

Legal Standards in Excessive Force Cases

*A PRESENTATION TO THE JOINT COMMITTEE ON
TRANSPARENT POLICING AND USE OF FORCE REFORM*

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CHIEF CRIMINAL JUDGE, MULTNOMAH COUNTY CIRCUIT COURT

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Overview of a Criminal Case Against a Law Enforcement Officer for Excessive Force

1. Alleged Criminal Conduct By the Officer
2. Grand Jury Proceedings if Charged With a Felony - Grand jury indictments are not required by law in use of force cases, but are commonly used by District Attorney's offices. Grand jury proceedings are conducted in secret, but they are recorded. ORS 132.270(3) permits disclosure when a grand jury inquires into conduct of a public servant. Police officers would fall under that provision, but there have to be court findings made.
3. Indictment and Arrest - An arrest may also occur pre-indictment where there is an information filed.
4. Pretrial Preparation - Scheduling, discovery, pre-trial motions, additional investigations, expert preparation, exhibit gathering, and preparation for trial occur during this phase.
5. Jury Selection
6. Trial
7. Jury is Instructed on the Legal Standard and Defenses

Note: Few cases in Oregon make it past the grand jury phase if the District Attorney pursues grand jury indictment. Excessive force cases that are brought to trial are more likely to be civil claims brought under 42 U.S.C. § 1983 and are mostly heard in the U.S. District Court (federal courts), not state courts. Some cases are brought as civil tort claims as well.

Grand Jury and Preliminary Hearing Proceedings

Types of crimes

Composition of the grand jury

Standard of proof

Instructions given to grand jurors

Types of evidence that is admissible and considered

Proceedings are recorded

Role of the court and perspectives from the bench

Differences between preliminary hearings and grand juries

Juror Orientation: Expectations, Addressing Bias, Preparing for Trial

Jury orientation begins well before jury selection (*voir dire*)

Setting expectations

Understanding bias in juror decision-making: [Oregon's implicit bias video](#)

Initial instructions and advisements

Jury Instructions Depend on the Charges Brought by the District Attorney and Defenses Alleged

Depending on the conduct, an officer using excessive force could be charged with any number of crimes under Oregon law, including but not limited to:

- **Murder**
- **Manslaughter**
- **Assault**
- **Strangulation**

These prosecutorial decisions are choices made by the District Attorney's office, not the court.

Jury Instructions 101

Role of jury instructions

How jury instructions are delivered to the jurors

Uniform instructions v. unique and case specific instructions

Arguments by the parties on proposed instructions

Charging the jury

Deliberations

Example Uniform Jury Instructions - No. 1310 - Manslaughter

UCrJI 1310

MANSLAUGHTER IN THE FIRST DEGREE— RECKLESSLY

Oregon law provides that a person commits the crime of manslaughter in the first degree if that person recklessly causes the death of another person under circumstances manifesting extreme indifference to the value of human life.

In this case, to establish the crime of manslaughter in the first degree, the state must prove beyond a reasonable doubt the following elements:

- (1) The act occurred on or about _____, 20__; and
- (2) [*Defendant's name*] unlawfully and recklessly caused the death of [*victim's name*] under circumstances manifesting extreme indifference to the value of human life.

COMMENT: ORS 163.118(1)(a). See **recklessly**, defined in UCrJI 1037.

See also the comment at UCrJI 1315. If charged under this section, both the state and the defendant are entitled to instruction on the lesser included offense of criminally negligent homicide.

See State v. Boone, 294 Or 630, 661 P2d 917 (1983) (concept of “extreme indifference to the value of human life”); *State v. Belcher*, 124 Or App 30, 860 P2d 903 (1993), *rev den*, 318 Or 351 (1994) (“extreme indifference to the value of human life” is actus rea, not mens rea); *State v. Van Gorder*, 56 Or App 83, 88, 641 P2d 584, *rev den*, 293 Or 146 (1982) (error to not instruct jury to focus on defendant’s mental state at time of gun’s discharge); *State v. Davis*, 44 Or App 549, 552, 606 P2d 671, *rev den*, 289 Or 45 (1980), *disapproved of by State v. Holmes*, 62 Or App 652, 661 P2d 556 (1983) (evidence did not support defendant’s claim that his acts were done recklessly within meaning of ORS 163.118(1)(a)); *State v. Goldsberry*, 30 Or App 1087, 1090, 569 P2d 646 (1977).

Defenses: Reasonable Belief

The defendant might pursue a defense that they were justified in their use of force under Oregon law.

ORS 161.239

(1) Notwithstanding the provisions of ORS 161.235 (Use of physical force in making an arrest or in preventing an escape), **a peace officer may use deadly physical force only when the peace officer reasonably believes that:**

(a) The crime committed by the person was a felony or an attempt to commit a felony involving the use or threatened imminent use of physical force against a person; or

(b) The crime committed by the person was kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from the use or threatened imminent use of deadly physical force; or

(d) The crime committed by the person was a felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place, the use of such force is necessary; or

(e) The officer's life or personal safety is endangered in the particular circumstances involved.

(2) Nothing in subsection (1) of this section constitutes justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom the peace officer is not seeking to arrest or retain in custody..

Translating the Reasonable Belief Defense into a Jury Instruction

Content

Standard of proof

Process

How the jury is charged

Uniform Criminal Jury Instruction No.1116 – Defense of Physical Force

UCrJI No. 1116

**DEFENSE—PHYSICAL FORCE—
INVOLVING PEACE OFFICERS**

A 1A/1B is justified in using physical force on a person being arrested when and to the extent that [he / she] reasonably believes it necessary to 2A/2B unless [he / she] knows that the arrest is not lawful. The use of deadly physical force is justified only in the following circumstances:

- (1) When the crime committed by the person being arrested was a felony or an attempted felony that involved the use or threatened imminent use of physical force against a person; or
- (2) When the crime committed by the person being arrested was kidnapping, arson, first-degree escape, first-degree burglary, or any attempt to commit one of these offenses; or
- (3) When, regardless of the offense, it is necessary to defend the officer or another person from what [he / she] reasonably believed to be the use or threatened imminent use of deadly physical force; or
- (4) When the crime committed by the person under arrest was a felony or an attempted felony and, under the totality of the circumstances existing at the time and place, the use of deadly physical force is necessary; or
- (5) The officer's life or personal safety was endangered in the particular circumstances involved.

The burden of proof is on the state to prove beyond a reasonable doubt that this defense does not apply.

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- 1A peace officer
1B private person acting at the direction of a peace officer
- 2A make an arrest
2B prevent the escape from custody of an arrested person
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COMMENT: ORS 161.235, 161.239, 161.245, 161.249 (private person acting at direction of peace officer). See **deadly physical force**, defined in UCrJI No. 1048. See also ORS 161.015(4) (definition of *peace officer*).

12/09

Questions?

FOR MORE INFORMATION PLEASE CONTACT NANCY J. COZINE, STATE COURT ADMINISTRATOR, OR ERIN M. PETTIGREW, ACCESS TO JUSTICE COUNSEL FOR LEGISLATIVE AFFAIRS, ERIN.M.PETTIGREW@OJD.STATE.OR.US