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*Via Hand Delivery*

March 10, 2017

RE: *UPD Officer Whitmore's Use of Deadly Force*  
Incident Location: 5820 West, 6200 South, Kearns, Utah  
Incident Date: October 5, 2016  
SLCPD Case No.: 16-18690  
UPD Case No.: 2016-165699  
D.A. Case No.: 2016-2768

Dear Chief Brown and Sheriff Winder:

The Salt Lake County District Attorney's Office ("D.A.'s Office") operates under Utah State law to review and "screen"<sup>1</sup> 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

<sup>1</sup> 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 declines to file criminal charges in the above referenced matter; however, as discussed further, we cannot conclude that Det. Whitmore's use of deadly force was "justified" under Utah State law.

On October 5, 2016, Unified Police Department of Greater Salt Lake ("UPD") Detective Cordell Whitmore chased Damian Huth through a field. Det. Whitmore tried to pull Mr. Huth off a fence over which Mr. Huth was climbing. Det. Whitmore fell backwards off the fence. As he was on the ground, Det. Whitmore said he heard a gunshot. Det. Whitmore said he looked up and saw his handgun in his left hand pointed in Mr. Huth's direction. Det. Whitmore said he realized he had fired his weapon. Mr. Huth was injured by a single gunshot wound to his shoulder; Mr. Huth was treated at the hospital and survived his injury.

### 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;

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#### **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.

#### ***Criminal Charges and Prosecution: Standards***

The D.A.'s Office reviews police officers' use of deadly force pursuant to the D.A.'s Office's authority as a public prosecutor as set forth in Utah Constitution Article VIII, Section 16<sup>2</sup> and Utah Code 17-18a-203<sup>3</sup>, among other legal authority. Pursuant to this authority, the D.A.'s Office is responsible for determining whether a person's actions (in this case, whether a law enforcement officer's use of deadly force) violates a criminal statute (Utah State law) and if so, whether and to what extent that person should be charged with a crime.

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<sup>2</sup> **Utah Const. Art. VIII, Section 16 [Public prosecutors.]** The Legislature shall provide for a system of public prosecutors who shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah and shall perform such other duties as may be provided by statute. Public prosecutors shall be elected in a manner provided by statute, and shall be admitted to practice law in Utah. If a public prosecutor fails or refuses to prosecute, the Supreme Court shall have power to appoint a prosecutor pro tempore.

<sup>3</sup> **17-18a-203. District attorney powers and functions.**

In a county that is located within a prosecution district, the district attorney:

(1) is a public prosecutor for the county; and

(2) shall perform each public prosecutor duty in accordance with this chapter or as otherwise required by law.

The D.A.'s Office is a public prosecution agency for and has jurisdiction over the prosecution of criminal offenses that occur within Salt Lake County. Among the duties of the D.A.'s Office is the responsibility to receive investigations of potential criminal activity from law enforcement agencies. Law enforcement agencies "screen"<sup>4</sup> potential criminal charges with the D.A.'s Office by presenting evidence to the D.A.'s Office that may support the filing of criminal charges against a person who may have committed a criminal offense. Law enforcement agencies present all the relevant facts presently known to them.

After receiving relevant facts about a particular matter, the D.A.'s Office considers potentially applicable statutes to determine whether the statutes proscribe the conduct. During the "screening" process, the D.A.'s Office applies legal and ethical standards to the matter at hand to decide whether to file criminal charges. The D.A.'s Office files criminal charges against individuals accused of violating the law when certain legal and ethical standards are satisfied. When these legal and ethical standards are not satisfied, the D.A.'s Office declines to file a criminal charge.

### ***Legal Standards***

A case must satisfy legal standards before a prosecutor files criminal charges. Among the legal standards to file a case is the requirement that facts show "probable cause" to believe that offense was committed and the accused committed the offense. *See, e.g.,* Ut.R.Cr.P. 4(b).

A criminal case must be built on admissible evidence; the screening function doesn't simply consider all the relevant facts presented by law enforcement but must evaluate what evidence will be legally admissible against a defendant charged with a crime. Some evidence proves facts that, while true, may nevertheless not be admissible against a defendant at trial. The screening function is limited to considering evidence that will likely be admissible against a defendant.

### ***Ethical Standards***

The D.A.'s Office files cases that satisfy ethical standards and considerations in addition to legal standards for filing<sup>5</sup>. Honoring ethical standards ensures that everyone affected by the criminal justice system—suspects, defendants, victims, the community and the system itself—are treated fairly, honorably and respectfully.

Among the ethical standards which a case must satisfy is a reasonable likelihood of success at trial. A prosecutor must prove each element of the case beyond a reasonable doubt and to the unanimous satisfaction of a jury to prevail (succeed) at trial. A screening decision

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<sup>4</sup> Utah State Code defines "screening" as "the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution [by filing an information or indictment], move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted." U.C.A. 77-2-2 (1).

<sup>5</sup> Even when a criminal case is filed, the defendant is presumed innocent of the charges unless and until convicted in a court of law.

includes a consideration of factors that a jury may consider in weighing testimony, evaluating evidence, applying the law and rendering a verdict.

The D.A.'s Office follows many of the screening considerations outlined by organizations like the National District Attorneys Association<sup>6</sup> and the American Bar Association—organizations that address the prosecution function and provide guidance in screening a case. These ethical screening standards are helpful to prosecutors deciding whether a case ought to be filed.

### ***“Justification” as Defense in Utah***

When screening a case, a prosecutor considers whether a person who ostensibly committed a crime (or for which there may be probable cause to believe has committed a crime) nevertheless has a legal defense to prosecution. If a person who, for instance, shot or attempted to kill another has a legal defense to ostensible criminal charges related thereto, no charges can be brought against that person.

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<sup>6</sup> For instance, some relevant considerations for screening are outlined in *NDAA Standards 3-3.9 and 4-4.2*:

#### **Standard 3-3.9 Discretion in the Charging Decision**

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.

(c) A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.

(d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

(e) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(f) The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

(g) The prosecutor should not condition a dismissal of charges, *nolle prosequi*, or similar action on the accused's relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.

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#### **4-2.2 Propriety of Charges**

A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.

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 as 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 include criminal homicide, murder (or attempted murder), aggravated assault, or other offenses 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 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 felony<sup>7</sup>.” *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:

“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 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 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 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. In relation to the 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). For the 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

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<sup>7</sup> For the enumerated “forcible felonies,” see U.C.A. 76-2-402(4)(a), *supra*.

that officer “reasonably believes” that the use of deadly force is “necessary to prevent” the threat of “death or serious bodily injury.” *Id.*

As mentioned above, U.C.A. 76-4-202 and 404 constitute legal defenses to potential criminal charges. Although Utah Code doesn’t directly reference other means of evaluating liability and reasonableness of police use of force, the United States Supreme Court case *Graham v. Conner* provides an analytical methodology for assessing excessive force claims in a Fourth Amendment context.<sup>8</sup> *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,’ [citation omitted] 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.* (citations omitted).

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 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. 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.

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<sup>8</sup> The issue addressed in this OICI review is narrow and well defined: did an officer’s use of force violate a criminal statute and if so, should a prosecution ensue? While our review does not directly employ a Fourth Amendment analysis, the *Graham* case is nevertheless informative.

As laid out in more detail below, we cannot conclude that Det. Whitmore's use of deadly force conformed to the relevant statutes outlined above, and therefore we cannot conclude that the legal defense of "justification" applies to the facts set forth herein. However, as outlined in more detail below, we do not believe there is evidence that Det. Whitmore's actions amount to a criminal case, and we will not file criminal charges against Det. Whitmore for his use of deadly force against Mr. Huth.

## 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.

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To comply with state law requiring an outside agency to investigate an OICI, UPD invoked the OICI investigation protocol, and an investigative team comprised of law enforcement personnel from several agencies responded to investigate this matter pursuant to the previously agreed upon OICI investigation protocol.

On December 15, 2016, OICI protocol investigators presented the investigation findings to the District Attorney for review and this opinion letter. During the presentation of the investigation findings, OICI protocol investigators reported that UPD was helpful and accommodating with the investigation's needs, but did not perform any investigation of the OICI itself.

## 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.

For some time prior to October 5, 2016, Damian Huth had an active warrant for his arrest. The warrant had been requested by Adult Probation and Parole for an alleged probation violation following Mr. Huth's conviction for Aggravated Assault. K.C., Mr. Huth's mother-in-law, and with whom Mr. Huth lived with his wife, K.H., knew about the arrest warrant. K.C. requested the assistance of UPD Officer Michael Khong to serve the warrant and take Mr. Huth to jail.

K.C. arranged with Officer Khong that Officer Khong would stop a vehicle driven by K.C. in which Mr. Huth was riding. Officer Khong's sergeant told Officer Khong to request the assistance of a backup officer for the arrest. Det. Whitmore was assigned as the backup officer.

On October 5, 2016, K.C. notified Officer Khong that she and Mr. Huth and his wife, K.H., were leaving a parking lot in Kearns, Utah. Officer Khong notified Det. Whitmore that he would be stopping the vehicle. Det. Whitmore acknowledged and drove toward the traffic stop.

Officer Khong pulled over K.C.'s car and went to Mr. Huth in the back seat. Officer Khong opened the car door and told Mr. Huth he was under arrest and Mr. Huth immediately started resisting and fighting with Officer Khong. Eventually, Mr. Huth escaped and ran north towards a fence. Det. Whitmore, who had just arrived, gave chase.

Mr. Huth started to climb a fence as Det. Whitmore caught up to him. Det. Whitmore grabbed Mr. Huth by the waist, but slipped off the fence and fell. As Det. Whitmore was on the ground, he said he heard a gunshot and saw Mr. Huth go over the fence.

Mr. Huth was taken into custody a short time later, and officers who arrested him saw he had been shot.

### ***Officer Khong***

OICI protocol investigators interviewed UPD Officer Michael Khong. Officer Khong said he was on duty on October 5, 2016. Officer Khong said he was in his duty uniform and driving his patrol car. Officer Khong said K.C. requested his assistance in serving an arrest warrant on her son-in-law, Damian Huth. Officer Khong said K.C. arranged to have Mr. Huth in her car at a predetermined place and time so Officer Khong could arrest him. Officer Khong said he confirmed that Mr. Huth had an active warrant for his arrest for an alleged probation violation.

Officer Khong said his sergeant told Officer Khong to have another officer provide backup during the arrest. Officer Khong said he enlisted the assistance of Det. Whitmore to help.

Officer Khong said on October 5, 2016, he got a call from K.C. who said they were leaving a parking lot in Kearns. Officer Khong said K.C. told him that her daughter, K.C. and K.C.'s husband, Damian Huth, were in the car, too. Officer Khong said he saw K.C.'s car and performed a traffic stop on 6200 South at about 5820 West in Kearns.

Officer Khong said he walked up to the car and saw Mr. Huth sitting in the back seat. Officer Khong said he opened the car door and told Mr. Huth he was under arrest. Officer Khong said he placed his hand on Mr. Huth's forearm and Mr. Huth immediately started to resist and pull away. Officer Khong said he pulled Mr. Huth from the car and "the fight was on." Officer Khong said Mr. Huth fought with Officer Khong and Mr. Huth's wife jumped on Officer Khong's back to help Mr. Huth escape. Officer Khong said Mr. Huth jumped up and ran northbound into a nearby park.

Officer Khong said he saw Det. Whitmore (who had just arrived at the scene) and Mr. Huth running westbound along a fence line at the border of the garden area. Officer Khong said he saw Mr. Huth climb the fence. Officer Khong said as he saw Mr. Huth at the top of the fence, he heard a "pop" or a "shot." Officer Khong said he thought it could have been the sound of a Taser deployment.

Officer Khong said he saw Mr. Huth go over the fence followed by Det. Whitmore in pursuit. Officer Khong said he ran back to his patrol car and drove it to search for Mr. Huth who he believed was heading north through a field and into a neighborhood. Officer Khong said he heard radio traffic announce that the foot pursuit terminated at 6154 South Trowbridge in West Jordan, Utah.

Officer Khong said he arrived in the area where the foot pursuit terminated and saw Mr. Huth who was bleeding. Officer Khong said he walked with Mr. Huth away from a house in the area and sat him down. Officer Khong said he administered first aid to Mr. Huth and applied a tourniquet. Officer Khong said he gave Mr. Huth a blanket and waited with him for medical personnel to arrive.

***Det. Whitmore***

OICI protocol investigators interviewed UPD Det. Cordell Whitmore with his attorney present. Det. Whitmore said he was on duty on October 5, 2016. Det. Whitmore said he was wearing plain clothes, consistent with his duties as a police detective.

Det. Whitmore said he was asked by Officer Khong to assist arresting Mr. Huth for outstanding warrants. Det. Whitmore said on October 5, 2016, he heard Officer Khong on the police radio announce he was going to stop a vehicle. Det. Whitmore said at the time he was stopped at a light at 5600 West in West Jordan, Utah.

Det. Whitmore said he arrived at the traffic stop and saw Officer Khong's police vehicle pulled over to the side of the road behind another car. Det. Whitmore said he got out of his police car and walked to Officer Khong's car. Det. Whitmore said he saw Officer Khong on the ground fighting with a person and a male running away from Officer Khong. Det. Whitmore said the situation "scared [him]" because Officer Khong is "fit" and Det. Whitmore didn't know why Officer Khong was down on the ground.

Det. Whitmore said he drew his firearm from the holster and pursued the fleeing person north through a garden area. Det. Whitmore said he repeatedly ordered the fleeing suspect to stop but the suspect did not comply and continued to run away.

Det. Whitmore said he saw the suspect climb a fence to the north. Det. Whitmore said he ran to the suspect who was on the fence trying to climb over. Det. Whitmore said he grabbed the suspect's waist with his left hand and tried to pull the suspect off the fence. Det. Whitmore said at the time, Det. Whitmore had his gun in his right hand.

Det. Whitmore said he used his foot for leverage against the fence. Det. Whitmore said he slipped off the fence and fell to the ground. Det. Whitmore stated he "doesn't recall" what happened next as he has been unable to recall it from his memory. Det. Whitmore said he "lost time," meaning (we believe) that a moment of time elapsed for which Det. Whitmore cannot account or remember. Det. Whitmore said he was on the ground next to the fence with his gun now in his left hand with the weapon pointed<sup>9</sup> toward the suspect on the fence. Det. Whitmore demonstrated that he was facing away from the fence and his gun was in his left hand. Det. Whitmore said he heard a "pop" and didn't know what it was, but then he looked up and saw his weapon pointing upward and realized it was his gun. Det. Whitmore said he knew he had just

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<sup>9</sup> In subsequent discussions with Det. Whitmore's attorneys, Det. Whitmore added that he was on the ground on his hands and knees, with his head away from the fence and his left hand pointing behind him and up towards the suspect on the fence.

accidentally discharged his weapon. Det. Whitmore said his memory doesn't quite make sense because he knows he is right handed.

Det. Whitmore said he dropped his gun on the ground and saw the suspect come off the fence on the other side and continue to run north. Det. Whitmore said he followed the suspect over the fence and was about to continue to give chase when he realized his gun was on the other side of the fence. Det. Whitmore said he climbed back over the fence and retrieved his gun.

Det. Whitmore said he found his gun lying in the weeds and "a girl" came over to him and yelled: "You shot him!" Det. Whitmore said he told her he did not. Det. Whitmore said he went to his car to get his radio because he realized he didn't have his radio with him. Det. Whitmore said that once he got his radio, he heard the foot pursuit had ended and he responded to that location.

Det. Whitmore said when he arrived at the area where the foot pursuit terminated, he saw the suspect holding his hand to his left arm/shoulder. Det. Whitmore said the suspect said: "I got shot!" Det. Whitmore said he said: "Let's see!" Det. Whitmore said he could not believe the suspect had been shot. Det. Whitmore said he believed his gun had discharged, but Det. Whitmore said there was "no way it hit [the suspect.]" Det. Whitmore said he saw a bullet wound in the suspect's shoulder and knew that he had in fact hit the suspect.

Det. Whitmore said when he saw the suspect's wound, he immediately recognized it as a gunshot wound. Det. Whitmore said he "just kind of lost [his] ability to function" at that point and he was sequestered by other officers. Det. Whitmore said he was in a police car and asking officers, "Where is the ambulance?" Det. Whitmore said he felt it was taking a long time for the ambulance to arrive. Det. Whitmore said he saw the ambulance arrive and took the suspect for treatment. Det. Whitmore said his hands and body were cut and his clothing was torn from climbing over the fence. During his interview with protocol investigators, Det. Whitmore expressed that he was baffled that he could have hit the suspect.

### ***Det. Neron***

OICI protocol investigators interviewed UPD Det. John Neron. Det. Neron said that he was on duty on October 5, 2016, and wearing a police uniform and drove his marked police car. Det. Neron said that he heard someone on the police radio call out a "foot pursuit." Det. Neron said he drove to the area to assist.

Det. Neron said he was traveling to the location with his emergency equipment activated. Det. Neron said while en route, he heard an officer say on the radio that he was with the suspect. Det. Neron said the officer sounded calm on the radio. Det. Neron said he assumed the situation was under control, so he turned off his emergency lights and siren. Det. Neron said that soon after this, he heard a radio dispatch that there had been "shots fired," so he reactivated his emergency equipment and continued to the scene.

Det. Neron said he arrived in a neighborhood and saw Mr. Huth, Det. Whitmore and Officer Khong. Det. Neron said he went to Mr. Huth and provided first aid. Det. Neron said he handcuffed Mr. Huth with his hands in front of him and applied pressure to Mr. Huth's wound. Det. Neron said he saw Officer Khong apply a tourniquet to Mr. Huth and Det. Neron said he gave Mr. Huth a blanket.

### ***Officer Lopez***

OICI protocol investigators interviewed UPD Officer Jose Lopez. Officer Lopez said he was on duty on October 5, 2016. Officer Lopez said he heard Officer Khong call out a "foot pursuit" on the police radio. Officer Lopez said a short time later, he heard Det. Whitmore on the police radio say that there had been an officer involved shooting. Officer Lopez said he heard Det. Whitmore on the radio ask for medical personnel to respond to the area where the foot pursuit terminated.

Officer Lopez said he saw Det. Neron handcuff Mr. Huth. Officer Lopez said he saw that Det. Whitmore had injuries to his hands and his clothing was torn.

### ***Officer Russell***

OICI protocol investigators interviewed Officer Michael Russell. We also reviewed Officer Russell's police report he wrote about the incident. Officer Russell said he was on duty on October 5, 2016 when he heard a foot pursuit called out on the police radio.

In his report, Officer Russell wrote that he drove to the location of Officer Khong's traffic stop and got out of his police car. Officer Russell wrote that Officer Khong yelled to Officer Russell that the suspect ran north from the traffic stop. Officer Russell wrote that he ran north as Officer Khong drove north in his vehicle.

Officer Russell wrote that as he arrived in front of a house at 6154 South Trowbridge, he heard a male screaming. Officer Russell wrote that he saw the male raise his head over a fence. Officer Russell wrote that he drew his duty weapon and gave commands to the male to show his hands. Officer Russell wrote that the male complied, and stated he was "done running." Officer Russell wrote that he saw the male was bleeding, but Officer Russell was unable to see the cause of the blood. Officer Russell wrote that the male was screaming he was shot and needed help.

Officer Russell wrote that it appeared the male was stuck between two fences. Officer Russell wrote that he advised police dispatchers to have more police officers come to his location. Officer Russell wrote that he was unable to get to the male safely so Officer Russell waited for other officers to arrive.

Officer Russell wrote that when other units arrived, officers knocked over a wooden fence to get to the male. Officer Russell wrote that he noticed the male was bleeding profusely from his left arm area. Officer Russell wrote that officers helped the male to the other side of the

fence and sat the male down to render medical aid. Officer Russell wrote at that point, he noticed the wound appeared to be caused by a gunshot.

In his interview, Officer Russell said he saw a plain-clothed police officer, later identified as Det. Whitmore, arrive at the scene. Officer Russell said he heard Det. Whitmore say: "I slipped," and walked away from Officer Russell. Officer Russell said a "hysterical female," later identified as K.H. arrived on scene; Officer Russell said he detained K.H. until he was relieved by SLCPD officers who arrived for the protocol investigation.

### ***Officer Dallof***

UPD Officer B. Warren Dallof wrote a report about his involvement in the incident. Officer Dallof wrote that he was on duty at UPD's Kearns Substation when he heard Officer Khong call over the radio and request a telephone call from Det. Whitmore. Officer Dallof wrote that he saw Detective Whitmore leave the substation a few minutes after that. Officer Dallof wrote that he heard Officer Khong on the police radio call out that he was stopped with another vehicle on the side of the road. Officer Dallof wrote that, shortly after he called out his traffic stop, he heard Officer Khong call over the radio "foot pursuit." Officer Dallof wrote that he heard someone say on the radio that the suspect was running northbound from 6200 South, Trowbridge Way.

Officer Dallof wrote that he left the substation and drove his police car towards the location of the foot pursuit with his emergency lights and siren activated. Officer Dallof wrote that, while he was driving to the scene, he heard Det. Whitmore request medical personnel to respond to the scene for a male with a gunshot wound. Officer Dallof wrote that he heard a police radio dispatcher ask if it was an "officer-involved" shooting. Officer Dallof wrote that he heard someone reply on the radio that it was.

Officer Dallof wrote that he heard police radio traffic of several police units arriving on scene prior his arrival. Officer Dallof wrote that while he was en route, he heard Officer Lopez tell dispatchers the male suspect had a gunshot wound to his shoulder and Officer Lopez was applying a tourniquet to the wounded person.

### ***Damian Huth***

OICI protocol investigators interviewed Damian Huth. Mr. Huth faces criminal charges related to the OICI. To preserve Mr. Huth's rights against self-incrimination, most of Mr. Huth's statements are not set forth herein.

### ***Witness K.C.***

OICI protocol investigators interviewed K.C. K.C. said she is the mother of K.H. who is married to Damian Huth. K.C. said she has been concerned about K.H.'s relationship with Mr. Huth. K.C. said that on October 5, 2016 and prior to it, she believed Mr. Huth had a warrant for his arrest. K.C. said that she believed the warrant related to allegations that Mr. Huth violated

his probation. K.C. said she believed Mr. Huth was on probation for a domestic violence conviction in which K.H., her daughter, was the victim.

K.C. said she called UPD and asked that the police serve the outstanding arrest warrant and take Mr. Huth into custody. K.C. said she specifically asked Officer Khong to help because he was somewhat familiar with Mr. Huth and the underlying domestic violence conviction against him. K.C. said she and Officer Khong agreed that he would pull over K.C. when she had Mr. Huth in the car and Officer Khong would arrest Mr. Huth.

K.C. said on October 5, 2016, she took K.H. and Mr. Huth to a store. K.C. said that she saw a police car with the lights on behind her and she pulled over. K.C. said she saw Officer Khong approach her car and open Mr. Huth's door. K.C. said she heard Officer Khong tell Mr. Huth: "I have a warrant for your arrest."

K.C. said that Mr. Huth immediately started resisting as Officer Khong pulled Mr. Huth out of the car. K.C. said that Officer Khong "slam[ed] Mr. Huth against the car, but not excessively." K.C. said that K.H. got out of the car and "got involved<sup>10</sup>," by which she meant that K.H. started fighting with the officer. K.C. said that Officer Khong, Mr. Huth and K.H. were all on the ground fighting when Mr. Huth was able to escape and ran north.

K.C. said soon after Mr. Huth ran, she heard a gunshot. K.C. said she did not see who fired the shot or what was happening when she heard the gunshot.

### ***Witness K.H.***

OICI protocol investigators interviewed K.H. K.H. was charged with crimes relating to the incident. K.H. pled guilty to obstruction of justice and was sentenced.

### ***Physical Evidence***

OICI protocol investigators determined that no one was wearing a body camera at the time of the incident; OICI protocol investigators also determined that no dash camera recording captured any of the incident.

OICI protocol investigators took photographs of the people involved in the OICI and photographs of the scene of the pursuit, the fence which Mr. Huth and Det. Whitmore climbed, and the area where the foot pursuit ended.

OICI protocol investigators inspected Det. Whitmore's firearm. Investigators documented that Det. Whitmore's weapon was a Glock Model 26; Investigators downloaded the weapon after the OICI and determined that the weapon was missing one round. Investigators recovered a spent (empty) 9mm handgun cartridge near the fence. OICI protocol investigators inspected Det. Whitmore's weapon and found that it appeared to function normally. Investigators ruled out the likelihood that Det. Whitmore's weapon malfunctioned during the incident.

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<sup>10</sup> K.C. said that K.H. told her after the incident that K.H. fought with Officer Khong so Mr. Huth could escape.

## DISCUSSION

### *Screening Criminal Charges*

As mentioned above and discussed further below, we cannot conclude that Det. Whitmore's conduct was "justified;" we cannot say that his conduct complied with the statute that provides the legal defense of "justification." Specifically, we cannot conclude Det. Whitmore reasonably believed that deadly force was necessary against Mr. Huth. Indeed, although it appears that Det. Whitmore used deadly force against Mr. Huth, it also appears he didn't mean to do so.

However, just because we cannot conclude that Det. Whitmore's conduct was "justified," it does not therefore mean that we must file criminal charges against Det. Whitmore for his use of deadly force against Mr. Huth. When we consider whether we ought to file criminal charges against Det. Whitmore, the legal and ethical standards discussed above apply and we use a "proof beyond a reasonable doubt" standard as required by Utah State law, since that is the standard of proof which a jury would apply. Our decision whether to file criminal charges against Det. Whitmore considers whether we can prove each element of each potential criminal charge beyond a reasonable doubt and to the unanimous satisfaction of all jurors. As discussed in more detail below, we don't believe that we can prove each element of a potential offense beyond a reasonable doubt in this matter, and therefore legal and ethical standards require us to decline a criminal case against Det. Whitmore.

We screened a criminal case involving Det. Whitmore's use of deadly force thusly: first we considered whether Det. Whitmore's use of deadly force was necessary and reasonable against Mr. Huth and therefore "justified." We decided we cannot conclude it was "justified." So we eliminated that potential defense as a barrier to prosecution.

Next we considered whether there was a reasonable likelihood of success at trial if we charged Det. Whitmore with a crime. To evaluate our likelihood of success, we considered whether we could prove each element of a potential criminal offense beyond a reasonable doubt and to the unanimous satisfaction of all members of a jury. As discussed in more detail below, we don't believe that we can prove a criminal case beyond a reasonable doubt; therefore, legal and ethical standards require us to decline criminal charges. Specifically, we don't believe Det. Whitmore had a criminal mental state at the time he used deadly force against Mr. Huth. We believe Det. Whitmore accidentally discharged his weapon, and unfortunately, the weapon happened to be pointing at Mr. Huth when it fired. We believe Det. Whitmore's use of deadly force was a result of an accident, and we do not believe the accident supports a criminal charge.

### *States of Mind*

An actor's state of mind is an element of nearly every criminal offense set forth in Utah State law. Prosecutors consider whether and to what extent they can prove the specific mental state described in each statute. Utah law defines and uses several states of mind:

**76-2-103 Definitions.**

A person engages in conduct:

(1) *Intentionally, or with intent or willfully* with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) *Knowingly, or with knowledge*, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) *Recklessly* with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With *criminal negligence* or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

Our process of screening criminal charges included an analysis and consideration of each of the above states of mind. We asked whether the facts at hand indicate that Det. Whitmore acted with any of the above listed mental states. For the reasons outlined below, we do not believe Det. Whitmore's accidental discharge of the weapon meets the definitions of the above referenced mental states.

We're not aware of any evidence to prove that Det. Whitmore meant or intended to fire his weapon at all, let alone at Mr. Huth. It seems clear that criminal charges that require a prosecutor to prove Det. Whitmore acted "intentionally, or with intent or willfully," or "knowingly, or with knowledge, with respect to his conduct" do not fit Det. Whitmore's conduct.

Det. Whitmore's conduct also doesn't seem reckless in that there doesn't seem to be evidence that Det. Whitmore was "aware of but consciously disregard[ed] a substantial and unjustifiable risk that the circumstances exist or the result will occur." In this case, to charge Det. Whitmore with a criminal offence including a "reckless" state of mind, a prosecutor would

have to prove that Det. Whitmore was aware that he would shoot Mr. Huth as he pulled Mr. Huth off the fence. At a minimum, a prosecutor would have to prove beyond a reasonable doubt that Det. Whitmore knew there was a substantial risk that he would shoot Mr. Huth as he pulled Mr. Huth off the fence.

To prosecute Det. Whitmore for a “reckless” crime, we would have to prove beyond a reasonable doubt that Det. Whitmore did in fact perceive a risk of shooting Mr. Huth, but acted anyway, in disregard of the risk. We’re not aware of any evidence that would prove beyond a reasonable doubt that Det. Whitmore perceived a risk of shooting Mr. Huth, but acted anyway.

Also, even if we had evidence that Det. Whitmore perceived some kind of risk, mere possibility of a certain outcome is not enough to satisfy the “reckless” state of mind. Det. Whitmore’s actions created a risk of shooting Mr. Huth such that his disregard for the risk of shooting Mr. Huth “constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.”

Here, Det. Whitmore said that he believed Mr. Huth had warrants for his arrest and they related to convictions of violence. Det. Whitmore said when he arrived at Officer Khong’s traffic stop, he saw Officer Khong—a fit officer presumably capable of defending himself in a fight—on the ground and a person running away. Under these circumstances, it seems Det. Whitmore acted reasonably when he drew his weapon and ran after the suspect. When Det. Whitmore held his gun in one hand while he tried to pull Mr. Huth off the fence with his other, a prosecution for a “reckless” criminal offense would need to prove beyond a reasonable doubt that an ordinary person (in this case, an ordinary police officer) under the circumstances as viewed from Det. Whitmore’s standpoint would not have acted similarly. We’re not aware of evidence to prove beyond a reasonable doubt that another officer would have acted differently. Accordingly, because we cannot prove beyond a reasonable doubt that Det. Whitmore acted “recklessly,” we decline to file a criminal charge in which a “reckless” state of mind is an element of the offense.

Some may argue that Det. Whitmore’s actions indicate a “criminally negligent” state of mind. But for criminal prosecution screening purposes (and not for other actions, like civil lawsuits) a prosecution for a “criminally negligent” offense would need to prove beyond a reasonable doubt that Det. Whitmore ought to have been aware that his conduct would create a “substantial and unjustifiable risk” of shooting Mr. Huth.

However, for purposes of criminal prosecution screening, we need not decide whether Det. Whitmore’s conduct was “criminally negligent,” since, even if (for the purposes of screening) we assume we could prove beyond a reasonable doubt Det. Whitmore was “criminally negligent,” there are no statutes that apply to Det. Whitmore’s conduct for which we could charge him. The statutes<sup>11</sup> which proscribe “criminally negligent” conduct do not apply to the facts of the OICI.

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<sup>11</sup> Utah State law outlaws the following offenses when committed with criminal negligence: Negligent Homicide; Automobile Homicide; Child Abuse Homicide; Providing a Cigar, Cigarette, Electronic Cigarette, or Tobacco to a Minor; Distribution of Pornographic Film; Cruelty to Animals; Possession of Dangerous Weapons, Firearms, or Explosives in Airport, Secure Areas Prohibited; Child Abuse - Child Abandonment; Taking, Transporting, Selling,

## CONCLUSION

From the facts available to us, it appears Det. Whitmore accidentally fired his gun, and it happened to hit Mr. Huth. We cannot say that Det. Whitmore's conduct conforms to Utah state law to provide him with the legal defense of "justification" for his use of deadly force against Mr. Huth. We can't say that Det. Whitmore was "justified" in his use of deadly force. However, we decline to file a criminal case against him related to this incident.

We're not aware of any evidence that indicates that Det. Whitmore meant to fire his gun at Mr. Huth. We don't believe that we could prove that Det. Whitmore actually appreciated a risk of shooting Mr. Huth and therefore acted recklessly. Even if we could prove beyond a reasonable doubt that Det. Whitmore ought to have appreciated a risk and therefore acted with criminal negligence, there is no applicable statute related to the facts of the OICI. Consequently, we decline to file criminal charges against Det. Whitmore.

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,

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SIM GILL,  
Salt Lake County District Attorney

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or Purchasing Protected Wildlife Illegal Except as Authorized; and Abuse, Neglect, or Exploitation of a Vulnerable Adult.