

Use of Force Fatality of
Anthony Tovar

Valley Independent Investigation Team
Port of Seattle Police Department, 2019-100019



King County Prosecuting Attorney
Public Integrity Team

January 24, 2025



This memorandum has been approved by the King County Prosecuting Attorney to be published on the website of the Prosecuting Attorney's Office Public Integrity Team.¹

I. INTRODUCTION

1. Purpose of the Memorandum

The King County Prosecuting Attorney's Office (KCPAO) is mandated by law to analyze certain incidents regarding police use of force and to determine if the action was justified or if there was a criminal action such that criminal charges should be filed.² Because the investigation and analysis are mandatory if specific criteria are met, the KCPAO's review of an incident does not implicitly signal that the use of force was either justified or that criminal charges are appropriate. Instead, the KCPAO is required to assist in independent investigations involving police use of deadly force to enhance accountability and increase trust to improve the legitimacy of policing for an increase in safety for everyone.³

Pursuant to the Law Enforcement Training and Community Safety Act, an independent investigation must be completed when the use of deadly force by a peace officers results in death, substantial bodily harm, or great bodily harm.⁴ The independent investigation is conducted in the same manner as a criminal investigation.⁵

Additionally, the KCPAO shall inform the King County Executive whenever the investigation into a death involving a member of any law enforcement agency in King County is

¹ <https://kingcounty.gov/en/dept/pao/about-king-county/about-pao/team-leadership/organizational-structure/criminal/mainstream/public-integrity-team>

² Except as required by federal consent decree, federal settlement agreement, or federal court order, where the use of deadly force by a peace officer results in death, substantial bodily harm, or great bodily harm, an independent investigation must be completed to inform any determination of whether the use of deadly force met the good faith standard and satisfied other applicable laws and policies. RCW 10.114.011. Similarly, if the Office of Independent Investigation is the lead investigation agency, the prosecutorial entity must review the investigation. RCW 43.102.020. 2021 c 318 § 101.

³ Id. See also WAC 139-12-010.

⁴ RCW 10.114.011. See also WAC 139-12-010.

⁵ WAC 139-12-010.

complete and also advise whether an inquest should be initiated in accordance with the King County Charter.⁶ There shall be an inquest into the manner, facts, and circumstances of any death of an individual where an action, decision, or possible failure to offer the appropriate care by a member of any law enforcement agency might have contributed to an individual's death unless the County Executive determines, based on a review of the investigation, that the role of law enforcement was de minimis and did not contribute in any discernable way to a person's death.⁷

2. Scope of the Memorandum

The KCPAO's determination if the police action was justified or if there was a criminal action such that criminal charges should be filed is based entirely on the investigation materials provided to the KCPAO, relevant criminal laws, rules of evidence governing criminal proceedings, the applicable burden of proof, and the KCPAO's Filing and Disposition Standards. This determination is not intended to address matters outside the scope of this memorandum including, but not limited to, an administrative action by the involved agency or any other civil action. The KCPAO expresses no opinion regarding the propriety or likely outcome of any such actions.

3. Status of the Independent Investigation

After a thorough review of the independent investigation and applicable laws, the Special Operations Unit Public Integrity Team (the Team) has determined the investigation into this matter is complete.

II. OVERVIEW

On December 12, 2019, Involved Officer 1, a police officer with the Renton Police Department, attempted to stop Anthony Tovar for a liquor violation. Tovar walked away from

⁶ Executive Order PHL 7-1-5 EO.

⁷ Id.

the officer and displayed what appeared to be a shotgun. The officer discharged his weapon at Tovar, but Tovar fled. Officers pursued Tovar and he drew a knife from his belt. An officer deployed a less lethal weapon at Tovar, but it had no effect on him. Involved Officer 1 discharged his handgun, striking Tovar. Officers provided medical aid to Tovar, but he was later pronounced deceased.

III. INVESTIGATION AND EVIDENCE

1. Police Reports – Des Moines Police Department 2019-3416
2. Police Reports – Auburn Police Department 2019-14433
3. Police Reports – Federal Way Police Department 2019-15061
4. Police Reports – Renton Police Department 2019-3260
5. Police Reports – Renton Police Department 2019-13948
6. Police Reports – Port of Seattle Police Department 2019-10019
7. Police Reports – Auburn Police Department 2020-14228
8. Police Reports – Auburn Police Department 2020-14228
9. Civilian Statements
10. CAD/MDT
11. Incident Scene Investigation
12. Autopsy Report
13. Subject Information
14. 911 Call and Radio
15. In-Car Video
16. Business Video
17. Photos

IV. **INVESTIGATION SUMMARY**⁸

1. Information Before and During the Use of Force

On December 12, 2019, Renton Police Department (RPD) Involved Officer 1 was on routine patrol, driving a marked RPD vehicle, and wearing an RPD uniform. The following information is based upon the RPD computer aided dispatch (CAD) report and recorded police radio:

- 3:44:50 p.m. Involved Officer 1 notified dispatch that he observed an individual, later identified as Anthony Tovar (Tovar), drinking alcohol in public near the 7-Eleven located at 11505 SE 168th St. in Renton. Involved Officer 1 radioed that he intended to contact Tovar and he requested additional officers. Other officers indicated they were enroute to assist.
- 3:45:39 p.m. An unknown 911 caller reported that Tovar had a gun and was in the area approximately two minutes ago.⁹ However, the 911 caller could not describe their exact location, so it is unlikely that this information reached Involved Officer 1.
- 3:45:52 p.m. Involved Officer 1 radioed that Tovar was, “Armed.”
- 3:45:57 p.m. Involved Officer 1 radioed, “Shots fired.”

⁸ The Investigation Summary is based upon the investigation and evidence outlined in Section III. When necessary, the Team will identify the source of the information. It is common for witnesses, including law enforcement officers, to provide multiple statements about the events witnessed. Similarly, it is common for multiple witnesses to provide information about the same event. If a witness provides multiple statements and the statement contains material and substantial differences that could affect the investigation or analysis, the Team will identify information that is materially and substantially different. However, if the information has a de minimis effect on the investigation or analysis, the differences may not be identified. Similarly, although some events may be observed by more than one witness, the Team may not summarize each witnesses’ statement unless it has a material and substantial effect on the investigation and analysis.

⁹ Tovar was not identified by name until a fingerprint scan confirmed his identify. However, the description of the individual inside 7-Eleven, the individual with a shotgun, and the individual with Involved Officer 1 matched Tovar’s description. Because identity is not at issue for purposes of this memorandum, the individual is referred to as Tovar prior to his identification being officially confirmed.

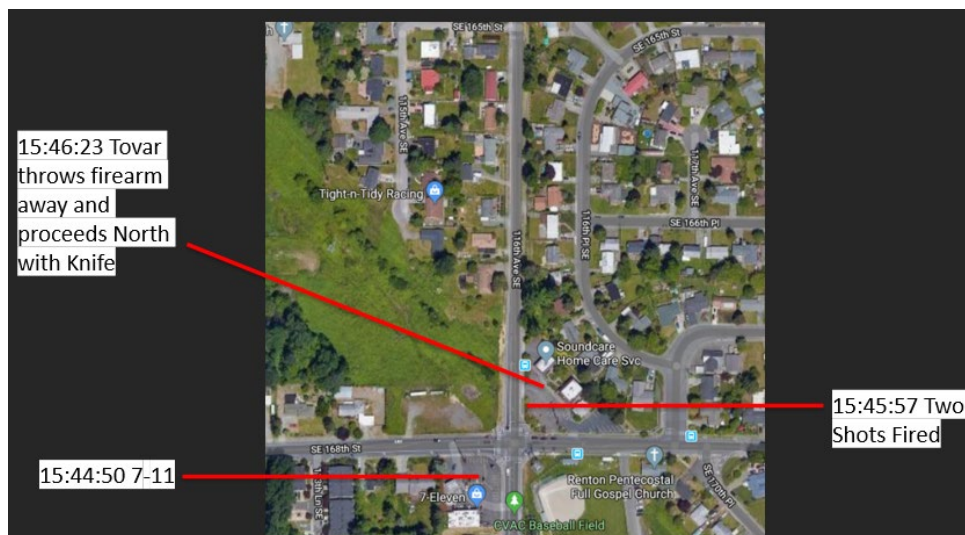


Figure 1 - Screenshot from independent investigation team's presentation showing the location of key events.

- 3:46:33 p.m. Involved Officer 1 radioed that Tovar was “continuing to refuse.” But he added that Tovar was “disarmed.”
- 3:47:15 p.m. Involved Officer 1 radioed that Tovar was now fifteen feet away from the shotgun and that Tovar was still moving.
- 3:48:02 p.m. Involved Officer 1 radioed that Tovar was “still northbound, refusing to comply, stating we’ll have to shoot him.”
- 3:48:15 p.m. Involved Officer 1 radioed that Tovar was still moving northbound.
- 3:49:00 p.m. Involved Officer 1 radioed that he saw a knife in Tovar’s belt.
- 3:50:12 p.m. Involved Officer 1 radioed “Shots fired. Subject down.” He also requested medics to respond to his location.

2. Independent Investigation Conducted by the Port of Seattle Police Department

As other officers arrived, the police secured the incident scene and rerouted traffic away from the area. The Valley Independent Investigation Team was requested to respond to the scene and to conduct an independent investigation. Port of Seattle Police Department Investigator 1 was assigned as the lead investigator. The independent investigation team (IIT) divided assignments between themselves and began to process the area.

3. Relevant Criminal History and Investigations

An IIT member went to Harborview Medical Center and requested an officer conduct a mobile fingerprint scan of Tovar. The fingerprint scan confirmed Tovar's identification and Investigator 1 began by conducting a background investigation, which revealed that Tovar was incarcerated from July 6, 2001 through December 4, 2018 for Murder in the Second Degree. The Department of Corrections Community Custody officer assigned to Tovar confirmed that Tovar was also arrested on November 6, 2019, November 18, 2019, and December 2, 2019, for using controlled substances, including methamphetamine and cocaine.

In addition, on November 25, 2019, the mother of a thirteen-year-old female reported to police that Tovar had been raping her daughter.¹⁰ The mother reported that Tovar lived with her family since he was released from prison. She reported that her daughter did not have her own cellphone, but she used her mother's phone to log into Facebook. The mother reported that her daughter did not log out of her Facebook account, and she found messages between her daughter and Tovar that referred to sexual conduct between them.

4. Processing of the Officers

As part of standard practice, the IIT determined which officers used force. Investigators determined that Involved Officer 1 discharged his handgun. Additionally, the IIT determined that Witness Officer 1 discharged a 40mm less lethal weapon at Tovar.

5. Involved Officer Statement

The investigation into this incident occurred prior to the implementation of RCW 10.114.011 and WAC 139-12-030, which established the requirements for an Independent Investigative Team to conduct independent investigations into police use of force cases. As was often the practice of the involved agencies, the investigative material supplied in this case included the involved officer's compelled statements. Such compelled statements are

¹⁰ Renton Police Department Case #2019-13260.

inadmissible against an officer in a subsequent criminal trial.¹¹ Police and prosecutors are also barred from making “indirect evidentiary use” of the officer’s compelled statement, which includes investigative efforts or testimony that has been shaped, altered, or affected, directly or indirectly, by the officer’s compelled statement.¹²

While the compelled statement and information derived from such a statement cannot be used to support criminal charges against an officer, a credible compelled statement provides insight into the potential testimony of an involved officer. Therefore, it may be useful to the Team in analyzing the current incident and may be used in support of a finding of no criminal liability for the officer’s actions.

In the current incident, Involved Officer 1 reported that he arrived at approximately 3:45 pm and noticed increased traffic in the area because the nearby high school and elementary school were nearing dismissal. Involved Officer 1’s attention was drawn to Tovar, who appeared to be drinking an open container of alcohol, so he decided he would contact Tovar for drinking alcohol while in public. As Involved Officer 1 exited his patrol vehicle, he observed Tovar remove his beanie cap, throw it to the ground, and walk away, which Involved Officer 1 found as an odd behavior.

From a safe distance, Involved Officer 1 ordered Tovar to “Stop!” and Tovar responded, “Are we really going to do this?” As Tovar walked away from Involved Officer 1, he noticed that Tovar had a tattoo associated with a gang, MS 13, which he knew was associated with violence. Involved Officer 1 observed Tovar walk against the intersection traffic control device and he commanded Tovar to “stop” multiple times, which Tovar ignored, so Involved Officer 1 requested additional units.

Involved Officer 1 continued to walk in Tovar’s direction as Tovar walked away. Tovar stated, “I’m not under arrest! You are not arresting me!” As Tovar continued to walk northbound on 116th Ave SE, Tovar suddenly turned towards Involved Officer 1 while pulling back his poncho, revealing what appeared to be a tactical shotgun slung from Tovar’s neck. Involved

¹¹ Garritty v. State of N.J., 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562 (1967).

¹² U.S. v. North, 910 F.2d 843, 857-858 (D.C. Cir., 1990).

Officer 1 saw that the shotgun was all black and had a pistol grip handle. Tovar reached for the shotgun and Involved Officer 1 reached for his handgun. However, as Involved Officer 1 cleared the handgun from his holster, he saw that Tovar's hand was already on the shotgun's pistol grip, which caused Involved Officer 1 to fear for his life because he noticed he did not have any area to cover or shield himself.

As Involved Officer 1 removed his handgun from the holster, he discharged one cartridge into the pavement while he stepped to his right and knelt so that he would be a smaller target. Tovar proceeded to walk toward an open business in the northeast corner of the intersection, which is when Involved Officer 1 discharged a second cartridge and Tovar disappeared from his view behind bushes.

Involved Officer 1 used his radio to announce, "shots fired." He observed Tovar in a parking lot, standing closer to the buildings. Involved Officer 1 saw that Tovar was holding the alcohol bottle and that his hands were in a fighting stance. Involved Officer 1 ordered Tovar to get on the ground, but Tovar refused and said, "Fuck you! I am not doing anything! You and me are going to go!" Tovar's statement caused Involved Officer 1 to believe that Tovar's mindset was intent on fighting Involved Officer 1 or someone else.

Involved Officer 1, who was familiar with the area, was aware that school dismissal would occur soon and many students walk to the 7-Eleven for snacks after school, so he felt it was important to maintain constant contact with Tovar. He lowered his handgun, which allowed him to see Tovar's hands and actions. Involved Officer 1 saw that Tovar was no longer armed with the shotgun and it was on the ground. Although Tovar continued to act aggressively, Involved Officer 1 felt that Tovar was less of an immediate threat given that Tovar was no longer in possession of the shotgun.

Involved Officer 1 continued to issue commands to Tovar, but Tovar ignored the commands, he walked into the roadway, and he told Involved Officer 1 to, "Kill [me]!" Tovar also continued to say that he was "not going to jail" and that we are "going to go!" Involved Officer 1 observed Tovar's veins bulged in his forehead while he threw his fists in the air.

At approximately 3:48 pm, Involved Officer 1 radioed that Tovar was moving northbound on 116th Ave SE. Tovar paced back and forth, sometimes walking towards Involved

Officer 1 and sometimes away from Involved Officer 1. Tovar took a long drink from his bottle and tossed the bottle away. Involved Officer 1 observed Tovar grab his poncho and remove it by pulling it over his head and tossing it away. Tovar next removed his shirt and Involved Officer 1 observed that Tovar appeared to be muscular and in good shape, which indicated to him that it may be difficult to get Tovar into custody if a physical fight occurred.

As they continued to move northbound, Involved Officer 1 could hear other police vehicles approaching. Involved Officer 1 motioned towards the other vehicles and when he looked back at Tovar, he observed that Tovar had a large knife on his waistline. However, he could not tell if the knife was inside a sheath or stuck through Tovar's belt. He was approximately twenty-five to thirty feet away from Tovar and he continued to hold his handgun in the low-ready position. Realizing that Tovar was still armed with a deadly weapon, Involved Officer 1 was concerned that Tovar could injure, kill, or take a civilian hostage.

Involved Officer 1 requested the responding officers to block the roadway and to have other civilians move their vehicles away from the area. As he and Tovar continued northbound, Involved Officer 1 noticed civilian vehicles moving away from the area. He also noticed another RPD vehicle was parked at an angle in the roadway, which he believed was done to provide cover for incoming officers. By this point, Involved Officer 1 and Tovar had walked approximately 200 yards northbound and Involved Officer 1 continued to give Tovar commands, such as "stop and get down" and that he "did not want to hurt him."

Witness Officer 2 approached Involved Officer 1 from behind and announced his presence. Involved Officer 1 heard Witness Officer 2 yell to other officers that Tovar had a knife. Witness Officer 1 appeared from the passenger side of the RPD vehicle parked at an angle in the roadway while holding a 40mm launcher, which is a less lethal alternative weapon.

Involved Officer 1 observed that Tovar stopped walking and that Tovar began looking in Witness Officer 1's direction and back in Involved Officer 1's direction. Involved Officer 1 ordered Witness Officer 1 to deploy the 40mm launcher, which he did. Involved Officer 1 heard Tovar grunt and bend forward slightly, but he did not fall or stop what he was doing. Given that the 40mm did not incapacitate Tovar, Involved Officer 1 was concerned that Tovar was under the influence of a controlled substance or something else that inhibited his pain.

Involved Officer 1 saw Witness Officer 1 look down at the 40mm launcher and then Witness Officer 1 returned to the passenger side of the RDP vehicle. Once Involved Officer 1 saw that Witness Officer 1 had disappeared behind the RDP vehicle, he also saw Tovar remove the knife from his waistband. Tovar turned and began walking northbound, towards Witness Officer 1's location. Involved Officer 1 saw Tovar raise the knife up around shoulder-level with the blade outwards so that it could be used in a downward thrusting motion. He estimated that the knife was approximately eight to ten inches long.

Based upon these movements, Involved Officer 1 believed that Tovar intended to advance towards the RDP vehicle and cause harm to Witness Officer 1. He estimated that he was approximately ten to twenty feet away from Tovar and that Tovar was approximately twenty to thirty feet from the back of Witness Officer 1's RDP vehicle. Involved Officer 1 believed that Tovar continued to present a risk to the public's safety and Witness Officer 1's safety. He was not aware if Witness Officer 1 knew about Tovar's proximity to him, so Involved Officer 1 continued to move towards Tovar, but Tovar continued to move towards Witness Officer 1's location. Involved Officer 1 was also aware that the 40mm launcher had no effect on Tovar, and he believed that if Tovar was allowed to get closer to a civilian or Witness Officer 1, Tovar could assault them with the knife. Involved Officer 1 discharged his handgun at Tovar, striking him. Officers placed Tovar into handcuffs and provided medical aid to him.

6. Civilian Witnesses

a. Civilian Witness 1

Civilian Witness 1, an employee of 7-Eleven, reported to police that Tovar entered the store, selected a bottle of wine, and exited without paying. Civilian Witness 1 followed Tovar out of the store and asked him to pay for the wine. Tovar refused to pay and told Civilian Witness 1 to call the police. Next, Civilian Witness 1 observed Tovar lift his poncho, revealing a shotgun that was slung around Tovar's neck. When asked if Tovar appeared intoxicated, Civilian Witness 1 opined that it appeared there was "something wrong" with Tovar's mind.

b. Civilian Witness 2

Civilian Witness 2, a 7-Eleven customer, reported to police she was inside the store when she observed Tovar grab a bottle and exit without paying. She saw Civilian Witness 1 exit the store to confront Tovar, but Civilian Witness 1 quickly returned and said they would call 911 later. Civilian Witness 2 described Tovar as aggressive and yelling at the store employee. After Civilian Witness 2 paid for her items, she exited the store and saw Involved Officer 1 talking to Tovar in a “patient” and calming motion. She noted that Involved Officer 1 was “clearly recognizable” as a police officer based on his uniform. Civilian Witness 2 described Tovar as “aggressive” and “erratic.” While Involved Officer 1 and Tovar were a “few feet” from each other, she heard Tovar yell, “Fuck the police!” Next, she saw Tovar swing a black shotgun from under his poncho, point it at Involved Officer 1, followed by two gunshots. Civilian Witness 2 recalled that when she heard the gunshots, Involved Officer 1 was the only officer present. After she heard gunshots, Tovar ran and Involved Officer 1 chased after him, shortly followed by several other police officers arriving in the area. Civilian Witness 2 did not see Tovar drop the shotgun, so she presumed that he ran away with it.

c. Civilian Witness 3

Civilian Witness 3, a 7-Eleven customer, reported to police that she called 911 after she drove into the 7-Eleven parking lot and observed Tovar arguing with a store employee. Civilian Witness 3 observed Tovar lift his poncho, revealing a firearm tucked into his pants. She described it as a large firearm or a rifle due to its size and that the store employee moved away while holding their hands up in a defensive manner.

d. Civilian Witness 4

Civilian Witness 4 observed Tovar exit the 7-Elven with some type of alcohol. He observed an employee talking to Tovar in the parking lot and he saw Tovar flip his clothing up, revealing a shotgun.

e. Civilian Witness 5

Civilian Witness 5 was sitting in her car and observed Tovar yelling something. She also observed Involved Officer 1 follow Tovar across the street, followed by two gunshots. She lost sight of Tovar and Involved Officer 1, but she heard Involved Officer 1 shouting instructions.

f. Civilian Witness 6

Civilian Witness 6 reported his attention was drawn to Involved Officer 1 and Tovar when he heard someone say, "Put the gun down!" He observed Tovar with a shorter style shotgun pointed in the air and Involved Officer 1 pointing a gun at Tovar. Civilian Witness 6 noted that Tovar refused to put the shotgun down.

g. Civilian Witness 7

Civilian Witness 7 was working in his office when he heard two gunshots outside. He observed Involved Officer 1 pointing a gun at Tovar who was walking away from the officer. He described Tovar as sometimes facing the officer and sometimes turning away from the officer. Although Civilian Witness 7 could not hear what said being said, it appeared Involved Officer 1 was giving commands based on his facial movements.

h. Civilian Witness 8

Civilian Witness 8 provided a statement to police and explained that Tovar was the friend of a neighbor and Tovar was temporarily staying at Civilian Witness 8's house. He had known Tovar for two weeks. When asked about Tovar's demeanor that day, Civilian Witness 8 recalled that Tovar appeared agitated and paranoid. Civilian Witness 8 recalled that Tovar was looking for something inside his stepson's bedroom that morning. Civilian Witness 8 also noted that his stepson kept an airsoft shotgun in his room, which appeared realistic. Finally, Civilian Witness 8 reported that his stepson found a handwritten note in his room, which he believed was left by Tovar. The note stated:

Jamie & Family

Thank you for being my family when mine tunrd [sic] there [sic] back on me. I love you guys. Wish I robbed a bank before this. I would of [sic] slid that shit your way just because that's how I know how to show love. I love helping people. Take care.

7. Witness Officers

a. Witness Officer 3

Witness Officer 3 responded to Involved Officer 1's location after he requested additional officers. While enroute, Witness Officer 3 heard Involved Officer 1 advise that he was stopping Tovar for a liquor violation and, shortly after, "Shots fired."

b. Witness Officer 4

Witness Officer 4 responded to Involved Officer 1's location when he heard Involved Officer 1 advise that shots were fired. Additionally, he heard Involved Officer 1 say that Tovar had a shotgun, which he had dropped, but Tovar was continuing to not comply with Involved Officer 1's commands and walking away. When Witness Officer 4 arrived, he saw Involved Officer 1 pointing his handgun at Tovar. He also saw Tovar holding a knife while walking along the side of the street. Witness Officer 4 heard Tovar yell something to the effect of, "Kill me!" while waving the knife in the air. Tovar failed to follow Involved Officer 1's commands to drop the knife. Next, he heard gunshots, saw Tovar fall to the ground, and observed officers provide medical assistance.

c. Witness Officer 2

While enroute to Involved Officer 1's location, Witness Officer 2 heard Involved Officer 1 state, "shots fired," and that Tovar was disarmed, but fifteen feet away from the gun. When he arrived, Witness Officer 2 saw Tovar wearing a poncho and he observed a straight blade knife in a sheath in Tovar's belt. Involved Officer 1 was giving Tovar commands to stop, but Tovar did not comply. As Witness Officer 2 walked next to Involved Officer 1, he saw Tovar remove his poncho and shirt. Next, Tovar removed the knife from the sheath. He saw Tovar hold the knife in his left hand and he waived it in the same way someone would use a knife in a fight. Witness Officer 2 observed Witness Officer 1 discharge a 40mm less lethal weapon, but it had no effect on Tovar and Tovar continued to waive his knife. Seeing that the less lethal alternative weapon had no effect on Tovar, Witness Officer 2 was concerned that Tovar still posed a significant risk

to the officers and civilians in the area. He then observed Involved Officer 1 discharge his weapon three times.

d. Witness Officer 5

When Witness Officer 5 arrived at Involved Officer 1's location, he observed Tovar walking away from Involved Officer 1, who had his handgun at "low ready." Witness Officer 5 retrieved his department-issued rifle and observed Tovar remove his shirt and repeatedly yell, "You are going to have to shoot me!" while walking toward an area with civilian traffic. At this point, Witness Officer 5 saw a fixed blade knife in Tovar's right hand. Additionally, he observed that a nearby elementary school and middle school had just dismissed its students, so the area was congested with students walking home as well as vehicles coming to pick up the students. As Tovar continued to move away from officers, Witness Officer 5 saw that Tovar was getting closer to a police vehicle that was blocking the roadway that led to an elementary school. Witness Officer 5 observed Witness Officer 1 discharge a 40mm less lethal weapon, but it was ineffective, and Tovar continued walking away while laughing. Witness Officer 5 heard Involved Officer 1 give Tovar another command to drop the knife, which Tovar did not do. Witness Officer 5 described Tovar as holding the knife with a tight grip and the blade was pointed upwards. As Tovar got closer to the patrol vehicle and within 200 yards of a nearby school, Witness Officer 5 raised his rifle to target Tovar. As he did so, he momentarily lost sight of Tovar, which is when Involved Officer 1 discharged his handgun three times.

e. Witness Officer 1

Witness Officer 1 responded to Involved Officer 1's location to assist him in stopping Tovar for a liquor violation. He also heard Involved Officer 1 state that Tovar was walking away from him. Seconds later, he heard Involved Officer 1 say that the suspect was armed. While enroute, Witness Officer 1 heard Involved Officer 1 state that Tovar had been disarmed, but he was still walking away. Moments later, Involved Officer 1 aired that Tovar was now armed with a knife and that Tovar was saying something to the effect that the police would have to kill him. Witness Officer 1 arrived and used his vehicle as a barrier by blocking the road and putting the vehicle between occupied civilian vehicles that were already in the area and close enough to Tovar to be in danger. Witness Officer 1 equipped himself with a 40mm less lethal weapon, but

given the exigency, he only took one round. Witness Officer 1 was approximately twenty-five feet from Tovar, and he heard the other nearby officers giving him commands, but he observed that Tovar did not comply with the commands.

Witness Officer 1 observed the knife sheath in Tovar's belt and understood that he was still armed with a knife. Witness Officer 1 opined that Tovar was a threat given his distance to the other officers and the presence of other civilians that were by the nearby homes and schools. Witness Officer 1 discharged the 40mm less lethal weapon at Tovar. He observed Tovar wince, but it did not have any other effect on Tovar. Given Witness Officer 1's experience, he expected that the 40mm less lethal weapon would incapacitate someone, at least, temporarily. This caused him to believe that Tovar was possibly intoxicated. The less lethal weapons' lack of effect on Tovar caused Witness Officer 1 to be more concerned for his safety, the officers' safety, and the public's safety.

Witness Officer 1 returned to his vehicle to reload the 40mm less lethal weapon. However, while he was in the process of doing so, he heard three gunshots. He next observed Tovar lying on the ground and saw officers providing medical attention to him.

f. Witness Officer 6

Witness Officer 6 responded to Involved Officer 1's location after he referenced an alcohol violation where the subject had a weapon and was failing to comply. While enroute, she heard Involved Officer 1 advise over the radio that shots were fired. When she arrived, she saw officers approximately seventy-five yards ahead of her. Witness Officer 6 retrieved her department-issued rifle. As she approached the other officers, she heard Tovar yelling at the officers and saw Tovar waving his arms in an aggressive and threatening manner at the officers. Specifically, she stated that Tovar was in a "fighting stance" and he was consistently moving. At no time did she observe Tovar make any effort to surrender or comply with commands although she heard officers giving Tovar commands. At about the same time, she observed Involved Officer 1 discharge his handgun, but she did not observe Tovar's exact actions just prior to the shots being discharged.

8. Incident Scene Investigation

The IIT collected potential evidence at the scene, including what appeared to be a possible disassembled airsoft shotgun.



Figure 2 - Partially disassembled airsoft shotgun.

9. Video Evidence

The IIT gathered available video from a nearby business. Relevant screenshots of the video are below.

15:44:54 – Security video from channel 1 of a nearby business captures Tovar, wearing a striped poncho, walking on the corner near the Seven Eleven.



15:46:33 – Tovar continues pacing on the corner while Involved Officer 1's vehicle comes into frame from the right.



15:47:16 – Involved Officer 1 enters from the left while Tovar crosses the street.



15:47:32 – Involved Officer 1 continues walking in Tovar's direction. Involved Officer 1's hands are visible at his side, and he is not holding a weapon.



15:47:46 – Involved Officer 1's right hand is visible at his side, while his left hand touches his radio located on the left side of his chest.



15:47:53 – As Tovar continues walking away from Involved Officer 1, the top half of his body moves out of frame.



15:47:55 – Tovar’s poncho suddenly appears wider than in the previous seconds.



15:47:55 – Involved Officer 1 begins to react by raising his left hand and reaching for his handgun with his right hand.



15:47:56 – Involved Officer 1 continues to draw his handgun. The camera’s view of Tovar is completely obscured by the bushes.



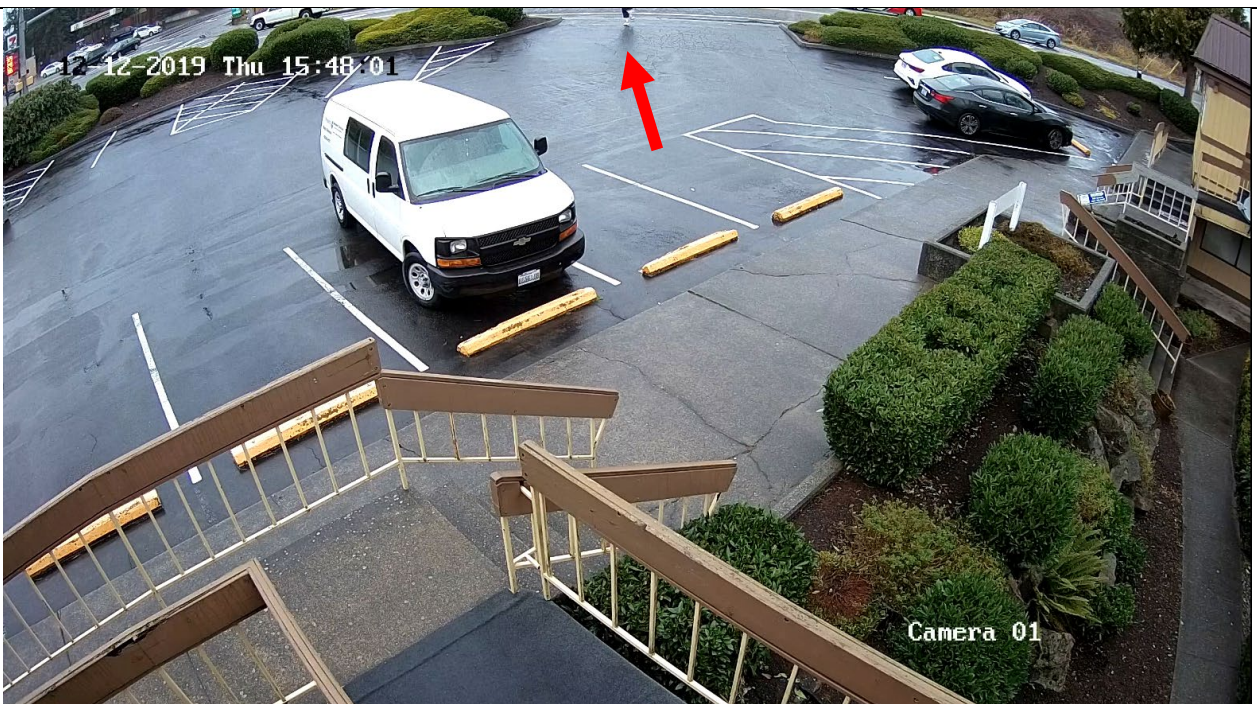
15:47:57 – Based on his hand movements, it appears that Involved Officer 1 has discharged his handgun in Tovar’s direction. The camera’s view of Tovar is completely obscured by the bushes.



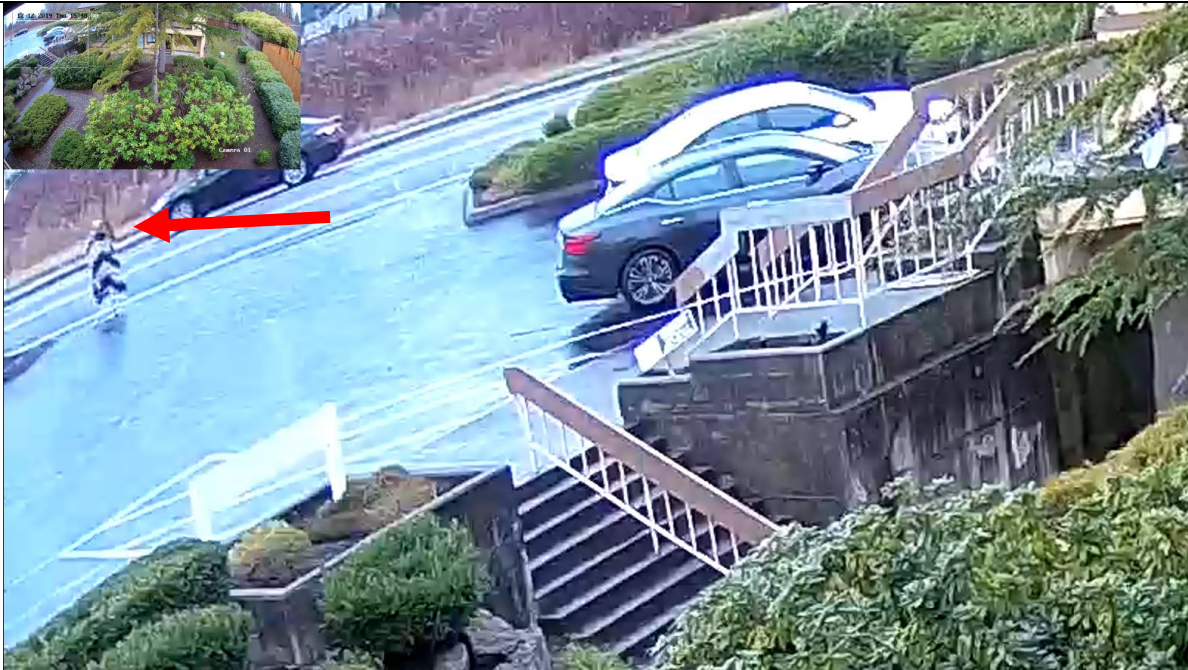
15:47:59 – Involved Officer 1 kneels down for cover while Tovar’s legs appear in the upper frame.



15:48:01 – Involved Officer 1 is completely obscured by the bushes. Tovar’s feet, which are visible while he enters the driveway of a parking lot while walking backwards.



15:48:00 – Channel 2 of the same business captures Tovar entering parking lot with shotgun pointed upwards.



15:48:01 – Tovar points the shotgun towards Involved Officer 1's direction.



15:48:06 – As Tovar quickly turns, a piece of his shotgun falls to the ground. He is still holding a bottle in his left hand.



15:48:06 – As Tovar continues running, he leaves the fallen piece of the shotgun on the ground, but he is still holding the pistol grip of the shotgun in his right hand.



15:48:09 – Tovar throws the remaining piece of the shotgun in the air.



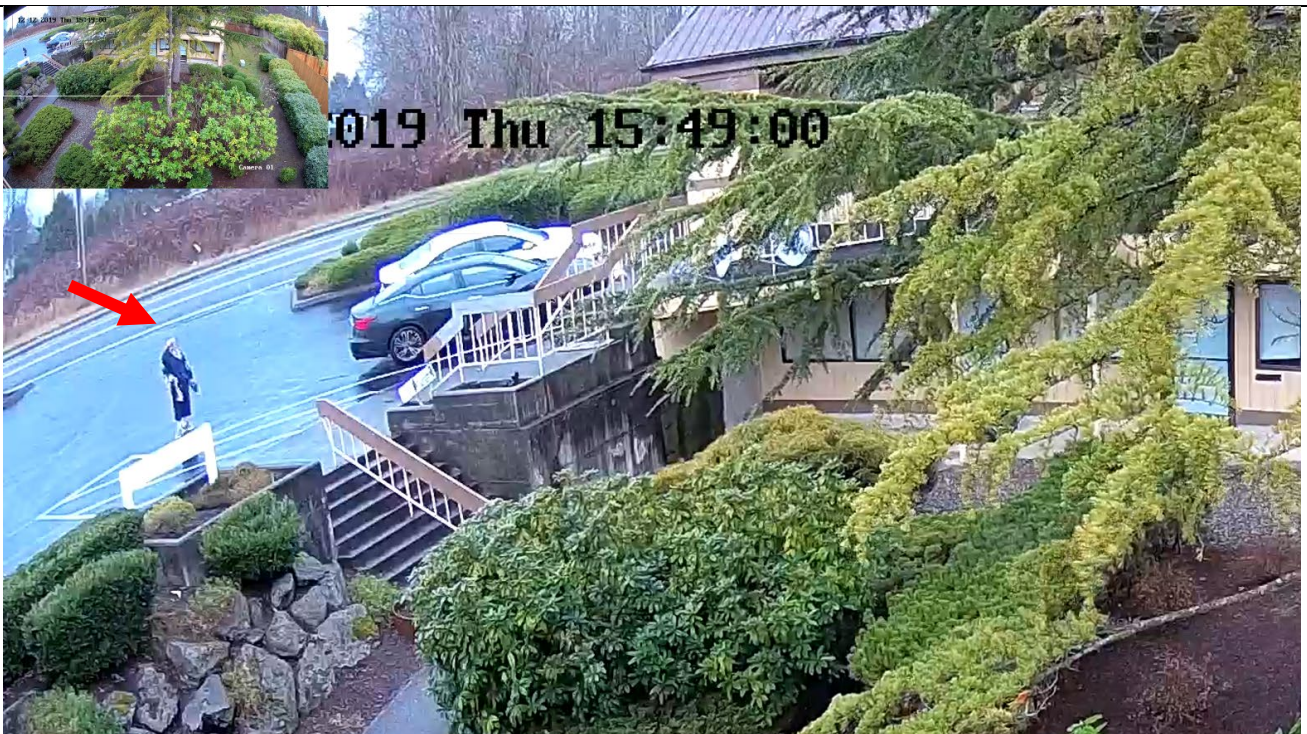
15:48:17 – Involved Officer 1's legs become visible as he approaches the driveway.



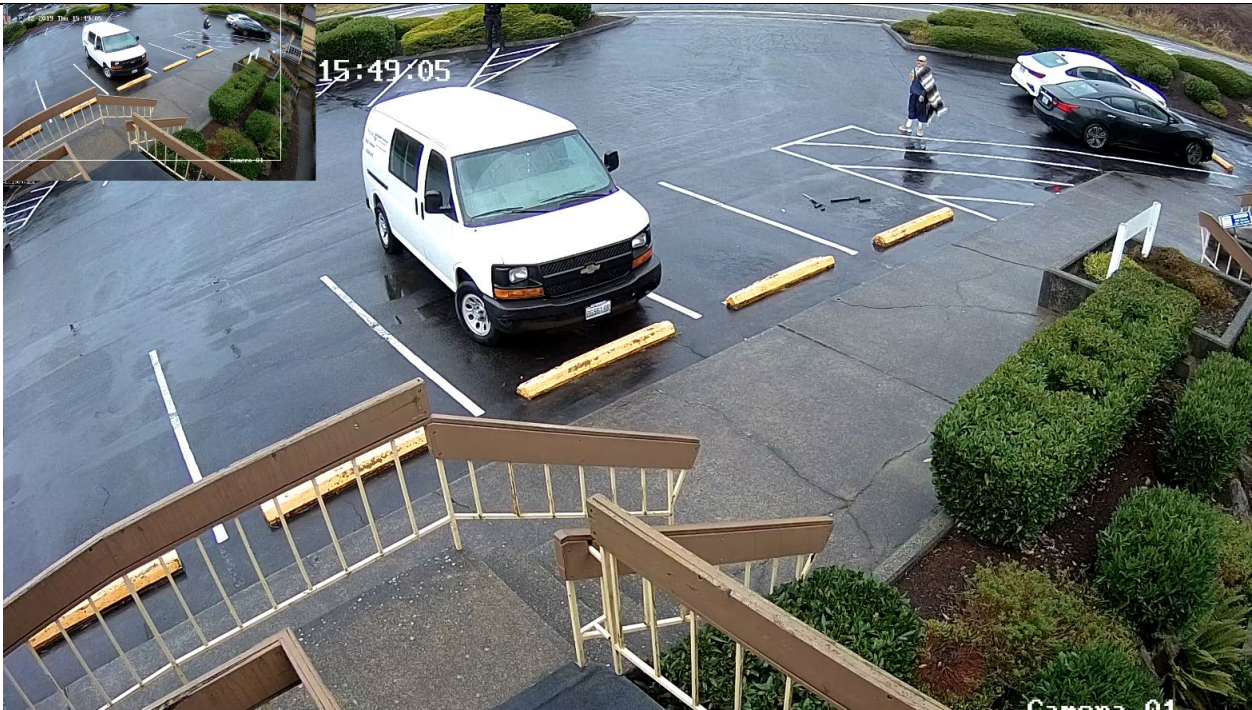
15:48:20 – Involved Officer 1 enters the parking lot, pointing his handgun at Tovar.



15:49:00 – Tovar is no longer in possession of the shotgun and he takes a drink from his bottle.



15:49:05 – Tovar's waistline becomes visible as his poncho blows behind his shoulders.



15:49:18 – Tovar motioning towards Involved Officer 1 while speaking.



15:49:34 – Tovar begins walking northbound on 116th Ave SE.



15:49:39 – Involved Officer 1 follows Tovar while pointing his handgun at Tovar.

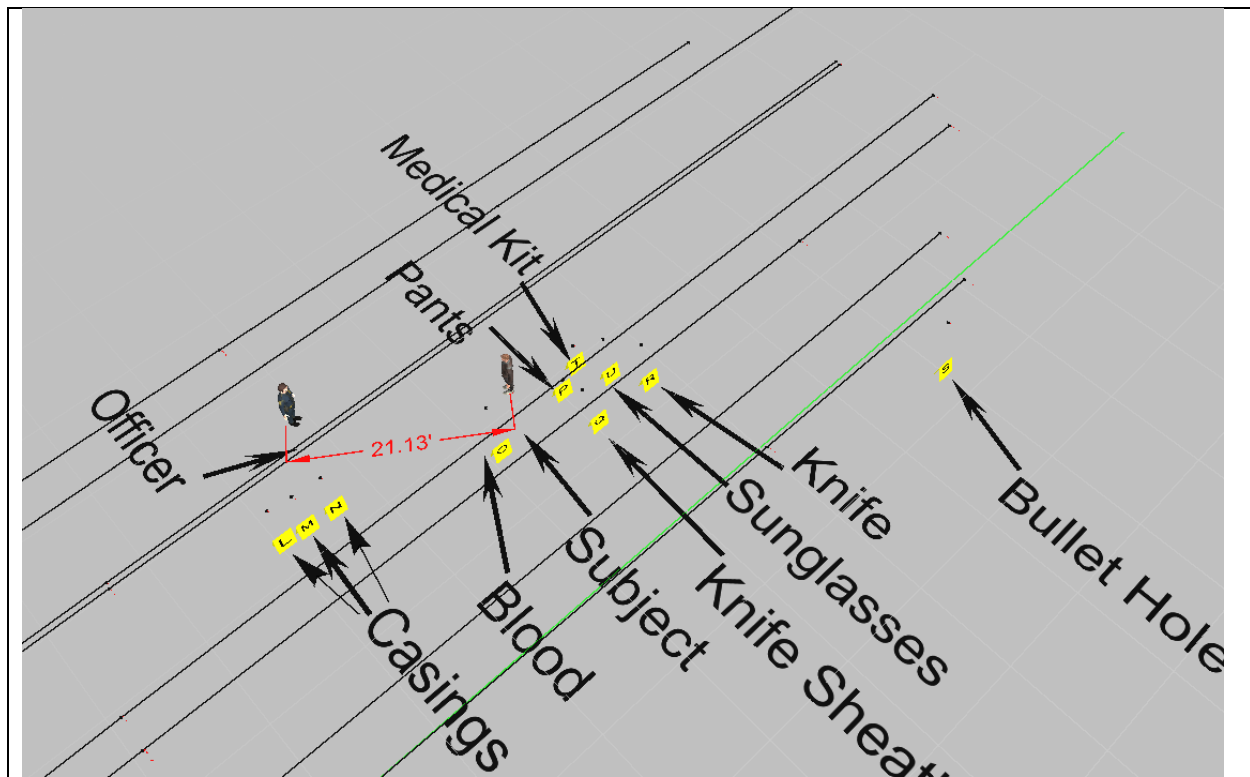


15:49:57 – Involved Officer 1 continues after Tovar, who is out of frame. Involved Officer 1’s left arm is on his radio, while his right arm is holding his handgun, which is extended out towards Tovar.



In addition, investigators conducted a crime scene investigation and reviewed the in-car video footage from responding police vehicles.

Screenshot from crime scene investigation, which determined that, based on the location of items found at the scene, Involved Officer 1 was approximately 21’ away from Tovar at the time he used force.



A photo taken when Tovar received medical care shows that he was approximately 15' to 20' from Witness Officer 1's vehicle when Involved Officer 1 used force.



10. Medical

The King County Medical Examiner's Office performed an autopsy of Tovar, which opined the cause of death is multiple gunshot wounds sustained in a confrontation with police and the manner of death is homicide.¹³ The pathological diagnoses included evidence of two handgun wounds:

- Gunshot wound of the neck.
- Gunshot wound of the left lower back.

The Washington State Patrol Toxicology Laboratory performed a drug analysis of Tovar's blood. The results showed that Tovar's blood tested positive for ethanol (.044 g/100mL), methamphetamine (1.1 mg/L), amphetamine (.047 mg/L), hydrocodone (.016 mg/L), and carboxy-THC (12 ng/mL).

V. LEGAL STANDARD AND APPLICABLE LAW

1. Burden of Proof

The State must prove each element of a criminal charge by competent evidence beyond a reasonable doubt.¹⁴ The KCPAO will file charges if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defenses that could be raised under the evidence, would justify conviction by a reasonable and objective factfinder.¹⁵

In addition, the State must disprove the existence of a defense that negates an element of the crime.¹⁶ Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such nature that, if established, would result in a complete defense for the accused and there is no substantial evidence to refute the affirmative defense.¹⁷ Therefore, the State may be required to disprove one or more of the following defenses:

¹³ Homicide is defined as the killing of one person by another. HOMICIDE, Black's Law Dictionary (11th ed. 2019). Thus, the term homicide as used in an autopsy report refers to the mechanism of death and does not refer to legal liability or culpability.

¹⁴ RCW 9A.04.100; WPIC 4.01.

¹⁵ KCPAO Filing and Disposition Standards.

¹⁶ WPIC 14.00.

¹⁷ Id.

- Justifiable Homicide by Peace Officer;¹⁸
- Justifiable Homicide Defense of Self or Others;¹⁹
- Justifiable Homicide Resistance to Felony;²⁰

2. Applicable Law

This incident occurred on December 12, 2019; therefore, the applicable Justifiable Homicide by a Peace Officer instruction would require the State to prove the officer acted without good faith.²¹

The following jury instructions, contained in Attachment A, would likely be applicable and are relevant to the Team's analysis and conclusion:

- Justifiable Homicide by a Peace Officer²²
- Necessary²³
- Justifiable Homicide – Defense of Self and Others²⁴
- Great Personal Injury²⁵
- Justifiable Homicide – Actual Danger Not Necessary²⁶
- Justifiable Homicide – Resistance to a Felony²⁷

VI. ANALYSIS AND CONCLUSION

Under the KCPAO filing standards, "Homicide cases will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense

¹⁸ RCW 9A.16.040; WPIC 16.01.

¹⁹ RCW 9A.16.050(1); WPIC 16.02.

²⁰ RCW 9A.16.050(2); WPIC 16.03.

²¹ For offenses committed on or prior to December 6, 2018, the former version of WPIC 16.01, based upon RCW 9A.16.040, required the prosecution to prove the officer acted with malice. For offenses committed between December 7, 2018, and February 3, 2019, RCW 9A.16.040, based upon Laws of 2019, Chapter 1, § 7, removed the malice standard and required the prosecution to prove the officer did not act in good faith. There are no pattern jury instructions for offenses committed between December 7, 2018, and February 3, 2019. For offenses committed on or after February 4, 2019, the current version of WPIC 16.01, based upon RCW 9A.16.040, requires the prosecution to prove the officer did not act in good faith. RCW 9A.16.040(1)(a) utilizes the malice and good faith standard, but this section only applies when a "public officer applied deadly force in obedience to the judgment of a competent court."

²² WPIC 16.01.

²³ WPIC 16.05.

²⁴ WPIC 16.02.

²⁵ WPIC 2.04.01.

²⁶ WPIC 16.07.

²⁷ WPIC 16.03.

that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder. Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such nature that, if established, would result in complete freedom for the accused and there is no substantial evidence to refute the affirmative defense.”

The KCPAO declines to file charges against Involved Officer 1 because the independent investigation and the Team’s analysis reveal that there is insufficient evidence to prove any criminal charges or disprove applicable affirmative defenses beyond a reasonable doubt.

1. Justifiable Homicide by a Peace Officer

a. Law Regarding Justifiable Homicide by a Peace Officer

Homicide is justifiable when necessarily used by a peace officer meeting the good faith standard to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty.²⁸ Additionally, homicide is justifiable when necessarily used by a peace officer meeting the good faith standard to arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony.²⁹

In considering whether to use deadly force to arrest or apprehend any person for the commission of any crime, the peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others.³⁰ Among the circumstances which may be considered by peace officers as a “threat of serious physical harm” are the following:

- The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening;
or

²⁸ RCW 9A.16.040(1)(b); WPIC 16.01.

²⁹ RCW 9A.16.040(1)(c)(i); WPIC 16.01.

³⁰ RCW 9A.16.040(2).

- There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.³¹

A peace officer acts in good faith, an objective standard, when considering all the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.³² Necessary means that no reasonably effective alternative to use the force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended.³³

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.³⁴ “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.”³⁵

b. Analysis Regarding Justifiable Homicide by a Peace Officer

The evidence in the independent investigation showed Tovar was resisting Involved Officer 1’s orders to stop and that there was probable cause for Involved Officer 1 to believe that Tovar committed and was in the process of committing various felonies. Specifically, when Tovar displayed what appeared to be a shotgun, there was probable cause to believe that Tovar was committing a felony assault against Involved Officer 1. Similarly, after Witness Officer 1 discharged the 40mm he returned to his vehicle for additional ammunition. It is not clear if Witness Officer 1 was aware that Tovar was advancing towards his location, but Involved Officer 1 observed Tovar approaching Witness Officer 1’s location. Based on Tovar’s actions, there was probable cause to believe that Tovar intended to assault Witness Officer 1.

³¹ Id.

³² RCW 9A.16.040(4).

³³ RCW 9A.16.010; WPIC 16.05.

³⁴ Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989).

³⁵ Id. 490 U.S. at 396-97.

Next, the evidence in the independent investigation showed there was probable cause to believe that Tovar, if not apprehended, posed a threat of serious physical harm to the officer or others when he displayed the shotgun. Given the shotgun's appearance and Tovar's movements with the shotgun, it was likely impossible for Involved Officer 1 to know the shotgun was an airsoft weapon. Further, the law does not require an officer to be fired upon first. When Involved Officer 1 observed that Tovar was no longer in possession of the shotgun, he appropriately did not use deadly force. However, Tovar introduced a second deadly weapon into the incident when he drew a knife and displayed that weapon in a threatening matter. After being struck by the 40mm, Tovar did not indicate that he intended to surrender nor did the less lethal weapon incapacitate him. Instead, Tovar advanced towards Witness Officer 1's location while armed with a knife. Based on these actions, it was reasonable for Involved Officer 1 to believe that Tovar posed a threat of serious physical harm.

Lastly, the evidence in the independent investigation showed that Involved Officer 1 used deadly force with a good faith belief that his actions were necessary to prevent death or serious physical harm to the officer or another individual. Based upon Tovar's previous refusals to comply with Involved Officer 1's commands, it was reasonable for Involved Officer 1 to fear that Tovar would continue to ignore his commands. Additionally, given that Tovar was armed with a knife, it was reasonable for Involved Officer 1 to be fearful that Tovar intended to commit serious physical harm.

2. Justifiable Homicide in Defense of Self or Others

a. Law Regarding Justifiable Homicide in Defense of Self or Others

Homicide is justifiable in defense of self or others when the slayer reasonably believed the person slain intended to commit a felony, to inflict death, or to inflict great personal injury; the slayer reasonably believed that was imminent danger of such harm being accomplished; and the slayer employed such force and means as a reasonably prudent person would under the same or similar conditions as they reasonably appeared to the slayer.³⁶ Great personal injury includes

³⁶ RCW 9A.16.050(1); WPIC 16.02.

an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering, if it were inflicted upon either the slayer or another person.³⁷

Under this instruction, the danger must be imminent, not immediate. The Washington Instruction Committee noted that “Imminence does not require an actual physical assault. A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out.”³⁸ Additionally, a person is entitled to act on appearances in defending himself, if that person acts in good faith and on reasonable grounds, although it afterwards might develop that the person was mistaken as to the extent of the danger.³⁹

The reasonable person standard used in this instruction does not expressly require the jury to compare the slayer to a reasonable officer. However, because law enforcement officers – especially compared to non-law enforcement civilians – receive significant amounts of training on weapons, defensive tactics, and the use of force, it is prudent to assume the jury would be required to take Involved Officer 1’s training into account. Therefore, the same evidence and testimony used to determine whether Involved Officer 1 acted as a reasonable peace officer are also relevant to this instruction.

b. Analysis Regarding Justifiable Homicide in Defense of Self or Others

As stated earlier, when Involved Officer 1 initially discharged his firearm, he was responding to the threat that Tovar posed when he displayed a shotgun. Although Tovar discarded the shotgun, he soon thereafter armed himself with a knife. Witness Officer 1 utilized a less lethal weapon to gain compliance, but it had no effect on Tovar. Given the potential threat that Tovar still posed, including his movement towards Witness Officer 1 who was reloading his less lethal weapon, Involved Officer 1’s use of force was also justifiable in defense of self or other.

³⁷ WPIC 2.04.01.

³⁸ WPIC 16.02.

³⁹ WPIC 16.07.

VII. KCPAO RESPONSIBILITIES REGARDING INQUEST

The KCPAO previously notified the King County Executive's Office of this incident and an inquest was completed on March 22, 2024. The inquest jury returned a split decision, with one juror finding that Involved Officer 1 caused Tovar's death by criminal means, three jurors finding he did not cause Tovar's death by criminal means, and two jurors answered that they were unsure. Although the jury has an opportunity to provide a written explanation of any of their answers, none of the explanations addressed the issue of criminal means. In addition, an inquest jury, which is made up of six jurors as opposed to twelve, is only instructed on the defense of Justifiable Homicide by a Peace Officer. The jury is not instructed on Justifiable Homicide in Defense of Self or Others. Although the jury was not provided with all relevant defenses, the jury still returned a split decision. Thus, this finding further evidences that there is insufficient evidence to prove any criminal charges or disprove applicable affirmative defenses beyond a reasonable doubt to a jury of twelve individuals.

Attachment A

WPIC 16.01 - Justifiable Homicide by a Peace Officer

It is a defense to a charge of [murder] [manslaughter] that the homicide was justifiable as defined in this instruction.

Homicide or the use of deadly force is justifiable:

[when necessarily used by a peace officer acting in good faith to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in discharge of a legal duty] [or]

[when necessarily and in good faith used by a peace officer or person acting under the officer's command and in the officer's aid [to arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony] [or] [to prevent the escape of a person from a federal or state correctional facility or in retaking a person who escapes from such a facility] [or] [to prevent the escape of a person from a county or city jail or holding facility if the person has been arrested for, charged with, or convicted of a felony] [or] [to lawfully suppress a riot if the actor or another participant is armed with a deadly weapon]. In considering whether to use deadly force to arrest or apprehend any person for the commission of any crime, a peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to others. Among the circumstances that may be considered by a peace officer as a “threat of serious physical harm” are the following: (a) The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening; or (b) There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm. Under these circumstances deadly force may also be used if necessary to prevent escape from the officer, when, if feasible, some warning is given.]

[A peace officer shall not be held criminally liable for using deadly force with a good faith belief that such act is justifiable.]

“Good faith” is an objective standard. A peace officer acts in “good faith” if a similarly situated reasonable peace officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the peace officer or another individual. In deciding whether a peace officer acted in good faith, you should consider all the facts, circumstances, and information known to the officer at the time.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 16.05 – Necessary

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

WPIC 16.02 – Justifiable Homicide – Defense of Self and Others

It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer or any person in the slayer's presence or company when:

(1) the slayer reasonably believed that the person slain intended to commit a felony⁴⁰ or to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger⁴¹ of such harm being accomplished; and

(3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

⁴⁰ For purposes of the defense, the use of deadly force appears to be limited to the resistance of violent felonies that threaten human life or may result in great personal injury. See *State v. Nyland*, 47 Wn.2d 240, 287 P.2d 345 (1955).

⁴¹ Regarding imminent danger, the WPIC commented:

Imminence does not require an actual physical assault. A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out. *State v. Janes*, 121 Wn.2d at 241 (citations omitted). While “immediate harm” means “occurring, acting, or accomplished without loss of time: made or done at once,” “imminent harm” means “ready to take place: near at hand: ... hanging threateningly over one's head.”

WPIC 2.04.01 – Great Personal Injury

Great personal injury means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering, if it were inflicted upon either the slayer or another person.

WPIC 16.07 – Justifiable Homicide – Actual Danger Not Necessary

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justifiable.

WPIC 16.03 – Justifiable Homicide – Resistance to a Felony

It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony⁴² upon the slayer or in the presence of the slayer.

The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

⁴² For purposes of the defense, the use of deadly force appears to be limited to the resistance of violent felonies that threaten human life or may result in great personal injury. See State v. Nyland, 47 Wn.2d 240, 287 P.2d 345 (1955)