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The Honorable Aisha N. Braveboy
State's Attorney for Prince George's County
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Dear State's Attorney Braveboy:

You have asked for advice on two questions about the Maryland Use of Force Statute, which provides in subsection (d) that a police officer may use only "the force [that] is necessary and proportional to: (i) prevent an imminent threat of physical injury to a person; or (ii) effectuate a legitimate law enforcement objective." Md. Code Ann., Pub. Safety ("PS") § 3-524. Your first question is about the meaning of "intent" in the penalty portion of the statute, which reads: "A police officer may not intentionally violate subsection (d)" of the statute, "resulting in serious physical injury or death to a person." PS § 3-524(*i*)(1). You have asked what an officer must have done "intentionally" to be subject to criminal liability under that provision. For example, does the prosecution need to prove that the officer intended to use force that the officer knew was not necessary and proportional or merely that the officer intended to perform the action—e.g., pulling the trigger of a gun—that ultimately resulted in a use of force that was not necessary and proportional? Your second question is whether the "necessary and proportional" standard in subsection (d) applies to use-of-force prosecutions for crimes other than the new crime codified in PS § 3-524(*i*). In other words, if the State does not prosecute a police officer under the Use of Force Statute but charges the officer with a different crime—such as second-degree assault, reckless endangerment, or manslaughter—does the new "necessary and proportional" standard apply, or is the officer's use of force still judged under the common law reasonableness test that applied to all police use-of-force cases before the enactment of the Use of Force Statute?

Our Office is not, of course, the ultimate decision-maker on these issues. As is often the case, our role here is to predict how the Maryland courts would resolve your questions. *See* 107 *Opinions of the Attorney General* 153, 153-54 (2022). That said, as we explain more fully below, we believe the answer to your first question is that the statute's "intent"

requirement means that the State must prove that an officer intended to use force that the officer knew was not necessary and proportional to prevent an imminent threat of physical injury to a person or effectuate a legitimate law enforcement objective. As to your second question, although not entirely clear, we believe that the common law reasonableness standard likely still applies to crimes other than the new offense set forth in the Use of Force Statute. That said, the Maryland courts might well find that an officer's compliance with the new necessary and proportional standard is at least relevant to whether the officer's use of force was reasonable under that common law test.

A. The Meaning of "Intent" in the Penalty Provision of the Maryland Use of Force Statute

The Maryland Use of Force Statute sets forth a general standard for police officers' use of force:

> (1) A police officer may not use force against a person unless, under the totality of the circumstances, the force is necessary and proportional to:
> (i) prevent an imminent threat of physical injury to a person; or
> (ii) effectuate a legitimate law enforcement objective.
> (2) A police officer shall cease the use of force as soon as:
> (i) the person on whom the force is used:
> 1. is under the police officer's control; or
> 2. no longer poses an imminent threat of physical injury or death to the police officer or to another person; or
> (ii) the police officer determines that force will no longer accomplish a legitimate law enforcement objective.[1]

PS § 3-524(d).

The penalty provision of the Use of Force Statute, found in subsection (*i*), provides that "[a] police officer may not intentionally violate subsection (d)," "resulting in serious physical injury or death to a person." PS § 3-524(*i*)(1). An officer who does so "is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 10 years." PS § 3-524(*i*)(2).

You have asked about the meaning of intent in the statute's penalty provision. More specifically, you have asked what it is that an officer must do intentionally to be subject to

[1] Although subsection (d) has two paragraphs, for the sake of brevity, we refer throughout this letter to necessary and proportional force, which we mean to encompass both (d)(1) and (d)(2).

criminal prosecution under the Use of Force Statute. Must the State prove only that the officer intended to use force, such as pulling the trigger of a firearm, that then ultimately resulted in a violation of the standard in subsection (d)? Must the State instead prove that the officer intended to use force that breached the standard set forth in subsection (d), because the officer knew that the force was not necessary and proportional to prevent an imminent threat of physical injury to a person or effectuate a legitimate law enforcement objective? Or must the State go even further and prove that the officer intended to use force that was not necessary and proportional *and* that the officer knew that such force violated the law? For reasons that we will explain, we believe that the statute adopts the second approach, that is, that it requires the State to prove that an officer intentionally used force that the officer knew was not necessary and proportional but does not require the State to specifically prove that the officer knew that their use of force was against the law.[2]

We begin our analysis with the language of the statute. "When construing a statutory term, . . . we need to give it the contextual meaning most probably intended by the Legislature." *Deibler v. State*, 365 Md. 185, 195 (2001). In that endeavor, "[w]e start, and usually end . . . with the statutory language itself, giving the words of the statute their ordinary and common meaning." *Brown v. Housing Opportunities Comm'n*, 350 Md. 570, 575-76 (1998).

Here, the penalty provision in subsection (*i*) of the Use of Force Statute applies when an officer "intentionally violate[s] subsection (d)." PS § 3-524(*i*)(1). It is thus necessary to look at the text of subsection (d). Subsection (d), in turn, does not prohibit the use of force generally, only the use of force that is not "necessary and proportional" to "prevent an imminent threat of physical injury to a person" or "effectuate a legitimate law enforcement objective." PS § 3-524(d)(1). Thus, under the plain language of the statute, criminal liability under subsection (*i*) requires proof not just that the officer intentionally used force but, rather, that the officer intentionally used force *that was not necessary and proportional*. And, under the ordinary meaning of the term "intentional," an officer cannot *intentionally* use force that is not necessary and proportional unless the officer knows that the force is not necessary and proportional and uses it anyway. *See, e.g.*, *Black's Law Dictionary* (11th ed. 2019) (defining "intentional" to mean "[d]one with the aim of carrying out the act."); *see also, e.g.*, *Fisher v. State*, 367 Md. 218, 273 (2001) (noting that wording such as "with intent to" is "a common signal of legislative intent to require a specific state of mind").

[2] To be clear, PS § 3-524(*i*), which prohibits the *intentional* violation of the necessary and proportional standard resulting in death or serious physical injury, governs only criminal prosecutions under the Use of Force Statute. As we discuss below, *see infra* p.11, a police officer may face administrative consequences for an *unintentional* violation of the necessary and proportional standard.

To adopt a contrary reading that would merely require proof that the officer intentionally used force (that then happened to result in a violation of the "necessary and proportional" standard) would both ignore the language of subsection (d) and read additional words into subsection (*i*)—neither of which is something that comports with the ordinary principles of statutory interpretation. *See, e.g.*, *Motor Vehicle Admin. v. Seidel Chevrolet, Inc.*, 326 Md. 237, 248 (1992) (noting that, in a "quest to divine the Legislature's intent," one must "attempt to give effect to all the words in the statute" (quoting *Morris v. Prince George's County*, 319 Md. 597, 603 (1990))); *Whiting-Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295, 302 (2001) (explaining that a court will "neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words the Legislature chose to use"). Indeed, that contrary interpretation would require us to read the statute as providing for criminal liability when an officer intentionally *commits an act that results in* a violation of subsection (d). Because those additional words do not appear in the statute, the most natural reading is that, to prove that an officer intentionally violated subsection (d), the prosecution must prove that the officer used force that the officer knew was not necessary and proportional.[3]

We draw further support for our interpretation from "the fundamental principle that penal statutes are to be strictly construed." *Ishola v. State*, 404 Md. 155, 162 (2008). For that reason, when interpreting criminal statutes, we must be careful not to adopt a reading that would "extend the punishment to cases not plainly within the language used." *Id.* (quoting *Tapscott v. State*, 343 Md. 650, 654 (1996)). Even if the text of the statute were ambiguous, then, any ambiguity would have to be resolved in favor of leniency for the defendant. *See, e.g.*, *Oglesby v. State*, 441 Md. 673, 676 (2015) (noting that, under the "rule of lenity," a court construing a criminal statute that "is open to more than one interpretation" that cannot be resolved by ordinary tools of statutory construction will "select[] the interpretation that treats the defendant more leniently"). Applying that principle here, it is

[3] Some form of intentionality requirement is not unusual in the police use-of-force context. Prosecutions of federal police officers are typically based on 18 U.S.C. § 242, which provides, in relevant part, that "[w]hoever, under color of any law, . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime]." Courts have long interpreted that provision to require not just proof that an officer used force but that the officer "knew his force was not reasonable"—reasonableness being the standard for judging the legality of police uses of force under the U.S. Constitution—"and used it anyway." *United States v. Proano*, 912 F.3d 431, 442 (7th Cir. 2019). The federal statute has different language and a different history (and there is no evidence in the legislative record that the Maryland General Assembly relied on it in crafting the Use of Force Statute), so we do not mean to suggest that the federal law can be imported into Maryland or even that it is particularly relevant in interpreting Maryland's law. We merely cite the federal statute to point out that an intentionality requirement of some form is not unusual in this context.

by no means clear that the General Assembly intended to subject police officers to criminal liability under the Use of Force Statute for failure to comply with the new "necessary and proportional" standard even when the officer did not intend to use more force than was necessary or proportional and instead made a good faith attempt to comply with the standard.

The foregoing conclusion does not mean, however, that the State must prove that the officer knew that their use of force violated the statute itself (or even that the officer knew that the statute existed). It is true that courts have sometimes said that a statute criminalizing a willful act[4] requires the government to prove that the accused knew that their conduct violated the law. *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 136-37 (1994) (holding that a federal statute criminalizing the willful violation of a provision prohibiting the structuring of financial transactions to evade a financial institution's reporting obligations required the government to prove that a "defendant acted with knowledge that his conduct was unlawful"); *Reisch v. State*, 107 Md. App. 464, 476-83 (1995) (concluding that "knowingly and willfully" performing home improvement work without a home improvement license required proof that the accused knew that his actions violated the law). But these cases involved "a confusing array of statutes and regulations," *Chen v. State*, 141 Md. App. 123, 139 (2001), *aff'd*, 370 Md. 99 (2002), which made it difficult to easily discern the legal duty at issue. Here, an officer's duty to use only force that is necessary and proportional under the circumstances is set forth in a single statutory provision and "not 'embedded' in a 'complex of provisions.'" *Id.* at 137 (quoting *Ratzlaf*, 510 U.S. at 141).

More recent decisions interpreting criminal statutes with a willfulness component have declined to require proof that an accused knew that their action was prohibited by law. *See Chen v. State*, 370 Md. 99, 101-02, 110-14 (2002) (holding that a law that prohibits a person from "willfully transport[ing] in the State unstamped cigarettes" requires that "an individual intended to transport the unstamped cigarettes" but "does not require the individual to have personal knowledge of the fact that [they are] violating the law"); *Deibler*, 365 Md. at 188, 191, 199 (holding that the wiretap statute, which makes it unlawful for any person to "[w]illfully intercept . . . any wire, oral, or electronic communication," requires proof that an interception was "done intentionally-purposely"—and not "from inadvertence or simple negligence," but does not require proof that the accused had "a bad

[4] Although the Maryland statute uses the term "intentional," rather than willful, the two terms are often understood to be synonymous. *See, e.g.*, *Deibler*, 365 Md. at 195 (noting that the Court has most often, although not invariably, interpreted "willful" to mean that "the act be committed intentionally, rather than through inadvertence"); *Brown v. State*, 285 Md. 469, 475 (1979) (recognizing that, in the context of arson, "willfully" is "commonly interpreted as meaning 'intentionally'"); *Ewell v. State*, 207 Md. 288, 299 (1955) (observing that "[t]he term 'wilfully' in criminal statutes has been said to characterize an act done with deliberate intention for which there is no reasonable excuse" (internal quotation marks and alterations omitted)).

motive" or knew that their conduct was prohibited by law (alterations in original)). We think these more recent cases support our conclusion that, to successfully prosecute a police officer under the Use of Force Statute, the State need only prove that an officer intended to use force that the officer knew was not necessary and proportional; the State need not prove that the officer knew that they were violating the law.

We recognize that the language of the Use of Force Statute, in the abstract, could be read to require proof that the officer knew that they were violating the law. After all, the statute imposes criminal liability only when the officer "intentionally violate[s] subsection (d)," PS § 3-524(*i*)(1), and one could argue that, to intentionally violate a provision of law, the officer must know that the provision exists. In our view, however, the General Assembly likely referred to subsection (d) in the penalty provision as a shorthand to avoid repeating the entire substance of the verbose standard in subsection (d), rather than to require the prosecution to prove that the officer had personal knowledge of the fact that they were violating the law. In other words, we suspect that what the Legislature cared about was whether the officer intentionally violated *the standard* in subsection (d)—i.e., used force that the officer knew was not necessary and proportional—and not whether the officer knew that the violation of that standard was against the law. That conclusion is more consistent with the general rule that an intent to violate the law is not ordinarily required, *see, e.g.*, *Chen*, 370 Md. at 101-02, 110-14, and with "the presumption that all citizens are charged with an awareness of the law," *State v. Chaney*, 375 Md. 168, 181 (2003), as well as with the principle that "ignorance of the law ordinarily does not give immunity from punishment for crime," *Hopkins v. State*, 193 Md. 489, 498 (1949).

To be clear, this reading of the statute does not require the prosecution to present direct evidence—such as a confession by the officer—to establish a violation of the statute. Rather, the Maryland courts have said that the State "may prove a defendant's intent through direct evidence *or* circumstantial evidence." *Jones v. State*, 440 Md. 450, 455 (2014) (cleaned up) (emphasis added). "Since intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence." *Davis v. State*, 204 Md. 44, 51 (1954); *see also Young v. State*, 303 Md. 298, 306 (1985) (recognizing that intent "may be inferred as a matter of fact from the actor's conduct and the attendant circumstances"). Relevant facts may include an officer's "acts, conduct and words," as well as "[p]rior crimes or bad acts." *Cardin v. State*, 73 Md. App. 200, 213 (1987). An officer's training, or guidelines on the appropriate use of force, may also be relevant to proving an officer's intent. *Cf. Proano*, 912 F.3d at 439 (recognizing, under the federal law used to prosecute excessive force cases, that when "an officer has been trained that officers should not do several things when confronted with tense situations, yet he does those things anyway, the fact that he broke from his training could make it more likely that he acted willfully").

B. Whether the Statute's "Necessary and Proportional" Standard Applies to Other Crimes

The creation of a new crime in PS § 3-524(*i*)(1) does not preclude the State from prosecuting an officer for other crimes related to the use of force, such as assault or reckless endangerment. Indeed, the Use of Force Statute expressly provides that "[a] sentence imposed" under the statute "may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing a violation of this subsection." PS § 3-524(*i*)(3). Your second question, then, is whether the "necessary and proportional" standard applies when the State charges an officer with a crime stemming from the officer's use of force other than the new offense in PS § 3-524(*i*)(1), or whether the common law standard of objective reasonableness, from *Graham v. Connor*, 490 U.S. 386 (1989), continues to apply to those other crimes. Last year, in an opinion interpreting the meaning of "necessary and proportional" force, our Office stated that an officer may be held criminally liable under the Use of Force Statute only for "intentional" violations of the necessary and proportional standard. 107 *Opinions of the Attorney General* 33, 41, 45 (2022) (citing PS § 3-524(*i*)(1)). But the opinion did not consider the question you pose here: what standard applies when police officers are charged with crimes other than the new offense established by subsection (*i*) of the Use of Force Statute?

Historically, police officers in Maryland accused of using excessive force have been criminally prosecuted for misconduct in office, *see Koushall v. State*, 479 Md. 124, 154-56 (2022); reckless endangerment, *see State v. Albrecht*, 336 Md. 475, 477, 482 (1994); assault, *see, e.g.*, *Koushall*, 479 Md. at 149-50; or homicide or attempted homicide, *see Cagle v. State*, 462 Md. 67, 72 (2018) (involving charges of attempted murder); *Albrecht*, 336 Md. at 477 (involving a charge of involuntary manslaughter).

At least when assessing use-of-force incidents that occurred before the enactment of the Use of Force Statute, Maryland's appellate courts have said that the sufficiency of the evidence of the above crimes depends on whether the defendant police officer acted reasonably under the circumstances. *See, e.g.*, *Koushall*, 479 Md. at 150. This "'reasonableness' standard," *id.*, is apparently the same test that the U.S. Supreme Court, in *Graham*, has said applies to constitutional "claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen." 490 U.S. at 395; *see also Koushall*, 479 Md. at 150 (holding, in the context of a criminal charge for assault, "[t]he lawfulness of use of force by a police officer is analyzed under the Fourth Amendment's objective reasonableness standard"); *State v. Pagotto*, 361 Md. 528, 555 (2000) (finding the *Graham* standard "equally apposite" in a use-of-force prosecution). Under this standard, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene," *Graham*, 490 U.S. at 396, and "[t]he calculus . . . must embody allowance for the fact that

police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation," *id.* at 396-97. The Supreme Court explained that "the 'reasonableness' inquiry in an excessive force case is an objective one," depending on "whether [an] officer['s] actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

Although *Graham* itself involved a constitutional claim under 42 U.S.C. § 1983, Maryland's appellate courts have used the *Graham* framework for analyzing whether an officer's use of force rises to the level of reckless endangerment, *see Pagotto*, 361 Md. at 549-50, 555; criminal assault, *see Cagle v. State*, 235 Md. App. 593, 604-05, 607 (2018), *aff'd*, 462 Md. 67; *Koushall*, 479 Md. at 150; involuntary manslaughter, *see Albrecht*, 336 Md. at 499-502, and/or misconduct in office, *see Koushall*, 479 Md. at 155-56.

For reckless endangerment, reasonableness is baked into an element of the offense. The crime requires proof that the defendant's "misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the [reckless endangerment] statute was designed to punish." *Pagotto*, 361 Md. at 549 (quoting *Minor v. State*, 326 Md. 436, 443 (1992)). While "[a] defendant's conduct is typically measured against the conduct of an ordinarily prudent citizen similarly situated," *id.*, Maryland's courts have recognized that police officers are permitted to use force that other citizens may not, *see, e.g.*, *Albrecht*, 336 Md. at 501 (noting that "[u]nder almost all circumstances, the gratuitous pointing of a deadly weapon at one civilian by another civilian would almost certainly be negligence *per se*, if not gross negligence *per se*" but "[a] police officer . . . is authorized and, indeed, frequently obligated to threaten deadly force on a regular basis"). Thus, in cases charging reckless endangerment, Maryland's highest court has said that "the reasonableness of the conduct must be evaluated . . . from the perspective of a reasonable police officer similarly situated," *id.*—that is, the *Graham* standard.

Maryland's appellate courts have also applied *Graham*'s reasonableness standard to the battery variety of second-degree assault, which is: "(1) the unlawful, (2) application of force, (3) to the person of another." *Koushall*, 479 Md. at 150.[5] Indeed, earlier this year, the then-Court of Appeals—now called the Supreme Court of Maryland—said that "[t]he lawfulness of use of force by a police officer is analyzed under the Fourth Amendment's objective reasonableness standard." *Id.* (citing *Graham*, 490 U.S. at 388).

[5] Assault has more than one modality. The other types of second-degree assault are "intent to frighten" and "attempted battery," *Koushall v. State*, 249 Md. App. 717, 727 (2021), *aff'd*, 479 Md. 124 (2022), but we are not aware of any reported Maryland appellate decision that has considered a police officer's criminal liability under either of these alternative modalities of assault.

That standard similarly has applied to the criminal charge of misconduct in office, a common law misdemeanor defined as "(1) corrupt behavior, (2) by a public officer, (3) in the exercise of his or her office or while acting under color of his or her office." *Koushall*, 479 Md. at 154 (cleaned up). Maryland's highest court has said that the use of "unreasonable force under the circumstances," sufficient to establish second-degree assault, is also sufficient to establish the requisite "corrupt behavior" for a misconduct in office conviction. *Id.* at 154-55.

Finally, the Maryland courts have applied the same standard to prosecutions against police officers for involuntary manslaughter. *See Albrecht*, 336 Md. at 501. There are three types of involuntary manslaughter, *see id.* at 499, though we know of only one test that has applied to police officers: whether the defendant "manifested such a gross departure from what would be the conduct of an ordinarily careful and prudent person under the same circumstances so as to furnish evidence of an indifference to consequences." *Id.* at 499-500. And it is our understanding that the Maryland courts have historically used the *Graham* reasonableness standard when applying this test to police officers. *See Albrecht*, 336 Md. at 501; *Pagotto*, 361 Md. at 549-50.[6]

As the above discussion demonstrates, Maryland's appellate courts have applied the common law *Graham* reasonableness standard to determine whether a police officer may be convicted of a crime in connection with the use of allegedly excessive force. It is not clear whether the reasonableness standard has been used in those contexts because the courts view the standard as an element of the criminal offenses themselves or because the courts view the standard as an element of the so-called "law enforcement justification" defense. Although our State's intermediate appellate court has suggested the latter, at least in assault cases, *see Koushall*, 249 Md. App. at 728 & n.4, what is now the Supreme Court of Maryland has expressly declined to resolve the issue of "whether law enforcement justification is an element for assault or an affirmative defense," *Koushall*, 479 Md. at 150 n.10. Either way, under Maryland case law, the *Graham* reasonableness test has been central to determining whether a police officer's use of force is subject to criminal liability.

These decisions, however, involved use-of-force incidents that predated the enactment of the Use of Force Statute, bringing us back to your second question: Does the *Graham* standard still apply to these crimes, or does the Use of Force Statute's new

[6] As for murder, we are not aware of any Maryland appellate decisions discussing the sufficiency of the evidence of murder as applied to a police officer accused of using excessive force. In *Cagle*, an officer was charged with, but acquitted of, attempted murder. 235 Md. App. at 605. Nonetheless, at least before enactment of the Use of Force Statute, we expect that the *Graham* reasonableness test still would have applied, meaning that an officer who acted as a reasonable officer would have under the circumstances would not have been guilty of murder, even if the officer's use of force resulted in death.

necessary and proportional standard now apply? We again begin our analysis by looking at the language of the Use of Force Statute. But the statute does not, on its face, indicate whether the necessary and proportional standard applies to all crimes for which an officer may be charged. The necessary and proportional standard only applies expressly to the new offense established in PS § 3-524(*i*), which states that a police officer who "intentionally violate[s] [the necessary and proportional standard], resulting in serious physical injury or death to a person," is "guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 10 years." The statute also, as noted above, expressly acknowledges that a police officer may be convicted and sentenced for another crime "based on the act establishing a violation" of PS § 3-524(*i*). *See* PS § 3-524(*i*)(3). However, the statute is silent as to how, if at all, the Use of Force Statute has changed how courts should analyze other potential crimes related to a police officer's use of force.

Because the "answer to [your] question is not evident merely from the text" of the Use of Force Statute, "we need to look for the legislative intent in a broader context." *Blevins v. Baltimore County*, 352 Md. 620, 635 (1999), *superseded by statute on other grounds as stated in Spevak v. Montgomery County*, 480 Md. 562, 575-76 (2022). We thus "seek to discern legislative intent from surrounding circumstances, such as legislative history, prior case law, and the purposes upon which the statutory framework was based," *Board of Educ. v. Marks-Sloan*, 202 Md. App. 59, 68 (2011), *aff'd*, 428 Md. 1 (2012), as well as other principles of statutory interpretation.

In seeking to discern the Legislature's intent here, we note as a starting point that, under ordinary principles of statutory interpretation, "statutes in derogation of the common law are strictly construed, and it is not to be presumed that the Legislature . . . intended to make any alteration in the common law other than what has been specified and plainly pronounced." *Mummert v. Alizadeh*, 435 Md. 207, 214 (2013) (brackets omitted); *see also Allen v. State*, 402 Md. 59, 72 (2007) ("The Legislature is presumed to be aware of [the Court's] prior holdings when it enacts new legislation and, where it does not express a clear intention to abrogate the holdings of those decisions, to have acquiesced in those holdings."). Thus, because the Maryland courts have long used the common law reasonableness test to determine whether police officers are subject to criminal liability for the use of force, there must be a clear indication in the statute that the General Assembly intended to displace that test with the new necessary and proportional standard.

Obviously, the General Assembly intended to depart from the common law to at least some degree, by creating a new statewide standard for the use of force that is stricter than the *Graham* test. *Cf.* 107 *Opinions of the Attorney General* at 34-35, 71-72 (explaining how the new "necessary and proportional" standard is stricter than the *Graham* reasonableness test). The new necessary and proportional standard clearly applies to prosecutions under PS § 3-524(*i*) for intentional violations of the standard that result in death or serious physical

injury. And the Legislature also made clear that an officer who violates the new necessary and proportional standard, even without intending to do so, may be subject to disciplinary action. *See, e.g.*, 2021 Md. Laws, ch. 59, § 4 (codified at PS § 3-212(a)) (providing that the Maryland Police Training and Standards Commission "may suspend or revoke the certification of a police officer" who "violates the Maryland Use of Force Statute," without specifying that such violation must be intentional). But the key question here, as is often the case in interpreting statutes that depart from the common law, is "not whether, but how much, [the] statute" was intended to "change[] the common law." 3 Shambie Singer, *Sutherland Statutes & Statutory Construction* § 61:2 (8th ed., Nov. 2022 update).

In our view, the General Assembly's clear intent to impose possible disciplinary action on police officers for *all* violations of the new standard and criminal liability for *intentional* violations does not necessarily suggest an intent to impose direct *criminal* liability on police officers for *unintentional* violations of the standard, which would be the practical effect of a reading that the necessary and proportional standard has displaced the common law reasonableness test for pre-existing crimes like assault. A decision to impose criminal penalties for unintentional violations of the necessary and proportional standard—even when, for example, the officer was attempting in good faith to comply with the new standard—raises different policy questions. *Cf. Voting Session on S.B. 626 Before the Senate Judicial Proceedings Comm.*, 2021 Leg., Reg. Sess., at 25:30-30:00 (Feb. 25, 2021) (involving a debate among senators on an earlier, somewhat different version of the Use of Force Statute about whether officers should be liable only for intentional uses of force). It is not our role to decide the answers to those policy questions. But, given the significant implications of departing from the common law in this context and in light of the general principle that statutes in derogation of the common law are strictly construed, we suspect that, if the Legislature had intended to supersede the *Graham* standard as applied to pre-existing crimes, it would have made a more explicit statement to that effect. After all, changing how assault (or any other existing crime) applies to police officers would be a departure from the common law and past precedent. *See Allen*, 402 Md. at 72; *Mummert*, 435 Md. at 214.

We recognize that there are arguments to the contrary. Although the Maryland courts have not been particularly clear about why they have so far chosen to employ the *Graham* standard in this context, to the extent that the courts did so merely because Maryland had no other standard for the use of force, the General Assembly has now adopted a statewide standard for when officers should be using force and how much force they should be using to discharge their duties. And if the primary purpose of having a law enforcement justification defense (or of importing a similar concept into the elements for assault and other pre-existing crimes) is to recognize that police officers are legally authorized to use force that ordinary members of the public are not, *see Albrecht*, 336 Md. at 501, the fact that the General Assembly has established a new standard for the force that officers are

legally permitted to use arguably undermines the rationale for employing the *Graham* standard to judge whether the force used by an officer was legally justified. Indeed, given that the new statute was purposefully creating a standard stricter than the *Graham* standard, the General Assembly might have assumed that the new standard would become the benchmark for determining whether an officer's conduct was legally justified under State law for *all* purposes, including in prosecutions for pre-existing crimes. After all, some lawmakers made clear their intent to "raise[] the standard substantially"[7] by allowing officers to use force only "as a last resort."[8]

But the General Assembly's creation of a new, stricter standard for police use of force does not necessarily mean that the Legislature intended criminal penalties to apply every time an officer fails to use necessary and proportional force. Rather, as noted above, the Use of Force Statute itself refers only to criminal penalties for *intentional* violations resulting in death and serious physical injury.

Ultimately, while it is possible that the General Assembly assumed that the new standard would apply also to existing crimes, such as assault and reckless endangerment, the legislative history seems to confirm that there was no clear intent on the part of the General Assembly to override the common law reasonableness test for those crimes. Although our review of the legislative history has not uncovered any specific statements by lawmakers about whether they intended the Use of Force Statute to change how existing crimes are applied in cases involving a police officer's use of force, the development of what eventually became the Use of Force Statute over the course of the legislative session offers some clues.

During the same legislative session when the Use of Force Statute was enacted, lawmakers considered, and ultimately rejected, two bills that would have expressly provided that an officer's use of force "inconsistent with" the necessary and proportional standard could result in charges of homicide, assault, or reckless endangerment. *See* H.B. 139, 2021 Leg., Reg. Sess. (First Reader) (providing that an officer could be charged with manslaughter or murder if the use of force "inconsistent with" the necessary and proportional standard was lethal, and reckless endangerment or assault if the "inconsistent"

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[7] *Police Reform Work Session, Senate Judicial Proceedings Comm.*, 2021 Leg., Reg. Sess., at 58:06-58:17 (Mar. 25, 2021) (statement of Sen. Waldstreicher, a sponsor of the bill that became the Use of Force Statute) (referring, in a discussion of another related bill, to the "necessary" standard initially adopted by the Senate).

[8] *Bill Hearings on Police Accountability and Law Enforcement Reform*, *Senate Judicial Proceedings Comm.*, at 44:30-46:25 (Sept. 22, 2020) (statement of Sen. Carter, another sponsor of the Use of Force Statute) (advocating for a "necessary" standard in hearings before the start of the 2021 legislative session).

use of force did not result in death); S.B. 626, 2021 Leg., Reg. Sess. (First Reader) (same).[9] In the Senate, lawmakers amended one of these bills (Senate Bill 626) after first reading to remove this language. *See* S.B. 626, 2021 Leg., Reg. Sess. (Third Reader). As to the second bill (House Bill 139), the House transferred the "inconsistent with" language to another bill, where it passed the House, only to be deleted in committee by the Senate. *See* H.B. 670, 2021 Leg., Reg. Sess. (Third Reader); Amend. No. 668370/1, H.B. 670, H.B. 670, 2021 Leg., Reg. Sess., at 7 (Senate Judicial Proceedings Comm.). Thereafter, lawmakers imported the substance of the use of force legislation to Senate Bill 71 (which ultimately became the Use of Force Statute) but replaced the proposed penalty language with what now appears in PS § 3-524(*i*). *See* Amend. No. 952415/1, S.B. 71, 2021 Leg., Reg. Sess., at 9 (House Judiciary Comm.); S.B. 71, 2021 Leg., Reg. Sess. (House Third Reader); 2021 Md. Laws, ch. 60. Presumably, under the language introduced (but ultimately rejected) in House Bill 139 and Senate Bill 626, an officer's liability for involuntary manslaughter, reckless endangerment, or assault (and other pre-existing crimes) would not have depended on whether the officer's conduct departed from that of a reasonable police officer, *see Albrecht*, 336 Md. at 501; *Koushall*, 479 Md. at 150, but, rather, whether the officer violated the necessary and proportional standard.

Although the legislative history does not indicate why the General Assembly rejected the original language, "amendments that occurred as [the Use of Force Statute] passed through the Legislature, and its relationship to earlier . . . legislation" may help us "ascertain the Legislature's goal in enacting the statute." *Motor Vehicle Admin. v. Lytle*, 374 Md. 37, 57 (2003); *see also, e.g.*, *Graves v. State*, 364 Md. 329, 351 (2001) ("Where the legislature has 'explicitly raised, considered, and then explicitly jettisoned' particular statutory phrasing or framework, this Court must consider the statute as is, without adding to or deleting from the express language provided therein." (quoting *Garnett v. State*, 332 Md. 571, 587 (1993))); *Hackley v. State*, 161 Md. App. 1, 14 (2005), *aff'd* 389 Md. 387 (noting that the "derivation of [a] statute" is relevant to statutory interpretation (quoting *Boffen v. State*, 372 Md. 724, 737 (2003))). Here, the Legislature ultimately adopted language that creates a new offense for an *intentional* violation of the new standard that results in death or serious physical injury, *see* PS § 3-524(*i*)(1), but unlike House Bill 139 and Senate Bill

[9] The bills varied slightly in how they worded the necessary and proportional standard. House Bill 139 said, "A law enforcement officer may not use force against a person unless the force is necessary force and proportional to: (i) prevent an imminent threat of physical injury to a person; or (ii) effectuate an arrest of a person who the officer has probable cause to believe has committed a criminal offense, taking into consideration the seriousness of the underlying offense." H.B. 139, 2021 Leg., Reg. Sess. (First Reader). Senate Bill 626 would have allowed an officer to "use force only . . . when it is necessary force," and to "cease the use of force as soon as . . . the officer determine[d] that force [would] no longer accomplish, or [was] no longer reasonable and proportional to accomplish, a legitimate law enforcement objective." S.B. 626, 2021 Leg., Reg. Sess. (First Reader).

626, the Use of Force Statute is silent about what effect, if any, an officer's violation of the necessary and proportional standard would have on a police officer's liability for existing crimes, such as manslaughter, reckless endangerment, and assault.

While this legislative history by itself is not conclusive, the absence of any express statement in the statute or its legislative history indicating that the General Assembly intended to disturb the cases applying the *Graham* standard to pre-existing crimes reinforces our sense that the Legislature did not, in passing the Use of Force Statute, intend to abrogate the common law reasonableness test as applied to those pre-existing crimes. If the General Assembly had intended such a result, it could easily have adopted the language from House Bill 139 and Senate Bill 626. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (noting that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language" (citation omitted)).

We also recognize that this conclusion means that two different standards would govern whether police offers are held criminally liable for their conduct and that this might cause some confusion. But regardless of how the courts resolve the question you have asked, there are still going to be at least two standards against which officers are judged, as the *Graham* reasonableness standard will, at the very least, continue to apply in determining whether officers are civilly liable for federal constitutional violations under 42 U.S.C. § 1983. *See* 107 *Opinions of the Attorney General* at 72 (explaining that the General Assembly cannot change the meaning of the U.S. Constitution). In addition, the existence of a different standard in certain contexts does not mean that officers are being asked to follow two different standards at once. Maryland police officers are clearly required to follow the necessary and proportional standard, which is enshrined in State law. PS § 3-524(d). And if an officer satisfies the necessary and proportional standard, they will necessarily have satisfied the less strict *Graham* reasonableness standard. *See* 107 *Opinions of the Attorney General* at 71. In our view, then, the reasonableness standard comes into play in the criminal context only in determining whether an officer faces criminal liability for crimes other than the new offense established in PS § 3-524(*i*). In other words, this understanding of the statute does not excuse an officer from following the necessary and proportional standard, which Maryland officers are still bound to follow and will be trained to follow; it merely recognizes that, under the ordinary principles of statutory interpretation, the General Assembly would likely have been clearer if it had intended to impose criminal liability for unintentional violations of the standard (or for violations that do not result in death or serious physical injury).

This understanding of the Use of Force Statute is also not inconsistent with the statute's purposes, which the General Assembly described as, among other things, "establishing certain use of force standards" and "prohibiting a police officer from

intentionally violating" those standards, "resulting in serious physical injury or death to a person." 2021 Md. Laws, ch. 60 (purpose clause); *see also Marks-Sloan*, 202 Md. App. at 68 (looking to "the purposes upon which the statutory framework was based" "to discern legislative intent" (citation omitted)). By setting forth the necessary and proportional standard in PS § 3-524(d) and establishing a new crime in PS § 3-524(*i*) for the intentional violation of that standard (as well as providing for disciplinary action against officers for violations of the standard), the Use of Force Statute carries out those purposes, which are not necessarily dependent on changes in the way that other crimes, such as assault and reckless endangerment, have historically applied to police officers. Although it may be that reading the new standard to apply to prosecutions for pre-existing crimes would advance some of the General Assembly's purposes even further, "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987), and we see no clear evidence in the statutory language or in the legislative history that the Legislature intended to go that far here. For all these reasons, we believe that the *Graham* reasonableness standard likely still applies when a police officer is charged with pre-existing crimes such as reckless endangerment, second-degree assault of the battery variety, or misconduct in office.

That conclusion does not necessarily mean, however, that the new standard in the Use of Force Statute will be irrelevant to prosecutions of police officers for those crimes. In criminal cases involving a police officer's use of force, Maryland's appellate courts have often considered an officer's compliance with police department policies or training guidelines when assessing the reasonableness of the officer's use of force. *See Koushall*, 479 Md. at 152, 156 & n.11 (noting that the policy of the defendant officer's police department "highlight[ed] the [officer's] unreasonable use of force under the circumstances" and supported his conviction for second-degree assault); *Albrecht*, 336 Md. at 477-78, 487, 502-03 (noting, in upholding a police officer's convictions for involuntary manslaughter and reckless endangerment, that "the record [was] replete with evidence . . . that [the officer] did not comply with . . . departmental guidelines, procedures or practices" and, thus, did not "act as a reasonable police officer under the circumstances" but, rather "in a grossly negligent and reckless manner"); *cf. Pagotto*, 361 Md. at 550-53 (considering three departmental guidelines about how to approach a suspect but ultimately deciding that a defendant police officer's violation of these guidelines did not, in that case, establish involuntary manslaughter or reckless endangerment). Because the necessary and proportional standard now applies to all Maryland police officers and will, for that reason, be incorporated into police department policies across the State, the Maryland courts might consider whether the officer complied with that standard as a relevant factor in determining whether a particular officer's use of force was reasonable.

To be clear, there is some uncertainty under Maryland law about the extent to which departmental policies should be relevant to this type of reasonableness analysis. In one civil

case, for example, a majority of the judges then sitting on what is now the Supreme Court of Maryland expressed doubts that such departmental policies are relevant to determining whether the *Graham* standard has been violated, at least for purposes of civil litigation. *See Estate of Blair v. Austin*, 469 Md. 1, 50 (2020) (Getty, J., dissenting, joined by Booth and Battaglia, JJ.) (asserting that whether a police officer "failed to act in accordance with his training is irrelevant" to whether an officer is civilly liable for excessive use of force, because "'the issue is whether the government official violated the Constitution'" and not whether they complied with "the policy, procedures, or training of" the police department (quoting *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993))); *id.* at 32 n.3 (Watts, J., concurring in the judgment) (agreeing with the dissenting opinion that an officer's adherence to department policies is "not relevant" to whether an officer acted reasonably under the Constitution).

Still, it is unclear how much precedential weight, if any, should be given to the fractured decision in *Estate of Blair*, *see State v. Falcon*, 451 Md. 138, 162 (2017) (discussing how precedential value is determined in a case without a majority opinion), and there are other examples where the Court apparently *has* considered police guidelines and procedures, including the cases cited above that, unlike *Estate of Blair*, arose in the criminal context. *See, e.g.*, *Koushall*, 479 Md. at 152, 156 n.11; *Albrecht*, 336 Md. at 477-78, 487, 502-03; *see also Richardson v. McGriff*, 361 Md. 437, 504 (2000) (Harrell, J., concurring in part and dissenting in part) (collecting cases for the proposition that the Court "frequently has considered police procedures and guidelines in determining whether police activity was reasonable under given circumstances.").[10] In addition, the Maryland courts have more

[10] In *Richardson*, a civil case, the majority concluded that certain police training guidelines were irrelevant to whether the officer's use of force was reasonable under the *Graham* standard. 361 Md. at 458-49, 465. It is not clear, however, whether the Court thought that police training guidelines were always irrelevant or merely that the specific guidelines at issue were irrelevant. The guidelines in question there focused on whether officers should have entered an apartment without backup, and, once there, whether the officers should have turned on lights. *Id.* at 448. The Court reasoned that the *Graham* standard considers only "the precise moment [an] officer[] effectuate[s] [a] seizure" through the use of force, *id.* at 454, 459 (quoting *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995)), and that the officers' decisions in that case to enter without backup and not turn on lights were too attenuated from the time the force was used to be relevant to the reasonableness of the use of force under the *Graham* test, *id.* at. 462-65. Thus, *Richardson* might stand for the proposition that, even if departmental policies can generally be relevant to the *Graham* test, a court may nonetheless decline to consider a departmental policy to the extent that it governs conduct that is too attenuated, "by time or intervening events," *id.* at 457 (quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)), from the officer's use of force. To the extent that is right (and to the extent that the Maryland courts would extend that rule to the criminal context), that could potentially have implications for the relevance, under the common law *Graham* standard, of those aspects of the necessary and proportional standard that govern conduct that occurs well

leeway to decide what should factor into a determination of reasonableness under State criminal law than in a § 1983 action governed by federal law and could thus decide that, even if police policies are irrelevant in the § 1983 context, they *are* relevant to a determination of reasonableness here. But given that the Maryland courts have not specifically decided the issue and have generally applied the federal constitutional standard in the Maryland criminal context, the most we can say with confidence is that the Maryland courts have, in the past, considered departmental policies and guidelines in determining whether an officer should be criminally liable under the common law test and, thus, might do so here.[11]

To summarize, we believe that the Use of Force Statute's penalty provision requires the State to prove that an officer intentionally used force that the officer knew was not necessary and proportional but does not require the State to prove that the officer knew that their use of force was against the law. We also believe that the *Graham* reasonableness standard still applies when an officer is charged with crimes other than an intentional violation of the Use of Force Statute under PS § 3-524(*i*). But the Maryland courts might well conclude that the new necessary and proportional standard can, at least sometimes, be a factor in determining whether an officer's use of force was unreasonable and, thus, subject to liability for one of the above crimes. Although this is not an official opinion of the Attorney General, we hope that it is helpful.

Sincerely,

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before the officer's use of force. *Cf.* 107 *Opinions of the Attorney General* at 67, 72 (noting that the necessary and proportional standard considers circumstances leading up to an officer's use of force, such as whether the officer used de-escalation techniques like speaking with a tone of voice that is not aggressive and tactically repositioning and requesting additional resources).

[11] Because you have asked only about crimes, we express no view on whether the Maryland courts might consider the necessary and proportional standard in the civil context. As our Office noted in its recent opinion, however, "we have seen no indication in the legislative history that the new law was specifically intended to establish a new civil standard." 107 *Opinions of the Attorney General* at 73.