



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

September 27, 2018

BY HAND DELIVERY

Chief Mike Brown
Salt Lake City Police Department
475 South 300 East
P.O. Box 145497
Salt Lake City, Utah 84114

Chief Colleen Jacobs
West Valley City Police Department
3600 S. Constitution Blvd.
West Valley City, Utah 84119

In re: *Use of Deadly Force by Officer Blake Noble*
Incident Location: 333 South Rio Grande, Salt Lake City, Utah
Incident Date: September 5, 2018
OICI No.: 18I016782

Dear Chief Brown and Chief Jacobs:

This letter addresses Salt Lake City Police Department (SLCPD) Officer Noble’s discharge of his service weapon at Michael Zahn (age 35) on September 5, 2018. Neither Mr. Zahn nor anyone else was injured due to Officer Noble’s use of deadly force. Mr. Zahn did, however, commit suicide shortly thereafter, prior to being apprehended by law enforcement.

SUMMARY OF FACTS AND FINDINGS

This matter was referred to the Salt Lake County District Attorney’s Office (DA’s Office) pursuant to what is known in Utah as the “officer involved critical incident” (OICI) protocol. *See* Utah Code Ann. § 76-2-408(2)-(3).¹ That protocol requires that: (i) a team of law enforcement officers from other than the agency employing Officer Noble, here officers from the West Valley City Police Department lead Protocol Team (“Protocol Investigators”), were called in to investigate Officer Noble’s weapon discharge; and (ii) Protocol Investigators’ independent findings were presented to the DA’s Office, which has the constitutional and statutory mandate to screen such matters for possible criminal charges.²

¹ For ease of reference, every constitutional and statutory provision referenced in this correspondence is reproduced in full and attached hereto as Appendix A.

² Utah Const. Art. VIII, section 16; Utah Code Ann. §§ 17-18a-203; *see also id.* at § 77-2-2(1) (defining “screening” as the “process used by a prosecuting attorney to terminate an investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or

For the reasons discussed below, the DA's Office believes filing criminal charges against Officer Noble would be entirely inconsistent with the evidence presented. Officer Noble made a reasoned, split-second decision to fire his service weapon only after seeing Mr. Zahn pull out a firearm in a populated downtown area of Salt Lake City. When interviewed by Protocol Investigators, Officer Noble testified that he saw Mr. Zahn's weapon (which Officer Noble was able to describe in almost exact detail) and fired only because, "Out of concern that [Mr. Zahn] would go in [the building] and take hostages or kill people inside [the building], I attempted to stop [Mr. Zahn] and fired." In other words, only because he "reasonably believe[d] that the use of deadly force [wa]s necessary to prevent death or serious bodily injury³ to the officer or another person." Utah Code § 76-2-404(1)(c); *see also id.* at -404(1)(b) (authorizing deadly force where a law enforcement officer "reasonably believes that deadly force is necessary" to prevent a suspect's escape and the officer had probable cause to believe the suspect posed "a threat of death or serious bodily injury to the officer or to others if apprehension is delayed"). The "reasonableness" of Officer Noble's decision to use deadly force is but further established by Mr. Zahn firing his weapon to break into an adjacent small business (with two employees inside) and, within approximately 30 minutes thereafter, taking his own life with that same gun.

We conclude that Officer Noble's weapons discharge on September 5 was "justified" within the meaning of Utah state law.

ROLE OF THE OICI PROTOCOL IN THIS CASE

Officer Noble's weapon discharge on September 5, 2018, constituted the "use of a dangerous weapon," which is defined under Utah law as "a firearm or [] object that in the manner of its use or intended use is capable of causing death or serious bodily injury." Utah Code Ann. § 76-2-408(1)(a), (d). It also constituted the use of "deadly force" within the meaning of Utah law. *See, e.g.,* Utah Code Ann. § 76-2-402(1)(b) ("deadly force" defined as "force intended or likely to cause death or serious bodily injury").

Officer Noble's weapon discharge did not, however, comprise an "officer-involved critical incident." That term is defined in statute to include, as relevant here, "the use of a dangerous weapon by an officer that causes injury to any person." Utah Code Ann. § 76-2-408(1)(d)(i) (emphasis added). As noted above, neither Mr. Zahn nor anyone else was injured

cause a prosecution to be diverted"). "Commencement of prosecution" is further defined as "the filing of an information or an indictment." *Id.* at § 77-2-2(3).

³ "Serious bodily injury" is defined, in turn, as "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death." Utah Code § 76-1-601(11).

due to Officer Noble's use of deadly force. This incident thus meets the first, but not the second, prerequisite to involvement by the DA's Office under section 408(1)(d)(i).⁴

Regardless, the OICI Investigative Protocol agreement between your agencies and ours (dated December 2015) allows a participating agency to invoke the protocol voluntarily and request intervention by the DA's Office. SLCPD did that in this case. Specifically, Chief Brown—in the interest of full transparency in light of Officer Noble's use of deadly force in a populated area of downtown Salt Lake City—asked OICI Protocol Investigators and the DA's Office to treat this as they would any OICI as defined by Utah state law. Both the Protocol Investigators and we have done so.

RELEVANT LEGAL STANDARDS

As relevant here,⁵ law enforcement officers such as Officer Noble are legally “justified” in using deadly force when (*see* Utah Code Ann. § 76-2-404(1) (emphases added)):

- (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

⁴ Although subsection 408(d)(1)(ii)-(iv) contains three other definitions for an “officer-involved critical incident,” none of those definitions apply on these facts either. *See* Utah Code § 76-2-408(ii)-(iv).

⁵ Also relevant, but less so given Officer Noble's status as a law enforcement officer, is the articulation of “justification” in Utah State law that applies to individuals more generally, including civilians (*see* Utah Code § 76-2-402(1) (emphases added)):

- (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 [i.e., deadly force] 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.

- (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.

Based on this statute, the legal defense of “justification,” then, may be available where a law enforcement officer “reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.” Utah Code § 76-2-404(1)(c). That affirmative defense may also be available where a law enforcement officer “reasonably believes that deadly force is necessary” to prevent a suspect’s escape and the officer had probable cause to believe the suspect posed “a threat of death or serious bodily injury to the officer or to others if apprehension is delayed.” *Id.* at § 76-2-404(1)(b). In determining whether the use of deadly force was “justified” under Utah law, courts may consider several factors, including: (i) the nature of the danger; (ii) the immediacy of the danger; and (iii) the probability that the unlawful force would result in death or serious bodily injury. *See* Utah Code Ann. § 76-2-402(5).

Although Utah statutory law does not fully differentiate standards of “reasonableness” as between law enforcement officers and civilians, *compare* Utah Code § 76-2-402(1) (universal application), *with* Utah Code § 76-2-404(1) (application to law enforcement officers only), the Supreme Court of the United States did exactly that in *Graham v. Conner*, 490 U.S. 386 (1989). In *Graham*, the Supreme Court instructed that “reasonableness” for law enforcement officers must be assessed in light of a “reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396 (internal citations omitted). The Supreme Court held that this determination “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.* Finally, the *Graham* court instructed (*id.* (internal citations omitted; emphases added)):

Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” . . . 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 [the suspect] is actively resisting arrest or attempting to evade arrest by flight.

RELEVANT ETHICAL STANDARDS

The DA's Office files cases that satisfy ethical standards and considerations in addition to legal standards for filing.⁶ Honoring ethical standards ensures that everyone affected by the criminal justice system—suspects, defendants, victims, the community, and the system itself—is treated fairly, honorably, and respectfully.

Among the ethical standards we consider before the DA's Office will commence a case is whether there is a reasonable likelihood of success at trial. It is not enough that the technical elements of crime may be met if, when presenting those facts to a jury, the prosecution strongly believes no reasonable jury would unanimously convict the defendant based on those facts. Accordingly, any screening decision by the DA's Office includes careful consideration of the various factors a jury may consider when weighing testimony, evaluating evidence, applying the law, and rendering a verdict.

FACTS DEVELOPED IN OICI INVESTIGATION⁷

On September 5, 2018, Michael Zahn committed suicide after leading the police on a foot chase near Pioneer Park, from outside the Homewood Suites Hotel (located at 423 West 300 South) to a small commercial building to which Mr. Zahn gained entrance by climbing over a fence and shooting out a glass side door (located at 333 South Rio Grande). At the time of the foot chase, Mr. Zahn, a convicted felon, had an outstanding arrest warrant for a firearms-related parole violation. Prior to that day, it was later determined by Protocol Investigators in the course of their witness interviews, Mr. Zahn told friends and family he “wouldn't go back” to prison.

The September 5 chase began after Officer Noble and his partner that day, Detective Steve Winters—who had minutes earlier responded in uniform to a 911 call to clear Mr. Zahn and three companions from a room inside the Homewood Suites—discovered Mr. Zahn's criminal history and also the outstanding arrest warrant. They located Mr. Zahn outside and across the street from the Homewood Suites and, at approximately 4:17 p.m., approached Mr. Zahn to place him under arrest. Rather than speak to the officers, Mr. Zahn began running, first going south down 400 West and then turning into an alley near 330 South. Body worn camera footage from Officer Noble indicates he yelled “police” and “stop” as he chased Mr. Zahn.

⁶ Among the legal standards a prosecutor must follow is the requirement that “probable cause” must exist to believe an offense (i) was committed and (ii) was committed by the accused. *See, e.g., Utah R. Crim. P. 4(b)*. In making that determination, the DA's Office must evaluate all evidence that will be legally admissible for or against the accused, but may disregard evidence that likely will not be admissible at trial (e.g., a coerced confession).

⁷ The facts and conclusions in this letter are based on the evidence of which we are currently aware. Although we believe it unlikely, these conclusions may change if additional facts become available.

In the alley, Mr. Zahn climbed over a fence to enter the small back courtyard off a commercial building located at 333 South Rio Grande. Officer Noble heard the sound of Mr. Zahn scaling the fence, located where Mr. Zahn had done so, and radioed, “He’s in a courtyard between 300 South, 400 West.” Within moments, Officer Noble shouted, “Hey! Stop right there, he’s got a gun!” When interviewed later by Protocol Investigators, Officer Noble was able to precisely describe the gun wielded by Mr. Zahn at that moment.

Mr. Zahn then fired his gun. At that time the direction of his shot was unclear, based on Officer Noble’s body worn camera footage, but surveillance video from the building next door later revealed Mr. Zahn shot out a glass side door in the commercial building before diving head first from the courtyard into the building. Officer Noble responded with two shots of his own, both fired at Mr. Zahn in rapid succession. Neither bullet hit Mr. Zahn or anyone else.

Officer Noble immediately radioed, “Shots fired! He’s got a gun!,” “He ran into the building!,” and “Need containment on this whole building, he shot through the glass!” Additional officers responded to the scene.

Officers later determined that, after gaining access to the business, Mr. Zahn spoke briefly with the owner and one employee of the business, asking them how to escape. Mr. Zahn then proceeded to the upper level of the business. The business owner and employee both exited the building unharmed, told officers what they had seen, and took cover away from the building.

By approximately 4:43 p.m., officers were able to enter the building. There they found Mr. Zahn already deceased, with what appeared to be a point blank gunshot wound to the head. Nobody else was in the building when Mr. Zahn was found.

LEGAL ANALYSIS

As discussed more fully above, we believe the facts conclusively establish that Officer Noble was “justified” in firing his service weapon at Mr. Zahn. Mr. Zahn, a convicted felon, absconded on foot when officers tried to effect an outstanding warrant for his arrest on firearms-related probation violations. Once cornered down an alley, Mr. Zahn scaled a fence to enter a private courtyard and then used a gun to shoot through the glass of a side door of the adjacent commercial building. When interviewed, Officer Noble said he saw Mr. Zahn “raise a gun.” Officer Noble described the weapon held by Mr. Zahn almost exactly⁸—leaving no doubt he had seen it—and further described his reason for firing at Mr. Zahn, “Out of concern that [Mr. Zahn] would go in [the building] and take hostages or kill people inside [the building], I attempted to stop [Mr. Zahn] and fired.”

⁸ Officer Noble did not view his body worn camera footage before he was interviewed. Officer Noble’s testimony, unaffected by viewing the recording prior to the interview, is therefore free from question or suggestion that his recollection was influenced in any way by details reflected in the body worn camera footage.

As the United States Supreme Court instructed in *Graham*, assessing “reasonableness” in the Fourth Amendment context “requires careful attention to the facts and circumstances of each particular case, including . . . whether the suspect poses an immediate threat to the safety of the officers or others.” 490 U.S. at 496 (emphases added). On these facts, we have no trouble concluding that Officer Noble’s decision to use deadly force directed toward Mr. Zahn was based on Officer Noble’s “reasonabl[e] belie[f] that the use of deadly force [was] necessary to prevent death or serious bodily injury to the officer or another person.” See Utah Code § 76-2-404(1)(c) (emphases added).

CONCLUSION

As explained more fully above, we conclude that Officer Noble’s weapons discharge on September 5 was “justified” within the meaning of Utah state law. We do not intend to pursue criminal charges against Officer Noble.

Very truly yours,



Sim Gill
Salt Lake County District Attorney

Article 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.

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.

Enacted by Chapter 237, 2013 General Session

76-1-601 Definitions.

Unless otherwise provided, the following terms apply to this title:

- (1) "Act" means a voluntary bodily movement and includes speech.
- (2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.
- (3) "Bodily injury" means physical pain, illness, or any impairment of physical condition.
- (4) "Conduct" means an act or omission.
- (5) "Dangerous weapon" means:
 - (a) any item capable of causing death or serious bodily injury; or
 - (b) a facsimile or representation of the item, if:
 - (i) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or
 - (ii) the actor represents to the victim verbally or in any other manner that he is in control of such an item.
- (6) "Grievous sexual offense" means:
 - (a) rape, Section 76-5-402;
 - (b) rape of a child, Section 76-5-402.1;
 - (c) object rape, Section 76-5-402.2;
 - (d) object rape of a child, Section 76-5-402.3;
 - (e) forcible sodomy, Subsection 76-5-403(2);
 - (f) sodomy on a child, Section 76-5-403.1;
 - (g) aggravated sexual abuse of a child, Subsection 76-5-404.1(4);
 - (h) aggravated sexual assault, Section 76-5-405;
 - (i) any felony attempt to commit an offense described in Subsections (6)(a) through (h); or
 - (j) an offense in another state, territory, or district of the United States that, if committed in Utah, would constitute an offense described in Subsections (6)(a) through (i).
- (7) "Offense" means a violation of any penal statute of this state.
- (8) "Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.
- (9) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.
- (10) "Possess" means to have physical possession of or to exercise dominion or control over tangible property.
- (11) "Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.
- (12) "Substantial bodily injury" means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ.
- (13) "Writing" or "written" includes any handwriting, typewriting, printing, electronic storage or transmission, or any other method of recording information or fixing information in a form capable of being preserved.

Amended by Chapter 339, 2007 General Session

Effective 5/8/2018

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 , unless the use of force is a reasonable response to factors unrelated to the commission, attempted commission, or fleeing after the commission of that 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.

Amended by Chapter 324, 2018 General Session

Effective 5/12/2015

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

- (1) A peace officer, or any person acting by the officer's command in providing 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(2), (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.
- (2) If feasible, a verbal warning should be given by the officer prior to any use of deadly force under Subsection (1)(b) or (1)(c).

Amended by Chapter 47, 2015 General Session

Effective 5/12/2015

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;
 - (ii) a fatal injury to any person except the officer, resulting from the use of a motor vehicle by an officer;
 - (iii) the death of a person who is in law enforcement custody, but not including deaths that are the result of disease, natural causes, or conditions that have been medically diagnosed prior to the person's death; or
 - (iv) a fatal injury to a person resulting from the efforts of an officer attempting to prevent a person's escape from custody, make an arrest, or otherwise gain physical control of a 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.
- (4) This section does not preclude the law enforcement agency employing an officer alleged to have caused or contributed to the officer-involved critical incident from conducting an internal administrative investigation.
- (5) Each law enforcement agency that is part of or administered by the state or any of its political subdivisions shall, by December 31, 2015, adopt and post on its publicly accessible website:
 - (a) the policies and procedures the agency has adopted to select the investigating agency if an officer-involved critical incident occurs in its jurisdiction and one of its officers is alleged to have caused or contributed to the officer-involved incident; and
 - (b) the protocols the agency has adopted to ensure that any investigation of officer-involved incidents occurring in its jurisdiction are conducted professionally, thoroughly, and impartially.

Enacted by Chapter 178, 2015 General Session

77-2-2 Definitions.

For the purpose of this chapter:

- (1) "Screening" means the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted;
- (2) "Diversion" means suspending criminal proceedings prior to conviction on the condition that a defendant agree to participate in a rehabilitation program or make restitution to the victim or fulfill some other condition; and
- (3) "Commencement of prosecution" means the filing of an information or an indictment.

Enacted by Chapter 15, 1980 General Session