

HOUSE BILL REPORT

ESHB 2037

As Passed House:
February 12, 2022

Title: An act relating to modifying the standard for use of force by peace officers, but only with respect to providing that physical force may be used to the extent necessary, clarifying that deadly force may be used in the face of an immediate threat, clarifying that physical force may be used to protect against a criminal offense when there is probable cause that a person has committed or is committing the offense, authorizing the use of physical force to prevent a person from fleeing a temporary investigative detention, authorizing the use of physical force to take a person into custody when authorized or directed by statute, providing that the standard does not permit violations to the United States Constitution or state Constitution, and defining deadly force, physical force, necessary, and totality of the circumstances.

Brief Description: Modifying the standard for use of force by peace officers.

Sponsors: House Committee on Public Safety (originally sponsored by Representatives Goodman and Sutherland).

Brief History:

Committee Activity:

Public Safety: 1/25/22, 2/3/22 [DPS].

Floor Activity:

Passed House: 2/12/22, 87-11.

Brief Summary of Engrossed Substitute Bill

- Modifies the standard for use of physical force by peace officers by defining "physical force" and authorizing peace officers to use physical force in additional specific circumstances.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Signed by 11 members: Representatives Goodman, Chair; Johnson, J., Vice Chair; Mosbrucker, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Davis, Griffey, Hackney, Orwall, Ramos, Thai and Young.

Minority Report: Do not pass. Signed by 2 members: Representatives Graham and Simmons.

Staff: Kelly Leonard (786-7147).

Background:

Constitutional Restrictions on the Use of Force by Peace Officers.

The United States Constitution protects citizens from excessive force by the government. Depending on the custodial status of the person against whom force is being used, the Fourth or Fourteenth Amendment provides the legal standard for determining whether the use of force is permissible. For example, when a person is subject to arrest or detained pretrial, courts have held that the use of force by a peace officer must be reasonable under the totality of the circumstances. Whether a peace officer's actions are considered reasonable depends upon several factors. This may include the severity of the crime, the threat to the safety of the peace officer or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. When a person is injured by excessive force, the primary legal remedy is to seek damages through a civil cause of action for deprivation of constitutional rights under 42 U.S.C. §1983.

State Standard for the Use of Force by Peace Officers.

In 2021 the state enacted a standard for use of force by peace officers, including separate restrictions on the use of physical force and deadly force.

Physical Force. Under the standard, a peace officer may use physical force against another person when necessary to:

- protect against criminal conduct where there is probable cause to make an arrest;
- effect an arrest;
- prevent an escape offense; or
- protect against an imminent threat of bodily injury to the peace officer, another person, or the person against whom force is being used.

Deadly Force. A peace officer may use deadly force against another person only when necessary to protect against an imminent threat of serious physical injury or death to the officer or another person. "Necessary" means that, under the totality of the circumstances, a reasonably effective alternative to the use of deadly force does not exist, and that the amount of force used was a reasonable and proportional response to the threat posed to the officer and others. "Imminent threat of serious physical injury or death" means that, based on the totality of the circumstances, it is objectively reasonable to believe that a person has the present and apparent ability, opportunity, and intent to immediately cause death or

serious bodily injury to the peace officer or another person. "Totality of the circumstances" means all facts known to the peace officer leading up to and at the time of the use of force, and includes the actions of the person against whom the peace officer uses such force, and the actions of the peace officer.

Reasonable Care and Other Restrictions. A peace officer must use reasonable care when determining whether to use physical force and when using any physical force against another person. To that end, a peace officer must:

- when possible, exhaust available and appropriate de-escalation tactics prior to using any physical force;
- when using physical force, use the least amount of physical force necessary to overcome resistance under the circumstances, which includes a consideration of the characteristics and conditions of the person for the purposes of determining whether to use force against that person and, if force is necessary, determining the appropriate and least amount of force possible to effect a lawful purpose;
- terminate the use of physical force as soon as the necessity for such force ends;
- when possible, use available and appropriate less lethal alternatives before using deadly force; and
- make less lethal alternatives issued to the officer reasonably available for his or her use.

Agency Policies. By July 1, 2022, the Attorney General must develop and publish model policies on use of force and de-escalation tactics consistent with the standard. By December 1, 2022, all law enforcement agencies must adopt the model policy or otherwise adopt policies consistent with the standard. Law enforcement agencies may adopt policies or standards with additional requirements for de-escalation and greater restrictions on the use of physical and deadly force. Law enforcement agencies must provide copies of policies and additional information to the Attorney General, including any future modifications.

Temporary Investigative Detentions.

In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court held that a peace officer may conduct a brief investigative detention without probable cause if the peace officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime.

Summary of Engrossed Substitute Bill:

The standard for the use of force by peace officers is modified.

Definitions. Definitions for "physical force" and "deadly force" are added to the standard. The definitions for "necessary" and "totality of the circumstances" are modified so as to make them broadly apply to the standard, rather than just the provisions pertaining to deadly force.

"Physical force" means any act reasonably likely to cause physical pain or injury or any other act exerted upon a person's body to compel, control, constrain, or restrain the person's movement. "Physical force" does not include pat-downs, incidental touching, verbal commands, or compliant handcuffing where there is no physical pain or injury. "Deadly force" means intentional application of force through the use of firearms or any other means reasonably likely to cause death or serious physical injury.

"Necessary" means that, under the totality of the circumstances, a reasonably effective alternative to the use of physical force or deadly force does not appear to exist, and the type and amount of physical force or deadly force used is a reasonable and proportional response to effect the legal purpose intended or to protect against the threat posed to the officer or others. "Totality of the circumstances" means all facts known to the peace officer leading up to, and at the time of, the use of force, and includes the actions of the person against whom the peace officer uses such force, and the actions of the peace officer.

Physical force. A peace officer may use physical force against a person "to the extent" necessary to carry out the acts specified in the standard. The authority of a peace officer to use physical force against a person when defending against criminal conduct is modified. In those instances, physical force may be used to the extent necessary to protect against a criminal offense when there is probable cause that the person has committed, is committing, or is about to commit the offense.

The authority of a peace officer to use physical force against a person, subject to the requirement to exercise reasonable care, is expanded to include additional specific circumstances. A peace officer may use physical force against a person to the extent necessary to prevent a person from fleeing or stop a person who is actively fleeing a lawful temporary investigative detention, provided that the person has been given notice that he or she is being detained and is not free to leave. A peace officer may also use physical force to the extent necessary to take a person into custody when authorized or directed by statute.

Deadly Force. The provision regarding use of deadly force is modified by replacing the term "imminent threat" with "immediate threat," distinguishing it from the restrictions on the use of physical force, but otherwise retaining the same definition in current law. A peace officer may use deadly force against another person only when necessary to protect against an immediate threat of serious physical injury or death to the officer or another person.

Reasonable Care and Other Restrictions. A provision is added specifying that the standard does not permit a peace officer to use physical force or deadly force in a manner or under such circumstances that would violate the United States Constitution or state Constitution.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 9, 2022.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) This bill is part of an effort to make important adjustments to comprehensive police reforms that passed last session. Other critical reforms remain intact and unchanged, including those relating to certification and decertification, data collection, and the duty to report to misconduct. The reasonable care requirements for use of force are also unchanged. This bill makes a narrow adjustment to the authority for peace officers to use force in certain circumstances.

There have been issues with implementing the standard for use of force in the field, particularly with criminal investigations. Peace officers are having issues with suspects running away and avoiding questioning. This is a real problem, not just a political narrative. Certain stakeholders are advocating for peace officers to arrest a person for Obstructing a Law Enforcement Officer when the person is attempting to flee the detention. This is problematic, and is likely to involve escalated force. More force is allowed for an arrest than for a temporary investigatory detention. Furthermore, recent legal guidance calls this practice into question. It makes more sense to amend the standard to allow peace officers to use force for this purpose without escalating a situation to an arrest. Peace officers need authority to prevent persons from fleeing lawful temporary investigative detentions. This bill allows for the use of physical force, subject to significant limitations, to address these circumstances. The bill does not open the door to use of physical force during any detention; instead, it is limited to preventing a person from fleeing.

Probable cause is a high standard for conducting a criminal investigation. Peace officers typically need to stop and question persons in order to develop probable cause. While some agencies are relying on their authority to arrest a person for Obstructing a Law Enforcement Officer in order to conduct temporary investigatory detentions, many agencies are not doing this. There are mixed opinions in the legal community as to whether this is appropriate. This bill will address the ambiguity and provide clarity for all law enforcement agencies across the state.

There is a shared understanding and respect for the policy goals underlying the standard for use of force by peace officers. Law enforcement and the community want the same things. However, the current standard went too far and has made the community less safe. There has been an increase in gun violence and property crimes. Professional partnerships have eroded, and there are significant public safety issues. This bill provides important balance. It is not good for public safety to hinder criminal investigations.

The bill is a work in progress. The definition of "physical force" needs to be amended. The state should also not rely on the Attorney General's opinion, which is based on a broad

dictionary definition. Some stakeholders would like to see a clearer definition that includes an exception for compliant handcuffing. The definition of "physical force" used by the Criminal Justice Training Commission (CJTC) would be preferred by many law enforcement stakeholders. It defines the term as "any technique or tactic reasonably likely to cause transient pain or physical injury." The CJTC spent countless hours developing this definition. Peace officers are already trained based on this understanding of physical force. This definition provides a clear line, allowing for ease of implementation and also data collection. The provision on temporary investigatory detentions should be modified to clarify that the detention must be lawful.

(Opposed) Engrossed Second Substitute House Bill (E2SHB) 1310, which passed last year, addressed serious issues with policing and racial equity. It established clear limits on the use of physical force. Other states across the nation are looking to Washington as a leader and model on these issues. This bill violates the commitment that the Legislature made to communities and families. It rolls back critical reforms and will allow police officers to engage in discriminatory practices. People of color often find themselves on the wrong side of police use of force, and the vast majority of these situations involve Terry stops. Many family members have lost loved ones to police violence. Police approached their family members based on reasonable suspicion, but they already had their minds made up. There are real problems with racial bias and discrimination in certain jurisdictions in the state. The bill allows police officers to continue with acts of violence against people of color, especially young Black men. If the state rolls back the standard, it is an invitation to continue these horrendous abuses. This bill should not advance.

The reauthorization to use physical force for Terry stops undermines the reforms in E2SHB 1310, but is also unconstitutional. There are significant constitutional restrictions on Terry stops. However, by passing the bill, police will have a greater argument for qualified immunity and it will be impossible to hold them accountable in any meaningful way. This bill is not needed. Police do not need to use force in these circumstances. Even arresting someone for Obstructing a Law Enforcement Officer does not warrant the use of physical force except in very limited circumstances. Police do not need to chase persons who flee. They can let them go and find them in other ways. They can catch them later.

This bill breaks a promise made to communities about addressing police brutality and police violence. This bill should not advance.

Persons Testifying: (In support) Representative Roger Goodman, prime sponsor; Taylor Gardner, Washington Association of Sheriffs and Police Chiefs; Ken Roske, City of Pasco; Jeff Myers, City of Hoquiam; Brian Smith, City of Port Angeles; Sharon Swanson, Association of Washington Cities; Armondo Pavone, City of Renton; Cherie Harris, City of Kirkland; Nancy Backus, City of Auburn; Darrell Lowe, Redmond Police Department; Monica Alexander, Washington State Criminal Justice Training Commission.

(Opposed) Michael Bennett; Angelina Smalls, Shelly Washington, and Debbie Novak,

Washington Coalition for Police Accountability; DeRay McKesson, Campaign Zero; Eliana Machefsky, The National Police Accountability Project; and Tamer Abouzeid, King County Office of Law Enforcement Oversight.

Persons Signed In To Testify But Not Testifying: More than 20 persons signed in. Please see committee staff for information.