Police Deadly Force Encounters – Recommendations for Investigations and Accountability

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Thank you, Attorney General Ellison, Commissioner Harrington and all the members of the Working Group for your work and for the opportunity to speak with you today about Police-Involved Deadly Force Encounters. Founded in 1952, the American Civil Liberties Union of Minnesota is the state’s leading organization dedicated to defending and advancing civil rights and liberties. We are a non-profit, non-partisan organization with more than 39,000 members across Minnesota. We are committed to advancing polices to reform our criminal legal system, enhance police accountability, end mass incarceration, and advance racial justice.

On July 7, 2016, the day after police killed Philando Castile, artists from the Twin Cities came together to create a public mural to process their shock and grief. In stark black and white lettering, the mural asked:

What do we tell our children when education didn’t matter? When compliance, age, or evidence didn’t matter? When guilt or innocence didn’t matter? When our outrage didn’t matter?

The building on which the mural lived was demolished shortly after its painting. But, like Castile, the mural lives on in memories of the community. Three years later, there is nothing reassuring to tell the hundreds of children at J.J. Hill Montessori Magnet School, where Castile worked for more than a decade. There was no reason for his killing.

But Castile is not the only person that Minnesota community members have had to grieve for in the three years since his killing. Families, friends, neighbors, and loved ones should not have to continually brace themselves for the next police shooting. Minnesota residents should not have to march in the streets demanding justice, only to have another member of their community shot and killed by police.

For Minnesota to address the problem of how police use excessive and deadly force, we need to enact large-scale reforms across the state. To start, that means establishing a truly independent
state agency or unit that is responsible for investigating police killings and prosecuting police officers who engage in excessive force and other police misconduct, reforming the state law on body cameras, and enhancing civilian oversight of police.

In Minnesota and across the country, deaths by law enforcement have sparked an outcry from communities about the need for transparency and accountability when an officer kills or seriously injures anyone. Minnesota’s system of investigating these kinds of incidents carries with it the potential for a significant conflict of interest or, at best, the perception of one.

Currently, when police use deadly force, Minnesota law does not require investigations and prosecutions that are external and independent of the law enforcement agency involved. Unless the police agency and prosecutor in the jurisdiction decide to seek an outside agency to handle the investigation and possible prosecution, the investigation can be handled by the agency itself and any ensuing grand jury proceedings or prosecutions can be done by the County Attorney’s office in the county where the incident occurred.

The fundamental problem with our existing process lies in the close working relationship between county prosecutors and the very law enforcement officers and departments they are charged with investigating. As a matter of course, prosecutors rely on local officers to serve as witnesses in prosecutors’ criminal cases, requiring mutual trust, cooperation, and partnership as colleagues in law enforcement. When local prosecutors investigate the same officers they work with on a daily basis, this sudden role-shifting creates a conflict of interest or, at a minimum, a perception of a conflict. The perception of a conflict of interest, alone, can still foster distrust between community residents and law enforcement officers. Lack of trust can lead residents feeling reluctant to cooperate with officers conducting investigations.

The same is true when it comes to the Minnesota Bureau of Criminal Apprehension or BCA, which is increasingly being called in to handle investigations that are purported to be
“independent”. But the BCA has strong interest maintaining a working relationship with local law enforcement agencies that includes the same mutual trust, cooperation, and partnership as colleagues in law enforcement.

The concept of requiring independent investigators and prosecutors is not new. President Obama’s Task Force on 21st Century Policing made recommendations that specifically address this concern with an action item that recommends, “Policies should… mandate external and independent criminal investigations in cases of police use of force resulting in death, officer involved shootings resulting in injury or death, or in-custody death.”

There have been legislative proposals to create an external, independent agency to investigate and prosecute police excessive force. But in the absence of legislative action, there are still steps that the Governor and Attorney General can take to make investigations more independent. Those steps are twofold. First, individual matters can be transferred to Attorney General Ellison. Second, Attorney General Ellison can appoint a Special Assistant Attorney General who is qualified to prosecute cases of this magnitude but who is not currently employed in the Attorney General’s office or as a prosecutor for another agency.

Minn. Stat. §8.01 provides two avenues the Attorney General could pursue:

The attorney general shall appear for the state in all causes in the supreme and federal courts wherein the state is directly interested; also in all civil causes of like nature in all other courts of the state whenever, in the attorney general's opinion, the interests of the state require it. Upon request of the county attorney, the attorney general shall appear in court in such criminal cases as the attorney general deems proper. Upon request of a county attorney, the attorney general may assume the duties of the county attorney in sexual psychopathic personality and sexually dangerous person commitment proceedings under chapter 253D. Whenever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense, and in all such cases may attend upon the grand jury and exercise the powers of a county attorney.

Minn. Stat. §8.01 (emphasis added). It is also within the attorney general’s authority to appoint a Special Assistant Attorney General. See *Conant v. Robins, Kaplan, Miller and Ciresi L.L.P.*, 603 N.W.2d 143, 148 (Minn. Ct. App. 1999) (“The attorney general may hire special attorneys pursuant to Minn. Stat. § 8.02, Subd. 1.”). Lastly, Minnesota law provides the Governor with broad authority to appoint special state employees not otherwise provided for by law. Minn. Stat. §4.04, Subd. 1 (2016) (The governor shall appoint and when necessary commission all officers and employees of the state whose selection is not otherwise provided for by law and, at pleasure, may remove any such appointee whose term of service is not by law prescribed”).

External, independent investigations and prosecutions are an important step to enhancing police accountability that can reduce actual and perceived conflicts of interest when a death occurs at the hands of law enforcement. Reforms could have the effect of bolstering the legitimacy of law enforcement, fostering more trust between police officers and community members they serve, and correcting patterns of excessive use of force.2

We also need significant reforms regarding the use of body cameras and other police video. We need statewide minimum standards for squad camera and body camera deployment by police departments, including mandatory activation, discipline for violating policy, and compliance audits. Given the stated concern that releasing video to the public before witnesses are interviewed will interfere with an investigation, officers should equally be prohibited from reviewing footage prior to writing their initial reports or being interviewed. We know that video will never present a full picture of what transpired and it is critical to get the mental impressions of officers and witnesses prior to their review of the video. Such reforms will help to ensure that video that is collected is meaningful and presents the fullest picture of what transpired.

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In the interest of public transparency, all video and audio should be released as soon as initial witness and police interviews have taken place – which should be only a matter of days, not the months that it has taken to release video in the past. We regularly see police releasing video of crimes – such as a store’s security footage of the incident – when they believe that releasing the video is in theirs and the public’s interest. When police take the life of a human being, there is a strong public interest in transparency that overrides any need to keep the footage secret until the investigation is complete.

Our third recommendation is to ensure strong, independent, civilian led oversight of the police to ensure that there are investigations and, where appropriate, discipline of officers who use excessive force in addition to the criminal legal process. To that end, the Minnesota Board of Peace Officer Standards and Training, which is responsible for dispensing occupational licenses to law enforcement, should be empowered to act like every other professional licensing board and conduct its own separate investigations and make its own decisions about actions against an officer’s license. We also need to reform state law to give civilian review boards the authority to investigate and discipline officers who abuse their authority. As a community, we have given the police tremendous power, including the power to deprive individuals of their liberty by arresting them, and the power to use physical force when it is justified. It is our responsibility to ensure that police do not abuse that power, and police should be responsive to the needs and wishes of the communities they serve. Meaningful, independent civilian review is critical component in our social contract with police.

There remains much work to be done to strengthen police accountability in Minnesota. We must mandate independent investigations and prosecutions for civilian deaths and serious bodily injury, we must also employ body cameras and police video with strong policies that will ensure the collection of meaningful video and full public transparency, and provide strong and independent civilian oversight bodies throughout the state. We would be happy to serve as a resource as this working group moves forward.