



**GBI & The *Unintended* Consequences of California's
'Revolution' In Police Use Of Force Law**
AB 392 (Cal. Penal Code §§ 196 & 835a)

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Roadmap

- 1 Police Use Of Force Law In California BEFORE AB 392 – California’s Adoption Of The *Graham/Garner* Standard.
- 2 Legislative History Of AB 392.
- 3 AB 392 – The Final Statutory Language & Its Media Hype.
- 4 Actual Substantive Changes Resulting From AB 392.
- 5 Unintended Consequences: The Debate Over The Scope Of “GBI”.
- 6 Q&A.



California Use of Force Law Prior to AB 392

- For Section 196, In Interpreting Section 196, California Courts Held That:
- **Deadly Force May Be Used When The Felon Threatens Death Or Serious Bodily Harm To The Officer Or Others.**
 - Even Though Section 196 Did *Not* Distinguish On The Type Of Felony Needed To Justify Deadly Force Under Subdivision 3...
 - “[D]eadly force may be used against felony suspects only if the felony is a ‘forcible and atrocious’ one, which threatens death or bodily harm.”

Kortum v. Alkire, 69 Cal. App. 3d 325, 330, 332 (1977).



California Use of Force Law Prior to AB 392

- Section 196 Was Expanded To Include Section 835A:
- **Deadly Force Also Authorized Against Fleeing Felon Who Threatens Death Or Serious Bodily Injury To The Officer Or Others.**
 - California courts construed those sections to “prohibit the use of deadly force by anyone, including a police officer, against a fleeing felony suspect unless the felony is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or seriously bodily harm to the officer or to another.”

Id. at 333.



Cal. POST Analysis of AB 392

According to California Commission on Peace Officer Standards & Training (POST):

- AB 392, effective January 1, 2020, amends the language of the following statutes and includes...
- **Amends Penal Code § 196:** The circumstances of justifiable homicide change...
 - FROM When "Overcoming Actual Resistance To The Execution Of Some Legal Process Or In The Discharge Of Any Other Legal Duty"
 - TO **"The Homicide Results From A Peace Officer's Use Of Force That Is In Compliance With PC 835a."**

Cal. POST Analysis of AB 392

Amends Penal Code § 835a:

- § 835a(a) Added To Reflect **Legislative Intent** Including:
 - Use Of Force Authority Conferred On Peace Officers Is A **Serious Responsibility**.
 - Deadly Force Should Be Used **Only When Necessary** Under The Totality of Circumstances.
 - Use Of Force Decisions Are To Be Evaluated Carefully And From A **"Reasonable Officer" Perspective**.
 - Individuals With Disabilities May Be Affected In Their Ability To Understand Or Comply With Peace Officer Commands.

Cal. Penal Code § 835a (amend. Jan. 2020)

- “Serious Bodily Injury” Means A Serious Impairment Of Physical Condition, Including, But Not Limited To, The Following: Loss Of Consciousness; Concussion; Bone Fracture; Protracted Loss Or Impairment Of Function Of Any Bodily Member Or Organ; A Wound Requiring Extensive Suturing; And Serious Disfigurement.



Cal. Penal Code § 234(f)(4).

Cal. Penal Code § 835a (amend. Jan. 2020)

- For Police Use Of Force, Case Law Says:
 - **“Serious Bodily Injury” & “Great Bodily Injury” Have “Substantially The Same Meaning”**

See *People v. Arnett* (2006) 139 Cal.App.4th 1609, 1613; see also *People v. Knoller* (2007) 41 Cal.4th 139, 143 n.2; *People v. Burroughs* (1984) 35 Cal.3d 824, 831.

AB 392/UOF – What Changed & What Did Not

According To California Courts, Not Much Has Changed.

<h3>Section 835a Merely Codified Pre-Existing UOF Case Law.</h3>	<ul style="list-style-type: none">• <i>Koussaya v. City of Stockton</i>, 54 Cal.App.5th 909, 934 (2020) (holding that portions of the amended Section 835a “are declaratory of preexisting case law”; The California “Supreme Court has long recognized that peace officers have a duty to act reasonably when using deadly force and that the reasonableness of an officer’s conduct is determined in light of the totality of the circumstances, including the tactical conduct and decisions leading up to the use of deadly force.”)• <i>Starks v. County of L.A.</i>, 2023 Cal. App. Unpub. LEXIS 418, at *18-19 (Jan. 23, 2023) (citing Pen. Code § 835a, subs. (c)(1), (e)(1); and holding that, in interpreting amended Section 835a, it has been noted that the Legislature has now just simply specifically defined when officers may justifiably use deadly force). This is reflected in the amendments to both Sections 196 and 835a.
<h3>Section 835a Did Not Change The <i>Graham</i> Standard For Use Of Force</h3> <ul style="list-style-type: none">• <i>E.G.</i>: Deadly Force Is Lawful When, From The Perspective Of A Reasonable Peace Officer, It Is Objectively Reasonable For The Officer To Believe A Suspect Poses A Significant Threat Of Death Or Serious Bodily Injury To The Officer Or Others.	<ul style="list-style-type: none">• <i>Koussaya v. City of Stockton</i>, 54 Cal.App.5th 909, 936-937 (2020) (holding that the enactment of the amended Section 835a did not change that “[g]enerally, a police officer’s use of deadly force against a suspect will be considered reasonable if the officer has probable cause to believe that the suspect poses a significant threat of death or serious bodily injury to the officer or others.”)• <i>Villalobos v. City of Santa Maria</i>, 85 Cal.App.5th 383, 389 (2022) (holding the same).• Pen. Code § 835a(c)-(d) (eff. 2020) (expressly adopting <i>Graham</i> and <i>Garner</i> rules for use of deadly force).
<h3>Officers May Still Use Reasonable Force To Make An Arrest, Prevent Escape, & Overcome Resistance</h3> <ul style="list-style-type: none">• Officers Are Not Required To Stop In The Face Of Resistance• Statute Clarifies That Force Must Be Objectively Reasonable	<ul style="list-style-type: none">• <i>Golick v. State of California</i>, 82 Cal.App.5th 1127, 1139 (2022) (citing <i>Brown v. Ransweiler</i>, 171 Cal.App.4th 516, 528 (2009); Pen. Code § 835a (eff. 2020)).• Pen. Code § 835a(a)(1)-(5) (eff. 2020); <i>cf.</i> Pen. Code § 835a (2019).

AB 392/UOF – What Changed & What Did Not

Technical Revisions to Penal Code § 196 & 835a

<p>AB 392 Revised § 196 To Make “Justifiable Homicide” A Use Of Force That Complies With § 835a</p>	<ul style="list-style-type: none">• In comparing the relevant statute before and after the enactment of AB 392, the only substantive changes to Section 196 was the deletion of the language stating that homicide was justifiable when committed by law enforcement officers and those acting by their command in their aid and assistance “[w]hen necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or, . . . [w]hen necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.” Pen. Code § 196 (2019). In place of that language, Section 196 now references “[w]hen the homicide results from a peace officer’s use of force that is in compliance with Section 835a.” Pen. Code § 196 (eff. 2020). Therefore, homicide by law enforcement officers remains justified “[i]n obedience to any judgment of a competent court[.]” <i>Id.</i>; <i>cf.</i> Pen. Code § 196 (2019).
<p>Adds Legislative Intent To Statute</p> <ul style="list-style-type: none">• To Encourage De-escalation Before The Use Of Force	<ul style="list-style-type: none">• Pen. Code § 835a(a)(1)-(5) (eff. 2020).
<p>Officers Are Not Required To Retreat Or Stop Law Enforcement Measures Just Because Suspect Resists</p> <ul style="list-style-type: none">• BUT Prohibition On “Retreat” Does Not Extend To Tactical Repositioning Or Other De-escalation Tactics• Officer Retains Right To Use Objectively Reasonable Force In Self-defense	<ul style="list-style-type: none">• Pen. Code § 835a(d) (eff. 2020) (“A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance if the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of objectively reasonable force . . . to effect the arrest or to prevent escape or to overcome resistance”); <i>cf.</i> Pen. Code § 835a (2019).• Pen. Code § 835a(d) (eff. 2020) (However, the new subdivision (d) does specify that “[f]or the purposes of this subdivision, ‘retreat’ does not mean tactical repositioning or other deescalation tactics.”)

AB 392/UOF – What Changed & What Did Not

The Big Changes From AB 392 Are...

Expressly Adopts The *Graham-Garner* Rule For Deadly Force

- Deadly Force May Be Used To Defend Against An “Imminent” Threat Of Death Or Serious Bodily Injury (SBI) To The Officer Or Others...
- From The Perspective Of A Reasonable Officer Facing The Same Totality Of The Circumstances

- Pen. Code § 835a(c)(1), (e)(1) (eff. 2020).

Clarifies That An “Imminent Harm” Is Not Merely A Fear Of Future Harm...

- But Rather One Where It Reasonably Appears Necessary To Instantly Confront And Address The Threat
- Reasonable Officer Must Believe That Suspect Has The Present Ability, Opportunity, And Apparent Intent To Cause Death Or Serious Bodily Injury (SBI) To The Officer Or Another Person

- Pen. Code § 835a(e)(2) (eff. 2020) (“A threat of death or serious bodily injury is ‘imminent’ when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, not matter how great the fear and no matter how great the likelihood of harm, but is one that, from appearances, must be instantly confronted and addressed.”).

Clarifies That “Totality Of The Circumstances” Includes All Facts Known To The Peace Officer At The Time, Including The Conduct Of The Officer And The Subject Leading Up To The Use Of Deadly Force.

- Pen. Code § 835a(e)(3) (eff. 2020); see also *Hayes v. County of San Diego*, 57 Cal.4th 622, 625-640 (2013).

AB 392/UOF – What Changed & What Did Not

The Big Changes From AB 392 Are...

Clarifies That, Where Feasible, Before The Use Of Deadly Force, The Officer Must: (a) Identify Himself/Herself As An Officer; And (b) Warn The Subject That Deadly Force May Be Used...

- UNLESS The Officer Has Objectively Reasonable Grounds To Believe That The Subject Is Already Aware Of Those Facts

- Pen. Code § 835a(c)(1) (eff. 2020).

Expressly Adopts The *Garner* Fleeing Felon Rule

- Deadly Force May Be Used To Stop A Fleeing Felony Suspect Where...
 - The Felony Threatens Or Results In Death Or Serious Bodily Injury (SBI) And
 - The Officer Reasonably Believes The Suspect Will Cause Death Or SBI To Someone Unless Immediately Stopped

- Pen. Code § 835a(c)(1) (eff. 2020) (expressly adopting *Graham* and *Garner* rules for use of deadly force).

Bans The Use Of Deadly Force To Protect A Person Only From Himself Or Herself

- And Not A Threat To Anyone Else

- Pen. Code § 835a(c)(2) (eff. 2020) (“[a] peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of serious bodily injury to the peace officer or to another person.”)

TYPES of Force

Non-Deadly Intermediate Force	Force With A Significant Risk Of Causing Injury So Far = <ul style="list-style-type: none">• TASER-Darts Only• K9• OC/Pepper Spray• Baton/Impact Weapon• LVNR (Now Banned In California)
Non-Deadly Low Force	All Other Non-Deadly Force: <ul style="list-style-type: none">• TASER Drive-Stun• Grappling• Empty-Hand Control Holds/Blows (“Personal Body Weapons”)• Restraint Devices

Rule – Use Of Force: Non-Deadly

<p>Non-Deadly – LOW</p>	<p>Officer Is Authorized To Use Non-Deadly (Low) Force When, From The Perspective (“POV”) Of A Reasonable Peace Officer, It’s Objectively Reasonable (“O.R.”) Under The Totality Of The Circumstances (“T.O.C.”)</p>	<p>Extra Credit =</p> <ol style="list-style-type: none"> 1. To Make An Arrest 2. To Overcome Resistance, Or 3. To Prevent Escape [PC § 835] 	<p>[TOC/OR = Reas. Ofcr. POV + Extra Credit - PC § 835]</p>
<p>Non-Deadly – INTERMEDIATE</p>	<p>Officer Is Authorized To Use Intermediate Force When, From The Perspective (“POV”) Of A Reasonable Peace Officer, It’s Objectively Reasonable (“O.R.”) Under The Totality Of The Circumstances (“T.O.C.”)...</p>	<p>To Address A Threat Of Physical Harm To Self/Others</p>	<p>[TOC/OR = Reas. Ofcr. POV + Threat]</p>

Rule – Use Of Force: Deadly

Deadly	Deadly: Officer Is Authorized To Use Deadly Force When, From The Perspective (“POV”) Of A Reasonable Peace Officer, It’s Objectively Reasonable (“O.R.”)	To Believe A Suspect Presents An Immediate Threat Of Death Or Great Bodily Injury (“D/GBI”) To Self/Others	[TOC/OR = Reas. Ofcr. POV + D/GBI Or VFF]
		OR	
		To Believe It’s Needed To Prevent The Escape Of A Deadly Violent Fleeing Felony Suspect (V.F.F.)	

The Debate Over The Scope Of “GBI” In AB 392

- **BROAD – Cal. Penal Code § 12022.7(f):** “great bodily injury’ means a significant or substantial physical injury.”
 - *Meant To Be A Sentencing Enhancement.*
 - Problem: However, case law associated with the Penal Code definition of GBI is much more expansive:
 - And it **stretches GBI to include a broad array of injuries resulting in abrasions/scrapes, contusions/bruises, burns, punctures, lacerations, and even just physical pain.**

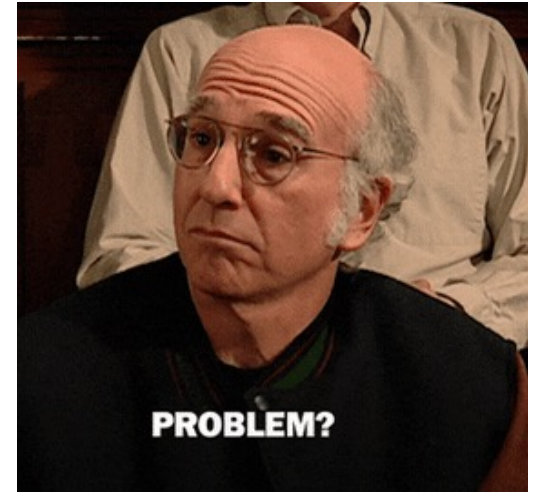
See *People v. Washington* (2021) 210 Cal.App.4th 1042, 1047-1048 (“some physical pain or damage, such as lacerations, bruises, or abrasions” constitutes great bodily injury under Cal. Pen. Code, § 12022.7(f)); *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042 (same); *People v. Wallace* (1993) 14 Cal.App.4th 651, 665-666 (cuts and burns from being flex-tied, burning sensation from an insecticide-like substance were great bodily injury); *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755 (multiple abrasions, lacerations, and contusions were great bodily injury); *People v. Corona* (1989) 213 Cal.App.3d 589 (a swollen jaw, bruises to head and neck and sore ribs were “great bodily injury”); *People v. Sanchez* (1982) 131 Cal.App.3d 718 (multiple abrasions and lacerations to victim’s back and bruising of eye and cheek were “great bodily injury”) *disapproved on other grounds in People v. Escobar* (1992) 3 Cal.4th 740, 751, fn. 5; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836–837 (multiple contusions, swelling and discoloration of the body, and extensive bruises were “great bodily injury”).



The Debate Over The Scope Of “GBI” In AB 392

- **BROAD (Continued):**

- PROBLEM 1: Would Lower The Bar For Use Of Deadly Force
 - If, For Police Use Of Force, SBI = GBI, And GBI Is Broad, Officers Will Be Authorized To Use Deadly Force When Confronted Only By Physical Pain
- PROBLEM 2: Would Elevate **ALL** UOF Into Disclosable Events
 - If, For Disclosure Of Police Force, GBI Is Broad Enough To Include Pain, Then Virtually All Uses Of Force Would Be Disclosable...
 - Contrary To Legislative History



Cal. Penal Code § 12022.7(f); see also Cal. Penal Code § 243(f)(4); *People v. Escobar* (1992) 3 Cal.4th 740, 746; *People v. Washington* (2021) 210 Cal.App.4th 1042, 1047-1048; *People v. Cross* (2008) 45 Cal.4th 58, 63-64.

The Debate Over The Scope Of “GBI” In AB 392

- **NARROW:**

- GBI = SBI In UOF Cases
People v. Arnett (2006) 139 Cal.App.4th 1609, 1613 (“great bodily injury” and “serious bodily injury” “have substantially the same meaning”).
- Gov. Code Defines SBI As: **“A Bodily Injury That Involves A Substantial Risk Of Death, Unconsciousness, Protracted & Obvious Disfigurement, Or Protracted Loss Or Impairment Of The Function Of A Bodily Member Or Organ”**

Cal. Gov. Code § 12525.2(d); *see also* Cal. Penal Code § 234(f)(4) (“Serious Bodily Injury” Means A Serious Impairment Of Physical Condition, Including, But Not Limited To, The Following: Loss Of Consciousness; Concussion; Bone Fracture; Protracted Loss Or Impairment Of Function Of Any Bodily Member Or Organ; A Wound Requiring Extensive Suturing; And Serious Disfigurement).

- CPRA ALSO Housed In Gov. Code – Same As Narrower SBI



The Debate Over The Scope Of “GBI” In AB 392

- **Narrow (Continued):**
 - Narrow Is More Consistent With:
 - Legislature’s Rejection Of Statutes Making All UOF Disclosable &
 - Case Law That Equates GBI To Something Akin To Death



Cal. Gov. Code § 12525.2(d); Cal. Penal Code § 835a (amend. 2020); *Smith v. Hemet* (9th Cir. 2005) 394 F.3d 689, 706; *Koussaya v. City of Stockton* (2020) 54 Cal.App.5th 902, 932-934 (explaining the 2020 amendments to Cal. Penal Code § 835a).

TYPES of Force & GBI

Deadly Force	Force With A Substantial Likelihood Of Causing Death Or Great Bodily Injury (“D/GBI”)
Non-Deadly Force	All Force That Is NOT Deadly Force

Q: What Effect Does The Level Of Force Have On The Definition Of GBI?

A: Seriousness Of Deadly Force Likely Means GBI Must Be Far More Serious Than Just Pain (E.G., GBI Likely Follows Narrow Definition)

Great Bodily Injury (GBI): Predicted Definition

Great Bodily Injury = An Injury Where, At The Time It Is Received, Without Timely Medical Treatment, Such Injury Is Substantially Likely To Lead To Death, Or To The Permanent Loss Or Permanent Impairment Of A Bodily Member Or Organ.

GBI Likely Is...	GBI Is Likely Not....
Loss Of An Eye	Other Fractures
Loss Of A Limb	Abrasions
Permanent Paralysis	Contusions
Fractures That Cause Permanent Impairment Of A Limb Or Organ	Most Lacerations
Gunshot Wounds	Most Avulsions
Life-threatening Hemorrhages Or Fractures Causing Fatal Or Permanent Injury To The Brain	