

**Memory, Video, and
Truthfulness in Reporting a
Use of Force**

Avoiding and Explaining Incompleteness
and Apparent Inconsistencies; Robert Higgason
and Bradley A. Morefield

▶ Part I by Bradley

Part II:
Reporting the Incident: Memory vs Video?

Multiple cameras,
multiple reports,
multiple memories?



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► What if the videos, reports, and memories are different?


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► What if the videos, reports, and memories are different?

► What legal difference would that make?

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- "The 'reasonableness' of a particular use of force must be judged from the **perspective of a reasonable officer on the scene**, rather than with the 20/20 vision of hindsight." (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968))

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- "The reasonableness inquiry in an excessive force case is an **objective** one: the question is whether the officers' actions are 'objectively reasonable' in light of the **facts and circumstances confronting them**"

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More from *Graham*: "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make **split-second judgments**—in circumstances that are **tense, uncertain, and rapidly evolving**—about the amount of force that is necessary in a particular situation." 490 U.S. at 396-97.

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See also *Lincoln v. Turner*, 874 F.3d 833, 842 (5th Cir. 2017) ("Probable cause exists when the **totality of the facts and circumstances within a police officer's knowledge at the moment** of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense.")

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Cf. *Devenpeck v. Alford*, 543 U.S. 146, 152–53, 155 (2004) ("Whether probable cause exists depends upon the **reasonable conclusion to be drawn from the facts known to the arresting officer** at the time of the arrest. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).")

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- › The fact that a suspect is unarmed; or
- › The fact that a suspect is mentally ill or noncommunicative or otherwise impaired.

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But what constitutes a conflict?



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Does the presence of the body worn camera create a potential for undermining an officer's credibility?

If so, how should we approach this?

Be prepared to reconcile the Report with the Video.

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- **Purpose of the Officer's statement:** To recount the incident and describe the officer's perceptions of the **totality of the circumstances** and the **objective reason** for using deadly force. NOTE: There are two types of statements:
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- Purpose of District Attorney's report: To evaluate the officer's shooting to determine if it appears to have constituted a **criminal** act and should be referred to the **grand jury**.

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- Potential for quite a number of videos, which could show the encounter—or portions of it—from very different perspectives.

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Purpose of Citizens' cell phone cameras: To capture video of anything that interests them.

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 - It may omit areas not within video view.




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- Video does not always show something you perceived while under stress.



[Video](#)

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The stress that an Officer can experience during a perceived high-risk encounter (death/serious injury) frequently creates **physiological/psychological changes** in his perception of the encounter. These changes include

auditory exclusion

tunnel vision

selective attention.

Because of these effects, the officer's perception might not include some of what appears in the video.

For research on this area, see, e.g., Chuck Remsberg, *New, Free Guide on Human Factors Affecting Perception & Memory*, Force Science News, April 17, 2018 (Force Science Institute), available at <https://www.forcescience.org/2018/04/new-free-guide-on-human-factors-affecting-perception-memory/> (last accessed on 03/11/2019)

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It is **very important** that the Officer describe or explain any "differences" between the report(s) and the video footage.

(Remember *Scott v. Harris*: if video clearly contradicts statement, the court will go with video.)

Plaintiffs will look for any differences to see if these are disparities or conflicts.

- "Differences" are not necessarily discrepancies or inconsistencies or conflicts or disparities, and it is better not to think of them as such.
- A "difference" can simply be one of "perspective"—i.e., the physical angle from which the scene is being viewed.

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Should the officer view the video before writing his statement?

Controversy over this:

Some departments permit it, others prohibit it.

What is the effect of viewing video?

More consistency?

Taint memory?

How deal with this?

Two statements?

One before, one after 48 hours and viewing video?

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The essence of a determination on Qualified Immunity is whether there are any genuine disputes of **material** fact.

Factual disputes when compared with an officer's statement can come from video, from a plaintiff, or from other witnesses. But if the disputes, while genuine, are not material, then the officer is entitled to Qualified Immunity.

For comparison, consider *Salazar-Limon v. City of Houston*, 826 F.3d 272, 275 n.2, 279 n.6 (5th Cir. 2016), cert. denied, 137 S.Ct. 1277 (2017).

Houston Police Officer Chris Thompson used deadly force against Ricardo Salazar-Limon, who survived the gunshot wound and sued. The district court held that Officer Thompson was entitled to Qualified Immunity, and Salazar-Limon appealed, pointing to a factual dispute about which direction he (plaintiff) was turning when Officer Thompson fired.

(Cont'd)

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(cont'd)

The Fifth Circuit disposed of that argument in two footnotes, observing that:

"Salazar disputes the direction of the turn, or indeed that he was turning at all at the time he was shot. This factual dispute does not preclude summary judgment for the reasons noted *infra*["] and

"in the context of the facts of this case, it is immaterial whether Salazar turned left, right, or at all before being shot. Specifically, we have never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety."

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Whether the officer views the video first or later, it is imperative that the officer write down in his own words his perception of the encounter, describing the objective facts upon which he relied in deciding that the use of deadly force was reasonable.

The officer must not just rely on video.

If the officer writes a second statement after viewing the video, he should explain any differences and how they did or did not enter into his decision.

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Conclusion

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If a video shows something different from what the officer said, the officer should be permitted to harmonize the video and his statement.

—END

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