



# Appleton Police Department

**Jack's Apple Pub Officer Involved Shooting  
Use of Force Team Review**

**Incident Date: May 21, 2017**

**Review Date: July 13, 2017**

**Assistant Chief Todd Olm & Lieutenant Polly Olson  
Appleton Police Department**



Appleton Police Department  
INTEROFFICE MEMORANDUM

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Date: July 21, 2017  
To: Chief Thomas  
From: Assistant Chief Todd Olm & Lieutenant Polly Olson  
Subject: Jack's Apple Pub Use of Force Review Team

By policy and under your direction, Assistant Chief Olm assembled a Use of Force Review Team to conduct an administrative review of Lieutenant Jay Steinke's use of deadly force at Jack's Apple Pub, 535 W. College Avenue, Appleton, WI on May 21, 2017. Assistant Chief Olm delegated the coordination of the review for the team to Lieutenant Olson.

The Appleton Police Department's *Use of Force* policy gives guidance and authority for this review. Under V., J., 4, it states:

The Use of Force Review Team shall conduct an administrative review of the following uses of force:

- a. **All incidents involving the accidental or intentional discharge of a firearm, excluding the intentional use to dispatch an animal or the use of kinetic energy impact projectiles, unless their use causes great bodily harm or death.**
- b. The intentional use of an object or technique on a person, the use of which would likely cause death. This is an untrained use of deadly force but may be justifiable under the circumstances.
- c. All incidents resulting in great bodily harm to a person by an officer's use of force.
- d. Any additional situations as directed by the Assistant Chief.

The purpose of this review is to determine whether the use of force was consistent with the policies and Rules and Regulations of the Appleton Police Department.

Upon conclusion of this review, the Use of Force Review Team shall submit to the Chief of Police a written report of their findings and conclusions. The report shall include a description of how the review was conducted, listing all facts established by the review, legal/policy considerations examined, and a recommended disposition.

**The Use of Force Review Team report shall include findings that the officer's use of force was:**

- a. Justified as trained
- b. Dynamic application of a trained technique
- c. Not trained, but justified under the circumstances
- d. Not justified

### **Use of Force Review Team**

This Use of Force Review Team was established due to the Jack's Apple Pub Officer Involved Shooting on May 21, 2017. By policy, the Use of Force Review Team includes the following personnel:

- Assistant Chief (Chairperson)
- Investigative Services Unit Coordinator
- The Assistant City Attorney assigned to the APD
- One member selected by the Chief of Police
- One officer selected by the involved officer

### **Use of Force Team Members**

- Assistant Chief Olm – Assistant Police Chief (Chairperson)
- Captain Rudy Nyman – Investigative Services Commander
- Assistant City Attorney Amanda Abshire
- Captain Larry Potter – Member selected by Chief of Police
- Lieutenant Todd Peters – Member selected by involved officer (Lt. Steinke)
- *Assistant City Attorney Darrin Glad – Non-voting observing member*
- *Lt. Polly Olson – Non-voting member selected by Assistant Chief Olm to facilitate the meeting*

### **Appleton Police Department Officer Using Force**

Appleton Police Department Lieutenant Jay Steinke was identified as discharging his firearm during this incident. His use of deadly force injured one person and caused the death of another.

### **Preparation**

In preparation for the review, Lieutenant Olson coordinated with other team members to review all of the existing evidence, documentation, offense reports, photos, and audio/video files pertinent to this review.

Prior to the meeting, for their review, each team member was provided with a copy of the Green Bay Police Department and Appleton Police Department offense reports related to this incident.

Additionally, the following information and evidence was examined by the Use of Force Team for consideration:

- Jack's Apple Pub Use of Force Review Committee PowerPoint Presentation
- Appleton Police Department's Use of Force policy
- Appleton Police Department's Officer-Involved Critical Incident policy

- Appleton Police Department's Firearms Regulation and Proficiency policy
- Appleton Police Department's training records for Lieutenant Steinke
- Green Bay Police Department's Report #17-205720 & 17-206406:
  - Case Reports
  - Narratives
  - Lt. Steinke's Transcribed Interview
  - Officer Aguilar's Transcribed Interview
  - Written Witness Statements
  - Crime Scene Log
  - Crime Scene Photos
  - Evidence Logs
  - Total Station drawings (map sketches of scene)
- Wisconsin Department of Justice's Firearms Training Guide for Law Enforcement Officers
- Wisconsin Department of Justice's Defense and Arrest Tactics (DAAT) Training Guide for Law Enforcement Officers
- Wisconsin Department of Justice's Tactical Response Training Guide for Law Enforcement Officers
- Appleton Police Department Audio/Video Recordings (Traffic camera and AXON Body Camera footage from May 21, 2017)
- Jack's Apple Pub Video Recordings from May 21, 2017
- Outagamie County Dispatch Recordings (9-11 Calls and Officer Radio Traffic)
- Appleton Police Department CAD Incident Detailed Report 17-019325
- Wisconsin State Laboratory of Hygiene Laboratory Reports for Lt. Steinke's Blood Samples

**Meeting**

The Use of Force Review Team met on July 13, 2017 to review this incident.

## Section One

### Summary of Events

#### **Incident 17-019325**

On 05/21/2017, Lt. Steinke and Ofc. Aguilar were on foot patrol in the 500 block of W. College Avenue. They were standing in front of C-Vine, which is one building to the east of the Apple Pub. At 0138 hrs. Lt. Steinke was alerted to a disturbance involving a man who fired a shot within the Apple Pub by a bartender who had exited the front of the business. Upon receiving this information, Lt. Steinke and Ofc. Aguilar ran westbound to the intersection of State Street and College Avenue. Lt. Steinke took his weapon out of his holster as he approached the corner of the building and headed south to the door on the west side of the business. Ofc. Aguilar took a backup position behind Lt. Steinke.

Lt. Steinke entered the west door with his weapon drawn and identified a male subject running towards him with a weapon in his left hand. Lt. Steinke fired 4 rounds from his service weapon as he was getting pushed out of the door by patrons running from the business.

Lt. Steinke took a position of cover behind a vehicle parked on State Street facing north. As additional units arrived on scene, a perimeter was quickly established securing the exit points of the business. At this time, officers believed there was an active shooter in the business, quite possibly in the basement area. The Apple Pub shares a common basement area with Mr. Taco, which is located to the south of the business. A rapid response team was quickly assembled to clear and secure the scene.

When the team entered the front door of the business, they observed 2 male subjects in the business with apparent gunshot wounds. The first subject, later identified as Henry Nellum, had sustained a gunshot wound to his left arm. He was properly secured and escorted to the ambulance to be transported to the hospital. The second subject, later identified as Jimmie Sanders, had a fatal gunshot wound to his lower back area. Mr. Sanders was unresponsive and unconscious when officers began to assess his medical needs.

The team proceeded to clear the business, taking a position at the top of the stairs to the basement. At that time they allowed paramedics to approach the scene to render aid to Mr. Sanders.

Mr. Sanders was transported to the hospital where he died. It was later determined via an autopsy that Mr. Sanders had sustained an injury to his left iliac artery, causing rapid blood loss and his death.

After the basement area was cleared and the scene secured, the Green Bay Police Department was asked to assist our agency by conducting the investigation into the shooting incident.

The Green Bay Police Department conducted multiple interviews with victims and witnesses, reviewed video from inside of the Apple Pub, reviewed traffic camera video, obtained video from a witness of a recording taken with her cell phone, and reviewed body camera video from officers.

It was through this investigation we learned Henry Nellum was involved in a physical disturbance within the Apple Pub with a male subject identified as Leander Moffit. During this fight Nellum withdrew a handgun from his pocket and fired. A bullet struck the floor of the bar. Moffit sustained a shoulder injury from this incident as well. There was also a female subject, later identified as Dree Sullivan, who attempted to intervene with the fight between Nellum and Moffit. Investigators later learned Sullivan is Nellum's girlfriend.

After a round was fired by Nellum, an employee of the Apple Pub, later identified as Andrew Evers, ran out the front door of the bar and alerted Lt. Steinke.

As mentioned previously, Lt. Steinke made entry to the business using the west side door. He only made it a short distance into the business before locating Nellum. While firing his weapon, he was pushed out of the business by a female subject, later identified as Danielle Kubaraperu. Kubaraperu is the girlfriend of Jimmie Sanders.

The video from inside of the Apple Pub shows Jimmie Sanders standing near the bar by the front door of the Apple Pub when the initial round is fired by Nellum. Sanders then starts to walk past the front door and towards the back of the business. Sanders is right behind Nellum when Lt. Steinke enters thru the west door. Sanders then turns around, exposing his back to Lt. Steinke when Lt. Steinke identifies the threat and engages Nellum.

Nellum hands his gun to Sullivan, who is observed exiting the bar using the west doors. She walks southwest, and hides the gun under her car where it is later found by Green Bay detectives.

## **Section Two**

### **Legal and Policy Considerations: Foundations for Review**

In order to determine if the level of force used by Lieutenant Steinke was in compliance with the Appleton Police Department policy, the Review Team must assess the content and foundation of the Use of Force Policy.

#### **WHAT ARE THE LIMITS ON USE OF FORCE?**

As a Wisconsin law enforcement officer, the legitimate use of force is limited by a hierarchy of laws and standards. These include the following:

1. The U.S. Constitution
2. Wisconsin Law
3. Agency Policy
4. Officer Training

Each of these laws and standards establish limits on what force an officer can legitimately use.

#### **The U.S. Constitution**

The 4<sup>th</sup> Amendment to the Constitution prohibits “unreasonable search and seizure.” In 1989, the United States Supreme Court found that law enforcement officers’ use of force against subjects was a type of seizure, and therefore, under the Constitution had to be “objectively reasonable.” This case was *Graham v. Connor*, and it is one of two landmark cases in law enforcement use of force. In its decision, the Court laid out the issues to consider when deciding if a particular use of force is reasonable. These include:

- The severity of the alleged crime at issue
- Whether the suspect poses an imminent threat to the safety of officers and/or others
- Whether the suspect is actively resisting or attempting to evade arrest by flight

The Court stated that reasonableness should be judged under the totality of the circumstances from the perspective of a reasonable officer at the scene with similar training and experience. The Court also noted that officers must frequently make split-second decisions. By saying that the use of force had to be “objectively reasonable,” the Court specifically excluded consideration of the officer’s intentions and motivations.

A second U.S. Supreme Court case, *Tennessee v. Garner (1985)*, has particular importance in deadly force decisions. Tennessee law permitted an officer, once having given a suspect notice of intent to arrest for a crime, to use “all the necessary means to effect the arrest” if the suspect fled or resisted. In this case, an officer shot and killed a fleeing burglary suspect whom the officer believed was unarmed. The Court, deciding the case in 1989, said it was **not** reasonable to use deadly force against an unarmed fleeing felon, unless there is “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others” if not immediately seized.

### **Wisconsin Law**

Wisconsin has several specific statutes governing use of force by law enforcement officers. One that is particularly important is §939.45, which describes the concept of privilege.

#### **§939.45 Privilege**

The fact that an actor’s conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:

1. When the actor’s conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47; or
2. When the actor’s conduct is in defense of persons or property under any of the circumstances described in s. 939.48 or 939.49; or
3. When the actor’s conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office; or
4. When the actor’s conduct is a reasonable accomplishment of a lawful arrest.

The concept of privilege is very important. As a law enforcement officer, if you are acting in good faith and seeking to achieve legitimate law enforcement objectives (including making arrests), you can legally use force *that could otherwise be considered a criminal act*. Naturally, if an officer uses force for some unauthorized purpose—such as to retaliate against someone—the use of force is *not* privileged, and the officer may be subject to criminal charges.

#### **Agency Policy**

Under §66.312 of the Wisconsin Statutes, the agency must have a policy on use of force by law enforcement officers in the performance of their duties. This policy may be more restrictive than Wisconsin law. The employing agency has a set of policies and procedures that describe how officers are expected to carry out their duties.

## **Appleton Police Department Use of Force Policy and Officer Training**

Below are *selected excerpts* from the Appleton Police Department Use of Force Policy and the Wisconsin Department of Justice's Defense and Arrest Tactics (DAAT) Training Guide for Law Enforcement Officers.

### **Department Policy**

The following are different standards and concepts, relative to this review, as set forth by the *Appleton Police Department's Use of Force Policy*.

### **Purpose**

The purpose of this document is to establish a policy for the use of force by sworn personnel to effect the detention, seizure, or arrest of a person. The policy also establishes guidelines for using force in self-defense or defense of another, to prevent or intercede in an attempt at self-injury, in defense of property, and in fulfilling the community caretaker function. The guidelines on proper use of force established in this policy will ensure due process for persons as well as provide protection for officers and the Department.

APD Officers use of force decisions and options shall be based on the Defense and Arrest Tactics (DAAT) program of the State of Wisconsin and other advanced standing techniques as authorized by this policy

### **Policy**

It is the policy of the Appleton Police Department that officers shall use only that amount of force that is reasonably necessary to achieve a lawful objective. The force used shall be in accordance with the Constitution of the United States and the Constitution of the State of Wisconsin, APD policy, and the officer's training.

### **Definitions**

1. Non-Deadly Force:

An amount of force that, under normal circumstances, would not be expected to result in great bodily harm or death.

2. Deadly Force:

The intentional use of a firearm or other instrument, the use of which would result in a high probability of death. *(As defined by the WI DOJ Defensive and Arrest Tactics; A Training Guide for*

*Law Enforcement Officers, December 2014, which is adopted by the APD Use of Force Policy under I. Purpose)*

3. Reasonable Force:

An act by a police officer in the performance of duty used to accomplish a legitimate law enforcement goal and objectively reasonable under the totality of circumstances as perceived by the officer at the time the officer acted. The totality of circumstances perceived by the officer can include statements made by the person or a known prior history of resistive or assaultive behavior.

4. Objective Reasonableness Standard:

The standard established by the U.S. Supreme Court in *Graham v. Connor*, and its progeny, which says that reasonableness should be judged under the totality of the circumstances from the perspective of a reasonable officer at the scene with similar training and experience. Three elements of the standard are:

1. The severity of the alleged crime at issue.
2. Whether the person poses an imminent threat to the safety of officers and/or others.
3. Whether the person is actively resisting seizure or attempting to evade seizure by flight.

**General Guidelines**

1. Officers shall not continue to use force beyond that which is objectively reasonable to maintain control once the person has stopped resisting and control the person has been established.
2. An officer shall not threaten the use of any control device, impact weapon, canine or firearm unless its use would be objectively reasonable.

**Deadly Force**

**Deadly Force Behavior**

- a. A person is causing an imminent threat of great bodily harm or death to another person. The imminent threat criteria are:
  - (1) Intent: expressed through words and/or actions.
  - (2) Weapon: an object or means capable of causing great bodily harm or death.
  - (3) Delivery System: the ability to utilize the means or weapon.

b. A person has caused or attempted to cause great bodily harm or death to another person and is still an uncontrolled threat. The “fleeing and dangerous person” principles established in the US Supreme Court Decision of *Tennessee v. Garner* are to be applied.

- (1) An uncontrolled or fleeing person that the officer has probable cause to believe has caused or attempted to cause great bodily harm or death to another person and the officer has probable cause to believe that the person will continue to cause or attempt to cause great bodily harm or death to another person if not immediately stopped by whatever means necessary including deadly force.
- (2) The imminent threat criteria outlined above does not apply in these situations

### **Deadly Force Decision**

1. When an officer has determined that a person has met the criteria for deadly force behavior the officer may respond with the use of deadly force to stop the threat after considering:
  - a. The use of deadly force is the only option reasonably available to the officer that is capable of immediately stopping the deadly threat.
  - b. The use of a verbal challenge or warning to the person prior to using deadly force, if feasible.
  - c. “Target Requirements”
    - (1) Target Identification: The officer has identified the source of the deadly threat.
    - (2) Target Isolation: The officer has reasonably isolated the source of the deadly threat so the use of deadly force does not unreasonably place other person at significant risk of death.
      - (a) “Greater Danger” exception to target isolation: This exception allows an officer to shoot without target isolation if the consequences of not immediately stopping the threat would be worse than the possibility of causing death to an unintended person.

**Deadly Force Application:** A firearm is the only APD trained deadly force option.

- a. The intentional discharge of a firearm directed at a person.
- b. Exceptional Circumstances discharge of a firearm.
  - (1) Controlled and directed fire toward the location of the deadly threat with the purpose of preventing the threat from shooting at an officer or another person. Examples include, but not limited to:
    - (a) Officer(s) or uninvolved citizens are receiving fire with no reasonable means of cover or retreat.
    - (b) Officer(s) or uninvolved citizens are “pinned down” or wounded and in a vulnerable location in need of immediate evacuation to a safer location.
    - (c) Bounding over-watch: This technique is used to move officers across a vulnerable area to a position of tactical advantage.
- c. The intentional use of an object or technique on a person, the use of which would likely cause death.
- d. An officer shall not discharge a firearm as a warning. “Warning shots are prohibited.”

#### **First Aid and Medical Assistance**

- 1. Officers who use force against a person shall ensure the subject is monitored for injury as soon as the scene is secured.
- 2. If an injury is observed or reported by the person, officers shall provide first aid and/or request medical assistance as needed.

## **APPROVED INTERVENTION OPTIONS (Addendum A of Use of Force Policy)**

- A. *Presence*
  - 1. *Use of Professional Communication Skills*
  
- B. *Passive and/or Active Resistance*
  - 1. *Control Alternatives*
    - a. *Escort Holds*
      - (1) *Blanket the Arm*
      - (2) *Escort Hold*
      - (3) *Alternative Escort Hold*
      - (4) *SPEAR Escort*
  
    - b. *Compliance Holds*
      - (1) *Come Along*
      - (2) *Pressure Points*
        - (a) *Mandibular Angle*
        - (b) *Hypoglossal*
      - (3) *Knee on Stomach/Back*
  
    - c. *OC Spray*
  
    - d. *Decentralization*
      - (1) *Hug Yourself*
      - (2) *Secure the Head*
      - (3) *Lower Your Center*
      - (4) *Push In/Pull Down*
      - (5) *Leg Wheel*
      - (6) *Alternate Hug Yourself*
  
    - a. *Electronic Control Device (ECD)*
  
- C. *Active Resistance/Continued Active Resistance*
  - 1. *Protective Alternatives*
    - a. *SPEAR*
      - (1) *Flinch*

- (2) *Tactical*
    - b. *Active Countermeasures*
      - (1) *Focus Strikes*
        - (a) *Fist/Palm Strikes*
        - (b) *Kicks*
          - (i) *Front Kick*
          - (ii) *Angle Kick*
        - (c) *Knee Strikes*
        - (d) *Elbow Strikes*
      - (2) *Vertical Stuns*
        - (a) *Wall Stun*
      - (3) *Incapacitating Techniques*
        - (a) *Brachial Stun*
    - c. *Intermediate Weapon*
- D. *Assaultive Behavior*
  - 1. *Ground Stun*
  - 2. *Advanced Striking Techniques*
    - a. *Palm Strikes*
    - b. *Eye Rake*
    - c. *Close Quarter Combat Elbow Strikes*
  - 3. *Advanced Control Techniques*
    - a. *Mandible Jaw Push*
    - b. *Elbow Roll*
    - c. *Arm Sweep and Strike*
    - d. *Wrist Lock*
  - 4. *Kinetic Energy Impact Projectile*
    - a. *12 Gauge Less-Lethal Munitions*
    - b. *37 MM Less-Lethal Munitions*
  - 5. *K-9 Apprehension*
- E. *Deadly Force Behavior*

1. Firearm
  - a. Intentional Discharge Directed at Person
  - b. Controlled and Directed Cover Fire

**Wisconsin Department of Justice's Defense and Arrest Tactics (DAAT) Training Guide for Law Enforcement Officers (dated December 2014)**

The following are different standards and concepts, relative to this review, as set forth by the Wisconsin Department of Justice's Defense and Arrest Tactics (DAAT) Training Guide for Law Enforcement Officers.

**Officer Training**

Under Defense and Arrest Tactics (DAAT), an officer learns a number of effective physical techniques to gain compliance from a subject. The officer may have been trained in other methods (such as one of the martial arts) as well. When an officer uses force as part of his/her law enforcement duties, the use of force must fit into one of these categories:

1. A trained technique.
2. A dynamic application of a trained technique (*i.e.*, not quite the classroom model, but as close to it as possible under the circumstances).
3. A technique not trained, but justifiable under the circumstances.

**WHEN CAN OFFICERS USE FORCE?**

Law enforcement officers may use force legitimately when it is needed to achieve control in five specific situations:

- To achieve and maintain control of resistive subjects
- To detain persons reasonably suspected of criminal behavior
- To make lawful arrests
- To defend themselves or others
- To prevent escape

The purpose of a law enforcement officer's use of force is to *control*.

**THE DISTURBANCE RESOLUTION MODEL**

The outline contained within the DAAT manual presents a more specific model for officers on how to proceed when responding to any sort of disturbance or potential disturbance.

**Approach Considerations**

### *Decision Making*

Before intervening in a disturbance or even making contact with a subject, a law enforcement officer must answer two fundamental questions:

- Is it legal for me to take the action that I am considering?
- Is it wise for me to do so at this time?

If the intervention is not within the scope of authority, any action taken by a law enforcement officer may be excessive—however reasonable it seems on its face.

### *Tactical Deployment*

- Control of Distance
- Relative Positioning
- Relative Positioning with Multiple Subjects
- Team Tactics

### *Tactical Evaluation*

- Threat Assessment Opportunities
- Officer/Subject Factors
- Special Circumstances (see below)
- Level/Stage/Degree of Stabilization (see below)

#### Special Circumstances

A number of other factors affect your threat assessment. Some of these include:

- *Reasonable perception of threat.* The actions a law enforcement officer takes must be based on his/her reasonable perception of the threat. The officer's perception— that a subject was armed with a gun, for example— may turn out to be incorrect (e.g., the “gun” was a toy pistol), but if the officer's perception was reasonable, the action in response to that perceived threat may well be justified nonetheless.
- *Sudden assaults.* Naturally, if the subject assaults the officer, another officer, or someone else, the officer's assessment of the threat posed by that subject should increase.
- *Subject's ability to escalate force rapidly.* Even if the subject does not actually assault the officer, his or her ability to do so should affect the officer's threat assessment; i.e., ready access to weapons and relative positioning.
- *The officer's physical positioning.* How the officer is positioned relative to the subject may affect his/her threat assessment. For example, if the officer were at a tactical disadvantage, the officer's threat assessment would be higher than if he/she were in a better position.

#### Level/Stage/Degree of Stabilization

Stabilization refers to the subject's ability to use force. In general, the less stabilization there is, the greater the threat.

### INTERVENTION OPTIONS

<u>MODE</u>	<u>PURPOSE</u>
A. Presence	To present a visible display of authority
B. Dialogue	To verbally persuade
C. Control Alternatives	To overcome passive resistance, active resistance, or their threats
D. Protective Alternatives	To overcome continued resistance, assaultive behavior, or their threats
E. Deadly Force	To stop the threat

Which mode a law enforcement officer chooses in a given situation depends upon his/her tactical evaluation and threat assessment. Note that the same tactic may, depending on the circumstances and the purpose for which it is used, fall into more than one mode. The criterion (as articulated in *Graham v. Connor*) is whether the level and degree of force is objectively reasonable. Five fundamental principles apply:

1. The purpose for use of force is to gain control in pursuit of a legitimate law enforcement objective. If verbalization is effective in gaining control, it is always preferable to physical force.
2. A law enforcement officer may initially use the level and degree of force that is reasonably necessary to achieve control. The officer need not escalate step-by-step through the Intervention Options. As the situation dictates, the officer may move from any mode to any other if he/she reasonably believes that a lower level of force would be ineffective.
3. At any time, if the level of force an officer is using is not effective to gain control, the officer may disengage and/or escalate to a higher level of force.
4. Once the officer has gained control of a subject, he/she must reduce the level of force to that needed to maintain control.
5. A law enforcement officer must always maintain a position of advantage.

#### **Deadly Force Decision-Making**

The legal and policy guidelines presented here provide a conceptual backdrop for the use of deadly force. The following section describes the specific criteria that must be present for the law enforcement officer's use of deadly force to be legitimate.

**The definition of deadly force is:**

The intentional use of a firearm or other instrument, the use of which would result in a high probability of death.

This definition has two important aspects. First, the use must be *intentional*. If a law enforcement officer deliberately hits a person in the head with his/her baton, it could be considered deadly force. On the other hand, suppose the officer attempted to strike a person in the elbow area (an appropriate baton target), but the person ducked or fell, and the baton actually struck his or her head. In this case, the officer's actions would not constitute deadly force—even if the person died as a result of the blow—because the officer did not intend to use deadly force.

Second, the use of the firearm or other instrument must have a *high probability of causing death*. A baton strike to the knee area is not likely to cause death, but it conceivably could do so in certain unlikely circumstances. Because a baton strike to the knee is not likely to cause death, it would not be considered deadly force even if the subject did die.

- High probability means that, considering all the circumstances, the probability of injury or death would be considered great by an ordinarily prudent person. Wis JI-Criminal 1175 (1986)
- High probability means that the probability would be considered great by the ordinary person, having in mind all the circumstances of the case, including the seriousness of the consequence. [Hart v. State, 75 Wis.2d 371, 249 N.W.2d 810 \(1977\)](#)

**The definition of subject behavior that justifies an officer's use of deadly force is:**

Any behavior which has caused or imminently threatens to cause death or great bodily harm to the officer or another person or persons.

Note that this definition is not quite the same as the definition of deadly force: it includes behavior likely to cause great bodily harm as well as death. As defined earlier, an officer may respond to a given level of force with a higher one, in order to control the situation.

The word *imminent* means “about to happen.” An imminent threat is an immediate threat. For a subject's threat to be considered *imminent*, it must meet three criteria:

- Intent
  - Weapon
  - Delivery System
- **Intent.** The subject must indicate his or her intent to cause great bodily harm or death to an officer or someone else. Some of the ways that intent might be shown would include deliberately pointing a weapon at an officer, stating an intention to kill the officer, rushing at an officer with a knife, and so on.

- **Weapon.** The subject must have a conventional or unconventional weapon capable of inflicting great bodily harm or death.
- **Delivery System.** The subject must have a means of using the weapon to inflict harm.

**Preclusion:** Within the DAAT system, a law enforcement officer may use deadly force to respond to behavior, but only if no other reasonable option is available. In other words, deadly force is a last resort. The officer must be able to articulate that, if possible, he/she attempted to escalate through other modes and tactics, and that all options except deadly force were closed. This concept is called *preclusion*. Note that in many deadly-force situations, a law enforcement officer will not have the time or the ability to try other options. If feasible, an officer should give a verbal warning before firing, but again, this is not always possible, and in some cases may not be desirable.

**Target Requirements:** If a law enforcement officer has determined that a threat meets the requirements to permit a deadly-force response, and he/she has decided to shoot, the officer must still fulfill three target requirements:

- Target acquisition
  - Target identification
  - Target isolation
- **Target acquisition.** Target acquisition means simply the officer has acquired an actual target to shoot at. An officer cannot fire blindly in the direction of a sound, for example, because he/she may endanger others. If someone has shot at an officer from an apartment building, he/she cannot return fire until they have a specific target to aim at.
  - **Target identification.** Target identification means that the officer has identified his/her target as the source of the imminent threat. To continue the previous example, just because the officer sees someone at a window in that apartment building, he/she cannot shoot until they verify that the individual they see is the person who shot (or someone else who is about to shoot at them).
  - **Target isolation.** Target isolation means that the officer can shoot at his/her target without danger of harming innocent people. If the person who shot at the officer from the apartment building ran out of the building and into a crowd of people, the officer could not shoot at him or her without endangering others.

The one exception to the requirement for target isolation is called the “**greater danger exception.**” Essentially, this exception allows the officer to shoot without target isolation if the consequence of not stopping the threat would be worse than the possibility of hitting an innocent person. The chance that the officer’s bullet might strike an innocent person is preferable to the likelihood of the suspect killing or injuring many others.

## Section Three

### Analysis of the Use of Force Event

#### Duty status

On 05/20/2017, Lieutenant Steinke was working from 2000 – 0400 as a patrol supervisor in the City of Appleton. He was in full Appleton Police Department duty uniform, carrying all mandated equipment.

#### Mandatory Carry On-Duty Equipment

Uniformed officers shall carry on their person:

- a. Authorized utility duty belt
- b. Loaded primary duty firearm and two loaded extra magazines
- c. Functioning portable police radio
- d. Handcuffs and key
- e. Authorized police baton
- f. Electronic Control Device (ECD)
- g. Police identification card and badge

Lieutenant Steinke was carrying his authorized duty handgun; a Glock Model 17, serial number MUH567, with Department issued Speer Gold Dot Luger 9mm ammunition.

Was Lieutenant Steinke on-duty, carrying all required equipment? Yes  No

#### Firearms Training/Limited Technical Inspection of Weapons

Lieutenant Steinke successfully completed the Appleton Police Departments Handgun Qualification Course on June 07, 2016. This qualification included a Limited Technical Inspection (LTI) of the weapon to include accuracy verification.

Was Lieutenant Steinke up to date with his required firearms training? Yes  No

## Justification for the stop/detention of Henry Nellum

On May 21, 2017, Lieutenant Steinke and Officer Aguilar were on foot patrol in the 300 block of W. College Avenue. They were standing in front of C-Vine, which is one building to the east of Jack's Apple Pub. At 0138 hrs. Lieutenant Steinke was alerted to a disturbance involving a man who fired a shot within the Apple Pub by a bartender who had exited the front of the business. Upon receiving this information, Lieutenant Steinke and Officer Aguilar ran westbound to the intersection of State Street and College Avenue. Lieutenant Steinke took his weapon out of his holster as he approached the corner of the building and headed south to the exit door on the west side of the business. Officer Aguilar took a backup position behind Lieutenant Steinke.

Lieutenant Steinke entered the west door with his weapon drawn and identified a male subject running towards him with a weapon in his left hand. The male was later identified as Henry Nellum. Lieutenant Steinke fired 4 rounds from his service weapon as he was getting pushed out of the door by patrons running from the business.

Was Lieutenant Steinke acting within the scope of his authority and did he have legal justification to make contact with Henry Nellum?

Yes  No

## Subject Behaviors/Reasonable Perception of Threat by Lieutenant Steinke

As Lieutenant Steinke entered the west doors of the Apple Pub, he believed there was an active shooter within the business. He was told by multiple patrons who were exiting the bar "He's shooting in there." Lieutenant Steinke passed the threshold of the doorway and saw Henry Nellum running in his direction with a gun in his left hand.

*"...because additional people keep coming out, extremely emotional, pointing inside, "He's shooting, their shooting," um, I then make the decision that it's an active shooter. I've got to get in to stop whatever's happening inside. Um, so I, I enter from the west door over here and as I'm entering, I'm trying to see as much as I can because the door's already open. The door's propped open with one of those rubber stoppers. Um, and I can't see anybody with a gun, ah, in this immediate area. I then step into the doorway...and, um, I don't see anybody with a gun here and, as I get in, I can see what to me is gun smoke in the air in the lighting. There was small lighting in there and then there's a guy right in front of me, 10 to 15 feet away, and I look into his hand, and he's got a gun in his left hand, and he's moving towards me, and I'm in, in my mind, immediate danger. He's got the weapon, intent, and delivery system." – Lt. Jay Steinke*

## Level of Threat Presented by the Suspect

## Deadly Force Behavior

A person is causing an imminent threat of great bodily harm or death to another person. The imminent threat criteria are:

- (1) Intent: expressed through words and/or actions
- (2) Weapon: an object or means capable of causing great bodily harm or death
- (3) Delivery System: the ability to utilize the means or weapon

Was Lieutenant Steinke's perception of the threat reasonable? Yes  No

## Officers Response to the Presented Threat

**Deadly Force:** The intentional use of a firearm or other instrument (directed at a person) the use of which would result in a high probability of death.

**Deadly Force Option:** A firearm is the only APD trained deadly force option. The intentional discharge of a firearm directed at a person.

## Deadly Force Decision

2. When an officer has determined that a person has met the criteria for deadly force behavior the officer may respond with the use of deadly force to stop the threat after considering:
  - d. The use of deadly force is the only option reasonably available to the officer that is capable of immediately stopping the deadly threat.

Was there any other reasonable option available to Lieutenant Steinke capable of immediately stopping the threat? Yes  No

- e. The use of a verbal challenge or warning to the person prior to using deadly force, if feasible.

At the moment Nellum presented the deadly threat, was it feasible for the officer to provide him with verbal warning to drop the gun? Yes  No

- f. "Target Requirements"

- (3) Target Identification: The officer has identified the source of the deadly threat.
- (4) Target Isolation: The officer has reasonably isolated the source of the deadly threat so the use of deadly force does not unreasonably place other person at significant risk of death.
  - (a) "Greater Danger" exception to target isolation: This exception allows an officer to shoot without target isolation if the consequences of not immediately stopping the threat would be worse than the possibility of causing death to an unintended person.

Did Lieutenant Steinke meet the target requirements? Yes  No

### General Use of Force Guideline

Officers shall not continue to use force beyond that which is objectively reasonable to maintain control once the person has stopped resisting and control of the person has been established.

Lieutenant Steinke addressed the threat by firing his weapon at Henry Nellum. After firing 4 rounds, he exited the bar and sought cover behind a vehicle. He gave commands and sought to stabilize the incident.

Did Lieutenant Steinke appropriately deescalate his use of force once Nellum no longer posed a deadly threat? Yes  No

### Follow Through Considerations

Lieutenant Steinke requested an ambulance immediately after the shooting incident. Paramedics were allowed into the scene as soon as officers could reasonably insure their safety.

### First Aid and Medical Assistance

- 3. Officers who use force against a person shall ensure the subject is monitored for injury as soon as the scene is secured.
- 4. If an injury is observed or reported by the person, officers shall provide first aid and/or request medical assistance as needed.

Did the officers provide adequate medical assistance? Yes  No

## Section Four

### Policy Compliance Findings

#### LIMITS ON USE OF FORCE

As a Wisconsin law enforcement officer, the legitimate use of force is limited by a hierarchy of laws and standards. These include the following:

1. The U.S. Constitution
2. Wisconsin Law
3. Agency Policy
4. Officer Training

Each of these laws and standards establish limits on what force an officer can legitimately use.

#### The U.S. Constitution

The 4th Amendment to the Constitution prohibits “unreasonable search and seizure.” In 1989, the United States Supreme Court found that law enforcement officers’ use of force against subjects was a type of seizure, and therefore, under the Constitution had to be “objectively reasonable.” This case was *Graham v. Connor*, and it is one of two landmark cases in law enforcement use of force. In its decision, the Court laid out the issues to consider when deciding if a particular use of force is reasonable. These include:

- The severity of the alleged crime at issue
- Whether the suspect poses an imminent threat to the safety of officers and/or others
- Whether the suspect is actively resisting or attempting to evade arrest by flight

The Court stated that reasonableness should be judged under the totality of the circumstances from the perspective of a reasonable officer at the scene with similar training and experience. The Court also noted that officers must frequently make split-second decisions. By saying that the use of force had to be “objectively reasonable,” the Court specifically excluded consideration of the officer’s intentions and motivations.

Applying the principles of *Graham v. Connor*, was Lieutenant Steinke’s use of deadly force objectively reasonable? Yes  No

A second U.S. Supreme Court case, *Tennessee v. Garner* (1985), has particular importance in deadly force decisions. Tennessee law permitted an officer, once having given a suspect notice of intent to arrest for a crime, to use “all the necessary means to effect the arrest” if the suspect fled or resisted. In this case, an officer shot and killed a fleeing burglary suspect whom the officer believed was unarmed. The Court, deciding the case in 1989, said it was not

reasonable to use deadly force against an unarmed fleeing felon, unless there is “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others” if not immediately seized.

- a. Does the Tennessee v. Garner case apply to this incident? Yes  No

*If the answer to question a is yes, please answer question b below*

- b. Applying the principles of Tennessee v. Garner, was Lieutenant Steinke’s use of deadly force reasonable? N/A

### Wisconsin Law

Wisconsin has several specific statutes governing use of force by law enforcement officers. One that is particularly important is §939.45, which describes the concept of privilege.

#### §939.45 Privilege

The fact that an actor’s conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:

1. When the actor’s conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47; or
2. When the actor’s conduct is in defense of persons or property under any of the circumstances described in s. 939.48 or 939.49; or
3. When the actor’s conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office; or
4. When the actor’s conduct is a reasonable accomplishment of a lawful arrest.

The concept of privilege is very important. As a law enforcement officer, if you are acting in good faith and seeking to achieve legitimate law enforcement objectives (including making arrests), you can legally use force that could otherwise be considered a criminal act. Naturally, if an officer uses force for some unauthorized purpose—such as to retaliate against someone—the use of force is not privileged, and the officer may be subject to criminal charges.

Applying the principles of Wisconsin ss. 939.45 Privilege, was Lieutenant Steinke’s use of deadly force in compliance with the law? Yes  No

### Officer Training

Under Defense and Arrest tactics training, an officer learns a number of effective physical techniques to gain compliance from a subject. The officer may have been trained in other methods (such as one of the martial arts) as well. When an officer uses force as part of his/her law enforcement duties, the use of force must fit into one of these categories:

1. A trained technique.

2. A dynamic application of a trained technique (i.e., not quite the classroom model, but as close to it as possible under the circumstances).
3. A technique not trained, but justifiable under the circumstances.

Was Lieutenant Steinke's use of his duty firearm to apply deadly force a trained technique?

Yes  No

**Agency Policy**

The employing agency has a set of policies and procedures that describe how officers are expected to carry out their duties. Under §66.312 of the Wisconsin Statutes, the agency must have a policy on use of force by law enforcement officers in the performance of their duties.

**Applying the principles of the Appleton Police Department Use of Force Policy, it is the unanimous decision of the Use of Force Review Team that Lieutenant Steinke's use of deadly force was Justified as Trained.**

- ✓ **Justified as Trained**
- A dynamic application of a trained technique**
- Not trained, but justified under the circumstances**
- Not justified**