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CHANNEZ M. ROGERS*

65 WETHERSFIELD AVENUE
HARTFORD, CT 06114-1121
(860) 249-1361
(860) 249-7665 (Fax)
www.hl-law.com

40 WASHINGTON STREET
SUITE 220
WELLESLEY, MA 02481
(781) 235-5594
(781) 235-5596 (Fax)

10 DORRANCE STREET, SUITE 700
PROVIDENCE, RI 02903
(401) 519-3810
(781) 235-5596 (Fax)

Reply to Hartford Office

ARIEL R. MACPHERSON
◊×JACQUELINE P. MCMAHON
JULIA E. LAVINE
ASHELY A. SGRO
◊SVETLANA STEELE-BAIRD
ADAM J. DIFULVIO
*KRISTAN M. JAKIELA
ERIC E. GERARDE
¤MEGAN K. BAKER

**OF COUNSEL, ADMITTED IN MA AND NY ONLY
*ALSO ADMITTED IN MA
†ALSO ADMITTED IN RI
◊ALSO ADMITTED IN NY
^ALSO ADMITTED IN IL
•ADMITTED IN MA ONLY
×ALSO ADMITTED IN NJ
¤ADMITTED IN MA AND FL ONLY

February 22, 2021

Judiciary Committee
Connecticut House of Representatives
Hartford CT

RE: Raised bill 6462

Dear Judiciary Committee:

I have followed closely the legislative process that resulted in the passing of the Police Accountability Act (P.A. 20-1,) and have paid special attention to Section 29. By way of background, I have represented public entities, police departments and police officers in civil rights cases for more than 25 years. I have regularly dealt with claims and applicable laws regarding police officers' use of force, including deadly force, in both state and federal trial courts in Connecticut. I also have argued numerous appeals in police civil rights matters, including use of force and application of various immunity doctrines, before the Connecticut Appellate Court, the Connecticut Supreme Court, and the United States Court of Appeals for the Second Circuit. I have Martindale Hubbell's highest rating of AV Preeminent and am nationally board-certified as a civil trial specialist by the National Board of Trial Advocacy. You can review more about my background at https://www.hl-law.com/attorney/tom-gerarde.

I have reviewed the latest iteration of Section 29 in Raised Bill 6462, and I'm writing to call to your attention problems with Section 2 of the raised bill (seen in lines 27-41 of the raised bill), which amends CGS 53a-22 (c), and to recommend that lines 27-41 be deleted from the raised bill. Section 1 of the raised bill should remain, unchanged, as it accomplishes the spirit and intent of the Police Accountability Act, is consistent with United States Supreme Court decisions, and avoids the prejudice and confusion that will result if Section 2 remains in the bill, as described below. Section 1 calls for a police use of deadly force to be judged by a standard

of objective reasonableness, which is the standard recognized by the United States Supreme Court. Under the objective reasonableness standard the issue for trial will be whether the officer who employed deadly force reasonably perceived a threat of death or serious physical injury to himself/herself or another at the time the decision was made to use deadly force. The United States Supreme Court and all the federal courts in the United States recognize that a police officer's decision to use deadly force is not a decision that should be looked at in hindsight, given that deadly force situations often arise suddenly and require an immediate response by a police officer. Judging a police use of deadly force with the benefit of "20/20 hindsight" would not only be unfair to police officers acting quickly to apply their training in emergency situations, it would be unfair to the victims the police are seeking to protect, as a system with judgment based on hindsight will lead to hesitation by police officers in emergency situations, and hesitation by a police officer confronted with a deadly force situation could easily lead to the unnecessary loss of life. Think about a domestic violence situation involving a female victim being threatened by an abuser who is in possession of a knife. A police officer's hesitation while he or she considers whether a list of prerequisites have been met before using deadly force could be the difference between the victim being killed, and the victim surviving. Another example arises in the scenario where an armed intruder gets into a school. Hesitation, to run through a list of prerequisites, prior to using deadly force could mean the difference between the intruder being stopped from accessing a classroom of students and the intruder reaching the classroom and locking the door behind him. This is why the United States Supreme Court has only one prerequisite, a reasonable perception of death or serious physical injury, as judged by one standing in the police officer shoes at the time force was used, and not aided by hindsight.

Connecticut police officers spend an extraordinary amount of time training on the use of deadly force so they will be able to apply their training in an emergency situation. They are trained on the United States Supreme Court standard of objective reasonableness, and judged by whether they had an objectively reasonable perception of death or serious physical injury at the time deadly force was employed. This training takes place no only at the police academy when the officers are recruits, but also throughout their entire professional careers as part of the recertification process. The objective reasonableness standard regarding perception of death or serious physical injury is the law provided to Connecticut juries currently in the state and federal courts. However, the requirements included in raised bill Section 2 (lines 27-41) changes that, and undermines the wisdom of the United States Supreme Court Justices (conservative, liberal and moderates alike) regarding the most appropriate way to judge a police officer's use of deadly force, formulated in numerous opinions over the past 35 years. The Supreme Court doctrine strikes the proper balance between the protection of a suspect and the protection of an innocent victim or the police officer himself or herself. By adding section 2 to the raised bill two major problems are created. First, section 2 of the raised bill (lines 27-41) in essence mandates a hindsight analysis of the police officers conduct by mandating that a consideration of objective reasonableness include an assessment of whether reasonable de-escalation attempts were made, and whether the officers own conduct contributed to the need to use deadly force. There are no such requirements under the state or federal constitutional decisions. Any police officer

who knows that he or she will be judged at a future time by police commissions or civil juries on whether reasonable de-escalation attempts were employed and whether the officers own conduct contributed to the need to use deadly force will naturally hesitate, and hesitation leads to the loss of innocent life. The citizens of Connecticut have a right to expect protection by their local police officers in deadly force situations, without the officers hesitating before action to analyze parameters that are in a Connecticut law but are not required by the United States Constitution. The Supreme Court has determined that the objective reasonableness standard regarding a perception of threat of death or serious physical injury is what should govern police decisions regarding use of deadly force and altering that standard, in the name of protecting would be assailants, actually lessens the protections afforded to the rest of society. Objective reasonableness has never been analyzed by looking at the actions taken by a police officer that preceded the perception of threat of death or serious physical injury. Below is a quote from the seminal decision on this issue:

> From 2d Circuit Court of Appeals—controlling law in Connecticut for 25 years:
>
> Salim v. Proulx, 93 F. 3d 86 (2d Cir. 1996)
>
> Plaintiff additionally contends that Officer Proulx is liable for using excessive force because he created a situation in which the use of deadly force became necessary. Plaintiff faults Proulx for various violations of police procedure, such as failing to carry a radio or call for back-up, and also for failing to disengage when the other children entered the fray. However, Officer Proulx's actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force. The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force. *See Schulz v. Long,* 44 F.3d 643, 649 (8th Cir.1995) ("[E]vidence that [the officers] created the need to use [deadly] force by their actions prior to the moment of seizure is irrelevant...."); *Fraire,* 957 F.2d at 1275–76 (same); *Carter v. Buscher,* 973 F.2d 1328, 1332 (7th Cir.1992) (same); *Greenidge v. Ruffin,* 927 F.2d 789, 792 (4th Cir.1991)

In direct contrast to the approach taken by the federal courts, the raised bill mandates a consideration of whether the police officers own conduct "increased the risk of an occurrence of the situation that precipitated the use of such force." (See line 40-41 of the Raised Bill). That is not a workable standard in the courts. What does "increased the risk" mean? By 1%? By 5%? How is possibly analyzed except through hindsight? What police officer would not hesitate to use otherwise justified deadly force if he/she knows they will be judged years later by a jury analyzing what they did with hindsight and included in the analysis will be all of the events preceding the situation that called for deadly force that the federal courts have concluded are

entirely irrelevant. It bears repeating that the persons hurt the worst by this piece of the legislation are the innocent victims who would otherwise be protected by police officers applying their training in deadly force situations, and who suffer serious injury or death due to the hesitation caused by the mandated considerations in section 2 of the raised bill (lines 27-41.) Eliminating lines 27-41 of the raised bill would keep Connecticut in line with the U.S. Supreme Court and lower court decisions that strike the proper balance among all interests—the suspects', the victims', and the police officers'—in deadly force situations.

The second problem with lines 27-41 of the raised bill concerns the impracticability of implementation in a suit brought for wrongful death following the use of deadly force. In a lawsuit involving the police use of deadly force the claim brought is that the police officer violated the deceased's constitutional protection against illegal seizures, guaranteed by the Fourth Amendment, when he or she used deadly force, and is usually accompanied by a claim of assault under Connecticut law and sometimes is accompanied by a claim of illegal seizure in violation of the Connecticut Constitution. When our jury is asked to make a determination of whether the police officer violated the Fourth Amendment rights of the deceased, the jury is provided with the U.S. Supreme Court standard for use of deadly, which is the reasonable perception of a threat of death or serious physical injury described above. However, if section 2 of the raised bill (lines 27-41) remains in the bill there will be a different standard for use of deadly force applicable to the claims based on Connecticut State law. The jury will be instructed on the federal constitutional claim under the 4th Amendment that it should judge the police officer by the objective reasonableness standard set forth by the Supreme Court that looks to the reasonableness of the perception of death or serious physical injury, and that the officer should not be judged by 20/20 hindsight; as to the state law –based claims for violation of the Connecticut Constitution the Court will have to instruct that jury that it must undertake an analysis of whether reasonable attempts at de-escalation occurred and whether the officers' actions increased the risk of the situation occurring that lead to the use of deadly force-- even though such actions are entirely irrelevant to the Fourth Amendment issue—so the same use of deadly force is judges under two different standards. This presents an impossible challenge to a trial judge when instructing a jury; the jury will be told that it <u>should not</u> consider the actions taken leading up to the use of deadly force as to the federal constitutional claim, but it <u>should</u> consider those same actions as to the state law claims; but be sure that that consideration does not spill back and color judgment on the federal claim. Hearing and absorbing the law is hard enough for a jury to do without presenting them with a legal and logical conundrum such as that posed by lines 27-41 of the raised bill. Surely, any police officer defendant hoping for a fair trial would have a claim he or she was deprived of a fair trial because the jury charge was illogical and contradictory, in essence, tying the jury up in knots.

In sum, eliminating lines 27-41 of the raised bill would keep Connecticut in line with the U.S. Supreme Court and lower court decisions that strike the proper balance among all interests—the suspects', the victims', and the police officers'—in deadly force situations; and

also allow the trial courts to provide consistent and fair instruction to the Connecticut juries that will be analyzing future uses of deadly force.

Thank you for your attention. I would be happy to speak to you in greater detail upon request.

Very truly yours,

Thomas R. Gerarde

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