

To: Jay Rivera, File  
From: David Roger, General Counsel  
Date: March 22, 2013  
Re: Fleeing Felon Rule

According to the hypothetical you provided, an officer observes a convenience store clerk, wearing bloody clothes, chasing a male who grabs the waistband of his pants as he flees. The clerk announces, "He just shot me." As the officer pursues the suspect, he recognizes that the suspect is running towards a casino entrance.

You have asked whether the officer would be justified using deadly force to apprehend the suspect.

The analysis of whether an officer's use of deadly force to arrest a fleeing felon is legal begins with NRS 171.1455.

NRS 171.1455 Use of deadly force to effect arrest: Limitations.

If necessary to prevent escape, an officer may, after giving a warning, if feasible, use deadly force to effect the arrest of a person only if there is probable cause to believe that the person:

1. Has committed a felony which involves the infliction or threat of serious bodily harm or the use of deadly force; or
2. Poses a threat of serious bodily harm to the officer or to others.

Thus, an officer may use deadly force to arrest a suspect if the officer has probable cause to believe the suspect committed a felony involving the infliction or threat of serious bodily harm. Similarly, the officer may use deadly force when the suspect commits a felony with the use of deadly force.

Alternatively, an officer may use deadly force when the officer has probable cause to believe the suspect poses a threat of serious bodily harm to the officer or others.

The above referenced statute was enacted, in 1993, to codify the U.S. Supreme Court decision in *Tennessee v. Garner*, 471 U.S. 1, 11-12, 105 S.Ct. 1964, 1701 (1985).<sup>1</sup>

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<sup>1</sup> *State v. Weddell*, 118 Nev. 206, 43 P.3d 987 (2002).

The Court, while defining the limitations of the fleeing felon rule, explained:

“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”

Id.

Similarly, the Federal Courts will look at the factors set forth in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989) when analyzing whether an officer has used excessive force. The Ninth Circuit Court of Appeals, in *Blanford v. Sacramento County*, 406 F.3d 1110, 1115 (9<sup>th</sup> Cir. 2005) explained:

All claims of excessive force, whether deadly or not, are analyzed under the objective reasonableness standard of the Fourth Amendment as enunciated in *Graham* and *Garner*. “Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.” (Citation and internal quotation marks omitted). This balancing test entails consideration of the totality of the facts and circumstances in the particular case, including “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”

*Garner* articulates a more particularized version of the Fourth Amendment's objective reasonableness analysis for assessing the reasonableness of deadly force. The Court explained that while it is unreasonable to apprehend an

unarmed, nondangerous suspect by killing him, an officer's use of deadly force to prevent escape satisfies Fourth Amendment standards "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." (*Citation* omitted).

Id.

Based upon the facts of your hypothetical, the officer would be justified in using deadly force to apprehend the suspect. First, the officer had probable cause (PC) to believe that the suspect had just committed a felony resulting in serious bodily harm. Depending on the severity of the injuries, the officer had pc to believe that the suspect committed Attempted Murder with a Deadly Weapon or Battery with a Deadly Weapon. Likewise, under the statute, the officer had pc to believe the suspect committed a crime with deadly force.

Additionally, the officer would be justified in using deadly force to arrest the suspect because he had pc to believe that the suspect posed a threat of serious bodily harm to himself and the casino patrons. According to the scenario you provided, the clerk told the officer that the suspect had shot him and the officer had reason to believe the suspect was still armed as the suspect held onto the waistband of his pants. The officer had sufficient facts to believe that the suspect was armed and dangerous.

I hope this memo helps with your training and discussion.