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*Via Hand Delivery*

November 1, 2017

RE: *CHPD Sgt. McHugh's Use of Deadly Force*  
Incident Location: 1300 South St. and I-15, Salt Lake City, Utah  
Incident Date: September 3, 2017  
SLCPD Case No.: 17-167035  
CHPD Case No.: 17X005225  
D.A. Case No.: 2017-1242

Dear Chief Brown and Chief Russo:

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 below, the D.A.'s Office declines to file criminal charges in the above referenced matter because

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<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.

we conclude that Cottonwood Heights City Police Department (“CHPD”) Sgt. McHugh’s use of deadly force was “justified” under Utah State law.

On September 3, 2017, CHPD Sgt. McHugh tried to stop a Ford Mustang, driven by a juvenile male later identified as A. J.<sup>2</sup> A. J. fled from Sgt. McHugh and drove north on I-15. A. J. got off the freeway at 1300 South and crashed. A. J. and his passenger, a female later identified as S. S. ran from the wreck. Sgt. McHugh caught up to A. J. who continued to walk away. As he walked, A. J. reached into his backpack. Sgt. McHugh saw a box of bullets fall to the ground. Sgt. McHugh saw A. J. put the thing he retrieved from the backpack down the front of his pants. Sgt. McHugh pursued A. J. and ordered him to stop and “drop the gun.”

A. J. eventually stopped and got on the ground, but had his hand down the front of his pants. A. J. wouldn’t stop moving his hand in his pants and Sgt. McHugh later said he feared A. J. was going to produce a gun and shoot him. Sgt. McHugh fired one round at A. J. hitting him. A. J. was transported to the hospital and survived the gunshot wound. While he was treated at the hospital, medical staff found a loaded .22 caliber revolver concealed under A. J.’s scrotum inside his underwear.

### UTAH STATE LAW

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

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

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

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

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

...

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

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

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<sup>2</sup> Privacy rules governing the involvement of juveniles in the justice system require us to identify this juvenile by his initials, “A. J.” See, U. C. A. 78A-6-114. SLCPD investigated allegations pertaining to the events surrounding the OICI and A. J.’s role therein. See, SLCPD Case No. 17-168701. A petition was filed in juvenile court containing allegations relating to some of A. J.’s alleged conduct in the matter. All persons are presumed innocent unless and until proven guilty or adjudicated in a court of law.

(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>3</sup> and Utah Code 17-18a-203<sup>4</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.

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>5</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.

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<sup>3</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>4</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.

<sup>5</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).

### ***Ethical Standards***

The D.A.'s Office files cases that satisfy ethical standards and considerations in addition to legal standards for filing<sup>6</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 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>7</sup> and the American Bar

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<sup>6</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.

<sup>7</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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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.

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 relevant potential criminal charge related to the use of force; 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 under consideration.

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>8</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

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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.

<sup>8</sup> For the enumerated “forcible felonies,” see U.C.A. 76-2-402(4)(a), *supra*.

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 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>9</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 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

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<sup>9</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.

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.

## 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, CHPD 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 October 2, 2017, 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 CHPD 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.

On September 3, 2017 at approximately 2:45 a.m., CHPD Sgt. Chris McHugh observed a Ford Mustang driving in the area of Union Park and Fort Union Blvd. in Cottonwood Heights City, Utah. Sgt. McHugh saw the Mustang drifting back and forth as it traveled, at times using all lanes of travel. Sgt. McHugh initiated a traffic stop.

The driver of the Mustang, later identified as A. J., a juvenile, initially pulled over as if to stop, but then sped away from Sgt. McHugh. A. J. got on to the I-215 beltway and then the I-15 freeway and drove north, often at very high speeds<sup>10</sup>. Sgt. McHugh pursued.

A. J. got off the freeway at the 1300 South exit, drove northbound through the intersection of the off-ramp and 1300 South, continued northbound (on what was now the on-

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<sup>10</sup> Sgt. McHugh said his police truck was limited to 100 mph and A. J. outpaced him during the pursuit.

ramp to I-15) and turned left up the embankment and up and over the cement barricades separating the freeway from the on-ramp area. The Mustang came to rest on its tires on the far right, northbound lanes of I-15 and A. J., and his passenger, S. S., jumped out and ran.

Sgt. McHugh saw A. J.'s car drive up the embankment and onto the freeway, and saw A. J. and S. S. flee on foot. Sgt. McHugh saw them both run southbound back to 1300 South. Sgt. McHugh got out of his patrol car and ordered A. J. to stop. A. J. did not and continued to walk westbound on 1300 South until he was under the I-15 overpass.

A. J. continued to disregard Sgt. McHugh's commands and kept walking away. A. J. took his backpack off his shoulder and reached inside. A box of .22 caliber bullets fell out. A. J. put his hand down the front of his pants. Sgt. McHugh later said when he saw the box of bullets and A. J.'s left hand go down the front of A. J.'s pants, he feared A. J. had a gun. Eventually A. J. stopped walking away and got on the ground as ordered by Sgt. McHugh, but A. J. continued to move his hand down his pants. Sgt. McHugh ordered him to stop moving, and A. J. briefly stopped moving until Sgt. McHugh holstered his handgun. When he put his gun away, A. J. immediately resumed moving his hand down his pants. Sgt. McHugh later said he believed A. J. was retrieving a weapon to use against Sgt. McHugh.

Sgt. McHugh drew his handgun and fired one shot at A. J. A. J. stopped moving and Sgt. McHugh and other officers on the scene secured A. J. and rendered first aid until medical personnel arrived. A. J. was transported to Intermountain Medical Center ("IMC") in stable condition.

While at the hospital, medical personnel found a loaded .22 caliber revolver handgun concealed in A. J.'s underwear under his scrotum.

### ***Sgt. McHugh***

On September 6, 2017, protocol investigators interviewed Sgt. Chris McHugh with his attorney present. Sgt. McHugh said at about 2:45 a.m. on September 3, 2017, he was on duty and in his patrol vehicle traveling eastbound on Fort Union Blvd., east of 1300 East when he saw a car driving erratically. Sgt. McHugh said he saw a Ford Mustang convertible with the top down, swerving on the road, sometimes driving across all lanes of travel. Sgt. McHugh said he decided to stop the vehicle and activated his overhead lights as he turned onto Union Park Blvd.

Sgt. McHugh said the driver, later identified as A. J., a male juvenile, pulled over to the side of the road a couple of times and then drove back out into the travel lane. Sgt. McHugh said eventually, A. J. brought the Mustang to a complete stop. Sgt. McHugh said A. J. kept looking back at Sgt. McHugh as though A. J. were waiting for Sgt. McHugh to get out of his patrol truck.

Sgt. McHugh said he stayed inside his patrol vehicle because he had a feeling the driver was going to flee. Sgt. McHugh said he opened his car door and waited for the driver's reaction. Sgt. McHugh said that's when A. J. sped off.

Sgt. McHugh said A. J. initially went westbound on I-215 and then went northbound on I-15 freeway. Sgt. McHugh said while he pursued A. J. northbound on I-15, he heard radio traffic on his police radio about a kidnapping in South Salt Lake City. Sgt. McHugh said he considered that A. J. and the passenger might have some involvement in the kidnapping (although it was subsequently determined that they did not.)

Sgt. McHugh said he followed A. J. as he exited the freeway at the 1300 South exit. Sgt. McHugh said A. J. was driving very fast and sped through the intersection of the freeway off-ramp and 1300 South Street. Sgt. McHugh said A. J. made a hard left turn after he passed 1300 South and drove up the embankment. Sgt. McHugh said he watched as A. J. struck the concrete “jersey” barriers that separate the freeway from the lower on-ramp and embankment. Sgt. McHugh said the Mustang “launched up off the freeway” into the air and landed on up on the freeway in the northbound lanes of travel.

Sgt. McHugh said he saw A. J. and a female, later identified as S. S., run from the Mustang. Sgt. McHugh said he saw A. J. walking westbound on the sidewalk on 1300 South as it went under the I-15 overpass. Sgt. McHugh said he saw the “female pointing at the male.” Sgt. McHugh said her behavior was not consistent (in his experience) with people fleeing in stolen cars. Sgt. McHugh said he has experienced people scattering in all directions after pursuits that end in accidents. In this case, Sgt. McHugh said the female’s behavior seemed consistent with and “reaffirmed to me this was” the previously described possible kidnapping.

Sgt. McHugh said as he followed A. J., he saw A. J. remove his backpack from off his shoulder and saw A. J. reach inside the backpack. Sgt. McHugh said he saw a “box of bullets<sup>11</sup>” fall from A. J.’s backpack and watched as A. J. pulled something out of the backpack, turned his back to the officer, and then put his hands down his pants.

Sgt. McHugh said he drew his firearm and yelled at A. J.: “Drop the gun, drop the gun!” Sgt. McHugh said he didn’t see a gun, but A. J.’s actions, combined with the box of bullets from the backpack caused him to believe A. J. was either trying to “get that gun back out or trying to hide it.” Sgt. McHugh said A. J. initially raised his hands as Sgt. McHugh got out of his car and approached A. J.

Sgt. McHugh said he ordered A. J. to get on the ground. Sgt. McHugh said he had his Taser in his left hand and handgun in his right hand. Sgt. McHugh said he saw that A. J. was wearing a heavy leather coat and worried the Taser would not be effective as the heavy leather coat would likely prevent the electrical prongs from making contact and rendering the Taser useless.

Sgt. McHugh said A. J. started to obey his commands and sat down on the ground and rolled on his stomach. Sgt. McHugh said A. J. appeared to be “calming down and giving up.” Sgt. McHugh said he continued to give A. J. commands not to move. Sgt. McHugh said he started to move towards A. J. to take him into custody.

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<sup>11</sup> Sgt. McHugh described his familiarity with a box of .22 caliber ammunition. Sgt. McHugh said he could a box, “clear plastic with the slide top” fall out of A. J.’s bag. Sgt. McHugh said he could see “gold through” the box in describing the bullets inside the box. Sgt. McHugh was asked: “You were able to tell from the distance you were at...?” Sgt. McHugh replied: “my kids have .22” and said it was clear to him it was a box containing ammunition.

Sgt. McHugh said he holstered his handgun and took a few steps towards A. J. to take him into custody. Sgt. McHugh said as soon as he holstered his handgun—“the second my holster snaps”—A. J. rolled to the side and “his hand immediately [went] down his pants to where I saw him shoving it in as he was running away; he starts to pull, his elbow starts to come up.” Sgt. McHugh characterized A. J.’s movements as a “draw stroke,” meaning an effort to draw a weapon from his waistband.

Sgt. McHugh said he quickly created some distance by moving “off-line” and yelled out commands, “stop, stop, stop, stop!” Sgt. McHugh said he aimed his weapon at A. J. and fired one round because A. J. wouldn’t stop moving and it looked like A. J. was bringing his hand out of his pants. Sgt. McHugh said A. J. stopped moving and he and other officers handcuffed A. J. and took him into custody. Sgt. McHugh he and other officers started first aid until medical personnel arrived.

As he described his decision to use deadly force and the factors that led up to his belief that he was in danger and deadly force was necessary, Sgt. McHugh said he had just seen a “.22 plastic box with the slide top” and “bullets, (is what I perceived it to be)” fall out of A. J.’s backpack. Sgt. McHugh said he saw A. J. turn away from him after retrieving something from his backpack. Sgt. McHugh said when A. J. initially raised his hands, Sgt. McHugh didn’t see a handgun or any dangerous weapon in A. J.’s hands.

Sgt. McHugh said once he holstered his handgun, A. J. “immediately” put his hand down his pants. Sgt. McHugh said he felt like A. J. “suckered [him] in,” and waited for Sgt. McHugh to put his handgun away. Sgt. McHugh said he believed A. J. waited “until I was ‘less lethal’ and thought he had the jump on me and he was going to take his chance and shoot me.”

Sgt. McHugh said he continued to order A. J. to stop but he wouldn’t stop moving. Sgt. McHugh said as he moved off line, A. J. continued to move his hands in his pants. Sgt. McHugh said he perceived A. J.’s movements: “To me, he is going for, I think he’s trying to get a gun from his waistband, the exact same spot that he just pulled something out of the backpack and shoved something down his pants.” Sgt. McHugh said he thought to himself: “... If I didn’t stop him, he was going to kill me.”

### ***Officer Alcivar***

On September 3, 2017, protocol investigators interviewed CHPD Officer Michael Alcivar. Officer Alcivar said he was on duty earlier that morning and heard over the police radio that Sgt. McHugh was attempting to pull over a Ford Mustang. Officer Alcivar said he later heard that the driver of the Mustang “TA’d” (was involved in a traffic accident) on the freeway near 1300 South, and that two suspects were running from the Mustang.

Officer Alcivar said when he arrived at the scene, he saw Sgt. McHugh chasing one of the suspects, and heard words being exchanged. Officer Alcivar said he focused on the female suspect (later identified as S. S.) who Officer Alcivar said was about 35 to 45 feet away from the

male suspect. Officer Alcivar said he couldn't see what was going on with Sgt. McHugh because concrete pillars were obstructing his view.

Officer Alcivar said he was coming to a complete stop when he heard a "pop, gunshot." Officer Alcivar said he jumped out of his vehicle and ordered S. S. to get on the ground. Officer Alcivar said he saw a red dot on the male suspect, and uncertain if Sgt. McHugh drew his Taser after the gunshot. Officer Alcivar said he saw the male suspect on the ground leaning against a retaining wall.

### ***Officer Franco***

On September 3, 2017, protocol investigators interviewed CHPD Officer Ricardo Franco. Officer Franco said he was on duty earlier in the day when heard Sgt. McHugh on the police radio say that he was pursuing a fleeing vehicle on I-15. Officer Franco said he traveled towards Sgt. McHugh's direction. Officer Franco said he heard Sgt. McHugh call out that he was chasing two people on foot after the vehicle crashed.

Officer Franco said he and his recruit, CHPD Officer Kenyon Kawa, were parking his patrol vehicle under the I-15 overpass when he heard Sgt. McHugh call out, "shots fired." Officer Franco said he drew his handgun and ran up to Sgt. McHugh's location. Officer Franco said he took a cover position while Sgt. McHugh handcuffed the suspect. Officer Franco said he retrieved his medical kit from his patrol car and rendered first aid to the suspect. Officer Franco said it appeared the suspect had a gunshot wound to the chest and a possible gunshot wound on the side of his abdomen.

Officer Franco said while he was with the male, he saw the suspect grab a fired bullet from the ground. Officer Franco said the suspect told him he needed it for "evidence." Officer Franco said the suspect eventually released the bullet from his grasp and Officer Franco took it. Officer Franco said he searched the suspect, but did not find a handgun. Officer Franco said he later learned that medical personnel at the hospital found a gun in the suspect's crotch area.

### ***Officer Salmon***

On September 3, 2017, protocol investigators interviewed CHPD Officer Kevin Salmon. Officer Salmon said was on duty earlier in the morning and heard Sgt. McHugh on the police radio call out a pursuit around Fort Union Blvd. Officer Salmon said he headed in Sgt. McHugh's direction. Officer Salmon said he heard the suspect crashed getting off the freeway.

Officer Salmon said he as he arrived at the scene at of the crash at 1300 South, he heard someone say "shots fired" over the radio. Officer Salmon said Sgt. McHugh and Officer Alcivar were already under the I-15 overpass when he arrived. Officer Salmon said he walked to where Sgt. McHugh was and he saw .22 caliber bullets scattered on the ground approximately 50 feet away from the suspect.

Officer Salmon said when he saw the male suspect, the suspect was in handcuffs. Officer Salmon said the suspect had a fired “.40” caliber bullet in his hands. Officer Salmon said the suspect told him that the suspect was going to keep the bullet for evidence. Officer Salmon said he and Officer Franco “pried” the bullet out of the suspect’s hand. Officer Salmon said he administered first aid and held pressure on two wounds in the suspect’s chest/abdomen area until medical personnel arrived.

***Witness N. J.***

As medical personnel attended to A. J. and his injuries at the hospital, N. J., an Intermountain Health Care employee, discovered a .22 caliber, derringer-style revolver under A. J.’s scrotum concealed by his underwear. See *Figure 3*, attached. N. J. notified law enforcement personnel and turned the gun over to police.

***Witness S. S.***

On September 3, 2017, protocol investigators interviewed S. S. who was in the car with A. J. prior to the OICI. S. S. said that on the day of the OICI, she received a text from A. J. that said: “would you mind going to 7-11 with me.” S. S. said she agreed to go with him.

S. S. said A. J. picked her up from her home, and they were on their way to 7-11 when a police officer turned on his overhead lights to pull them over. S. S. said A. J. was acting weird just moments before the police officer turned on his lights. S. S. said A. J. had been talking on his cellphone about spice.

S. S. said at first, A. J. pulled over for the officer, but S. S. said A. J. told her he was going to flee. S. S. said she tried to convince A. J. to wait for the officer, but S. S. said he didn’t listen. S. S. said to her: “just be quiet and enjoy the ride.” S. S. said A. J. then drove away and fled from the officer.

S. S. said they drove northbound on I-15 and the police officer followed. S. S. said A. J. got off the freeway on 1300 south and crashed the car when he tried to get back on the freeway. S. S. said A. J. got out of the car and jumped over the barrier. S. S. said A. J. stopped, turned around and went back to the car and grabbed a backpack from the passenger compartment. S. S. said she got out of the car, ran down the slope and made contact with the police officer.

S. S. said she thought she was about half a block away when she said she heard “three pops.” S. S. said the officer told her to look away. S. S. said another officer came to her and took her into custody.

***Witness H. L.***

On September 3, 2017, protocol investigators interviewed H. L. who witnessed some of the OICI. H. L. said she was on 1300 South and saw a police car coming at her with emergency lights on. H. L. said the police officer turned left in front of her and stopped in the middle of

street. H. L. said she saw the police officer get out of his police car with his gun drawn. H. L. said her view was blocked by the police car but heard the police officer saying something to a person. H. L. said she saw a female in the area, walking quickly towards the officer's location. H. L. said she heard a gunshot and quickly closed her eyes. H. L. said she drove away traveling eastbound on 1300 South.

***Witness M. J.***

On September 3, 2017, protocol investigators interviewed M. J., A. J.'s sister. M. J. said that her brother, A. J., asked her for ride the day before the OICI. M. J. said she told A. J. that she was too busy that afternoon; she said she gave the keys to the Mustang to A. J. M. J. said she knew that A. J. did not have valid driver's license and she knew the Mustang was not insured.

***Witness T. J.***

On September 3, 2017, protocol investigators interviewed T. J.'s A. J.'s brother and legal guardian at the time. T. J. declined to answer most of the investigator's questions. However, T. J. stated that he was upset police officers shot A. J. because he said A. J. usually conceals his handgun.

***Physical Evidence***

Sgt. McHugh's body-worn video camera recorded the events of the OICI. Other officers also wore body cameras and those recordings were collected and reviewed. None of the other officers' body worn cameras recorded the OICI. A video from a passerby was shown on the news. Protocol investigators reviewed that video recording as well.

Protocol investigators photographed, documented and collected items of physical evidence. Investigators recovered a box of .22 caliber cartridges (bullets) and scattered .22 caliber cartridges on the ground near where A. J. was taken into custody. A. J.'s backpack, ankle wallet (which contained a knife), leather coat and other personal effects were documented and collected by investigators.

Investigators inspected and downloaded Sgt. McHugh's handgun and determined that he fired one round from his handgun. Investigators also inspected and documented Sgt. McHugh's Taser and determined that it had not been fired.

## DISCUSSION AND CONCLUSION

### *Justified Use of Deadly Force*

Prior to the OICI, A. J. demonstrated an apparent disregard for police instructions and commands and exhibited dangerous behavior rather than stopping and complying with the officer's lawful commands. Rather than stop his car, A. J. led police on a high speed pursuit, endangering his life, the life of his passenger, and the lives of those around him. Sgt. McHugh observed A. J.'s apparently considerable disregard for his safety and those around him. Sgt. McHugh's observations and conclusions derived from A. J.'s behavior were reasonable and appropriate considerations to include in his decision to use deadly force.

After the car wreck, A. J. disregarded Sgt. McHugh's repeated, lawful commands to "stop" and to "drop the gun." Sgt. McHugh's concerns that A. J. may present a deadly threat were heightened when A. J. took his backpack off his shoulder and reached inside and box of .22 caliber bullets fell out. Instead of stopping and informing Sgt. McHugh that A. J. had a gun, A. J. kept walking away and moved his hands down his pants. Sgt. McHugh later said when he saw the box of bullets and A. J.'s left hand go down the front of A. J.'s pants, he feared A. J. had a gun. Sgt. McHugh's concerns that A. J. was armed with a gun were reasonable in light of all the circumstances that Sgt. McHugh perceived and articulated.

Sgt. McHugh's concerns were heightened when A. J. appeared to be reaching down the front of his pants as he lied on the ground. Sgt. McHugh was reasonably concerned that A. J. continued to disregard commands, and A. J.'s behavior was consistent with someone retrieving a concealed firearm. Sgt. McHugh reasonably inferred that the threat posed by A. J. was significant and growing larger.

Sgt. McHugh ordered him to stop moving, and A. J. briefly stopped moving until Sgt. McHugh holstered his handgun. When he put his gun away, A. J. immediately resumed moving his hand down his pants. It was reasonable for Sgt. McHugh to infer that A. J.'s actions presented a threat to him. Sgt. McHugh's concerns were further heightened by A. J.'s movements, especially inasmuch as A. J. seemed to wait until Sgt. McHugh holstered his weapon before he started his movements again. Sgt. McHugh reasonably believed that A. J. was retrieving a weapon to use against Sgt. McHugh.

Sgt. McHugh reasonably understood that he could not react faster than A. J. would act. Nothing in the statutory defense of "justification" requires an officer to see a gun before using deadly force if the officer reasonably believes deadly force is necessary to prevent death or serious bodily injury to the officer or another person.

For purposes of this discussion, if we were to conclude that Sgt. McHugh should be criminal charged for his use of deadly force against A. J., we would have to prove Sgt. McHugh's decision to use deadly force was not reasonable, and we would have to prove it beyond a reasonable doubt. In this case, we determined that Sgt. McHugh reasonably believed

that A. J. was armed with a gun, and reasonably believed that A. J. was going to use a gun against Sgt. McHugh. We conclude that Sgt. McHugh reasonably believed deadly force was necessary to prevent death or serious bodily injury to himself or another person, and was therefore a “justified” use of deadly force.

A “justified” use of deadly force provides Sgt. McHugh a legal defense to a criminal prosecution for his use of force. The District Attorney’s Office declines to file criminal charges and prosecute or otherwise pursue matters against Sgt. McHugh.

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.

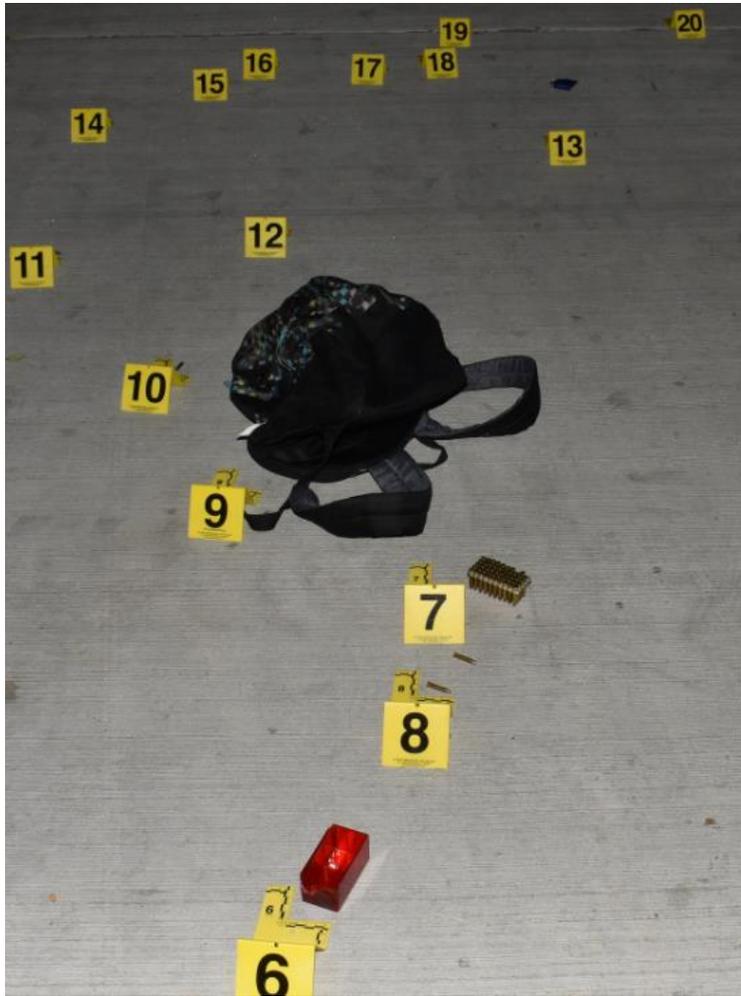
Very Truly Yours,

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SIM GILL,  
Salt Lake County District Attorney

SG/JWH/jh  
enclosure

## Photographs



*Figure 1: A. J.'s backpack (9); red box lid (6); and box of .22 caliber bullets (7).*



*Figure 2: Close up photograph of box of .22 caliber bullets.*



*Figure 3: North American Arms .22 Caliber revolver that medical personnel recovered from under A. J.'s scrotum.*