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Via Hand Delivery

June 13, 2016

RE: *UPD Officer Cory Tsouras' Use of Deadly Force*
Incident Location: 180 West 7200 South, Midvale, UT
Incident Date: October 30, 2015
SLCPD Case No.: 15-208919
UPD Case No.: 15-186009
D.A. Case No.: 2015-2361

Dear Chief Brown and Sheriff Winder:

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

¹ As explained more fully herein, the process of "screening" a case includes an assessment of the facts and an application of the facts to relevant law, using legal and ethical standards to determine whether to file a criminal charge.

below, the D.A.'s Office declines to file criminal charges in the above referenced matter, even though we cannot conclude that the use of deadly force was "justified."

On October 30, 2015, a person, subsequently identified as Jeremy Bowden, fired six shots at Unified Police Department of Greater Salt Lake ("UPD") Officer Cory Tsouras while Officer Tsouras was in his patrol car. Officer Tsouras quickly drove away from Mr. Bowden towards the Rocket Express car wash. Officer Tsouras exited his patrol vehicle and surveyed the area. Mr. Bowden fired more shots at Officer Tsouras. Officer Tsouras retreated from his vehicle and while doing so, lost sight of the person shooting at him. Officer Tsouras saw a male who he incorrectly inferred was Mr. Bowden trying to enter the car wash office. Officer Tsouras fired at the male who he thought was Mr. Bowden, hitting him twice. It was subsequently discovered that Officer Tsouras had in fact shot and wounded Dustin Evans who was not the gunman (Mr. Bowden) previously involved in the incident, but rather was a civilian trying to find safety from the violence around him.

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.

(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 16² and Utah Code 17-18a-203³, among other legal authority. Pursuant to this authority, the

² **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.

³ **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

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"⁴ potential criminal charges with the D.A.'s Office by presenting evidence to the D.A.'s Office that may support the filing of criminal charges against a person who may have committed a criminal offense. Law enforcement agencies present all the relevant facts presently known to them.

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

Legal Standards

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

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

Ethical Standards

The D.A.'s Office files cases that satisfy ethical standards and considerations in addition to legal standards for filing⁵. 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.

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

⁴ 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).

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

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 (success) at trial. A screening decision includes a consideration of factors that a jury may consider in weighing testimony, evaluating evidence, apply 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 Association⁶ and the American Bar Association—organizations that address the prosecution function and provide guidance in screening a case. These ethical screening standards are helpful to prosecutors deciding whether a case ought to be filed.

⁶ 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.

...

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.

“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 set forth above and operates in conjunction with other legal authority. The legal defense of “justification” could apply to any potential criminal charge; some of the potential criminal charges a police officer could face through an improper use of deadly force could include criminal homicide, murder (or attempted murder); aggravated assault; or other offenses set forth in the criminal code. The legal defense of “justification” is applicable to any potential criminal charge.

A person’s use of deadly force (including but not limited to use of deadly force by peace officers) is “justified” when the use of deadly force conformed to the statutes referenced above. Persons may lawfully defend themselves under circumstances outlined by law, and are afforded the legal defense of “justification” for the lawful use of deadly force in accordance with statutes. Utah Code Ann. 76-2-402 states that a “person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person’s imminent use of unlawful force.” *Id.* This section also states: “A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person’s imminent use of unlawful force, or to prevent the commission of a forcible felony⁷.” *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

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

injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use of unlawful force" U.C.A. 76-2-402(1)(a),(b). Use of deadly force by *peace officers*: "the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person," or to effect an arrest under circumstances set forth in law. See, U.C.A. 76-2-404. A peace officer's use of deadly force is "justified" when that officer "reasonably believes⁸" that the use of deadly force is "necessary to prevent" the threat of "death or serious bodily injury."

This OICI investigation and our review that followed was conducted in accordance with an OICI investigation protocol previously established and in conformity with recently enacted legislation governing investigations of OICI events. The OICI investigation protocol strives to establish an investigation methodology and process that provides the D. A.'s Office with the evidence needed to review the investigation to determine whether a police officer's use of deadly force conformed to the above referenced statutes. If the use of deadly force conformed to the statutes, the use of deadly force is "justified," and the legal defense of "justification" is available to the officer such that criminal charges cannot be filed against the officer and the criminal investigation into the actions of the officer is concluded.

If the use of deadly force does not conform to the statutes above, the 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 may not afford the officer the legal defense of "justification." Further consideration may be needed to determine whether, and if so which criminal charges can and should be filed against the officer if any.

Just because the legal defense of "justification" may not be available (because the use of deadly force did not conform to the statutes) does not therefore necessarily mean that criminal charges should be filed against the officer. For instance, the evidence available to the District Attorney may not support criminal charges, the case may not have a reasonable likelihood of success at trial, the interests of justice may not be served by a prosecution, or other factors may preclude a prosecution. Again, as discussed in more detail below, further consideration may be required to determine whether the use of deadly force warrants criminal charges.

⁸ As mentioned above, U.C.A. 76-4-202 and 404 constitute legal defenses to potential criminal charges. Utah Code doesn't 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. We acknowledge that *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.) However, *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," *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), 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. See, *Tennessee v. Garner*, 471 U.S., at 8-9 (the question is "whether the totality of the circumstances justify[es] a particular sort of . . . seizure").

Screening Criminal Charges

As discussed further below, we cannot conclude that Officer Tsouras' conduct was "justified;" we cannot say that his conduct complied with the statute that provides the legal defense of "justification." Specifically, we cannot conclude Officer Tsouras reasonably believed that deadly force was necessary against Mr. Evans.

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

We screened a criminal case involving Officer Tsouras' use of deadly force thusly: we considered whether Officer Tsouras reasonably believed that deadly force was necessary against Mr. Evans and therefore "justified" in his conduct. We decided we cannot conclude it was "justified." Next we considered whether there was a reasonable likelihood of success at trial if we charged Officer Tsouras with a crime. To evaluate our likelihood of success, we considered whether we could prove each element of a criminal offense beyond a reasonable doubt and to the unanimous satisfaction of a jury. As discussed in more detail below, we don't believe that we can prove a criminal case beyond a reasonable doubt; therefore, legal and ethical standards require us to decline criminal charges. We don't believe Officer Tsouras had a criminal mental state at the time he used deadly force against Mr. Evans. We believe Officer Tsouras mistook Mr. Evans for the gunman. We believe Officer Tsouras made a mistake when he used deadly force against Mr. Evans, but we do not believe that mistake supports a criminal charge.

States of Mind

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

76-2-103 Definitions.

A person engages in conduct:

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

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

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

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

As discussed in more detail below, our process of screening criminal charges included an analysis and consideration of each of the above states of mind. We asked whether we could prove that Officer Tsouras acted with any of the mental states enumerated above. For the reasons outlined below, we do not believe Officer Tsouras' mistake meets the definitions of the above referenced mental states.

INVESTIGATION

During the 2015 Utah State Legislature's General Session, the legislature enacted U.C.A. 76-2-408 which sets forth in relevant part the following provisions governing the investigation of peace officers' use of deadly force:

76-2-408 Peace officer use of force -- Investigations.

(1) As used in this section:

(a) "Dangerous weapon" is a firearm or an object that in the manner of its use or intended use is capable of causing death or serious bodily injury.

(b) "Investigating agency" is a law enforcement agency, the county or district attorney's office, or an interagency task force composed of officers from multiple law enforcement agencies.

(c) “Officer” is a law enforcement officer as defined in Section 53-13-103.

(d) “Officer-involved critical incident” is any of the following:

(i) the use of a dangerous weapon by an officer against a person that causes injury to any person;

...

(2) When an officer-involved critical incident occurs:

(a) upon receiving notice of the officer-involved critical incident, the law enforcement agency having jurisdiction where the incident occurred shall, as soon as practical, notify the county or district attorney having jurisdiction where the incident occurred; and

(b) the chief executive of the law enforcement agency and the county or district attorney having jurisdiction where the incident occurred shall:

(i) jointly designate an investigating agency for the officer-involved critical incident; and

(ii) designate which agency is the lead investigative agency if the officer-involved critical incident involves multiple investigations.

(3) The investigating agency under Subsection (2) may not be the law enforcement agency employing the officer who is alleged to have caused or contributed to the officer-involved critical incident.

...

To comply with state law requiring an outside agency to investigate an OICI, UPD asked the Salt Lake City Police Department (“SLCPD”) to investigate this matter together with investigators from the D.A.’s Office.

On December 8, 2015, SLCPD and D.A.’s Office investigators presented the investigation findings to the District Attorney for review and this opinion letter. During the presentation of the investigation findings, both SLCPD personnel and D.A.’s Office investigators reported that UPD was helpful and accommodating with the investigation’s needs, but did not perform any investigation of the OICI itself.

FACTS

The following facts were developed from the OICI protocol investigation. Should additional or different facts subsequently come to light, the opinions and conclusions contained in this letter may likewise be different.

In the evening⁹ of October 30, 2015, UPD Officer Nate Clark was conducting surveillance on a stolen vehicle parked in the parking lot of the “Mouse Pad¹⁰” at 38 West, 7200 South, Midvale, Utah. Officer Clark saw a man walk towards the stolen truck and attempted to make contact him. Instead of stopping and talking with the officer, the man, subsequently identified as Jeremy Bowden ran through the Mouse Pad parking lot in a westerly direction and across a field and into a parking lot.

UPD Officer Corey Tsouras was backing up Officer Clark and heard Officer Clark say the suspect was “going mobile.” Officer Tsouras drove his police car to intercept Mr. Bowden. As Officer Tsouras approached Mr. Bowden in the Les Schwab Tire store parking lot, Mr. Bowden opened fire on Officer Tsouras, striking Officer Tsouras and his vehicle. Officer Tsouras sped away westbound from Mr. Bowden and stopped his patrol car north of the Rocket Express Car Wash at 180 West, 7200 South. Officer Tsouras lost sight of Mr. Bowden as he drove away.

Utah Highway Patrol (“UHP”) Trooper Andrew O’Gwin was cleaning his car on the south side of the Rocket Express Car Wash. He heard the radio traffic about the stolen car and the suspect nearby and drove his UHP patrol car to assist. Trooper O’Gwin heard Mr. Bowden shooting at Officer Tsouras but did not see it. As Trooper O’Gwin rounded the southeast corner of the car wash and drove north, he saw a man firing a gun in a westerly direction. Trooper O’Gwin did not know who the gunman in front of him was. Even though the person was shooting a gun, Trooper O’Gwin did not see the gunman directly threaten Trooper O’Gwin. The gunman had a two-handed grip on the weapon and moved in what Trooper O’Gwin believed to be a tactical manner such that Trooper O’Gwin could not rule out the gunman was a police officer. Trooper O’Gwin did not fire at the gunman. Trooper O’Gwin shouted commands at the gunman who did not comply and hid behind a wall instead. Eventually, the gunman reappeared and ran northbound to a wall separating the car wash property and an apartment complex. Trooper O’Gwin continued to yell commands to the gunman but the gunman did not comply. Trooper O’Gwin saw the gunman climb the wall and disappear.

About this same time, Dustin Evans, a person hitherto uninvolved with the above events, arrived at the car wash from the west. Mr. Evans drove in the lanes to enter the car wash and heard gunfire. As Mr. Evans stopped his car to the north of the car wash, Officer Tsouras drove past him westbound and stopped his patrol vehicle to the west of Mr. Evans’ vehicle. Mr. Evans ducked down in his vehicle and then crawled over the center console and exited the vehicle out the passenger door.

Around this same time, Officer Tsouras left his patrol vehicle and looked for the gunman (Mr. Bowden) who was east of Officer Tsouras. Officer Tsouras, consistent with his training, put distance between him and the gunman and moved westbound along a high masonry wall lined with trees and shrubs. Officer Tsouras had lost sight of the gunman and still could not see him. Officer Tsouras left the vehicle’s siren and overhead emergency lights running. Officer

⁹ It was dark during all relevant times; buildings and parking lots were lighted to varying degrees by outdoor electric lighting as well as ambient light.

¹⁰ The “Mouse Pad” is an “internet café” business that offers computers and internet connectivity to its customers.

Tsouras believed the gunman was still east of Officer Tsouras, but the gunman remained out of Officer Tsouras' sight.

Mr. Evans was also east of Officer Tsouras and running southbound dressed in dark clothing when Officer Tsouras saw Mr. Evans. Although Officer Tsouras later recounted that he shouted commands to Mr. Evans, Mr. Evans later said he didn't hear anyone saying anything¹¹. When Officer Tsouras spotted Mr. Evans, Mr. Evans appeared to be trying to enter the car wash office. Officer Tsouras later stated that to him, Mr. Evans appeared to be the same person who had just recently tried to kill Officer Tsouras, and it appeared that the person was going to enter the car wash offices and/or wait for other responding police officers to ambush them. However, Officer Tsouras did not confirm that the person in front of him was the gunman from the earlier shooting incident nor did the person in front of him present any direct, discernable threat to Officer Tsouras or a another person.

Officer Tsouras later recounted that Mr. Evans did not comply with any of Officer Tsouras' commands, and Officer Tsouras believed he saw something in Mr. Evans' hands that he appeared to be manipulating. Officer Tsouras later said that to him it appeared Mr. Evans was possibly reloading or repairing a malfunctioning firearm, although Officer Tsouras never saw nor was presented with any weapon by Mr. Evans. Officer Tsouras later stated he believed he needed to use deadly force against the person and shot Mr. Evans twice, hitting Mr. Evans in the left hand and right knee. Mr. Evans went down and was secured and treated for his injuries. Mr. Bowden was located and arrested a short time later.

OICI protocol investigators interviewed several witnesses to the incident, many of which are recounted below:

Officer Nate Clark

OICI protocol investigators interviewed UPD Officer Nate Clark with his attorneys present on October 31, 2015. Officer Clark described the circumstances that brought him to the Mouse Pad. Officer Clark said he was on an unrelated call looking for another subject when a confidential informant told him that he could find a person of interest¹² at the Mouse Pad. Officer Clark said he went to the Mouse Pad and drove through the parking lot. Officer Clark said he saw a black Chevy Silverado truck with dealer license plates parked in the lot on the west side of the Mouse Pad. Officer Clark said the truck caught his attention and he wondered whether it might be stolen.

Officer Clark said he tried to confirm the status of the truck by comparing the Chevy Silverado to any similar stolen vehicles on the "hot sheet" available to police. Officer Clark said he found a stolen truck on the "hot sheet" that matched the Chevy in the Mouse Pad parking lot. Officer Clark said he specifically noted that the "hot sheet" listed a black Silverado with Hummer wheels and chrome side steps; this exactly matched the description of the truck Officer Clark was viewing at the time. Officer Clark said he called for another unit to come assist him.

¹¹ It is reasonable that Mr. Evans may not have heard Officer Tsouras' commands due to the siren running nearby.

¹² This person of interest was apparently not Jeremy Bowden.

Officer Clark said that while he waited for a backup officer to arrive, he saw a white male, later identified as Jeremy Bowden, approach the truck as though he were going to get in. Officer Clark described the man as thirty to forty years old, wearing a black bandana on his head, a black jacket and blue jeans.

Officer Clark said although his backup hadn't arrived at the time, he pulled up to Mr. Bowden in his marked police car and challenged him. Officer Clark said Mr. Bowden immediately fled from him westbound through the parking lot behind the EZ Pawn store. Officer Clark said he stopped pursuing the man; he heard Officer Cory Tsouras on the radio saying he was to the west and would intercept Mr. Bowden.

Officer Clark said as he walked back to his patrol car, he heard five or six gunshots. Officer Clark said there was a lull after which he heard a second volley of gunfire. Officer Clark said he got in his patrol car and drove west toward the Rocket Express Car Wash at 180 West, 7200 South. When he arrived at the car wash, Officer Clark said he saw Officer Tsouras standing next to an injured man on the ground. Officer Clark said he told Officer Tsouras that the man on the ground was not the same man Officer Clark had chased on foot from the stolen truck. Officer Clark said that he and Officer Tsouras had been joined by UPD Sgt. Morton; Officer Clark said Sgt. Morton told the officers that a man (Mr. Bowden) jumped the fence north of the car wash and was still at large.

Trooper O'Gwin

OICI protocol investigators interviewed UHP Trooper Andrew O'Gwin with his attorney present.

Trooper O'Gwin said he was at the Rocket Express car wash vacuuming his UHP vehicle. Trooper O'Gwin said his car radio was turned on and in scan mode. Trooper O'Gwin said he heard police radio traffic discussing a stolen truck that was "going mobile" nearby.

Trooper O'Gwin said that while he was vacuuming his car, he "looked up and saw a UPD patrol vehicle with its overhead emergency lights and sirens on, traveling east at a high rate of speed on 7200 South." Trooper O'Gwin said the police car turned into a parking lot on the north side of the street, and immediately came back out onto 7200 South heading eastbound again.

Trooper O'Gwin said he saw the police car turn into the nearby Les Schwab parking lot east of the car wash. Trooper O'Gwin said he "assumed that the unit was responding to the possible stolen truck, and that a pursuit was happening close" to his location. Trooper O'Gwin said he got into his patrol vehicle "and started driving east on the south side parking lot of the car wash." Trooper O'Gwin said that he "heard several gunshots. The gunshots were loud and I knew that it was in the immediate vicinity...."

Trooper O'Gwin said he "saw a male individual dressed in a black coat and blue jeans running westbound in the Les Schwab parking lot." Trooper O'Gwin said he "activated [his]

overhead emergency lights as [he] was turning left into the Les Schwab parking lot, now facing northbound.”

Trooper O’Gwin said he saw the male “slightly change his angle walking north while raising a handgun in a two handed grip, and firing multiple times.” Of the suspect, Trooper O’Gwin said: “he seemed to me to have military/law enforcement training, because of the very aggressive stance and stable shooting platform he used while moving and shooting with a two handed grip. The radio traffic on the designated Metro Gang radio channel made me concerned he was a plain clothes Metro Gang officer who was there also providing assistance to the UPD officer [who was at the time north of the carwash.]”

At this point, the suspect was fifty feet or so north of Trooper O’Gwin’s position. Trooper O’Gwin said he got out of his car and drew his “sidearm immediately, and, not knowing who the male individual was...gave one loud verbal command to ‘Get on the ground.’” Trooper O’Gwin said the suspect “walked behind [a] brick wall that enclosed a dumpster,” after which Trooper O’Gwin lost visual contact with the suspect.

As Trooper O’Gwin started to advance towards the suspect to try to regain visual contact, he said he heard several gunshots. Trooper O’Gwin said he couldn’t tell who was shooting or from where. Trooper O’Gwin said as he moved back towards his vehicle, he “saw the male individual reappear from behind the dumpster.” Trooper O’Gwin said he the suspect “running northbound away from [him] along a cinder block privacy wall that separated the Les Schwab parking lot and the Park Station Apartments.” Trooper O’Gwin said he saw the suspect “stop where the wall merged with the Les Schwab building, and [climb over] the privacy wall.”

Trooper O’Gwin said: “At this time I realized the male individual was the suspect, and was now fleeing from the scene. I radioed Salt Lake Dispatch letting them know the suspect jumped over a wall heading northbound.”

Trooper O’Gwin said he got his rifle out of his patrol vehicle. Trooper O’Gwin said that he saw a “female attendant of the car wash still standing next to the car wash bay door located on the east side of the building.” Trooper O’Gwin said he “ran to her location, and advised her to take cover, and get on the south side of the building away from the gunfire.”

Trooper O’Gwin said he “advanced to the northeast corner of the building.” Trooper O’Gwin said: “As I rounded the corner I observed one or two UPD Officers standing approximately twenty feet west of the corner along the building. In front of them was a male individual laying on the ground. He appeared to have been shot multiple times.”

Trooper O’Gwin said asked the injured male “if the dark colored SUV that was in the middle lane just east of the carwash entrance terminals” was his. Trooper O’Gwin said the male answered that it was. Trooper O’Gwin said he “attempted to open the doors, and clear the vehicle.” Trooper O’Gwin said: “All the doors were locked, so I illuminated the inside with my light to make sure no one else was inside the vehicle.”

Trooper O’Gwin said that as more police officers arrived on the scene, he saw a West Jordan Police K-9 unit stop just north of his patrol car. Trooper O’Gwin said he made contact with the K-9 officer to let him know information about Mr. Bowden--the suspect who climbed over the wall.

As Trooper O’Gwin and other officers searched for Mr. Bowden, Trooper O’Gwin said he heard radio traffic indicating that other officers had located Mr. Bowden and taken him into custody.

Officer Corey Tsouras

UPD Officer Corey Tsouras declined to be interviewed by OICI protocol investigators; however, Officer Tsouras provided a written statement and a follow up statement through his attorneys.

In relevant part, Officer Tsouras wrote that he heard Officer Clark on the police radio discussing Officer Clark’s work on the stolen truck in the Mouse Pad parking lot. Officer Tsouras wrote that he heard Officer Clark broadcast that the suspect, later identified as Mr. Bowden was on the move and headed westbound.

Officer Tsouras said that he drove his patrol car to intercept Mr. Bowden. Officer Tsouras said that he saw the suspect in the Les Schwab Tire store parking lot moving westbound. As Mr. Bowden neared Officer Tsouras’ vehicle, Mr. Bowden opened fire with several shots at Officer Tsouras. Officer Tsouras said that Mr. Bowden’s rounds hit his patrol car and shattered windows; rounds went through his seat’s headrest and impacted his mobile data terminal (laptop computer). And, although apparently unbeknownst to Officer Tsouras at the time, one round hit him Officer Tsouras in the chest and impacted the trauma plate of his body armor.

Officer Tsouras said that he wanted to put distance between him and the suspect. Officer Tsouras said he quickly drove away from the suspect and as he “sped up after the first shot was fired, [he] heard approximately three more shots being fired.” Officer Tsouras said he announced “shots fired, shots fired, shots fired” over the police radio.

Officer Tsouras said that when he “reached the farthest west portion of the Rocket Express Car Wash, [he] stopped [his] patrol vehicle facing southwest at a locked gate.” Officer Tsouras said he got out of his patrol car, “drew [his] duty weapon from the holster and turned east in the direction of where [he] last saw the suspect.”

Officer Tsouras said he saw “the suspect had advanced on [him] from the middle of Les Schwab parking lot to the border of the Les Schwab and Rocket Express Car Wash parking lot.” Officer Tsouras said the “suspect was now approximately 20 yards from where he was [then] standing.” Officer Tsouras said he “saw approximately 3 more muzzle flashes from the gun all coming from one spot.” Officer Tsouras said he “retreated to the front of [his] patrol vehicle to gain cover behind the engine block.”

Officer Tsouras said he knew “Officer Clark and other responding officers would be arriving on scene from the way [he] entered the Les Schwab parking lot.” Officer Tsouras said: “based on this, I believed the suspect would probably continue towards me rather than retreat back to the east and face multiple officers.”

Officer Tsouras said he moved away from his vehicle to prevent the suspect from “flanking him.” Officer Tsouras said he lost sight of the suspect and believed the suspect was “likely in the area of [his] patrol vehicle as he had been closing the distance between [them] from the first round of bullets he fired at [Officer Tsouras.]”

Officer Tsouras said that as he “stepped off the curb and out onto the drive thru of the Rocket Express Car Wash, [he] observed a male, matching the description of the suspect, dark jacket and jeans, in a crouching position under the awnings where customers purchase carwashes.” Officer Tsouras said he was about thirty feet away from the male. Officer Tsouras said he “observed the male manipulating something black in his hands that appeared to be his weapon, which he was re-loading or unjamming.” Officer Tsouras said he also saw police car lights to the east, “in the direction the suspect was facing.”

Officer Tsouras said he “feared that the suspect had positioned himself in a crouching position [*sic*] and against the building to allow himself to see 180 degrees and gain a tactical advantage over officers responding to the scene.” Officer Tsouras said that he “feared the suspect either would shoot at any responding officer(s) as they passed the building either on foot or in their patrol vehicles or turn and begin firing at [Officer Tsouras.]”

Officer Tsouras said he “verbally yelled at the suspect to ‘show me your hands, show me your hands,’ with no compliance.” Officer Tsouras said “at this point the suspect was positioned to see responding officers arriving and he knew [Officer Tsouras’] location based on [his] verbal commands.” Officer Tsouras said he “knew [he] needed to act quickly before he started shooting at me or the responding officers.” Officer Tsouras said he “fired 3-4 shots at the suspect.” Officer Tsouras said he “observed the suspect fall back (with his head to the west) and drop the black object in his hands down by his feet.”

Officer Tsouras said he “immediately yelled more verbal commands to the male, ‘Police, show me your hands, show me your hands.’” Officer Tsouras said he “observed the suspect’s left hand try to reach down for the object near his feet.” Officer Tsouras said that he feared the “suspect was reaching for his weapon, [and he] fired 3-4 more shots at the suspect.”

Officer Tsouras said the male stopped moving. Officer Tsouras said he moved towards the male and as he got to the person, Officer Tsouras said he “saw the black object down by the male’s feet was a long lanyard attached to keys.” Officer Tsouras said he asked the male: “where’s the fucking gun, where’s the gun[?]” Officer Tsouras said the “male stated he was ‘not the guy’ and ‘you shot me.’” Officer Tsouras said the male pointed to a vehicle parked under the car wash awning close to them and stated that it was the male’s vehicle.

Officer Tsouras said he saw that the male was shot in the hand and somewhere in the male's lower extremities. Officer Tsouras called for medical assistance to respond.

Officer Tsouras said Officer Clark and UPD Officer VanWagoner came to where he was to assist him. Officer Tsouras said Officer Clark "looked at the male and stated he did not believe the male was the suspect." Officer Tsouras said he "responded to Officer Clark that this was the suspect, but Officer Clark stated he did not think it was."

Officer Tsouras said eventually, he was transported to the Salt Lake Police Department. He said he "removed [his] uniform shirt...and took off [his] bullet proof vest." As he inspected his vest, Officer Tsouras said he found a bullet lodged in the front of the vest which the vest had stopped from entering Officer Tsouras' chest.

Sgt. James Morton

OICI protocol investigators interviewed UPD Sgt. James Morton with his attorney present. Sgt. Morton said that on October 30, 2015, he was on duty assisting another police agency when he heard UPD Officer Clark say on the police radio that that someone was going back to a truck that Officer Clark was watching.

Sgt. Morton said he drove his police car to the area. Sgt. Morton said that by the time he eastbound on 7200 South, Sgt. Morton heard Officer Clark on the radio say, "shots fired, shots fired" and that the suspect was running west bound through the Les Schwab store parking lot.

Sgt. Morton said that he was at about 180 West and 7200 South going eastbound when he looked over his left shoulder as he passed the car wash. Sgt. Morton said he noticed a UHP Trooper (who he subsequently identified as Trooper O'Gwin) wearing a bright colored uniform. He said he saw the trooper "tactically retreat back to his vehicle." Sgt. Morton said that shortly after he heard Officer Clark on the radio call "shots fired," Sgt. Morton heard several shots—he said probably four or five rounds fired.

Sgt. Morton said he was still driving eastbound and was east of the car wash at 180 West and 7200 South when he looked over his shoulder saw a man jump the fence to the north.

Sgt. Morton said he turned his vehicle around and traveled westbound on 7200 South to High Tech Drive. Sgt. Morton said he turned north and drove in the direction the suspect fled. Sgt. Morton said he arrived at an apartment complex and helped set up containment to try to locate the fleeing suspect.

Dustin Evans

OICI protocol investigators interviewed Dustin Evans with his attorney present. Mr. Evans said he arrived at the Rocket Express Car Wash at about 8:30 p.m. Mr. Evans said he heard a police siren in the distance coming towards him. Mr. Evans said he saw a gunman

walking backwards and shooting at a police car. Mr. Evans said he stopped his car and ducked down in his vehicle. Mr. Evans said he tried to call his wife, but she didn't answer.

Mr. Evans said that when his wife didn't answer, he looked back up out of his vehicle and saw the gunman over by a trash dumpster. Mr. Evans said he crawled over the center console in his vehicle and got out of the car's front passenger door. Mr. Evans said he went towards the car wash office on the east side of the building.

Mr. Evans said he could see through a glass door into the car wash office on the east side of the building. Mr. Evans said he saw employees inside the car wash office. Mr. Evans said one employee was holding a glass door closed while another employee locked the door. Mr. Evans said he gestured to the employees inside the office. Mr. Evans said he was on the sidewalk next to the office glass door when the glass in the door shattered and he perceived he had been shot. Mr. Evans said he fell to the ground.

Mr. Evans said a police officer came to him and asked him where the gun was. Mr. Evans said he replied he didn't have a gun. Mr. Evans said another police officer asked him whether the vehicle parked nearby was his, and he replied that it was. Mr. Evans said that police officers and then medical personnel treated his injuries and he was transported to the hospital.

Mr. Evans said he was shot through his left hand and through his right knee. When asked about what he heard prior to being shot, Mr. Evans said that he did not hear anyone say anything.

Other Interviews

OICI protocol investigators interviewed several other police officers who responded and civilian witnesses. The recordings and notes of these interviews are part of the OICI protocol investigators' file, but are not set forth here.

Physical Evidence

OICI protocol investigators inspected and documented items of physical evidence at the scene and other physical evidence related to the event.

UHP Dash-Cam

OICI protocol investigators reviewed "dash-cam" video from Trooper O'Gwin's patrol car. The UHP dash-cam video was helpful in that the recording captured Mr. Bowden's movements after allegedly firing his initial volley at Officer Tsouras, and it captured Mr. Bowden's alleged subsequent shooting at Officer Tsouras. The video also captured the sounds of Officer Tsouras firing at Mr. Evans. OICI protocol investigators were able to use the recording to construct a partial timeline of the events.

According to the UHP dash-cam video, it appears that approximately thirty seconds elapsed between the time Mr. Bowden allegedly fired his second volley of shots (or shot) at Officer Tsouras and the recording captured the sound of Officer Tsouras firing at Mr. Evans.

The UHP dash-cam video was also the only video recording of which we're aware that recorded audio information. Although the trooper's vehicle was several yards away from Officer Tsouras and Mr. Evans, Officer Tsouras' siren overwhelms much of the other audio information captured on the UHP dash-cam. It seemed that Officer Tsouras' siren may have obscured verbal commands he may have issued to Mr. Evans prior to firing at him.

Rocket Express Surveillance Video

OICI protocol investigators also reviewed surveillance camera videos from the Rocket Express Car Wash. These videos were also helpful as they captured some of the incident from several different angles. The videos also depict the various lighting conditions existing at the time. The videos may not accurately depict a timeline as the video recording appears at times to skip.

In several videos (obtained from different cameras and therefore from different vantage points), Mr. Evans is seen arriving at the car wash and stopping before Officer Tsouras arrived north of the car wash and got out of his patrol car. From these videos, it seems possible that Officer Tsouras did not see Mr. Evans' vehicle arrive at the car wash. It seems plausible that once Officer Tsouras got out of his patrol car and surveyed the surroundings, Mr. Evans' vehicle was already part of the scene. Had Mr. Evans arrived after Officer Tsouras arrived, Officer Tsouras may have had an indication that Mr. Evans was not the shooter who just tried to kill Officer Tsouras. As it happened, however, Mr. Evans and his vehicle were essentially already in position when Officer Tsouras got out of his patrol car and began to observe what was going on.

In one video, Mr. Evans can be seen exiting from the passenger side of his vehicle. Mr. Evans can be seen running southbound towards the car wash office door with an item in his hand. While the video is not entirely clear, it appears that Mr. Evans was holding an object, possibly a lanyard, perhaps attached to car keys. At one point, it appears that Mr. Evans pointed the object (possibly car keys) at his vehicle, perhaps in an attempt to remotely lock the vehicle doors. When asked about objects in his hand at the time, Mr. Evans said he didn't believe he had anything in his hands, but if he did, he believed it may have been his car keys.

And in one video, Mr. Evans' clothing can be seen. It appears Mr. Evans was wearing a hat, a dark coat, dark trousers or jeans, a light colored shoes.

Photos

OICI protocol investigators obtained and reviewed surveillance video and photos from the Mouse Pad showing Mr. Bowden inside. Video stills depict Mr. Bowden wearing a dark bandana (or other covering) on his head, a dark jacket, dark trousers or jeans and light colored shoes.

DISCUSSION

Use of Deadly Force

Officer Tsouras said he used deadly force because he believed deadly force was necessary under the circumstances. We don't take issue with the need for deadly force. It is alleged¹³ that Mr. Bowden fired multiple rounds directly at Officer Tsouras in his patrol car, one of which hit Officer Tsouras in the chest. Then Mr. Bowden allegedly continued to shoot at Officer Tsouras after Officer Tsouras distanced himself from Mr. Bowden. Mr. Bowden allegedly committed several violent felonies against Officer Tsouras and allegedly demonstrated a clear willingness and ability to kill a police officer. Had Officer Tsouras (or anyone else) used deadly force against Mr. Bowden, our analysis would probably be straightforward.

The analysis is considerably more complicated since Officer Tsouras used deadly force not against Mr. Bowden, but against Mr. Evans; a person who, as it turned out, had done nothing other than find himself amongst gunfire in a public place.

While it is clear that Officer Tsouras shot the wrong person who he mistook for the person who just tried to kill him, our "justification" analysis asks whether Officer Tsouras' mistaken belief was reasonable in this instance and under these circumstances. If Officer Tsouras' mistaken belief was reasonable under the circumstances, Officer Tsouras' conduct would be "justified" under Utah law and Officer Tsouras would have a legal defense to criminal charges. If we cannot conclude that Officer's Tsouras' mistake was reasonable, we cannot conclude that his use of deadly force against Mr. Evans was "justified."

We believe several factors probably combined that may have facilitated Officer Tsouras' belief that Mr. Evans was the gunman and contributed to Officer Tsouras' belief that deadly force against Mr. Evans was necessary:

- Mr. Bowden and Mr. Evans were of a similar build, height and weight and dressed similarly;
- From Officer Tsouras' vantage point, Officer Tsouras was to the west of where he believed Mr. Bowden was and where Mr. Evans was;
- Officer Tsouras' siren was still running when he shouted commands to Mr. Evans, making it improbable that Mr. Evans heard Officer Tsouras;
- When Mr. Evans didn't comply with the commands, Officer Tsouras' concern was heightened;
- Officer Tsouras said he saw something in Mr. Evans' hands which he appeared to manipulate; and,

¹³ Mr. Bowden has been charged with several felony offenses in connection with this incident; as with every person accused of crimes, Mr. Bowden is presumed innocent unless and until proven guilty in a court of law.

- Officer Tsouras said it appeared that the person he believed was the gunman was about to enter the car wash office, or tactically position himself to shoot and kill other arriving officers.

While we appreciate that the above factors probably contributed to Officer Tsouras' mistaken belief that Mr. Evans was the gunman and that Officer Tsouras needed to use deadly force against Mr. Evans, we nevertheless cannot conclude that Officer Tsouras' mistaken belief was reasonable. The following factors contributed to our decision that Officer Tsouras' mistake was not reasonable under the circumstances:

- Officer Tsouras knew he lost sight of Mr. Bowden, and Officer Tsouras knew he traveled a considerable distance away from Mr. Bowden;
- When Officer Tsouras lost visual contact with Mr. Bowden, Mr. Bowden was northeast of Officer Tsouras; when Officer Tsouras visually acquired Mr. Evans, Mr. Evans was southeast of Officer Tsouras; in other words, when Officer Tsouras saw Mr. Evans, Mr. Evans was not in the same place or area where Officer Tsouras last perceived Mr. Bowden;
- A considerable amount of time (more than about 30 seconds) elapsed between the time when Officer Tsouras last saw Mr. Bowden and Officer Tsouras shot at Mr. Evans;
- Mr. Evans was in a public place where an uninvolved civilian could have been (and indeed was);
- Officer Tsouras knew or should have known he had to reacquire and reassess his target, due to the break in time and space between Officer Tsouras' awareness of Mr. Bowden and his awareness of Mr. Evans;
- Officer Tsouras stated he thought Mr. Evans may have had a weapon that Mr. Evans appeared to be manipulating, but Officer Tsouras did not say that he saw Mr. Evans with a gun or weapon;
- Officer Tsouras also did not say that, after acquiring an awareness of Mr. Evans that Mr. Evans presented a threat to him or those inside the car wash office beyond that which he mistakenly inferred;

From the facts outlined earlier, it seems Officer Tsouras made several inferences about Mr. Evans. We cannot conclude that the inferences Officer Tsouras made about Mr. Evans were reasonable at the time and under the circumstances. Officer Tsouras had to infer that Mr. Evans was the gunman from earlier. And Officer Tsouras had to infer that this person was a threat to Officer Tsouras or to others at the time Officer Tsouras decided to use deadly force against that person. We believe Officer Tsouras used those inferences when we chose to use deadly force against Mr. Evans.

While not definitive, and appreciating his likely different state of mind, we do not overlook the actions of Trooper O’Gwin. Trooper O’Gwin saw a person in front of him firing a weapon. Trooper O’Gwin yelled commands to the shooter who did not comply. Although he probably would have been justified in using deadly force against Mr. Bowden, Trooper O’Gwin did not use deadly force because he said he could not be sure of the identity of his target. Trooper O’Gwin’s reservations about his target informed his decision not to use deadly force under the circumstances and at the time.

In contrast to Trooper O’Gwin, Officer Tsouras didn’t see Mr. Evans with a weapon; he didn’t see Mr. Evans shooting a gun or otherwise threatening him or anyone else. Officer Tsouras said he saw Mr. Evans appear to manipulate something like a weapon, but Officer Tsouras did not articulate what about Mr. Evans presented a threat to him or others at the time Officer Tsouras elected to use deadly force against Mr. Evans. Officer Tsouras inferred both an identity and a threat to his target; however, there was nothing visible to Officer Tsouras that communicated Mr. Evans was a threat at the time Officer Tsouras decided to use deadly force¹⁴.

We cannot infer a threat to justify the use of deadly force where the facts did not exist to support the inferences. Inferences without facts sometimes yield incorrect results. We cannot conclude that Officer Tsouras’ inferences and his resulting decision to use deadly force was reasonable. Since we cannot say that Officer Tsouras reasonably believed deadly force was necessary against Mr. Evans, we cannot conclude that Officer Tsouras’ use of deadly force was “justified.” We believe the responsibility to discern threats against which deadly force is appropriately used is upon police officers, rather than obliging citizens to negate the appearance of a threat against which deadly force may be used.

Beyond a Reasonable Doubt

As we discussed above, just because we cannot say that Officer Tsouras’ use of deadly force against Mr. Evans was “justified,” it does not necessarily follow that his use of deadly force supports criminal charges. We must consider whether a criminal case against Officer Tsouras has a reasonable likelihood of success at trial and whether the case meets legal and ethical standards for prosecution. Unless we believe we can prove the elements of a potential criminal offense beyond a reasonable doubt, we cannot file a criminal case against Officer Tsouras.

We considered several statutes which may relate to Officer Tsouras’ conduct. We first considered criminal offenses that require proof of intentional or knowing (or purposeful conduct.) We believe there is no reasonable assertion (and we know of no evidence to support the conclusion) that Officer Tsouras intentionally or knowingly used deadly force against the wrong person. There is no evidence to suggest or prove that Officer Tsouras knew he used deadly force against someone other than the gunman. We believe all the evidence indicates that Officer Tsouras made a mistake; therefore, we did not consider filing a criminal charge which requires us to show an “intentional” or “knowing” state of mind.

¹⁴ We believe it is not unreasonable for citizens take measures (including running) to avoid violence around them; and it is reasonable for citizens to expect that they will not be shot by police officers unless they present a factually reasonable threat by some affirmative action by the citizen.

We next considered criminal statutes¹⁵ which require the prosecution to prove a person acted with a “reckless” state of mind. Utah State law defines “reckless” as conduct in which the actor is “aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur.” U.C.A. 76-2-103(3). The code observes that the: “risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.” *Id.*

In this matter, we don’t believe there’s evidence to conclude beyond a reasonable doubt that Officer Tsouras acted recklessly. To prove a criminal charge requiring a “reckless” state of mind, we would have to show that Officer Tsouras was aware of a risk that the person against whom he used deadly force was the wrong person and nevertheless went ahead and used deadly force. As we discussed above, there were a few factors that could have indicated to Officer Tsouras that Mr. Evans was the gunman. These factors are reasonable doubt that Officer Tsouras was aware of a risk that his target was not the gunman but used deadly force anyway. We do not believe we could prove beyond a reasonable doubt that Officer Tsouras acted recklessly.

Lastly, we considered criminal offenses which require a prosecutor only to prove beyond a reasonable doubt that a defendant acted with “criminal negligence.” Utah law defines acting with “criminal negligence” when the actor “ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur.” U.C.A. 76-2-103(4). The code elaborates that the “risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor’s standpoint.” *Id.*

Officer Tsouras may have acted with criminal negligence if we could prove beyond a reasonable doubt that his decisions and actions constituted a “gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor’s standpoint.” *Id.* It is unclear whether Officer Tsouras’ decision to use deadly force against Mr. Evans was a “gross deviation from the standard of care.” While we believe that Officer Tsouras did not correctly assess the situation when he decided to use deadly force, we cannot say beyond a reasonable doubt that his decision making process and conclusion represented a “gross deviation from the standard of care,” so we cannot conclude that we could prove a criminal offense which required us to prove a “criminal negligence” state of mind.

Even if we assume for the moment that we could prove beyond a reasonable doubt that Office Tsouras acted with “criminal negligence,” of the criminal statutes that outlaw “criminally negligent” conduct, none of them fit the facts presented here. So whether or not the prosecution could prove beyond a reasonable doubt that Officer Tsouras acted negligently, there nevertheless are no criminal statutes that fit the conduct in question.

¹⁵ For instance, we considered U.C.A. 76-5-112, Reckless Endangerment: “A person commits reckless endangerment if, under circumstances not amounting to a felony offense, the person recklessly engages in conduct that creates a substantial risk of death or serious bodily injury to another person.”

CONCLUSIONS

For the reasons outlined above, although we cannot conclude that Officer Tsouras' use of deadly force was "justified" under Utah law, we decline to file any criminal charge related to his use of deadly force.

When police officers use deadly force, the risk of mistake cannot be borne by innocent civilians. However, criminal charges as a remedy are only appropriate in instances where facts prove elements beyond a reasonable doubt, and there is a reasonable likelihood of success at trial, and the interests of justice are served by a prosecution. Whether or not other remedies exist, and whether or not the risk of mistake is reconciled in other forums, we do not believe a criminal remedy is appropriate in this case.

Our opinions and conclusions should not be misread to suggest moral judgment about Officer Tsouras' decisions and actions: right and wrong are qualitative judgments about actions; mistakes are factual errors. Anyone who recognizes Officer Tsouras' factual errors in this dynamic situation must also acknowledge how Officer Tsouras made the inferences in this context leading to his decision to use lethal force which subsequently can be viewed as a factual error. Officer Tsouras made a mistake—one which was not criminal in nature.

Thank you for the opportunity to review this interesting and challenging case. If you'd like to discuss this matter, or if I can be of any other assistance, please don't hesitate to let me know.

Very Truly Yours,

SIM GILL,
Salt Lake County District Attorney