do have an independent magistrate deciding whether there is sufficient evidence to bind the defendant for trial. In case of the grand jury, the proceeding is behind closed doors. The defendant does not even have a right to know that the grand jury is being convened to consider charges against him. All testimony is presented by the District Attorney. The defendant has absolutely no input into it, nor does any outside interest have a right to be present.

ASSEMBLYMAN BANNAI: Once you set up this other commission or whatever you're thinking of, do you think that you would get more input, or it would be better, or be unprejudiced or more likely to be evenhanded? Do you think that is the reason why you think a separate body? In other words, you have a suggestion. Who would you get?

MR. ROYBAL: Okay. I would suggest an independent prosecutor or an independent office.

ASSEMBLYMAN BANNAI: Who would be independent? One person, or just a group of people? Who would be independent?

MR. ROYBAL: Something on the state level. It would be obviously more than one person. It would be an entire office, and I would assume a team of prosecutors.

ASSEMBLYMAN BANNAI: Attorney General's office?

MR. ROYBAL: For example, or an independent body established for this purpose. The issue of the problem which I am attempting to address is the failure of both police officers, police departments, and the local district attorneys to act in cases of police brutality. In the U.S. Commission of Civil Rights, the Congress of the United States, even the U.S. Attorney in Philadephia, Pennsylvania, have all sighted but they call a blindness to police brutality, and that these cases are not prosecuted, they are not acted upon.

CHAIRMAN LEVINE: I would like, just for the record, to indicate that these hearings, as I assume you know, don't deal with the scope of the matters that you're testifying about. We're talking now, at least in this context, only about the issue of the use of deadly force by police officers, and we're trying to get a focus on whether or not there ought to be different legislation or any legislation with regard to the use of deadly force. These other issues that go beyond deadly force are not really going to be dealt with by any of the legislation that will come out of these hearings, so to the extent you could confine your testimony to the issue before us, it would be helpful.

MR. ROYBAL: Could I ask you, not only the discharge of firearms, but also the use of firearms and in which situations it

is permissible for an officer to use and draw weapons. By the use of the firearms, I find it would be clearly included within the issue of use of deadly force.

MR. ULLMAN: I hate to go back on what you're just talking about after Mr. Levine was taking you away from it, but you're talking about police officers violating civil rights of other persons, and you seem to be fairly well convinced that the evidence against us is fairly well documented. Has the FBI been brought into it?

MR. ROYBAL: Yes. The FBI investigation in the Benevitus case began in June. Just last week I was in Washington, and that was the Justice Department, and was told the investigation will be expedited and completed in the coming weeks.

MR. ULLMAN: Well, do you feel that the FBI is providing protection that you're asking that some independent body, such as a special prosecutor or a state attorney general or whatever have you, because you're talking about flagrant cases, I believe, or violations of civil rights, and we're not talking about judgmental calls which is basically what this hearing is about. Do you feel that the FBI is providing the kind of protection that you're talking about?

MR. ROYBAL: Well, in answer to your question, no, and in fact one of the first comments that Mr. G. Days made, head of the civil rights division in Washington, is that the FBI cannot go around policing incidents of police brutality every time the local authorities fail to take action to prosecute. And of course that is true. The answer to that would be to point out the very flagrant nature of the civil rights violation in this particular case, but it is true that the federal government cannot assume the role of policing the police.

That's why I'm calling for a body on the local level which will assume that function, given the unwillingness of the police to patrol themselves.

CHAIRMAN LEVINE: Do you have further testimony?

MR. ROYBAL: That is basically all.

CHAIRMAN LEVINE: Do you have a police commission in Oakland?

MR. ROYBAL: There is no police commission.

CHAIRMAN LEVINE: Is there a local body in Oakland that does have jurisdiction, the so-called policing the police?

MR. ROYBAL: There is none. The only body is the internal affairs division of the police department.

CHAIRMAN LEVINE: Thank you very much for your time and your testimony.

Our next scheduled witness is Jermiah P. Taylor, Deputy Chief of Operations of the San Francisco Police Department. Chief Taylor.

MR. JEREMIAH P. TAYLOR: Welcome. I'm unfamiliar with the format of your hearing.

CHAIRMAN LEVINE: Okay. Fine. What we are trying to get at, Chief Taylor, is basically whether or not the 1872 Statute which is on the books with regard to the use of deadly force by police officers, Penal Code Section 196, should be changed.

We are looking at it in light of the Peterson and Kortum cases which addressed that issue directly in the courts in the past year, and we're interested in your thoughts on that subject. In particular, on anything related to it that you'd like to offer.

MR. TAYLOR: Well, I refreshed my memory on that particular section last night when I knew I was coming down here, and I see no need in San Francisco for any revision or change of it. We have a strict and close control of all of our operations in regard to the use of deadly force, and in fact, in the use of any force by any San Francisco policeman. I've been over the statistical material that bears on the subject, that is the amount of people in San Francisco, the cases that we're involved in with regard to arrest, and I'm talking about serious felony cases where violence or force could be used, or homicides, robberies, and/or aggravated assaults, and I find that in all those cases, and we made about 3,000 arrests this year, we've had to use force in less than 1% of the cases. This gets down to actually 37 instances when our policemen were involved in the use of violence or deadly force, a pistol, and we find that our investigation of the incidents by the patrol force, myself, that is the hierarchy of command by our internal affairs bureau, that lays on an additional examination, by the inspector's bureau, that is our detectives that work in conjunction with and closely alongside of the district attorney's office, that we have no difficulty that way.

So, as I say, we find we're under close control, and have no difficulty.

CHAIRMAN LEVINE: Can I ask you a question about those instances Have there been any deaths in those 37 instances in 1977?

MR. TAYLOR: Yes. Of the 13 cases in which somebody was actually hit with gun fire, two suspects were killed, one police officer was killed, two officers were injured, and eight suspects

were injured, making a total number of thirteen cases in which there was actually a result or rather injuries as a result of police action.

CHAIRMAN LEVINE: Do you know whether those statistics are generally the same from year to year or whether there are any significant changes from year to year?

MR. TAYLOR: I think they were reduced about three years ago, and now they are consistently quite low.

CHAIRMAN LEVINE: Do you have any ideas as to why they were reduced?

MR. TAYLOR: Yes. A concentration of effort on the part of the department with the implementation of a new gun control policy was no doubt almost completely responsible for it.

CHAIRMAN LEVINE: So that about three years ago, there was a new gun control policy in the SFPD?

MR. TAYLOR: Yes. I have the date here exactly, if you'll give me a moment. It was in January of 1972 that we implemented our new policy and procedures with regard to the use of firearms throughout the department, and it was at that time we started teaching it basically to the recruits. We passed out information generally, and there was a complete education in the department in regard to their ability to use firearms and the restrictions thereon.

CHAIRMAN LEVINE: How does that policy compare with Section 196?

MR. TAYLOR: Actually, this lies on the restrictive side of that particular section. In other words, we're more restrictive.

CHAIRMAN LEVINE: Can you summarize how you're more restrictive in San Francisco?

MR. TAYLOR: Well, I think that the requirements that can only be used in defense of himself when he has reasonable cause to believe that he is in imminent danger of death or serious bodily injury, is a little bit more restrictive, and this also applies to using it or utilizing the deadly force when some other person is in danger of death or of serious bodily injury, and the interpretation of the particular cases. And what we've done is we've gone through the criminal code and picked up those areas where our policemen are most apt to be involved with violence, and we specified specifically what it is that they can and can't do.

For instance, under the section on burglarly, we tell them that they can't use force in the arrest of a burglar. "An ordinary burglary does not involve the use of force likely to produce death or serious bodily injury. Therefore, an officer would not be permitted to discharge his weapon in attempting to apprehend a burglar unless he possesses information time he is required to act, that the burglar used force likely to produce death or great bodily injury or threatened to use such deadly force or perpetrate such great bodily injury. He should keep in mind that the right of self-defense always exists." As I say, we have these particular sections broken down with the specifics of what they can and can't do, and I feel that this is more restrictive.

CHAIRMAN LEVINE: Is it your understanding that that policy has, to all intent and purposes, been complied with since it's been enacted?

MR. TAYLOR: Yes.

CHAIRMAN LEVINE: Has an argument been made internally to the effect that it has?

MR. TAYLOR: There are arguments to that effect that this is inhibiting, and that officers, instead of coming up to the mine of legality back away in order to have a cushion, a safety, and this is probably true. However, I don't think it acts adversely on our operation to the extent that it needs changing.

CHAIRMAN LEVINE: Would there be any difficulty, in your opinion, in applying that type of a standard statewide?

MR. TAYLOR: I can hardly see anything but think that it ought to be done if we're doing it here, and it's working, and it is, and I can testify to that. I can't see anything wrong with it being done statewide. I would recommend that it be done statewide.

CHAIRMAN LEVINE: In the form of a statute?

MR. TAYLOR: You're getting into areas of technical questions that I don't think I am capable of answering.

CHAIRMAN LEVINE: The solution in the form of policy, you would recommend this as a statewide policy.

MR. TAYLOR: I think that we have the finest policy that I am aware of, and as a consequence, for the safety of all why it would not be appropriate.

CHAIRMAN LEVINE: And you have had good success with that policy?

MR. TAYLOR: We have had very good success.

CHAIRMAN LEVINE: Thank you. Do you have any other testimony or remarks that you care to give the committee?

MR. TAYLOR: I can only say, as I say, summing up what I have made comments about, and that is that our officers act without precipitation. They go forth deliberately. I've quoted the fact that we've been involved with 3,000 arrests here in San Francisco, and as a result of our training and of the policies that we have in effect, that there has been a miniscule amount of violence used, and I attribute this to the high quality of the policemen in San Francisco and to their training.

ASSEMBLYMAN BANNAI: Are you under any kind of police commission in San Francisco today? How much influence do they have upon the rules such as you draw up there? Do they get involved in that, or is that something within the department?

MR. TAYLOR: Everyone of the rules must be submitted to them, and they must pass it. They are the ones who actually implement or promulgate all rules in the police department and they, as I say, did on both this policy and on the rules and procedures, and I make that point that the policy is additional material bearing on what amounts to the rules or laws of our operation so that it widens it and enlarges it and gives them information.

CHAIRMAN LEVINE: Do they ever get involved in any of your internal doings? Let's assume that in this 37 use of deadly force, that there might have been a question relative to whether or not the police act in a right manner? Would the police commission be involved in that? Are they given any right to look into it?

MR. TAYLOR: Any allegation of impropriety or failure or lack of, however you want to call it, any fault on the part of the police department ends up in the form of an investigation which the chief passes through and the commission gets a copy of the entire

and complete investigation, and it's on the basis of their determination that the final--they're kind of like the top echelon.

MR. ULLMAN: Chief, prior to 1972 when these rules were talked about, was there a widespread prediction within the police department that these new rules would not work, or would lead to not making arrests, predictions that it would just fail in general?

MR. TAYLOR: There were comments to that effect. I don't want to say that they were--there were enough of them around. As I say, any change brings problems, comments, and unhappiness, but it went down smoothly and swiftly enough.

CHAIRMAN LEVINE: And you think now generally that the police officers are satisfied with these rules on their conduct?

MR. TAYLOR: That's correct.

CHAIRMAN LEVINE: Chief, could I ask you if you could submit a copy of those rules to this committee at some point?

MR. TAYLOR: I will request of the Chief of the Department that you were rather well informed and have made this request, and I'm sure he'll send you one.

CHAIRMAN LEVINE: Thank you for your time and your helpful testimony.

Is Mr. Walter Barkdull here? Mr. Barkdull from the California Department of Corrections, our next witness.

MR. WALTER BARKDULL: Thank you, Mr. Chairman, and members of the committee. Walter Barkdull, Department of Corrections, the State Department of Corrections.

What I'd like to do this morning is take a moment of your time to describe briefly the role of the Department of Corrections

and how that differs from the general law enforcement operations about which you've already heard substantial testimony, also some of the problems created by the Peterson decision as we understand it and some specific solutions we think could be reached in that matter, plus perhaps a few miscellaneous comments on some of the prior testimony.

One of the big differences, of course, is that with a very minor exception we are not in the corrections end of it dealing with any question of innocence, and I would like to speak at some greater length about that, but a little later on. But on the other hand, they're not necessarily all felons either, so there is a problem in that respect. We have, as a department, basically two missions. One is the supervision of persons in the field, the parole operations and the other, of course, is the institutional phase of the correctional experience. I'll dwell only a moment on the parole end of it simply to say that there are 18,000 persons currently under supervision in California by approximately 500 officers of the department, all of whom are peace officers. They make several thousand arrests in the course of a year, but with some very small exceptions, the parole agents of the department are not permitted to be armed. We permit them to be armed only when they are the subject of a direct personal immediate threat, and as a consequence out of these more than 500 agents currently only three are armed and that, of course, is purely for purposes of self-defense.

CHAIRMAN LEVINE: Are they trained in the use of firearms?

MR. BARKDULL: In the instances where they are committed to be armed, we insist that they have the POST approved firearms

training. We do not provide that training to the bulk of agents because, obviously, it would be unnecessary.

Now, the institutional phase, I think, is where we run into the major problems in this area. We've got about 19,500 persons currently imprisoned in the state institutions. About 18,000 of those are convicted felons. The difference represents approximately 1500 or so persons who are civilly committed as narcotic addicts, and a group generally runs around 500 miscellaneous category, probably the largest number of which are persons who have been convicted of an offense for which they could be sent to prison, and the court has elected to send them to us for a diagnostic study, 1203 P.C. study, Z cases as they are called in the system. But they have them convicted but not sentenced, and I suppose some could be disposed of by the courts as misdemeanants when that time arrives.

In connection with the civil rights, it should be understood also that 95% of those have been convicted of a felony in Superior Court, but the judgment has been stayed while the civil commitment has been exercised. There are, however, one or two straight-forward volunteers and there is a small percentage who are convicted only of misdemeanors. The Penal Code, however, says that that institution has to be treated in the same way as the state prison. The characteristics of the male felons who are committed to prison, I think, are also illuminating.

CHAIRMAN LEVINE: Excuse me. I don't know if your're about to get into this, but can you divide within the general felony categories violent and non-violent felonious convictions?

MR. BARKDULL: I can do it statistically, but I can't do it operationally.

CHAIRMAN LEVINE: Approximately statistically.

MR. BARKDULL: Well, statistically, in fact I will give you the details. Statistically of the male felons, 58.9% of those in prison at the end of this last June were there on what I would describe as a crime of violence. Homicide, robbery assault, or rape. The percentage is slightly smaller for the female felon offender, 41.1%.

We get less than 15% of those persons who are convicted in superior courts and could be sentenced to prison. Now, the other 85% roughly are dealt with by diversion into probation, or probation in jail, or into the narcotic effort and smaller amounts into the Youth Authority and the Department of Health. So we're only getting 15% or less of those convicted. And this, of course, is an adverse kind of screening process that results in the high proportion of those that we receive being in for homicide over the system as a whole. Of the men, almost 18% are in on a conviction of homicide, somewhat over 18% of the women in the system are there on a conviction of homicide. Robbery runs in the men around 28%, 16% females, assault is about 7.9 and 5.6. Rape around 5.2 among the males, and .2 among the females. We do have one woman currently convicted of rape in the system.

On other thing besides these formal commitment offenses, we have looked into the background of others received, and due to a variety of circumstances with which you're familiar in the criminal justice system, many of the others are actually--the conduct was a

violent offense which for one reason or another has typically been a violent offense reduced to a burglarly instead of being prosecuted as a rape or robbery or something of that kind. And others do have violence in their background, so we're dealing with a volatile and dangerous population, but they're not all convicted felons.

Now, how do we control the people who are sent to us? The biggest method, the most significant method, I think, is a classification of the inmates. We have 12 institutions, 15 or 18 minimum security camps. They range from the maximum institution at Folsom where there are walls and armed perimeter inside cells, interior gun rails, et cetera, to the camps which really have no perimeter. There's a couple of signs out there that say this is off-limits or out of bounds, and that's about the extent of it. And then we have more than 3,000 of these 18,000 felons in minimum security at this time. Obviously, this concentrates the more dangerous individual in the more secure institutions and conversely places those convicted of less serious crimes, generally speaking, in the less secure institutions where we do not have an armed perimeter and we don't get into the problems the committee is concerned with. But at DVI, the Deuel Vocational Institution, The California Medical Facility, the California Mens' Colony, the central facility at Soledad, Folsom, and San Quentin, every fourth or fifth person that you encounter in the yard there has been officially convicted of a homicide ranging 20-25% of them.

The other big method of control is personal interraction between the staff and the inmate body. 85% of our officers serve in unarmed assignments. I'm speaking strictly of the peace officer

personnel at this point, the correctional officers and their superiors, and none of those who are down in contact with prisoners, of course, are ever armed except under some extreme emergency, and even then we try to avoid that. So it's a lot of control by personal interraction.

We do have over the three shifts that it takes, of course, to operate an institution, about 13% of the uniformed staff in armed posts. That amounts to about 550 employees, and we do have for their guidance a written policy as to the use of firearms. It's a conservative policy. If I may, I'll just read it here because it's brief. This is from the Department of Corrections' rules of the Director.

"The greatest caution and conservative judgment must be exercised when using firearms. No employee will be assigned to carry or use a firearm who has not received departmentally approved firearms training. Institution firearms are only to be used when absolutely necessary to prevent escapes, assaults, or disorders. Before aiming a shot at any inmate, a warning must be given by shouting, blowing a whistle or firing a warning shot into the air or in a safe direction in keeping with the surroundings. When it is necessary to direct shots at an inmate, they will be aimed to disable rather than kill." Each institution must maintain a permanent chronological record, et cetera.

You will note that this policy does differ to some extent, I think necessarily so, from that policy that has been presented this mroning, and as I understand, at your Los Angeles hearing. One of the differences, of course, relates to the restriction to violent felonies, and again as I progress through here I want to

comment on that a little more, but the simple fact as you elicited by questioning earlier, once they're in the system, and in certain places there may be high probabilities, but there is no way that the officer on the wall or in the tower can tell what the basis of the conviction was.

The other difference is in the use of warning shots which we employ frequently. I can understand that the institutional thing is a great deal different than what you would be doing on a busy street, but we use them very frequently. We use, even as a matter of fact, blanks, quite frequently, as a warning shot, or frequently that's all it takes. We do have another difference, I think, that the police officer does not generally have, and that's the capability to the circumstance, and we lean heavily in the direction of the less lethal weapon. We do use tear gas on occasion. We use blanks as I've mentioned. We use something called, I guess, it's trade-marked, but it's a stun gun--it shoots a thing like a bean bag out and while it may incapacitate the person, it doesn't break the skin or that sort of thing. We've used weapons that fire wooden pellets, and on some occasions some kind of plastic. Again, these are far less lethal than the normal kind of weaponry. And we do, by policy, have a specific set of weapons that are employed throughout the department. We have shotguns, but bird shot is probably the most frequently loaded in connection with that.

MR. ULLMAN: Is there an average range at which you generally have to shoot?

MR. BARKDULL: Taking it as an average, yes. It's probably somewhere around 150 yeards, somewhere in that vicinity. But this

varies tremendously. I guess what I'm really saying is the maximum distance is perhaps 200 from any particular armed post. We do issue a rifle, which is a small caliber rifle with a fairly small projectile, and the training for these requires a semi-annual qualification on a POST approved course including explanations of the policy, and when to use the weapon, that sort of thing, safety with the weapons, and the actual firing of them. We use the weapons, of course, to prevent escapes or to capture people who have escaped to prevent or halt assaults, and to prevent or halt riots. Incidentally, in the rare occasions when this may result in a fatality under existing statutes, this is automatically a coroner's case or there is an outside independent investigation of any fatality that's involved.

Now, as we understand the court decision...

MR. ULLMAN: What is the status of the current law on using deadly force to disburse a riot within a prison? Is that covered under 196?

MR. BARKDULL: We believe that it is, yes, and I think that's something that we have to watch carefully in the process, how you define a riot, et cetera.

MR. ULLMAN: Riot traditionally is a misdemeanor. Is there a special felony statute that covers riot within a prison, or is that dispute an attempt to escape?

MR. BARKDULL: I can't give you a direct answer on it, Mike. It's regarded, I think, as a prelude to an assault.

MR. ULLMAN: And this underscores my second question. Do you feel that the prison situation should not be covered by the same 1872 statute that covers the line officer on the street?

MR. BARKDULL: No. We have no problem with the existing statute.

MR. ULLMAN: Even though you're demonstrating that the needs within prisons are quite different.

MR. BARKDULL: Yes. I think we have no problem with the statute as it stands currently, or with the Government Code as it relates to liability.

MR. ULLMAN: You would have problems if someone interpreted a riot within the prison as being non-felonious conduct.

MR. BARKDULL: Yes, we would.

CHAIRMAN LEVINE: I assume you also do have a problem with Kortum and Peterson as it applies to prisons.

MR. BARKDULL: Yes, we do sir. And as we understand it, the decision overreaches the argument that Mr. Finch proposed both to the court and to the committee in that the decision at least seems to change not only the tort liability that I got that he was seeking to have changed, but also defense against criminal charges, and we would suggest that this causes not only the problem that Mr. Ullman raised, but whether the language of Peterson speaks to an atrocious, violent felony, and from past decisions in relation to the felony murder rule, et cetera, we doubt that escape could be considered an atrocious, violent felony unless it were accompanied by some other action other than the escape itself, and the problem of assaults is a very real one. It's really impossible down in a prison yard, a fight breaks out, people are milling around. You can't tell whether the combatants are armed until somebody is gravely wounded, and it's been our policy to try to break up something of that sort.

Now obviously we don't want, because of this decision, to subject the employees to some kind of criminal homicide charges, and we certainly don't want to place them in a position where some punitive personal liability might ensue. On the other hand, we feel a duty to protect the inmates and the staff because that's how you can have those unarmed persons down there backed by others who are; so what we would suggest, as our solution to the problem, would be for the Legislature to, by resolution I think would be appropriate, to reaffirm that the Legislature meant what it said when it said that deadly force could be used in connection with any felony.

Now I recognize from the testimony this morning that that may cause you a problem in connection with things on the street, and I guess we'd have to suggest alternatively there should be some special provisions, some special defenses in relation to the prison situation. Otherwise you have anomalousness, and I would think ridiculous the situation of people escaping with impunity or not only with impunity, if they got hurt in the process, being compensated by the state, perhaps.

Basically, we feel that if the Peterson circumstances were allowed to stand so far as they applied to the prison situation, that it will badly cloud our ability to respond to immediate life and death kinds of situations, and that kind of immediate response is vital to the safety of the inmates and the staff, and to the public as well.

CHAIRMAN LEVINE: In light of who you're representing, your concern I take it is primarily, if not exclusively in this testimony, with regard to prison situation.

MR. BARKDULL: Yes sir, that's correct.

CHAIRMAN LEVINE: So that if we were to draft legislation which provided a special defense for prison situation or exempted a prison situation, and made clear that in those circumstances the 1872 law applied, you'd be okay as far as your specific concerns?

MR. BARKDULL: Yes, I believe that we would. Other than the possibility that Mr. Ullman raised.

CHAIRMAN LEVINE: Right. Do you have statistics at your disposal with regard to the number of shootings or deaths that have taken place in the California prison system of a relevant time period?

MR. BARKDULL: Yes, I have them here with me. We went over it for an 18 year period, and there were 12 fatalities.

CHAIRMAN LEVINE: During the 18 years?

MR. BARKDULL: Yes, and of those 12, five occurred in the attempt to escape, five occurred in the midst of a direct assault by the victim, and two were in the nature of disturbances.

CHAIRMAN LEVINE: What about the other six?

MR. BARKDULL: No, that should add up to 12.

CHAIRMAN LEVINE: I'm sorry, that's right, 12. What were the 18 years?

MR. BARKDULL: Up to the present. I think it was 1963 that statistics were started. Actually it measures from 1960. I'm sorry, the first fatality in that period was in 1963.

CHAIRMAN LEVINE: Has there been any period in which there were a number of fatalities, or have they been spread out over the time period?

MR. BARKDULL: Generally speaking, they were spread out over the time period with the exception of an extremely unfortunate incident in 1970 in which three persons were killed in one operation, so to speak.

CHAIRMAN LEVINE: Was that an escape attempt?

MR. BARKDULL: No, that was an assault by one group of prisoners on another group of prisoners in the adjustment center exercise yard at Soledad.

CHAIRMAN LEVINE: And these 12 fatalities are statewide for this entire period here?

MR. BARKDULL: Yes. Incidentally, in the period during which those occurred, more than 105,000 persons were committed to prison.

CHAIRMAN LEVINE: Have your rules changed at all with regard to the use of force during thos 18 years?

MR. BARKDULL: I don't believe that they have changed to any appreciable substantive degree. They have changed because we had to go under the Administrative Procedures Act and things of that sort in that intervening period so there have been different numbers on them, and probably somewhat different wordings.

MR. ULLMAN: Are there any changes in director's rules, or institutional rules based on the class of custody at the institutions? For instance, at a minimum security camp, are they the same rules for use of force to prevent escapes as there are at Folsom?

MR. BARKDULL: I believe, Mr. Ullman, that the rules are the same, but the practical circumstances are vastly different. At San Quentin or Folsom you have an armed perimeter, you have gunmen on

the rails there and inside, et cetera. At the minimum security facilities you have no such armed perimeter. The camp, for example, if there is something to escape to, the lieutenant has to go some distance, usually to his home, and there he has a .38 revolver that he can provide himself.

MR. ULLMAN: Is it the policy of the department to use deadly force to prevent escape at minimum security institutions?

MR. BARKDULL: No, it would not be.

MR. ULLMAN: I have another question. Do you have advice of the Counsel or advice of the Attorney General as to Kortum and Petersen affecting your department?

MR. BARKDULL: We have discussed it with our own counsels. To the best of my knowledge we have had no advice from the Attorney General in that respect.

MR. ULLMAN: And do you have any conclusions as to whether or not the department is going to regard it as applying to them?

MR. BARKDULL: We do not now regard them as applicable in its current status.

CHAIRMAN LEVINE: Thank you very, very much.

Our next witness will be Harold Snow, the Executive Director of the Peace Officers Standards and Training Post.

Is Steve La Plante here, San Francisco Sheriff's office?

MR. STEVE LA PLANTE: I'm what is called the jail ombudsman for the City and County. It's a German word and means mediator, and I handle grievances and resolve disputes in the jails and in the Sheriff's Department. I am a criminologist by background, and I am a civilian, not a peace officer. I'm also the team leader of the

of the Sheriff's Department Crisis Negotiating Unit which will become relevant in a minute.

What I want to address my comments to is specifically to situations wherein a suspect is contained, where you have a situation of an armed suspect who may or may not have assaulted somebody but who is not fleeing, who is contained and surrounded by peace officers. That's what I'd like to talk about. As you probably know, in the Fall of '72, the New York City Police Department developed a hostage negotiator unit, and it was January 20th of '73 that it was used for the first time in which trained negotiators dealt with the hostage situation in Brooklyn. It was successfully concluded and no hostages were killed. Since that time, it spread throughout the country. As a matter of fact, the San Francisco Police Department started it in 1974. What we have in the Sheriff's Department is based on the concept of negotiating, where hostages are taken, and to develop a situation where whenever there's a major crisis in our department, whether it be in the jails or on the streets, in a sense of an addition, for example, that it be our policy to negotiate first and only to assault when that would have failed.

Now what I'd like to explain is that what happens now with hostage teams is that they are also used whenever the situation of a barricaded suspect, where there may not be a hostage, but just a suspect in a room who has a weapon and locked in. What we feel and what the administration of the San Francisco Sheriff's Office feels, is that it should be the policy of every agency in California, peace officer agency, to take the postion if there's a contained situation

to negotiate first, to attempt to negotiate, and only if that fails, to assault. You see a lot of agencies take the position that the SWAT special weapons tactics teams are called out, they set up a perimeter, they get out the bull horn, they say you got five minutes, and you don't come out, they throw in tear gas, and wait for it to settle and then they storm. Well, we think that's a very antiquated notion of doing police work. We feel that it should be the position of every agency that at least an attempt is made to negotiate first with the suspect. Oftentimes the suspects are engaging in an elaborate form of suicide, and they cannot kill themselves, and they want somebody like the police to kill them for them. Sometimes they are simply caught in the act of a crime, or they are caught in the act of being out in the streets with a weapon, and quite often they are mentally disturbed. I'm not sure how you would translate that to legislation, but what we would like to propose is that you seriously consider if that's possible to the extent that it would apply to all the law enforcement agencies in California.

CHAIRMAN LEVINE: That we seriously consider requiring negotiation first, is that what you're saying?

MR. LA PLANTE: Right. Now let me explain that it's possible to draw that up in such a manner, and we'd be happy to give you a few documents that I didn't bring, to really clarify what situations would entail negotiating, and which ones wouldn't.

Generally speaking, what we feel is this. If once an attempt were to be made to talk to the suspects with a hostage taker and after that attempt was made the person was to do any harm or to hurt anybody, we would suggest that negotiations cease

and you assault. However, in a situation where, let's say the homicide or the serious assaults inflicted, in the heat of the beginning of the situation where anxiety levels are high, that you retreat and wait a few minutes and try to negotiate after you have set up a perimeter. We do not advocate the abolition of SWAT teams. We do not advocate a statewide unit or regional units. We think it should stay within the local purvue. We feel there should be specially trained teams but we feel that SWAT teams should work in conjunction with negotiator teams. As a matter of fact, the latest thing we are doing in the sheriff's and police department is undergoing joint SWAT negotiator training sessions where we'll set up a situation and then negotiate it and try to resolve it.

CHAIRMAN LEVINE: Mr. Ullman.

MR. ULLMAN: Why do you think this has not been widespread in California, after the New York experiment and, apparently it received a lot of publicity with the police agencies, why is there hostility towards this in the police departments, if there is any?

MR. LA PLANTE: Basically, particularly in the last year and a half, the main form of hostility has really dissipated. It was the kind of a change that just took a few years to take effect. Where you have hostages, I don't think there are very many agencies left in California that wouldn't try to talk first. What I am talking about specifically is where you don't have a hostage, where you can contain a suspect, most agencies will get out their sharp-shooter teams in position, go green light, which means that when they have a chance to shoot, they will, and that will take care of it. We are saying that even in those situations there should be a policy of trying to negotiate first.

MR. ULLMAN: And you believe that policy should be statewide?

MR. LA PLANTE: Yes, definitely.

MR. ULLMAN: Who are you representing?

MR. LA PLANTE: I am representing the department here, the acting sheriff, Jim Denman, has authorized me to say this. It would have been the same thing. The previous sheriff would have said it if he'd been here.

ASSEMBLYMAN BANNAI: May I ask a question?

CHAIRMAN LEVINE: Yes, Mr. Bannai.

ASSEMBLYMAN BANNAI: You indicated that you are a jail ombudsman, is that what it is?

MR. LA PLANTE: Right.

ASSEMBLYMAN BANNAI: If somebody is in jail and feels that there is undue force in retaining him or, shall we say brutality, do you listen to his case, is that your responsibility? Do you have many of those in San Francisco?

MR. LA PLANTE: Actually, quite frankly, since the time that Sheriff Hongisto first took in, we have had a tremendous decrease in those things. In the last year, you can count them on one hand. I handle some very traditional working-condition, living-condition type grievances. I am also on call and respond whenever there is a crisis, such as a potential disturbance or an actual disturbance in the jail.

CHAIRMAN BANNAI: I meant to ask the chief when he was here, but maybe you can answer it. In Los Angeles, you know we have lines of debarkation and jurisdiction of the sheriff and

the city police because we have city and county lines. Since you are a county and a city of San Francisco, what jurisdiction do you have as far as the sheriff's department and the police department? Does one write tickets on the street and the other one somewhere else?

MR. LA PLANTE: The San Francisco Sheriff's office handles all of the jail duties for the city and county jails, including the booking facility. About 85% of our duties concern the jails. We also have the baliffs and the courts and a small civil division that executies civil writs. The police department has complete police duties on the streets. So our sheriff's deputies do not do any patrol, do not work on the streets in the police capacity.

ASSEMBLYMAN BANNAI: So they make the arrests and then they hand the jurisdiction of that person over to you at the jail?

MR. LA PLANTE: Right. So we have all of the jails. But even in this case, as you know, we do get some controversial evictions that are difficult. As a matter of fact, in the case of the International Hotel, our six-man squads went in, five of whom were unarmed. Although in uniform with an empty holster, one of the 16 members had a gun, and our policy and procedure with regard to that eviction, had we met any armed force, was that the deputies would have retreated, and we negotiators would have gone in to attempt to negotiate. I think that many other agencies in California would have handled that differently.

CHAIRMAN LEVINE: Does your experience enable you to reach any conclusions as to whether or not the Kortum and Peterson interpretations of the use of deadly force statute should be applied statewide?

We have not formally studied this issue, and therefore do not have a formal policy, but I would like to make just a few observations. One of them is that my background and experience has been that of a public prosecutor in Alameda County, and I've heard some of the witnesses testify about police shootings in Alameda County, in Oakland in particular, and I would just like to make the observation that the testimony I've heard has been so contrary to my own personal experience in Alameda County that I find it to be somewhat incredulous. With reference to police shootings in that county, we had a number of cases that I can recall. One of them involving police officers that got drunk one night and shot up a Black Panther headquarters. The District Attorney did charge them. They were tried, they were convicted, they did go to jail.

Another case involving a police officer who got drunk and got into an automobile accident and hurt a person under circumstances that we felt amounted to criminal negligence. He was charged. The Geiten case that reference was made to, involved an Emeryville police officer who was charged with killing a young man by the name of Geiten, who apparently was escaping from a burglary. There was conflicting testimony in that case as to whether or not he was armed. Every witness that could be found was brought to the grand jury and testified in front of the grand jury. The grand jury concluded that there was not probable cause to believe that the officer had violated the law.

We had another case in Berkeley, involving a police officer who was allegedly abusing a prisoner. That case was charged, it was

tried, the jury acquitted him, but I think in terms of any reluctance on the part of the D.A., at least in that county to prosecute police misconduct, that he should not be concerned with it because I don't think it exists.

CHAIRMAN LEVINE: Tom, can I ask you a question? At the hearing in Los Angeles on Monday, one of the suggestions that was offered, and it was offered on behalf of the State Public Defender's Office, was that a special prosecuting office be established in order to prosecute improper use of deadly force by police. The argument that was made essentially was that the D.A.s have to work so closely with the police on a day to day basis, that it is just difficult for a D.A.'s office to be put in a position of having to prosecute people that they're going to have to rely on to prepare their own cases the next time around. Do you think there's anything to that argument?

MR. CONDIT: Well, I think it will require the D.A.s to make hard choices, but I think D.A.s have a pretty exemplary record of making hard choices. I don't know exactly what the position the D.A.'s association would make on that issue.

CHAIRMAN LEVINE: But in your experience I take it your testimony is that you haven't seen a problem as far as D.A.s prosecuting peace officers in Alameda County.

MR. CONDIT: No, I haven't seen a reluctance to do so when I felt the evidence warranted it, and when I was in Alameda County we had a policy in any instance where a police officer had shot someone, we sent out to one of our investigators and we sent out an attorney to conduct an investigation at that time to

determine whether there was any evidence which would suggest that criminal charges ought to be brought, and if there were, they were brought.

MR. ULLMAN: Did I understand that you said that the District Attorney was involved in investigating every police shooting or every police killing?

MR. CONDIT: In Alameda County the D.A.'s office was involved in investigating every police killing.

MR. ULLMAN: And so it wasn't strictly handled by Internal Affairs?

MR. CONDIT: No.

MR. ULLMAN: Let me ask you a question. You heard Mr. Royball testify. Now I say you're responding to that. His perception of the grand jury proceedings in the Geigen case is obviously different than what you've testified was presented before the grand jury.

Do you feel that this should maybe be some other apparatus to investigate these shootings where the information is made public? I know the other balancing factor is dragging an officer's name through the public records, but obviously the secrecy of the proceedings has just led to suspicion by Mr. Royball that either the right witnesses weren't presented to the grand jury. Do you have any comment on that?

MR. CONDIT: Well, I think the grand jury being the cross section of the community was an appropriate form to bring the case in front of, and I had spent some time with Chuck Herbert who was the prosecutor in that case, and I know from talking to him that

he made a conscientious effort to bring in front of the Grand Jury every bit of evidence that his investigation could uncover.

MR. ULLMAN: Of course, again the problem other people perceive that the grand jury only knows what the District Attorney brings before it, and obviously Mr. Royball has the impression that not all evidence was brought before it which may or may not be fault.

MR. CONDIT: Well, I'm not sure whether a public hearing would have satisfied Mr. Royball.

MR. ULLMAN: You may be right.

MR. CONDIT: I have no further comments than what the committee does.

CHAIRMAN LEVINE: We will reconvene the subcommittee hearings and ask Harold Snow if he would testify at this time.

MR. HAROLD SNOW: Mr. Chairman, and committee members. My name is Harold Snow, and I am senior consultant, Commission on Peace Officers Standards and Training, and I'm here representing our Executive Director, Bill Garlington, who was the person invited to speak. The POST Commission has a very, very narrowly defined role as you know in law, and our primary purpose for existence is to set training and selection standards for California peace officers, and seldom do we stray from that unless the Legislature has given direction to do so. The Commission has, in the past, had opportunity to take positions on matters dealing with guns and use of deadly force, but it has refrained from doing so primarily because it was felt that that is something that should be left to other organizations and particularly the Legislature because it's a matter of public policy. I will though provide you with some comments and some other

In the apprehension of persons suspected of being involved in a crime where a firearm was used, 75% said "yes" and 9% said "no".

In the defense of an officer, 96% said "yes".

In the defense of others, 95% said "yes".

As warning shots, 88% said "no" and only 6% said "yes".

CHAIRMAN LEVINE: What was the question?

MR. SNOW: As warning shots. Do you favor? And the overwhelming majority disfavors the use of warning shots.

CHAIRMAN LEVINE: Disfavors?

MR. SNOW: Right.

Another question, should a firearms use policy include specific instructions on the use of firearms, where it is known that a juvenile is involved? The answer there is 54% said "yes" and 34% said "no".

Does your department have a system established to determine the facts in each incident involving the discharge of firearms by and officer? 89% said "yes" and 10% said "no".

And the other questions relate to off-duty use of firearms.

CHAIRMAN LEVINE: Could we have a copy of the complete results?

MR. SNOW: Yes. The entire thing, I'll provide that.

CHAIRMAN LEVINE: If the statute were to change and, say, were to change in the Kortum-Peterson direction, would your training change procedures?

MR. SNOW: Most definitely. We would change now and be an existing basic academy, but we undertake undoubtedly a program to retrain all existing 43,000, well, in this case, 80,000 peace officers, because you're talking about all peace officers in California. Some 80,000 peace officers would have to be retrained in the subject.

CHAIRMAN LEVINE: Have you given any thought to how the training would be changed, what retraining or what difference in training would be necessary?

MR. SNOW: We would not only have instruction on the change of law, but we would develop situations and much of our instruction has gone to performance objective instruction, where we get down to specific example, where we would ask them, based upon the instruction on the law, you know give them situational kinds, and then determine whether they would shoot or not shoot.

CHAIRMAN LEVINE: Do you have any reason to believe that standards and training couldn't be developed which would enable law enforcement to deal with a Kortum-Peterson standard as effectively as law enforcement currently deals with an 1872 standard?

MR. SNOW: I would say that the training would be longer, there would be a more complex kind of instruction than now as currently exists because the standards would be more restrictive. I would say it's not impossible. We could develop training programs to meet more restrictive standards.

MR. ULLMAN: Mr. Snow, let me ask you a question. In your survey of 1974, it appears that 34% or so of the responding police chiefs felt that use of deadly force should be utilized in felonious death offenses, and currently, I think the thinking is about 85%

adopting the CPOA standards. What's caused the change? Do you have any idea?

MR. SNOW: Well, I think we've evolved in California from previous times where we had different thinking, different community standards, less public acceptance of use of deadly force, and the law enforcement is a reactive responsive kind of...

MR. ULLMAN: Let me ask you another question. I'm just asking your personal opinion. Do you think that the policy decision as to whether or not the peace officers should be able to use deadly force and non-dangerous offenses should be a policy decision made by law enforcement, or should it be made by the Legislature?

MR. SNOW: As a personal response?

MR. ULLMAN: Yes.

MR. SNOW: I see both sides of the issue, and being a former policeman, it was difficult at times to make decisions in a fraction of a second when a car is bearing down on you, and you have to decide whether it's a juvenile or an adult. I think there are two sides of the story, and I don't really have a comment on it.

CHAIRMAN LEVINE: I'd just like to explore one area with you which I'm not, in other words, sure where I'm headed in specifics, but in general there are some questions that have been developing in this area in my mind. In Los Angeles we heard from at least three representatives of different law enforcement agencies that the issue with regard to the use of deadly force really isn't the standard so much, if at all, as it is with the training, that how deadly force gets used in the field depends largely, if not exclusively, upon the officer's ability and training as opposed to whatever the words are

on paper that constitutes a standard, whether we have a Kortum standard or whether we have what we currently have.

First of all, do you think that is generally right? Or do you think that there is more to the standard in the midst of standards and training? What would you view as predominate and to what extent, and are you able to make any general comments about?

MR. SNOW: I think attitudes have a tremendous impact. Attitudes which are shaped by not only the kind of people that we're bringing into law enforcement these days, but by the training. Our training has evolved a lot which may impact upon the use of deadly force, also, in that we have become far more humanistic in the kind of training we're providing. We spent over $1 million on a training program to update training concerning the role of a peace officer and getting along with people and the community, and this was known as Project Star which has become national in scope now, and this has shaped our training program, and it shaped the selection of peace officers. I really believe that there are three things that shape whether deadly force is used, the attitude, and the caliber of an officer, the law, and the department's policy. All three of those have equal impact in the use of deadly force.

CHAIRMAN LEVINE: Now, as I understood your prior testimony, if the law were to change, the training would change, and the training would become more sophisticated or complex, or detailed.

MR. SNOW: Yes.

CHAIRMAN LEVINE: I wonder then if another reason to consider a change in the law, and I don't know if this would be a logical conclusion, I'd be curious as to whether you think it is, is that through that type of a change we would then have another

incentive for the training to get stiffer or tougher, which the training might not otherwise do if the law stays the same.

MR. SNOW: We're currently in the process of increasing our training requirement. We have historically had, since 1964, a 200 hour training requirement. Now, in January, the Commission will consider a proposal and we have reason to believe that they will double that to 400 hours. That is the minimum. In reality, the average training time now in law enforcement is about 550 hours, and that's something like 14 or 15 weeks of instruction which is -- we view as improvement.

ASSEMBLYMAN LEVINE: Thank you very much for taking the time to testify.

MR. SNOW: I'll send that to you too.

ASSEMBLYMAN LEVINE: Good, thanks a lot. Our final witness will be Amitai Schwartz who -- are you speaking for the ACLU or are you speaking as a private citizen?

MR. AMITAI SCHWARTZ: No, I'm speaking on behalf of the American Civil Liberties Union, as well as a number of other groups.

CHAIRMAN LEVINE: Good. Proceed.

MR. SCHWARTZ: Thank you very much. First of all, let me apologize for holding up the Committee.

CHAIRMAN LEVINE: It is not at all your falut, you were scheduled on our formal agenda for 3:00 pm so you are an hour early.

MR. SCHWARTZ: I would have liked to have come earlier but I was attending a banquet where I was one of the honorees and it would have been impolite to walk out.

CHAIRMAN LEVINE: Congratulations.

MR. SCHWARTZ: I'm the Legal Director of the Northern California Police Practices Project, which is a joint project of the American Civil Liberties Union and the Mexican-American Legal Defense Fund and the NAACP Legal Defense Fund. I've been the Director of that Project for over four years and our principal concern is with police abuses of power and furthering police accountability in the manner in which they deal with citizens. We do that in two ways, we litigate when that becomes necessary. For example, our group brought and prosecuted the case of Kortum vs. Alkire, which I presume precipitated these hearings.

We prosecuted that on behalf of a number of mock taxpayers because we saw the deadly force problem as one that was resolvable by the courts.

Secondly, we try to negotiate and work with police departments as best we can, and in many circumstances we've been able to do that. We worked at great length with the Vallejo Police Department when Bill Garlington was its Chief of Police. We worked with the San Francisco Police Department and we've worked with others in a non-adversary capacity trying to assist the departments in developing regulations governing contacts with citizens.

One of the principal issues that has come into our office over the four years that we have been in existence is police use of deadly force generally. It is situations of police use of deadly force and probably the most -- the most serious and critical police issues facing minority communities in particular, and all other communities in California. There is, at least in my personal experience as Director of this project, there is nothing like a policeman

shooting, whether the officer be right or wrong in the particular circumstance, that quite triggers the feeling and the hurt for both the officer and the community.

ASSEMBLYMAN LEVINE: Excuse me for one moment. Mr. Jensen would like to interrupt.

MR. JENSEN: I wonder if you'd elaborate on that. We've taken testimony before that said this is a very infrequent problem; that considering the number of arrests, the use of deadly force is miniscule compared to the number of assaults on peace officers; but yet, you're saying it is a prevalent problem. Is it symbolically a problem, or a real one?

MR. SCHWARTZ: It's in part symbolic and it's in part in actuality. I'm suggesting that the symbolism that revolves around any of these events when it happens, such as in Oakland, there have been a number of recent incidents of police killing suspects and I'm not prejudging whether those were justified or not, I'm just saying that they happened. Symbolically, that represents to many minority communities, particularly Black and Latino communities, the tip of the iceberg in terms of many of the other problems with the police. But as a factual matter, the Bureau of Criminal Statistics did a study in 1973 for this committee, I believe, where they went through every single death that had occurred as a result of police use of deadly force in California over the past two years, I don't remember the exact number but think it was somewhere between 90 and 100 per year. That's 90 and 100 people killed and in some of those cases it was likely justified and in some of the cases it wasn't, either as a matter of fact or as a matter of law, but it's

not something that's susceptible to quantification, because when you lose a life, when you extinguish a life in a situation when it's not justified, it's something that the Legislature and the courts and each and every one of us have to consider very, very seriously.

ASSEMBLYMAN LEVINE: Mr. Jensen.

MR. JENSEN: Could I ask you a question? What do you mean by not justified? Could that--I think that's sort of begging the issue. Are you talking about the killings where it was just obviously a willful act that is not justified under the current law, or not justified under what should be current policy?

MR. SCHWARTZ: You're absolutely correct, I am begging the question: I was hoping to get to it and you gave me the opportunity. Well, there are two senses in which I use the word not justified. One is not justified as a matter of fact. There have been a number of incidents in the Bay Area within the last couple of years that have come to our attention where the police officers in stopping a suspect, or attempting to apprehend a suspect, handled the firearms in a reckless manner. The principal incident that comes to mind was the situation in San Jose with the San Jose Sheriff's Department some three years ago where a Black man was stopped on a warrant check and after being pulled out of the car and spread-eagled against the car, one of the officers put a gun to his head while he was frisking him with the other hand and meantime there were other police officers standing around with guns drawn. What happened was the gun went off, and we looked into the facts very carefully and it wasn't our belief that it was an intentional shooting. It was, in fact, an accidental shooting.

But on the other hand, it would not have happened had the gun been handled in a more appropriate manner and had the gun been reholstered and the other officers covered the suspect during the time that he was being frisked. So I'm suggesting that that sort of a killing, whether or not it's justified by the Penal Code as an unintentional act, is unjustified as a matter of fact or as a matter of policy.

The second area deals with the legal justifications for use of deadly force, and as this committee most likely knows, that area is presently in flux. The Penal Code, on its face, and the Penal Code, Section 1963 was enacted in 1872, a hundred and five years ago, so that the police can use deadly force in attempting to apprehend any felon who is fleeing from arrest.

The First District Court of Appeal interpreted that term "any felon" in the case of Kortum vs. Alcari to mean any violent felon, to bring it into standards of contemporary times rather than the time of 1872. That issue is presently before the California Supreme Court and is likely to be resolved early next year in a case called Peterson vs. City of Long Beach. It's our position, the organizations that I represent, certainly the taxpayers that we represented in the Kortum case, that Penal Code Section 1963 can no longer be read literally, that the Kortum court was absolutely correct in its interpretation of the Penal Code as a matter of law and that the Constitution of both the State of California and the United States compelled the result that was reached in the Kortum case.

So, when I talk about justifiable homicide, I mean one--the position we take is a homicide is justified because the lethal force was used in circumstances where there was a danger to the officer, a danger to life, or serious bodily harm; or there was a danger to others, a danger to life or serious bodily harm.

ASSEMBLYMAN LEVINE: Let me just ask a question please. Did you argue in Kortum that when the Legislature drafted the 1872 statute that the legislative intent was that felony didn't really mean felony but it meant violent felony?

MR. SCHWARTZ: No we didn't. We did not argue from the standpoint of what legislative intent was in 1872.

ASSEMBLYMAN LEVINE: What was your theory that got you to the definition of--the restricted definition of felony?

MR. SCHWARTZ: Well what we suggested was that in 1872 there were, under the common law, there were only a number of offenses categorized as felonies. All except, I think, mayhem were punishable by death.

ASSEMBLYMAN LEVINE: May I just ask you, were those offenses violent crimes or were some of them non-violent crimes?

MR. SCHWARTZ: No, they weren't. Every one of them was violent, with the exception of treason, I believe.

ASSEMBLYMAN LEVINE: So felony in 1872 meant basically a narrower list of what was, other than treason, violent criminal acts.

MR. SCHWARTZ: That's correct. The origin is of the common law growing out of England; but I can't tell you precisely. Obviously, there were other felonies in 1872, because much of the

present Penal Code defining offenses was also passed in 1872; but I'm saying that back in those times, they were rough and ready times, and to be a suspected felon was as good as being a dead one in many cases.

The 1872 rule made some sense, but we argued what was good in 1872 has totally outlived its usefulness for contemporary times, and the reason for that is--there are a great many reasons, but one is that the Legislature establishes new crimes all the time, or raises certain offenses from misdemeanor to a felony, sometimes based on the violent character of the crime, sometimes not. But I think it's fair to say that the Legislature, when it categorizes an offense as a felony does not consider that in terms of whether the police officer is going to shoot somebody and kill them in the course of apprehending them. Likewise, the justifications for the 1872 rule just evaporate upon inspection. The reasons why killing a person makes sense, if they have not committed a violent crime and if they present no immediate threat to anyone...

ASSEMBLYMAN LEVINE: What about the argument that we've heard both today and Monday that you have a burglar who has not, at least to the knowledge of the police officer who is trying to apprehend him at the time, used violence, but although the officer didn't realize it, this burglar also committed a homicide and did some other terrible things that did involve violence and if you don't have the leeway of getting him with the 1872 statute, you may lose somebody who you don't know at the time really is somebody who has committed violent criminal behavior, and you've got to have the opportunity to apprehend them with deadly force.

MR. SCHWARTZ: Well, let me answer it in two ways. First of all, I think it's completely unjustified to allow a police officer to make a split second decision as to whether to take someone's life on the basis of speculative facts in that there is a possibility that this suspect may have done something worse than what we're apprehending him for. I think the Los Angeles Police Commission regulations, which were recently passed, provide specifically that you can't justify a death by something that came after--something you found out afterward. You have to take the facts as you find them.

Secondly, I think that in this time with increased police communications equipment, with mutual aid compacts between cities, it's unrealistic to assume that every person who is suspected of committing a felony and then escapes will permanently evade apprehension. I think you're assuming too much and in a sense I think our police are better than that. I think they can do the job.

ASSEMBLYMAN LEVINE: What if the police don't know whether the person they're going after does or does not have a gun and did or did not commit a crime with violence but, you know, may have but they just don't know?

MR. SCHWARTZ: Well, the answer to the question really depends on the circumstances. I'm not advocating that any police officer ought to take any unreasonable risk. If the circumstances apparent to a reasonable police officer lead him to fear for his life or that there might be harm, then I think it's appropriate to have the gun ready. But without examining the circumstances, it's impossible to say. Obviously, if you get stopped for a traffic

offense on the way out of this auditorium, I think you would probably be offended and scared if the officer put a gun through the window in the course of telling you to get out.

On the other hand, if he had some objective information which led him to believe that you were a danger, it might make more sense.

Let me just take one more minute to answer the question about burglary. Chief Gain, when he was Chief in Oakland, changed his department's policy back in 1968 with regard to fleeing burglars, in particular, in not using firearms to apprehend the fleeing burglar unless there was an indication of violence or a risk to the officer or others, and this is the way he justified this policy. He said: "Considering that only 7.65% of all adult burglars arrested, and only .28% of all juvenile burglars arrested are eventually incarcerated, it is difficult to resist the conclusion that the use of deadly force by peace officers to apprehend burglars cannot conceivably be justified. For adults, the police would have to shoot 100 burglars in order to have captured the eight who would have gone to prison. For juveniles, the police would have had to shoot 1,000 burglars in order to have captured the three who would have gone to the Youth Authority." That was one of the justifications given back in 1968 in connection with the problem of burglary.

ASSEMBLYMAN LEVINE: Did you have a question?

MR. SCHWARTZ: Obviously at the bottom of all of this is the question of whether human life is so dear to us, as it is, that we can justify taking the life of a suspected person on the more probably cause belief that the person has committed a felony in

the course of attempting to apprehend that person. Traditionally, and under the common law, it was the rule that deadly force is never justified in attempting to apprehend a fleeing misdemeanant, and that was the law in 1872; but the dichotomy now between felonies and misdemeanors is so fuzzy, in many cases, and there are so many nonviolent sorts of crime; for example, voter fraud, certain forms of voter fraud are felonies. And you may recall that about two years ago there was quite a hullabaloo in San Francisco about various police officers, firemen, and other city officials voting in the city elections even though they lived outside the city, and some of those people were charged with--initially, with certain forms of felony voter fraud. Well, under the rule, as some officers interpret it and as the Legislature wrote it in 1872, if some of those voter fraud suspects had attempted to flee, and the police attempted to apprehend them and felt that it was necessary to shoot, it would have been justified. I don't think that rule makes any sense and I don't think it's the kind of rule that the police need in order to do their job effectively.

Secondly, the section of the Penal Code, Section 17 (b) which defines what a felony is and generally says it's any offense which is punishable for more than a year, or punishable in the state prison, also says that there are certain sorts of offenses which are commonly called wobblers which you don't determine whether they are felonies or misdemeanors until after the district attorney has filed an information and the judge has given consideration to the various circumstances and then the court decides in the deliberation of a courtroom with full due process for both sides whether it's a

misdemeanor or a felony. And if you contrast that to the situation on the streets where you have a police officer with a deadly weapon making the determination on the spot with regard to what is a felony and what is a misdemeanor and whether force is justified...

MR. ULLMAN: Mr. Schwartz, do you have any idea what the percentage of arrests that are booked as felonies result in convictions as felonies? Do you have an idea what...

MR. SCHWARTZ: I don't know offhand.

MR. ULLMAN: I think it's astoundingly small.

MR. SCHWARTZ: It is because, and I think the Bureau of Criminal Statistics could give us an answer relatively quick, but you know, with the number of dismissals for lack of evidence, or whatever, and the number of dismissals for police practices that violate the Fourth Amendment or certain state statutes, and then when you get into the plea bargaining situation, and then you get into the judge's discretion as to what kind of sentence he's going to give, I think the number of felonies, and especially when you start looking at the area of nonviolent felonies, that actually result in convictions and incarceration, I think it would be quite revealing, but I don't have the statistics on the top of my head.

The final conclusion to this portion is that we all have to recognize this goes into the plea bargaining situation and the way the courts work generally is that it's impossible for any police department to prosecute all persons that they have probable cause to believe have committed felonies. It happens all the time that the police, as they should do, make selective decisions as to what their priorities are. What are their priorities in a particular

community? The priorities in Los Angeles County might be a little different than the priorities in the City of Pleasant Hills, a suburb of San Francisco. And the police are given the discretion to make those selective decisions as to priorities. And we support that; but at the same time, one has to recognize that there are certain sorts of offenses which are either defined as misdemeanors or felonies that go unprosecuted. To allow the police to make the snap judgment that it's worth taking a human life in the situation of a nonviolent felony in order to prevent the person from escaping, I think is, again, giving the police much too much power to exercise in those situations. Now, you know, I've put great stress on the fleeing felon rule and that's what I intend to underscore because what I'm not suggesting is that there isn't a role for firearms in self-defense and where serious bodily harm is threatened. That obviously makes sense and it's obviously justified.

The second area that I want to suggest is on the whole area of drawing firearms and intimidating behavior with firearms. It's something that I suspect is not easily resolvable by the Legislature, but I want to bring it to your attention. The question was asked of me earlier, how many of these instances actually occur? Well, if you count the number of people who actually die, you know, it's maybe 100, 110, 125 in a year, but then you also have to ask, how many people are threatened or how many officers draw guns in situations where an accident could have occurred in that same sort of situation that I suggested happened in San Jose. And you know, I remember a conversation I had with Bill Garlington about three years ago about the Vallejo Police Department, and he said, we tell

our officers to keep the gun in the holster unless you're going to use it, and if you have cause to believe you might have to use it but you're not sure, then you take the gun out of the holster and you point it toward the ground and you have your finger on the trigger, but you don't point it at the guy's head unless it becomes apparent that the circumstances justify the firing of that gun; and I think the Los Angeles Police Commission attempted to deal with this problem specifically. Time and time again, we're contacted by persons who run into situations where the police, certain police officers, and they're definitely a minority, use the weapon as a means of intimidation and as a means of authority. We've had situations where police come to the door of a home and the resident says, do you have a warrant? And he pulls out a gun and says, this is my warrant. Things like that can't be tolerated, and on local levels there really is a responsibility of the chief of police and the sheriff to control that sort of thing, but I think that especially with regard to Penal Code Section 417, dealing with brandishing firearms, it's not clear whether that applies to peace officers or just private citizens.

But there is some area to look into, the local intentional intimidation by use of a gun and it's something that I suggest happens more frequently than one would suspect by the number of deaths.

Finally, there's the area of investigation in shooting cases. One of the major problems that I've noted, for minority communities in particular, is that they just don't have the information and they're just not leveled with by law enforcement officials, by some law enforcement officials, with regard to whether a particular

shooting was justified or not justified, and when you lose someone you love or a noted community person, the immediate response is that the person was killed by the police and there was not good reason for it. And the police feed that paranoia by refusing to make public any of the information that they gather in their investigations and refusing to come forward and be honest about it.

I have seen situations where the police were quite up front about precisely what happened, giving reports, district attorneys giving reports as to the progress they were taking in the cases, and I think it went a long way to alleviate a good deal of the suspicion and a good deal of the problems that are often generated by these shootings.

ASSEMBLYMAN LEVINE: What about the argument that you don't want to cause the offending officer, in the course of an investigation, to be prejudged, or that you don't want to drag his name out in public while the investigation is still proceeding, if there is an investigation?

MR. SCHWARTZ: Well, I understand that concern and I think it's a serious one and it's a balance that has to be struck and has to be struck carefully. I think, particularly with the rights of the police officer as a criminal suspect, I think those have to be inviolate.

And secondly, because I think anytime that a police officer pulls a trigger and kills someone, it's going to bring tremendous sorrow and remorse.

But I think there is a way to give out information without necessarily dragging the police officer into something which is both

unfair and unjust. The police officer is acting on behalf of the department; he's wearing the uniform and using the firearm which is issued by the department, and I think the department can take a position, and certainly a tentative position, with regard to the circumstances, and let the criminal process take its course. If the officer is not prosecuted criminally, as most are not, the district attorney ought to explain why that decision was made, rather than just saying that the officer will not be prosecuted and that's the end of it and we didn't do anything wrong and everybody go home until it happens again.

I saw this happen in Alameda County where there was a killing of the Union City resident by a Union City police officer, and initially the community, the Chicano community in Union City, was terribly upset and for good reason, because they believed that there was no justification in shooting this particular person. He was riding a bicycle after stealing a ham out of a supermarket and was shot by a police officer in the course of fleeing with the ham. The district attorney investigated that incident, and as far as I could tell, did a fairly thorough job of it, and refused to prosecute the officer; but at the same time he refused to prosecute the officer, he also issued a statement saying we investigated the case, we talked to any number of witnesses, we flew witnesses up here from Los Angeles, we tracked down various witnesses who were here. He didn't use any witnesses' names, and said it was apparent that the suspect had a knife, and illustrated why that belief was true. Obviously a statement like that is not going to satisfy everybody, but I think it did satisfy some persons because it went into some detail, without

revealing names and without giving away the case, of what the facts were. And I think the District Attorney and the Grand Jury of Alameda County at that time really did a commendable exercise in coming forward, but most police don't do that.

MR. ULLMAN: Can I ask you for the record, was that the Geidon (?) case?

MR. SCHWARTZ: The what?

MR. ULLMAN: The Guedon (?) case.

MR. SCHWARTZ: Guidon?

MR. ULLMAN: Guidon case.

MR. SCHWARTZ: No, that was not. It was the case of Alberto Teheronez. (?)

MR. ULLMAN: Could I ask you a couple of other questions? Do you feel, number one, that the internal affairs division of a police department should be the ones investigating police shootings, or police killings and if not, is the district attorney an adequate investigator, given the ties with the police department in their day to day prosecutions?

MR. SCHWARTZ: I think, for the most part, internal affairs bureaus of the police departments are definitely not the place to make a conclusive investigation of the circumstances surrounding a death at the hands of a police officer. District attorneys, I think district attorneys can be used profitably provided that the deputies who actually do the investigation don't rely exclusively on the findings of the police department but, in fact, do an independent investigation; and secondly, that the deputy who does the investigation is sufficiently removed from the day to day workings of the police

department that he can reach an objective judgment.

San Francisco has worked out an informal procedure between the police department and the district attorney's office here with regard to how District Attorney Freitas is going to investigate police shooting cases. I've been trying a year to get them to do it in writing and they keep promising me that it's coming but, in fact, they've been doing it informally and it's a standing policy, they assure me, if a shooting occurs in San Francisco at the hands of a police officer, the district attorney's office is called immediately. The chief assistant district attorney assigns an investigator; the investigator goes to the scene as soon as he or she can and begins an independent investigation. The instructions are not to get in the way of the police and not to go making accusations against the officer, but to get to the scene as soon as possible and then to do an independent follow-up investigation with regard to the circumstances.

MR. ULLMAN: Is this fairly common in Bay Area counties, or is it just San Francisco?

MR. SCHWARTZ: I don't know that it is common because the situation where we've had, and I don't want to mislead the committee by saying that I have recent information but at least, as of about two years ago Santa Clara County, the district attorney's office down there was merely reviewing the investigations done by the police and making a judgment on that basis and then presenting the case to the grand jury.

MR. ULLMAN: Do you think there should be some state legislation mandating district attorney's offices to investigate all police shootings or police killings?

MR. SCHWARTZ: You know, I think it would be very useful and probably the spur that's necessary to make sure that it works, because you've got a number of values at stake. One, you've got the value of preventing an unjustified killing from happening again. Secondly, you've got the whole value of the criminal law, that people who commit crimes ought not to be treated differently because of their class or character and that police officers commit crimes, as most don't; but when they do that the situation ought to be investigated and looked into the same way it is if you or I commit a crime.

And third is the whole question of the kind of information that's going to be given to the community and whether the people who are served by the municipal service known as policing, whether they will accept the findings of the police department or the district attorney's office which merely says that the killing was justified and that's the end of it. There has to be openness. This Legislature has recognized time and time again, in the Brown Act and in the Public Records Act and in various other kinds of sunshine laws, that openness really leads to honesty and leads to confidence on the part of citizens; and I think the Legislature can go a long way in this particular area, precisely because in some sense it's a symbol, and in some sense because we are talking about human lives.

I'll conclude unless the Committee has further questions.

MR. ULLMAN: Yes, Mr. Jensen has a question and I do, right at this point.

MR. JENSEN: You want to go ahead?

MR. ULLMAN: No, go ahead.

MR. JENSEN: I have a couple of questions. I wonder if you would elaborate a little bit about the basis of your constitutional challenge to the broad ruling of justifiable homicide.

MR. SCHWARTZ: Well, it's difficult to do briefly. I'd be happy to make a copy of the brief we filed in the Peterson case...

MR. JENSEN: Maybe that would be simplest.

MR. SCHWARTZ: ...available to you, but generally, the Fourth Amendment prohibits unreasonable force in the apprehension of a suspect and the rule which authorizes police to use lethal force is unreasonable for a variety of reasons which I've alluded to some and I haven't others.

And the other right at stake is the right not to be deprived of life without a trial. Not even a judge can summarily take action in his courtroom in terms of contempt unless the contempt directly interferes and is immediately necessary to preserve the function of the court, so to give the police officer the right to take a life on the mere probable cause belief that the person has comitted any felony violates due process.

MR. JENSEN: I have a second question and we haven't discussed this, or at least you haven't discussed this. It's been suggested at least once that the concern of law enforcement was with the criminal liability that might flow from the restricted reading of when they make a reasonable mistake. For instance, the criminal liability that might flow from a narrow statute would pose an extreme problem with them and dissuade them from vigorously pursuing their duty; whereas they were not concerned necessarily with the civil liability that might flow from a reasonable mistake.

Have you given any thought to the idea of bifurcating this? In other words, saying that we will expand or narrow the term "reasonable force" when we're talking about civil liability but not when we're talking about criminal liability.

Well, let me just elaborate on that for one second. It's the area that I wanted to get into. Short of the issue of bifurcation, how do you feel about the concern that if somebody is faced with a split second decision, as a law enforcement officer is in these situations, and they end up making the wrong decision, they do have criminal liability, should they or shouldn't they?

MR. SCHWARTZ: Well, the question of liability, I guess, the way you're using the term, is the person possibly subject to criminal sanctions...

MR. JENSEN: Right.

MR. SCHWARTZ: ...because I think in the examples you're giving me, if it's an accident or if there is a group faith and belief, then it's no longer an intentional violation and therefore would not necessarily lead to criminal liability.

MR. JENSEN: Well still, you get questions of theft which gets read differently by different people and the officer insists that he had a good faith belief and the jury concludes that it wasn't reasonably held, and then he's prosecuted and convicted.

MR. SCHWARTZ: Well, that's why we have the jury system, and we're all subject to those sort of concerns when we, in our daily lives -- I'm not convinced, at least, that the police hold a special case, especially when it's in regard to this nonviolent killing situation. With this nonviolent killing situation, I mean

if an officer can point to circumstances that lead him or her to believe that the subject is armed or that it was a dangerous felony, then you don't have a problem. I think it depends more, for me at least, and I understand that many representatives of law enforcement are saying, it probably depends on how the statute is worded, and I think if you make the statute precise enough and the Legislature is careful about, as it should be whenever it defines an offense or a justification for an offense, that you're going to get rid of most of these problems, but if you just use the term violent felony, you know, then you've got some other problems, but you see, right now I think that the police department themselves can begin to rectify some of those problems by giving careful considerate instructions, both in terms of training and guidelines.

CHAIRMAN LEVINE: Have you tried your hand at drafting a statute in this area?

MR. SCHWARTZ: No, I have not.

CHAIRMAN LEVINE: Would you be interested in doing so?

MR. SCHWARTZ: I may be. I'd like to see what the Supreme Court does in the Peterson case, and then, depending on the result...

CHAIRMAN LEVINE: If you do have a specific thought as to a statute that you would suggest, I'd be interested in it sometime in the next several months.

MR. SCHWARTZ: I'd be happy to do that and, in fact, just recently we had a law student at our office go through the codes of all fifty states and collect the existing statutes on justifiable homicide, and I'll be happy to make those available to the Committee.

MR. JENSEN: I'd be particularly interested in sort of the range: What the toughest are, the most lenient, and where we fit, basically.

MR. SCHWARTZ: Well, where we presently fit is in the dark ages in that we follow the old common law of rule, but that is not to say that we're alone; but it is to say that many states are beginning to change over from that legislation.

MR. ULLMAN: Could I explore that with you? You say we are in the dark ages as far as the statute is concerned, but aren't we sort of in a progressive age as far as the police department regulations are concerned generally? Don't most, if not nearly all police departments, have pretty restrictive gun use policies that are on paper?

MR. SCHWARTZ: Well, many of them do. And as far as I've been able to tell recently, the major California departments do. I don't know about the Highway Patrol, but the major departments do. But part of the problem is enforcement of those local regulations. In the Peterson case, the City of Long Beach had a regulations saying, thou shalt not shoot in this situation, and the shooting occurred anyway. So I think what's indicated by the fact that many of the major police departments already have their own administrative rules saying this is that -- the police can live without, because they've said it. They've said it to their own people, and they've said that we've administratively made a policy saying that we don't want you shooting in these situations.

CHAIRMAN LEVINE: Mr. Schwartz, thank you very much for your testimony and your help and I would be interested in staying in touch with regard to possible developments in the law.

MR. SCHWARTZ: Thank you very much, and I'll make that summary of the other states' statutes available to the Committee, hopefully right after the new year.

CHAIRMAN LEVINE: Thank you.

MR. SCHWARTZ: Thank you.

CHAIRMAN LEVINE: With this testimony, we will conclude our hearings on the use of deadly force by law enforcement by the joint subcommittees for the interim session. Thank you.

# # # # # # # #