

Investigating and Prosecuting Use of Force Incidents in North Carolina



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Officer-involved shootings and other use of force incidents, though rare when compared to the number of interactions law enforcement officers have with the public every day, tend to be high profile, may generate media coverage and may involve community interest. The investigations of these incidents can be complex and have profound social, civil, administrative and criminal consequences. When law enforcement uses force, up to and including deadly force, law enforcement agencies and District Attorneys' offices must be prepared to conduct thorough internal and/or criminal investigations. In the overwhelming majority of prosecutorial districts, the State Bureau of Investigation (SBI)¹ is the primary agency requested to investigate use of deadly force incidents. Using independent investigatory assistance is one way to help build trust in the community and ensure that a fair and impartial inquiry will take place. Regardless of which agency investigates the incident, it is paramount that the process is objective and unbiased.

Upon request, the SBI is authorized to give assistance to "sheriffs, police officers, district attorneys and judges."² The SBI can assist in these use of force situations:

1. Fatal officer-involved shooting;
2. Non-fatal officer-involved shooting;
3. Death in custody;³
4. Complaints of use of excessive force by officers.⁴

¹ In North Carolina, the SBI is a state-level law enforcement agency. Within the state, the agency acts as a criminal investigation bureau, similar to the Federal Bureau of Investigation on the federal level. The SBI serves as an independent agency under the direction and supervision of the Director of the Bureau. N.C. Gen. Stat. § 143B-915 (2014); see also <http://www.ncdps.gov/Our-Organization/Law-Enforcement/state-bureau-investigation> (accessed March 7, 2016).

² N.C. Gen. Stat. § 143B-917 (2014).

³ NC Sheriffs' Association, Officers' Use of Force – The Investigative Process – What a Sheriff Should Expect, July 2014.

⁴ SBI Response to Officer-Involved Shooting Investigations, presented to the NC Best Practices Committee, 1/15/16, by Special Agent in Charge of the Southern Piedmont District Office Audria Bridges.

The SBI does not have original jurisdiction in these matters unless a request is made pursuant to N.C. Gen. Stat. § 143B-917. Generally, the head of the law enforcement agency, his or her designee, or the District Attorney (DA) will promptly contact either the Special or Assistant Special Agent in Charge (SAC or ASAC) of his or her SBI district to request an independent investigation.⁵ It is critical to develop a contact protocol in your district to ensure prompt communication and response.⁶ If the SBI has been requested and is investigating the incident, the SAC or ASAC should obtain all pertinent information to begin the investigation. Once on the scene, SBI personnel should ensure the scene is secured, properly processed and that physical evidence is submitted to the appropriate laboratory for analysis. Of note, laboratory analyses are not automatically rushed in these cases. Rush requests can be made by the SBI, DA, and/or the law enforcement agency head. Additionally, the SBI should interview all witnesses, including any involved officers. All interviews should be audio or video recorded if feasible. The DA should make reasonable efforts to communicate with and coordinate with law enforcement agencies to ensure the integrity of the investigation and that the release of any information is done in compliance with ethical obligations. During the course of the investigation, it is the policy of the SBI to release the name of the officer(s) involved and not to appear at press conferences with the DA. The SBI is not the only agency that conducts these types of investigations. Therefore, the DA should become familiar with the policies and procedures of any agency that is conducting a use of force investigation.

⁵ Note that since 2008, North Carolina law has required the SBI to investigate fatal shootings by police officers if the family of the deceased, via the District Attorney's Office, requests such an investigation within 180 days of the death. N.C. Gen. Stat. § 143B-917 (2014). For example, even though the Charlotte-Mecklenburg Police Department (CMPD) has a dedicated Officer Involved Shooting Team to handle these investigations, if a request by the family is made for an independent investigation by the SBI, CMPD may cease its investigation and turns over its files to the SBI (CMPD Homicide Officer Involved Shooting Protocol, presented to the NC Best Practices Committee, 1/15/16, by CMPD Major Cameron Selvey).

⁶ For example, in Prosecutorial District 18, the practice is for the law enforcement agency involved to make an immediate request to the SBI and follow that up with notice to either the elected DA or Chief Assistant ADA. The DA then makes a separate request to the SBI so together, the law enforcement agency and DA request the SBI's investigative assistance.

The SBI should brief the DA as soon as practicable and throughout the investigation. Once an investigation is complete, the case agent should brief the DA, the head of the law enforcement agency, and the district SAC. At the conclusion of the investigation, a copy of the case file and the final report should be delivered to the DA. A thorough investigation may require a significant amount of time. The SBI estimates that while the majority of the file will be complete within 6-8 weeks, it may require an additional 2-3 months, and in some cases even longer, for the completion of the final report. In the interim, it is important to have consistent communication and coordination among agencies.

Multiple requests are regularly made by various entities throughout the investigation for information. Several factors, including ethical obligations,⁷ the integrity of the investigation,⁸ privacy concerns,⁹ and statutory requirements¹⁰ need to be considered when deciding how to respond to these requests. Those considerations need to be balanced with the need for public confidence in the investigation. Early in the investigation, DAs should anticipate requests to other agencies for the release of public records such as 911 calls and radio traffic.¹¹ Protective orders may be used to prevent the release of these records when doing so would jeopardize a fair trial or undermine an ongoing investigation.¹²

Many requests for information come from the media, and the DA should be prepared with a plan to respond to inquiries and release information in accordance with their ethical obligations.¹³ While there are different approaches, at the beginning of an investigation, limited release of information can

⁷ See, e.g., N.C. Gen. Stat. § 132-1.4(e) (2014); The North Carolina State Bar Rules of Professional Conduct, Rules 3.6, 3.8 (effective July 24, 1997).

⁸ N.C. Gen. Stat. § 132-1.4(d) (2014).

⁹ Id.; see also N.C. Gen. Stat. § 15A-904 (2014).

¹⁰ N.C. Gen. Stat. § 132-1.4(d) (2014).

¹¹ N.C. Gen. Stat. § 132-1.4(e) (2014).

¹² Id.

¹³ N.C. Gen. Stat. § 132-1.4(e) (2014); The North Carolina State Bar Rules of Professional Conduct, Rule 3.8 (effective July 24, 1997).

be beneficial so that the investigation can proceed independently. In fact, DAs should exercise caution in commenting to the press about the facts of an ongoing investigation.

With the rise of digital evidence, there is a great probability that some sort of video will exist, whether from a dashboard camera, body-worn camera, or even a cell phone video taken by a bystander. It is important to consider whether the video should be released, the timing of the release, and who should release it.¹⁴ The public, the media and the family may be strong advocates for early release of video footage. Additional considerations in releasing a video or other evidence include: the limitations and/or requirements for release of information pursuant to applicable law,¹⁵ any evidence that has already been made public and whether the family has had an opportunity to review the evidence. While public concern is also a consideration, release of a video too early, or without context, could jeopardize the integrity of the investigation. It is important to bear in mind that the DA may not have control over whether video footage becomes public. If a bystander with a cell phone captured the incident, he or she may release it to the media or post it online. The DA does have some control over when public records such as 911 recordings and law enforcement radio traffic will be turned over to the media. The media can immediately make a public records request for this type of information, so the DA should be familiar with the applicable statute related to the release of public records.¹⁶ The statute gives the DA authority to seek a protective order if “release of information will jeopardize the right of the State to prosecute a

¹⁴ House Bill 972, effective October 1, 2016, greatly limits the District Attorneys abilities with respect to video. The law allows people who are recorded, or their representatives, to view the video if the law enforcement agency agrees. The police chief or sheriff will decide whether to grant access. The agency can consider a number of factors, including whether disclosure may harm someone’s reputation or jeopardize someone’s safety, or if confidentiality is “necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation.” If access is denied, interested persons must seek a court order to view it, and that will only be granted if the court finds that the agency abused its discretion in denying the request. Importantly, a court order is required for the general release of police camera footage. Thus, should a DA’s office desire to release the footage, a Superior Court Judge’s order must be obtained. The law further defines these videos as not public records or personnel records.

¹⁵ N.C. Gen. Stat. § 132-1.4 (2014); N.C. Gen. Stat. §§ 15A-903, 904 (2004).

¹⁶ See N.C. Gen. Stat. § 132-1.4 (2014).

defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation.”¹⁷

Communication with the family is critical. Early in the investigation, the family may contact the DA’s office. It is important to be responsive, communicate with the family and explain the process. If the family retains civil counsel, he or she may speak with the media, raise additional questions, and even initiate and conduct their own investigation. Throughout this process, DAs should monitor that investigation and be prepared to respond to issues if necessary.

Beyond the media, a DA should consider communicating with community leaders or arranging a town hall meeting. It is wise for DAs to develop these relationships even before a use of force case arises. This affords the DA and the community an opportunity to dialogue about the community’s views on other issues, not just those surrounding a specific case. It is important to remember that the decision whether to charge is the DA’s alone, and it is a legal one, not one that is emotionally or agenda driven. Open communication with community leaders allows an opportunity for community leaders to help explain a decision to the public once it is made.

There is no time limit in which a charging decision has to be made; however, once an investigation is complete, a decision should be made without unnecessary delay. A DA may choose to solely make the charging decision. Others may utilize a team approach. Another option is to implement a blind review, in which the DA and experienced prosecutors conduct independent reviews of the file. Then, they come together, discuss their findings and legal conclusions and the DA makes a final decision. The DA may also consider presenting the case to the grand jury.

¹⁷ N.C. Gen. Stat. § 132-1.4 (2014).

Once a decision whether the officer used excessive force is made, the DA needs to determine what information to release and to whom. As with all criminal investigations, DAs are not required to release the report unless ordered by a court.¹⁸ Civil counsel or police attorneys can seek a court order for the report's release.¹⁹ Many DAs' offices have a designated and secure file cabinet for maintaining the files of all use of force investigations. If the officer is to be charged, the DA may want to allow the head of the law enforcement agency to come in and look at the report first. When the officer is not to be charged, the DA should consider notifying the officer/agency first. The family should also be notified, and the DA should consider making himself or herself available to explain the decision. The investigating agency may also be present for this meeting.

Finally, after the charging decision is made and the appropriate parties have been notified, the DA should consider contacting the media, holding a press conference or writing a detailed media release. If the officer is to be charged, the DA should refrain from "making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."²⁰

Officer-involved shootings and other use of force incidents have captured both local and national attention. At a time of heightened public interest and scrutiny of prosecutorial decisions, we have the burden to prove our cases beyond a reasonable doubt while exercising sound, independent and impartial judgment. The District Attorney has the authority and responsibility to prosecute violations of our criminal laws. This responsibility includes charging decisions in officer-involved cases. Cases that are fully and fairly examined will help ensure confidence that justice is served for everyone involved.

¹⁸ N.C. Gen. Stat. § 132-1.4(a), (b)(1) (2014).

¹⁹ Id.

²⁰ The North Carolina State Bar Rules of Professional Conduct, Rules 3.6, 3.8(f) (effective July 24, 1997).

