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Chief Craig Burnett
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5025 South State St.
Murray, UT 84107

Via Hand Delivery

June 22, 2016

RE: *Murray PD Officer Walker's Use of Deadly Force*
Incident Location: 584 West Winchester St., Murray, Utah
Incident Date: February 21, 2016
UPD Case No.: CO16-28065
MPD Case No.: 16C003172
D.A. Case No.: 2016-531

Dear Sheriff Winder and Chief Burnett:

The Salt Lake County District Attorney's Office ("D.A.'s Office") operates under Utah State law to review and "screen"¹ criminal charges against individuals where criminal activity may have occurred. The D.A.'s Office operates pursuant to an agreement between the D.A.'s Office and participating law enforcement agencies to perform joint investigations and independent reviews of officer involved critical incidents ("OICI") including police officers' use of deadly force while in the scope of their official duties. Pursuant to the State law and the agreement between the D.A.'s Office and participating law enforcement agencies, the D.A.'s Office has reviewed the above referenced matter to determine whether the above referenced use of deadly force violated criminal statutes and whether a criminal prosecution should commence. Part of our screening process considered whether the use of deadly force was "justified" under Utah State law thereby providing a legal defense to a criminal charge. As outlined more fully

¹ As explained more fully herein, the process of "screening" a case includes an assessment of the facts and an application of the facts to relevant law, using legal and ethical standards to determine whether to file a criminal charge.

below, the D.A.'s Office determined that Officer Walker's use of deadly force was "justified" and declines to file criminal charges in the above referenced matter.

On February 21, 2016, Tyler Persellin broke into a home at 584 West Winchester St. in Murray. The occupants of the home heard him breaking things inside the home, fled and called police. Murray Police Officer Michael Walker arrived at the home and eventually saw Mr. Persellin in the home's garage with a gun. Mr. Persellin fired a gun at Officer Walker who returned fire. Mr. Persellin went back inside the home. Eventually a SWAT team found Mr. Persellin's deceased body in the home. The medical examiner subsequently determined that Mr. Persellin died from a self-inflicted gunshot wound to his head.

UTAH STATE LAW

As part of the review and screening determination, the D.A.'s Office relied in part upon the following statutory provisions for the legal analysis:

76-2-401 Justification as defense -- When allowed.

(1) Conduct which is justified is a defense to prosecution for any offense based on the conduct. The defense of justification may be claimed:

(a) when the actor's conduct is in defense of persons or property under the circumstances described in Sections 76-2-402 through 76-2-406 of this part;

(b) when the actor's conduct is reasonable and in fulfillment of his duties as a governmental officer or employee;

...

76-2-402 Force in defense of person -- Forcible felony defined.

(1)(a) A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force.

(b) A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2)(a) A person is not justified in using force under the circumstances specified in Subsection (1) if the person:

(i) initially provokes the use of force against the person with the intent to use

force as an excuse to inflict bodily harm upon the assailant;

(ii) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(iii) was the aggressor or was engaged in a combat by agreement, unless the person withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

(b) For purposes of Subsection (2)(a)(iii) the following do not, by themselves, constitute “combat by agreement”:

(i) voluntarily entering into or remaining in an ongoing relationship; or

(ii) entering or remaining in a place where one has a legal right to be.

(3) A person does not have a duty to retreat from the force or threatened force described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(a)(iii).

(4)(a) For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person, and arson, robbery, and burglary as defined in Title 76, Chapter 6, Offenses Against Property.

(b) Any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony.

(c) Burglary of a vehicle, defined in Section 76-6-204, does not constitute a forcible felony except when the vehicle is occupied at the time unlawful entry is made or attempted.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

(a) the nature of the danger;

(b) the immediacy of the danger;

(c) the probability that the unlawful force would result in death or serious bodily

injury;

(d) the other's prior violent acts or violent propensities; and

(e) any patterns of abuse or violence in the parties' relationship.

76-2-404 Peace officer's use of deadly force.

(1) A peace officer, or any person acting by his command in his aid and assistance, is justified in using deadly force when:

(a) the officer is acting in obedience to and in accordance with the judgment of a competent court in executing a penalty of death under Subsection 77-18-5.5(3) or (4);

(b) effecting an arrest or preventing an escape from custody following an arrest, where the officer reasonably believes that deadly force is necessary to prevent the arrest from being defeated by escape; and

(i) the officer has probable cause to believe that the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury; or

(ii) the officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed; or

(c) the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.

“Justification” as Defense in Utah

One legal defense to potential criminal charges available to police officers who used deadly force (whether or not the deadly force caused the death of a person) is the legal defense of “justification.” This legal defense is found in Utah State Code set forth above and operates in conjunction with other legal authority. The legal defense of “justification” could apply to any potential criminal charge; some of the potential criminal charges a police officer could face through an improper use of deadly force could include criminal homicide, murder, aggravated assault; or other violations set forth in the criminal code. The legal defense of “justification” is applicable to any potential criminal charge.

A person's use of deadly force (including but not limited to use of deadly force by peace officers) is “justified” when the use of deadly force conformed to the statutes referenced above. Persons may lawfully defend themselves and/or others under circumstances outlined by law, and are afforded the legal defense of “justification” for the lawful use of deadly force in accordance with statutes. Utah Code Ann. 76-2-402 states that a “person is justified in threatening or using

force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force.” *Id.* This section also states: “A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person’s imminent use of unlawful force, or to prevent the commission of a forcible felony².” *Id.*

In addition to the use of deadly force in defense of self or others, a peace officer’s use of deadly force is “justified” when “the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.” U.C.A. 76-2-404.

In essence, the analysis for the use of deadly force to prevent death or serious bodily injury (whether by individuals or peace officers) turns on similar elements. Use of deadly force by *individuals*: “A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use of unlawful force” U.C.A. 76-2-402(1)(a),(b). Use of deadly force by *peace officers*: “the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person,” or to effect an arrest under circumstances set forth in law. See, U.C.A. 76-2-404. A peace officer’s use of deadly force is “justified” when that officer “reasonably believes³” that the use of deadly force is “necessary to prevent” the threat of “death or serious bodily injury.”

This OICI investigation and our review that followed was conducted in accordance with an OICI investigation protocol previously established and in conformity with recently enacted legislation governing investigations of OICI events. The OICI investigation protocol strives to establish an investigation methodology and process that provides the D. A.’s Office with the evidence needed to review the investigation to determine whether a police officer’s use of deadly force conformed to the above referenced statutes. If the use of deadly force conformed to the

2 U.C.A. 76-2-402(4)(a): “For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person, and arson, robbery, and burglary as defined in Title 76, Chapter 6, Offenses Against Property.”

³ As mentioned above, U.C.A. 76-4-202 and 404 constitute a legal defense to potential criminal charges. Utah Code doesn’t reference other means of evaluating criminality and reasonableness of police use of force and defenses thereto; the United States Supreme Court case *Graham v. Conner* provides an analytical methodology for assessing excessive force claims in a Fourth Amendment context. *Graham* considers excessive force claims from a “reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham v. Conner*, 490 U.S. 386, 396 (1989)(citations omitted.) *Graham* also “requires a careful balancing of ‘the nature and quality of the intrusion on the individual's Fourth Amendment interests’ ... against the countervailing governmental interests at stake.” *Id.* (citations omitted) *Graham* observes: “Because ‘[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,’ ...however, 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 attempting to evade arrest by flight.” *Id.*

statutes, the use of deadly force is “justified,” and the legal defense of “justification” is available to the officer such that criminal charges cannot be filed against the officer and the criminal investigation into the actions of the officer is concluded.

If the use of deadly force does not conform to the statutes above, the use of deadly force may not be “justified,” and the legal defense of “justification” may not be available to the officer. In other words, if the use of deadly force failed to conform to the applicable statutes, the law does not afford the officer the legal defense of “justification.” Further investigation may be needed to determine whether, and if so which criminal charges can and should be filed against the officer if any. Just because the legal defense of “justification” may not be available (because the use of deadly force did not conform to the statutes) does not therefore necessarily mean that criminal charges should be filed against the officer. For instance, the evidence available to the District Attorney may not support criminal charges, the case may not have a reasonable likelihood of success at trial, or other reasons may preclude a prosecution. Again, further investigation and consideration may be required to determine whether the use of deadly force warrants criminal charges.

As laid out in more detail below, because we conclude that Officer Walker’s use of deadly force conformed to the relevant statutes outlined above, we therefore conclude that the legal defense of “justification” applies to the facts set forth herein and we will not file criminal charges against Officer Walker for his use of deadly force.

INVESTIGATION

During the 2015 Utah State Legislature’s General Session, the legislature enacted U.C.A. 76-2-408 which sets forth in relevant part the following provisions governing the investigation of peace officers’ use of deadly force:

76-2-408 Peace officer use of force -- Investigations.

(1) As used in this section:

- (a) “Dangerous weapon” is a firearm or an object that in the manner of its use or intended use is capable of causing death or serious bodily injury.
- (b) “Investigating agency” is a law enforcement agency, the county or district attorney’s office, or an interagency task force composed of officers from multiple law enforcement agencies.
- (c) “Officer” is a law enforcement officer as defined in Section 53-13-103.
- (d) “Officer-involved critical incident” is any of the following:
 - (i) the use of a dangerous weapon by an officer against a person that causes injury to any person;

...

(2) When an officer-involved critical incident occurs:

(a) upon receiving notice of the officer-involved critical incident, the law enforcement agency having jurisdiction where the incident occurred shall, as soon as practical, notify the county or district attorney having jurisdiction where the incident occurred; and

(b) the chief executive of the law enforcement agency and the county or district attorney having jurisdiction where the incident occurred shall:

(i) jointly designate an investigating agency for the officer-involved critical incident; and

(ii) designate which agency is the lead investigative agency if the officer-involved critical incident involves multiple investigations.

(3) The investigating agency under Subsection (2) may not be the law enforcement agency employing the officer who is alleged to have caused or contributed to the officer-involved critical incident.

...

To comply with state law requiring an outside agency to investigate an OICI, Murray PD invoked the OICI investigation protocol; a protocol investigation team led by Unified Police Department (“UPD”) and consisting of law enforcement personnel from many different agencies investigated this matter together with investigators from the D.A.’s Office.

On March 23, 2016, OICI protocol investigators presented the investigation’s findings to the District Attorney for review and this opinion letter.

FACTS

The following facts were developed from the OICI protocol investigation. Should additional or different facts subsequently come to light, the opinions and conclusions contained in this letter may likewise be different.

During the evening of February 21, 2016, J. W. and J. P. were in a home at 584 West Winchester St., Murray, Utah. While J. W. (the homeowner) and J. P. (a renter) were watching a movie in the home, they heard glass breaking downstairs. J. W. and J. P. left the home through the garage and J. P. saw her ex-boyfriend's car parked near the garage. J. W. and J. P. called Murray Police Department and notified them that Tyler Persellin, J. P.'s ex-boyfriend, broke into the home and was in the basement breaking things. J. P. told police dispatchers that Mr. Persellin owned firearms, but she didn't know whether Mr. Persellin was armed at the time.

Murray PD initially dispatched two police officers, Officer Michael Walker and Officer T. Evans to the home. Officer Walker arrived and walked toward the house while Officer Evans walked over to J. W. and J. P. to talk with them.

While Officer Walker was looking into the open garage, he saw a man, subsequently identified as Tyler Persellin, open the door from the home to the garage and step into the garage. Officer Walker ordered Mr. Persellin to show his hands. Mr. Persellin raised his hand toward Officer Walker and fired four shots at Officer Walker. Officer Walker returned fire and shot seven rounds at Mr. Persellin.

Mr. Persellin went back inside the home, and Officer Walker advised police dispatchers that shots had been fired. Murray PD dispatched the SWAT team to the home. Eventually, the SWAT team entered the home and found Mr. Persellin's deceased body. Medical examiners subsequently determined that Mr. Persellin died of a self-inflicted gunshot wound to his head.

Witness Interviews and Statements

Officer Walker

OICI protocol investigators interviewed Murray PD Officer Michael Walker with his attorney present. Officer Walker said on February 21, 2016, he was dispatched to 584 West Winchester St., Murray, Utah on a report of a residential burglary in progress. Officer Walker said the police dispatchers relayed information that the homeowner knew the suspected burglar and she feared for her safety. Officer Walker said he heard the dispatcher say that the homeowner believed the suspected burglar owned guns but did not know if he was armed at the time.

Officer Walker said he arrived at the house first and Murray PD Officer Evans arrived right behind him. Officer Walker said that the homeowner, J. W., was across the street from the home. Officer Walker said that Officer Evans spoke to J. W. while he walked over by the garage to see if he could see where the suspect entered the home.

Officer Walker said while he was outside the home, he could hear the suspect inside. Officer Walker said for his own safety, he moved to cover behind a vehicle parked in front of the garage. While he was looking into the garage through the open garage door, Officer Walker said he saw a man subsequently identified as Tyler Persellin exit the door in the garage leading to the home's interior and walk into the garage.

Officer Walker said he commanded Mr. Persellin to show his hands. Officer Walker said he saw Mr. Persellin lift his hand up. Officer Walker said he heard a pop and saw a muzzle flash. Officer Walker said he believed Mr. Persellin was firing a gun at him. Officer Walker said he felt like Mr. Persellin was trying to kill him by firing his gun at Officer Walker. Officer Walker said he returned fire and shot back at Mr. Persellin.

Officer Walker said he saw Mr. Persellin go back in the house. Officer Walker said he called out "shots fired, shots fired" on his police radio. Officer Walker said he stayed outside the home and remained on scene until he was told that he needed to leave and participate in the OICI investigation.

Civilian Witnesses

OICI protocol investigators interviewed the homeowner, J. W. J. W. said on February 21, 2016, she was sitting in her living room with J. P. watching a movie. J. W. said she heard glass break and other items being damaged in the basement. J. W. said she and J. P. escaped through the garage and called 911. J. W. said she saw Tyler Persellin's vehicle parked in front of the garage. J. W. said she had installed a surveillance camera outside the home because of Mr. Persellin's prior stalking incidents. J. W. said the police arrived and she and J. P. spoke with the officers. J. W. said she heard one officer giving commands to someone in the garage and then heard gunfire.

OICI protocol investigators interviewed J. P. J. P. said on February 21, 2016, she and J. W. were watching a movie when they heard glass breaking downstairs. J. P. said she and J. W. ran out of the home through the garage. J. P. said she noticed a car belonging to Tyler Persellin, her ex-boyfriend, parked in front of the garage. J. P. said she told J. W. (who was on the phone with 911) that Mr. Persellin had guns, but she didn't know whether he was armed at the time.

Physical Evidence

Body Camera Footage

OICI protocol investigators obtained and reviewed a video recording made from Officer Walker's body camera which recorded relevant parts of the OICI. Officer Walker's recording was presented to the District Attorney's Office for this review. Officer Walker's body camera recorded Mr. Persellin in the garage shooting at Officer Walker and Officer Walker returning fire.

Scene Examination

OICI protocol investigators examined the scene and collected evidence. Among the items of evidence collected were four fired (empty) 9mm cartridge casings from Mr. Persellin's weapon, and seven fired (empty) .45 ACP caliber cartridge casings from Officer Walker's weapon. Inside a bedroom in the home, protocol investigators also located one fired (empty) 9mm cartridge casing from Mr. Persellin's weapon lying next to Mr. Persellin's deceased body. Investigators also recovered Mr. Persellin's firearm lying next to Mr. Persellin's body inside the home. Protocol investigators recovered a 40mm oleoresin capsaicin round that SWAT fired into the home.

DISCUSSION AND CONCLUSION***Officer Walker Reasonably Believed Deadly Force was Necessary.***

Officer Walker responded to a home on a report of a residential burglary in progress and encountered the suspect in the garage. Officer Walker lawfully ordered Mr. Persellin to show his hands; instead, Mr. Persellin tried to kill Officer Walker by shooting a gun at him.

As Mr. Persellin was trying to kill Officer Walker, Officer Walker reasonably believed he needed to use deadly force against Mr. Persellin to prevent Officer Walker's death or serious bodily injury, or to prevent the death or serious bodily injury to another. As such, Officer Walker's use of deadly force against Mr. Persellin was "justified" under Utah State law, and provides Officer Walker a legal defense to a criminal prosecution. Accordingly, the District Attorney's Office declines to file criminal charges and prosecute or otherwise pursue matters against Officer Walker.

If you have any questions or concerns regarding the determination made in this case, or otherwise wish to discuss the matter, please feel free to contact our office to set up a personal meeting.

Very Truly Yours,

SIM GILL,
Salt Lake County District Attorney