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RE: Investigation into the officer-involved shooting of Tamir Rice which occurred at Cudell Park, 1910 West Boulevard, Cleveland, OH, on November 22, 2014.

Gentlemen:

In July of this year, you requested I review the case investigation into the death of Tamir Rice which resulted from shots fired by Cleveland Police Officer Timothy Loehmann. When you made the request, I advised you that I was not a member of the Bar of the State of Ohio and had never practiced law in that jurisdiction. You indicated you understood that and that the review would be based on my experience investigating officer-involved shootings in Denver, Colorado,<sup>1</sup> and my experience in teaching Federal and Colorado laws regarding use of force at seminars and at law enforcement service academies. Based upon that understanding, I agreed to review the case file and I have now completed that review. The factual determinations made below are based solely on the materials you provided. Based upon my review of those facts and the legal doctrines discussed below, I conclude that Officer Loehmann's actions were objectively reasonable as that term is defined by controlling Federal case law.

#### FACTS

The investigation appears to be complete and thorough. For purposes of my analyses, there are four separate areas to consider: 1) the statements of witnesses regarding Tamir Rice's activities in the hours and minutes before the shooting; 2) the information provided to Officer Loehmann, #1231, and his partner Officer Frank Garmback, #1582, before and as they responded to the scene; 3) the shooting incident

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<sup>1</sup> I have been a member of the team which investigates officer-involved shootings in Denver since 1989. My participation begins with the initial call-out and continues through the legal analysis and ultimate charging decision.

itself; and 4) relevant observations of first responders who arrived immediately after the shooting.

The investigation concerns the fatal shooting of Tamir Rice ("Rice"), DOB [REDACTED] 2, by Cleveland Police Officer Timothy Loehmann on Saturday, November 22, 2014, at the City of Cleveland Cudell Park, 1910 West Boulevard, Cleveland, OH. Within the grounds of the park is the Cudell Recreation Center (the "Rec Center"). Cement walkways lead to and from the entrance of the Rec Center. One of the walkways leads to a parking lot and also to a hexagonally shaped gazebo which, according to police reports is "approximately 200' south of the recreation center entrance." A short distance south of the gazebo "is a park playground pad that also has a swing set that was approximately 50' from the gazebo."<sup>2</sup> The shooting occurred at the gazebo.<sup>3</sup>

The shooting occurred at about 3:30 p.m. Local weather reports from that date show the high temperature for the day was 49 degrees Fahrenheit and the low temperature was 16 degrees Fahrenheit. The snow depth was marked at 1.2 inches and precipitation was measured at 0.16 inches. Visibility was 9.2 miles. This report and surveillance video from the scene indicate weather was not a factor.

Rice frequented the Rec Center. According to at least one witness he was there almost daily.<sup>4</sup> On this Saturday, Rice walked to the Rec Center with a friend of his, [REDACTED]. According to [REDACTED] they were accompanied by Rice's sister and a cousin of [REDACTED]. In a video-recorded statement [REDACTED] provided to investigators from the Cuyahoga County Sheriff's Department on March 11, 2015, [REDACTED] informed them that he had with him a "toy gun" his father had given him. The gun had been purchased at Walmart. [REDACTED] stated the gun was spring activated and held twelve "rainbow colored" pellets. [REDACTED] further stated that, at some point before the day in question, the gun had been broken and he fixed it but when he did so he was unable to get the orange safety tip back on the end of the muzzle.<sup>5</sup>

[REDACTED] told investigators that Rice asked him whether he could see the gun, as he had seen it before and knew [REDACTED] possessed it ([REDACTED] was carrying it in his bag). According to [REDACTED] he agreed to loan Rice the gun in return for an old cell phone Rice possessed, adding, "I told [Rice] to be careful and to make sure, if anybody's around, to put it away." [REDACTED] stated he saw Rice put the gun in his front coat pocket. He later stated he warned Rice that someone might think it was real, after which he saw Rice move the gun to his back pocket. [REDACTED] made it clear to investigators that when he gave Rice the gun, it did not have the orange safety tip. [REDACTED] left the Rec Center some time before the shooting incident.

<sup>2</sup> See, Cleveland Police Department Homicide file (redacted), page 14.

<sup>3</sup> See the photos attached on page 15 and 17.

<sup>4</sup> See, [REDACTED] video statement, recorded May 14, 2015.

<sup>5</sup> The gun was, in fact, a spring powered air soft "Colt 1911 Target Pistol." Crime scene photos of the gun are found at page 16 and 17. It will be referred to as the "air soft" or the "gun."

Several witnesses saw Rice with the gun on the afternoon of the shooting. Two of them were other juveniles who knew Rice, [REDACTED], and [REDACTED]. [REDACTED] in the company of his father, provided investigators with an audio recorded statement on April 2, 2015; [REDACTED] in the company of his grandmother, gave a video recorded statement on the same day.

[REDACTED] told investigators that he and [REDACTED] were friends. The two of them were walking to the Rec Center in the early afternoon and they saw Rice outside of the Rec Center playing with what [REDACTED] referred to as the "BB gun." [REDACTED] stated "[Rice] had it out when I walked up . . . he was shooting it at a trailer, or something." An investigator asked whether this was taking place "over by the swings" and [REDACTED] responded in the affirmative. According to [REDACTED] Rice was with "some other little boy" whom he did not know, adding "They were waiting for the gym to open."

[REDACTED] stated that Rice kept the gun, which he described as "all black," in his waistband, on the left side, with the barrel was pointing down and the butt or handle just above the waist band and that he would lift up his jacket to get to the handle. [REDACTED] admitted that he asked Rice to let him shoot the gun and Rice did so. The investigators showed [REDACTED] a crime scene photo and he identified the gun in the photo as the gun he was describing. During the course of the interview, investigators showed [REDACTED] a surveillance video clip<sup>6</sup> and he identified himself, Rice and some others. He also confirmed the accuracy of footage on the video that shows Rice shooting "at a car." [REDACTED] reaffirmed that Rice put the gun back in his waistband and showed them that action on the video. (One of the interviewers noted that this took place at "15:10" on the video time stamp.)

[REDACTED] and [REDACTED] left Rice and entered the Rec Center. A short while later they went outside through a back door of the Rec Center. [REDACTED] stated they were out back when they heard gunshots. He thought he heard three shots "the first two were real quick" and then there was brief pause – maybe a second – and then the third pop. Neither he nor [REDACTED] witnessed the actual shooting. An investigator asked [REDACTED] about Rice's apparent age and [REDACTED] responded, "He was big, ya, he was big. But he didn't look like he'd be older than 16."

The eleven year old [REDACTED] largely corroborated [REDACTED] statement. He told investigators he and [REDACTED] walked together to the Rec Center and arrived at about 2:30 p.m. Rice and his sister were in the park when they arrived but he and [REDACTED] did not join them at that time. Instead, they went into the Rec Center for a while. The two boys went back outside and found Rice and another boy shooting "the BBs" at the tires of some cars parked in the lot. [REDACTED] told investigators that at some point, he, [REDACTED] and Rice were handling the gun and Rice was pointing the gun at people, adding that although Rice was just playing, "some people probably thought it was real."

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<sup>6</sup> The Rec Center has a number of video surveillance cameras which capture areas inside the Rec Center and on the grounds around the Rec Center. The materials I was provided included surveillance videos labeled by camera number (e.g., camera # 1).

Witness [REDACTED] [REDACTED] [REDACTED], was another person who knew Rice and saw him with the gun that afternoon. In her statement to investigators, [REDACTED] advised that she was a high school student who taught "arts and crafts" for credit at the Rec Center. Rice was one of the individuals whom she taught. She indicated Rice was at the center every day and she knew and liked him.

[REDACTED] told investigators she was walking home past the Rec Center when she saw Rice sitting on the swings and she walked over to talk to him. According to [REDACTED] Rice appeared to be playing with a handgun which she described as black with an "orange tip" at the end.<sup>7</sup> She told investigators she asked Rice "is that real?" and he responded in the negative. In her words, "first, I thought it was real. I'm like, little kids shouldn't be coming around with real guns." Rice then showed her the "little green, little, plastic little balls" used as ammunition.<sup>8</sup> [REDACTED] claimed that before leaving the park she warned Rice, "'Stay out of trouble!' I'm like 'don't do nothing stupid. Just be careful.'"

Investigators located two additional two witnesses who indicated they saw Rice with the gun that afternoon: [REDACTED] and [REDACTED]. Neither man was acquainted with Rice.

[REDACTED] gave a video interview to investigators on March 20, 2015, in which he stated he had gone to Rec Center because he was a "supervisor of the Cleveland Old Tymers Basketball Team." [REDACTED] told investigators he arrived at the Rec Center about 20 minutes before 2 p.m. and, as he parked, he saw "a young man. He's got a gun. He's right at the end of the sidewalk, pointing it down [demonstrating with his right hand]." [REDACTED] stated he was sitting in his car, and the male (Rice), was "maybe 20 feet" from him when this action occurred. The two made eye contact and then Rice turned and walked toward [the gazebo]. [REDACTED] stated he saw no one else in the area but a shortly thereafter [REDACTED] saw one person come out of the Rec Center, get in a car and leave. [REDACTED] claimed he was not alarmed because "there was no one out there" and he was focused on checking in the people who were coming to the basketball practice. Nonetheless, he remained sitting in his car until two people arrived and entered the Rec Center, at which point he got out of his car and went inside.

[REDACTED] described the gun as "black." When asked whether he thought it was a real or fake gun he responded, "I'm not a gun person. . . .it was black, and I called it a gun - black in color." [REDACTED] also told investigators that when he first saw the kid with the gun he thought he was around 12 years old.<sup>9</sup>

<sup>7</sup> Later in the interview, [REDACTED] stated she "could tell "it was a fake gun because of the orange tip." This statement is troubling. The overwhelming weight of the evidence is that the orange safety tip had been removed from the gun before Rice obtained it on November 22, 2014. [REDACTED] statement on this aspect is simply not credible but it serves no useful purpose to speculate whether she is mistaken or prevaricating on this point.

<sup>8</sup> [REDACTED] described the projectiles the gun fired as "green" but transparent or translucent. [REDACTED] recalled them as being orange.

<sup>9</sup> [REDACTED] is the only witness, to whom Rice was unknown, who estimated Rice to be 12 years of age. Rice's apparent age as perceived by witnesses will be discussed below.

████████ provided investigators with a video interview on March 5, 2015. He stated that he had arrived at the park in the early afternoon and was sitting at a table, drinking a beer and waiting for the bus.<sup>10</sup> Investigators asked ██████████ when he first saw Rice and specifically what Rice was doing. ██████████ responded that

[Rice] was being a gangster. He kept reaching in his crotch, and then when I finally seen the gun, it was time to make the call [to 911]. Cuz I didn't know! Should I get up and leave? Was he going to shoot me in the back? I don't know!"

████████ said Rice, whom he guessed to be about 18 years old, was alone when he saw him and he kept reaching into his "crotch" [demonstrating a person pulling at his waistband.] He told investigators Rice's actions "scared" him and it was not until Rice "finally went over and sat down, that's when I left." He stated that Rice went over to the "swing set" [and] "he turned his back to me and that was my time to leave." ██████████ stated that he watched Rice for about 20 minutes and that Rice was "pulling it [the gun] out" and pointing it. He told investigators he thought the gun was real<sup>11</sup> and, when Rice walked over to the swing set, he called 911, adding "I just wanted to get out of there, you know? But I wanted to make sure I got out safe."

████████'s 911 call came in at 3:19 p.m. The transcript of the relevant part of the call reads:

████████ I'm sitting her [sic] in the park by West Boulevard by the West Boulevard Rapid Transit Station. There's a guy with a pistol. It's probably fake, but he's like pointing it at everybody.

[A brief conversation follows regarding the specific location.]

**Call Taker:** What's the name of the park? Cudell?

████████ Cudell, yes. Guy keeps pulling it in and out of his pants. It's probably fake, but you know what? It's scaring the shit out of me.

**Call Taker:** What does he look like?

████████ He has a camouflage hat on. He has a gray, gray coat with black sleeves [and] gray pants on.

**Call Taker:** Is he black or white?

████████ I'm sorry.

**Call Taker:** Is he black or white?

████████ He's black.

**Call Taker:** You said a camel jacket and grey pants?

████████ No, he has on a camouflage hat on. You know what that is?

**Call Taker:** Yes.

████████ Desert Storm and his jacket is gray, and it's got black sleeves on it. He's sitting on a swing right now, but he keeps pulling it in and out of his pants, and pointing it at people. He's probably a juvenile, you know.

The Cleveland 911 emergency system relies on a network of call takers and dispatchers. The call takers handle 911, Fire, EMS and non-emergent calls. When a call

<sup>10</sup> Video surveillance shows ██████████ arrived at the park at 2:52 p.m.

<sup>11</sup> The actual 911 call shows that ██████████ was unsure whether the gun was in fact real.

taker receives the call, he or she will obtain the pertinent information and then send the call, electronically, to the dispatcher assigned to the area where the incident occurred (for police dispatch purposes, the city is divided into five districts.) The call taker enters the information into the Computer Aided Dispatch (“CAD”) system and it is sent by the CAD to the dispatcher who has the actual responsibility of communicating the call to the assigned police cars. The information provided to the dispatcher is that which is typed into the CAD system by the call taker.

The CAD tape reflects what appears to be an initial conversation between two dispatchers regarding [REDACTED] call:

**Dispatcher:** Um, hey, we have a code 1<sup>12</sup> accidental. Everybody’s tied up on priorities. Supposed to be a guy sitting on the swings pointing a gun at people.

**Dispatcher:** What do you have the cars on? Check their status’s [and] see if one of them is on<sup>13</sup> break.

The first dispatcher responds that two cars were on calls and then goes on the air and inquires of two cars, “Charlie 21 and Charlie 24,” whether either was able to “break for this code 1.” Charlie 21 advises that it can break for the call and then this exchange occurs over the air:

**Adam 2-5:** We’ll take it. The alarm check’s OK.

**Dispatcher:** Alright, thanks. Charlie 20 [21?] just disregard then. Alright, it’s at Cudell Rec Center, 1910 West Boulevard, 1-9-1-0 West Boulevard. [REDACTED] calling. He said in the park by the youth center there’s a black male sitting on a swing. He’s wearing a camouflage hat, a gray jacket with black sleeves. He keeps pulling a gun out of his pants and pointing it at people.

Immediately after ADAM 25 takes the call, car ADAM 26 advises that the call is in their “zone” and that they will take it. This occurs at 3:28 p.m. However, ADAM 26 advises the dispatcher it is some distance away and the dispatcher asks ADAM 25 to continue in and assist.

The patrol car designated “ADAM 25” was manned by Officers Garmback and Loehmann. Officer Garmback was driving; Officer Loehmann was the passenger. Officer Loehmann was a probationary officer who had begun his field training in August of 2014.<sup>14</sup> His training officer on this day was Officer Garmback.

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<sup>12</sup> The Cleveland dispatch system categorizes calls by priority. I was provided no information regarding the “code” levels and their meanings. The fact that cars are asked to break from other calls suggest a Code 1 is a high priority call.

<sup>13</sup> The transcript reads “on break.” The actual wording may be “can break” – the taped conversation is not clear.

<sup>14</sup> Officer Loehmann had previously served as a patrol officer for Independence, OH, in 2012. His records indicate he resigned that position in December of 2012 and applied for several other police agencies, including the Cleveland, OH, police department.

Officers Garmback and Loehmann arrived on the scene at 3:30 p.m.<sup>15</sup> Neither Officer Garmback nor Officer Loehmann made statements to investigators however surveillance video provides substantial details regarding the actual shooting incident.

When the officers arrived, Rice was sitting alone at the gazebo. The officers' police car approached from the south and drove through the park grounds to the gazebo, traveling at an estimated speed of approximately 19 mph before it slowed to a stop at the gazebo.<sup>16</sup> The police car was a fully marked patrol car; both officers were in full Cleveland Police Uniforms.

Surveillance video camera #1 provides video of the incident, viewing the gazebo from the west. There are three tables in the gazebo and Rice is sitting at the northernmost table. At 3:30:13, according to time stamp on the surveillance video, Rice stands up. He takes three or four steps toward the west side of the gazebo and in the direction of the approaching police car. When Rice first stands and walks in the direction of the approaching police car, his hands appear to be out of his pockets and midway between his waist and chest. The patrol car comes into frame at 3:30:19. As the police car comes to a stop, Rice's hands drop to his waistband area. When the police car stops, Rice is standing abeam the "A" pillar and, it appears from the video, that he is in close proximity to the patrol car. Rice's hands continue to move toward his waistband, however, the video is grainy and it is unclear - from the video - whether Rice reaches for his gun. At 3:30:23, Officer Loehmann's passenger door opens. At almost the same moment, Rice begins to fall to the ground. The evidence thus suggests that this is the point at which Rice was shot. Officer Loehmann is seen getting out of the vehicle and moving rapidly around the back of the police car to a position behind the rear of the police car on the driver's side. His handgun is drawn and aimed in Rice's direction. At the same time, Officer Garmback gets out of the driver's seat and moves around the front of the police car to a position near the push bumper at the right headlight. He, too, has his pistol drawn. The officers arrive at their respective positions of cover at 3:30:32 p.m. The critical events took place in less than 10 seconds. The officers continue to hold Rice, who is on the ground and can no longer be seen from this camera angle, at gunpoint. Officer Garmback moves around to the north side of the gazebo and appears to make a radio call.

CAD records indicate the "shots fired" call was made at 13:31:51.<sup>17</sup> The dispatch audio details Officer Garmback's ("ADAM 25") radio transmission:

**ADAM 2-5:** Radio, um, shots fired! Male down. Um, black male, maybe 20 [years old]. Black revolver – black handgun. Send EMS this way. And a road boss.

**Dispatcher:** Are you, this is at Cudell? Are you at Cudell?

<sup>15</sup> See time stamp from surveillance video camera #1. See, also, Ohio State Highway Patrol Reconstruction Report 2015-304-00, p. 10.

<sup>16</sup> Ohio State Highway Patrol Reconstruction Report, page 42.

<sup>17</sup> I found no evidence in the files indicating the CAD times and the surveillance time stamps from the Cudell videos were based on same source or otherwise synchronized. Any minor differences between the two times are not dispositive in this investigation.

ADAM 2-5: Yes, ma'am. At Cudell. [Unintelligible] got a gunshot wound to the abdomen.

ADAM 2-1: (another patrol car): Are they OK down there?

ADAM 2-5: We're fine. My rookie hurt his ankle.

Other police cars monitored the call and began responding to the Rec Center. One of those cars was an undercover unit driven by Cleveland Police Detective Daniel Lentz, who was working that day with FBI Special Agent [REDACTED] [REDACTED]. Det. Lentz and Agent [REDACTED] were nearby and were the first cover officers to arrive. Agent [REDACTED] provided investigators with a detailed written statement and thereafter, on February 27, 2015, provided an audio-recorded interview. In the recorded interview, Agent [REDACTED] estimated he and Det. Lentz arrived on scene within "maybe 3 minutes." Det. Lentz went to assist Officers Garmback and Loehmann who were attempting to keep bystanders away from the scene. Agent [REDACTED] who had served in the U.S. Marine Corps and in November of 2014 was a member of the Air Force National Guard, had been trained as a paramedic and was "a national registered paramedic." He immediately went to Rice to render aid. He saw Rice had suffered a serious abdominal wound which he was able to see because "his shirt was kind of pulled up and his coat was open." Agent [REDACTED] quickly concluded that Rice would need surgery to survive his wound and worked to assure Rice had an open airway. Agent [REDACTED] told investigators he thought Rice "was like an older teenager; like eighteen-ish."

Agent [REDACTED] administered first aid to Rice until Cleveland paramedics and firefighters arrived on scene. He then went to check on Officer Loehmann who, he had been advised, had suffered an injury. In his written statement, Agent [REDACTED] provided this information:

After exiting the ambulance [in which Rice had been placed] I directed my attention to the injured CPD officer who was seated in the front passenger side of a CPD zone car. The officer was holding his ankle close to his body, and appeared to be distraught and in significant pain. I asked the officer if he was okay, and he advised that he had injured his ankle during the incident. I informed the CPD officer that another EMS unit was en route to treat and transport him to the hospital. The CPD officer advised me that he would be okay until EMS arrived, and did not require any medical treatment at this time. The officer made a spontaneous utterance that the suspect had a gun and reached for it, after he told the suspect to show his hands and not to reach for it.

On May 28, 2015, Det. Daniel Lentz gave a video recorded interview to investigators. He stated that he and FBI Special Agent [REDACTED] [REDACTED] were in the area investigating a bank robbery which had occurred the day before when they heard a radio call in which an "officer called out yelling 'shots fired.'" They realized they were close to the location and drove to Cudell Park. The two investigators were in an undercover detective car and Detective Lentz stated that, as they arrived, he activated his emergency lights because

we didn't know what we were approaching. Just knew there was a call for shots fired. I didn't know if there was an active shooter. I didn't know if the officers had been shot or if they had shot someone else. Or just shots fired in general.



Det. Lentz stated they arrived on the scene at about 3:33 p.m. He told investigators he got out of his police car and was immediately met by Officer Loehmann, who was limping and appeared injured. Det. Lentz recalled that he asked Officer Loehmann several times to sit down and wait for paramedics. Det. Lentz recalled Officer Loehmann saying he hurt his leg when he "exited the vehicle." Det. Lentz then began working on securing the crime scene – asking citizens to stay back.

Det. Lentz stated that he saw the "subject" on the ground and that Special Agent [REDACTED] was attempting to administer what appeared to Det. Lentz to be advanced first aid/medical aid. He therefore began working on securing the crime scene as several citizens were approaching the area. "At some point" while he was so engaged, he became aware of Rice's handgun which was "was within the vicinity" of Rice and the officers. Det. Lentz was focused on officer safety and scene security so he

went over and looked at the gun. I think I squatted next to it. It was at that point – it was separated. The magazine was out of the weapon. It appeared to be, uh, similar in nature to a Colt 1911 [semi-automatic pistol].

He then went to look at the magazine which had fallen a short distance away from the gun and, on "a secondary look, I saw like a green BB which confused me. Cuz the gun looked very real to me."

When asked of his initial impressions of Rice's age, his response was "my initial thought, when I saw him? And then what his sister<sup>18</sup> told me in the car that he was 12, didn't really match up in my mind. The male that was on the ground was rather large." When asked, specifically, what was his initial impression of Rice's age, Det. Lentz replied, "If I had to guess, probably seventeen. Eighteen."

Officer Loehmann was armed with Glock 17, 9mm semi-automatic pistol. This firearm has a 17-round magazine and may be carried with an additional cartridge in the chamber. Investigators at the scene recovered two spent shell casings. The pistol was submitted to the Cleveland Police Forensic Laboratory ("Police Lab") along with 16 live cartridges. Officer Loehmann fired two shots.

An autopsy was performed on Rice's body by Dr. Thomas Gilson, the Cuyahoga County Medical Examiner on November 24, 2014. Dr. Gilson determined that Rice "died as a result of a gunshot wound to the abdomen which injured his inferior vena cava, intestines and pelvis. The decedent was shot by law enforcement during legal intervention." Rice was shot once. The bullet was removed at autopsy and submitted to the Police Lab. Forensic analysts confirmed it was fired from Officer Loehmann's pistol. Dr. Gilson also found that Rice was 67 inches in height (5'7") and weighed 195 lbs.

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<sup>18</sup> Rice's sister was one of the first citizens to arrive on scene after the shooting.

## LEGAL CONSIDERATIONS

The legal issues in this investigation center around self-defense and reasonableness of the use of deadly force by a police officer. It appears the primary sources of Ohio law regarding self-defense and use of deadly force by law enforcement officers derives from common law and case law.<sup>19</sup> In Ohio,

Self-defense is an affirmative defense that requires a defendant to prove three elements by a preponderance of the evidence: "(1) the defendant was not at fault in creating the violent situation, (2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger." [Citation.]

*State v. Goff*, 942 N.E. 2<sup>nd</sup> 1075, 1082 (Ohio 2010).

As I stated at the outset, I do not practice in Ohio and it would be inappropriate for me to engage in an analysis or application of Ohio law. It is for Ohio attorneys to determine and resolve issues with regards to Ohio self-defense laws. However, I am aware that where issues arise regarding the criminality of use of force by police officers, Ohio courts have looked to Federal constitutional analysis and principles. In its recent decision in *State v. White*, \_\_\_ N.E. 3rd \_\_\_ (Ohio 2015), *slip op.* 2015 WL 687461(Ohio), the Ohio Supreme Court held that the United States Supreme Court's rulings in *Tennessee v. Garner*, 471 U.S. 1, (1985) and *Graham v. Connor*, 490 U.S. 386 (1989) provide the framework for reviewing criminal prosecutions of officers involved in deadly force encounters, stating:

Although the [U.S.] Supreme Court's decisions in *Garner* and *Graham* involved an officer's civil liability of deprivation of civil rights under color of law, these cases nonetheless help to define the circumstances in which the Fourth Amendment permits a police officer to use deadly and non-deadly force.

Courts therefore apply *Garner* and *Graham* in reviewing criminal convictions arising from a police officer's use of deadly force.  
*White*, *slip op.* at 24-25.

Accordingly, it is appropriate to discuss the principles established in *Garner* and *Graham* as they may be seen to apply to the facts of this case.

In *Garner*, the Court addressed the "constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon." 471 U.S. at 3. The Court first held that when an officer has restrained the freedom of a person to walk away, the officer has seized the person and "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U.S. at 7. The Court went on to find that the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally

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<sup>19</sup> Ohio has codified the "castle doctrine". Ohio Revised Code §2901.05. That provision is not applicable to this case.

unreasonable.<sup>20</sup> However, and of critical importance to the instant case, the Court went on to note:

*Where an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officers 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 . . . deadly force may be used if necessary to prevent escape, . . .*  
471 U.S. at 11 [italics added.]

In *Graham*, the Supreme Court returned to the question of whether and how to apply the constitutional standards set forth in *Garner* to allegations of excessive physical force by law enforcement officers. The *Graham* Court, after confirming that the Fourth Amendment's objective reasonableness standard also applies to excessive force claims arising out an arrest or investigatory stop of a citizen, set forth guidelines for applying the standard:

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of the " 'the nature and qualify of the intrusion on the individual's Fourth Amendment interest' " against the countervailing governmental interests at stake. . . . its proper application requires careful attention to the facts and circumstances of each 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 attempt to evade arrest by flight. 490 U.S. at 396 (italics added).

Of particular importance in the context of the Rice investigation is the statement next made by the Court:

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonable 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. 490 U.S. at 396-97.

The Ohio court reaffirmed that, in deadly force encounters, *Garner* stands for the principle that "a peace officer acts reasonably in using deadly force when the officer has a reasonable belief that the suspect poses a threat of serious physical harm or death to the officers or to others." *White*, slip op at \_\_\_. In determining the reasonableness of an officer's actions, close attention must be focused on what the officer knew or reasonably should have known at the time in determining whether a reasonable officer could have concluded the subject posed a threat of serious physical harm or death *or* whether there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm.

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<sup>20</sup> At issue in *Garner* was the constitutionality of a Tennessee statute authorizing the use of all necessary means to effect the arrest of a fleeing felon.

## DISCUSSION

Determining whether Officer Loehmann's actions were objectively reasonable requires a careful analysis of the circumstances surrounding the officers' attempt to contact Rice with particular emphasis on the facts known to Officer Loehmann at the time and such reasonable inferences as may be drawn from those facts.

Officers Garmback and Loehmann were responding to a call of a party with a gun at a park and recreation center. Additional information was that the party was said to be pulling the gun out of his pants and pointing it at people. They were provided no more facts other than a description of the suspect's clothing and a possible location. A "gun" call suggests to any reasonable officer that there is a concern for his safety and the safety of others, particularly where the officer is responding to a location where there may be children and young people - such as a park and recreational center - and where the suspect is said to be aiming the weapon at people. When responding to such a call, a reasonable officer may either remove his firearm from its holster or place his hand on the holstered gun. As they arrived, Officer Garmback drove the patrol car to the gazebo where one party was located. He approached and stopped in such fashion that Officer Loehmann was in a position of great peril - he was within feet of a gunman who had stood up, was approaching the police car and reaching toward his waistband.<sup>21</sup> The officers did not create the violent situation - they were responding to a situation fraught with the potential for violence to citizens.

As neither of the involved officers made a statement, the evidence available in the materials I reviewed regarding the immediate threat Officer Loehmann perceived is found, first, in the video showing Rice's movements as the police approached, second, in the statement Officer Loehmann blurted out to Agent [REDACTED] that suspect had a gun and reached for it, and third, and as can be seen on the video,<sup>22</sup> in Officer Loehmann's rapid exit from the car and immediate retreat from an exposed position to a position of cover. These facts, considered together suggest, Officer Loehmann was reacting to an immediate threat resulting from the actions of a gunman. When viewed through the prism mandated by *Garner* and *White*, Officer Loehmann's decision to shoot to protect himself from that threat is objectively reasonable. Of particular import is the statement he made to Agent [REDACTED]

I am mindful that this case has resulted in great controversy, much of it stemming from three facts: 1), Rice's age; 2), the fact Rice was armed with an airsoft pistol; and 3), the short time between the officers' arrival on scene and the shots fired.

Neither Rice's age nor the nature of his weapon were known to the responding

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<sup>21</sup> The Cuyahoga County Sheriff's investigation concluded Rice was within seven feet of Officer Loehmann when Officer Loehmann discharged his weapon. Cuyahoga County Sheriff's Final Synopsis, June 2, 2015, p. 4

<sup>22</sup> The fact that Officer Loehmann injured his ankle getting out of the car is evidence of a rapid or "panic" exit.

officers. However, the statements of the witnesses compel the conclusion a reasonable officer responding to the call would have believed Rice was an older teen or young adult. Rice was 5'7" and 195 lbs. When Officer Garmack made the "shots fired" call, he told the dispatcher, "Male down. Um, black male, maybe 20 [years old]." Det. Lentz first thought Rice was 17 or 18 years old. [REDACTED] who had watched Rice for several minutes, told the 911 call taker Rice was "probably a juvenile." [REDACTED] who knew Rice, told investigators, "[h]e was big, ya, he was big. But he didn't look like he'd be older than 16."

The gun Rice possessed was not, in fact, a functioning firearm. That Loehmann perceived it to be a real gun was, in retrospect, erroneous.<sup>23</sup> However, "searches and seizures based on mistakes of fact can be reasonable." *Heien v. North Carolina*, 135 S. Ct 530, 536 (2014). "The limit is that 'mistakes must be those of reasonable men.' *Brinegar*, [338 U.S.] at 176, 69. S.Ct.1302." *Ibid.* The issue is, in short, could a reasonable police officer have believed Rice's gun was a real firearm. The answer must clearly be answered in the affirmative. [REDACTED] the juvenile who gave Rice the gun, warned him it looked real. [REDACTED] told investigators when she first saw the gun her thought processes were, "first, I thought it was real, I'm like, little kids shouldn't be coming around with real guns." The eleven year old [REDACTED] admitted that although he knew the gun was a toy, "some people probably thought it was real." [REDACTED] told investigators he "saw a young man, he's got a gun. ...". [REDACTED] called 911 to report a man with a gun, adding, "it's probably fake, but, you know what? It's scaring the shit out of me." Lastly, Det. Lentz, a veteran police officer who saw the gun immediately after the shooting, first thought the gun was a "Colt 1911" semi-automatic pistol and expressed surprise when he realized it was not a firearm but an airsoft.

Concerns about the interval between the officers' arrival at the gazebo and the firing of the shots are, essentially, an inquiry into the officers' tactics. The police car, driven by Officer Garmack, drove up to and stopped within ten feet of Rice as he stood up and walked toward the car. As Officer Garmack has not made a statement, I am aware of no evidence regarding this decision. However, it is critical to note that Officer Loehmann, a "trainee" officer, was not in control of the police car. Officer Loehmann, in the passenger seat and closest to Rice when the patrol car stopped, was in a position of greater peril. In a case decided earlier this year, the United States Supreme Court wrote

[I]ndeed, even if [the officers] misjudged the situation, [Respondent] Sheehan cannot "establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." [Citation.] Courts must not judge officers with "the 20/20 vision of hindsight."

*City and County of San Francisco v. Sheehan*, 575 U.S. \_\_\_\_, 135 S. Ct 1765, 1777 (2015).

To suggest that Officer Garmack should have stopped the car at another location

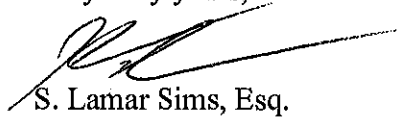
<sup>23</sup> The threat posed by toy guns has long bedeviled law enforcement. I have attached a 1990 Bureau of Justice Statistics and Police Executive Research Forum report on "Toy Guns – Involvement in Crime & Encounters with Police." Note, particularly, the statement regarding "Circumstances Related to Police Officers Use of Force When Mistaking an Imitation Gun for a Real Gun." p. ix.

is to engage in exactly the kind of "Monday morning quarterbacking" the case law exhorts us to avoid.

There can be no doubt that Rice's death was tragic and, indeed, when one considers his age, heartbreaking. However, for all of the reasons discussed herein, I conclude that Officer Loehmann's belief that Rice posed a threat of serious physical harm or death was objectively reasonable as was his response to that perceived threat.

I am hopeful that this discussion is of some assistance to you and those members of your office who are handling this matter.

Very truly yours,



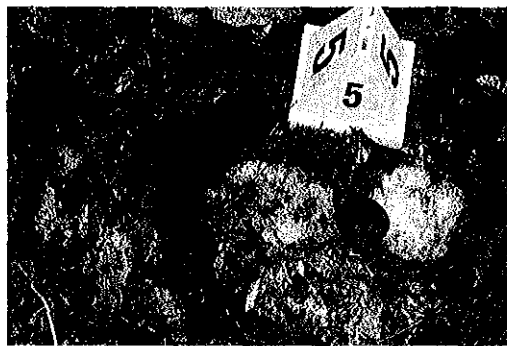
S. Lamar Sims, Esq.



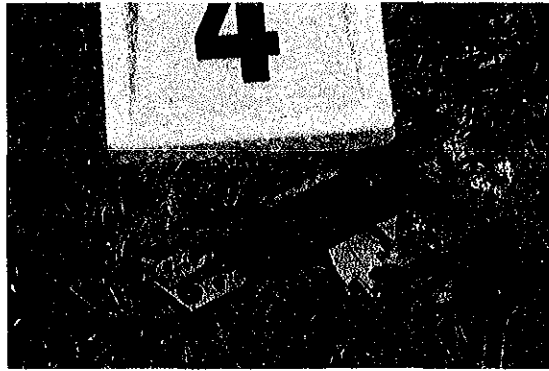
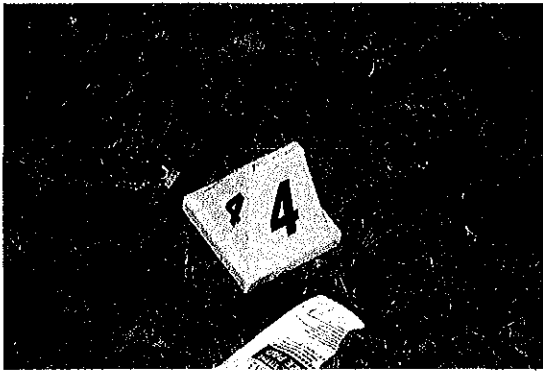
The parking lot, gazebo and swing set



The Rec Center, gazebo and swing set and the officers' patrol car.

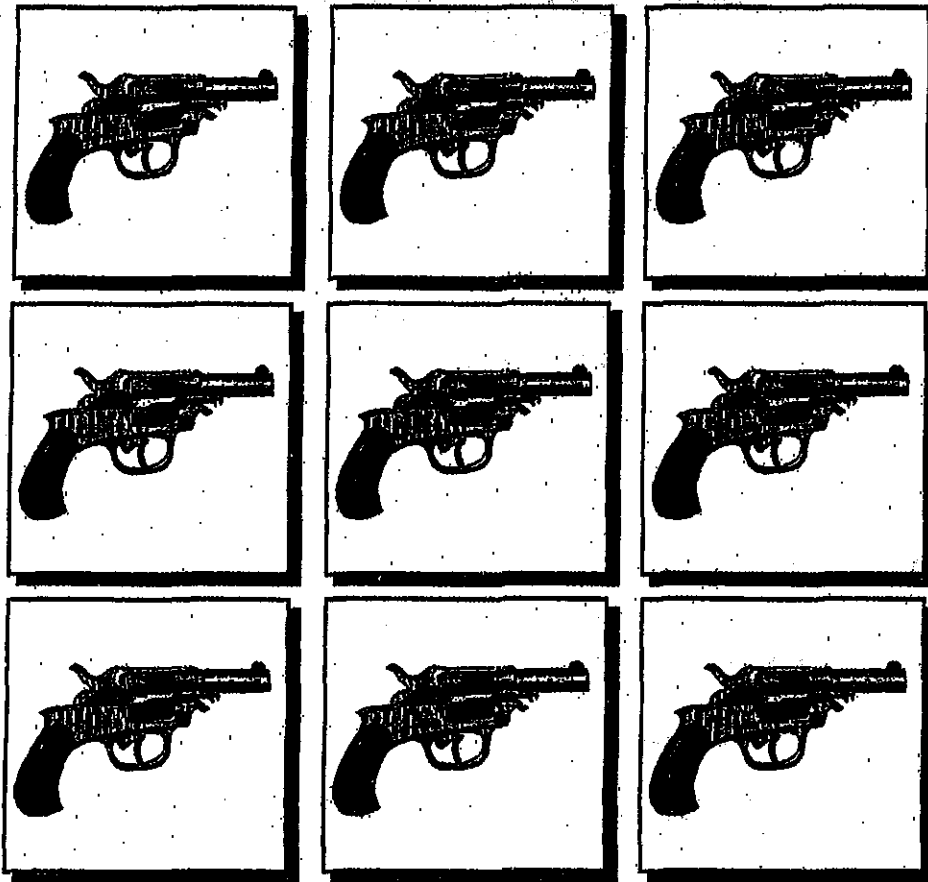






# TOY GUNS

INVOLVEMENT IN CRIME & ENCOUNTERS WITH POLICE



BUREAU OF JUSTICE STATISTICS



POLICE EXECUTIVE RESEARCH FORUM

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enforcement agencies were visited for the project representing all agency types included in the study.

### Characteristics of Police-Toy Gun Encounters

As the problem and issues were examined, it was determined that in order to meet the spirit of the study's mandate, the problem would have to be broken down into more operational components. Broadly viewed, circumstances involving toy guns can be categorized for study based on the *nature of the incident* or *nature of the weapon*.

#### *Nature of the Incident...*

- *Commission of a crime* with an imitation gun being intentionally used as an instrumentality of the crime.
- *Mistaken encounters* when a citizen and/or officer encountered a person with a toy gun but, as a result of the gun's appearance and the circumstances of the incident, the people involved reacted as if the gun were real.
- *Officer-involved shootings in non-criminal situations* where the circumstances facing the officer reasonably appeared threatening and/or criminal.
- *Commission of a crime and/or the brandishment of a toy gun as a real weapon resulting in an officer-involved shooting.* In these cases the suspect was involved in a crime (or a criminal attempt) and attempted to dissuade officer intervention by acting as if the imitation weapon were real.

#### *Nature of the Weapon...*

- *Toys.* These are imitation weapons designed with the specific intent for playing. They include a wide array of game types such as a child using the toy in concert with his/her imagination (e.g., "cops and robbers"); the use of water guns; toy guns designed for some type of "target practice"; and the more sophisticated games such as "laser tag."
- *Pneumatic Guns.* Types of guns using pneumatic pressure to propel some type of projectile. The propellant system may be either through an internal pump, hand operated by the person using the gun or one using a compressed CO<sub>2</sub> air cartridge.
- *Replica Guns.* Guns that are *replicas* of actual weapons. Replica guns are full size "working" reproductions of firearms. Replicas are manufactured so they are unable to fire.

### Major Findings

- Between January 1, 1985 and September 1, 1989, 458 police departments (65.5% of the study population) reported 5,654 robberies known to be committed with an imitation gun. Robbery investigators interviewed estimated that, on an average, 15% of all robberies were committed with imitation guns.
- In the same time period, police departments reported 8,128 known assaults with imitation guns.

- **Shape/Design of the Gun.** A finding repeated in every incident was that the shape or design of the gun was a paramount factor in the officer's decision to shoot. Many of the imitation guns are modeled after real weapons. Even those made of plastic and with some degree of coloration are frequently indistinguishable from real guns, particularly under low light conditions.
- **Actions of the Person(s) Involved in the Incident.** In the shooting incidents examined by the researchers, the factor ultimately influencing the officers' decisions to shoot was the actions of the individual. The actions were more than simply pointing the weapon, but included such things as overt threatening movements, shouting, and even acting like they were going to shoot at the officer.

Site visit interviews and comments on some surveys indicated that there had been crimes or police encounters with imitation guns which *did* have markings. However, the data were insufficient to determine the proportion of all incidents involving guns with markings or to distinguish between the types of guns (i.e., toy, pneumatic, or replica).

interpretations of the collected data, interviews, and content analysis of documents and reports. These conclusions should not be construed to be the opinions or position of the Bureau of Justice Statistics or the U.S. Department of Justice.

The researchers are most grateful to the police executives who helped us in this study and particularly thank those law enforcement chief executives who opened their departments and availed their staff to us for the site visits. Especially important has been the support and flexibility provided by Dr. Robert Trojanowicz, Michigan State University and Dr. Richard Holden, Central Missouri State University. Their assistance truly facilitated the smooth and timely completion of this project. We also extend our gratitude to the staff of the Police Executive Research Forum who assisted us in making arrangements and facilitating logistics on typically short notice. We particularly thank Lexta Taylor for his rapid work in assisting with important arrangements and Jennifer Brooks for her usual reliable assistance on a wide variety of matters.

The time commitment and advice of our Advisory Board members have been important ingredients in formulating the final report. Their enthusiasm and selfless contributions are truly appreciated. We also thank our BJS Project Monitor, Paul White, for his valuable insights and assistance from the design concept through completion of the final report.

Finally, we would like to express our special appreciation to Captain Paul Connor of the Las Vegas Metropolitan Police Department. Captain Connor went "the extra mile" in his preparation for our site visit and set important standards that have helped us immensely throughout this entire project.

David L. Carter  
East Lansing, MI

Allen D. Sapp  
Warrensburg, MO

Darrel W. Stephens  
Washington, DC



survey, status reports, and interpretations of the research team. It was the concern of the researchers to present a balanced perspective of the problem and ensure accuracy in all aspects of the report. As a result, the Advisory Board includes persons from different groups and experiences which provide a balanced view of the issues. Advisory Board members are:

- Dr. Helen Boehm, Children's Advertising Review Unit, Council of Better Business Bureaus
- Detective Don Cahill, Prince William County (VA) Police Department
- Mr. Paul Estaver, National Institute of Justice
- Mr. William Moulder, Chief of Police, Des Moines Police Department
- Mr. Thomas B. Nelson, President, Collector's Armoury, Inc.
- Mr. Robert Reid, Vice President of Marketing, Daisy Manufacturing
- Dr. Stanley I. Warshaw, Associate Director for Industry and Standards, National Institute of Standards and Technology
- Mr. Paul White, Project Monitor, Bureau of Justice Statistics (Ex-officio)

### Research Methods

The first step in the research process was to define the specific issues and goals which needed to be examined to meet the Congressional mandate. This necessitated that the researchers identify the types of toy gun incidents which have occurred and analyze them for trends or similarities. This was initially done through a content analysis of news stories selected through a Lexis®/Nexis® computer search of news stories. (See Appendix 3 for news sources.)

With this analysis serving as the foundation, two primary data collection methodologies were developed and used: survey research and law enforcement agency site visits.

**Survey Research.** A survey was developed which collected data on the experiences of police departments with toy gun incidents. The survey was sent to all municipal police and consolidated police departments serving populations of 50,000 or more inhabitants; all sheriff's departments with 100 or more sworn employees; and all primary state police agencies. Of the 699 agencies in the study population, a total response rate of 70% was received based on 489 responses. Thirty-one questionnaires were not included in the analysis because they were either improperly completed, received too late, or returned without being completed. In these cases the agency acknowledged receiving the survey but chose not to participate. As a result, the usable response rate was 65.5% (458 responses—Figure 1). By all measures of survey research, this is an above average response rate. (Appendix 4 shows responses by census region of the country.) *Excluding* the state police agencies, the police departments surveyed cover slightly over one-third (33.6%) of the U.S. Population as reported in the 1988 *Statistical Abstract of the United States*. With respect to police activity, since the agencies surveyed represent the

incidents, criteria for site selection included jurisdiction size, geographic distribution, and agency type. (Those agencies visited are listed in Appendix S.)

During the site visits the researchers interviewed officers involved in toy gun incidents; investigators; police commanders; and training personnel. Reports were also reviewed and seized imitation guns were examined. In some cases, the researchers were given weapons seized in toy gun incidents which were no longer needed for evidence. While in the various site visit cities, the researchers also went to stores which sold toy, imitation, or replica guns in order to get a perspective on the national imitation gun market.

Figure 2

**POLICE ENCOUNTERS BY THE NATURE OF THE INCIDENT**

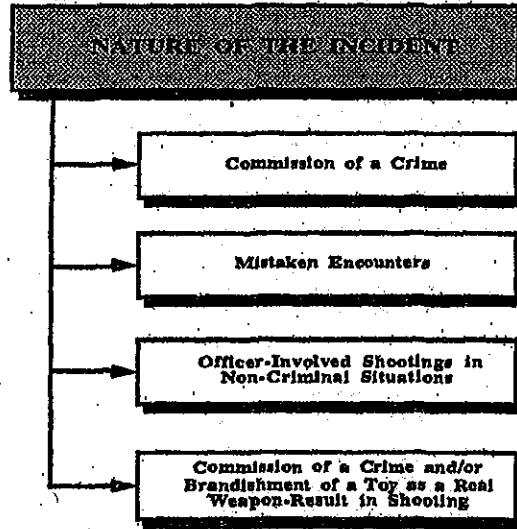
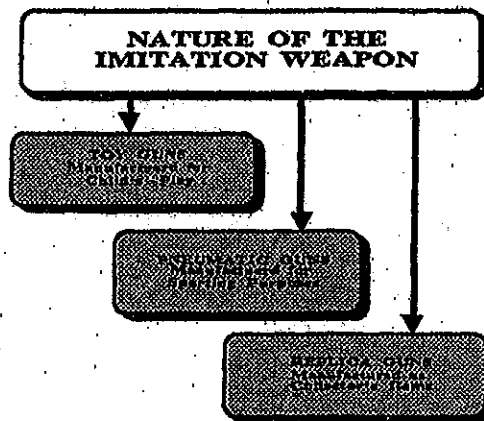


Figure 3

**GUN CLASSIFICATIONS BY NATURE OF THE WEAPON**



As illustrated by the above scenarios, fundamental distinctions can be made between the incident types which are useful for both analytic and descriptive purposes.

### Nature of the Weapon

This categorization became problematic. Weapon types transgressed the various incident types. Moreover, while clearly not firearms, many of the guns were also not "toys" in the traditional sense. The guns found in the incidents may most accurately be described as *imitations*. In some instances the weapon was not included in Public Law 100-615 requirements for distinctive markings. Yet, police officials were adamant about their concern for these types of weapons. Because of these dilemmas, imitation weapons were categorized into three groups (Figure 3):

- Toy Guns
- Pneumatic Guns
- Replica Guns

**Toy Guns.** The first group of weapons is simply toys. These are imitation weapons designed with the specific intent for playing. They include a wide array of game types such as a child using the toy in concert with his/her imagination (e.g., "cops and robbers"); the use of waterguns; toy guns designed for some type of "target practice"; and the more sophisticated games such as "laser tag."

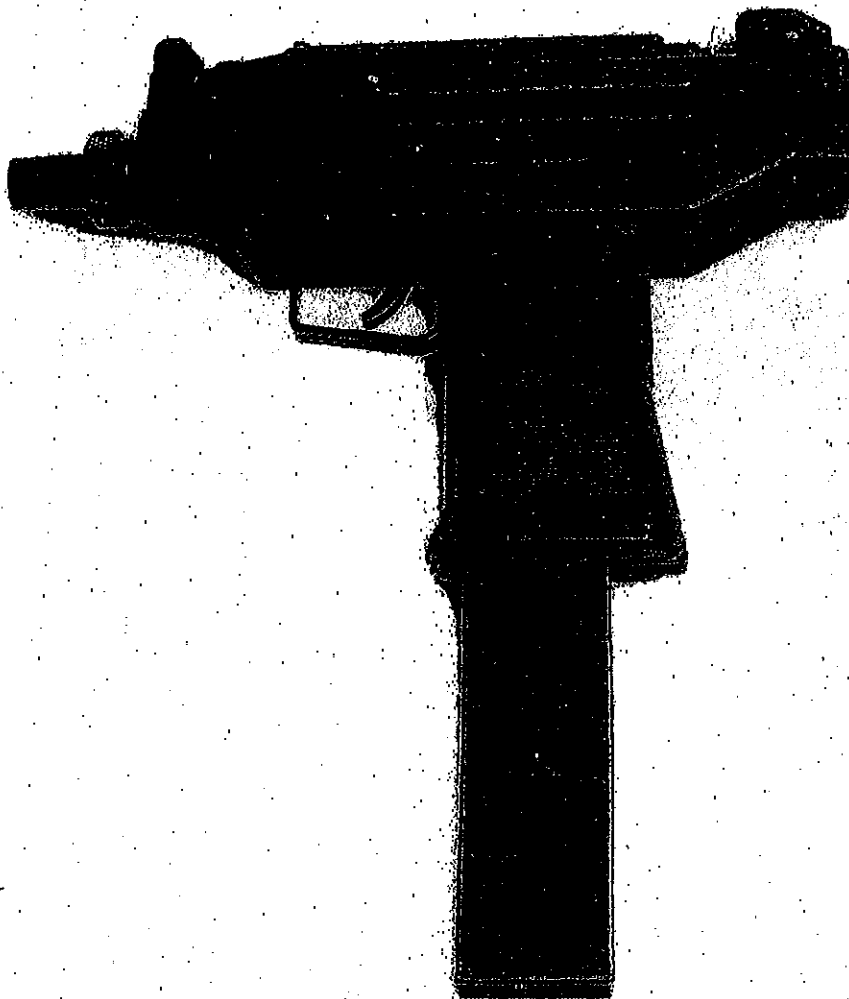
There is a wide variety of toy guns available in the market—too many to completely address in this report. Instead, the researchers have identified selected toy guns as illustrations. These were selected because of their prominence in identified incidents; because their characteristics illustrate the issues encountered during the course of the research; and/or because the guns are widely available.

In an attempt to get a perspective of the types of toy guns available on the market, the researchers visited toy gun stores in cities throughout the country. Some stores were national or regional chain stores while others were locally owned. Some variation existed in the inventory depending on the region of the country and, it appeared, depending on the attitude or philosophy of the stores' management. Despite these anomalous variations, some clear trends emerged concerning the availability of various types of toy guns. A number of manufacturers (notably domestic companies) have stopped making toy guns which replicate real weapons. Some foreign companies still appear to be making these

**RANCHO CUCAMONGA, CA** - Late one evening a citizen called the San Bernardino County Sheriff's Office reporting prowlers who were possibly armed at a school. Deputies responded to the school and began a systematic search of the premises. They observed profiles of people moving around the school as if they were stalking. One deputy, armed with a shotgun, looked around a corner and saw a person approaching with a weapon in hand that appeared to be a "Desert Eagle" automatic pistol. As the man approached, the officer yelled and ordered the man to drop the gun. Instead, the man turned, assumed a shooting position, and appeared to fire at the officer. The deputy fired the shotgun, spinning the man around. The man turned back in a shooting position again and the deputy fired a second shotgun round, killing the man. As the officer approached the downed man, he kicked the gun out of his hand and "heard the sound of plastic." At that point the deputy learned the gun was a toy and that the man had been playing "Laser Tag." Because of the psychological trauma of this incident, the deputy, a seven-year veteran with a good service record, remains on disability leave and will probably not be able to return to duty. In addition, two trained reserve deputies who responded to the call at the school, resigned their commissions as a direct result of the trauma of this incident. **SOURCE:** Officer interviews and review of incident reports during the site visit.

**Illustration 1**

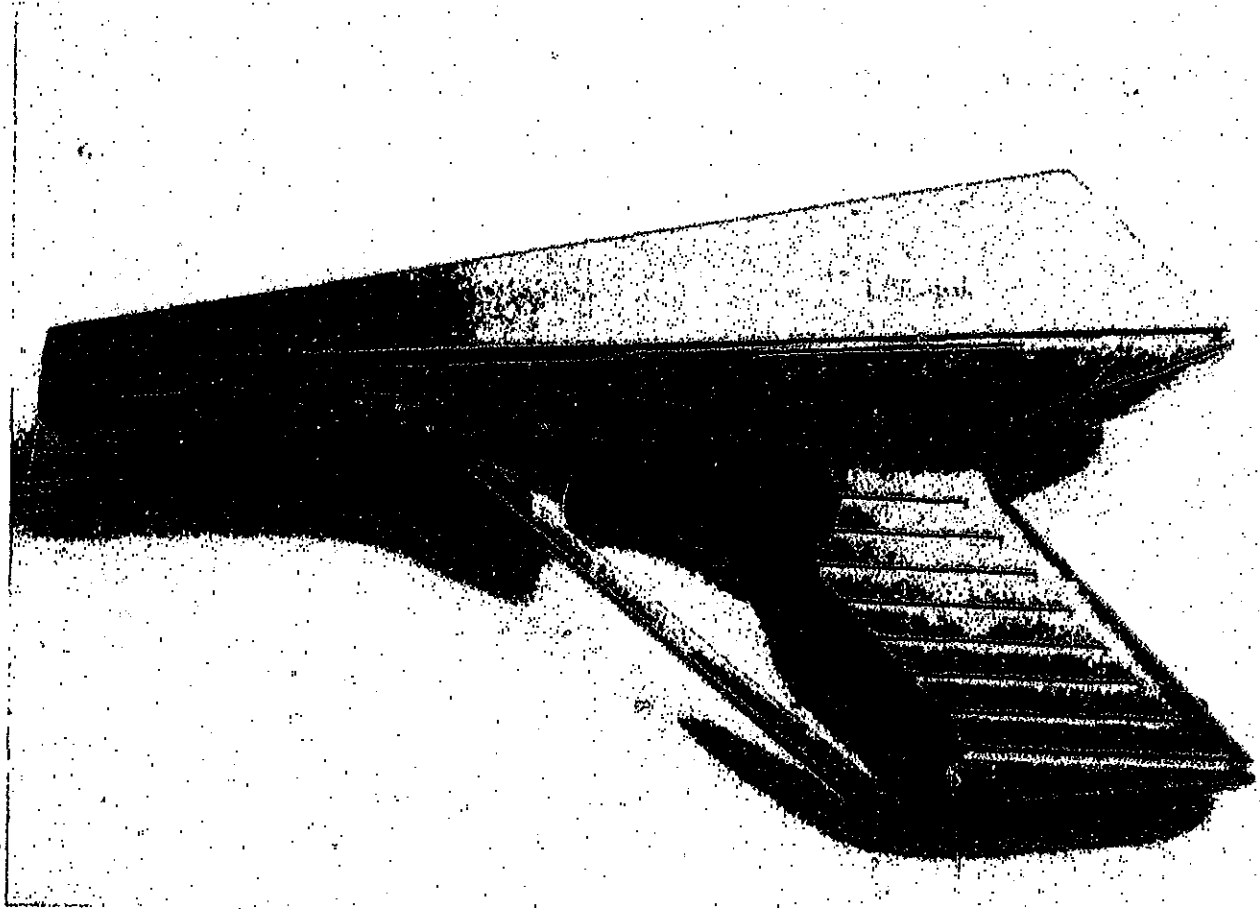
**LARAMI Water Pistol Modeled After the Uzi Automatic Pistol  
(Seized in Las Vegas, Nevada Involving  
What Appeared to be a Kidnapping)†**



†This gun is made of black plastic with no markings signifying it is a toy.

**Illustration 3**

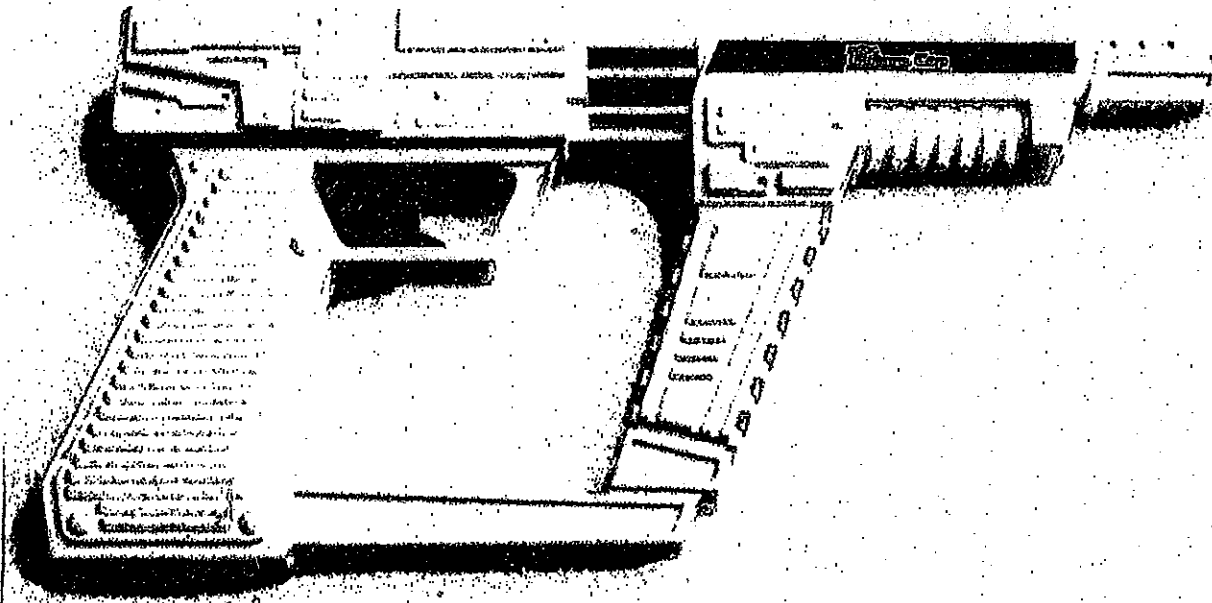
**LARAMI Nontraditionally Shaped PULSAR™ Water Pistol**



†This gun is made of a bright pink plastic. Not shown is a black plastic "water clip" which is inserted in the grip.

Illustration 4

*Future Cop* "Laser Sound Pistol"—ARCO Toys Ltd./Mattel†



†This gun is made of white plastic.

propellant system may be either through an internal pump, hand operated by the person using the gun or one using a compressed CO<sub>2</sub> air cartridge. Most commonly thought of in this category are BB and pellet guns, however, other pneumatic guns are available. The fastest growing in popularity are "paint-ball sports"—a thriving recreational industry with sophisticated pneumatic guns and equipment.

While clearly not firearms, the pneumatic weapons may neither be classified as a toy. They are powerful enough to cause injury, yet the pneumatic guns can be purchased over the counter by virtually anyone and are likely to be in the possession of adolescents. (Most jurisdictions have a state law or local ordinance requiring a person to be eighteen years old to purchase a pneumatic gun.)

Common in the industry is the pneumatic gun classification used by Daisy manufacturing. Their BB guns are classified into three categories:

- **Youth Line**—These are pneumatic guns with a muzzle velocity of less than 350 Feet Per Second (FPS) and targeted for use by youths aged 10-16 years old with adult supervision.
- **Power Line**—Pneumatic guns with a muzzle velocity greater than 350 FPS and targeted for use by people older than 16 years of age. Daisy recommends that youths age 16-18 use the gun only with adult supervision.
- **Adult Precision**—These guns have the same characteristics as the Power Line guns, however they are more expensive and are manufactured for competition shooting.

Despite the care the pneumatic gun industry has taken to "target" the guns for specific uses, the public attitude appears to be that pneumatic weapons do not pose a threat similar to firearms. Thus, possession and use of the pneumatic guns without adult supervision are relatively common.

With respect to pneumatic guns, the marking provisions of Public Law 100-615 apply to "air-soft guns firing nonmetallic projectiles" but not to "traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure."

"Air-soft" guns were originally produced by the Japanese as a sporting alternative to firearms and traditional pneumatic guns which are virtually unattainable for private citizens under Japanese law. Typically, the "air-soft" gun is a facsimile of a firearm with a small spring piston or air propellant capable of shooting only lightweight plastic projectiles at a rather low muzzle velocity of around 150 Feet Per Second. In some cases the air propellant and projectile are encased in individual "bullets" with the action on the guns working the same as they would on the real firearm. Some of these model designs have been manufactured as traditional pneumatic guns that will fire BB's and pellets. Air-soft guns are manufactured to look virtually identical to many real guns, notably "assault" weapons—such as the AR-15 rifle; the Mini-Uzi automatic; the H&K MP5K machine gun; the Walther MPK and MPL machine guns; the U.S. M3 "Grease Gun"; and the TECH-9 automatic, among others. The pneumatic BB gun illustrated in Illustration 6 is but one example designed to look like the *Intratec 9mm Luger* semiautomatic assault handgun. The gun not only closely resembles the real weapon, the BB gun has "Interdynamic ... 9mm Luger" printed on the side. (This particular gun was seized in Houston involving a potential assault.) Importation of nearly all air-soft guns stopped in 1987, although some guns are still available in back inventories just as some are still in use which were



previously purchased. (The cease of importation was a marketing decision by retailers, not a function of legislative prohibition.)

There are several models of pneumatic pistols (as opposed to air-soft guns) manufactured to look like real firearms. For example, Crosman makes an air rifle capable of shooting either BB's or pellets called the "AIR 17" that looks like the Colt AR-15 (military M-16) assault rifle. Similarly, the Crosman model Z-77 CO<sub>2</sub> gun is a facsimile of the Uzi machine gun, complete with folding stock. The Benjamin single shot pneumatic pistol looks similar to the AMT .22 magnum automatic pistol or the Israeli made Desert Eagle 9mm automatic. Beeman's P1 air pistol design virtually replicates several models of the .45 automatic handgun. Similarly, Crosman's Model 357 CO<sub>2</sub> pellet pistol is almost indistinguishable from the Colt Python .357 magnum revolver. In this same product line is the Crosman 38T CO<sub>2</sub> pellet revolver which looks very similar to the Colt MK111 .357 magnum. Many other configurations of pneumatic pistols exist which look similar to a real firearm, particularly in light of their metallic construction (such as the one illustrated in Illustration 7).

Market trends have affected the sale of some of these models to the point that manufacturers have stopped their production. Nonetheless, models are still available in both wholesale and retail inventories as observed by the researchers during site visits.

As in the case of toy guns, the national perspective on the availability of such guns was fairly consistent. BB and pellet rifles do not appear to have been a problem with respect to robberies or threatening situations between citizens and police officers. However, BB and pellet pistols pose a different problem. There are a number of recorded robberies committed with these weapons just as there are recorded shootings by police officers wherein a person confronting the officer was holding a BB or pellet pistol. These pistols, more so than toy guns, have the appearance of a real firearm. As noted above, some are manufactured to replicate actual firearm designs. Regardless of this replication, the issue again becomes one of design.

The appearance of the pistols, coupled with the fact that persons possessing the guns are usually somewhat older than those possessing toys, complicates the dilemma. It has been suggested by police officials that BB and pellet pistols be redesigned to look less like firearms. One suggestion was to have distinctive functional protuberances—such as an air compression chamber or the chamber to hold "ammunition"—which would signify the pistol was a BB or pellet pistol. While it is recognized that this design may be in conflict with marketing

**FLORIDA** - A well dressed, white male of about thirty who frequently wore a tie committed 33 bank robberies in Florida. The man, who became known in law enforcement as "Fumbles" (who earned this nickname after being observed on a surveillance tape falling down during one of the robberies), never wore a mask during the robberies. The Florida Department of Law Enforcement, FBI, and various county and municipal police agencies had viewed the robbery surveillance videotapes carefully getting good descriptions and pictures of "Fumbles", his clothing, and his gun which appeared to be a automatic handgun. Despite detailed investigations, the robber was finally captured as a result of the case being depicted on the television show *Unsolved Mysteries*. When police arrested him, they learned that the weapon he used in all the robberies was a CO<sub>2</sub> pellet gun manufactured to look like a .45 caliber automatic pistol. One investigator, after learning the gun was an imitation, asked "Fumbles" what he would have done if the police had confronted him during a robbery. Oddly, the robber said he would have taken his imitation gun and "acted like I was going to take a shot." **SOURCE:** Officer interviews and review of incident reports during the site visit.

concerns, perhaps a reasonable design alternative could be reached. Many of the paint-ball guns have this unique configuration. While the gun has realistic-looking characteristics, the "magazine" holding the paint-balls is distinctive. Whether or not this design change is feasible for BB and pellet pistols is beyond the scope of this report. The fact remains, however, that law enforcement personnel interviewed in this project had significant concerns about the realistic-looking appearances of pneumatic pistols.

**Replica Guns.** Some of the weapons used in robberies and confrontations with police officers were not toys, per se, but *replicas* of actual weapons. Replica guns, according to the *Collector's Armoury 1989 Catalog of Military Collectibles* (page 3), are:

"... full size realistic reproductions of classic firearms. However, they are completely safe and cannot be made to fire real ammunition. They look, feel, weigh and function like the expensive originals [emphasis added]. You can spin the cylinders, work the slide actions, load dummy shells into the clips, and even 'field strip' these models. They are made of over 30 precision cast and machined metal parts. ... Nearly exact duplication has produced realism down to the last detail [emphasis added]. There's just a hair's breath of difference in measurements to prohibit the parts from being interchanged with components from a real firearm. ..."

With this degree of realism noted in the advertising literature, there is no reason to expect that police officers or robbery victims could distinguish between a real gun and a replica. Indeed, a number of robberies, shootings by police, and near shootings have involved people in possession of replicas.

**MIAMI, FLORIDA** - One evening a Miami patrol officer stopped a car on a routine traffic check. The driver, acting erratic and aggressive, got out of the car shouting at the officer. As the officer approached the car trying to calm the driver down, the man pulled out a gun pointing it at the officer. The officer retreated behind the stopped car and the man chased him. The officer went around the car again with the armed driver in pursuit. The officer then shot and killed the man, learning later the handgun was a replica .45 caliber automatic. **SOURCE:** Officer interviews and review of incident reports during the site visit

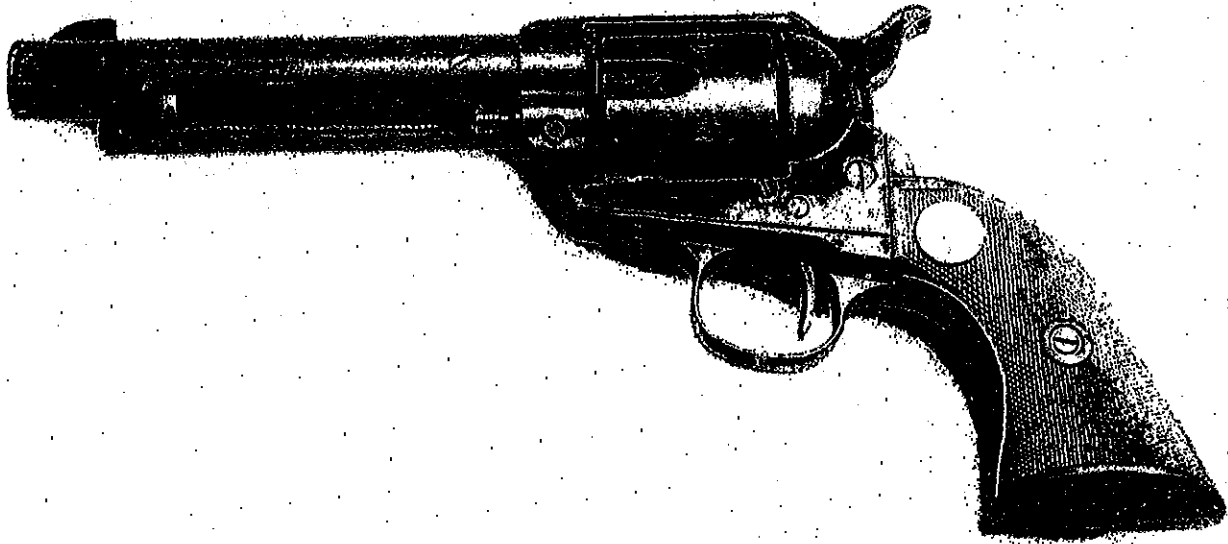
**LAS VEGAS, NEVADA** - An officer stopped a motorcycle during the afternoon for a traffic violation. As the officer approached, the driver pulled out a blue steel revolver and pointed at the officer from a shooting stance. The officer shot and killed the man, learning that the gun was a replica of a revolver only after he picked up the gun after the shooting. It was later learned that the expressed purpose of the deceased was to use the replica pistol to "get the drop" on a police officer in order to get the officer's gun with the intent to kill a police officer. **SOURCE:** Officer interviews and review of incident reports during the site visit.

The gun shown in Illustration 8 was the weapon used in the Las Vegas incident. It is a replica of the Colt .44 caliber Single Action Revolver. The replica, manufactured by "MGC Manufactory", is of metal construction, has moving parts, and the approximate same weight as the Ruger Blackhawk.

As noted in the above catalog description, the replicas not only look real, they are of similar weight and "function" similar to real firearms. For example, on a replica of an automatic handgun, the slide, trigger, magazine, cartridge feed, and ejector systems all work just as they do in the actual weapon. However, the replica weapon does not have a firing pin and the barrel is at least partially plugged. This realism makes it difficult for police officers to

**Illustration 8**

***MGC Manufactory .44 Caliber Replica of the Ruger Blackhawk***  
**(Seized in Las Vegas, Nevada following an Officer-involved Shooting)†**



†This gun is made of a black metal with the grips being brown plastic.

*forward. As they started to enter the apartment a woman shouted, "He has a gun!" As the officer and sergeant walked in, guns drawn, they saw a man pointing what appeared to be a .45 caliber automatic pistol in their direction. They shouted twice for him to drop the gun before he put it down. After confiscating and examining the gun they learned it was a CO<sub>2</sub> pellet pistol. A few weeks later, the same officer was driving his patrol car down a highway when a young man in a convertible Jeep in front of him turned and pointed what appeared to be an Uzi automatic pistol at the officer. With backup from the Washington State Patrol the officers conducted a felony car stop with guns drawn. As they were getting out of the car, the young man shouted "It's a fake!" The officers found the gun to be a water pistol manufactured to look like an Uzi. Under both circumstances, the officers' expectation was that the guns were real. The officer said that even though he had two incidents dealing with imitation guns in a short amount of time, he still had to assume anything pointed at him resembling a firearm was real. SOURCE: Officer interviews during the site visit.*

**Environment at the Scene of the Incident.** Beyond what an officer is told about an incident and the expectations he/she may develop, observations of facts and circumstances at the incident scene are strong predictors of officer behavior. For example, an officer may not be predisposed to use deadly force until assessing the environment. Indicators may then be observed to change the officer's threat assessment of the incident. Conversely, an officer may perceive circumstances which appear more threatening thus heightening his/her perception of danger. These environmental cues—ranging from geographical location, appearance, time, weather conditions, etc.—are important determinants in the officer's response to the situation.

***DALLAS, TEXAS** - A store in Dallas had been the target of several robberies. As a result, the owner began hiring off-duty Dallas police officers for security. The officers were told of the repeated armed robberies and advised to "always be on alert" because they could reasonably expect a robber. One evening, a man entered the brightly lit store, pulled a gun and ordered that all the cash be given to him. As the robber started to leave, the off-duty officer, weapon drawn, confronted the man and ordered him to stop and drop the gun. The man then raised his gun and the officer shot him. Later, as the gun was inspected it was found to be a starter's pistol. SOURCE: Officer interviews during the site visit.*

**Shape/Design of the Gun.** In discussing the markings and appearance of toy guns with officers who had confronted them, invariably the officers would mention the shape of the gun. The concern expressed by officers was that toy gun designs were so realistic that they could not distinguish the imitation from a real gun even under good light conditions. When the officer confronted a person under poor visibility conditions, particularly when the person was moving and/or acting in a threatening manner, the identification of the gun as being real or not was virtually impossible.

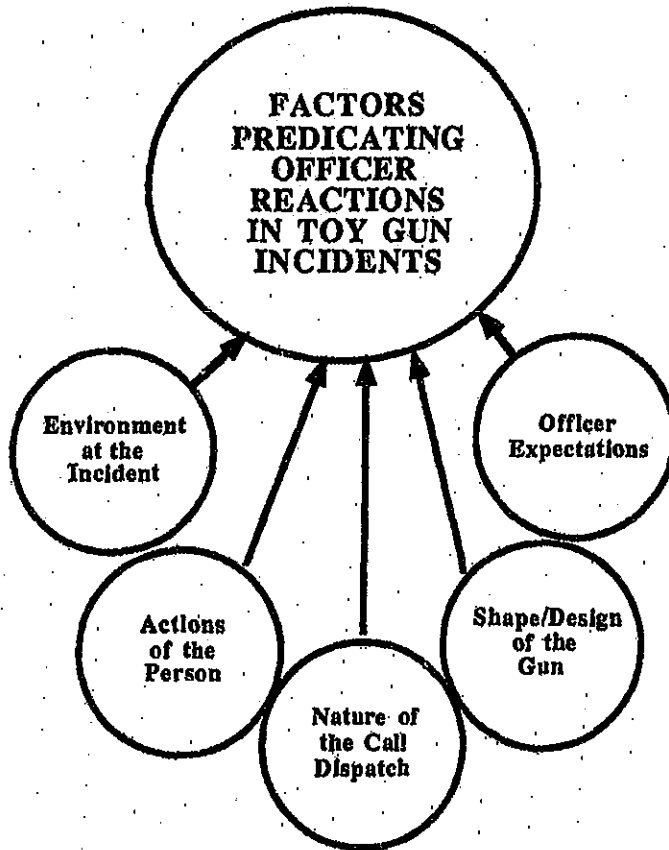
***LAS VEGAS, NEVADA** - An officer responding to a silent alarm at a liquor store, observed through the front window the robbery in progress. The officer, whose view was unobstructed in the brightly lit store, saw the man move a group of seven people to a back room as the man brandished a gun stuffed in his waistband. Another officer, unaware of the robbery call,*

never to return to work. In these instances, the officer's family will also be a victim. When the officer does return to work, he/she may be haunted by the incident resulting in slower decision and response times in incidents involving guns. Finally, citizens reporting suspicious circumstances which ultimately lead to a toy gun shooting may also be victims. The citizen may question whether he/she did the right thing in calling the police or ask themselves whether they should have gotten more facts before reporting their suspicions.

The dynamics of toy gun-related shootings are complicated and should not be dismissed as anomalous accidents.

Figure 4

**FACTORS PREDICATING A POLICE OFFICER'S REACTION DURING A TOY GUN ENCOUNTER**



circumstances). If a robber uses a toy as an instrumentality of the robbery and the victim is in fear, then the perpetrator may still be charged with the more serious crime. Thus, in this case the robber's logic does not bear out in law. On the other hand, in Washington, state statutes have robbery, first degree robbery, and first degree robbery with a firearm. While a person with an imitation gun could be charged with a first degree robbery, he/she could not be charged with first degree robbery *with a firearm*. While these are issues of law, investigators told the researchers, as a practical matter, prosecutors will generally charge a person with a lesser offense if a toy gun is used, regardless of the victim's degree of fear. Similarly, it is likely that during the sentencing stage, a judge or jury may mitigate the robber's sentence if a toy was used instead of a real firearm.

The second reason a robber may use a toy is because the thief, for some reason, cannot obtain a real gun. It appears from a review of reports, that the criminal prefers to use replicas or pneumatic guns because of their more realistic appearance. Robbers also appear to have some form of psychological displacement about the realism of a toy gun. That is, if the gun is similar to a real weapon, the person seems to adopt a feeling of power and manipulation as if the gun is real. This gives the thief more confidence enabling him/her to control the robbery more firmly despite the fact the gun is an imitation.

Results from the survey show that robberies by imitation guns are occurring on a daily basis in the United States (see Table 1/Figure 5). Somewhat surprisingly, toy and pneumatic guns are the most commonly used "weapon" with the more realistic replica guns being used in proportionately fewer cases. Possible reasons for this are (1) the replica guns are not marketed nearly as broadly as the toys and pneumatic guns and (2) the cost of the replicas are significantly higher than the other types with some replicas approximating the cost of working firearms.

Despite the survey findings, the researchers infer, based on what was learned during the site visits, that more robberies are committed with imitation guns than the data show. On an average, robbery investigators consistently estimated around 15% of the robberies were committed with guns that were toys, pneumatic, replicas, or starter's pistols. Yet, unless the gun could be *clearly shown* to have been an imitation, official records would assume the gun was real. Because of the poor record keeping on imitation gun robberies, the fact that the estimates of investigators are experiential rather than empirical, and the inherent methodological differences between the UCR and this study, the authors feel that estimating the number of imitation gun robberies from those reported in the UCR would have limited value.

**NEWARK, NEW JERSEY -** Newark robbery Detective Barry Colicelli, who is also President of the New Jersey Robbery Investigators' Association (NJRIA), has been tracking robberies committed by toy guns since 1984. Detective Colicelli and his NJRIA colleagues concluded that at least 15%-20% of their robberies are committed with imitation guns. The problem was deemed to be of sufficient importance that the NJRIA worked with the state legislature to pass a law which specifically addressed toy and imitation guns by making it a crime if the guns were used or intended to be used for an unlawful purpose. Detective Colicelli's experiences show that unusual circumstances occur during imitation gun robberies and encounters. In one case, a robber armed with a real gun entered a Newark bar demanding cash. The disk jockey—outfitted in a cowboy costume, pulled his toy gun on the robber ordering the thief to "drop it." The robber turned and shot the DJ. In another case, a man brandishing a black Uzi-style water pistol forced a car off the highway. The man then robbed the occupants and squirted them with the watergun before leaving "...adding insult to injury."  
**SOURCE:** Interview with Det. Colicelli during the site visit.

### Imitation Guns and Assaults

An "assault" under common law includes not only injury to another but also the creation of a "... well-founded fear of imminent peril, coupled with *apparent present ability to execute attempt*, if not prevented" [*Black's Law Dictionary*, West Publishing Company (1968), p. 147]. (Emphasis added). While it is conceivable that a person could be physically assailed with an imitation gun, the more likely crime is the "simple assault" where a person is threatened and in fear of injury.

The survey results (Table 2/Figure 6, page 31) show notably more assault incidents with imitation guns than robberies despite the fact that there were fewer agencies reporting assaults on the survey. No meaningful comparisons can be made between these findings and the Uniform Crime Report assault data since the UCR statistics reflect only aggravated assaults.

As a collateral issue of imitation guns and crime, law enforcement agencies reported that between January 1, 1985 and September 1, 1989 they had seized a total of 31,650 imitation guns (Table 3/Figure 7, page 33). This does not include guns which were stolen property, only those which were directly or indirectly involved in some incident (e.g., robbery, assault, domestic disturbance,

suspicious person, etc.) where the police took some form of action.

### Imitation Guns and the Use of Force by Police

The police departments were asked on the survey to report the number of incidents where officers had warned/threatened to use force or actually used force in a confrontation where an imitation gun had been mistaken for a real firearm. A total of 1,128 incidents between January 1, 1985 and September 1, 1989 were reported where officers had warned or threatened to use force (Table 4/Figure 8, page 34). Based on the site visits, the researchers believe that this number may be significantly underreported because the incidents were simply not known to the agency. Repeatedly when interviewing officers, they would talk about incidents they (or their friends) had been involved in where a person was told to drop the gun or be shot. In nearly all the cases, when asked whether a report had been made on the incident, the answer was "no."

**HOUSTON, TEXAS** - As soon as police officers stopped a car going at a high rate of speed, a shirtless man jumped out of the car bleeding from the left eye. The man said the driver had a gun, handcuffs, and badge and claimed to be a police officer. The man further said the driver pulled the gun threatening to shoot him, showed the badge and ordered the man to turn over his money. The driver then forced the man into the car, beat him with the handcuffs saying, "I'm the law. You better be cool with the law man or I'll take care of you." The driver continued to threaten the man with his badge and gun. The Houston officers got the driver out to investigate the incident and found the driver—who had calmly remained in the car—had handcuffs, a badge that said "Special Police" and a black Uzi type toy cap gun. **SOURCE:** Officer interviews during the site visit.

**NEW YORK, NEW YORK** - While on foot patrol a New York police officer observed a man with the butt of what appeared to be a semiautomatic pistol sticking out of his pants. The officer pulled his service revolver, stopped the man and conducted a frisk, seizing the gun which turned out to be a water pistol. The case involved an official action of a police officer who lawfully stopped and frisked a citizen in the course of an investigation. When asked if he made a report on the incident, the officer stated, "No, it turned out there was nothing to report: you can legally carry a watergun." **SOURCE:** Officer interviews during the site visit.

Table 2

**ASSAULTS COMMITTED INVOLVING  
IMITATION GUNS BY GUN TYPE**

	Toy <sup>a</sup>	Replica <sup>b</sup>	Pneumatic <sup>c</sup>	TOTAL
1989 (9 Months)	567	128	693	1,388
1988	686	213	1,188	2,087
1987	601	120	935	1,656
1986	615	124	780	1,519
1985	635	110	733	1,478
<b>TOTAL</b>	<b>3,104</b>	<b>695</b>	<b>4,329</b>	<b>8,128</b>

<sup>a</sup>Based on 121 agencies reporting assaults known to have been committed with a toy gun.

<sup>b</sup>Based on 65 agencies reporting assaults known to have been committed with a replica gun.

<sup>c</sup>Based on 154 agencies reporting assaults known to have been committed with a pneumatic gun or starter's pistol.

Figure 6

**ASSAULTS COMMITTED INVOLVING  
IMITATION GUNS BY GUN TYPE**

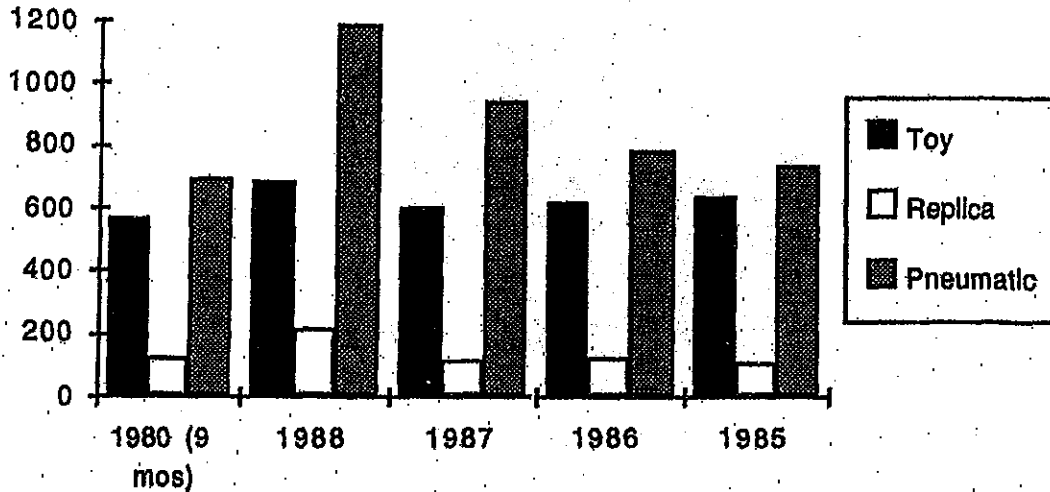




Table 4

**INCIDENTS WHERE AN OFFICER HAS WARNED OR THREATENED THE USE OF FORCE BASED ON THE BELIEF THAT AN IMITATION GUN WAS REAL**

	Toy <sup>a</sup>	Replica <sup>b</sup>	Pneumatic <sup>c</sup>	TOTAL
1989 (9 Months)	91	59	113	263
1988	106	59	124	289
1987	72	103	106	281
1986	61	28	67	156
1985	55	23	61	139
<b>TOTAL</b>	<b>385</b>	<b>272</b>	<b>471</b>	<b>1,128</b>

<sup>a</sup>Based on 82 agencies reporting incidents known to have been committed with a toy gun.

<sup>b</sup>Based on 32 agencies reporting incidents known to have been committed with a replica gun.

<sup>c</sup>Based on 72 agencies reporting incidents known to have been committed with a pneumatic gun or starter's pistol.

Figure 8

**INCIDENTS WHERE AN OFFICER HAS WARNED OR THREATENED THE USE OF FORCE BASED ON THE BELIEF THAT AN IMITATION GUN WAS REAL**

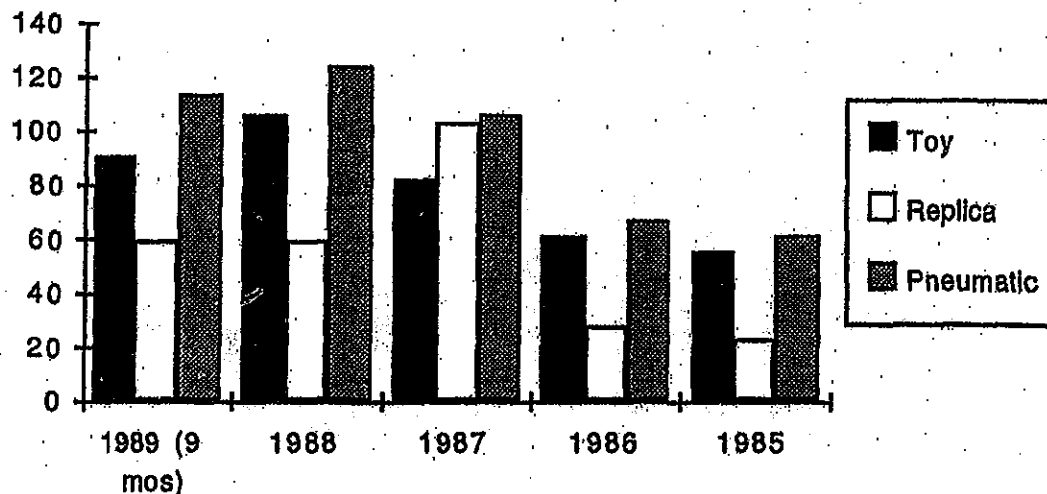


Figure 10

COMBINED TOTAL REPORTED ROBBERIES AND ASSAULTS

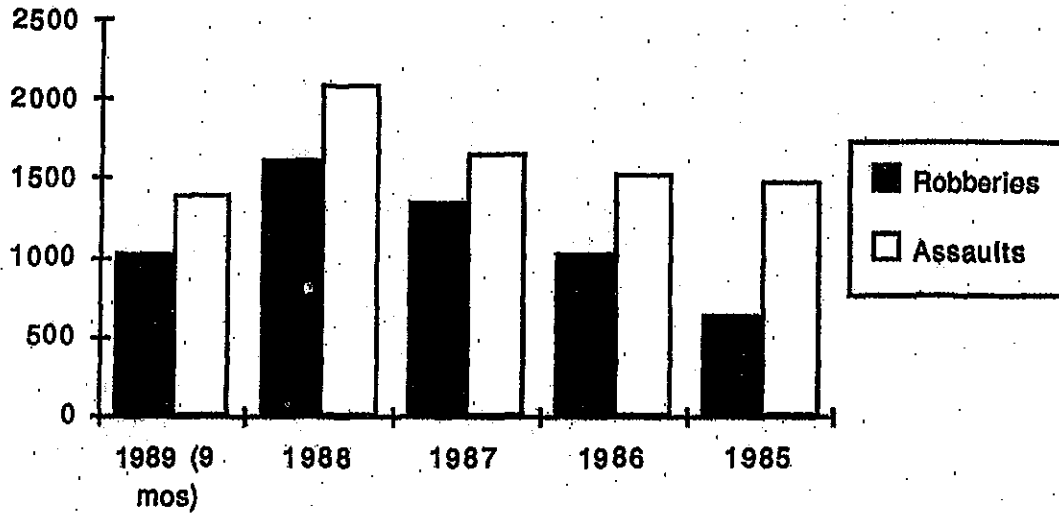
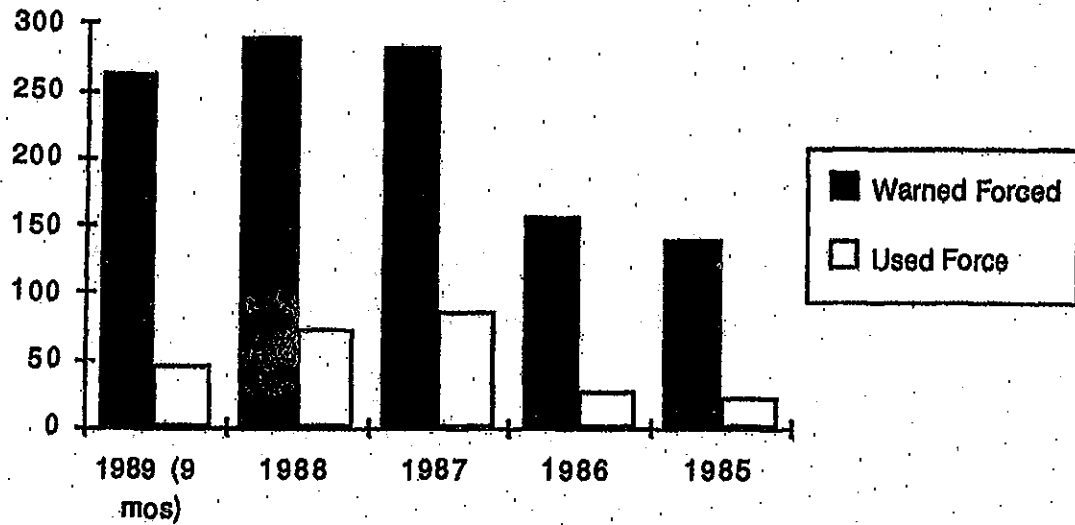


Figure 11

COMBINED TOTAL OFFICER WARNING ABOUT FORCE AND USE OF FORCE



barrel. This cap gun was maroon in color except for the grip and cylinder which were black. The gun had a blaze orange plastic "collar" about four millimeters long over the muzzle end of the barrel. The researcher removed this collar in about 15 seconds—a task which could have been done faster, had care not been taken to avoid breaking the plastic.

The other toy was a watergun manufactured to resemble a MAC-10 automatic pistol. This particular gun was made of a bright blue plastic. The researcher taped half of each weapon with masking tape in order to compare the painted side with the manufactured side. The researcher's six-year-old son was then given black spray paint and told to "paint the gun." This experiment exemplified both the concern of the officers and the importance of shape. The difference in appearance of both toys was dramatic with the painted side making the guns look real even in daylight conditions.

**Circumstances of the Gun-Related Calls or Incidents.** Another concern with the markings was that under circumstances when officers confront people with guns, simple markings may easily escape the officer's attention due to the threat inherent in the incident. This is particularly true under low light conditions and when the shape of the gun is similar to a real firearm. In such incidents the officer's attention is devoted to many different facets of public safety, self-protection, maintaining control of the incident, and resolving the incident. The officer's focal concern is not on the gun, per se, but on the person holding the weapon and their actions.

The concern was also expressed that with a gun design that looks real, but with minimal identification markings, one could still not be assured that the gun was a toy. Particularly in cases of robbery, there have been instances when victims have said that they thought the gun was a toy by its appearance, yet, the gun looked sufficiently real that they felt endangered. In Houston, for example, the victims in one robbery said the weapon was a red cap pistol. In another robbery the weapon was identified as an orange watergun. Yet, in both instances the victims were in sufficient fear to comply with the robber's demands.

**OVERLAND PARK, KANSAS** - A 31-year-old man committed an armed robbery of a convenience store with a toy gun. After the robbery he kidnapped the clerk and took her to a remote area and raped her. The gun, clearly shown in a surveillance camera photograph, had a distinctive marking on the cylinder. The suspect was captured and convicted of robbery and rape. **SOURCE:** Officer interviews and review of incident reports during the site visit.

**LAS VEGAS, NEVADA** - A police officer received a call during mid-afternoon on a sunny day on what was reported as an assault and possible kidnapping. The caller reported one juvenile male was holding a gun at the head of another juvenile male. It was further reported that the apparent victim looked frightened and afraid to escape. Upon arrival the officer observed a scene similar to that described by the citizen caller. The officer, about 20 yards away, drew his firearm and ordered the youth with the gun to drop his. The youth continued to hold the gun and the officer repeated the order to drop the gun or the officer would fire. The youth dropped the gun and the officer approached, discovering that the gun was a plastic toy cap pistol. **SOURCE:** Officer interviews during the site visit.

The fact that some toy guns are simply marked by a blaze orange plug or orange collar around the barrel is further complicated by the coloration of front sights on real guns. It has long been a practice of police officers and sportsmen to color the front sight ramp on firearms red or orange as a means to more rapidly and distinctly aim the weapon. As a result, some gun manufacturers have made handguns with barrel options that have the front sight colored orange during the manufacturing

they reinforce the lesson to officers that any gun, regardless of color, must be treated as a real threat and no distinction between guns should be made until the situation is under control. Similarly, officers are trained that anyone can pose a threat with a gun regardless of age or sex. Thus, officers are told that even when encountering a youth with a gun, it should be treated as a life threatening circumstance. (Reinforcing this is the disturbing fact that police departments are arresting increasing numbers of 11-year-old to 14-year-old juveniles—male and female—on weapons charges, most frequently associated with drug offenses.)

Another element of police firearms training is what is known as "shoot/don't shoot" scenarios. This approach involves interactive media wherein an officer watches a vignette or circumstance and is confronted with the need to make an instantaneous decision of whether or not to use deadly force. In

one of the scenarios, the officer is confronted by a person who is holding a gun and says, "don't shoot, it's a toy"—a moment later, when the officer may have relaxed, the subject raises the gun and fires at the officer. Approaches such as these are meant to reinforce the need for officers to be conservative and assume all weapons are real.

**LOS ANGELES COUNTY, CA** - A sheriff's department detective in an unmarked car saw a teenage boy lean from a car and point what an officer thought was a .45 caliber automatic pistol. The detective called for uniformed deputies who stopped the car and ordered the driver, her two sons (ages 16 and 10), and a daughter (age 11) out of the car at gunpoint. The officers searched the car and found a toy .45 caliber pistol and a watergun modeled after an Uzi automatic pistol. **SOURCE:** Review of report submitted by the agency.

# Appendix 1

## THE FEDERAL ENERGY MANAGEMENT IMPROVEMENT ACT OF 1988

PUBLIC LAW 100-615, Section 4

16 USC 5001.

### SEC. 4. PENALTIES FOR ENTERING INTO COMMERCE OF IMITATION FIRE- ARMS.

(a) It shall be unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce, as provided in subsection (b).

(b)(1) Except as provided in paragraph (2) or (3), each toy, look-alike, or imitation firearm shall have as an integral part, permanently affixed, a blaze orange plug inserted in the barrel of such toy, look-alike, or imitation firearm. Such plug shall be recessed no more than 6 millimeters from the muzzle end of the barrel of such firearm.

(2) The Secretary of Commerce may provide for an alternate marking or device for any toy, look-alike, or imitation firearm not capable of being marked as provided in paragraph (1) and may waive the requirement of any such marking or device for any toy, look-alike, or imitation firearm that will only be used in the theatrical, movie or television industry.

(3) The Secretary is authorized to make adjustments and changes in the marking system provided for by this section, after consulting with interested persons.

(c) For purposes of this section, the term "look-alike firearm" means any imitation of any original firearm which was manufactured, designed, and produced since 1898, including and limited to toy guns, water guns, replica nonguns, and air-soft guns firing nonmetallic projectiles. Such term does not include any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

Reports.

(d) The Director of the Bureau of Justice Statistics is authorized and directed to conduct a study of the criminal misuse of toy, look-alike and imitation firearms, including studying police reports of such incidences and shall report on such incidences relative to marked and unmarked firearms.

(e) The Director of National Institute of Justice is authorized and directed to conduct a technical evaluation of the marking systems provided for in subsection (b) to determine their effectiveness in police combat situations. The Director shall begin the study within 8 months after the date of enactment of this section and such study shall be completed within 9 months after such date of enactment.

Effective date.

(f) This section shall become effective on the date 6 months after the date of its enactment and shall apply to toy, look-alike, and imitation firearms manufactured or entered into commerce after such date of enactment.

State and local governments.

(g) The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section provided that no State shall—

(i) prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or

(ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

Approved November 5, 1988.

position that a total ban on realistic toy guns was necessary and therefore opposed the regulation as too weak, and three took no position.

The two most frequent comments about the regulation were, first, that the marking requirements should be changed to eliminate the recessed orange plug as an acceptable marking, and second, that a complete ban on realistic toy guns was needed. Eight commenters raised the first issue and five raised the second. No changes are being made to the regulations at this time as a result of either comment. The Technology Administration is awaiting the results of a study by the Director of the National Institute of Justice, mandated by section 4(e) of the Act, before deciding whether to remove the recessed orange plug as an acceptable marking. That study is a technical evaluation of the marking system established by the Act and of the alternative marking systems being implemented by this regulation. The Act requires that study to be completed within nine months of enactment, or no later than August 5, 1989. With respect to the comments requesting a complete ban on realistic toy guns, the Secretary of Commerce has no authority under the Act to take such action.

Other comments received are described below, listed by commenter. Among the five manufacturers, vendors, and their representatives, all generally supported the methods of marking contained in the proposed regulation. However, three requested changes in § 1150.1 "Applicability" of the regulation to make clear the intent of Congress that the regulation did not apply to toy, look-alike or imitation firearms that are non-firing replicas of an antique firearm modeled on a real firearm designed, manufactured, and produced prior to 1899. The final regulation has been revised to accommodate this request. One commenter requested an exemption from the regulations for airguns and look-alike guns marketed to the adult buyer; another commenter requested that section 1150.5, dealing with the presumption of marking requirements by state and local governments, be strengthened. These requested changes have not been made, because the Secretary of Commerce has no authority under the Act to make the requested changes.

Among the ten police officials, all generally supported the proposed regulation, although as discussed above, six of the ten questioned the effectiveness of a recessed orange plug without additional marking. In addition, two of the ten commenters suggested the

inclusion of BB guns and the like under the scope of the regulation. Because the exclusion of BB guns is statutorily mandated by section 4(e) of the Act, the requested change was not made.

Four comments were received from representatives of state governments, three supporting the regulation and one opposing it. The Consumer Protection Board of one state fully supported the regulation, as did the Department of Human Resources of a second state. The Consumer Council of a state Department of Agriculture supported the alternative marking scheme, but questioned the utility of the recessed blaze orange plug, recommending elimination of that method of marking. One state Senator opposed the regulation, strongly supporting in its place a total ban on toy guns and look-alikes.

Seven comments were received from the general public, four generally supporting the regulation and three preferring a total ban on toy guns and look-alikes. Finally, materials were received from Senator Cranston of California and the National Institute of Justice, neither of which specifically commented on the regulation.

The final rule repeats the blaze orange plug method of marking established by the Act and repeats the presumption set forth in the statute. In all other respects it grants waivers and allows less restrictive methods of marking. Accordingly, since the rule thus grants or recognizes an exemption and relieves restrictions, under section 553(d) of the Administrative Procedure Act (5 U.S.C. 553(d)) it may and is being made effective without a 30 day delay in effective date.

#### Additional Information

##### Executive Order 12291

The Under Secretary for Technology has determined that this rule is not a major rule within the meaning of section 1(b) of Executive Order 12291 because it will not result in:

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies or geographic regions; or
- (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S. based enterprises to compete with foreign-based enterprises in domestic or export markets.

Therefore, preparation of a Regulatory Impact Analysis is not required under Executive Order 12291.

##### Executive Order 12612

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

##### Executive Order 12372

This rule does not involve Federal financial assistance, direct Federal development, or the payment of any matching funds from a state or local government. Accordingly, the requirements of Executive Order 12372 are not applicable to this rule.

##### Executive Order 12630

This rule does not pose significant takings implications within the meaning of Executive Order 12630.

##### Regulatory Flexibility Act

The General Counsel of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the time this rule was proposed that, if it were adopted as proposed, it would not have a significant economic impact on a substantial number of small entities because the alternative markings conform to existing industry practices for most toy, look-alike, and imitation firearms, thus reducing the rule's impact to only where such practices are not followed. As a result, a Regulatory Flexibility Analysis is not required to be prepared under the Regulatory Flexibility Act.

##### Paperwork Reduction Act

This rule does not contain information collection requirements subject to the Paperwork Reduction Act.

##### National Environmental Policy Act

This rule will not significantly affect the quality of the human environment. Therefore, an environmental assessment or Environmental Impact Statement is not required to be prepared under the National Environmental Policy Act of 1969.

##### List of Subjects in 15 CFR Part 1150

Commerce, Business and Industry, Labeling, Hobbies, Imports, Exports, Shipping, Toys, Transportation, Freight, Incorporation by reference.

Lee W. Meroz,

Deputy Under Secretary for Technology.

Dated: April 28, 1989.

For reasons set forth in the preamble, Title 15, Subtitle B of the Code of Federal Regulations is amended by adding a Chapter XI, consisting of Part 1150, to read as follows:

## **Appendix 3**

# **NEWS SOURCES REVIEWED FOR TOY GUN INCIDENTS**

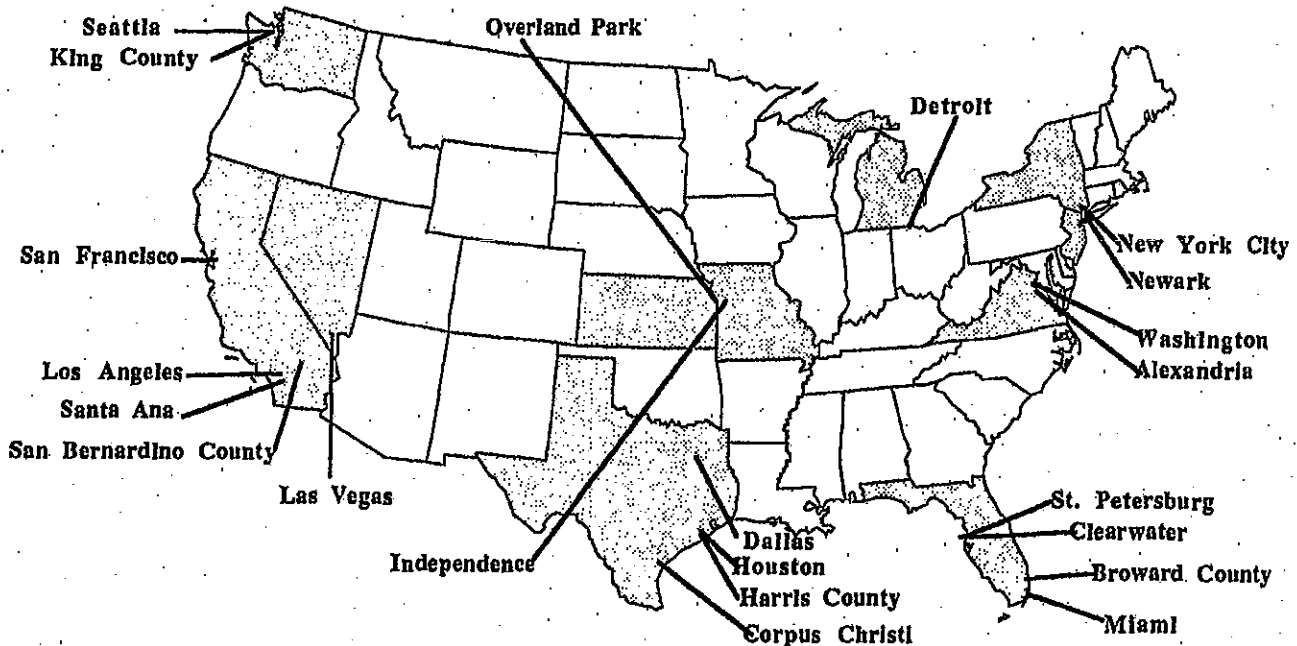
As noted in the "research methods" section, incidents and locales involving toy guns were initially identified through a computer search of news stories found in the Lexis®/Nexis® data base.

- Associated Press
- Boston Globe
- Chicago Tribune
- Detroit Free Press
- Federal Information Systems Corporation
- Gannett News Service
- Kansas City Star/Times
- Los Angeles Times
- Newsday, Inc.
- Reuters News Service
- States News Service
- Time Magazine
- United Press International
- USA Today
- U.S. News and World Report
- Washington Post

## Appendix 5

# LAW ENFORCEMENT AGENCIES VISITED IN SITE VISITS

- Alexandria, VA Police Department
- Broward County, FL Office of the Sheriff
- Clearwater, FL Police Department
- Corpus Christi, TX Police Department
- Dallas, TX Police Department
- Florida Department of Law Enforcement
- Harris County, TX Office of the Sheriff
- Houston, TX Police Department
- Independence, MO Police Department
- King County, WA Sheriff's Department
- Las Vegas, NV Metropolitan Police Department
- Los Angeles, CA Police Department
- Miami, FL Police Department
- New York, NY Police Department
- Newark, NJ Police Department
- Overland Park, KS Police Department
- San Bernardino County, CA Sheriff's Department
- San Francisco, CA Police Department
- Santa Ana, CA Police Department
- Seattle, WA Police Department
- St. Petersburg, FL Police Department
- U.S. Bureau of Alcohol, Tobacco, and Firearms - Detroit Office
- U.S. Bureau of Alcohol, Tobacco, and Firearms - Houston Office
- U.S. Bureau of Alcohol, Tobacco, and Firearms - Las Vegas Office
- U.S. Bureau of Alcohol, Tobacco, and Firearms - Washington Headquarters
- U.S. Drug Enforcement Administration - Las Vegas Office
- U.S. Drug Enforcement Administration - Washington Headquarters





S. LAMAR SIMS  
Senior Chief Deputy District Attorney

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**PROFESSIONAL  
EXPERIENCE:**

- January 2012 – Present      Senior Chief Deputy D.A. – Administration & Operations  
(The District Attorney, the two Senior Chief Deputies, and the  
Office Manager – Senior Chief Deputy comprise the leadership team  
for the office.)
- May 1992-January 2012      Chief Deputy District Attorney - Police Liaison/Administration:  
Supervise civil asset forfeiture unit;  
Provide legal advice and support to the Denver Police  
Department on a 24-hour on-call basis;  
Coordinate the D.A.'s on-call program;  
Prosecute special high-profile cases;  
Handle special assignments.
- June 1987-May 1991:      Chief Deputy District Attorney - Police Liaison/  
Special Projects and Intake Units:  
Supervise felony charging functions;  
Director of training;  
Provide legal advice and support to the Denver Police  
Department on a 24-hour on-call basis;  
Responsible, with other members of senior legal and administrative  
staff, for responding to queries and concerns of media and general public.
- Nov. 1984-June 1987:      Chief Trial Deputy District Attorney:  
Supervised one of six felony trial divisions and maintained  
full felony trial docket.
- Nov. 1981-Nov. 1984:      Deputy District Attorney:  
Prosecuted misdemeanors cases (Nov. 1989--May 1982);  
- juvenile cases (May 1982--Nov. 1982);  
- adult felony cases (Nov. 1982--Nov. 1984).
- Oct. 1979-Nov. 1981:      Associate: Ireland, Stapleton & Pryor, P.C.  
1675 Broadway, Suite 2600, Denver, CO.
- Sept. 1978-Sept. 1979:      Law Clerk to the Honorable William E. Doyle, Judge  
Tenth Circuit, U.S. Court of Appeals, Denver, CO.

**EDUCATION:**

Harvard Law School, 1975-1978 (J.D. Degree - 1978)  
Cambridge, Massachusetts  
Member: Board of Student Advisors  
Hampshire College, 1971-1975 (B.A. Degree - 1975)  
Amherst, Massachusetts

**MEMBERSHIPS AND  
ASSOCIATIONS:**

Member of the Bars of the State of Colorado; the U.S.  
District Court for the District of Colorado; and  
the Tenth Circuit, U.S. Court of Appeals  
Member, Supreme Court Nominating Commission,  
State of Colorado, 2009 - 2014  
Member, Mayor's Task Force – Commission on Police Reform  
2004  
Past Member of the National Black Prosecutors Association and  
Coordinator of the NBPA 1990 Annual Conference.  
Past Member of the National District Attorneys Association  
Chair, Board of Directors, U.S. Canoe and Kayak Team  
1995-1997; Vice-Chair, 1993-1995  
Member, 1989-1993, 1999 - 2002  
Member of Board of Directors, Metro Big Brothers  
1983-1989  
Member, Denver Community Corrections Board, 1987 - present  
Who's Who in American Law, 10th Ed., 1998-1999  
Member, JTTF – Rocky Mountain Region

**TEACHING  
EXPERIENCE:**

Instructor with Harvard Law School's Trial Advocacy  
Workshop Program: 1984 to 2012

Instructor -- Denver Police Department Academy  
Recruit classes: 1986 to present  
Coordinator -- basic law instruction 1993-- to present

Chief Legal Instructor -- Denver Sheriff Department Academy  
Recruit classes: 1989, 1994 to present

Guest Lecturer/presenter

Cuyahoga County (OH) Prosecutor's Office  
Symposium on Use of Deadly Force –  
Officer-involved shootings, 2015  
U.S. Office of Community Oriented Police Service  
Director's Forum, 2013  
Reducing Officer-involved shootings  
Colorado POST – Morgan County Sheriff Dept., 2009  
Understanding Death Investigation  
(presented with Lt. Jon Priest, DPD)

Colorado State Investigators' Association  
Annual Training Conference, 2008  
Courtroom Testimony and the Expert Witness  
(presented with Denver Mgr. of Safety Al Lacabe)

Lorman Educational Services,  
Seminar - Recent Trends Involving the Law of  
Arrest, Search and Seizure in Colorado, 2006

Colorado District Attorney's Council,  
Crime Scene Response – Role of the D.A., 2006

CSI-Regis – 1<sup>st</sup> Annual Conference,  
Crime Scene Response & Control  
(presented with Sgt. Jason Brake, DPD), 2006

Colorado District Attorney's Council  
Investigation and Prosecution of Gun Violence, 2004

Colorado District Attorney's Council  
Felony Prosecution Skills Course, 2003, 2004, 2005

Lorman Educational Services  
Interview & Interrogation seminar, 2003  
(presented w/ Lt. Jon Priest, DPD)

Colorado District Attorney's Council  
Murder Prosecution School, 2002

Regional Office, Federal Bureau of Investigation  
Courtroom Testimony - 2000

Rocky Mountain HIDTA (w/Lt. Jon Priest, DPD)  
2004, 2003, 2002 and 2000

Cheyenne, WY, Police Department  
Courtroom Testimony - 2000

Colorado District Attorney's Council  
Annual Fall Training Conference - 1999 and 1998

U.S. Probation Department, District of Colorado  
Fall Training Conference - 1998

Rocky Mtn. Div., International Assoc. for Identification  
Fall Conference - 1998

Colorado Coroners Training Conference - 1996

Colorado Interagency Training Institute - 1996 and 1996  
Colorado Association of Robbery Investigators  
1995 Regional Conference

Denver Fire Department Advanced Arson  
Investigation Seminar- 2005, 2003, 2001, 1999,  
1995 and 1993

Denver Police Criminal Investigations  
Detective Training Seminar - 1995

Colorado Division of Wildlife - 1992, 1991, 1989

Colorado Welfare Fraud Council - 1989

U.S. Department of Health & Human Services,  
Inspector General's Office of Investigations - 1988

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Denver Police Department Certified Assistant Tactical  
Firearms Instructor 1988 - 1998

**ACTIVITIES AND  
INTERESTS:**

Venue Announcer for Slalom Canoe-Kayak events at the 1996, 2000, 2004  
and 2008 Olympic Games;  
Commercial pilot with multi-engine and instrument ratings;  
Certified Group Exercise instructor, kayaking, strength & conditioning.