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Chief Thayle "Buzz" Nielson  
West Valley City Police Department  
3600 South Constitution Boulevard  
West Valley City, UT, 84119

*Via Hand Delivery*

July 13, 2011

RE: *Investigation of Officer Jared Cardon's Use of Deadly Force*  
Our Case No.: 11-1577  
Incident Date: May 24, 2011  
Incident Location: 5275 West 3500 South West Valley City, Utah

Dear Chief Nielson:

As you know, the Office of the Salt Lake County District Attorney ("DA") is required by Utah State law to investigate officer involved critical incidents, including police officers' use of deadly (or potentially deadly) force used in the scope of their official duties.

On May 24, 2011, at 5275 West 3500 South, West Valley City, Utah, West Valley City Police Officer Jared Cardon fired three rounds from his firearm at a vehicle driven by Jose Contreras. A marking was located on the right front passenger wheel of the vehicle that was consistent with an impact from a round from a firearm. During a subsequent examination of the wheel, additional markings were located on the brake caliper of the same wheel that are also consistent with and highly suggestive of impact from another round from a firearm. The location of the third round could not be conclusively determined. West Valley City Police Department (hereinafter, the "Department") invoked the officer involved critical incident ("OICI") protocol. Pursuant to the protocol, Investigators from the DA's Office responded to the incident and with the Department conducted a joint investigation of the incident. Consistent with the OICI protocol, the DA's Office reviewed investigative findings from the incident. This letter reports those findings and outlines the conclusions the DA's Office reached regarding whether Officer Cardon's discharge of his firearm was justified.

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### MATERIALS RELIED UPON

The joint investigation of this incident developed facts ascertained through a variety of sources, many of which are set forth below:

- **WVCPD Reports** Re: Case No. 11i020218 (approximately 90 pages), which sets forth information about the incident as more fully described therein; including but not limited to the reports of Detective Maxwell dated May 24, May 27, May 30, and June 9, 2011; the report of Sergeant Bobrowski dated May 24, 2011; and the report of Detective Fossmo dated May 27, 2011;
- **Follow up Reports of District Attorney's Officer Investigator Vaun Delahunty** dated June 15, 2011 detailing the follow up interview of Anthony Thompson on June 8, 2011 and the examination of the suspect vehicle on June 9, 2011.
- **Follow up Report of District Attorney's Office Investigator Craig Watson** dated June 13, 2011 detailing his examination on June 9, 2011 of the suspect's vehicle held in evidence at West Valley City Police Department.
- **Photograph** taken for demonstrative purposes of the crime scene from the officer's point of view at the North end of the Hunsaker Meats building.
- **Photograph** taken on May 24, 2011 depicting the scene of the incident shortly after the events occurred with orange cones placed over shell casings and bullet fragments;
- **Aerial photograph** with inserted markings in red type labeled SC for shell casings and BF for bullet fragments;
- **Aerial photograph** with inserted markings in red type labeled "tire marks," "damaged fence and sign," "bicycles," and number 1, 2, 3, 4, and 5 for the evidence markers.
- **Photographs (4)** taken on June 8, 2011 depicting the front passenger wheel of the vehicle driven by the suspect involved in the incident;
- **West Valley City Public Safety Statement Form** completed by Officer Jared Cardon shortly after the incident.
- **Recorded Interview and Transcript of West Valley City Police Officer Jared Cardon**, conducted on May 27, 2011, wherein Officer Cardon described his involvement in and recollection of the incident;
- **Hand-Written Statement, Transcribed Interviews, and Diagrams of Anthony Thompson**, conducted on May 24 and June 8, 2011, wherein Thompson described his recollection of the incident;

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- **Hand-Written Statement and Transcribed Interviews of Ken Anderson**, conducted on May 24 and June 8, 2011, wherein Anderson described his recollection of the incident.<sup>1</sup>
  - **Hand-Written Statement and Transcribed Interviews of Kelsie Parks**, conducted on May 24 and June 8, 2011, wherein Parks described her recollection of the incident.
  - **Recorded Interview and Transcript of Harry Sanfilippo**, conducted on May 24, 2011, wherein Sanfilippo described his recollection of the incident.
  - **Recorded Interview, Transcript, and Diagram of suspect Jose Contreras**, conducted on May 24, 2011, wherein Contreras described his recollection of the incident.
  - **Audio Recording of Radio Traffic** from VECC that occurred prior to and during the incident, in which information about the incident was broadcast to police officers.
  - **Aerial Photograph** ostensibly prepared by Detective Maxwell with star marking Cardon's location and red vehicle marking Contreras' location.

The opinions and conclusions set forth in this letter are based upon facts obtained from the sources set forth above, among others. Should additional materials or facts subsequently come to light, the opinions and conclusions contained herein may be materially different.

#### UTAH STATE LAW

The Utah Code contains statutory provisions that outline circumstances when an officer's use of deadly force is justified. The following statutory provisions were considered in this review.

**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;  
...
- (e) when the actor's conduct is justified for any other reason under the laws of this state.

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<sup>1</sup> Although Ken Anderson was presented with a pre-prepared diagram of the area at his follow-up interview conducted by Detective Maxwell on June 8, 2011, the diagram was not prepared by Anderson and Anderson was merely asked to confirm if the locations were correct. In addition, only verbal confirmation of the diagram was obtained by Detective Maxwell. Ken Anderson did not sign any diagram. Therefore, no diagram can be officially attributed to Ken Anderson.

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**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.

### SUMMARY

On May 24, 2011, at approximately 6:00 P.M. at 5275 West 3500 South, West Valley City, Utah, Officer Jared Cardon ("Cardon") stopped a vehicle in the eastbound direction in the outside lane, commonly referred to as lane number two, and was in the process of citing the vehicle for a traffic violation. 3500 South is a two-lane highway in each direction with a center median. Because 3500 South has narrow lanes of travel with no shoulder, vehicles traveling eastbound were stopping behind Cardon as he was issuing the traffic citation. The vehicles were stopped while seemingly waiting to pass him using the inside lane, commonly referred to as lane number one.

At about the same time, Ken and Sarah Anderson, along with their children, were stopped on their bicycles in a small driveway that runs along the west side of the Hunsaker Meats building that is located on 3500 South. The driveway leads to a parking area directly behind Hunsaker Meats. Cardon's traffic stop was taking place east of Hunsaker Meats and the vehicles behind him were stopping directly in front of the building. The Andersons were reading a sign located on a fence that is adjacent to the driveway near a large pole.

Anthony Thompson ("Thompson") was driving a vehicle with a passenger, Kelsie Parks, eastbound on 3500 South. As Thompson was stopping his vehicle behind the other vehicles that were stopping for Cardon, he noticed a vehicle behind him that he believed may not be able to stop without impacting the rear of his vehicle. Thompson previously noted this vehicle behind him due to the erratic driving it was displaying. Thompson was the third vehicle behind Cardon. As Thompson's vehicle was coming to a stop in front of the driveway west of the Hunsaker Meats building, the vehicle behind him suddenly swerved right, drove over the curb and into the front yard of a fronting property and impacted the fence and pole that the sign the Andersons were reading was affixed to. The impact of this vehicle caused the fencing to lean striking Sarah Anderson causing her to fall over with her bicycle. Upon noticing the collision, Thompson turned his vehicle and moved it into the driveway, stopped and exited his vehicle to see if anyone needed assistance.

The driver of that vehicle that lost control, later identified as Jose Contreras ("Contreras"), briefly exited his vehicle after the collision. Ken Anderson (Sarah's husband) and Thompson briefly questioned Contreras about his careless driving. Contreras then re-entered his vehicle, reversed it back onto 3500 South. Thompson got in front of Contreras' vehicle and hit the hood in an effort to get Contreras' attention and was demanding that he stop his vehicle. Contreras ignored Thompson's demands and instead accelerated his vehicle from the outside lane, lane number two, into lane number one and around the two vehicles that were still stopped behind Cardon. To avoid being hit by Contreras, Thompson jumped out of the way and visually followed the vehicle as Contreras sped away eastbound in lane number one. As Contreras sped away, several witnesses, including Thompson and Ken Anderson, noticed Cardon and began yelling at him to stop Contreras.

Cardon, while still processing the traffic citation, heard what he believed to be a vehicle accident and the yelling by the witnesses. He turned his attention from the vehicle he was issuing the citation to and proceeded toward the commotion along the curb of lane number two and toward the area of the accident. After hearing the collision and the yelling Cardon believed that that an altercation between individuals involved in the accident was possibly occurring.

As Cardon was approaching the location, he radioed dispatch that he was on view of a traffic accident and would advise of any injuries. While walking towards the accident, Cardon heard and saw the vehicle Contreras was operating fleeing the scene. 18 seconds after the initial radio contact, Cardon radioed again to "expedite me a back I got people fleeing." Five seconds later, Cardon radioed that the suspect "tried to run me over, he's fleeing, shots fired." Contreras was later apprehended a short distance away and his vehicle was recovered.

After the incident Cardon reported that as Contreras was fleeing he steered his vehicle at him and Cardon believed that he would be hit by Contreras. Cardon explained that he drew his firearm and fired a total of three rounds at the vehicle. Cardon stated that he fired two rounds at the vehicle as his only means of defense and one at the vehicle's tire as it was passing him in an effort to disable the vehicle.

Upon inspection of Cardon's firearm after the incident, the down count on the weapon revealed that it was down three rounds and three spent casings of a type consistent with those in Cardon's firearm were also located at the scene of the incident. Two bullet fragments were also located at the scene of the incident.

Inspections of Contreras' vehicle revealed an impression mark on the right front passenger wheel that distinctly appears to have been caused from a round from a firearm. Another marking was located on the brake caliper of the right front passenger wheel that appears to be highly suggestive of a strike from a round from a firearm. No other marks were found on the vehicle were suggestive or consistent with being caused by a round from a firearm.

### **THE SCENE**

The incident occurred in front of Hunsaker Meats, which is located at approximately 5300 West and 3500 South, West Valley City, Utah. A photograph of the scene which was

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prepared for demonstrative purposes from the officer's point of view is attached hereto as Exhibit A.<sup>2</sup>

Each lane of travel on 3500 South is approximately ten feet wide (twenty feet total width) plus a center median that is also approximately ten feet wide. A photograph of the scene including orange cones depicting the location of the shell casings and bullet fragments is attached hereto as Exhibit B. Aerial photographs prepared with red type are attached hereto as Exhibits C and D.

### **PHYSICAL EVIDENCE**

Three spent (empty) .45 cartridge casings from Cardon's firearm were recovered from the scene along with two bullet fragments. The locations from which the shell casings and the bullet fragments were recovered are depicted on the diagrams previously noted as Exhibits B, C and D.

A photograph of the passenger side front wheel that depicts an impression believed to have been caused by a round from Cardon's firearm is marked with evidence placard "A" and attached as Exhibit E. Another photograph of the passenger side front wheel with another impression also believed to have been caused by a round from Cardon's firearm is attached as Exhibit F. A photograph of the passenger side front wheel, with the brake caliper exposed is attached as Exhibit G. A photograph of the broken clip on the passenger side front brake caliper is attached as Exhibit H.

### **WITNESS INTERVIEWS AND STATEMENTS**

Pursuant to the OICI protocol, several witnesses were interviewed, the substance of which are set forth in more detail below.

#### *Officer Cardon*

Cardon completed and signed a Public Safety Statement (apparently inadvertently dated 3/24/11 instead of 5/24/11), shortly after the incident (18:20 hours) and was briefly interviewed by Sergeant Bobrowski at the scene of the incident on May 24, 2011. He was also interviewed at length by Detective Maxwell and District Attorney Investigator Vaun Delahunty, with his attorney present, on May 27, 2011, at the West Valley City Police Department.

In his Public Safety Statement, Cardon indicates that he fired three rounds in a North West direction fifty feet west of the intersection of 5885 West 3500 South.

In the brief interview with Sergeant Bobrowski and Lieutenant Stokes on May 24, 2011, Cardon again confirmed his location and the direction of the shots fired at the vehicle consistent with his Public Safety Statement.

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<sup>2</sup> The photograph was prepared by West Valley City Police Detectives who apparently placed three vehicles in locations where they may have believed those vehicles were located in front of Hunsaker Meats at the time of the incident. It is unknown and to what extent those vehicles are accurately placed within the number two lane of travel, as those vehicles appear to be as close as physically possible to the right side of the lane, whereas an actual vehicles that were were stopped due to traffic delay would more likely have been in the center of the lane of travel.

In his recorded interview on May 27, 2011, Cardon indicated that as he responded to the scene of the traffic accident he walked on “the edge way of the roadway now, just on the street off of the sidewalk, walking westbound in the number two lane.” As Cardon was moving toward the accident, he saw the suspect vehicle as it turned back onto 35<sup>th</sup> South going east and that “I then discerned that okay, this guy is trying to flee . . . he’s not going to remain at the scene of the accident . . . he’s trying to get out of here.”

Cardon stated that he moved his position from the number two lane to between the number two and number one lane and continued to the accident along the dividing line between the two lanes. To draw attention to himself, Cardon brought his arms up in the air and started waving them, hoping that the suspect would recognize him and stop. He indicated that “the car . . . continued accelerating . . . very quickly and was now right over the . . . center stripe divider of the number two and the number one eastbound lanes coming directly towards my location.” As the vehicle was “straddling” divider lines, Cardon described the vehicle as angled slightly south coming directly at him “going to a degree of possibly five degrees cant to the south”.

Believing that the vehicle was not going to stop and suddenly realizing the potential threat that the vehicle could hit him, Cardon stated he stopped and drew his firearm. Cardon pointed his firearm directly at the vehicle hoping that it would persuade the driver to stop the vehicle or alter its course that was directed on him. Cardon stated that the display of his firearm had no effect on driver’s direction of travel directed at him and he retreated east to create distance from the vehicle.

Cardon stated that the vehicle continued straight at him and he concluded that that the driver was determined to hit him. In response, Cardon fired two rounds at the vehicle in quick succession. Cardon then retreated turning 90 degrees to get out of the way of the vehicle. Cardon stated that he turned west, but his description of a 90 degree turn to get out of the way of the vehicle likely placed him turning south.

After firing the two shots at the vehicle, Cardon said he “felt okay, the . . . car is . . . now going to continue fleeing” and he fired a third round into the tire to possibly disable the car. Cardon further stated that he felt it was an exigent circumstance to stop the driver from “threatening my life, threatening the lives of other people that were in the area.” He also indicated that after firing the third round, he might have “gone down to a knee or something, fallen back onto my knee. . .”

Cardon clarified that when he began walking towards the accident and heard a commotion, “that was when I began running . . . and I moved to the right, into the center running so that I could get a better view.” Cardon stated that as the suspect vehicle was coming east, he had to come out to pass these vehicles” and “once he clears these cars now . . . is at a very slight angle towards where I was standing.” He also stated that there was “no doubt in my mind that his intention was to . . . hit me at that point.”

Cardon estimated that the distance between himself and the suspect car was 9 to 10 yards for the first shot, 8 to 9 yards for the second shot, and 2 to 3 yards for the third shot. Cardon also indicated that the suspect vehicle was facing mostly east but “to a degree of possibly five degrees

cant to the south.” Cardon also estimated that the suspect vehicle was traveling 20 miles per hour when he first waved his arms, 35 miles per hour when the first shot was fired and 40-45 miles per hour when he passed by him. Cardon indicated that “two seconds at most” transpired from shot one to shot three.

Cardon indicated that the first two shots were aimed at “the vehicle” and only the third shot was “directed at the wheel well . . . the front right tire.” Cardon further stated that at the point of the first two shots, “it was just a defensive reaction to the threat approaching was to fire rounds to protect myself. And I’m, I’m just unable to say if it was . . . immediately for the driver or if it was for the car.”

#### *Detective Maxwell*

Detective Maxwell prepared reports dated May 24, May 27, May 30, and June 9, 2011. In Detective Maxwell’s May 24, 2011, report, he noted, among other things, that Cardon stated he had “sustained some minor injuries and damage to his pants from chasing the suspect on foot at the termination point where the suspect abandoned his vehicle and fled on foot. There was an abrasion on Ofc. Cardon’s right bicep and tears in his right knee of his pants.”

In Detective Maxwell’s May 27, 2011, report of Cardon’s interview conducted at the West Valley City Police Department, he noted that Cardon stated that he heard a “two car accident” behind him when he initially went to investigate. He also indicated that Cardon stated that he “couldn’t see what was going on or the crash because of the vehicles in the number two lane.” He also indicated that Cardon stated he could “see this vehicle was trying to flee the scene and the witnesses were telling him to stop the vehicle.” He also indicated that:

“Ofc. Cardon stated that the suspect began turning into, towards him so he drew his firearm and fired two rounds. Ofc. Cardon estimated the distance to be 9-10 yards between him and the suspect vehicle. Ofc. Cardon fired a second round immediately after the first and estimated the suspect had closed the distance to about 8-9 yards. Ofc. Cardon advised he was retreating backwards towards the sidewalk when the suspect closed the distance, now to 2-3 yards, this is when Ofc. Cardon fired the third and last round directly at the passenger front tire vehicle prior to falling to his knee.”

In Detective Maxwell’s May 30, 2011, report he indicated that he had measured various distances at the crime scene and the distance from Officer Cardon’s motorcycle to the north east corner of Hunsaker Meats was 77 feet. He also indicated that the distance from where Officer Cardon advised he was standing in the roadway to where the suspect vehicle would likely have entered the number one lane of travel when he began to flee was between 70 and 80 feet. Detective Maxwell also prepared an aerial diagram for use in the presentation to the District Attorneys Office and in the follow up interview with Ken Anderson which is included as Exhibit L.

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*Detective Fossmo*

Detective Fossmo also interviewed Cardon on May 27, 2011, separately from and after Detective Maxwell's interview. In his report Detective Fossmo indicated, among other things, that Cardon stated that he believed he had observed a traffic accident, and reported that:

"Ofc. Cardon advised that he realized the suspect was not going to stop and he therefore removed his firearm from the holster and pointed it directly at the vehicle. Cardon did this as a show of force in an attempt to get the driver to stop the vehicle. Ofc. Cardon states that the vehicle continually accelerated as it got closer and closer to him. Cardon began to back pedal in an attempt to get out of the vehicle's path. Cardon stated that he fully anticipated being hit by the vehicle. Ofc. Cardon advised that, fearing he was about to be run over, he fired two rounds at the suspect driver as a means of his only defense. Cardon states that the driver continued towards him and as a last resort he fired a single round at the front passenger side tire in an attempt to disable the suspect vehicle. Cardon stated that he hoped to disable the vehicle so that the driver could not harm anyone else with it."

Detective Fossmo's report also indicated that "Cardon stated that he did fear for his life and believed he would be run over. Cardon stated that the suspect appeared to have no regard for the safety of anyone that day and believed the suspect was going to do whatever it took to avoid police contact and apprehension."

*Investigator Craig Watson*

District Attorney's Office Investigator Craig Watson, along with District Attorney's Office Investigator Vaun Delahunty, re-examined the suspect vehicle on June 9, 2011, at the West Valley City Police Department Evidence Holding Facility. No bullets, bullet fragments, or bullet indentations were located on the front end, the windshield or the undercarriage of the suspect vehicle. After viewing the right front wheel, an indentation from a second bullet strike appeared on the next clockwise spoke of the wheel, adjacent to the original bullet strike marked with placard A. A lighter marking also appeared on the brake caliper directly behind the right front wheel. Investigator Watson removed the right front wheel and "it revealed evidence of a second bullet hitting the brake caliper housing assembly. This bullet then traveled downward further into the wheel, where the lower metal clip which holds the brake assembly together was ripped apart. The metal clip had a fresh tear, with sharp and shiny edges. Also the oxidization on the housing had been freshly removed where the bullet had hit it, leaving it a different color than the surrounding areas."

*Investigator Vaun Delahunty*

On June 8, 2011, District Attorney Investigator Vaun Delahunty participated in a follow up interview of Anthony Thompson, the witness to the incident noted in a prior section of this report, at the District Attorney's Office. In his supplemental report from that recorded interview, Delahunty noted that Thompson stated he had an unobstructed view of the incident and was standing near or next to the outside of lane number two when it occurred. Thomson stated that he saw the suspect vehicle "swerve around the officer standing in the roadway." Thompson

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observed that the officer was standing near the painted lines that divided lanes one and two, and when he shot his firearm it appeared that the “officer took a step or two toward the vehicle being driven by Mr. Contreras.” Thompson observed the officer fire two shots at the right front tire.

Delahunty also prepared a supplemental report from the June 9, 2011 inspection of the suspect vehicle that is consistent with the report of Investigator Craig Watson.

*Anthony Thompson*

Anthony Thompson’s hand-written witness statement dated May 24, 2011, indicates that as the suspect was leaving the scene, “I jumped in front of his car and I pushed off and he floored his car and proceeded forward and swerved away from the officer who was in the road and the officer fired two shots and he sped away.”

Thompson was also interviewed the evening of the incident and drew a diagram that was attached to his witness statement. That diagram is attached as Exhibit I. It depicts Cardon in the center of the number one lane of travel moving toward the center median as Contreras approached him. It also depicts Contreras in the center median. The diagram is actually labeled at the top “Lexus in media[n].” When asked to explain the diagram in the interview, Thompson explained that after he pushed off the hood of the vehicle, Contreras “floored it . . . he came right here into the turn lane because there was a cop right here.”

Thompson reviewed an aerial map of the area at a follow up interview at the District Attorney’s Office conducted by Investigator Vaun Delahunty on June 8, 2011 and made markings consistent with his original diagram. That diagram is attached as Exhibit J.

In the interview on May 24, 2011, Thompson’s was asked “Did you see where the officer was in relation to where the car was at that time when you heard the shots?” Thompson stated that Cardon was “maybe about right at the end of the Hunsaker Meat Building . . . that he fired the shots.” Thompson was then asked, “and where was the car at that point when the shots were fired?” To which Thompson stated, “It was in the turn lane.” Thompson further indicated that Officer Cardon “was in the first lane” and that the suspect vehicle “had swerved over into the middle lane and he [Cardon] fired the shots at his [suspect’s] tires when he was “about six or seven feet away from his tires.” Thompson stated that Cardon fired “right as his car got where the officer was”.

When further questioned directly as to whether he saw the suspect vehicle make any movement towards the officer, Thompson stated, “No he didn’t. No he was actually trying to avoid the officer and . . . incoming shots and then . . . No he didn’t accelerate toward the officer . . . The officer moved more towards this car to try to get a better shot at his tires, but he never really broke the six or seven foot barrier what it looked like to me.” Thompson also stated, “he [Contreras] was trying to get around the officer. He wanted to get away.” When further questioned as to the direction the gun was pointed, Thompson stated that Cardon shot at “the front passenger tire and when he had his gun he was aimed right for that tire.” Thompson further stated that Cardon “wasn’t in front of the car.” Thompson also stated that the suspect vehicle “moved around the officer before we heard the shots” and he did not make any movement toward the officer.

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*Ken Anderson*

Ken Anderson's hand-written witness statement dated May 24, 2011, indicates that after his wife was hit by the car and the fence, he watched as the driver got in his car and sped away. He also indicated that "the officer down the street stepped out and yelled something, however the driver kept going. As the car sped past the officer he pulled out something and fired a few loud shots." Anderson's witness statement is attached as Exhibit K.

In Anderson's interview on May 24, 2011, he stated "the driver of the car just . . . pretty much . . . ignored him . . . just drove right on by." He also stated that the officer was "in the lane that was on the north side, but closer to the center of the two lanes." When asked where the officer fired the bullets, Anderson stated that "he fired the bullets . . . as far as I could tell at the front right tire." When asked whether it looked like the car was trying to hit the officer or trying to go around the officer, Anderson stated, "the car should have stopped. I . . . don't know . . . if he was intentionally trying to hit the officer. I don't know if he was kind of trying to swerve around it."

In Anderson's interview on June 8, 2011, he stated that Cardon was in between the number one and number two lanes and that the suspect was driving east in the number one lane.<sup>3</sup> Anderson further stated that "I don't know if he [Contreras] swerved towards him or just went at a straight line." When asked where Cardon was as he approached where Contreras initially crashed, Anderson confirmed that Cardon was closer to the sidewalk as he was approaching the scene and then "ran out" to the center. When further asked about whether Contreras swerved towards or away from Cardon, Anderson stated "He [Contreras] didn't like swerve towards the officer, but to do that, he would have, would have wrecked right into a car."

*Kelsie Parks*

Kelsie Parks' hand-written witness statement dated May 24, 2011, indicates that after Thompson tried to stop the suspect vehicle, she "called the officer over and he saw the guy leaving the scene and the officer fired twice at his tire. Then he sped off." Parks written statement is attached as Exhibit L.

In Park's interview on May 24, 2011, she was asked "when the officer was firing his shots where was he . . . was he in front of the car . . . was he beside the car?" To which Parks replied that Cardon was "beside the car." Parks again clarified that "when he [Cardon] shot he was on the side." Parks also indicated that "there were two gunshots that I heard for his tire . . . I don't know if it was his tire or his rim, but I know that he was aiming for his tire to get him to stop." When asked again if the Officer was pointing his gun down or just pointing his gun at the car, Parks stated "he was pointing at the tires."

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<sup>3</sup> A careful review of Anderson's statement seems to indicate that he had some difficulty providing specifics as to locations on the map without being asked leading questions by Detective Maxwell. Anderson further admitted that "the whole thing was very, very stressful and it's hard to pinpoint" because "my wife was underneath the car basically and if it had not stopped there it would have killed both of my kids. Anderson further stated that "[q]uite frankly this is difficult for me, because I understand that my testimony affects the officer and I firmly believe that he made the right decision."

When asked where Cardon was at the time of the shooting, Parks stated "the officer was running towards this way." Parks was further questioned as to whether the suspect vehicle was coming towards Cardon, to which she replied, "No it's not, it's passing." She further stated that "I'm pretty sure he [Contreras] went pretty much more of around him." Detective Maxwell then specifically asked, "Okay, so he never, you never saw the vehicle angle towards the officer?" Parks specifically stated, "No he never went towards the officer."

#### *Harry Sanfilippo*

In Sanfilippo's interview on May 24, 2011, he explained that he had been sitting in a chair looking out his window when the crash occurred. He observed the Andersons on their bikes and immediately rushed to provide assistance in the situation. He also stated that he thought the suspect vehicle was a Honda (now known to be a Lexus) and watched as the driver of that vehicle got back in the car and began leaving the scene. He explained that as the suspect vehicle left, "we hollered at the officer who was writing the citation. At that time, the officer pulled out his revolver, fired two rounds into the Honda's passenger side front tire trying to stop the vehicle." When asked where the Honda was when he heard the shots fired, Sanfilippo stated that the Lexus was in the number one lane of travel in front of the meat market. He further stated that "you could probably go up there and find a couple shell casings up there I would imagine because that's where the officer fired two rounds into the passenger side . . . the front tire and he [Contreras] still didn't stop."

#### *Suspect Contreras*

In Contreras' interview on May 27, 2011, he admitted swerving to avoid hitting the Camaro in front of him, hitting the pole, the fence, and a woman on her bike, and said that the vehicle's brakes were not working properly. Contreras further stated that, "[s]o the guy in the tan shirt tried stopping me and I didn't want to hit him so I turned left and he just smacks the hood of the car and I take off and then so I get in the middle lanes and then that's when I saw a cop and then pulled out the gun and I'm like I went down and he points it at me, so I thought he was gonna shoot me and fuckin I just like stepped on it and went like this and then I just saw his gun going down and he tried shooting out the tire and then I think he shot like three times."

Contreras was asked which lane he was in when he started driving east . . . "in [the] center one, where the turn lane is or are you in the one close to the curb or the one in between those two?" To which Contreras stated that he was, "in between where the middle lane's at." Detective Fossmo further clarified by saying "so it's kind a going down the straddle on that one line that solid yellow line? Okay and then the officer come out to that area? To which Contreras stated "yeah he was running out towards the center."

When asked if he made eye contact with Cardon, or whether he could tell if Cardon was yelling and holding up his hands to stop, Contreras stated, "I just saw the gun." Contreras further clarified when asked if Cardon had his gun out already or took it out as his vehicle approached that "I'm pretty sure he had it out quick, I think he had it out quick." When asked what he did when the officer pointed his gun at the windshield, Contreras stated, "I just went to the left a little bit cuz I thought he actually was gonna shoot me . . . to like stop me or like get his . . . I'm sure like that but he only shot the tire." When asked why he stepped on the peddle when he saw

the gun pointing at him and didn't stop, Contreras responded that "I don't know, I thought I was gonna get shot that's the first thing that went through my head." When asked whether he thought the officer pointed the gun at the tires or at him, Contreras responded that "Yeah he pointed it at me, then he went down and hit the tires."

When asked whether it was logical for Thompson to think that he was going to run him over, Contreras stated, "Yeah, yeah I would of done the same thing too." When asked the same question about the officer, Contreras stated, "No, cuz me and him cuz he was pretty far away . . . cuz he was standing there chillin, not chillin but like he was there you know to like stop, point the gun at me and shoot down."

The hand-drawn diagram prepared by Contreras at the time of his interview depicts his vehicle in the center median but straddling the yellow line with the right tires in the number one lane. It also depicts Cardon in the number one lane of travel, very close to the dashed center line between lanes one and two. This diagram is attached as Exhibit M.

#### **DISCUSSION OF § 76-2-404**

Utah Code § 76-2-404 describes several circumstances under which an officer's use of deadly force is justified. Based upon the circumstances of this incident, subsections (b) and (c) of the statute merit consideration and discussion.

- 1. Because Cardon did not have probable cause to believe that Contreras committed a felony involving the infliction or possible infliction of death or serious bodily injury or that Contreras posed a threat of death or serious bodily injury to himself or others if his apprehension was delayed, Cardon's use of deadly force was not justified under Utah Code § 76-2-404(b).*

Utah Code 76-2-404(b) specifies that an officer is justified in using deadly force in 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. In this case, the facts do not support the existence of either (i) or (ii), therefore this subsection does not apply nor justifies Cardon's actions.

Cardon did not have probable cause to believe that Contreras committed a felony that involved the infliction or threatened infliction of death or serious bodily injury at the time he shot at Contreras. According to Cardon's own statements, he initially observed what he believed to be a traffic accident followed by what he thought may be a physical altercation between the operators of the vehicles involved in the accident. He then observed a vehicle leaving the scene of the accident causing him to believe that the operator was not going to remain at scene. Those circumstances do not support a probable cause belief that Contreras committed a felony that involved the threat of death or serious bodily injury.

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Similarly, Cardon did not have probable cause to believe that Contreras posed a threat of death or serious bodily injury to him or others if his apprehension was delayed. At the moment Cardon shot at Contreras' vehicle, Cardon's belief was that Contreras was intending to flee the scene of a traffic accident where a brief physical altercation may have occurred. Cardon did not have any information that the possible physical altercation involved any conduct that could have caused him to believe that Contreras was a threat to him or others if his apprehension was delayed. Thus, the circumstances known to Cardon at the time he discharged his firearm at Contreras' vehicle do not support the belief that Contreras posed a threat of death or serious bodily injury to Cardon or others if his apprehension was delayed.

2. *Because Cardon's belief that the use of deadly force against Contreras was necessary to prevent his death or serious bodily injury to himself or others was not reasonable, his use of deadly force against Contreras was not justified under Utah Code § 76-2-404(c).*

Utah Code 76-2-404(c) specifies that an officer is justified in using deadly force against another if 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. This statute does apply to the facts of this case since Cardon contends that he fired at Contreras because his safety was threatened when Contreras drove his vehicle directly at him. However, Cardon's use of deadly force against Contreras was not justified because the evidence does not support that Cardon's belief of the threat was reasonable.

*A. Cardon's discharge of his firearm amounted to deadly force:*

In evaluating the facts of this case, some evidence indicates that Cardon discharged his firearm at the wheel of Contreras' vehicle. Because arguably the discharge of a firearm at the wheel of a vehicle may not amount to deadly force, the first issue is whether Cardon's discharge of his firearm was deadly force.

Deadly force has been defined by statute and case law as force that "creates a substantial risk of causing death or serious bodily harm." *Thomson v. Salt Lake County*, 584 F.3d 1304, 1314 (10<sup>th</sup> Cir. 2009). This definition is derived from Model Penal Code §3.11(2) (1985) which includes an alternative subjective element, focusing on whether an individual used the force "with the purpose of causing . . . a substantial risk of . . . death or serious bodily injury." *Id.* at 1315.

When Cardon was interviewed by Detective Maxwell, he explained the circumstances under which he discharged his firearm. Cardon stated that he fired the first two shots at the vehicle. In his interview with Detective Maxwell, Cardon explained that he was not focused on hitting the driver, but rather at the vehicle generally. However, in his interview with Detective Fossmo, Cardon explained that he fired two rounds at Contreras, the driver of the vehicle.

By shooting at the vehicle that was being operated by Contreras, Cardon created a substantial risk of death or serious bodily injury to Contreras. The risk was particularly substantial considering Cardon's proximity to the vehicle at the time he fired at it. Though Cardon explained that he was shooting at the vehicle and not Contreras, his intent was to stop the

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vehicle that he contended was posing an imminent threat to his welfare. His intent, therefore, was to disable the vehicle through disabling its operator. That is consistent with his statement to Detective Fossmo that he was shooting at Contreras.

The physical and testimonial evidence, however, suggests that Cardon was aiming for and shot at the right front wheel. While an argument can be made that shooting at the wheel of a moving vehicle does not amount to deadly force because the risk of death or serious bodily injury is not substantial, discharging a firearm in the direction of a person inherently carries a substantial risk of death or serious bodily injury by the very nature of the function of a firearm. Even if that argument were accepted in this case, however, the totality of the evidence nevertheless supports the conclusion that Cardon used deadly force against Contreras.

The testimonial evidence from witnesses and Contreras suggests that Cardon fired only at the wheel. Their accounts of the number of rounds vary from two to three. The physical evidence suggests at least two rounds hit the right front wheel. One distinct impression mark on the wheel itself would account for one round. The other mark on the brake is highly suggestive of being caused by another round. Though Cardon explained that he only shot at the wheel once, if the physical evidence is accepted it would only account for two rounds.

The remaining physical evidence, though, clearly supports Cardon's statement that he fired three rounds. Three expended cartridges were found at the scene and the down count on his firearm revealed that three rounds were expended.

In an effort to account for the third round, the entire vehicle was closely inspected. No markings consistent with being caused by a round from a firearm, other than the two found on the wheel and brake, were found on the vehicle.

Thus, considering the totality of the evidence, and even accepting that two rounds were fired at the wheel of the vehicle that arguably did not create a substantial risk of death or serious bodily injury, Cardon fired a third round at the vehicle that amounted to deadly force. The fact that the evidence suggests that the round missed the vehicle does not alter the substantial risk of death or serious bodily injury that third round caused.

*B. Cardon's use of deadly force was not reasonable:*

Having concluded that Cardon used deadly force against Contreras, the remaining issue is whether Cardon's belief that the use of that deadly force was reasonable. In determining the degree of threat that a suspect poses to an officer, various factors are considered. Whether the officer ordered the suspect to drop his weapon, whether any hostile motions were made with the weapon towards the officer, the distance separating the officer and the suspect, and the manifest intentions of the suspect are some of the factors considered. Another important aspect of this inquiry is whether the officer was in danger at the precise moment the deadly force was used.<sup>4</sup>

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<sup>4</sup> Although such factors were listed in the context of a civil §1983 action in *Thomson v. Salt Lake County* regarding excessive force allegations, such factors give us some indication of the Courts' stance on what is considered deadly force and when such force is considered reasonable.

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Cardon made several statements indicating that the vehicle was aimed “straight for him;” that Contreras’ vehicle was going to “run right over him;” and that there was “no doubt in my mind that his intention was to . . . hit me at that point.” In evaluating the threat Cardon identifies, we do so through the standard of a “reasonable officer on the scene”. In doing so, however, Cardon’s assessment of the threat that the vehicle was an imminent threat to his safety is not supported by the observations of the witnesses or the physical evidence.

Thompson, who had an unobstructed view of the incident, stated specifically that Contreras “swerved away from the officer.” He further stated that Contreras “was actually trying to avoid the officer” and that Contreras “was trying to get around the officer.” Thompson further stated that as soon as Contreras began to accelerate he moved into the median to avoid hitting the officer, and that he did not make a movement toward the officer. Those descriptions are consistent with Thompson’s other statement and diagram that at the time Cardon fired at Contreras, the vehicle was passing Cardon and not coming at him. In fact, Thompson also stated that he saw Cardon advance toward the vehicle as it was passing him and believed that he did so to get a better shot at the wheels.

Ken Anderson, who also had a clear view of the incident, stated that “I . . . don’t know . . . if he was intentionally trying to hit the officer. I don’t know if he was kind of trying to swerve around it.” Anderson further stated, “I don’t know if he [Contreras] swerved towards him or just went at a straight line. Anderson also stated that Contreras did not turn into the officer and explained “[h]e [Contreras] didn’t like swerve towards the officer . . . to do that, he would have, would have wrecked right into a car.”

Kelsie Parks stated that Contreras was not aimed directly at Cardon and that Contreras was “passing.” She further stated that “I’m pretty sure he [Contreras] went pretty much more of around him.” She was specifically questioned as to whether she saw the vehicle angle towards Cardon and she specifically stated, “No he never went towards the officer.”

Contreras also described his direction of travel. While the accuracy of his description would naturally receive scrutiny because he would not be expected to accurately describe incriminating conduct, his description was notably consistent with the observations of the other witnesses. Contreras stated that he initially drove in the number one lane proceeding east as he was leaving the accident scene. When he saw the officer, he stated that he moved to the center median in an effort to avoid hitting the officer.

The physical evidence also supports the testimonial evidence of the witnesses. Cardon states that as Contreras was driving the vehicle directly toward him, he was walking along the line that divides the number one and two lanes. Cardon stated that Contreras was driving over that line coming straight at him. However, all the witnesses and Cardon explained that the number two lane was occupied by stopped vehicles. Because the lane width is narrow at that location, little room exists for vehicles to be parked and permit a vehicle to travel parallel to those vehicles over the line that divides the lanes of travel for any appreciable length. There is no dispute that Contreras drove over the lane line that separates lane number one from lane number two as he was moving from lane number two to lane number one, but the physical evidence would not make it reasonable for Contreras to straddle the lane line directly toward Cardon and pass two parked vehicles.

For the same reason, the physical evidence does not support Cardon's statement that as Contreras was driving toward him straddling the lane line between lanes one and two, he was angled or "canted" about five degrees directly toward Cardon. The parked vehicles in lane two would have prevented Contreras from driving his vehicle at such an angle.

It is also not reasonable to conclude Contreras could have swerved his vehicle toward Cardon as he passed the parked vehicles. Cardon also stated that Contreras was accelerating directly toward him and as he passed the parked vehicles he swerved slightly toward him. Cardon explained that he initially was retreating as the vehicle was accelerating toward him and then turned ninety degrees toward the curb. That description, along with Cardon's description of Contreras' direction of travel swerving toward him is not reasonable. It would put Cardon in front of and protected by the parked vehicles on lane number two and, as Ken Anderson stated, Contreras "didn't . . . swerve towards the officer . . . to do that, he would have, would have wrecked right into a car."

The evidence, both testimonial and physical, also does not support the possibility that Contreras was driving directly at Cardon, but swerved away at the last minute. As noted previously, there is no question that Contreras was traveling in the direction of Cardon. Cardon was positioned in the easterly direction and Contreras was driving his vehicle in the easterly direction. However, none of the witnesses describe a path of the vehicle that places the vehicle driving directly toward Cardon. Indeed, all describe a path opposite of that description. In that regard, Cardon could not have reasonably believed that he was being threatened by the vehicle since the path described by the witnesses would or should have caused Cardon to realize what they all observed – that Contreras was driving around Cardon in an effort to flee not to hit Cardon. Thompson's additional observation that Cardon stepped toward the vehicle when it was passing him just prior to shooting at the wheels seems to fortify that premise.

Finally, it is also worth noting an additional observation regarding the position of vehicle at the time Cardon fired at it. Cardon stated that he fired at the vehicle as it was accelerating directly at him. He placed his position in between lanes one and two and the vehicle on the line separating those two lanes. Both Anderson and Thompson were behind the vehicle. By firing at the vehicle, Cardon placed those two individuals and likely others at risk of being hit by his fire. The fact that one round apparently missed the vehicle illustrates that risk. Cardon failed to appreciate that risk that, in turn, calls his belief that he needed to use deadly force to respond to the threat of the vehicle into further question.

Considered collectively, the evidence does not support that Cardon's use of deadly force against Contreras was reasonable. Though Cardon did attempt to stop Contreras through his presence and authority as a peace officer and Contreras was traveling in the general direction of Cardon and accelerating, the evidence supports the finding that the vehicle was traveling around and away from Cardon. The evidence does not support that Contreras swerved at the last moment to avoid Cardon, but rather was avoiding Cardon from its initial direction to flee the area. The evidence also supports a finding that Cardon was protected from Contreras by parked vehicles that were essentially between them. Thus, a reasonable officer in Cardon's situation could not have reasonably concluded that Contreras was a threat. The testimonial and physical

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evidence all support a finding that Contreras was driving his vehicle in a manner not with a “hostile” or manifest intent of hitting Cardon, but rather to avoid Cardon.

### CONCLUSION

Cardon used deadly force against Contreras when he discharged his firearm at the vehicle driven by Contreras because it presented a substantial risk of death or serious bodily injury to Contreras. Under the circumstances of this case, Cardon would be justified in using that deadly force against Contreras only if Cardon reasonably believed that it was necessary to prevent Contreras from causing his death or serious bodily injury.

While Cardon states that Contreras posed such a threat because he drove his vehicle directly at him, the testimony of all the witnesses to the incident consistently described that Contreras was driving around Cardon and not directly at him. While the distance between the vehicle and Cardon was not great, it was sufficient to not cause a reasonable officer to perceive any threat. Indeed, that seems to have been appreciated by Cardon since he appeared to advance toward the vehicle as it was passing him.

Furthermore, the physical evidence does not support Cardon’s contention that Contreras drove directly at or swerved at him. The position of the parked vehicles and the angle at which Contreras would have had to take relative to the parked vehicle and the location of Cardon make that contention unreasonable.

Accordingly, for all the foregoing reasons, the District Attorney’s Office concludes that Officer Cardon’s use of deadly force against Jose Contreras was not justified.

If you have any question regarding our review and conclusions, please do not hesitate to contact me at (801) 230-1209.

Very Truly Yours,

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SIM GILL,  
Salt Lake County District Attorney

SG/bn