What Happened to the Perception of the Officer?

Description

The Issues with watching the video before writing a Use of Force Report.

Over the past few weeks, I have seen more and more articles regarding the policy of allowing police officers to view video of an incident before writing their use of force report, which is incredibly concerning. It appears that individuals across the country have decided to be reactionary to “win” over the officer, rather than prescriptive to “protect” the officer. When it comes to the subject of watching the video from your body-worn camera, do you want to feel good about your case now, or later? You cannot have it both ways. I would ask that you leave your preconceived notions right here and allow us to explain the rationale behind protecting officers who use force and are wearing a body-worn camera.

Let’s be clear, this is nothing new. Use of force has been captured by video long before departments started implementing body-worn cameras in daily operations. Most of those videos were taken by the public and officers did not have the opportunity to view them before they were released. I have seen numerous comments that not allowing an officer to watch his video before writing a use of force report serves only one purpose: “It’s a trap!” These commentators claim that this process leads to a game of “gotcha” and is intended to “catch” the officer in a lie. This thinking is ludicrous and short-sighted insofar as protection of the officer is concerned. It is my hope that this article will assist police executives as they engage in this most necessary, but admittedly tough conversation.

Let’s set some ground rules for this discussion. First, I believe every department should have a clear, concise policy that sets up the process and procedure for viewing videos by involved officers and others that were present on the scene. Second, I have no concerns with officers viewing videos recorded during the course of their daily operations for documentation purposes including, but not limited to, criminal investigations, witness and victim interviews, suspect interviews, and general contacts with the public. Some will challenge the policy of allowing officers to view video by stating that criminal suspects are not allowed to view video prior to their interviews. The response to this sentiment is that we allow officers to view video to assist in memory mining and recollection. The question then becomes “why can’t we use this same reasoning for use of force incidents?” This is where confusion sets in, but where I hope to bring clarity. The answer lies within the legal interpretation of the “objectively reasonable” standard. No one, however, is talking about the legal implications of this policy and practice, which may be undermining the application of *Graham v. Connor*.

As you undoubtedly know, there are opposing opinions on the issue of when officers may view a video – *before or after writing* their report or participating in an interview. I, and many of my colleagues who regularly deal this issue, solidly agree with the recommendation that officers *NOT* be allowed to view the video prior to writing the report or participating in an interview. Granted, this is not consistent with the position of many in policing, particularly union leaders and their attorneys, but it is consistent with the view of many public interest organizations, including the ACLU. Most importantly, it is consistent with the views of the public at large, to whom we are ultimately responsible.

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Having spent many years developing policy and conducting training for use of force, it is clear that the application of an officer's perception is a foundational principle. After attending the Force Science certification training, and watching experts testify in court on issues of memory and perception, I agree that we tend to remember things in bits and pieces. Our memory is not a fluid video, and we are inclined to experience what experts call tunnel vision and auditory exclusion. I think we can all agree that once the officer watches his/her video prior to writing his/her report, the video fills in the officer's memory.

Those who take the position that officers should be allowed to view videos before writing their report generally believe this process prevents the officer from being caught unintentionally "lying," and/or that it will result in a more accurate, complete and comprehensive report or statement. For the most part, these beliefs are sincerely held in part due to the propensity of police critics to quickly leap to the conclusion that officers are being untruthful when even the slightest variance between an officer's statement and an event is depicted on video. Honestly, critics will often quickly allege untruthfulness with the slightest provocation. Of course, when writing a report or providing a statement post viewing a video, an officer is able to prepare a more complete, detailed, comprehensive report of the facts and circumstances of the event, moreover one that closely matches the events depicted in the video. Therein, however, lays the problem. The problem being this: is it the truth? By viewing the video pre-report/interview in an effort to mitigate an allegation of untruthfulness, the officer is allowed, or more accurately encouraged subtly or directly, to adapt his or her documentation of his/her *perspective of the threat or circumstances at the time force was used* to more closely match contents of the video. While one can debate the issues of accuracy or untruthfulness, one thing is clear; viewing a video prior to preparing a report or providing a statement regarding a use of force *influences* an officer's representation/documentation of his/her *perspective of the event at the time he/she used force.*

As you know, *Graham v. Connor* established the "objective reasonableness" standard for officers' use of force. It held that an officers' use of force is judged based on the *totality of circumstances, from the perspective of the officer, on the scene, at the* ***moment*** *force was used, without 20/20 hindsight, in circumstances that are tense, uncertain and rapidly evolving.* The so-called *Graham factors* used to determine *reasonableness* are set forth as: *1) the severity of the crime; 2) whether the subject was an immediate threat to the officers or others; 3) how the subject was actively resisting arrest (seizure); and how the subject was attempting to evade arrest by flight.*

This is important to remember when determining whether to allow an officer to view a video prior to describing his or her ***perspective of the event at the moment force was used.*** There is a high likelihood that such viewing will allow, or even encourage directly or subtly, an officer to modify his or her description of the factors. This creates a *perspective* that is, in effect, unintentional untruthfulness. If we use this process to dilute the standard of review for an officer's use of force, the courts may begin to reassess the concept of an officer's "perspective."

To dismiss the importance of the above-described *protection* afforded by *Graham* is, in my view, a disservice to policing and the integrity of the process. Let's also not forget that videos are two dimensional recordings from the point of view/perspective of the area in which the camera is pointed. The quality of the camera may record things better and clearer, even in darkness, than the officer, who has the added the pressure of raised heartbeat and physiological stress. Will this change the norm of perception and process for remembering?

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Furthermore, pre-statement/interview viewing of a video sets up a trap for officers when subsequently testifying in court. An astute attorney, and there are a few, need only ask this strategic question: “Officer, did you view the video before you wrote your report?” If the officer responds “yes,” he is then asked whether the report is based solely on his perspective at the time he used force. Then it is “game on” as the attorney goes through each and every excruciating detail depicted on the video in an effort to cast doubt on the officer’s truthfulness by pointing out details the officer did not, or could not, have possibly internalized prior to/at the moment force was used. This policy may also serve to undermine protections afforded an officer for perception issues caused by tunnel vision, inattentional blindness, auditory exclusion, or other factors affecting an officer’s perspective or recollection of events.

This all started back on New Year’s Day of 2009; Oscar Grant was fatally shot by Bay Area Rapid Transit Police (BART) Officer Johannes Mahserle. Mahserle’s defense attorney argued that he mistakenly shot Grant with his pistol, intending to use his Taser, when he saw Grant reaching for his waistband. The events were captured on multiple digital videos and cell phone cameras, and watched millions of times, even by involved officers. An outside law firm that was hired to conduct an independent operational study commented on the practice of police officers watching the videos of a deadly force incident. The report stated:

Officers should not view video of an incident prior to being interviewed. Allowing officers to view video prior to an interview allows them to either subconsciously fill in the blanks where there are no memories of the incident or preplan for alibis for substandard conduct. Either way, allowing officers to view video of the event prior to the interview erodes the public’s faith in the process and unnecessarily impacts the investigation.[1]

While the language is strong, we urge agencies to consider the negative effect on the officer’s defense that such viewing may have many years later in both criminal cases and civil litigation.

So, your next question is: “So *when* should officers view the video of the use of force incident?” The recommended practice in most use of force incidents is for the officer to complete his or her use of force documentation and then immediately sit down with the supervisor and watch the video. If there are any discrepancies between the officer’s report and the video, the supervisor can provide an explanation in the supervisor’s investigation report. In deadly force incidents, after the officer gives his/her perceived version of events, the video can be watched during the officer’s interview and any discrepancies can be addressed at that time.

In my view, allowing an officer to view the video prior to writing a report, or participating in an interview (in serious use of force cases, in particular), is a serious mistake, particularly for the officer and his or her agency. The most important part of a force investigation is the officer’s ability to articulate his/her perception of the incident, not match his/her perception to that of the recorded video.

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[1] *Review of BART PD Policies, Practices and Procedures re: New Year's Day 2009*, page 5.

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