



Ralph Chamness
Chief Deputy
Civil Division

SIM GILL
DISTRICT ATTORNEY

Jeffrey William Hall
Chief Deputy
Justice Division

Lisa Ashman
Administrative
Operations

Blake Nakamura
Chief Deputy
Justice Division

Chief Craig Burnett
Murray City Police Department
5025 S. State St.
Murray, UT 84107

Chief Kevin Thacker
Sandy City Police Department
10000 Centennial Pkwy.
Sandy, UT 84070

Via Hand Delivery

November 2, 2015

RE: *SPD Officer Clayton T. Swensen's Use of Deadly Force*
Incident Location: 197 E. Corrie Cir., Sandy, Utah
Incident Date: October 2, 2015
MPD Case No.: 15c018410
SPD Case No.: SY15-45912
D.A. Case No.: 2015-2207

Dear Chief Burnett and Chief Thacker:

The Salt Lake County District Attorney's Office ("D.A.'s Office") operates under Utah State law and 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 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, and if so why, the use of deadly force in the above referenced OICI was "justified." As outlined more fully below, the D.A.'s Office determined Sandy City Police Department ("SPD") Officer Clayton T. Swensen's use of deadly force was "justified" under Utah State law.

On October 2, 2015, Marty Kaumans called 911 and asked for the police to help her and her son. She told police that her husband, Ivan Kaumans, was intoxicated and was threatening her and their son with a knife. Ms. Kaumans told 911 that Mr. Kaumans had a rifle and was threatening to shoot people.

SPD police officers responded to the home. Mr. Kaumans came outside with a rifle. Officers told Mr. Kaumans to drop the gun several times, but Mr. Kaumans did not. Instead, he operated the rifle's action and pointed the gun at the officers. SPD Officer Swensen was armed with an AR-15 rifle and fired once, hitting Mr. Kaumans in the arm and chest. Mr. Kaumans was transported to the hospital and treated for his injuries; he survived.

UTAH STATE LAW

As part of the review and "justification" 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;

...

76-2-404. 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.

Use of Deadly Force and “Justification as Defense” in Utah

Reviewing a use of deadly force that results in a person’s death falls within the statutory obligation imposed on the District Attorney to determine whether a decedent died by unlawful means.¹ The District Attorney also determines whether acts that caused or attempted to cause a person’s death warrant prosecution. A District Attorney determination considers whether a person who caused or attempted to cause the death of another nevertheless has a legal defense to prosecution. If a person who caused or attempted to cause the death of another has a legal defense to ostensible criminal charges related thereto, no charges can be brought against that person.

By operation of agreement and pursuant to the D. A.’s Office to screen potential criminal charges against persons who may have violated the law, the D.A.’s Office also reviews the use of deadly force which did not cause a person’s death. This use of deadly force, whether resulting in the death of another or not, is the subject of recent legislation enacted in Utah and is discussed in more detail below.

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 attempted 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 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.*

1 U.C.A. 26-4-21. Authority of county attorney or district attorney to subpoena witnesses and compel testimony--Determination if decedent died by unlawful means.

...

(2) Upon review of all facts and testimony taken concerning the death of a person, the district attorney or county attorney having criminal jurisdiction shall determine if the decedent died by unlawful means and shall also determine if criminal prosecution shall be instituted.

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

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. 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 believes" 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 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

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."

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 Swensen'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 Swensen's related to 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, SPD asked Murray City Police Department ("MPD") and D.A.'s Office investigators to investigate this matter together.

On October 26, 2015, MPD and D.A.'s Office investigators presented the investigation's findings to the District Attorney for review and this opinion letter. During the presentation of the investigation findings, both MPD personnel and D.A.'s Office investigators reported that SPD was helpful and accommodating of 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.

On October 2, 2015, Marty Kaumans called 911 and reported that her husband, Ivan Kaumans was intoxicated and threatening her and their son with a knife. Ms. Kaumans told 911 that Mr. Kaumans also had a rifle and was threatening to shoot people with it. Ms. Kaumans told 911 that she believed the rifle was unloaded. 911 dispatchers told Mr. Kaumans to lock herself and her son in a bedroom and told her that police officers were on their way.

Ms. Kaumans told 911 dispatchers that she could see the police officers arriving at the home. Ms. Kaumans told 911 that Mr. Kaumans was going out the front of the home where the officers were³.

Police dispatchers sent several officers to the Kaumans' home at 197 E. Corrie Cir in Sandy, Utah. SPD officers Swensen, Page and Dunn arrived and shortly thereafter, Mr. Kaumans came out of the home with a rifle.

Officer Swensen's Interview

³ In a subsequent interview with OICI protocol investigators, Ms. Kaumans said she could hear officers yelling commands to "drop the gun." Ms. Kaumans told 911 that she could see Mr. Kaumans raising the rifle and pointing it in the officers' direction. Ms. Kaumans told 911 that the officers had fired a shot.

OICI protocol investigators interviewed SPD Officer Swensen with his counsel present. Officer Swensen said that he was on duty and in uniform on October 2, 2015 when he heard radio traffic dispatch officers to 197 E. Corrie Cir in Sandy. Officer Swensen said he heard police dispatchers advise that the complainant reported that her husband was intoxicated and had a knife. Officer Swensen said he heard that the husband had a rifle and was threatening to shoot people, but that the complainant believed the rifle was unloaded. Officer Swensen said dispatchers stated that the complainant was locked in a bedroom inside the home and the husband was trying to break in.

Officer Swensen said he arrived at the home and approached it formulating a plan to deal with the situation. Officer Swensen said as he walked towards the home, he saw the husband, subsequently identified as Ivan Kaumans, come out of the home and stand in the front yard. Officer Swensen said he saw that Mr. Kaumans had a rifle in his hands. Officer Swensen said he could see that the rifle had a bolt action.

Officer Swensen said he yelled several times to Mr. Kaumans to drop the gun. Officer Swensen said he saw Mr. Kaumans bring the rifle up and manipulate the action as though Mr. Kaumans were loading a cartridge into the chamber. Officer Swensen said he continued to order Mr. Kaumans to drop the gun, but Mr. Kaumans did not comply with the orders. Instead, Officer Swensen said Mr. Kaumans brought the rifle up to his shoulder and aimed the rifle at Officer Swensen.

Officer Swensen said he believed that whether or not the rifle had been unloaded up to that point, it appeared that Mr. Kaumans had loaded the rifle and was now pointing it at him. Officer Swensen said he feared for his life and the lives of those around him. Officer Swensen said he aimed his department issued AR-15 rifle at Mr. Kaumans and fired one shot at him. Officer Swensen said he saw the bullet impact Mr. Kaumans and he went down. Officer Swensen said he and other police officers secured Mr. Kaumans and placed him under arrest and provided first aid until medical personnel arrived and transported Mr. Kaumans to the hospital.

Other Witness Interviews

OICI protocol investigators interviewed the other police officers on scene who witnessed the OICI. The police officers who witnessed the OICI reported essentially the same recollection of events as described by Officer Swensen.

OICI protocol investigators also interviewed neighbors who witnessed the OICI or were aware of police activities going on in the neighborhood. Neighbors who were interviewed included M. M. (a former combat medic who assisted police officers with first aid to Mr. Kaumans) and K.B.

Neighbor M. M. said she heard someone outside her house yell "put the gun down." She said she looked outside her house and saw Mr. Kaumans in his yard with a rifle pointing it to the west. She said she looked west and saw police officers. M. M. said she heard the police

continue to order Mr. Kaumans to put the gun down. She said she saw the police shoot Mr. Kaumans.

Neighbor K.B. said she heard yelling outside her house. She said she looked outside and saw Mr. Kaumans outside his house with a gun. K. B. said she heard the officers yelling at Mr. Kaumans to drop the gun. She said she saw Mr. Kaumans lower the gun in the officers' direction. K. B. said she heard a shot and saw Mr. Kaumans fall down.

OICI investigators also interviewed other people in the neighborhood some of whom heard yelling and/or the gun shot. The reports of those interviewed were essentially consistent with the reports set forth above. No one interviewed by OICI protocol investigators contradicted the statements of other witnesses.

Ivan Kauman's Interview

OICI protocol investigators interviewed Mr. Kaumans about his alleged role in the OICI. Because Mr. Kaumans has been charged with felony offenses relating to this OICI, his statements are not set forth or otherwise described herein.

Physical Evidence

OICI protocol investigators inspected and documented items of physical evidence at the scene. Investigators recovered Mr. Kauman's rifle from the front yard. Investigators also collected one empty (spent) rifle cartridge from Officer Swensen's weapon.

None of the officers at the OICI were wearing body cameras at the time. No patrol vehicle video captured the incident. As far as OICI protocol investigators know, no video recording of the OICI exists. The audio recording of Ms. Kauman's 911 call recorded Ms. Kauman's narration of events as Mr. Kaumans exited the home with a gun and the police officers' actions as Mr. Kaumans pointed his rifle at the officers.

DISCUSSION AND CONCLUSION

Officer Swensen Reasonably Believed Deadly Force was Necessary.

Officer Swensen was dispatched to a request for help from Ms. Kaumans who said her intoxicated husband was threatening her and their son with a knife. Officer Swensen was advised that Mr. Kaumans had a rifle and had threatened to shoot people. Officer Swensen saw Mr. Kaumans come out of the home with a rifle. Although he had been advised that Ms. Kaumans believed the rifle might be unloaded, Officer Swensen saw Mr. Kaumans manipulate the action as though he were chambering a cartridge and loading the rifle. And rather than drop the gun as he had been ordered to do many times, Mr. Kaumans pointed the rifle at Officer Swensen and the other police officers near him.

In this case, Mr. Kaumans' imminent, unlawful threat of death or serious bodily injury to Officer Swensen and the other police officers made Officer Swensen's belief reasonable that deadly force was necessary to prevent his or other's death or serious bodily injury.

We believe Officer Swensen's use of deadly force against Mr. Kaumans was reasonably necessary to prevent Officer Swensen's and the other officers' apparent imminent death or serious bodily injury as a result of Mr. Kauman's own unlawful use of deadly force. As such, Officer Swensen's use of deadly force against Mr. Kaumans was "justified" under Utah State law, and provides Officer Swensen 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 Swensen.

If you have any questions or concerns regarding the determination made in this case, or otherwise wish to discuss the matter further, please feel free to contact our office to set up a personal meeting. In the meantime, I wish you and your department all the best.

Very Truly Yours,

SIM GILL,
Salt Lake County District Attorney