

## Calibre Press Street Survival Newsline

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### Test Your “Excessive Force” I.Q.

In federal civil cases seeking millions of dollars in damages, plaintiffs’ attorneys commonly claim that defendant officers could have prevented fatal conflicts by using better tactics, that they should have deployed less-lethal options rather than shooting, that they failed to give verbal warnings before delivering deadly force, that they had a duty to retreat rather than violently engage, and so on.

Their assertions may be little more than legal bombast. But they sometimes confuse officers just as they are intended to confuse civilian jurors. And that’s dangerous. When you’re facing a critical force decision, your mind needs to be focused without hesitation or doubt on the tactical problems at hand, not on where you might stand in a lawsuit later.

### Test Your “Excessive Force” I.Q.

By Judge Emory A. Plitt, Jr. \*



*Provided by the AELE Law Enforcement Legal Center*

This quick True/False quiz addresses issues typically raised in excessive force litigation. See how well you can separate legal fact from the many misconceptions that abound.

The answers are based on federal laws and the decisions of the Supreme Court and federal appellate courts, the primary sources of legal rules that govern your use of force. For any differences that may affect claims brought against you in your state courts, consult your department’s legal advisor.

1. There are constitutional limits on the types of weapons and tactics you can use on the street. *True or False?*
2. Your intent and your state of mind at the time you use force can be important factors in determining if your use of force was legal. *True or False?*
3. You must always retreat if possible before using deadly force. *True or False?*
4. You must first see a suspect’s weapon before you can use force. *True or False?*

5. You must always use the least amount of force possible to gain control of a person. *True or False?*
6. You cannot lawfully shoot a fleeing felon. *True or False?*
7. You may not use force to temporarily detain someone for purposes of a Terry stop. *True or False?*
8. Information you discover after force was used can be a factor in determining if the force you used was legally justified. *True or False?*
9. Courts and juries are permitted to evaluate your use of force by considering what you could have done differently. *True or False?*
10. Your uses of force in prior incidents can be considered in court in evaluating whether your use of force in the current situation was legally proper. *True or False?*

How well did you do?

***Test Your “Excessive Force” I.Q. Answer sheet***  
***Provided by the AELE Law Enforcement Legal Center***



Are you and the courts in agreement about what constitutes lawful use of force? Check your answers:

**Question 1:** There are constitutional limits on the types of weapons and tactics you can use on the street. *True or False?*

False. No court has ever flat out banned any specific tactic, weapon, technique, or equipment. The closest was the case of City of Los Angeles v. Lyons, 461 U.S. 95 (1983), which involved the so-called “choke hold.” There had been a number of deaths/injuries attributed to its use by the Los Angeles Police Department. Plaintiffs sought an injunction to prohibit its use, alleging it was unconstitutional excessive force.

Federal district and appellate courts granted the injunction, ruling that the tactic was “unreasonable” when neither death nor serious injury was threatened. By the time the case got to the Supreme Court, LAPD had modified its policies. The Supreme Court reversed the finding of the lower courts, explaining that there now was no need to consider the matter because use of the challenged tactic was not likely to be repeated.

The type of weapon or tactic used may play a role in determining whether the nature and extent of the force you employed was reasonable under the unique factual circumstances of the situation. But it is not the weapon or tactic standing alone which causes any legal difficulty.

For example, if a suspect is struggling with you and trying to get your weapon out of your holster, and the only thing available to you to prevent the risk of serious injury or death to yourself is a nearby brick applied to the suspect's head, that would likely be a permissible use of force. Hitting him with a brick to get him to stop mouthing off to you would not be.

**Question 2:** Your intent and your state of mind at the time you use force can be important factors in determining if your use of force was legal. *True or False?*

False. Almost all uses of force on the street are analyzed under Fourth Amendment principles. The key is “objective legal reasonableness.” Whether the force you use is constitutionally permissible is determined by the facts and circumstances existing and known to you at the very moment the force is used.

Your ill will and or malice toward the suspect will not taint an otherwise appropriate use of force. The reverse is also true. The lack of any ill will or malice on your part will not save an otherwise objectively unreasonable use of force. Your motivation and state of mind simply are not considered as a factor.

**Question 3:** You must always retreat if possible before using deadly force. *True or False?*

False. There is no constitutional duty to retreat before using deadly force. There may be good tactical reasons to do so—to help in containment, to gain a tactical advantage, to wait for backup, etc.—but it's not constitutionally required.

**Question 4:** You must first see a suspect's weapon before you can use force. *True or False?*

False. Often expert witnesses for plaintiffs will try to convince a judge or jury that the force used was improper because the officer did not first see any weapon in possession of the suspect. In reality, there is no constitutional requirement that you must first see a weapon in a suspect's hands before you can use force.

You may have ample reason to believe that a suspect is in possession of a weapon without seeing it, based on his furtive movements, on personal knowledge you might have about him, or on information from your dispatcher, from witnesses, or from other officers, for example. You will be judged on what you knew or reasonably perceived to be the facts at the very moment you used force.

**Question 5:** You must always use the least amount of force possible to gain control of a person. *True or False?*

False. Normally the degree of force you use does not have to be the least intrusive option. As the Supreme Court has pointed out in Graham v. Connor, 490 U.S. 386 (1989), tactical situations on the street are “rapidly evolving.” Given their uncertain, fast-

changing dynamics, you are not going to have the luxury of consulting some use-of-force matrix, or taking a recess to consider alternatives. Determining the least intrusive alternative is inherently subjective.

Requiring you to do so could possibly deter you from acting promptly when safety is at stake, and would put courts and juries in the position of endlessly second-guessing. It is the exigencies of the situation that govern. Allowance is made for you to decide with reasonable latitude what to do in tense situations.

**Question 6:** You cannot lawfully shoot a fleeing felon. *True or False?*

Surprise! The answer to this question is both true and false. You may lawfully shoot a fleeing felon if certain conditions are met: Do you have probable cause to believe that a felony has been committed and that the fleeing person did it? Is it a felony that involves violence or the threat of violence? Does the suspect present a danger of violence or the threat of violence to the public and/or other officers if not stopped? Was a warning given, if practical? Did the suspect ignore or refuse to follow direction from you, if it was practical to attempt verbal compliance? See Tennessee v. Garner, 471 U.S. 1 (1985).

Where the circumstances do not fit these conditions, you may not use deadly force to stop a fleeing felon. The involvement of violence, threatened or actual, is key. For example, some thefts may be felonies. But theft usually does not involve the suspect's threat or use of violent force. Thus a fleeing thief is usually not fair game for deadly force.

**Question 7:** You may not use force to temporarily detain someone for purposes of a Terry stop. *True or False?*

False. A reasonable amount of force may be used for purposes of a Terry stop [Terry v. Ohio, 392 U.S. 1 (1968)]. Most frequently this involves the handcuffing of a suspect, sometimes forcibly. Remember that such a stop must be based on a reasonable suspicion that the subject is about to or has recently engaged in some criminal activity and you are temporarily detaining him or her so you can check it out. Such a stop can last no longer than reasonably necessary for you to dispel your suspicion or determine probable cause to make an arrest.

**Question 8:** Information you discover after force was used can be a factor in determining if the force you used was legally justified. *True or False?*

False. What is discovered after you use force simply cannot be considered in determining its justification. What counts are the circumstances as they were known or reasonably believed to be at the very moment you used force.

The classic example is where you shoot someone because you have a reason to believe that the person is making a threatening move toward a firearm. After the shooting, no gun is found or the presumed weapon turns out to be an innocuous object, like a cell phone. Does that discovery alone make your shooting improper? No.

**Question 9:** Courts and juries are permitted to evaluate your use of force by considering what you could have done differently. *True or False?*

False. Your use of force cannot be measured by what you could have done differently. In Graham v. Conner, the Supreme Court said your use of force must be evaluated by a judge and/or jury putting themselves in your shoes at the scene at the moment the force was used. The Court specifically cautioned against applying “the 20/20 vision of hindsight.” After the fact you (and others) can always think of something you could have done differently.

This is a tactic frequently used by plaintiffs’ expert witnesses, trying to convince judges and juries that there were lesser, more humane methods that could have been employed instead of the level of force you used. But in Graham, the Supreme Court made clear that perfection is not expected and is not the standard to be applied. You are not expected to evaluate all possible alternatives, only to do what a “reasonable” officer “reasonably trained” would have done in the same circumstances.

**Question 10:** Your uses of force in prior incidents can be considered in court in evaluating whether your use of force in the current situation was legally proper. *True or False?*

False. Each use of force is measured only by its own unique facts. The mere fact that you have used force in prior incidents—even constitutionally impermissible force — does not mean that your use of force in the current incident was improper.

The only time that past uses of force may play a role is when an agency (as opposed to an individual officer) is a defendant and there is a claim that the agency failed to properly manage, train, discipline, or supervise its officers. Such a “policy” claim against the agency is much different from the claim against an individual officer for using unconstitutional force.

**\* About the author**

Emory Plitt, Jr. is a Circuit Court judge in Maryland and an instructor in the Lethal and Less-Lethal Force seminar presented twice yearly by AELE. For 20 years he served as principal legal advisor to the State Police, 24 sheriffs’ agencies, and the Department of Correctional Services in Maryland.

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