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21<sup>st</sup> CENTURY  
PRINCIPLES  
OF PROSECUTION  
**PEACE OFFICER**  
USE OF FORCE PROJECT  

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ASSOCIATION OF PROSECUTING ATTORNEYS

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## FOREWORD

The images of general civil unrest from big cities to small towns have become increasingly familiar to us as peace officer use of force incidents continue to be reported across the country. Broadcast real-time and on widespread social media platforms, peace officer use of force cases have deepened already fragile racial, social, and economic divides in our country, and have aggravated distrust between our officers and the communities they serve.

Our country also has witnessed recent increases in peace officers injured or killed on duty. According to the National Law Enforcement Officers Memorial Fund, in 2016 alone, 64 police officers were killed in on-duty shooting deaths, up from 41 shooting deaths in 2015. One in three peace officer shooting deaths is an “ambush-style” attack, which understandably has put police departments on high alert.

At the same time, we are seeing in jurisdictions across the country an erosion of public faith in the criminal justice system, to include the investigations and prosecutions of use of force cases. The public may be increasingly distrustful of the independence of the prosecutor’s office in holding all offenders accountable, and in ensuring fair and equal justice for all, regardless of position or power.

During the course of this project we attempted to gather numbers associated with deadly Use of Force cases, but there are no defined mechanisms in place to collect that data. We had to rely on public internet searches and media coverage, which is why the current efforts by the FBI to accumulate and store this data is vitally important to providing actual numbers to the public, instead of speculation.

These themes have played out across television and computer screens in every household in America. They have been the subject the White House’s 21st Century Policing Task Force Report, the U.S. Department of Justice’s Ferguson Report, and the Police Executives Research Foundation’s Guiding Principles on Use of Force. These reports have addressed, among other things, peace officer use of force incidents involving person of color and others members of historically marginalized communities in our country.

Following these reports, in October 2016, Chief Terrence M. Cummings, President of the International Associations of Chiefs of Police (IACP), took steps to address these tensions by issuing an apology on behalf of IACP and its 23,000 law enforcement officials “for the actions of the past and the role that our profession has played in society’s historical mistreatment of communities of color.”

The Association of Prosecuting Attorneys (APA), a national organization of elected and appointed prosecutors and their deputies, has established the Use of Force Project in direct response to these difficult and divisive community issues. In 2016, the Use of Force Project reached out to experienced prosecuting attorneys,

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as well as other criminal and social justice professionals, who conducted several summit meetings throughout the year and around the country, culminating in this 2017 report. The project leaders also arranged for meetings in cities across the country to speak to religious, community and law enforcement leaders. During these meetings, we heard anger, frustration and disillusionment about the current state of the criminal justice process. We heard you, and we used those discussions to help us shape this document. Among other things, this report recommends innovative and promising practices for investigating use of force cases, ensuring the integrity of use of force prosecutions, and promoting equal justice and safer communities.

As co-chairs of the Use of Force Project and President of the APA, we are honored to publish this report and its recommendations. More importantly, we wish to thank the many prosecutors and other professionals who have dedicated their time and expertise to this project. These experts include a Steering Committee of 14 elected prosecutors, and a Working Group Committee of 30 prosecutors, civil rights attorneys, and advocates. Several Steering and Working Group Committee Members are senior-level state and federal prosecutors with several decades' worth of experience among them prosecuting peace officer use of force cases. Working Group Committee Members also include community leaders from the American Civil Liberties Union, the National Association for the Advancement of Colored People, and other organizations with long-standing investments in our criminal justice system. Their diverse and sometimes conflicting perspectives contributed to a productive collaboration on questions that are often emotionally charged but that demand meaningful answers.

We are deeply indebted to these Steering Committee and Working Group Members, who each are identified in the Appendices at the conclusion of this report. We also wish to extend a special thank you to the Laura and John Arnold Foundation for their funding, and to Peter Katz, the Director of Criminal Justice at the Arnold Foundation, for his continued guidance and active participation in this critically important project.

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## EXECUTIVE SUMMARY

Steeped in tradition and age-old practices, the criminal justice system is one that has remained relatively constant over the years. As the courtrooms in which justice is observed have literally been passed down from generation to generation, so too have the methods and psychology for prosecuting today's crimes.

While our profession has maintained much of the same appearance and process, time has not stood still. Trust in law enforcement has weakened as peace officer use of force incidents have become increasingly visible throughout the country. As a result, public confidence in a fair criminal justice system that works for all has waned.

The American justice system needs to address this trust deficit. We need to confront today's realities and express our continued commitment to our profession's ethics and principles with a renewed spirit of justice and equality for all. With such an undertaking in mind, the Association of Prosecuting Attorneys (APA) convened leading experts from across the nation to identify the principles and actions necessary for a 21st century criminal justice system.

The result of their work: **The 21st Century Principles of Prosecution.**

To restore public confidence in law enforcement and prosecutors, officer use of force cases must be reviewed and investigated with 1) **respect for human dignity**, 2) **independent investigation and prosecution decision making**, 3) **responsible transparency**, and 4) **procedural fairness and justice**.

These principles establish a foundation for confronting the difficult challenges that impede the effective investigation and litigation of peace officer use of force cases today. These challenges include the current politically and racially charged climate; the perceived or in some cases real implicit bias of law enforcement and prosecutors; the acute need for prosecutors' independent and transparent review of these cases; and, the rise of social media and new technologies that often broadcast these incidents both in real time and as part of a larger sequence and a broader narrative.

To activate these principles, prosecuting agencies should implement Memorandums of Understanding establishing roles and functions of prosecutors and other entities in the criminal justice system in use of force cases, and establish protocols governing use of force investigations and prosecutions.

While these 21st Century Principles provide the roadmap for navigating through today's distrust in law enforcement, they equally and importantly set the compass for our criminal justice system moving forward and create the roadmap for taking our work to the next level.

The APA and the Use of Force Project's Steering and Working Group Committee Members believe that these four 21st Century Principles are critical to begin to confront the many challenges facing state and local prosecutors investigating, evaluating and prosecuting use of force cases. These recommendations also provide unique opportunities for prosecutors seeking to ensure the integrity of our criminal justice system and to ensure fair, equal, and impartial justice for all in our society.

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## INTRODUCTION TO USE OF FORCE CASES

For purposes of this project, principles, and recommendations, a peace officer’s “use of force” is defined as the use of physical force, by a municipal, county, state or federal officer, which causes death or serious physical injury. During their enforcement of municipal, county, state or federal laws, peace officers are permitted to use deadly force when they have reason to believe that a suspect poses a significant threat of death or serious physical injury to the officer or others or in other limited circumstances pursuant to their respective laws. An officer’s use of force resulting in death or serious physical injury is treated as a critical incident. Use of force cases that do not result in death or serious physical injury also may rise to the level of critical incidents, and trigger investigations into officer misconduct, and in such cases many of the principles articulated herein are equally applicable.

## USE OF FORCE CASE DESCRIPTIVE STATISTICS

The APA collected information on a stratified random sample of 333 cases derived from The Washington Post’s 2015 police shooting database. The sample was stratified to collect a proportionate sample by UCR region – Midwest, Northeast, South, and West. As such, the sample included the following totals from each region: (1) Midwest, 45 cases (13.5%), (2) Northeast, 23 cases (6.9%), (3) South, 141 cases (42.3%), (4) West, 121 cases (36.3%). **Table 1** describes the descriptive statistics for the sample including the armed status of the citizen at the time of death, whether or not the citizen was fleeing law enforcement, whether body worn camera video of the incident was available, the investigative case status, and whether the case was justified and presented to a grand jury.

**Table 1.** Descriptive statistics (Sample = 333 cases)

Variable	Count	Percentage
<b>Region</b>		
Midwest	45	13.5
Northeast	23	6.9
South	141	42.3
West	121	36.3
<b>Armed Status</b>		
Unarmed	35	10.5
Gun	177	53.2
Knife	50	15.0
Toy weapon	12	3.6
Vehicle	22	6.6
Other weapon	29	8.7
Unknown weapon	8	2.4
<b>Status of Case</b>		
Unknown	21	6.3
Under investigation	157	47.1
Pending legal proceeding	20	6.0
Missing	3	.9
Closed	132	39.6
<b>Citizen Fleeing Police</b>		
Car	46	13.8
Foot	42	12.6
Not fleeing	234	70.3
Other	11	2.3
<b>Body Camera Footage</b>		
No	305	91.6
Yes	25	7.5
<b>Justified</b>		
Justified	148	44.4
Unjustified	6	1.8
Unknown	179	53.8
<b>Legal Proceeding</b>		
No	108	32.4
Yes	67	20.1
Unknown	158	47.4
<b>Grand Jury</b>		
No	117	35.1
Yes	49	14.7
Unknown	167	50.1

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## THE ROLE OF THE PROSECUTOR

The Use of Force Project identified the following role of the prosecutor in all criminal cases:

Prosecutors will **Faithfully** uphold, protect, and defend the United States Constitution and laws of the United States, as well as the constitution and laws of their respective states.

Prosecutors **Recognize** and apply the highest ethical, legal, and moral standards when reviewing allegations of criminal conduct, only bringing criminal charges where the applicable standard is met where there is a reasonable likelihood of conviction based on constitutionally admissible evidence.

Prosecutors will **Require** that all crimes are thoroughly, objectively, and timely investigated by qualified law enforcement personnel.

Prosecutors will **Ensure** that all criminal investigations receive a reasonable and consistent charging decision independent of a suspect's standing within the community.

Lastly, prosecutors will **Seek** the just, public disposition of all charged offenses, in light of all the evidence and applicable law with due regard for the degree of harm caused to the victim, and the community, mindful of the need to maintain public safety and reduce the risks of recidivism.

These prosecutor roles are delineated to a large extent in existing federal and state constitutions and laws and ethics provisions, but they bear repeating here to remind prosecutors and our audience about our general responsibilities in reviewing criminal investigations and litigating criminal cases.

More specifically, prosecutors have unique roles in the review and prosecution of peace officer use of force cases. Individuals, advocates, elected officials, and other entities involved in use of force incidents may express strong opinions and desired outcomes, but prosecutors must be exceedingly careful in these particular cases to seek justice without fear or favor or political consideration.

The prosecutor... "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." ***Berger v. United States, 295 U.S. 78 (1935)***

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In responding to police officer use of force incidents, law enforcement officers and prosecutors have distinct roles and responsibilities. Indeed, with the exception of a prosecutor's internal investigative staff, peace officers and prosecutors typically occupy separate, independent agencies, with each agency having its own separate mandates, functions, chains of command and mechanisms for public accountability.

A prosecutor's foremost obligation in any criminal case is to pursue the evidence and the law, without political considerations, and to do so according to the highest standards of ethics and integrity. For this reason, prosecutors are well-situated to conduct independent investigations and assessments of use of force incidents, but only if they maintain their independent stature.



## CHALLENGES & OPPORTUNITIES FOR PROSECUTORS

**Police Use of Force Policies:** Prosecutors recognize the perceived, or in some cases real, lack of independence on the part of police officers investigating a fellow officer subject of a use of force investigation. The public is understandably uncertain, at best, of the idea of any public entity investigating itself, but especially in the case of an entity such as a police department, vested with such awesome state powers, which is investigating a civilian fatality caused by a fellow officer. This concern may be particularly acute where there is community frustration or in some cases community anger that less lethal actions were not taken. Consequently, police agency practices and policies governing use of force investigations are the subject of unprecedented scrutiny.

As an initial matter, the control and review of police department policies resides not with prosecutors, but with state or local governments. That is, police do not work for prosecutors and prosecutors do not work for the police. In fact, there is a natural tension that often exists between police and prosecutors, as evidenced in the ongoing, vigorous, and sometimes even acrimonious disagreements over each other's policies and standards. Prosecutors can be as open and transparent as we choose about the evidence and conclusions of our investigations into police use of force, but, in many jurisdictions, we have limited or in some instances no control or authority over the police practices governing use of force cases.

As such, a critical element in the investigation and prosecution of use of force cases is the prosecuting authority's explicit power to control or manage the underlying criminal investigation. It is only through this mechanism that we can help to sustain our communities' trust in the impartiality of the criminal justice system investigating use of force cases where a peace officer may be the defendant. In the recommendations below, we provide specific mechanisms by which prosecutors can help to ensure that the underlying criminal investigation is conducted with investigative independence and impartiality.

**Working Relationships between Police and Prosecutors:** In the majority of a local prosecutor's cases, the police are their witnesses. Many in the community are concerned that this close working relationship makes it difficult for those same prosecutors to fairly evaluate police as potential criminal suspects. As a result, in recent years, some have come to question whether local prosecutors, working closely with the police, are sufficiently independent of the police to render fair, true and impartial judgment about their conduct. Some experts, to address these perceived biases, have recommended that only "special prosecutors" prosecute use of force cases. For example, the Ferguson Commission recommends that an official from the Attorney General's Office serve as special prosecutor in all cases of police use of force resulting in death, officer-involved shootings resulting in injury or death, or in-custody deaths.

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However, we believe that this position largely ignores the actual structure of law enforcement in the American criminal justice system and the reality of the different underlying roles and responsibilities of peace officers and prosecutors within that system. Though both professions share certain goals to ensure public safety and hold offenders accountable, the professions are nonetheless independent of one another and each must zealously guard their own independence and prerogatives. Absent a demonstrated conflict in a specific use of force incident, in which case established protocols can provide for the expeditious assistance of an outside prosecutor, the issue of prosecutorial independence must be established over time through the prosecutor's demonstrated commitment to impartiality, along with the coinciding principles of respect for human dignity, responsible transparency, and procedural justice and fairness.

**Charged Climate:** A peace officer use of force event may cause not only extreme trauma and sorrow to the parties involved, but often results in a broader dialogue about appropriate policing, the criminal justice system generally, officer safety, and the treatment of people of color and the poor in our country. Furthermore, it is not unusual for use of force events to be comingled or treated as one continuous stream of peace officer violence rather than separate events with distinctly different facts.

This is an opportunity for prosecutors and law enforcement officials to implement community outreach programs to build more trust in their communities between law enforcement and civilians. Outreach should focus on different people, groups, organizations, and stakeholders within the community, such as members of the clergy from various faith traditions, civil rights organizations like American Civil Liberties Union, the National Association for the Advancement of Colored People, and the Urban League. While large established community groups must be a significant part of outreach, individuals and smaller and less organized groups deserve the prosecutor's attention as well. This outreach should be an ongoing and open dialogue to examine the issues related to use of force incidents, including the disproportionate treatment of communities of color and other minority populations. A refusal to account for or take part in these important conversations can often widen the gap between law enforcement and prosecutors and their fellow community members and work against the forging of meaningful relationships with the community. By contrast, a willingness to engage in these conversations and forge these relationships before a critical incident can serve as a core management tool to demonstrate prosecutorial and investigative independence and impartiality in use of force cases.

**Social media and new technology:** In the past, use of force incidents were viewed in relatively localized isolation. Today, with the internet and rise of social media and new technologies, the facts and circumstances of each incident are often being broadcast and scrutinized in real time, and are now viewed as part of a larger

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sequence and a broader narrative. That broader narrative at times has been intensely skeptical of those tasked with holding peace officers accountable. At a time when social media and social movements have demonstrated both the positive power to focus public attention and mobilize action, as well as the destructive power to fill the public space with partial, unverified or even blatantly false information, we strongly encourage prosecutors to establish written guidance governing these cases that adopts the APA's prosecutor principles of respect for human dignity, prosecutorial independence, responsible transparency, and procedural fairness and justice.

## 21<sup>st</sup> CENTURY PRINCIPLES OF PROSECUTION

As prosecutors and use of force experts from both small agencies and large departments around the country, we recognize the inherent difficulties in articulating recommended policies for multi-jurisdictional institutions. What follows then are a set of prosecutor principles that aim to transcend jurisdictional boundaries and differences in legal definition and standards. These principles are designed to be adaptable to state and local laws and jurisdictions. Their purpose and aim is not to tilt outcomes in any specific direction, in order to satisfy narrow political agendas or broader public passions, but rather to ensure a fair, predictable, independent, understandable, transparent, and reviewable process that builds and maintains public confidence. Most importantly, these principles speak directly to the profound challenges and the abiding concerns of the people of this country to ensure fair, equal, and impartial justice for all.

### Principle I. Human Dignity:

Prosecutors uphold the rule of law to ensure human dignity. Respect for human dignity and all persons in the criminal justice system should be the key tenet of prosecutors' relationship with the community at large.

Tragedy and pain will always follow violence and loss of life. The time following a use of force event can be uniquely confusing and complex to the individual who has been injured and to his or her family. Unlike in traditional criminal matters in which an injured party or an injured party's family can lean on the support and advice of law enforcement, use of force events often create a division between those injured or killed and law enforcement. The division and space between those individuals and law enforcement is then sometimes filled with fear, mistrust, misinformation, and miscommunication. It is into this space that the prosecutor must step. It is critical that prosecutors, as a representative of the government, articulate a distinct core message: the person who has been injured was or is a member of our community and his or her safety and rights are important to us.

### Principle II. Independent Investigation & Prosecution Decision Making:

#### **1. Prosecutors must ensure that all investigations into police use of force cases are thoroughly and independently investigated.**

Well before making charging determinations, prosecutors must ensure that both qualified and independent law enforcement personnel investigate each use of force incident thoroughly, objectively, and timely. Prosecutors must assert their independence and exercise leadership in the investigation of use of force incidents. Such leadership comes with recognizing the perceived or, in some cases, real lack of independence on the part of a law enforcement agency investigating the conduct of one of its own officers. Ideally, these investigations are conducted by someone other than the agency involved in the use of force. The public is rightfully skeptical of a police department that is investigating itself, particularly in a case involving a civilian fatality or serious injury. 21st Century principles require that either a prosecutorial agency with investigative capacity or another law enforcement agency should lead any investigation into potential criminal conduct by an officer.

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The responsibilities of prosecutors have rapidly evolved and expanded such that many seasoned and experienced professionals from prosecutor's offices are deployed to scenes of sex crimes, gang offenses, and homicides. The prosecutor's presence at such a crime scene may promote the quality and efficiency of the entire investigation, provided no legal or ethical requirements are compromised. A prosecutor's presence, oversight, and leadership, where feasible, also may serve as a valuable check and balance on the quality, competency and reliability of police investigations. And nowhere is this check and balance more important than the investigation of a law enforcement agency's use of force causing death or serious bodily injury. While not all prosecution agencies have the resources and expertise to send their prosecutors to the scene of an officer involved shooting, such a capability should be the goal of every prosecution office in the United States.

## **2. Prosecutors must ensure that all prosecutorial charging decisions are made independent of any bias or influence.**

In 'typical' cases, prosecutors often work directly with local law enforcement officers to gather evidence and to review a case against an individual. However, in peace officer use of force cases, the officer and the officer's conduct is the subject of review. The office of the prosecutor must ensure its independence from influence and coercion to ensure impartiality for all persons in the criminal justice system, including victims, defendants, officers, and the community at large.

Prosecutors should ensure that all use of force investigations and prosecutions are sufficiently resourced and geographically separated from other police and prosecutor offices, to the extent possible; and, that prosecutors in such cases have direct reporting to the elected official or her deputy where feasible. The end result should include a comprehensive analysis of whether the officer's belief, that the officer faced a threat that warranted the resultant use of force, was a reasonable belief under the circumstances as they existed or not. The prosecutor's charging decision should be a reasonable, consistent determination independent of an individual's standing within the community, free of unsupported assertions or assumptions, and reflecting a strict faithfulness to the applicable law and admissible evidence.

### **Principle III. Responsible Transparency:**

The office of the prosecutor must preserve and promote the highest standards of our profession around responsible transparency. Prosecutors should take the lead from the outset to ensure that community leaders, the general public, and the media are properly informed of the investigation and decision making progress. Prosecutors always must find that elusive balance between keeping the public informed and not jeopardizing a case or compromising ethical obligations. The prosecutor should calibrate expectations, and educate the public on the role, responsibility, and mission of prosecutors in the wake of use of force case. The prosecutor

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should convey to the public that the investigative process is to be conducted by the best independent team available; address the laws governing charging decisions; impress that certain information may not be disclosed until the investigation concludes; and, make a public commitment to responsible transparency at the conclusion of the investigation.

Ultimately, responsible transparency helps to ensure the best efforts of investigators, who know that every step in the investigation is being carefully documented and may be closely scrutinized by reviewing agencies as well as by the family of the deceased and their counsel, community leaders, the media, and the public. Responsible transparency enables the public and other stakeholders to understand the evidence, the law, and ultimately the final charging decision in a given case.

#### **Principle IV. Procedural Fairness and Justice:**

To fulfill our promise of equal justice under the law, the office of the prosecutor must ensure procedural fairness and justice for all regardless of race, creed, sexual orientation, sexual identity, or occupation. Prosecutors must ensure through their practice that the system is fair and just for all, to include the safeguarding of key evidence, disclosing exculpatory as well as impeachment material, and ensuring the proper and timely commitment of resources and communication with each stakeholder.

In sum, these four principles are a foundation for credible use of force investigations and litigation that will help to sustain public confidence that our prosecutorial conclusions are arrived at professionally, impartially, and with integrity. Prosecutors' successful translation of these principles into effective investigations and litigation carries enormous potential to enhance legitimacy and reduce crime. It is our hope that prosecutors across our nation will formalize these principles in the day-to-day interactions that they have with victims, witnesses, defendants, and the community. When these principles become part of the fabric of a prosecutor's office, we firmly believe they will enhance the trust and legitimacy of her office.

## IMPLEMENTING 21<sup>st</sup> CENTURY PROSECUTION STANDARDS

Prosecutors participating in the 2016 Use of Force meetings recommended two vehicles by which prosecutors might build these 21st Century Principles of Prosecution into a permanent framework.

First, prosecutors should initiate the development of **Memorandum of Understanding (MOUs)** with police departments, and other criminal justice agencies and public offices, clearly delineating the specific roles and functions of investigators, prosecutors, and other public officials involved in use of force cases, as well as incorporating the core principles of human dignity, prosecutorial independence, responsible transparency, and procedural fairness and justice.

Second, prosecutors should collaborate with peace officers and other criminal justice agencies to develop **written protocols** addressing the mechanics of use of force investigations. These protocols, among other things, will serve to hold law enforcement and prosecutors accountable in their administration of these cases.

**Memorandum of Understanding:** Prosecutors should initiate the development of MOUs with police departments, and other criminal justice agencies and public offices, to define the general roles and responsibilities of all applicable parties at each and every stage of the case. These MOUs can be broad and general but should include, among other things:

**Personnel Assigned-** Delineate duties and responsibilities of prosecutors and law enforcement officials in an investigation, as well as general ethical obligations, powers, and limitations. Prosecutors and investigators selected for investigations should be highly qualified, and specifically chosen for their independence, experience, and integrity.

**Independence Mechanisms-** Establish the duties, responsibilities and procedures of independent investigators with experience in use of force investigations that are assigned to prosecutors. Ideally, a jurisdiction will utilize specialized investigation teams made up of senior level detectives who are specially trained and experienced in officer-involved fatalities and who are not part of the involved agency.

**Eliminate Conflicts of Interest-** Require affirmative conflict of interest analysis by both investigatory and prosecutor agency in a use of force case. Where a conflict is identified, develop protocols to immediately resolve the conflict.

**Confidentiality and Transparency-** Prosecutors must strive to achieve the appropriate balance between transparency and the protection of information and evidence in a manner consistent with law and ethics. For example, prosecutors should endeavor to communicate all appropriate information to the public, but prosecutors cannot make statements or release evidence likely to prejudice the outcome of the investigation or subsequent trial. Establish principles that all stakeholders must be vigilant about premature release of information, particularly prejudicial information.

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**Timeline-** Agree on a timeline to complete review of these cases as quickly as possible, to include when all supplemental reports and briefings will be provided to the prosecutors' office.

**Notification-** Establish a process by which prosecutors and law enforcement delineate how and when to notify all pertinent stakeholders.

**Data Collection-** Establish a process by which prosecutors either partner with or support law enforcement in collecting and making publicly available comprehensive data on use of force incidents, to include fatalities if any and any other information related to the circumstances around the incident. Prosecutors should record, track, and supplement the law enforcement data. This process also should include reporting of data to the FBI's Uniform Crime Reporting data tool. Public reporting of such information will help to ensure that all stakeholders understand how many incidents there are and, in certain circumstances, identify how and why they occurred.

**Training-** Provide for routine collaborative training for prosecutors and law enforcement on the lawful use of force, including applicable state and federal statutes and case law; on constitutional restrictions regarding use of compelled statements and all investigative measures necessary to protect constitutional rights; on what happens when an officer is the subject of a use of force investigation and legal standards for convictions; and, on joint or collaborative development of de-escalation training for officers.

**Written protocols on use of force investigations:** Written protocols should be developed to compliment the MOU. These written protocols are the internal governing documents each department will rely upon in investigating and prosecuting use of force incidents. The written protocols should establish specific departmental procedures that ensure that the process is just and fair for all stakeholders. In the case of policing agencies, these protocols should cover their use of force policies, training requirements, and other critical issues.

For prosecutors, these protocols should address our responsibilities to manage use of force cases consistent with the principles of prosecution described above. The protocols at a minimum should address the need for independent and experienced prosecutors who are trained in issues of lawful use of force to lead specialized and sufficiently resourced investigation teams. These protocols should seek to safeguard due process and privacy rights while at the same time lend responsible transparency and accountability to the process. As explained in further detail below, these protocols should include at a minimum the following categories:

**Incidents to Be Investigated-** While each jurisdiction will have to assess its resources and plan accordingly, the protocols ideally should apply to any incident in which an individual dies or sustains

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serious physical injury during contact with a state, county, or federal law enforcement officer, or while in the custody or control of a law enforcement officer or agency while the officer is acting under the color of law

Additionally, if the use of force is non-fatal, the responding prosecutor may be required to call in an additional prosecutor to handle any parallel investigation of the subject for criminal conduct against the involved peace officers. By bi-furcating the simultaneous criminal investigations, the on-scene prosecutor may prevent potential conflict of interest that can have serious consequences for both cases.

**Separation of Criminal/Administration Investigations-** Law enforcement agencies investigating a use of force incident have the responsibility to address several legally distinct issues following the use of force. These issues include: whether any criminal laws have been violated; whether departmental policies have been followed; and whether appropriate law enforcement tactics and training were utilized under the circumstances. To address these issues, the investigating law enforcement agency may simultaneously choose to conduct separate criminal as well as administrative investigations.

First, as indicated above, in a non-fatal use of force case, the prosecutor's office may need to manage two separate criminal investigations, one to investigate the involved officer and one to investigate the civilian subject.

Second, as state and federal laws impact the admissibility of evidence collected during these investigations, it is critically important that the two criminal and administrative inquiries be conducted separately. The prosecutor's primary duty is to oversee the criminal investigation, review the evidence, and determine whether any violation of criminal law occurred during the peace officer's use of force. Evidence discovered during the criminal investigation must be collected in an independent manner wholly separate from the administrative inquiry. A criminal prosecution may deprive a subject of their liberty, and as such the criminal investigation must take precedence over any administrative or internal investigation. Any protocol that permits administrative reviews to occur before a criminal investigation has been completed should be strongly discouraged.

**Activation of the Protocol-** The written protocol of a given jurisdiction should explicitly identify the agency tasked with leading, responding, conducting, and reporting on the critical incident, to include activating the protocol as well as securing the scene and rendering necessary first aid. A protocol's details will vary from jurisdiction to jurisdiction based on resources, capabilities and frequency of the activation of the protocol.

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At a minimum, the protocol should require the law enforcement agency with jurisdiction over the matter to immediately notify the appropriate prosecutor's office of a use of force incident, such that prosecutors can arrive and be present at the scene as quickly as possible, have unfettered access to all sources of information and physical evidence at the scene, and consider if additional investigative resources are necessary.

By activating and then properly following an established protocol, a jurisdiction will establish a level of consistency and responsible transparency that is in the best interests of those officers who engage in lawful conduct, their departments, and the communities they serve.

**At the Scene-** The protocol should establish the roles of each responding agency. With respect to the prosecutor's role, the protocol should indicate that the responding prosecutor's responsibilities include, at a minimum: (i) observe and monitor the investigative agency's criminal investigation; (ii) assure that the investigative agency is properly documenting all evidence and the existence of any and all potential witnesses, injured parties, and suspects; and, (iii) assist in addressing legal issues relevant to the investigation of the use of force event and any subsequent review by the prosecutor's office. If the on-scene prosecutor determines that additional investigative resources are necessary for a thorough investigation, the prosecutor will coordinate with the investigating agency or conduct the investigation themselves depending on the jurisdiction, its protocol, and resources.

**Initial Briefings and Conflict Checks-** As soon as possible, the agency in charge of the criminal investigation will provide the responding investigators and prosecutor with an initial briefing of the incident. The briefing should consist of all relevant information including but not limited to: the names and present whereabouts of the peace officers involved in the incident the names, addresses and present whereabouts of all civilian witnesses to the incident; the voluntary statements of the peace officers as provided to first responders; the physical evidence discovered; a summary of witness statements and the status of the investigation; identification of the case agent; and, the medical condition of all injured parties. The protocol also might include a requirement that the agency provide information about any outstanding subpoenas, potential third-party videos (e.g., from businesses close to the incident), or other investigative leads that should be pursued.

In addition, during the initial briefing it is critical that all responding investigators and prosecutors conduct a conflict of interest review for any personally involved investigators and/or prosecutors. Any member of the protocol team having a conflict of interest should recuse themselves prior to proceeding with the investigation.

**During the investigation: Initial Meetings-** At the very outset of the investigation, prosecutors should offer to meet with the immediate family members of the deceased or injured party as soon as possible, where appropriate. This may be a difficult meeting but essential to

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establish point of contacts, explain the nature of the investigation and decision-making process, the prosecutor's role, ways in which charging decisions are made, convey condolences, invite family to share information and evidence, and always, to answer questions. Prosecutors should take time to explain the ramifications of decisions to file criminal charges or not to file criminal charges. At this meeting, prosecutors should clarify that they do not pursue cases against individuals not supported by probable cause even in the face of public pressure. At the forefront of this discussion should be a clear statement that any decision to not proceed with criminal litigation is not a statement about the injured party but rather is a statement about the evidence and the law. The prosecutor should outline the standard protocol for their respective office's internal review of a use of force event. Finally, prosecutors should keep the injured party or their representative informed about the status of the investigation and of the charging decision throughout the process.

**Interviews-** The prosecutor should endeavor to conduct or be present and participate with the investigating agency in any witness interviews. All witnesses or potential witnesses, including peace officers, should be separated to maintain the integrity of the investigation and their individual statements. All interviews should take place as soon as practical and should be electronically recorded. When appropriate, the interviews may take place at the scene to aid a witness in recalling and explaining the exact location of the parties and the events that took place.

Officer interviews are particularly crucial. For peace officers acting under the color of law, the interview must be voluntary and face-to-face between the case agent, the involved officer, and when applicable his legal counsel, and where appropriate, prosecutors. The case agent will electronically record the voluntariness of the waiver in addition to the interview, and if possible, videotape the interview. A complete and thorough explanation of the nature of the interview and the consent of the officer should be digitally recorded and memorialized in the final police report. Under no circumstances should members of the involved officer's direct chain of command or administrative investigation attend an involved officer's interview.

Note that, if an involved officer chooses not to make a voluntary statement, the prosecutor and a representative of the investigating agency should meet and immediately review the available investigative options. Also, note that the advent of the use of surveillance cameras, in-car dash cameras, aerial cameras, and body worn cameras can and does result in the capture and preservation of images that may be relevant to the investigation. An involved employee may well desire to review images before they make a formal statement. If an officer has the legal right or is allowed to view the videotape, a statement should be taken in advance of the viewing consistent with the way all witnesses should be treated.

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**Evidence-** All evidence, including all body worn, dash, Taser, aircraft and cell phone camera and video evidence, should be compiled during the investigation with the goal of responsible transparency. As required by local ethical rules, evidence generally shall not be commented on or released to the media until the prosecution agency has had a reasonable opportunity to review the completed case file and has made a formal charging decision. Premature release may violate not only ethics rules but may compromise witness testimony or otherwise jeopardize the integrity of the case.

However, in certain limited circumstances, such as where false narratives take hold in social media and are reported by the traditional media, and public safety is threatened, the prosecutor and her team should confer and agree upon an appropriate public response to repudiate false information whose intent or result is to create or inflame violence. In these narrow instances, serious public safety considerations may outweigh withholding evidence for investigative integrity purposes--and early release of specific evidence may be warranted

**Reports-** The protocol should require that all participating law enforcement agencies complete their review pursuant to the MOU's prescribed timelines, but consistent with the primary goal of conducting a thorough and objective review of the evidence. This may include submission of subsequent supplemental reports. This procedure will permit the prosecutor to review what has been completed and to proceed simultaneously with any additional follow-up investigation.

**Conclusion of the investigation:** At the conclusion of the investigation, the protocols should establish both the legal requirements and the jurisdiction's policies for announcing the decision and notifying relevant stakeholders. For example, the protocol should insist that, prior to any public statement, the prosecutor first notify the family of the deceased or the injured parties, the involved officer and his employing agency, and any relevant counsel to such persons or entities. In the event that charges are filed, prosecutors should explain in detail the expectations for the litigation, and what role different persons will play.

In the event charges are not filed, prosecutors may wish to explain that a decision not to proceed with criminal charges is not an indictment of the injured party or their conduct or an approval of the conduct of the officer or officer involved, and that such a decision does not preclude civil or federal criminal remedies. Other prosecutors may choose to not address other remedies, but regardless, prosecutors should not make any statement about the likely outcome of any civil case or the likelihood of federal criminal charges

In addition, prosecutors should inform the public of the decision. When the incident will not be charged, the prosecutor should communicate with the public directly via a detailed letter from the prosecutor to the public, posted on the office website or otherwise made easily accessible. This letter should describe in detail the statutory authority of the prosecutor, how the investigation was conducted, the evidence of the case, applicable case law, and legal analysis supporting the decision. The letter should also outline the prosecutor's commitment to responsible transparency and

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how it is practiced. Finally, prosecutors are strongly encouraged to release appropriate contents from their files to interested media.

Of course, any such disclosures to individuals or to the public first must comport with the subject's due process requirements as well as all applicable legal and ethical provisions. In this regard, some information a prosecutor by law cannot legally share or disclose, and it is important to be candid with the media about what information is withheld and why. For example, prosecutors may be prohibited from sharing medically-privileged material such as mental health, hospital or treatment records; autopsy results; personal identifying information of all parties; photographs of the deceased in situ where their reproduction by media or others could provide unexpected shock to survivors. In extremely limited cases, officer names may be withheld where there is a significant threat to the safety of an involved officer or their family.

Finally, in instances where no charges are filed, the prosecutor should consider meeting with select community leaders to review the evidence, the law, and the findings. While there is no precise way to determine who should or should not be invited to such meetings, the assembled leaders should be representative of a good cross-section of an affected community. Ideally, as addressed earlier in the section on community outreach, prosecutors are meeting regularly with these same community leaders to inform and educate them about prosecutorial decision-making practices, instead of waiting for a critical incident. The purpose of a post-critical incident is not to establish these relationships nor to provide general information, but to have a deliberate, methodical conversation about the evidence, the law, the prosecutor's findings, and how the investigation was conducted in a particular case. These leaders and the community at large is more likely to trust in the integrity of the criminal justice system if they believe that they received respectful and fair treatment throughout the process -- and that the process was transparent and all stakeholders accountable -- even if they face adverse outcomes.

**Note on the Use of Grand Juries:** Jurisdictions vary in their use of the grand jury in use of force cases. The grand jury is comprised of members of the community selected by the court who are tasked with deciding whether there is probable cause, or other legal standard depending on the jurisdiction, to indict on a criminal charge. Grand juries can be used as an investigatory or a charging body, depending on the constitutional or legislative mandates. Rules governing grand jury proceedings vary greatly by state. Many state laws require prosecutors to put these types of cases before the grand jury, and further, to prohibit the dissemination of information relative to grand jury investigations.

For those jurisdictions that use grand juries, use of force protocols can delineate how prosecutors can best support the grand jury process, and how the prosecutors can effectively message to the public the results of a grand jury inquiry. For example, in Multnomah County, Oregon, after being authorized by the court, a public transcription of the grand jury proceedings has resulted in heightened public confidence in the quality of the investigation, the professionalism and independence of the prosecution, and ultimately the outcome of the determination.

## CONCLUSION

Today's criminal justice system is burdened by rising visibility of police use of force incidents. Saddled by the corresponding distrust of law enforcement, and stunted by the lack of confidence in prosecution agencies abilities to hold such actors accountable.

**Trust and legitimacy** can be rebuilt, but it requires beginning at the roots. It starts with a respect for **human dignity, independent investigation and prosecution decision making, responsible transparency, and procedural fairness and justice.** It starts with prosecuting agencies breathing life into these principles by implementing Memorandums of Understanding that establish clear roles and functions of prosecutors and other entities involved in use of force cases. It continues with the establishment of protocols governing use of force investigations and prosecutions more generally.

***The 21st Century Principles and Prosecution Standards discussed here are the foundational pieces that set the reform of this aspect of the criminal justice system into motion. They are not the ultimate or only solutions. They are, however, the vital and necessary starting points for structuring a criminal justice system that gets stronger over time.***

While the APA, our Steering Committee and Working Group members strongly recommend these MOUs and protocols for use of force cases, we recognize that there is no one-size-fits-all solution for prosecutors' offices nationwide. That said, we are grateful to our colleagues who have developed proven MOUs and protocols addressing use of force, and who have contributed greatly to the recommendations herein, including San Francisco, Phoenix, and Boston.

These departments recognize that prosecutors cannot do their job without effective standards governing peace officer investigations and state prosecutions of use of force incidents. Among other things, the recommended MOUs and protocols foster the **"responsible transparency"** that is so critical to successfully retaining the public trust in these investigations and prosecutions, and additionally, in demonstrating prosecutors' respect for **human dignity, independence, and procedural fairness and justice.**

We fully expect our Use of Force Project to continue well past its yearlong tenure, and that similarly, this document will continue to be revised and even changed as law enforcement and prosecutors find new and improved mechanisms to enhance the trust in our offices and ultimately to reduce and prevent peace officer use of force cases resulting in death or serious injury.



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