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FOR IMMEDIATE RELEASE: Sept. 26, 2014

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Salt Lake County District Attorney's Office Finds Officer Involved Shooting Legally Justified

Salt Lake City, UT -- After conducting a routine Officer Involved Critical Incident (OICI) review, the Salt Lake County District Attorney's Office has determined that the July 25th, 2014 Use of Deadly Force by Unified Police Department Officers Evans and Franchow was legally justified.

The Salt Lake County District Attorney's Office is required by Utah State law, and operates pursuant to an agreement with participating law enforcement agencies and consistent with established protocols and applicable law, to perform joint investigations and independent reviews of officer involved critical incidents including police officers' use of deadly (including potentially deadly) force used in the scope of police officers' official duties.

See the attached letter to Salt Lake County Sheriff Winder for more information.
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Sheriff James M. Winder
Unified Police Department
3365 South 900 West
Salt Lake City, Utah 84119

September 25, 2014

RE: *Unified Police Officers Gary Evans' and Shane Franchow's Use of Deadly Force*
Incident Location: 360 E. Woodlake Cove #213, Salt Lake City, Utah
Incident Date: July 25, 2014
UPD Case No.: CO14-114103
Our Case No.: 2014-1717

Dear Sheriff Winder:

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 Officers Evans' and Franchow's use of deadly force was "justified" under Utah State law.

On July 25, 2014, Unified Police Department ("UPD") Officers Gary Evans and Shane Franchow responded with other officers on a possible domestic violence/DUI call that escalated into a "man with a gun" incident. As outlined in more detail below, when Nicholas Lister pointed a shotgun in Officers Evans' and Officer Franchow's direction, they fired their weapons at Lister, killing him.

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.

FACTS

OICI protocol investigators established the following facts during the joint investigation of the incident; these facts and others were presented to the D.A.'s office for our review. Should additional or different facts subsequently come to light, the opinions and conclusions contained herein may likewise be materially different.

On July 25, 2014, Lindsay Lister called 911 and reported that she and her husband, Nicholas Lister, had been in a verbal domestic dispute and he had just left their apartment complex in their car. Lindsay reported that Lister had been drinking. Lindsay reported that she was concerned that Lister might be DUI. While talking on the phone with 911 from outside her apartment, Lindsay said that Lister had returned, gone back inside the apartment and had locked¹ her out. While Lindsay was talking to 911, she and Lister spoke to each other for several minutes. Lindsay relayed to 911 some of the things Lister was saying to her.

Lindsay reported to 911 that Lister had guns inside the apartment. Initially, when 911 asked Lindsay if Lister was threatening to hurt anyone, Lindsay said: "Just himself." Later in the phone call, Lindsay relayed to 911 that Lister had threatened to shoot police if they came inside the apartment. 911 advised Lindsay to move away from the apartment and wait for the police to arrive.

Police dispatchers sent UPD officers² to the apartment complex and advised the responding officers that Lister had weapons inside the apartment and that he had threatened to harm himself as well as shoot police officers who entered the apartment. When UPD officers arrived, they met Lindsay in the apartment complex parking lot. Lindsay told the officers that Lister was inside the apartment; that he was angry and intoxicated; and that he had a handgun and a shotgun inside the apartment. Lindsay told UPD officers that the earlier domestic dispute was only verbal. Some of the arriving officers set up a containment perimeter around the apartment to keep others from approaching Lister's apartment and to manage the unfolding scene at the apartment complex.

While Lindsay was in the parking lot talking with officers, police dispatchers called Lister on the phone and spoke to him while he was still inside the apartment. Lister told the police that he had a .380 handgun at his head. The police dispatcher asked Lister what was going on. Lister replied: "go ahead; that's all I can say. Go ahead and try." Dispatch asked Lister: "Try what?" Lister replied: "Coming in here." Lister told dispatch that he was going to hurt himself with the handgun. Lister then told dispatch that he had "no reason to live" and hung up the phone.

¹ Lindsay reported that Lister had secured the front door chain from inside. The front door was locked but cracked open enough to allow Lindsay and Lister to communicate.

² Dispatchers sent uniformed patrol and supervisor officers to the scene but SWAT was not dispatched nor responded to the apartment complex for this incident.

Shortly thereafter, Lister called Lindsay's phone. She handed the phone to UPD Officer Nick Renfro who talked to Lister on the phone. In a subsequent interview during the OICI investigation, Officer Renfro said that Lister was agitated; Officer Renfro was trying to get Lister to put the gun down and go to bed to sleep off the intoxication. While on the phone with Officer Renfro, Lister said that the only way the incident was going to end was that either he was going to kill himself or he would kill someone if they came through the apartment door. Lister also told Officer Renfro that he was "bunkered in," and "ready to fight for his freedom." Then Lister hung up the phone.

At about this time, UPD Sgt. Torrin Chambers arrived on scene and assumed Incident Command. Officer Renfro advised Sgt. Chambers that Lister was "spun up" and had threatened to shoot officers if they approached or entered the apartment. Officer Renfro told Sgt. Chambers that Lister claimed to have barricaded himself in the apartment and was lying in wait for officers to enter the apartment. In an effort to de-escalate the situation, Sgt. Chambers had UPD officers withdraw from their containment positions and allow Lister to sleep off his intoxication. UPD Officers who were on containment left their positions and returned to the south parking lot for a debriefing.

While officers were meeting in the south parking lot, Lister called Lindsay's phone again. Again, she handed the phone to Officer Renfro. Lister told Officer Renfro that Lister was going to go out on the balcony to smoke a cigarette. Lister also told Officer Renfro he was going to take his shotgun out on the balcony with him. Officer Renfro told Lister not to come out with a gun due to safety concerns for everyone involved. Sgt. Chambers was near Officer Renfro while he was on the phone with Lister. Sgt. Chambers said he heard Officer Renfro tell Lister: "don't come out with a gun" and "don't go to the balcony with a shotgun."

Sgt. Chambers ordered the UPD officers back to containment positions in case Lister came out on the balcony with a gun. Sgt. Chambers was concerned about Lister being intoxicated, threatening officers, and being armed outside. Sgt. Chambers explained in a subsequent interview that he was also concerned for the safety of the apartment building residents and police officers.

UPD Officers Gary Evans and Shane Franchow had previously responded to Lindsay's domestic violence/DUI call at the apartment complex. After Sgt. Chambers reinstated containment positions, Officers Evans and Franchow were positioned on the east side of the apartment building facing Lister's balcony. Both Officers Evans and Franchow had been briefed on the unfolding events and were aware of Lister's threats and behavior up to this point. They also knew that Lister told Officer Renfro that Lister was coming outside armed.

Lister came out of the apartment onto the balcony with his shotgun. Several witnesses (including other officers) who were subsequently interviewed said they heard police officers yelling commands to "Drop the gun!" several times. Then they heard several gunshots. Lister was fatally wounded by multiple gunshot wounds.

During the subsequent OICI investigation, investigators recovered Lister's model 1300 Winchester 12 gauge shotgun on the balcony. The shotgun was loaded with four shells in the magazine and one shell in the chamber. Investigators also recovered Lister's FI Industries .380 Auto handgun on the apartment balcony. The .380 Auto's hammer was cocked and the safety was on. The .380 Auto was loaded with two cartridges in the magazine and an empty chamber. No spent shell casings belonging to Lister's weapons were recovered during the investigation, and it was not conclusively determined whether Lister fired a weapon during the incident.

1. *Officer Evans*

Officer Evans provided a written statement to OICI protocol investigators. As outlined in more detail in his statement, Officer Evans said he was on patrol when he heard the call dispatched. Officer Evans said he was told about Lister's threats and his previous behavior and believed that Lister had threatened to kill himself and/or police officers.

Officer Evans said he saw Lister come out on the balcony with a shotgun. Officer Evans said he identified himself as a police officer and repeatedly made loud, clear commands for Lister to drop the weapon. Officer Evans said that Officer Franchow was nearby and also gave Lister commands. Officer Evans said that Lister disregarded all of his orders. Officer Evans said that Lister began to swing the shotgun in his direction. Officer Evans said that because Lister was swinging his shotgun in his direction, and because Lister had previously stated he would shoot officers, Officer Evans said he was in fear for his life and Officer Franchow's life.

Officer Evans said he fired approximately two shots when he observed what appeared to be a muzzle flash coming from the direction of the barrel of Lister's shotgun. Officer Evans said that Lister continued to swing the barrel of the shotgun in his direction. Officer Evans said he continued to fire his rifle until Lister fell to the ground.

Officer Evans engaged Lister with his UPD issued weapon, a Colt model 6940 .223 Caliber semi-automatic rifle. A subsequent down count performed during the OICI investigation showed that 13 rounds were missing from Officer Evans' weapon. Investigators determined that Officer Evans did not use any of his other weapons during the incident.

2. *Officer Franchow*

Officer Franchow provided a written statement to OICI protocol investigators. As outlined in more detail in his statement, Officer Franchow said that on July 25, 2014, he was working as a uniformed patrolman in a marked patrol car in the Millcreek Township. Officer Franchow said he responded to the Country Lake apartments. Officer Franchow said that police dispatch advised that a female caller had reported a domestic argument at her apartment. Officer Franchow said he heard that the husband (Lister) had guns inside the home.

Officer Franchow said that after he arrived at the scene, other police officers briefed him on Lister's threats and actions to that point. Officer Franchow said that he was assigned to a

containment position with Officer Evans. Officer Franchow said that he heard that Lister was coming outside and was armed.

Officer Franchow said that he and Officer Evans were about 20 feet south of the balcony when Lister came out of the apartment onto the balcony. Officer Franchow said he could see Lister holding a long barreled firearm. Officer Franchow said he turned his rifle flashlight on Lister and shouted loud verbal commands “drop the gun, drop the gun.” Officer Franchow said that Officer Evans also yelled commands to Lister.

Officer Franchow said that Lister did not comply with the commands and instead began sweeping the muzzle of his gun towards him and Officer Evans. Officer Franchow said that he and Officer Evans had no protective cover and no way to safely retreat. Officer Franchow said he feared Lister was going to shoot Officer Evans and him at close range.

Officer Franchow said he aimed his rifle at Lister and prepared to fire. Officer Franchow said Lister continued to sweep the barrel of his gun in Officer Franchow’s and Officer Evans’ direction. Officer Franchow said that just as he was about to shoot, he saw a muzzle flash in front of him and heard a shot. Officer Franchow said that it appeared to him that Lister had fired his weapon.

Officer Franchow said he fired his rifle at Lister. Officer Franchow said that Lister continued to swing the weapon and pointed it in Officer Franchow’s and Officer Evans’ direction. Officer Franchow said he continued shooting at Lister. Officer Franchow said Lister held onto his gun as he fell to the floor of the balcony. Officer Franchow said he stopped firing. Officer Franchow said he kept his rifle sights on Lister because Lister was still holding his weapon in his right hand. Officer Franchow said that Lister’s weapon was on top of him and still pointing in Officer Franchow’s general direction.

Officer Franchow engaged Lister with his UPD issued weapon, a Colt model 6940 .223 Caliber semi-automatic rifle. A subsequent down count performed during the OICI investigation showed that 12 rounds were missing from Officer Franchow’s weapon. Investigators determined that Officer Franchow did not use any of his other weapons during the incident.

DISCUSSION

1. Use of Deadly Force: Utah State Law

The use of deadly force by a person (including but not limited to peace officers) is “justified” when the use of deadly force conforms 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 the above 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 felony³." *Id.*

In addition to the use of deadly force in defense of self or others, a peace officer's use of deadly force is "justified" when:

"effecting an arrest or preventing an escape from custody following an arrest, where the officer reasonably believes that deadly force is necessary to prevent the arrest from being defeated by escape; and the officer has probable cause to believe that the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury; or the officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed; or the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person." U.C.A. 76-2-404.

In essence, the analysis for the use of deadly force to prevent death or serious bodily injury (whether by individuals or peace officers) turns on similar elements. 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 the officer "reasonably believes" that the use of deadly force is "necessary to prevent" the threat of "death or serious bodily injury."

2. *Officers Evans and Franchow Reasonably Believed Deadly Force was Necessary.*

Officer Evans and Officer Franchow received information that Lister was ostensibly intoxicated, had had a verbal argument with his spouse, had threatened to shoot police officers if they entered the apartment, and had made statements that the situation would end with either he or someone getting killed. The officers received information that Lister said he was coming out on the balcony armed and that he had been told not to do so. Officer Evans and Officer Franchow also gave Lister commands and saw that Lister was not obeying their commands. So when Lister swung the muzzle of his shotgun in Officer Evans' and Officer Franchow's direction, it was reasonable for the officers to believe their lives were in danger. Lister's actions presented an imminent and unlawful threat of death or serious bodily injury to Officer Evans and Officer Franchow.

Under the circumstances that Lister created and presented to the officers, the officers reasonably believed that the use of deadly force was necessary to prevent death or serious bodily

³ Utah Code 76-2-402(4)(a): "For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person, and arson, robbery, and burglary as defined in Title 76, Chapter 6, Offenses Against Property."

injury to the officers and/or another person. As such, Officer Evans' and Officer Franchow's use of deadly force was "justified" under Utah State law.

CONCLUSIONS

Given the totality of the circumstances they faced, Officer Evans and Officer Franchow reasonably believed their lives were in danger when Lister presented an imminent and unlawful threat of death or serious bodily injury. Officer Evans' and Officer Franchow's belief that deadly force was necessary to prevent their death or serious bodily injury was reasonable. Accordingly, their use of deadly force was "justified" under Utah State law.

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

Very Truly Yours,

SIM GILL,
Salt Lake County District Attorney