Unreasonable, Unfair, and Unaccountable: What *Commonwealth v. Pownall* Reveals About Instructing Juries on Police Use of Deadly Force

Jennifer Bauer*

ABSTRACT

Police violence is a widespread problem in the United States that disproportionately affects Black communities. Social justice movements and the media pressure prosecutors to pursue criminal charges against offending officers. However, convictions are rare, partly because officers can assert a legal defense for using deadly force in effecting arrests. Based on common law or state justification statutes, this available defense permits officers to use deadly force in "reasonable" circumstances, pursuant to the Fourth Amendment. What constitutes "reasonable," however, is a fact-specific, discretionary, and murky question for courts.

Pennsylvania's justification statute, 18 PA. CONS. STAT. § 508(a), was at issue in *Commonwealth v. Pownall*, in which the Philadelphia District Attorney's Office ("DAO") charged Officer Ryan Pownall with third-degree murder for allegedly killing David Jones, a Black man, during a traffic stop. The DAO anticipated that Pownall would rely on section 508(a) at trial and, in a motion in limine, preemptively asked the court not to use the standard suggested jury instructions that summarize the statute. The DAO argued that the statute is unconstitutional because it permits the use of deadly force in categorically unreasonable situations. The Pennsylvania Supreme Court affirmed the lower courts' dismissal of the motion under procedural rules without reaching the issue of section 508(a)'s constitutionality. But, the court strongly suggested that section 508(a) is constitutional and, importantly, reasoned that rewriting the statute is a job reserved solely for the legislature.

Pownall highlights the difficulty and necessity of challenging and changing use of force policies and defenses and the way they are explained to juries. Today, the jury instructions are vague and do not reflect the

* J.D. Candidate, The Pennsylvania State University, Penn State Law, 2024

nuances of deadly force, including the systemic biases favoring police. Because jury instructions are critical to reaching accurate verdicts, stakeholders should rewrite the instructions to ensure a fair administration of justice and hold officers accountable, thereby reducing future violence.

Table of Contents

I. INTRODUCTION

On June 8, 2017, former Philadelphia Police Officer Ryan Pownall shot and killed David Jones.[1] The shooting occurred after Pownall stopped Jones, a Black man, for driving his dirt bike erratically.[2] Witnesses described seeing Jones and Pownall get into a "scuffle" during a traffic

1. *See* Presentment No. 4, at 12, *In re* Twenty-Ninth Cnty. Investigating Grand Jury, Misc. No. 0006987-2016 (Phila. Cnty. Ct. Com. Pl. 2018) [hereinafter Grand Jury Presentment]. Because the case against Pownall never made it to a trial on the merits and the court did not establish a factual record, the facts relayed in this Comment are based on the Grand Jury Presentment. *See* Commonwealth v. Pownall, 278 A.3d 885, 889 (Pa. 2022). Importantly, issues with the Presentment's credibility and integrity led Court of Common Pleas Judge Barbara McDermott to dismiss the charges. *See supra* Section II.C.3.; Chris Palmer, *A Philly Judge Threw Out All Charges in the Murder Case Against Former Police Officer Ryan Pownall*, PHILA. INQUIRER (Oct. 11, 2022), https://perma.cc/3N28-8SCF.

2. *See* Grand Jury Presentment, *supra* note 1, at 1.

stop, after which Jones, apparently unarmed, fled as Pownall fired at least three shots at his back.[3] Jones later died from the gunshot wounds.[4]

The facts underlying *Commonwealth v. Pownall* are upsetting, but not surprising, as police violence, especially against unarmed Black men, dominates the news.[5] Incidents like that between Pownall and Jones have "spur[red] social movements[,] such as Black Lives Matter," and caused police violence to be categorized as a public health crisis.[6] As one journalist powerfully describes, "liv[ing] in a world . . . in which you feel that your very life is constantly under threat because of the color of your skin is . . . a form of violence . . . ."[7]

In response to Jones' death and the growing police violence epidemic, the Philadelphia District Attorney's Office ("DAO") charged Pownall with third-degree murder, a rare move in this type of case.[8] Adding to the uniqueness of this case, before trial, the DAO challenged one of Pownall's major defenses provided for in 18 PA. CONS. STAT. § 508(a), Pennsylvania's justification statute.[9] Section 508(a) excuses an officer's use of deadly force in certain circumstances.[10] The DAO attempted to preclude the court from using the standard suggested jury instructions tied to section 508(a)(1), arguing that the instructions'

3. *Id*.

4. *See id*. at 7.

5. *See* Commonwealth v. Pownall, 278 A.3d 885, 908 (Pa. 2022) (Wecht, J. dissenting). While this Comment focuses on police violence against Black men, primarily because of the nature the *Pownall* case, it is important to note that Black women are victims of overpolicing at a similar, alarming rate and deserve to be centered in their own discussion. *See generally* Kimberlé Williams Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 9 UCLA J. SCHOLARLY PERSP. 21 (2013) (discussing how the discourse around racial overpolicing rarely centers or considers Black women, to their significant detriment).

6. GBD 2019 Police Violence U.S. Subnational Collaborators, *Fatal Police Violence by Race and State in the USA, 1980-2019: A Network Meta-Regression*, 398 THE LANCET 1239, 1240 (2021). Black Lives Matter was "initiated in 2013 by community [organizers] Patrisse Cullors, Alicia Garza, and Opal Tometi in response to the killing of Trayvon Martin." *Id*.

7. Charles M. Blow, *Blow: The Destructive Power of Despair in America*, AUSTIN-AMERICAN STATESMAN (June 4, 2020, 1:00 AM), https://perma.cc/M2QJ-L6QU.

8. *See* Press Release, Phila. Dist. Att'y's Off., Brief Filed Ahead of Murder Trial of Ryan Pownall for Shooting Unarmed Man in the Back (July 1, 2021), [hereinafter DAO Press Release] https://perma.cc/TRZ7-6RRG; *see also* Aaron Hill, *Putting Police in the Paddywagon: An Analysis of the Difficulties of Prosecuting Police and Proposed Solutions*, 53 UNIV. TOLEDO L. REV. 497, 500 (2022) (citing factors that inhibit police prosecution, such as prosecutorial relationships with police, jury bias, available defenses, police unions, and police culture).

9. *See* DAO Press Release, *supra* note 8.

10. *See* 18 PA. CONS. STAT. § 508(a) (2022); *see also* DAO Press Release, *supra* note 8. The *Pownall* court and parties refer interchangeably to section 508, section 508(a), and section 508(a)(1). *See Pownall*, 278 A.3d at 888, 890 (majority opinion). For clarity, this Comment uses section 508(a) to refer to the statute generally and section 508(a)(1) to refer to that specific statutory provision.

summary of the statute is "facially unconstitutional" under the Fourth Amendment.[11] The trial court denied the motion as "insufficient,"[12] and the Pennsylvania Superior Court quashed the appeal under appellate procedural rules.[13] The Pennsylvania Supreme Court affirmed the Superior Court's quashing of the appeal without ruling on the statute's constitutionality or the use of the jury instructions at trial.[14]

Pownall merits review for several reasons: (1) the DAO's strategy of challenging the suggested standard jury instructions was unique;[15] (2) the Pennsylvania Supreme Court left open the critical question of section 508(a)'s constitutionality;[16] and (3) evaluating section 508(a) and the related jury instructions is crucial to ensure fair justice and hold officers properly accountable, thereby reducing future violent police encounters.[17]

This Comment begins in Part II by outlining the Fourth Amendment's general limitations on police use of deadly force and detailing Pennsylvania's justification statute.[18] Part II concludes by reviewing the *Pownall* case and the eventual dismissal of all charges.[19] Finally, Part III argues for reforming Pennsylvania's use-of-deadly-force standard suggested jury instructions because the instructions do not promote a fair administration of justice and do not hold police officers accountable for violence.[20]

II. BACKGROUND

Pownall addresses a controversial question: when is an officer's use of deadly force legally justified?[21] In *Pownall*, the DAO challenged the constitutionality of Pennsylvania's justification statute.[22] The unique case highlights the important issue of police violence in both Pennsylvania and the United States and the need for action and accountability.[23]

11. *See Pownall*, 278 A.3d at 892.
12. *Id*. at 896.
13. *See id*. at 897.
14. *See id*. at 902, 907 (concluding that the order is not appealable under PA. R. APP. P. 311(d) and/or PA. R. APP. P. 313(b)).
15. *See infra* Section II.C.1.
16. *See infra* Section II.C.2.
17. *See infra* Section III.A.
18. *See infra* Section II.A–II.B.
19. *See infra* Section II.C.
20. *See infra* Part III.
21. *See* Commonwealth v. Pownall, 278 A.3d 885, 890 (Pa. 2022); *see also* DAO Press Release, *supra* note 8.
22. *See* DAO Press Release, *supra* note 8.
23. *See Pownall*, 278 A.3d at 907 n.19, 908 (noting that the "troubling and recurring issue of police shootings . . . warrants serious examination" but also questioning whether a "facial [Fourth Amendment] claim is even viable").

A. Police Use of Deadly Force in the United States

Since 2015, U.S. police have shot and killed more than 9,300 people nationwide.[24] But not everyone is at the same risk of harm: police killings in the United States involve Black people more than twice as often as white people.[25] Pennsylvania is not immune to police violence and racial bias. From 2015 to 2023, Pennsylvania police killed an average of 20 victims each year.[26] Nearly one-third of those victims were Black men, and at least four were reported to be unarmed.[27]

These statistics underrepresent police use of deadly force by failing to account for instances in which police shot but did not kill the suspect.[28] Providing a clearer picture of the totality of police violence, the Philadelphia Police Department tracks "officer[-]involved shootings" ("OIS"s).[29] An OIS is any instance involving "the [accidental or intentional] discharge of a firearm . . . by a police officer whether on or off duty."[30] There were 115 OISs from 2015 to 2023, almost five times the number of reported deaths in Philadelphia for the same period.[31]

While the circumstances of police shootings vary widely, every shooting calls into question the officer's authority to use deadly force.[32] Importantly, many police departments have policies for when officers may use such force.[33] Those policies, in turn, are subject to state justification statutes, case law, state constitutions, and the Fourth Amendment of the U.S. Constitution.[34]

---

24. *Police Shootings Database*, WASH. POST, https://perma.cc/NQT7-KYRQ (last visited Feb. 15, 2024).

25. Brief for Amicus Curiae ACLU of Pa. in Support of Petitioner at 5, Commonwealth v. Pownall, 278 A.3d 885 (Pa. 2022) (No. Cp-51-Cr-0007307-2018).

26. *Police Shootings Database*, *supra* note 24. 2023 was the deadliest year, with 28 police shootings. *Id.*

27. *Id*. (reporting as unarmed: Danny Washington (2018); Antwon Rose (2018); *Pownall* victim David Jones (2017); and Christopher Sowell (2016)). In the first four months of 2023, there were eight fatalities, four of which involved Black individuals. *Id.*

28. *See Officer Involved Shootings*, PHILA. POLICE DEP'T, https://perma.cc/U77J-JV9G (last visited Feb. 15, 2024).

29. *See id*.

30. *See id*. The OIS database is related to the Department's work with the U.S. Department of Justice Office of Community Oriented Policing Services following a rise in OISs. *See* GEORGE FACHNER & STEVEN CARTER, OFF. OF CMTY. ORIENTED POLICING SERV., COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF DEADLY FORCE IN PHILADELPHIA POLICE DEPARTMENT (2015), https://perma.cc/9PFY-KTSX.

31. *See Officer Involved Shootings*, *supra* note 28.

32. *See Police Shootings Database*, *supra* note 24.

33. *See Officer Involved Shootings*, *supra* note 28; *see also infra* Part III (discussing the Philadelphia Police Department use of deadly force directives). For a review of national police department policies, see Osagie K. Obasagie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Became Constitutional Law*, 104 CORNELL L. REV. 1281, 1300–06 (2019).

34. *See* Obasagie & Newman, *supra* note 33, at 1286.

Despite the prevalence of deadly shootings and the legal checks on police department policies, officer prosecutions for murder or manslaughter are rare, in part, because department policies and state laws make it nearly impossible for prosecutors to secure homicide convictions.[35] From 2005 to 2014, on-duty police officers shot approximately 10,000 individuals, but criminal charges were filed in less than 2% of those cases.[36]

Some states have attempted reform.[37] For example, in 2019, California passed a narrower justification statute, requiring the use of force to be "necessary," not just "reasonable," in light of the "officer's actions leading up to the killing."[38] A previous version of the proposed bill, which gained support from Black Lives Matter,[39] was even stricter.[40] That version included a "specific definition of the 'necessary' standard" that required "de-escalation tactics" and allowed officers to "be charged with involuntary manslaughter if they were negligent in their conduct leading up to the shooting."[41] Ultimately, lawmakers compromised on the final law, which advocates believe is too watered down to improve accountability or reduce violence in any meaningful way.[42]

Since the law's passage, California police departments have only recently started to "comply and update their policies . . . . after years of legal disputes," further highlighting the difficulty with reform efforts, partially due to institutionalized systems that want to protect their own interests.[43] Because of the uncertainty in the criminal system, victims may

35. *See* Zusha Elinson & Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, WALL ST. J. (Nov. 25, 2014, 7:22 PM), https://perma.cc/W3R4-RTFF. From 2004 to 2011, only "41 officers in the [United States] were charged with either murder or manslaughter in connection with on-duty shootings" as compared to more than 2,700 civilian charges. *Id*.; *see also* Sam Levin, *'Hunted': One in Three People Killed by US Police Were Fleeing, Data Reveals*, THE GUARDIAN (July 28, 2022, 6:00 AM), https://perma.cc/7W2Q-UHRM.

36. *See* Hill, *supra* note 8, at 500.

37. *See* Levin, *supra* note 35.

38. *Id*.

39. *See supra* note 6 and accompanying text.

40. *See* Levin, *supra* note 35.

41. Jane Coaston, *California's New Law to Stop Police Shootings, Explained*, VOX (Aug. 23, 2019, 1:00 PM), https://perma.cc/4M23-55WU.

42. *See id*. ("These compromises did what they were intended to do . . . . Police withdrew their opposition, legislators signed on, and the bill passed and was signed by the governor, but it wasn't the kind of meaningful legislation we envisioned." (quoting Melina Abdullah, co-founder of the Los Angeles chapter of Black Lives Matter)); *see also* Eliana Machefsky, Note, *The California Act to Save [Black] Lives? Race, Policing, and the Interest-Convergence Dilemma in the State of California*, 109 CAL. L. REV. 1959, 1977–79 (2021).

43. Levin, *supra* note 35; *see also* Machefsky, *supra* note 42, at 1991–94.

choose to pursue civil remedies, such as those provided under 42 U.S.C. § 1983.[44]

In the rare case that a state charges an officer following a shooting, the officer may be able to assert a statutory or common law justification defense to escape culpability.[45] Because each state has the power to determine its own criminal code, there is not a universal defense for police use of deadly force.[46] Generally, the defense is based on the officer's reasonable belief that either the victim posed an "imminent threat" of injury or committed a "dangerous" felony leading to the attempted arrest.[47] The "reasonableness" standard comes from the U.S. Constitution's Fourth Amendment protection against unreasonable seizures.[48]

44. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 4 (1985). Section 1983 creates a private right of action for civil damages when an officer violates a victim's rights in certain circumstances. *See* 42 U.S.C. § 1983. Section 1983 cases are challenging because, to overcome the officer's qualified immunity, the rights violated must be "clearly established," and rights related to the use of deadly force are not clear. *See* WHITNEY NOVAK, CONG. RSCH. SERV., LSB10492 POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 3 (2020) ("[T]he level of specificity required has made it increasingly difficult for plaintiffs to show that the law was clearly established—which some scholars have argued may jeopardize the purpose of [§] 1983 as a tool . . . ."). "From 2005 to 2007, for example, 44[%] of courts favored police in excessive force cases. That number jumped to 57[%] in excessive force cases decided from 2017 to 2019." *See id.* at 2. *But see* Allison Sherry, *A Family Will Receive the Largest Known Police Settlement in Colorado's History*, NPR (May 23, 2023, 5:04 AM), https://perma.cc/2V33-NQHN (detailing the police shooting of Christian Glass, in which the state and law enforcement agencies settled rather than risked going to trial, which is rare).

45. *See* Obasagie & Newman, *supra* note 33, at 1286.

46. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320 (2007) (referencing the "police powers" reserved to the states). Many states have statutes that are based on the Model Penal Code ("MPC"), which was drafted by the American Law Institute ("ALI") and provides standardized language that states may adopt for their criminal codes. *See id*.; *see also* Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After Garner*, 35 ST. LOUIS U. PUB. L. REV. 109, 119 (2015) (surveying state justification statutes in relation to the MPC and *Garner*). The ALI promulgated the MPC in 1962, which "prompted a wave of state code reforms." Robinson & Dubber, *supra*, at 32. The MPC did not endorse a specific theory of criminal law or seek to further policy goals but instead summarized criminal common law at the time. *See id*. at 334.

47. *See* Flanders & Welling, *supra* note 46, at 122.

48. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 7 (1985) (finding officer's shooting of an unarmed, fleeing suspect during an attempted arrest unreasonable); Graham v. Connor, 490 U.S. 386, 395 (1989) (finding officer's conduct during an investigatory stop unreasonable); Scott v. Harris, 550 U.S. 372, 381 (2007) (finding officers' conduct in an attempt to stop a motorist from driving erratically and endangering the public reasonable).

1. "Reasonableness" and the Fourth Amendment in Use-of-Deadly-Force Cases

The U.S. Constitution's Fourth Amendment guarantees the "right . . . to be secure . . . against unreasonable searches and seizures."[49] A "seizure" includes arrest, physical restraint, and "apprehension by the use of deadly force."[50] The U.S. Supreme Court has considered the Fourth Amendment's limit on use of deadly force in three landmark cases: *Tennessee v. Garner*,[51] *Graham v. Connor*,[52] and *Scott v. Harris*.[53]

In *Garner*, the Supreme Court held that it is unreasonable for a police officer to use deadly force against an "apparently unarmed felon" trying to escape arrest unless it is necessary and the officer has probable cause to believe that the suspect "poses a significant threat of death or serious physical injury to the officer or others."[54] *Garner* involved the death of Edward Garner.[55] Officer Elton Hymon shot and killed Garner when Garner tried to escape arrest after officers caught him allegedly breaking into a home.[56]

Garner's father sued Hymon under § 1983, claiming that Hymon violated Garner's constitutional rights by shooting him.[57] Hymon asserted a defense under Tennessee's justification statute, which, at the time, authorized him to "use all the necessary means" to arrest the defendant if the defendant "fle[d] or forcibly resist[ed]" after being notified of the officer's "intention to arrest [them]."[58] The police department did not charge Hymon with a crime or formally discipline him for shooting and killing Garner.[59]

After considerable back and forth between the district court and the Sixth Circuit Court of Appeals, the U.S. Supreme Court granted certiorari

49. U.S. CONST. amend. IV.

50. *Garner*, 471 U.S. at 7; *see also* Torres v. Madrid, 141 S. Ct. 989, 999 (2021) (holding that officers seized the plaintiff when they shot her, even though she escaped and was not killed or captured immediately).

51. *Garner*, 471 U.S. at 7.

52. *Graham*, 490 U.S. at 395.

53. *Scott*, 550 U.S. at 381. *Garner*, *Graham*, and *Scott* involved civil claims against the officer(s) under § 1983. *See Garner*, 471 U.S at 5; *Graham*, 490 U.S. at 388; *Scott*, 550 U.S. at 375. While those cases did not address criminal charges against the officer(s), the *Pownall* court condoned the application of *Garner* and its progeny with respect to the limitations of use of deadly force in a criminal case. *See* Commonwealth v. Pownall, 278 A.3d 885, 891 (Pa. 2022). For a discussion of the importance of these rulings as applied to criminal charges and defenses, see *infra* Section II.A.2.

54. *Garner*, 471 U.S. at 3.

55. *See id.* at 3–4.

56. *See id*.

57. *See id*. at 5; *see also supra* note 44 (discussing § 1983 claims).

58. *Garner*, 471 U.S. at 4 (citing TENN. CODE ANN. § 40-7-108 (1982)). The code was amended in 1990. *See* TENN. CODE ANN. § 40-7-108(b) (2012).

59. *Garner*, 471 U.S. at 5.

to decide whether the Tennessee statute was constitutional under the Fourth Amendment.[60] As a threshold issue, the Court held that "apprehension by use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[61] Balancing the government's interest in effectuating arrests against the "unmatched" intrusiveness of deadly force and its "self-defeating way of apprehending a suspect,"[62] the Court further held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."[63]

The Court also concluded that Tennessee's justification statute was unconstitutional insofar as it allowed officers to use deadly force unconditionally against a fleeing suspect, regardless of whether the suspect was armed or dangerous.[64] However, the Court explained that the statute itself was not *facially* unconstitutional because, under some circumstances, an "officer [would have] probable cause to believe that [a fleeing] suspect poses a threat of serious physical harm . . . [and] it is not constitutionally unreasonable to prevent escape by using deadly force" in those situations.[65] The Court clarified that deadly force is reasonable if the suspect has a weapon or committed prior threatening acts, but, even in those situations, the Court still needs to determine whether the officer had probable cause to believe the suspect posed a threat of serious physical harm at the time of arrest.[66] Thus, *Garner* requires a fact-based review of circumstances, and Fourth Amendment reasonableness is not predicated on specific circumstances being present.[67]

Three years after *Garner*, in *Graham*, the Supreme Court reaffirmed that use-of-deadly-force claims are subject to the Fourth Amendment's

60. *See id*. at 4–7.

61. *Id*. at 7.

62. *See id*. at 8–10 ("To determine the constitutionality of a seizure, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion.'" (quoting United States v. Place, 462 U.S. 696, 703 (1983))).

63. *Id*. at 10. This premise has been deemed the "fleeing felon" rule, and it relates to the main points of contention the DAO raised in *Pownall*. *See* Robert Leider, *Taming Self-Defense: Using Deadly Force to Prevent Escapes*, 70 FLA. L. REV. 971, 972 (2018); Commonwealth v. Pownall, 278 A.3d 885, 891 (Pa. 2022).

64. *See Garner*, 471 U.S. at 11.

65. *Id.*

66. *See id*. at 11–12, 21.

67. *See id*. at 11–12. The Court noted that departmental policies are important in determining what conduct is "reasonable" because they are designed not to "hamper effective law enforcement" but rather to guide what officers do in the field. *Id*. at 18–19 (citing KENNETH J. MATULIA, A BALANCE OF FORCES: A REPORT OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE 161 (1982)). The Court determined that Hymon's use of deadly force against Garner was not justified. *Id*. at 20–21. ("Hymon could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat.").

"reasonableness" standard.[68] *Graham* refined *Garner*, specifying that "objective[] reasonable[ness]" should be determined "in light of the facts and circumstances . . . , without regard to . . . [the officer's] underlying intent or motivation."[69] The Court, in a narrow win for the officers, clarified that the "perspective of . . . [a typical] officer on the scene" matters in determining objective reasonableness because of the "split-second" risk assessments and decisions officers are required to make in dangerous situations.[70]

Nearly two decades later, *Scott* held that *Garner* was "an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation."[71] *Scott* rejected the idea that *Garner* "establish[ed] a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"[72] Instead, *Scott* reaffirmed that courts "must still slosh [their] way through the factbound morass of 'reasonableness'" in assessing use of deadly force.[73] Thus, deadly force reasonableness determinations continue to depend on the individual facts of the case and an officer's objective beliefs.[74]

2. *Garner*, *Graham*, and *Scott's* Impact on Justification Statutes

Importantly, *Garner* and its progeny did not require states to change their justification statutes or common law rules.[75]

> *Garner* means that the use of deadly force by the police without regard to dangerousness violates the Fourth Amendment, but, of course, the Supreme Court cannot change the state substantive criminal law . . . . The standards for criminal liability in a state criminal prosecution do not have to mimic the standards for a constitutional tort.[76]

In fact, as of 2015, 12 states upheld a common law "fleeing felon" rule; and, while 36 states either already had *Garner*-like language in place or

68. *See* Graham v. Connor, 490 U.S. 386, 390 (1989).

69. *Id*. at 397. The *Graham* Court rejected the lower courts' four-part analysis examining whether the force was "applied maliciously or sadistically." *Id*. at 390–91 (quoting Graham v. City of Charlotte, 644 F. Supp. 246, 248–49 (W.D.N.C. 1986)).

70. *Id*. at 397.

71. *See* Scott v. Harris, 550 U.S. 372, 374, 382 (2007).

72. *Id*. at 382.

73. *Id*. at 383.

74. *See id*.

75. *See* Flanders & Welling, *supra* note 46, at 122 (noting that the Michigan Supreme Court "went out of its way to say it was not going to change the common law rule after *Garner* and even doubted its power to do so" (citing People v. Couch, 461 N.W.2d 683, at 684 n.1 (Mich. 1990))).

76. *See id.* at 125 (quoting GILLESPIE MICHIGAN CRIMINAL LAW AND PROCEDURE § 5:60 (2d ed. 2015)).

changed their statutes sometime after the ruling, *Garner* did not require them to do so.[77]

Though states must follow the Fourth Amendment's prohibition against unreasonable seizures, as stated above, nothing requires a state to criminalize a police officer who violates the Fourth Amendment.[78] A state may choose to prosecute the officer, but the jury can acquit if it finds that the officer's conduct was reasonable, pursuant to an available and asserted defense.[79] Courts have struggled to define and apply "reasonableness" so as to guide officers in the field effectively and limit violent conduct.[80]

B. Police Use of Deadly Force in Pennsylvania

Pennsylvania's justification statute, 18 PA. CONS. STAT. § 508(a), does not include the word "reasonable," but a related statutory section instructs courts to read the Fourth Amendment limitation into the statute.[81] Thus, section 508(a)(1) generally justifies an officer's use of deadly force "when there is a [reasonable] belief that such force is necessary to prevent death or serious bodily injury to [the officer] or others."[82] Sections 508(a)(1)(i) and (ii) provide additional scenarios in which deadly force is justified.[83] Though there are competing interpretations of the statute,[84] in *Pownall*, the DAO argued that section 508(a)(1) provides four distinct justifications: (1) the prevention of harm justification; (2) the "'forcible felony' . . . justification[]"; (3) the "'deadly weapons' justification[]"; and (4) the endangering human life justification.[85]

First, and most broadly, the prevention of harm justification allows deadly force "when the officer reasonably believes 'such force is necessary to prevent death or serious bodily injury to [the officer] or [another,]'" adhering to the general standard in *Garner*.[86]

---

77. *See id*.

78. *See id*. at 126.

79. *See, e.g.*, Neelam Bohra, *Former Texas Police Officer Acquitted in 2020 Shooting Death of Black Man*, N.Y. TIMES (Sept. 25, 2022), https://perma.cc/AX7M-8BR2 (detailing the acquittal of Officer Shaun Lucas for shooting Jonathan Price, despite a strong argument that "[the officer's] use of deadly force was unjustified").

80. *See* Obasagie & Newman, *supra* note 33, at 1283.

81. *See* Commonwealth v. Pownall, 278 A.3d 885, 891 n.6 (Pa. 2022) ("The word 'reasonable' does not appear in [section 508]. But, [18 PA. CONS. STAT. §] 501 instructs that the words "believes" and "belief" . . . mean 'reasonably believes' or 'reasonable belief.' We therefore substitute this definition for clarity.").

82. *See* Wargo v. Mun. of Monroeville, 646 F. Supp. 777, 784 (W.D. Pa. 2009) (applying Pennsylvania law in a claim arising under § 1983).

83. *See* 18 PA. CONS. STAT. § 508(a) (2022).

84. *See, e.g.*, Johnson v. Rosemeyer, 117 F.3d 104, 107 (3d Cir. 1997) (appealing denial of a habeas corpus petition).

85. *See Pownall*, 278 A.3d at 890–91.

86. *Id*. at 891 (quoting 18 PA. CONS. STAT. § 508 (2022)); *see also* Tennessee v. Garner, 471 U.S. 1, 3 (1985).

Second, the "'forcible felony' . . . justification[]"[87] allows deadly force "when the officer reasonably believes 'such force is necessary to prevent the [suspect] from . . . resist[ing] or escap[ing arrest]' and 'the [suspect] has committed or attempted a forcible felony[.]'"[88] This justification overcomes the "fleeing felon" issue in *Garner* by requiring officers to believe that a qualified "forcible felony" occurred and that deadly force was necessary to carry out the arrest.[89]

Third, the "'deadly weapon' justification[]" allows deadly force "when the officer reasonably believes 'such force is necessary to prevent the [suspect] from . . . resist[ing] or escap[ing arrest]' and 'the [suspect] . . . is [both] attempting to escape and possesses a deadly weapon[.]'"[90] Section 508 does not define "deadly weapon," and other sections of the criminal code provide varying definitions depending on the application.[91]

Finally, the endangering human life justification allows deadly force "when the officer reasonably believes that 'such force is necessary to prevent the [suspect] from . . . resist[ing] or escap[ing arrest]' and '[the suspect] . . . indicates that [they] will endanger human life or inflict serious bodily injury unless arrested [immediately.]'"[92]

The lack of commas in sections 508(a)(1)(i) and (ii) allows for an alternate interpretation that changes the DAO's posited second and third justifications.[93] In this alternate interpretation, an officer may use deadly force only when they "believe[] that such force is necessary" to carry out an arrest and the suspect either (1) "has committed or attempted a forcible felony" or (2) is "attempting to escape" and, in either scenario, "possesses a deadly weapon."[94] Under this interpretation, the suspect *must* have a

87. *Pownall*, 278 A.3d at 891.

88. *Id.* (quoting 18 PA. CONS. STAT. § 508 (2022)).

89. *See Garner*, 471 U.S. at 20–21.

90. *Pownall*, 278 A.3d at 891 (quoting 18 PA. CONS. STAT. § 508 (2022)).

91. *See* 18 PA. CONS. STAT. § 508; *see also* 18 PA. CONS. STAT. § 2301 (2022) (defining "deadly weapon" for "Offenses Involving Danger to the Person" under Pennsylvania criminal code chapters 23–32, but not section 508). Pennsylvania case law includes "knives, blackjacks, mace, mouse poison, and cars" as examples of deadly weapons. *Pownall*, 278 A.3d at 894 (quoting Motion in Limine at 10, Commonwealth v. Pownall, No. Cp-51-Cr-0007307-2018 (Phila. Cnty. Ct. Com. Pl. Dec. 30, 2019) [hereinafter DAO Motion in Limine]). Section 508(a)'s lack of deadly weapon definition creates a vague standard for officers and courts. *See supra* Section II.B. (presenting alternative interpretations); *infra* Part III (discussing issues with alternative interpretations).

92. *Pownall*, 278 A.3d at 891 (quoting 18 PA. CONS. STAT. § 508 (2022)).

93. *See* 18 PA. CONS. STAT. § 508(a)(1) (2022).

94. *See id.*; *see also* Dolan v. Golla, 481 F. Supp. 475, 480 (M.D. Pa. 1979) (holding that the officer was justified "under any of the three requirements of section 508(a)(1)" because "[h]e knew Plaintiff ha[d] committed a forcible felony and possessed a deadly weapon"); *cf.* Johnson v. Rosemeyer, 117 F.3d 104, 107 (3d Cir. 1997) ("The phrase 'committed or attempted a forcible felony . . . ' has, as a necessary condition, the

deadly weapon to justify the officer's use of deadly force, which more strictly limits an officer's use of deadly force than the separate second and third justifications in the DAO's interpretation.[95]

Section 508(a)(1)'s interpretation matters significantly at trial because it shapes how the parties present evidence.[96] Moreover, the statute's interpretation directly supplies the law the jury will apply to the facts to determine whether the officer's actions were reasonable pursuant to the statute, thereby relieving them of guilt.[97] Juries reach verdicts based on a judge's instructions, which explain in detail the crime's elements, burdens of proof, and evidentiary standards so that the jury can properly apply the law to the case facts.[98] The instructions' specific language is essential because trials involve challenging, nuanced legal concepts "that need to be broken down so the jury can interpret and apply them" fairly.[99]

Relatedly, attorneys spend a significant amount of time drafting and advocating for specific, advantageous jury instructions.[100] In that drafting, attorneys may consider or even wholly adopt suggested standard instructions, which are accurate and impartial statements of the law that can serve as templates for instructions given at trial.[101] Despite the existence of suggested standard instructions, the judge has final say and can disregard them and the attorneys' proposals.[102] However, a judge is

requirement of '[possession of] a deadly weapon, or [other indication] that he will endanger human life or inflict serious bodily injury . . . .'" (alteration in original)).

95. *See Rosemeyer*, 117 F.3d at 107. This interpretation is similar to the DAO's proposed rewriting. *See infra* Section II.C.1.

96. *Cf.* United States v. Adair, 227 F. Supp. 2d 586, 588 (W.D. Va. 2002) (ruling on a motion in limine to define "willfully," because "the issues raised in the government's motion . . . [would] affect all phases of the trial").

97. *See* Commonwealth v. Boden, 507 A.2d 813, 813 (Pa. 1986) ("[A] jury chosen to determine whether the officer did . . . use force which was excessive under the circumstances must be fully appraised of the principles of law which govern a police officer's use of force . . . .").

98. *See* Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 235, 240 (2013) (discussing the role of jury instructions).

99. *See* Jeffrey M. Pollock, *Jury Instructions are Critically Important*, LAW.COM: NEW JERSEY LAW JOURNAL (June 26, 2017, 3:11 PM), https://perma.cc/W8KY-HUGA; *see also* Walter W. Steele & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 78 (1988) (noting that jurors have low comprehension of instructions and that "rewriting instructions with clarity as the goal can dramatically improve comprehensibility").

100. *See* Pollock, *supra* note 99.

101. *See* Steele & Thornburg, *supra* note 99, at 78 n.8.

102. *See* Pollock, *supra* note 99. The Pennsylvania Supreme Court noted that "suggested standard jury instructions 'are not binding and do not alter the discretion afforded trial courts in crafting jury instructions; rather, as their title suggests, the instructions are guides only.'" Commonwealth v. Pownall, 278 A.3d 885, 895 n.11 (Pa. 2022) (quoting Commonwealth v. Eichinger, 108 A.3d 821, 845 (Pa. 2014)).

bound by one, important limitation: jury instructions must "clearly, adequately, and accurately" reflect the law.[103]

Thus, jury instructions on use of deadly force must accurately reflect the Fourth Amendment's reasonableness requirement.[104] Given the ambiguity in "reasonableness," prosecutors and defense attorneys alike seek to control the jury instruction's reasonableness language because it could determine the outcome of the case.[105] Tension over anticipated jury instructions related to Pennsylvania's justification statute were front and center in *Pownall*.[106]

C. The Case of Commonwealth v. Pownall

While *Pownall's* underlying facts are familiar in the shadow of the United States's history of police violence and brutality against Black people,[107] the case procedure and outcome are "unusual."[108] *Pownall* illustrates how difficult it is to challenge the statutory safeguards that prevent fair prosecution and police officer accountability.[109]

1. Case Facts and the DAO's Motion in Limine

On June 8, 2017, former Philadelphia Police Officer Ryan Pownall shot and killed David Jones, an unarmed Black man, who fled the scene after a traffic stop.[110] In determining whether there was sufficient evidence to charge Pownall, the Investigating Grand Jury relied on witness testimony, video footage, and firearm evidence and concluded that Pownall had no reason to shoot Jones.[111] The Investigating Grand Jury reasoned that, when Pownall shot him, Jones was fleeing the scene, not

103. Commonwealth v. Hawkins, 701 A.2d 492, 511 (Pa. 1997). Because jurors are laypeople charged with a weighty task, especially in criminal cases involving homicide, jury instructions should be understandable by the average citizen. *See* Steele & Thornburg, *supra* note 99, at 77.

104. *See* Commonwealth v. Boden, 507 A.2d 813, 817 (Pa. 1986) (Larsen, J., dissenting) (referencing "reasonableness," though the United States Supreme Court had not yet decided *Garner*); *see also* Wargo v. Mun. of Monroeville, 646 F. Supp. 2d 777, 783–84 (W.D. Pa. 2009) (referencing "reasonableness" of officer's use of force).

105. *See* Pollock, *supra* note 99; *see also* V. James DeSimone, *Chauvin Jury Instructions Could Determine Trial Outcome*, U.S.L.W. (BL) (Mar. 25, 2021, 4:01 AM), https://perma.cc/9TN2-Y9QY ("The prosecution wants Chauvin's conduct to be evaluated using an 'objective reasonableness' standard . . . . The defense wants the jury to hear an instruction used in [§] 1983 excessive force cases . . . .").

106. *See Pownall*, 278 A.3d at 885.

107. *See supra* Sections II.A–B.

108. *See Pownall*, 278 A.3d at 908 (Dougherty, J., concurring) ("A special concurrence is unusual. But so is the [DAO's] prosecution in this case.").

109. *See id*. at 920 (Wecht, J., dissenting).

110. *See* Grand Jury Presentment, *supra* note 1, at 1. For a discussion of issues related to the Grand Jury presentment, see *supra* note 1 and *infra* Section II.C.3.

111. *See* Grand Jury Presentment, *supra* note 1, at 12–13.

armed, and not a threat to Pownall or anyone else.[112] Based on these conclusions, the DAO charged Pownall with third-degree murder,[113] possession of an instrument of a crime,[114] and recklessly endangering another person.[115]

Before the trial, the DAO anticipated that Pownall would invoke the section 508(a)(1) defense, claiming that the law justified the officer's use of deadly force in apprehending Jones.[116] Because this defense would be detrimental to the DAO's case, the DAO filed a pretrial motion in limine,[117] asking the court to find section 508(a)(1) unconstitutional by challenging the standard suggested jury instructions that summarize the statute.[118] The DAO cited *Garner* and argued that section 508(a)(1)

112. *Id*. at 12–13. The Grand Jury's language and findings are particularly important in light of the anticipated defense that Pownall was "justified in using deadly force [because] he believe[d] that such force [was] necessary to prevent death or serious bodily injury to himself or such other person." 18 PA. CONS. STAT. § 508(a)(1) (2022); *see also Pownall*, 278 A.3d at 888.

113. *Pownall*, 278 A.3d at 889 (majority opinion). Third-degree murder is a "felony of the first degree" and is a catch-all charge used when a defendant does not otherwise commit an "intentional killing" (first-degree murder) or a killing "while engaged . . . in the perpetration of a felony" (second-degree murder)." 18 PA. CONS. STAT. § 2502 (2022).

114. *See Pownall*, 278 A.3d at 889; *see also* 18 PA. CONS. STAT. § 907 (2022).

115. *See Pownall*, 278 A.3d at 889; *see also* 18 PA. CONS. STAT. § 2705 (2022).

116. *Pownall*, 278 A.3d at 888. The relevant text of the statute reads as follows:

> (a) Peace officer's use of deadly force in making arrest. --
>
> (1) A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that:
>
> (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and
>
> (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

18 PA. CONS. STAT. § 508(a)(1) (2022).

117. *See Pownall*, 278 A.3d at 888. A party traditionally files a motion in limine before trial to ask the court either to exclude or allow certain evidence at trial. *See, e.g.*, Commonwealth v. Cohen, 529 Pa. 552, 556 (Pa. 1990) (appealing the denial of a motion in limine to exclude evidence of "intent to kill"). However, a motion in limine can be used for other pre-trial rulings, such as "[f]ocusing jury instructions." Kent A. Higgins, *The Motion in Limine: Probing the Potential of this Powerful Tool*, 58 ADVOCATE 50, 50–51 (2015) (discussing how courts "would not decide on . . . proposed jury instructions until after the evidence is already before the jury" and proposing that a motion in limine about "whether [certain language] would be embodied in a jury instruction" could help attorneys "avoid the needless preparation and assemblage of evidence that may end up as irrelevant").

118. *See Pownall*, 278 A.3d at 888.

violates the Fourth Amendment's prohibition against unreasonable seizures because the statute allows deadly force in situations that are unreasonable[119] by

> allow[ing] the use of deadly force against (1) all fleeing "forcible felons" with no definition of that term and with no requirement that the felon pose any risk of death or serious bodily injury, and (2) any suspect fleeing with a "deadly weapon," again with no limitation on that broadly defined term or requirement that the weapon be used to threaten imminent death or serious bodily injury.[120]

With this argument, the DAO attempted to preclude the court from explaining the use of deadly force justification defense in a certain way to the jury.[121] Specifically, the DAO requested that the court not use the Suggested Standard Jury Instruction (Crim) § 9.508(B) ("SSJI (Crim) § 9.508(B)"), which "largely tracks [s]ection 508[(a)(1)]."[122]

The DAO argued that two provisions of section 508(a)(1), the "'forcible felony' and 'deadly weapons' justifications," violate the Fourth Amendment because they are "too broad" in allowing force in situations that would be so unreasonable that any court would have to agree.[123] For example, the DAO argued that the "forcible felony . . . justification[]" permits the use of deadly force for "felonies that, under *Garner*, would not warrant deadly use of force," like crimes involving "'damage to or loss of

---

119. *See id*. at 888, 892–95; *see also* Tennessee v. Garner, 471 U.S. 1, 3, 7 (1985).

120. *See* Brief for the Commonwealth as Appellant at 21–22, Commonwealth v. Pownall, 278 A.3d 885 (Pa. 2022) (No. Cp-51-Cr-0007307-2018) [hereinafter Commonwealth Brief].

121. *See Pownall*, 278 A.3d at 888.

122. *Id*. Any references throughout this Comment to Suggested Standard Jury Instruction (Crim) § 9.508(B) or SSJI (Crim) §9.508(B) refer to PA. BAR INST., PA. SUGGESTED STANDARD CRIM. JURY INSTRUCTIONS § 9.508B (3d ed. 2019 Supp.). The relevant text of the jury instruction reads as follows:

> [Y]ou cannot find the defendant guilty:
> a. unless the evidence convinces you beyond a reasonable doubt that [he] [she] did not reasonably believe that deadly force was necessary to prevent death or serious bodily injury to [himself] [herself] [other person];
> [b. and unless the evidence also convinces you beyond a reasonable doubt that [[[[[he] [she] did not reasonably believe either that deadly force was necessary to prevent [name of arrested person] from escaping or that [name of arrested person]:
> [(1) in attempting to escape had committed or attempted to commit the crime of [[[[[crime]; [or]
> (2) possessed a deadly weapon; [or]
> (3) had indicated that [he] [she] would endanger human life or inflict serious bodily injury unless [his] [her] custody was secured without delay.]]

PA. BAR INST., PA. SUGGESTED STANDARD CRIM. JURY INSTRUCTIONS § 9.508B (3d ed. 2019 Supp.).

123. *Pownall*, 278 A.3d at 891–92. For a discussion of section 508(a)(1) and the four instances in which the statute justifies a police officer's use of deadly force, see *supra* Section II.B.

property[]' or a 'breach of the peace.'"[124] The DAO also argued that the "'deadly weapons' justification[]" allows "police officers to kill anyone . . . who attempts to escape from arrest and happens to possess a 'deadly weapon[.]'"[125] The DAO argued that this justification is overly broad because, under Pennsylvania law, "deadly weapon" includes several objects that do not necessarily pose an immediate threat, like "mouse poison[] and cars."[126]

To remedy the constitutional violation, the DAO proposed changing the jury instructions to "collapse three of the four independent justifications . . . into one" by changing each relevant "or" in the instructions to "and."[127] In the DAO's rewritten version, the statute would permit officers to "use deadly force [only] against fleeing arrestees who attempted or committed a forcible felony *and* possess[ed] a deadly weapon *and* indicate[d] that they would endanger human life or inflict serious bodily injury unless arrested without delay."[128] To support turning the "disjunctive" statute into a "conjunctive" one, the DAO relied on Pennsylvania's Rules of Statutory Construction and case law.[129]

The DAO's strategy—challenging SSJI (Crim) § 9.508(B) to challenge section 508(a)(1)'s constitutionality—was unique, first, because jury instructions are generally challenged on appeal after they are given and/or the jury renders a verdict.[130] In *Pownall*, however, the DAO challenged the instruction before the trial even began.[131] Notably and relatedly, a motion in limine preemptively challenging a jury instruction was an issue of first impression for the court.[132]

---

124. *Pownall*, 278 A.3d at 892–93 (quoting DAO Motion in Limine, *supra* note 91, at 9) (noting that "forcible felony" is not defined "in the code," but the subcommittee note to the suggested jury instruction "appear[s] to . . . limit[] [the application of the defense] to the felonies involving some element of force," which the DAO defines based on other language within the instruction).

125. *Id*. at 894.

126. *Id*. at 894 (quoting DAO Motion in Limine, *supra* note 91, at 10); *see supra* note 93 and accompanying text.

127. *See id*. at 894 (quoting DAO Motion in Limine, *supra* note 91, at 13).

128. *See id.* (quoting DAO Motion in Limine, *supra* note 91, at 16).

129. *Id*. at 932 (Wecht, J., dissenting) (discussing the difference between "disjunctive" and "conjunctive" sentences); s*ee* Commonwealth Brief, *supra* note 124, at 36–40. To support its argument, the DAO cites *Johnson v. Rosemeyer*, in which the Pennsylvania Superior Court upheld an aggravated assault conviction of an officer because the "trial court correctly instructed the jury that *each element* of [section 508(a)(1)]'s escape justification was a necessary condition for deadly force in order to ensure it was used only against one posing a threat to human life and safety." *Id*. at 38–39 (citing Johnson v. Rosemeyer, 117 F.3d 104, 107 (3d Cir. 1997)).

130. *See, e.g.*, Smith v. Horn, 120 F.3d 400, 419 (3d Cir. 1997) (determining that a jury instruction error was "not harmless" on appeal).

131. *See supra* notes 116–122 and accompanying text.

132. *See Pownall*, 278 A.3d at 900 (majority opinion).

Second, the DAO's strategy was unique because, ordinarily, the Commonwealth, whom the DAO represents, defends both the U.S. Constitution and the Pennsylvania Constitution, rather than challenges their provisions.[133] As the *Pownall* court explained,

> when a county district attorney prosecutes a case "in the name of the Commonwealth," he or she assumes [the Attorney General's] duty to defend a challenged statute's constitutionality . . . . Here, the DAO takes the exact opposite stance: not only does it decline to uphold [s]ection 508's constitutionality, it leads the charge against it.[134]

The court clarified that it was "unusual" for the Commonwealth, as a party, to attack the constitutionality of a statute it would generally uphold.[135] However, Justice Wecht's dissent points out the unique nature and arguable necessity of the DAO's appeal of the motion's dismissal, explaining that

> this appeal is [the DAO's] one and only opportunity to secure appellate review of its challenge to [s]ection 508. If the jury acquits Pownall, double jeopardy precludes the Commonwealth from seeking appellate review of the challenge to [s]ection 508(a)[1] . . . . Conversely, if the jury convicts Pownall notwithstanding the trial court's denial of the Commonwealth's [motion], then the Commonwealth would not be the aggrieved party entitled to challenge the denial on appeal.[136]

Following Justice Wecht's logic, the motion in limine was the DAO's only available method to challenge the statute because, "regardless of how Pownall's bell tolls, on this question [of section 508(a)(1)'s constitutionality,] that bell 'cannot be unrung by a later appeal.'"[137]

The DAO's strategy was also unique because of the type of challenge it brought: a "facial" constitutional challenge.[138] A "facial" challenge argues that the statute's language itself ("on its face") violates the

133. *See id*. at 888 n.2.

134. *Id*. (citation omitted).

135. *Id*. Citizens or organizations are usually the parties to bring a constitutional challenge, arguing that the law infringes upon their rights. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845 (1992) (ruling on a claim brought by healthcare providers that provisions of the Pennsylvania Abortion Control Act violated the Fourteenth Amendment right to privacy), *overruled*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

136. *Pownall*, 278 A.3d at 926 (Wecht, J., dissenting). Double jeopardy is the prohibition against retrying an individual for the same offense after acquittal. *See* PA. CONST. art. 1, § 10 (stating that no individual may be "put in jeopardy of life or limb" more than once for the "same offense").

137. *Pownall*, 278 A.3d at 926 (Wecht, J., dissenting) (quoting Commonwealth v. Harris, 32 A.3d 243, 249 (Pa. 2011)).

138. *Id*. at 900 (majority opinion).

Constitution.[139] In contrast, an "as-applied" challenge argues that the statute's application to case facts and circumstances violated a party's constitutional rights.[140] Challenges or appeals of a statute's constitutionality are usually "as-applied" challenges, rather than "facial" challenges.[141] For example, *Garner* involved an "as-applied" challenge because the plaintiffs alleged that Hymon's actions were unreasonable under the Tennessee statute as applied to shooting Garner, and, therefore, that Hymon violated Garner's Fourth Amendment rights by shooting him.[142]

Conversely, in *Pownall*, the DAO argued that its challenge was "facial" because the statute's language violates the Fourth Amendment generally rather than as applied to the facts of the case.[143] The court did not determine whether the DAO's challenge was "facial" or applied.[144] Moreover, and importantly, the court did not rule on section 508(a)(1)'s constitutionality at all, which would have been an issue of first impression in Pennsylvania.[145] Instead, the court quashed the appeal under procedural rules.[146] It's possible that the court chose not to address the admittedly "troubling" topic of police violence,[147] in part, because of the DAO's "irregular[]" and provocative behavior.[148]

The progressive and controversial District Attorney responsible for prosecuting Pownall and raising the constitutional challenge was Larry Krasner.[149] Before *Pownall*, Krasner was vocal about police use of deadly

---

139. Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 660 (2010).

140. *See id*. at 657.

141. *See Pownall*, 278 A.3d at 906 n.19; Kreit, *supra* note 139, at 660 (discussing the complexity of the Supreme Court's distinction between facial and applied challenges).

142. *See* Tennessee v. Garner, 471 U.S. 1, 5 (1985).

143. *See Pownall*, 278 A.3d at 904–06. In fact, there were almost no case facts to consider at the time of the motion. *See id.* at 889.

144. *See id*. at 906 n.19 ("[There is] a serious question of whether a facial claim is even viable . . . . But we need not resolve this novel and prickly issue today.").

145. *See id.* Though in a different context, *Johnson v. Rosemeyer* addresses jury instructions relating to section 508. *See* Johnson v. Rosemeyer, 117 F.3d 104, 105 (3d Cir. 1997). Johnson appealed from a denial of his habeas corpus petition following a conviction for aggravated assault by "contend[ing] that 'the district court erred . . . where the state trial court's jury instruction[s] on justification [were] erroneous and thus violated [his] right to due process.'" *Id*. (quoting Appellant's Brief at 11, Johnson v. Rosemeyer, 117 F.3d 104 (3d Cir. 1997) (No. 95-7365)). The *Johnson* court did not address the jury instructions because it affirmed the district court's denial of the claim because Johnson did not meet the federal habeas corpus action's requirements. *Id*. at 10–11. The *Johnson* court also held that *Garner* "did not establish a federal right to particular jury instructions . . . in a state criminal case . . . ." *Id*.

146. *See Pownall*, 278 A.3d at 888, 898; *see also infra* Section II.C.2.

147. *See Pownall*, 278 A.3d at 897.

148. *See id*. at 908 (Dougherty, J., concurring).

149. *See* Rachel M. Cohen, *Pennsylvania Republicans' Attempt to Impeach Larry Krasner, Explained*, VOX (Oct. 26, 2022, 5:40 PM), https://perma.cc/QQ67-9U5L

force and the difficulty in prosecuting officers because of section 508(a)(1).[150]

Due to the infrequency of police officer prosecutions, *Pownall* gave Krasner a rare opportunity to challenge what he felt was a too-permissive justification statute, and he filed the "unusual" motion in limine because he wanted "a fair trial."[151] Although Krasner recognized that officers require a different use-of-deadly-force standard than civilians because of their role in safeguarding the community, he believed that Pownall's shooting of the apparently unarmed and fleeing Jones in the back was inexcusable.[152] Krasner filed the motion as an attempt to challenge the law that would immunize Pownall—and other officers in the future—from the Commonwealth holding them accountable for those inexcusable actions.[153]

In response, Pownall's defense team challenged what it saw as the DAO's attempt to "change the law that [Pownall] had relied on in the performance of his duties."[154] Pownall rebutted the DAO's reliance on

("Krasner . . . ran on a platform of reducing mass incarceration and the criminalization of poverty."). In 2022, the Pennsylvania House of Representatives passed a resolution to establish a committee "to investigate, review and make findings and recommendations concerning rising rates of crime, law enforcement and the enforcement of crime victim rights." STAFF OF H. COMM. ON RESTORING L. & ORD., SECOND INTERIM REPORT, H. 206-216, 2021-2022 Sess., at 1 (Pa. 2022). The public and judiciary criticized Krasner's progressive policies after a severe rise in crime in 2021 and 2022 and the low rate of prosecution for police shootings. *Id*. at 4–5. The House Committee referenced *Pownall* and the judicial backlash against the DAO's handling of the case. *See id*. at 56–58; *see also infra* Section II.C.3 (discussing Judge McDermott's dismissal of the *Pownall* case). "Republican [lawmakers] filed two articles of impeachment" against Krasner in October 2022. Cohen, *supra.*

150. *See* Chris Norris, *Philly DA Reflects on Chauvin Verdict, Where Case Against Former Officer Ryan Pownall Stands*, WHYY (Apr. 18, 2021), https://perma.cc/GY79-8GFU ("We believe the law in Pennsylvania [referencing section 508] is not fair. It's not fair to a prosecutor who is trying to hold a police officer accountable for committing a crime on-duty that is violent." (quoting Larry Krasner)).

151. *Id.* (quoting Larry Krasner); *see also* Elinson & Palazzolo, *supra* note 35.

152. *See* Norris, *supra* note 150 ("[W]hen someone is running away[] who is unarmed, . . . that doesn't mean it's time for target practice on their spine." (quoting Larry Krasner)).

153. *See id*.

154. *See* Commonwealth v. Pownall, 278 A.3d 885, 895 (Pa. 2022) (citing Response to Motion in Limine, at 7–8, Commonwealth v. Pownall, No. Cp-51-Cr-0007307-2018 (Phila. Cnty. Ct. Com. Pl. Dec. 30, 2019)). The defense also posited that the DAO's argument presented "*ex post facto* concerns." *Id*. An ex post facto issue occurs when a "law . . . inflicts a greater punishment[] than the law [prescribed] when committed . . . [or] alters the legal rules of evidence . . . [necessary] to convict the offender." Calder v. Bull*,* 3 U.S. 386, 391 (1798). If the "challenged law was enacted after the occurrence of the triggering offense and then applied retroactively" and the law negatively impacts the offender, the court may rule application of the changed law unconstitutional. Commonwealth v. Santana, 266 A.3d 528, 537, 539 (Pa. 2021). Pownall argues that changing section 508(a)(1), and then applying it to his crime retroactively, would violate his constitutional rights. *See Pownall*, 278 A.3d at 895.

Garner to find section 508(a)(1) facially unconstitutional, arguing that *Garner* was a civil case—therefore, not a relevant comparison—and that the *Garner* Court did not find the Tennessee statute facially unconstitutional, only unconstitutional as applied to the facts.[155] Pownall further argued that the Court refused to "make shooting a nondangerous fleeing felon a crime" and, therefore, that the Pennsylvania Supreme Court should not be able to criminalize Pownall's actions by changing the statute.[156] After reviewing both arguments, the trial court denied the DAO's motion in limine, reasoning that the DAO did not sufficiently prove that section 508(a)(1) was unconstitutional.[157] This ruling prompted a lengthy appeals process.[158]

2. Case Procedure and the Pennsylvania Supreme Court's Ruling

In denying the DAO's constitutional challenge to section 508(a)(1), the trial court reasoned that the DAO's motion was "insufficient," did not "launch an actual facial challenge," and "only raised hypothetical problems in the abstract, untethered to Pownall's case."[159] The trial court also determined that the court could not adopt the DAO's proposed remedy of rewriting the statute because it lacked the authority to do so, regardless of the statute's constitutionality.[160]

In addition to dismissing the motion, the trial court denied the DAO's ability to appeal the decision under two rules of appellate procedure that govern when a party can appeal an interlocutory, or non-final, order: PA. R. APP. P. 311 and PA. R. APP. P. 313.[161] Under rule 311, the Commonwealth may appeal if "the order will terminate or substantially handicap the prosecution."[162] Additionally, under rule 313, the "collateral order doctrine," the Commonwealth can only appeal if the order is "collateral," or separate from the "main cause of action," and if the issue is "too important to be denied review."[163]

The trial court determined that the order was not appealable under rule 311(d) because the order was "limited only to the application of a jury

155. *See Pownall*, 278 A.3d at 895.

156. *Id*. (quoting People v. Couch*,* 461 N.W.2d 683, 684 (Mich. 1990)).

157. *Id*. at 896.

158. *Id*.

159. *Id*.

160. *Id*. at 888 (explaining that rewriting the statute would "usurp the legislative function of the Pennsylvania General Assembly").

161. *See id*. at 896.

162. PA. R. APP. P. 311(d) (addressing the ability to appeal interlocutory orders in criminal cases).

163. PA. R. APP. P. 313. Rule 313 also requires a finding that the "claim will be irreparably lost" if the party has to wait until the final judgment of the trial on the merits. *Id.*

instruction," did not prevent the DAO from presenting evidence at trial, and did not "terminate[] its prosecution."[164] Further, the trial court felt that the issue was not properly collateral under rule 313(b) because "the propriety and necessity of a self-defense instruction . . . cannot be decided without considering the evidence presented at trial."[165]

On first appeal, the Pennsylvania Superior Court issued a unanimous order upholding the trial court's recommendation to quash the appeal under rules 311(d) and 313(b).[166] The court affirmed that the DAO's argument "depends upon consideration of the evidence presented at trial" and thus was not separate "from the ultimate issue—[Pownall's] guilt or innocence."[167]

The Pennsylvania Supreme Court granted review of the DAO's three issues on appeal related to the dismissal under rules 313(b) and 311(d) and the Superior Court's assertion that it "could not properly construe a statute to give effect [to] legislative intent."[168] The court first addressed the issue related to rule 311(d): whether the trial court's dismissal "excludes, suppresses, or precludes the Commonwealth's evidence."[169] The court determined that the motion's dismissal did not fall within the parameters of rule 311(d) because it did not "substantially" hinder the case and only related to the DAO's burden of proof at trial.[170]

The court then addressed whether the issue was appealable under rule 313(b)'s collateral order doctrine.[171] The court disagreed with the DAO, discussing only what it considered to be the threshold issue of separability:

---

164. *Pownall*, 278 A.3d at 896 (citing Trial Court Opinion at 4, Commonwealth v. Pownall, No. Cp-51-Cr-0007307-2018 (Phila. Cnty. Ct. Com. Pl. Dec. 30, 2019)).

165. *Id*. The trial court further denied the DAO's request to "amend its order by adding a certification permitting the DAO to . . . appeal" under Pennsylvania law governing interlocutory orders, 42 PA. CONS. STAT. § 702(b) (2022). *Id*. at 897. Under section 702(b), a trial court can authorize an appellate court to take an appeal if the trial court feels that an order "involves a controlling question of law as to which there is substantial ground for difference of an opinion" and if allowing an immediate appeal will bring resolution to the question of law. *See* 42 PA. CONS. STAT. § 702(b) (2022). Without the trial court's permission under section 702(b), the DAO filed a notice of appeal under both rule 311(d) and rule 313(b), despite the trial court's determination that the rules did not apply. *See Pownall*, 278 A.3d at 897.

166. See *Pownall*, 278 A.3d at 897.

167. *Id*. (quoting Commonwealth v. Pownall, No. 148 EDA 2020, 2020 WL 5269825, at *1 (Pa. Super. Ct. Sep. 4, 2020)).

168. *Id*. at 898 n.12.

169. *See id*. at 898; *see also* PA. R. APP. P. 311(d).

170. *Pownall*, 278 A.3d at 900–01 (referencing Shearer v. Hafer, 177 A.3d 850, 867 (Pa. 2018) and noting that appeal of an order dismissing a request for the trial court to refrain from using a suggested standard jury instruction is an issue of first impression in its jurisdiction).

171. *See id*. at 902 (explaining that an interlocutory appeal is permissible when the "separability, importance, and irreparability" requirements are met (quoting *Shearer*, 177 A.3d at 858)).

> it is impossible to separate the DAO's claim . . . from the merits of the criminal case . . . [because] a ruling in the DAO's favor on its constitutional issue would, quite literally, result in an after-the-fact judicial alteration of the substantive criminal law with which Pownall has been charged . . . essentially criminaliz[ing] conduct the [Pennsylvania] General Assembly has deemed non-criminal.[172]

In the court's view, if the DAO's motion was intended to simply request or preclude the use of a jury instruction, the order "would fail to be separable from the merits because, by its very nature, a jury instruction must be based on evidence introduced at trial."[173] Alternatively, if the DAO's motion was intended to be a "facial" constitutional challenge, the "claim still would not be separable from the merits."[174]

The court's analysis of the claim's separability, as construed as a "facial" challenge, strongly implies that it would find section 508(a)(1) constitutional if it were addressing the issue.[175] The court considered precedent regarding facial constitutional challenges, affirming that "a statute is facially unconstitutional only where no set of circumstances exist[s] under which the statute would be invalid."[176] Applying that rule of law, the court reasoned that the DAO's "conce[ssion that there would be] some circumstances under which the forcible felony and deadly weapon justifications could be applied constitutionally . . . essentially defeat[ed] the DAO's claimed facial challenge."[177]

Additionally, the court rejected the DAO's assertion that the claim was "purely legal" because, under *Graham*, constitutional challenges to police use of deadly force are highly fact-specific.[178] Thus, the court concluded that the order was not separate from the main cause of action under rule 312(b) because the DAO did not explicitly bring a facial challenge to the statute and the challenge "necessarily requires

172. *Id*. at 904.
173. *Id*.
174. *Id*.
175. *Id*.
176. *Id*. (quoting Clifton v. Allegheny Cnty., 969 A.2d 1197, 1222 (Pa. 2009)).
177. *Id*. at 905. The court highlighted that *Garner* "refused to declare even Tennessee's egregious statute *facially* unconstitutional . . . [because] there remained the possibility that in other cases the facts might reveal the officer" acted with probable cause. *Id.* at 905 n.19.
178. *Id*. (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). In a footnote, the court addresses its rejection of the DAO's assertion that the challenge is "abstract" or facial, distinguishing the holdings referenced in the dissent related to facial constitutional challenges because they stem from qualified immunity claims in civil cases. *See id.* at 905 n.18. The court declined to expand the collateral order doctrine to any order involving "'the constitutional validity of a statutory defense' . . . [because] it would undermine the narrow approach favored by this Court and United States Supreme Court with respect to collateral orders." *Id.* (quoting Wecht, J., dissenting).

consideration of" the facts and evidence of the case.[179] Ultimately, the court quashed the DAO's appeal and affirmed the Pennsylvania Superior Court's ruling, meaning that the case could continue without a ruling on section 508(a)(1)'s constitutionality or the use of SSJI (Crim) § 9.508(B) at trial.[180]

3. Judge McDermott's Dismissal of the Case

In October 2022, more than five years after Jones' death, Judge McDermott dismissed all charges against Pownall based on the impropriety of the Grand Jury Presentment.[181] Judge McDermott believed that the presentment, which provided the basis for Pownall's charges, had "so many things wrong" with it that it was rendered completely unreliable.[182] Specifically, the Judge reasoned that the DAO "had failed to provide the panel with information on how and when officers are legally justified in firing their weapons" and on the specific elements of the homicide charge.[183]

However, Judge McDermott did not dismiss the case with prejudice, meaning that the DAO could appeal or seek a new grand jury proceeding and file new charges against Pownall.[184] The dismissal leaves open the question of whether a jury will eventually convict Pownall for shooting and killing Jones.[185] Further, if the DAO decides to refile charges, section 508(a)(1)'s constitutionality may very well resurface; after *Pownall*, however, those questions remain unanswered.[186]

---

179. *See id*. at 907.

180. *Pownall*, 278 A.3d at 907.

181. *See* Palmer, *supra* note 1. Importantly, though the criminal charges were dismissed, the Philadelphia Police Department dismissed Officer Pownall. *See* Press Release, Citizens Police Oversight Comm'n, CPOC Releases Statement on the Dismissal of Criminal Charges Against former Philadelphia Police Officer Ryan Pownall (October 13, 2022), https://perma.cc/A2LA-6MA5.

182. *See* Palmer, *supra* note 1.

183. *See id*. Judge McDermott's dismissal echoed Pennsylvania Supreme Court Justice Dougherty's special concurrence to the appeal on the DAO's motion in limine, which argued that "the DAO appears to have obtained a presentment . . . without providing the grand jury the definition for the crime that was actually charged in the subsequent complaint . . . , or the possible justification for that criminal offense." *Pownall*, 278 A.2d at 911 (Dougherty, J., concurring). Judge McDermott expressed her disdain for the DAO's behavior, "saying that if a defense attorney . . . [had] behaved in a similar fashion . . . 'I would declare them incompetent.'" Palmer, *supra* note 1 (quoting Judge McDermott).

184. *See* Palmer, *supra* note 1; Ernest Owens, *Ex-Cop Ryan Pownall's Case Should Be Krasner's Humbling Moment*, PHILA. MAGAZINE: CITY LIFE (Oct. 19, 2022, 8:28 AM), https://perma.cc/8JZX-67BS. Following the dismissal, Krasner has indicated that the "case is not over," though no charges have been filed as of the date of this publication. Tom MacDonald, *Former Philly Cop Could Face New Charges After Judge Tossed Murder Case Last Week*, WHYY (Oct. 17, 2022), https://perma.cc/LXF2-4QFH.

185. *See* MacDonald, *supra* note 184.

186. *See Pownall*, 278 A.3d at 906–07, 906 n.19; *see also supra* Section II.C.2.

III. ANALYSIS

After *Pownall*, section 508(a)(1) remains good law and a viable defense for Pennsylvania police officers who use deadly force in apprehending suspects.[187] Thus, despite the DAO's efforts, SSJI (Crim) § 9.508(B) also stands because the instruction accurately summarizes section 508(a)(1).[188] Leaving SSJI (Crim) § 9.508(B) as-is, however, poses two distinct but related problems: (1) it hinders the fair administration of justice, and (2) it fails to hold police officers appropriately accountable, allowing police violence to continue unchecked in many ways.

A. The Standard Jury Instructions Hinder Justice and Fail to Hold Officers Accountable

Section 508(a)(1)'s ambiguity and reliance on the opaque and fact-specific Fourth Amendment reasonableness standard places the determination of guilt in the hands of less-than-equipped—and often racially biased[189]—jurors relying on unclear law that defers to and favors police officers. Officers, therefore, continually escape accountability for their violent actions because of section 508(a)(1) and the way it is described to juries.[190] Though an imperfect solution, modifying jury instructions, including SSJI (Crim) § 9.508(B), to include the nuances of use of deadly force and police interactions with the public would ensure a fairer administration of justice, improve accountability for police officers, and, ultimately, reduce future violence.

Jury instructions mirrored on section 508(a)(1) lead to the unfair administration of justice because of the statute's unclear guidance, interpretation issues, and unbalanced perspective.[191] Section 508(a)(1) serves a particular legal function: to provide a culpability escape route for an officer charged with harming or killing another person based on conduct that would otherwise be a crime, but is instead deemed "reasonable" based on a threat of harm to the officer.[192] Section 508(a)(1) does not, however, provide officers with specific guidance on how to

187. *See supra* Section II.C.2.

188. *See supra* Section II.C.1.

189. *See, e.g.*, Monica Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide"*, 45 L. & Soc'y Rev. 69, 69 (2011) ("[R]acial and ethnic bias against nonwhite defendants continues to affect criminal case outcomes in multiple and complicated ways.").

190. *Cf.* German Lopez, *Police Officers are Prosecuted for Murder in Less Than Two Percent of Fatal Shootings*, VOX (Apr. 2, 2021, 11:30 AM), https://perma.cc/DWN7-K5YR.

191. *See supra* Section II.B. (discussing differing interpretations of section 508(a)).

192. *See supra* Section II.B.; *see also* Raoul Shah, *Licensed to Kill? An Analysis of the Standard for Assessing Law Enforcement's Criminal Liability for Use of Deadly Force,* 39 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 1, 18 (2018).

evaluate the danger of a situation and, in turn, the reasonableness of deadly force.[193] This important task of educating officers is best tasked to police department trainings, procedures, and directives partly because a department best understands the particulars of their own police force and community and can communicate with officers in more effective ways than via a widely-applicable, legislature-created statute.[194]

For example, the Philadelphia Police Department provides at least four published directives to "guide personnel decisions and actions" surrounding "use of deadly force."[195] Directive 10.1, updated on January 30, 2017, and effective when Pownall shot Jones, opens with a clear policy statement:

> [i]t is the policy of the Philadelphia Police Department, that officers hold the highest regard for the sanctity of human life, dignity, and liberty of all persons. The application of deadly force is a measure to be employed only in the most *extreme circumstances* and all lesser means of force have failed or could not be reasonably employed . . . . Police [o]fficers shall not use deadly force against another person, unless they have an objectively reasonable belief that they must protect themselves or another person from death or serious bodily injury.[196]

Importantly, Directive 10.1's language and "objective reasonableness" standard track directly with *Garner*, *Graham*, and *Scott*.[197] The 24-page directive also goes well beyond section 508(a)(1)'s statutory prescription, including context of what an officer should consider—namely, "the sanctity of human life"—and a decision spectrum of "no force" to "deadly force" and instructs officers to "use the option that represents the minimal amount of force necessary to reduce the immediate threat."[198]

Notably, there is a stark difference between Directive 10.1's context and specificity and SSJI (Crim) § 9.508(B)'s ambiguity.[199] The suggested

193. *See* Obasagie & Newman, *supra* note 33, at 1286.

194. *See id*. However, researchers found that many policies and directives are just as vague and lacking in practical guidance as the justification statutes, merely referencing "reasonableness" without more instruction. *See id*. at 1303–04, 1306, 1320.

195. PHILA. POLICE DEP'T, DIRECTIVE 10.1, USE OF FORCE—INVOLVING THE DISCHARGE OF FIREARMS 1 (2017).

196. *Id*. at 1.

197. *Id*. at 2. The directive explains that the "objectively reasonable" standard is met by "reviewing all relevant facts and circumstances of each particular case" and specifically warns that "resisting arrest or flight alone would not justify the use of deadly force," reflecting *Garner*. *Id*.; *see supra* Section II.A.1.

198. *Id*. at 1, 4. The directive also requires officers to report firearm discharges immediately and undergo a thorough OIS investigation. *Id*. at 13–15.

199. *See* PA. BAR INST., PA. SUGGESTED STANDARD CRIM. JURY INSTRUCTIONS § 9.508B (3d ed. 2019 Supp.); *see also* Johnson v. Rosemeyer, 117 F.3d 104, 106 (3d Cir. 1997) (providing an example of use-of-force jury instructions in a criminal case).

instructions are a summary of the three-paragraph statute that itself lacks definitions and offers competing interpretations with disparate implications. To illustrate: one interpretation of section 508(a)(1) requires only a reasonable belief that the suspect "has committed or attempted a forcible felony" and is trying to escape arrest.[200] Another interpretation of the same language adds a critical third criteria that the individual must also be armed with a "deadly weapon" to justify use of deadly force.[201] The statute notably fails to define the important qualifying terms of "forcible felony" and "deadly weapon," which necessarily govern the statute's applicability in a given situation.[202] This definition and interpretation problem creates confusion over whether an officer would ever be justified in using deadly force against an unarmed suspect, what felonies would qualify, and what types of objects would be considered sufficiently dangerous.

Moreover, court opinions discussing when an officer is justified in using deadly force show that jury instructions, including SSJI (Crim) § 9.508(b), lack the balanced perspective necessary for changing the trend of police violence, specifically toward Black Americans. For example, one judge believes that

> in assessing the reasonableness of [the officer's] belief [that deadly force is necessary], the jury should [be] fully informed of the demands that society has placed upon a police officer in requiring that officer to stand his ground in making arrests and executing his duties, demands which society does not place on private citizens.[203]

In that judge's view, it is important for the jury to recognize the context of an officer's actions and his role in "society's battle against the anarchy of crime."[204] The judge says nothing about the victim's point of view or experience.

Another judge explains that "specific facts and circumstances of the case, which include the severity of the underlying offense, the threat to the safety of the officers or others . . . , and whether that suspect is actively resisting arrest" matter.[205] Further, he argues, "[a]ny reasonableness determination . . . is to occur from the perspective of a reasonable officer at the scene, . . . without the benefit of hindsight. Additionally,

200. *See* 18 PA. CONS. STAT. § 508(a) (2022); *see also supra* notes 91–93 and accompanying text.

201. *See supra* notes 94–95 and accompanying text.

202. *See supra* notes 124, 129–130 and accompanying text.

203. *See* Commonwealth v. Boden, 507 A.2d 813, 818 (Pa. 1986) (Larsen, J., dissenting) (dissenting from the majority opinion, which affirmed the officer's conviction based on the jury instructions that were given without any reference to societal demands).

204. *Id*. at 813 (Larsen, J., dissenting). Notably, there is no mention of "the sanctity of life" as part of the officer's duties. *See* PHILA. POLICE DEP'T, *supra* note 195, at 1.

205. Wargo v. Mun. of Monroeville, 646 F.Supp. 2d 777, 783–84 (W.D. Pa. 2009).

determinations . . . must take into account that split-second decisions are required by law enforcement personnel in circumstances."[206] Again, the victim's perspective is not considered.

Both judges' statements indicate a bias toward police, which is passed onto the jury via the instructions on reasonable force. Then, when juries rely on that bias and acquit officers, police violence continues because officers believe, at best, that similar conduct is appropriate or, at worst, know that they likely will not be found guilty for their actions.[207] Instead, to be fair and effective, jury instructions should reflect the full spectrum of case facts and context, including not only the officer's point of view but also the victim's perspective and lived experience and the context of police encounters against the backdrop of systemic racism in American policing.[208]

Consider the *Pownall* case: instead of focusing solely on the officer's view, imagine Jones's perspective in his encounter with Pownall. As a Black man in the United States, who was stopped for allegedly illegally crossing a few lanes of traffic on his dirt bike,[209] Jones likely carried the kind of fear "that makes a grown man's shoulder draw up and his jaws clench whenever officers approach, even when there has been no offense or infraction."[210] To ensure a fair verdict, the jury must be instructed to consider that truth, too: police in the United States are more likely to stop Black men, subject Black men to violence, and kill Black men.[211] Jury instructions must capture the reality of American policing, including its pervasive racial biases. This inclusion is crucial to balance the public's overwhelming "tendency to believe an officer over a civilian" and its "reluctan[ce] to second-guess the split-second, life-or-death decisions of a police officer," despite the near-daily media coverage showing police violence against nonaggressive Black men.[212]

206. *Id*. (citation omitted) (referencing that the suspect in the instant case was "armed, suicidal, and belligerent").

207. *Cf*. Jennifer L. Doleac, *Do Body-Worn Cameras Improve Police Behavior*, BROOKINGS: UP FRONT (Oct. 25, 2017), https://perma.cc/J8HS-XVZ7.

208. *See* Toussaint Cummings, *I Thought He Had a Gun: Amending New York's Justification Statute to Prevent Police Officers from Mistakenly Shooting Unarmed Black Men*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 781, 785–86 (2014) (tying instances of police violence against young Black men to research showing a "pervasive cultural stereotype of Black men as violent and prone to criminality" and the existence of police officer "shooter bias" and "weapon bias" against Black men (first quoting Art Markman, *Shooter Bias and Stereotypes*, PSYCH. TODAY (Oct. 12, 2012), https://perma.cc/JJV8-37YK; and then quoting B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS IN PSYCH. SCI. 287 *passim* (2006))).

209. *See supra* Section II.C.1; Grand Jury Presentment, *supra* note 1, at 1.

210. Blow, *supra* note 7.

211. *See* Cummings, *supra* note 208, at 785–86.

212. Lopez, *supra* note 190 (first quoting David Rudovsky, civil rights lawyer; and then quoting Philip Matthew Stinson, criminal justice expert).

This public bias toward police officers and the fact that jury instructions do not address such a bias help to explain why juries often do not hold officers accountable for violent acts in the same way they would civilians. Because SSJI (Crim) § 9.508(B) is tied to section 508(a)(1)'s ambiguous and insufficient language, justice lies with a jury's ability to understand the complexity of American policing and consider its own and institutional biases without guidance. More nuanced, comprehensive jury instructions can educate juries on the crucial reality of the racial biases inherent in police use-of-force cases against Black men.[213]

B. Rewriting the Jury Instructions is a Workable Solution

One solution, as proposed by the DAO, is to change section 508(a)(1) itself.[214] But, as evidenced by the *Pownall* court's ruling, only the state legislature could rewrite the statute.[215] A legislative rewrite would be long and tedious and would require lawmakers to agree and, more importantly, to want to act on the issue.[216] Alternatively, focusing on jury instructions is a more practical, short-term solution because judges have considerable discretion in setting instructions.[217] Rather than relying on the legislature, stakeholders—judges, lawyers, community advocates, and law enforcement—should work together to rewrite suggested instructions and draft instructions in individual cases that encompass specific guidance beyond "objective reasonableness," educate juries on the context of modern policing and systemic racism, and better reflect the "slosh . . . through the factbound morass" that the Fourth Amendment and fair justice require.[218]

For example, some jury instructions expand upon statutory language by defining key terms, such as "imminent harm" or "reasonable force."[219] In contrast, SSJI (Crim) §9.508(B) does not include any of these important

213. *See* Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery, and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1072 (1995). In her article examining how juries treat Black women in domestic violence cases, Ammons discussses how expert witnesses must be "culturally competent" in their testimony to educate juries on why Black women may act differently than their white counterparts and how Black cultural stereotypes and "mythology" affects juries. *See id.* Ammons also advocates for the use of jury questionnaires that specifically ask about racial biases to help attorneys "determine whether the juror is likely to understand the theory of the case, or just how much the juror will have to be educated." *Id*. at 1074. Thus, jury education is a critical step. *See generally id.*

214. *See supra* Section II.B.C.

215. *See supra* note 160 and accompanying text; Shah, *supra* note 192, at 28.

216. *See, e.g.*, *supra* notes 37–44 and accompanying text.

217. *See supra* notes 102–106 and accompanying text.

218. Graham v. Connor, 490 U.S. 386, 388 (1989); Scott v. Harris, 550 U.S. 372, 383 (2007).

219. *See* Jury Instructions at 8, State v. Chauvin, No. 27-CR-20-12646 (D. Minn. Apr. 20, 2021), https://perma.cc/4ARZ-P9PG.

definitions.[220] Notably absent, too, is any explanation of what the statute means by the officer's "reasonable belief," which is a threshold prerequisite.[221] Not defining "reasonable" creates substantial ambiguity in how jurors should evaluate an officer's actions. A simple solution is to include the definition offered by the Philadelphia Police Department's own Directive 10.1:

> [o]bjectively [r]easonable[] [i]s a Fourth Amendment standard whereby an officer's belief that they must protect themselves or others from death or serious bodily injury is compared and weighed against what a reasonable or rational officer would have believed under similar circumstances. The TOTALITY OF THE CIRCUMSTANCES that led an officer to believe force was needed is critical.[222]

This definition of "objectively reasonable" aligns with *Garner*, *Graham*, and *Scott*, and it would provide jurors with crucial guidance.

Rewriting jury instructions is also more effective than rewriting the statute for one significant reason: section 508(a)(1) is only meaningful when it is applied to facts and has no power outside of the courtroom, other than to deter officer prosecutions in the first place.[223] Jury instructions, conversely, are the practical mechanism by which the jurors learn the contours of law they are required to apply.[224] Thus, jury instructions are more critical to the administration of justice and accountability than the language of the statute itself.

Still, changing jury instructions is not a perfect solution. First, and most importantly, rewriting the instructions is a post-hoc measure that fails to tackle a fundamental and deadly problem: the police's bias toward shooting unarmed Black men.[225] Second, and relatedly, police officer prosecutions are hindered by more than just section 508(a)(1).[226] For example, in murder trials, the police are the main vehicle for the prosecution to gather evidence, and the fear of damaging the important relationship between prosecutors and the police leads to prosecutors declining to charge violent officers.[227] Moreover, when charges are brought, the "blue wall of silence" prevents officers from thoroughly gathering evidence and investigating their peers.[228] Finally, it is unlikely that jury instructions will significantly impact an officer's split-second

220. *See supra* Section II.B.
221. *See supra* note 123 and accompanying text.
222. PHILA. POLICE DEP'T, *supra* note 195, at 1.
223. *See* Lopez, *supra* note 190.
224. *See supra* notes 102–108 and accompanying text.
225. *See* Cummings, *supra* note 208, at 785–86.
226. *See* Lopez, *supra* note 190.
227. *See id*.
228. *See id*. ("[T]he 'blue wall of silence' [is] essentially a code between officers that they won't . . . try to get each other in trouble.").

decisions involving whether to shoot a suspect.[229] Instead, the officer will rely on their training, guidance from police leadership, and directives.[230] Accordingly, courts often conclude that merely following a directive is enough to justify the officer's actions.[231] This type of reasoning creates a self-fulfilling cycle that inhibits officer accountability when directives are too vague or permissive.[232] Therefore, a holistic approach will require changing directives and training to include more concrete language, de-escalation tactics, and nonviolent responses.[233] In turn, incorporating these higher standards into suggested standard jury instructions is critical to holding officers appropriately accountable under the law.

C. The Chauvin *Case: An Example of Accountability*

Accountability matters. In April 2021, former Minneapolis Police Officer Derrek Chauvin was convicted of killing George Floyd.[234] During his closing argument, the prosecutor, Steven Schleicher, urged the jury to reconsider their biases and "set aside the notion that it's impossible for a police officer to do something like this."[235] Schleicher reminded the jury that Chauvin "didn't follow [his] . . . hundreds of hours of training . . . . He did not follow the department's use of force rules. He did not perform CPR. He knew better. He just didn't do better."[236] Schleicher advocated that the jury should have found Chauvin guilty for unreasonably ignoring his training, common sense, and humanity.[237]

The *Chauvin* jury instructions related to the use-of-deadly-force defense were short but included more than a recitation of Minnesota's relevant statute.[238] The instructions and Schleicher's nearly two-hour,

229. *Cf*. Obasagie & Newman, *supra* note 33, at 1285.

230. *Cf*. *id*. at 1283.

231. *See id*. at 1323–26, 1329–30 ("[B]ecause a policy appear[ed] to comply with Fourth Amendment standards, and because an officer followed the policy, . . . the officer therefore complied with the Fourth Amendment.").

232. *See id*.

233. *See id*. at 1332–33 (detailing various community-led reforms).

234. *See* Bill Chappell, *Derek Chauvin is Sentenced to 22 1/2 Years for George Floyd's Murder*, NPR (June 25, 2021, 6:05 PM), https://perma.cc/Q65L-EUM7.

235. Trial Transcript at 00:17:26, State v. Chauvin, No. 27-CR-20-12646 (D. Minn. Apr. 20, 2021), https://perma.cc/3F6F-TN53.

236. *Id*. at 00:17:55.

237. *See id*.

238. *See* Jury Instructions, *supra* note 219, at 8. The relevant text of the jury instructions reads as follows:

> To determine if the actions of the police Officer were reasonable, you must look at those facts which reasonable officer in the same situation would have known at the precise moment the officer acted with force. You must decide whether the officer's actions were objectively reasonable in light of the totality of the facts and circumstances confronting the officer and without regard to the officer's own subjective state of mind, intentions, or motivations.

passionate closing provided the necessary context for the jury to hold Chauvin accountable for killing Floyd.[239]

Following the verdict, the Minneapolis Police Department updated its policies to ban chokeholds and neck restraints and impose a "duty to intervene" on "officers who witness unauthorized force[,]"[240] These higher standards are important first steps in battling police violence, but as Attorney General Keith Ellison implored: "We've just got to keep on pushing, we just can't quit, we can't stop."[241]

IV. CONCLUSION

In the court of public opinion, police officers who shoot unarmed victims are often vilified for their actions, but, in criminal court, the officers are rarely prosecuted, let alone convicted, due to several layers of protection, including use-of-deadly-force justification statutes.[242] When the Philadelphia DAO challenged the jury instructions related to Pennsylvania's justification statute, the Pennsylvania Supreme Court declined to rule on whether the statute was a violation of the Fourth Amendment and instead dismissed the appeal for procedural reasons.[243] Though the court stated that it almost certainly would not rewrite the statute even if it were unconstitutional,[244] the DAO's suggested cure of rewriting the suggested standard jury instructions is workable.[245]

Jury instructions educate jurors on the law so they can deliver a fair verdict.[246] Pennsylvania's suggested standard jury instructions on use of deadly force do not provide the context necessary for jurors to ovecome their biases and determine if an officer was justified in using deadly force.[247] Rewriting jury instructions to reflect the nuances of Fourth Amendment's reasonableness, modern policing, and a proper balancing of perspectives and biases would better promote the fair administration of justice and ensure that officers are held accountable for their violent actions.[248]

Id. Minnesota's justification statute includes legislative intent, giving further guidance as to what is "reasonable" and the "special care" officers should use when "interacting with individuals" with disabilities. MINN. STAT. ANN. § 609.066 (West 2021).

239. *See* Trial Transcript, *supra* note 235, at 00:18:29; Chappell, *supra* note 236.

240. *See* CBS Minnesota, *The Chauvin Verdict: A Look at What's Changed One Year On*, CBS NEWS MINN. (Apr. 19, 2022, 10:12 PM), https://perma.cc/9A2S-PWRH.

241. *Id*.

242. *See, e.g.*, Lopez, *supra* note 190.

243. *See supra* Section II.C.

244. *See supra* note 160 and accompanying text.

245. *See supra* Part III.B.

246. *See supra* notes 98–106 and accompanying text.

247. *See supra* Section III.A.

248. *See supra* Part III.