

Use of Force Fatality Investigation

Nicholas John Ellingson

Valley Independent Investigation Team

Tukwila Police Department 20-6546



King County Prosecuting Attorney

Public Integrity Team

September 23, 2025

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DECLINE MEMORANDUM

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

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

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I. INTRODUCTION

1. Purpose of the Memorandum

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 officer results in death, substantial bodily harm, or great bodily harm.² The independent investigation is conducted in the same manner as a criminal investigation and must be completely independent of the involved agency.³

The Revised Code of Washington requires the prosecuting attorney to represent the State of Washington and to prosecute all criminal actions in which the state or the county may be a party.⁴ In addition to exercising its prosecutorial discretion to initiate criminal proceedings, the prosecuting attorney is required to review certain incidents regarding police use of force and to determine if sufficient evidence exists to support the filing of criminal charges.⁵ Therefore, the review of an incident by the King County Prosecuting Attorney's Office (KCPAO) 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 an independent investigation 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.⁶

2. Scope of the Memorandum

The KCPAO's decision whether 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

² RCW 10.114.011. See also WAC 139-12-010.

³ WAC 139-12-010.

⁴ RCW 36.27.020(4).

⁵ 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.

⁶ Id. See also WAC 139-12-010.

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.

The KCPAO's 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, any civil action, or any inquiry, or other proceeding. Compared to a criminal prosecution, these proceedings involve different areas of the legal system, utilize different standards of proof, and may include evidence that is not admissible in a criminal prosecution. The KCPAO expresses no opinion regarding the propriety or likely outcome of any such actions. However, topics that are relevant to matters outside the scope of this memorandum, such as department policy, procedures, or training, may be included and reviewed in this memorandum to the extent those topics are relevant to assessing whether the police action was justified or if there was a criminal action such that criminal charges should be filed.

3. Status of the Independent Investigation

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

II. OVERVIEW

On December 17, 2020, Auburn Police Department officers were dispatched to a report of a motorhome partially blocking the roadway. An officer confirmed that Nicholas Ellingson, an owner and occupant of the motorhome, had outstanding arrest warrants. When officers saw Ellingson, he fled and produced what appeared to be a handgun. An officer discharged his firearm at Ellingson striking him. Officers and medics administered lifesaving efforts, but Ellingson died as a result of his injuries. Upon closer examination, Ellingson's handgun was a CO₂ pistol that closely resembled a genuine handgun.

III. INVESTIGATION MATERIALS

1. Police Reports – Auburn Police Department 2020-12547
2. Police Reports – Des Moines Police Department 2020-3067

3. Police Reports – Kent Police Department 2020-15817
4. Police Reports – Federal Way Police Department 2020-13786
5. Police Reports – Port of Seattle Police Department 2020-88292
6. Police Reports – Renton Police Department 2020-13115
7. Police Reports – Tukwila Police Department 2020-6546
8. Civilian Statements
9. Computer Aided Dispatch
10. Mobile Data Terminal
11. Crime Scene Investigation
12. King County AFIS Reports
13. Autopsy and Toxicology Reports
14. Involved Officer Information
15. Subject Information
16. 911 Call and Police Radio Traffic
17. Audio
18. In-Car Video
19. Other Video
20. Photos
21. Miscellaneous

IV. **FACTUAL SUMMARY**⁷

1. Facts Prior To The Use of Force

The following information is based upon several sources, including, but not limited to, witness observations, police reports, the Auburn Police Department (APD) computer aided dispatch (CAD) report, recorded police radio, 911 recordings, and in-car video (ICV) cameras from December 17, 2020.

⁷ The Factual 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.

At approximately 3:52 pm, Civilian Witness 1 called 911 to report there was a disabled motor home located in front of 217 T St. SE. Civilian Witness 1 reported that the motorhome was partially blocking the southbound lane, but it appeared the driver of the motorhome was attempting to move it off the road.

At approximately 6:43 pm, Civilian Witness 2 called 911 to report there was a disabled recreational vehicle⁸ stuck in the bushes, it was blocking the northbound lane for the past forty-five minutes, and there were previous issues with this same vehicle. Civilian Witness 2 also reported that a person associated with the motorhome was a white male, in his thirties, approximately 5'10", with black hair, and wearing dark clothing. The 911 operator who took Civilian Witness 2's call noted in the CAD that this vehicle may be related to the same vehicle described by Civilian Witness 1 earlier.

At approximately 8:16 pm, APD Witness Officer 1 was dispatched to investigate the motorhome blocking the road. Witness Officer 1 arrived at 310 T St. SE approximately four minutes later. When she arrived, Witness Officer 1 was wearing an APD uniform and she drove an APD patrol vehicle, which were both marked "Police" and contained other insignia that identified her as a law enforcement officer.

⁸ The terms motorhome, recreational vehicle, and RV were used interchangeably throughout witness statements and police reports; however, all parties appeared to be referring to the same vehicle.



Figure 1 - Image from Witness Officer 1's ICV at the time she arrived.

Witness Officer 1 saw the motorhome, a white Winnebago, partially on private property with approximately two feet of the rear end of the vehicle protruding into the roadway. There was limited natural night, so Witness Officer 1 activated her takedown lights⁹ and observed a female, later identified as Civilian Witness 3 (Civilian Witness 3), inside the motorhome via the rear window. Witness Officer 1 heard the engine accelerating, but the vehicle was not moving because it appeared stuck in the wet grass and mud.

Witness Officer 1 walked to the passenger side of the motorhome and identified herself as being with the "Auburn Police Department." From inside the motorhome, Civilian Witness 3 responded, "Just a minute." Civilian Witness 3 opened the door and exited the motorhome. Civilian Witness 3 explained that she and her husband had permission to be on the property from the property owner. She identified the property owner as "Civilian Witness 4," but she did not know his last name. "Civilian Witness 4" was later identified as Civilian Witness 4.

Witness Officer 1 could not see entirely inside the motorhome, but she heard movement inside. Given the information provided by Civilian Witness 2 regarding a male associated with the motorhome, Witness Officer 1 believed another person may be inside. When asked if anyone

⁹ Takedown lights are bright lights designed to illuminate the area in front of the police vehicle.

else was inside, Civilian Witness 3 stated that her husband was also inside. Civilian Witness 3 provided his name, Nicholas John Ellingson (Ellingson), and his date of birth. Witness Officer 1 advised Civilian Witness 3 that she needed to move the motorhome out of the roadway.

Witness Officer 1 returned to her patrol vehicle and did a criminal history check on Civilian Witness 3 and Ellingson. Witness Officer 1 observed that Civilian Witness 3 did not have any outstanding arrest warrants, but Ellingson did. Witness Officer 1 confirmed that the warrants belonging to the Bothell Police Department were valid and she agreed to meet an officer from their department to transfer custody of Ellingson.

While she conducted the warrant search, Witness Officer 1 was inside her patrol vehicle and parked behind the motorhome. Although she did not observe anyone leaving or approaching the motorhome, she could not see the passenger side of the motorhome from her patrol vehicle.

After confirming Ellingson's arrest warrants, Witness Officer 1 walked back to the passenger side of the motorhome. When Civilian Witness 3 exited the motorhome, Witness Officer 1 asked Civilian Witness 3 to have Ellingson exit the motorhome. Civilian Witness 3 stated Ellingson was no longer in the motorhome and he went to "Civilian Witness 4's" residence. Because she did not see anyone exit the motorhome, Witness Officer 1 requested consent to enter the motorhome and search for Ellingson. Civilian Witness 3 provided consent and Witness Officer 1 entered the motorhome.

Before Witness Officer 1 entered the motorhome, she announced herself as an APD officer, stated that Ellingson was under arrest, and ordered him to exit the motorhome. There was no response, so Witness Officer 1 entered the motorhome and searched for Ellingson, but she did not locate him.

As Witness Officer 1 exited the motorhome, Involved Officer 1 and Witness Officer 2¹⁰ arrived to assist. Involved Officer 1 noticed a male approaching their location from one of the nearby homes. Involved Officer 1 asked Witness Officer 1 if the male was Ellingson. Witness Officer 2 used her flashlight to illuminate the male. While the male appeared to match

¹⁰ At the time of this incident, Witness Officer 2 was in the zero phase of her field training observation period and assigned to ride with Involved Officer 1, her field training officer. During the zero phase, the officer observes and learns the basics of police work from their field training officer.

Ellingson's physical description, she could not clearly see him due to the dark lighting conditions. Witness Officer 1 shouted, "Hey, Nick!" The male, later identified as Ellingson, responded, "Yeah?" This affirmative answer caused the officers to believe that the male was, in fact, Ellingson.

2. Facts During The Use of Force

Witness Officer 1 told Ellingson that he was under arrest for his warrants. She observed Ellingson turn east along the driveway, walking away from the officers. Involved Officer 1 told Ellingson not to run, but Ellingson ran away from the officers. Ellingson ran east, along the driveway, between a house and two vehicles that were parked along the driveway.



Figure 2 - View looking towards the private driveway.

Involved Officer 1 pursued Ellingson between the house and two vehicles. Witness Officer 1 ran eastbound to the north of the vehicles, which was parallel to Involved Officer 1 and Ellingson. As Witness Officer 2 pursued Ellingson, she heard Involved Officer 1 yell something about a gun.

When Ellingson and Involved Officer 1 emerged around the vehicles, Witness Officer 1 observed that Ellingson was in between Involved Officer 1 and herself, but she could not observe his hands. Witness Officer 1 observed Ellingson turn towards Involved Officer 1, followed by

several gunshots that caused Ellingson to fall to the ground. Witness Officer 2 notified the APD dispatcher, “Shots fired.”

3. Facts Immediately After the Use of Force

Witness Officer 1 observed Ellingson laying in the prone position on the ground, his left arm was out to the side and bent at the elbow, and his right arm was tucked underneath his body. Concerned that Ellingson may be armed, Witness Officer 1 ordered Ellingson to put his arms out to his side, but he did not respond. Involved Officer 1, who was approximately ten feet to the east, asked Witness Officer 1 if she saw the firearm. Witness Officer 1 observed what appeared to be a black, semiautomatic pistol on the ground to the left side of Ellingson’s legs.



Figure 3 - Photograph of the CO₂ pistol found next to Ellingson.

Within moments of the gunshots, Civilian Witness 3 screamed, “He doesn’t have a gun,” “It’s not a real gun,” and “It’s a BB gun¹¹.” Witness Officer 2 turned her attention to Civilian Witness 3, who was running toward the scene and yelling. Witness Officer 2 ordered Civilian

¹¹ Ellingson’s weapon was interchangeably referred to as a CO₂ pistol and a BB gun. For purposes of this memorandum, the terms are used synonymously to refer to the same object.

Witness 3 to stay back, which she did. While Civilian Witness 3 screamed that Ellingson did not have a gun, Witness Officer 2 heard Involved Officer 1 ask, “Then why does he have a gun?”

Involved Officer 1 and Witness Officer 1 planned to detain Ellingson, secure the firearm, and provide him with medical aid. As they approached Ellingson, Involved Officer 1 stepped onto the firearm so that Ellingson could not access it and Witness Officer 1 placed Ellingson in handcuffs. Next, the officers rolled Ellingson over, observed he was not breathing, and felt that he had no pulse. Witness Officer 1 began chest compressions while other officers quickly arrived and assisted with medical aid. Witness Officer 3, one of the officers that arrived, observed Witness Officer 1 administering chest compressions and saw Involved Officer 1 resting his foot on, what he believed to be, a black handgun. Witness Officer 3 assumed Involved Officer 1’s position, with his foot on the firearm, and used his flashlight to illuminate Ellingson for Witness Officer 1. Another officer brought an AED machine to Witness Officer 1. While they continued to provide medical aid, the Valley Regional Fire Authority and the King County Medics arrived and took over medical attention. However, at approximately 9:07, medics determined that Ellingson was deceased.

As other officers arrived, they assisted in securing the scene and identified potential evidence. Officers located a total of seven discharged cartridge casings that appeared to be silver 9mm ammunition. One cartridge casing was located in a grassy area near the location where the six other casings were located.

V. INDEPENDENT INVESTIGATION

1. Independent Investigation Team

As required by law, an independent investigation team was notified about the use of force and requested to respond to the scene to conduct an independent investigation.¹²

The Valley Independent Investigation Team (VIIT) was contacted, the Tukwila Police Department was identified as the lead agency conducting the independent investigation, and Investigator 1 was designated as the lead investigator. VIIT divided assignments between

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

themselves, such as interviewing witnesses, officer processing, crime scene investigation, and evidence collection.

2. Test Firing Ellingson's Carbon Dioxide (CO₂) Pistol

After the initial investigation at the scene, Investigator 1 and a firearm instructor test fired the CO₂ pistol located by Ellingson at a police facility. First, Investigator 1 removed the CO₂ cartridge and the magazine loaded into the pistol. He noted there were approximately eight pellets in the magazine and an additional pellet in the handle of the pistol. Next, Investigator 1 loaded the CO₂ cartridge into the pistol and pulled the trigger twenty-four times. Each time, Investigator 1 heard a distinct sound, which sounded like metal striking metal. Regardless of whether he pulled the trigger slowly or in rapid succession, the pistol made the same noise.

The firearm instructor informed Investigator 1 that it did not sound like there was any CO₂ remaining in the cartridge. Upon further inspection of the cartridge, the firearm instructor and Investigator 1 observed a small pin hole in the cartridge, which may have allowed CO₂ to slowly leak out of the cartridge.

Investigator 1 loaded a new CO₂ cartridge into the pistol and pulled the trigger, which emitted a distinctly different sound that sounded muffled. Investigator 1 described the sound as the sound a suppressed firearm makes. He inserted the magazine into the pistol and discharged it. Investigator 1 observed that the pistol discharged a pellet, which indicated it was functional.

Finally, Investigator 1 also test fired the pistol in a dark room to observe if the pistol emitted a muzzle flash when discharged. Regardless of whether the pistol was loaded with a magazine or not, Investigator 1 did not observe any muzzle flash when he pulled the pistol's trigger.

3. Officer Processing

Consistent with standard protocol, VIIT determined which officers used force and processed those officers. Officer processing refers to the investigative steps of documenting the physical appearance and condition of uniforms and equipment of each involved officer. Depending on the specific facts and circumstances of the incident, officer processing typically consists of four parts:

- Investigators photograph the involved officer to document their appearance, including the involved officer's clothing and equipment worn during the use of force, uniform defects, injuries, equipment, and potential trace evidence.
- Investigators identify which weapons were involved during the use of force and document the condition of those items.
- Investigators determine and document the number of firearm cartridges, if applicable, in the involved officer's firearm, loaded magazine, and any spare magazines.
- Investigators collect firearms, equipment, uniforms, and other items as necessary.

Investigators determined that Involved Officer 1 discharged his handgun. Based upon the photographs taken by investigators, the involved officer wore an APD uniform, which was obviously marked with the word "Police" and other law enforcement insignias that clearly identified him as law enforcement officer.



Figure 4 - Photograph taken of the involved officer during processing.

While examining an involved officer's firearm, investigators determine if the firearm is loaded, whether there is an unfired cartridge in the chamber of the firearm, whether there are unfired cartridges in the magazine loaded into the firearm, and whether there are unfired cartridges in the involved officer's spare magazines. Based on this examination, investigators can estimate how many cartridges were discharged during the use of force. Crime scene investigators

also seek to collect discharged cartridge casings located at the use of force scene to ensure that all the involved officer's discharged cartridges are accounted for.

a. Involved Officer 1

Weapon Examined: Glock 17, 9mm caliber handgun		
Location	Recovered	Capacity
Chamber	1	1
Loaded Magazine	10	17
Spare Magazine	17	17
Spare Magazine	17	17

If Involved Officer 1 filled his loaded magazine to capacity with an additional cartridge in the chamber, his handgun was loaded with eighteen cartridges, which would indicate that he discharged seven cartridges.

4. Civilian Witness Statements

a. Civilian Witness 4

Civilian Witness 4 reported to VIIT he was home watching television when he heard six to eight gunshots. He reported he did not hear anything prior to or after hearing the gunshots. Civilian Witness 4 asked what occurred and VIIT explained there was an officer-involved shooting. Civilian Witness 4 asked if the person shot was "Nick." When asked why he thought it was, "Nick," Civilian Witness 4 explained that "Nick" was a mechanic who "sometimes" did work for Civilian Witness 4 and that Nick was present today between 3:30 pm and 4:00 pm.

When asked if Civilian Witness 4 noticed the motorhome stuck in the mud outside his home, Civilian Witness 4 said he saw it earlier when he left for "about an hour," but he thought it belonged to his neighbor, Civilian Witness 1. When asked how many times "Nick" had been to his home, Civilian Witness 4 approximated five times. However, VIIT investigators noted that, during their conversation with Civilian Witness 4, he seemed somewhat vague as to his relationship with "Nick." For example, Civilian Witness 4 claimed he did not have a phone number for "Nick" and there was never a woman with "Nick."

b. Civilian Witness 1

Civilian Witness 1 reported to VIIT that she was at work when she received a phone call from her father. He told Civilian Witness 1 that he had dropped off her daughter at Civilian Witness 1's home and noticed a motorhome that looked suspicious, stuck in the mud and blocking the roadway. He added that a male associated with the motorhome asked him to help pull the motorhome from the mud, but he declined.

Civilian Witness 1 accessed her home surveillance camera from her phone and saw the motorhome in front of her home. She recognized this motorhome as belonging to a male and female who lived in the vehicle while it was parked in the Civilian Witness 4's front yard. Civilian Witness 1 stated that the couple's dogs ran loose and eventually bit a child. She previously contacted APD in 2020 and animal control addressed the issue with the dogs. Civilian Witness 1 recalled that the vehicle was present in the summer, but it left about six weeks ago.

Civilian Witness 1 reported she went home and continued to watch the motorhome via her surveillance camera. She observed the couple associated with the motorhome continued to try to get the motorhome out of the mud. At one point, a "blue pickup" arrived and attempted to assist the couple, but it was unsuccessful.

Civilian Witness 1 continued to watch the surveillance cameras until a second police officer arrived. When she heard gunshots, she went back to watching the video and noticed muzzle flashes on the video.

Civilian Witness 1 described the couple who lived in the motorhome as "strung out" from using drugs.

c. Civilian Witness 3

Civilian Witness 3 provided a statement to APD Witness Officer 4 at approximately 9:29 pm, about thirty-five minutes after the use of force. Civilian Witness 3 reported that she arrived at this location with Ellingson to look at a new motorhome they purchased. When the police were on scene, she saw Ellingson walk out of the bushes and she saw Ellingson run from the officers. She believed that Ellingson ran because he had existing arrest warrants. However, she was surprised that Ellingson ran because the warrants were for misdemeanors.

Civilian Witness 3 reported that Ellingson told her previously that if he were stopped by the police, he would commit a felony so that he could go to prison, which may be easier than a local jail. Civilian Witness 3 believed, however, that Ellingson would not do anything serious.

When asked about the use of force, Civilian Witness 3 reported she first heard what sounded like tasers, followed by four “pop” sounds. When she turned to see what the sounds were, she saw lights from bullets. Civilian Witness 3 believed that Ellingson drew his BB gun. Although she did not see Ellingson remove the BB gun, she came to this conclusion when she heard the officers say something about Ellingson’s handgun. She described the BB gun as small and that it looked real unless you examined it closely. When asked if Civilian Witness 3 thought the officers would have perceived the BB gun as an actual firearm given the circumstances and the lack of lighting, Civilian Witness 3 confirmed that officers would believe the BB gun was an actual firearm. Civilian Witness 3 reported she believed that Ellingson “did that” on purpose so that the police “would shoot him.” When asked if Ellingson ever made suicidal statements about wanting police officers to kill him, she confirmed that he did. She reported Ellingson did not want to go to jail and he told her that if he pulled out the firearm on police officers, they would shoot him right away. Additionally, Civilian Witness 3 believed that Ellingson was suicidal recently.

Civilian Witness 3 also provided a statement to VIIT. In this statement, Civilian Witness 3 substantially reported similar information as she did with Witness Officer 4. In addition, Civilian Witness 3 reported that Witness Officer 1 arrived due to their motorhome blocking part of the lane. She said that she and Ellingson were aware that he had outstanding arrest warrants. When Witness Officer 1 returned to her vehicle, Ellingson told Civilian Witness 3 that he needed to leave because Witness Officer 1 was likely going to check his criminal history for warrants. Ellingson stated he was going to “Civilian Witness 4’s” until the officer left.

Civilian Witness 3 also reported that when additional officers arrived, she saw Ellingson walk out of nearby bushes. An officer called out to him, “Nick?” and he replied “Yep.” Based on his body language, Civilian Witness 3 believed Ellingson was trying to figure out whether to run away or not. Civilian Witness 3 reported that the officers told Ellingson he was under arrest, which caused him to run. While the officers pursued Ellingson, she thought she heard a taser discharged three times, which she described as a buzzing sound. Civilian Witness 3 stated she

did not know what happened next because Ellingson's back was facing her as he attempted to elude the officers. The next thing she knew, Civilian Witness 3 saw bullets being fired and "big flashes of guns." Civilian Witness 3 stated she did not see Ellingson draw his BB gun, but she admitted that he may have and it was possible she did not see it or that it was inside his clothes. She confirmed that the BB gun looked like an actual firearm and it resembled the firearm in the investigator's holster, which was a semi-automatic pistol. Civilian Witness 3 confirmed she heard four distinct gunshots and only the "guy" officer discharged his weapon.

Civilian Witness 3 reported that Ellingson was an alcoholic, but he had not been drinking that day. She reported that Ellingson used heroin and methamphetamine and that he overdosed on heroin last week, but she successfully revived him with Narcan. Civilian Witness 3 assumed that Ellingson likely consumed methamphetamine earlier today and he suffered from a "meth psychosis," which caused Ellingson to believe that people were following him. Civilian Witness 3 clarified that she initially heard the tasers deployed, followed by five seconds, followed by three gunshots, followed by a few seconds, followed by a fourth gunshot.

5. Crime Scene Investigation and Search Warrants

Investigators conducted a crime scene investigation, documented the location of various items that appeared to have evidentiary value, and collected various items as evidence.

6. Video Evidence

At the time this incident occurred, APD officers were not equipped with body worn video cameras; however, their patrol vehicles were equipped with ICV. VIIT reviewed the ICV. Because the ICV cameras are mounted inside the patrol vehicles, the cameras did not capture the use of force which occurred in another area. Additionally, VIIT noted that the audio associated with the ICV did not begin recording until after the use of force occurred. For instance, the first statements captured on video contain the officers checking if they were injured and Civilian Witness 3 telling the officers that Ellingson's firearm was not real.

Civilian Witness 1's surveillance camera captured video of the officers near Ellingson's and Civilian Witness 3's motorhome. Additionally, her camera captured the moment when Ellingson approached officers, the officers used their flashlights to illuminate him, Ellingson

walked towards the officers, and Ellingson fled the officers. The officers and Ellingson ran past the motorhome and were no longer visible.



Figure 5 - Image from Civilian Witness 1's surveillance camera. The officers and Ellingson are located to the right of the motorhome.



Figure 6 - A zoomed-in image from Civilian Witness 1's surveillance camera, which depicts Ellingson walking towards the officers.



Figure 7 - A zoomed-in image from Civilian Witness 1's surveillance camera, which depicts Ellingson walking away from the officers.



Figure 8 - A zoomed-in image from Civilian Witness 1's surveillance camera, which depicts Ellingson fleeing the officers.

7. Autopsy and Toxicology

The King County Medical Examiner's Office performed an autopsy of Ellingson to determine the cause and manner of death. The cause of death is a term used to indicate *what* specific injury or disease led to death. The manner of death is a term used to categorize *how* the injury or disease led to death. Manner of death is categorized into one of five categories:

- Accident is defined as a death other than natural, where there is no evidence of intent.
- Homicide is defined as a death due to intentionally inflicted harm of one person by another. It is also defined as the killing of one person by another.¹³ Thus, the term homicide as used in an autopsy report refers to the mechanism of death and does not refer to legal terms, such as murder or manslaughter, which do include a determination of legal liability or culpability.
- Natural is defined as a death solely by organic disease. If natural death is hastened by injury, such as a fall, the manner of death will not be considered natural.
- Pending is a temporary designation used when additional investigation, information, or test results are required to determine the cause or manner of death.
- Suicide is defined as a death as the result of a purposeful action, with intent to end one's life.
- Undetermined is defined as a death when there is insufficient evidence or information to assign to accident, homicide, suicide, or natural categories, or when two plausible manners are equally likely.

The King County Medical Examiner's Office opined the cause of death was multiple gunshot wounds sustained in a confrontation with police and the manner of death was homicide. In general, a gunshot wound is characterized as penetrating or perforating.¹⁴ The pathological diagnoses included evidence of five gunshot wounds:

1. Multiple, three, gunshot wounds of torso
 - Entrance wounds: right shoulder, right presternal¹⁵ chest, left abdomen/flank
 - Exit wounds: right lateral chest, right posterior chest wall
 - Recovery of bullet from left chest wall
2. Multiple, two, gunshot wounds of extremities
 - Perforating gunshot wound of left forearm
 - Penetrating gunshot wound of left thigh with one bullet recovered

¹³ HOMICIDE, Black's Law Dictionary (11th ed. 2019).

¹⁴ A penetrating gunshot wound occurs when a bullet pierces the skin, enters the body creating an entrance wound, but the bullet does not exit the body. In contrast, a perforating gunshot wound occurs when the bullet pierces the skin, enters the body creating an entrance wound, and exits the body creating an exit wound.

¹⁵ Refers to the area in front of the sternum.

The Washington State Patrol Toxicology Laboratory performed a drug analysis of Ellingson's blood. The results showed that Ellingson's blood tested positive for amphetamines (amphetamine .14 mg/L; methamphetamine 1.3 mg/L).

8. Involved Officer's Statement

a. 5th Amendment Protections

Under current law the independent investigation must be conducted in the same manner as a criminal investigation.¹⁶ Moreover, one of the primary purposes of the independent investigation is to “inform any determination of whether the use of deadly force met the good faith standard and satisfied other applicable laws and policies.”¹⁷ Thus, a law enforcement officer, like any other citizen, is protected by the 5th Amendment of the United States Constitution, which prohibits compelling a person to be a witness against themselves.¹⁸ A law enforcement officer, like any other citizen, can choose whether or not to voluntarily waive their 5th Amendment protection and provide a statement to criminal investigators.

The involved agency, however, may compel an involved officer to provide a statement in an administrative investigation for the purpose of determining if the involved officer's actions were in accordance with the agency's policy and training. If an involved officer refuses to provide a statement during an administrative investigation, their refusal may result in consequences such as termination.

While the involved officer's statements may be used against them in an administrative or civil proceeding, such compelled statements are inadmissible against an officer in a subsequent criminal trial.¹⁹ 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.²⁰ Therefore, the investigators conducting the independent investigation may not receive any

¹⁶ WAC 139-12-010.

¹⁷ Id.

¹⁸ U.S. Const. amend. V.

¹⁹ Garrity v. State of N.J., 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562 (1967).

²⁰ U.S. v. North, 910 F.2d 843, 857-858 (D.C. Cir., 1990).

compelled statements from an involved officer or any investigative content that was informed by such compelled statements.²¹

b. Statements Taken During the Current Incident

Although the involved officer had a 5th Amendment right to refuse to provide a statement, except for an administrative compelled statement that could not be relied upon by investigators or the Team, the involved officer elected to provide a voluntary statement regarding the use of force. Because the statement is voluntary, it would very likely be admissible in a criminal proceeding.

c. Voluntary Statement by Involved Officer

Involved Officer 1 provided a voluntary written statement to VIIT. His statement began by outlining his law enforcement experience. APD hired Involved Officer 1 in 2015 and he graduated from the Washington Criminal Justice Training Commission in November 2015. Throughout his career, he received regular use of force and deadly force training. In addition to his regular duties, Involved Officer 1 is currently a Field Training Officer and a member of the Valley SWAT Team.

Involved Officer 1 reported that he was on duty December 17, 2020. While on duty, he wore his APD-issued navy blue jumpsuit and other equipment that contained the word “Police” and other items that clearly identified him as a police officer. His duty weapon is a Glock 17 9mm handgun. His normal loading procedure is to load a full magazine into his handgun, which contains seventeen cartridges, with an additional cartridge in the chamber of the firearm for a total of eighteen cartridges. He also carries two additional spare magazines, which each contain seventeen cartridges.

On the evening of the use of force, he was working with Witness Officer 2. Witness Officer 2 had recently graduated from the Basic Law Enforcement Academy, and she was on her “zero week” phase of APD’s field training observation program. Witness Officer 2 and Involved

²¹ WAC 139-12-030.

Officer 1 rode in an APD patrol vehicle, which contained obvious markings that clearly identified it as a police vehicle. This evening, Witness Officer 2 was assigned to drive their patrol vehicle and she also wore the same type of police uniform as Involved Officer 1.

At approximately 8:44 pm, Involved Officer 1 and Witness Officer 2 were driving back to the APD station when they heard Witness Officer 1 requested a second police unit to her location to assist with a subject who had misdemeanor arrest warrants. Witness Officer 2 advised the APD dispatcher, that she and Involved Officer 1 would respond to assist.

On their way to Witness Officer 1's location, Involved Officer 1 reviewed the mobile data terminal (MDT) to familiarize himself with the situation. Involved Officer 1 learned that Witness Officer 1 was dispatched to a disabled motorhome that was stuck in the bushes and blocking the road. The reporting party stated the motorhome was occupied by a male and they had not observed any weapons. The reporting party described the motorhome as white and black, older, and possibly a Winnebago. Additionally, the reporting party described the male as white, in his thirties, 5'10", thin build, black hair, and wearing dark clothing.

Involved Officer 1 observed on the MDT that Witness Officer 1 confirmed outstanding misdemeanor warrants for Ellingson. Involved Officer 1 retrieved a Department of Licensing photograph of Ellingson to familiarize himself with Ellingson's appearance.

When Witness Officer 2 and Involved Officer 1 arrived, he observed the motorhome and Witness Officer 1's patrol vehicle, which had the headlamps illuminated. Additionally, Involved Officer 1 observed Witness Officer 1 was inside the motorhome and using her flashlight to illuminate the inside. Witness Officer 1 told Involved Officer 1 that Ellingson was present when she arrived, but after she returned from her patrol vehicle, Ellingson was no longer inside the motorhome.

As Witness Officer 1 exited the motorhome, Involved Officer 1 observed a male approaching them from approximately thirty feet away. From Involved Officer 1's point of view, there was nothing obstructing the male's view of the officers. Involved Officer 1 asked Witness Officer 1 if the male was Ellingson, but she was not certain. Witness Officer 1 called, "You Nicholas?" and the male replied affirmatively, "Yeah." Involved Officer 1 observed Ellingson continue to approach their location, but he suddenly stopped and moved in a different direction.

Witness Officer 1 loudly yelled to Ellingson to, "Stop!" and that he was under arrest. Ellingson did not respond. Instead, he quickened his pace away from the officers.

Thinking that Ellingson was about to flee, Involved Officer 1 started jogging towards Ellingson. Involved Officer 1 observed Ellingson leaning forward and begin to sprint. While running after Ellingson, Involved Officer 1 observed Ellingson was not swinging his arms in a manner consistent with someone running, which he found concerning. Based on his training and experience, Involved Officer 1 believed that Ellingson may be holding something in his hands and trying to not drop the item. Ellingson continued running, but he stumbled, which allowed Involved Officer 1 to close the distance between them to approximately two to six feet. Involved Officer 1 thought he was close enough that he could wrap his arms around Ellingson and pull him to the ground. As he was about to grab Ellingson, Ellingson started turning his body counterclockwise toward Involved Officer 1. While turning, Involved Officer 1 observed Ellingson's full body turned, not only Ellingson's head. This concerned Involved Officer 1 because it did not appear that Ellingson was merely looking to see how far away Involved Officer 1 was. Instead, Involved Officer 1 thought Ellingson was turning his whole body in a manner consistent with someone who is trying to gain "target acquisition." In other words, based on his experience, it did not appear that Ellingson was simply looking back to see if Involved Officer 1 was right behind him.

Involved Officer 1 was also aware of the backdrop behind him. The backdrop behind Involved Officer 1 was the motorhome, where he last knew Civilian Witness 3 was located. As Ellingson continued turning towards Involved Officer 1, Involved Officer 1 heard a loud "pop." Involved Officer 1 looked at Ellingson's hands and observed what appeared to be a black semiautomatic handgun in Ellingson's right hand, which Ellingson held parallel to the ground at stomach height. Involved Officer 1 heard an additional two to five "pops" as Ellingson completed his turn towards Involved Officer 1. Involved Officer 1 believed the noise came from Ellingson's handgun.

Involved Officer 1 reported, at that moment, he feared for his life and the other officers he knew were in the area. Additionally, Involved Officer 1 reported he believed that if Ellingson had more time, he could quickly adjust his aim at the officers. Involved Officer 1 moved to his right and drew his handgun. He reported that, under the circumstances, he knew a taser was not

an effective weapon against a handgun. Additionally, he was aware a taser was not guaranteed to immobilize Ellingson. Involved Officer 1 discharged his handgun at Ellingson and he observed Ellingson's body react to being struck. Involved Officer 1 observed Ellingson fall to the ground and when it appeared to Involved Officer 1 that Ellingson was no longer holding the handgun, Involved Officer 1 stopped discharging his handgun.

After Ellingson fell to the ground, Involved Officer 1 observed Ellingson's handgun on the ground. After ensuring the other officers were not struck by Ellingson, Involved Officer 1 and Witness Officer 1 approached Ellingson. Involved Officer 1 stepped on Ellingson's handgun, while Witness Officer 1 rendered aid. As other officers arrived, Involved Officer 1 showed them the location of Ellingson's handgun. Per protocol, other officers secured the scene and administered aid. Involved Officer 1 was removed from the scene and participated in officer processing.

VI. POTENTIAL IMPEACHMENT INFORMATION

Law enforcement agencies are required to report misconduct that an officer has engaged in that affects their credibility.²² In turn, each county prosecutor is required to develop and adopt a written protocol addressing potential impeachment disclosures pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and subsequent case law.²³ The Team has confirmed that, to its knowledge, there is no potential impeachment information regarding the involved officer who used deadly force in this incident.

VII. LEGAL STANDARD AND APPLICABLE LAW

1. Burden of Proof

In a criminal prosecution, the State must prove each element of a criminal charge by competent evidence beyond a reasonable doubt.²⁴ The KCPAO will file charges if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably

²² RCW 10.93.180(2)(a)(ii).

²³ RCW 10.93.180(1)(a).

²⁴ RCW 9A.04.100; WPIC 4.01.

foreseeable defenses that could be raised under the evidence, would justify conviction by a reasonable and objective factfinder.²⁵

In addition, the State must disprove the existence of a defense that negates an element of the crime beyond a reasonable doubt.²⁶ 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.²⁷

Therefore, in addition to proving that the accused committed a crime, the State will be required to disprove one or more of the following defenses:

1. Justifiable Homicide by Peace Officer²⁸
 2. Justifiable Homicide Defense of Self or Others²⁹
 3. Justifiable Homicide Resistance to Felony³⁰
-
2. Applicable Law Regarding Justifiable Homicide by a Peace Officer

This incident occurred on December 17, 2020. The applicable pattern jury instruction for Justifiable Homicide by a Peace Officer requires the State to prove the involved officer acted without good faith.³¹

²⁵ KCPAO Filing and Disposition Standards.

²⁶ WPIC 14.00.

²⁷ KCPAO Filing and Disposition Standards.

²⁸ RCW 9A.16.040; WPIC 16.01.

²⁹ RCW 9A.16.050(1); WPIC 16.02.

³⁰ RCW 9A.16.050(2); WPIC 16.03.

³¹ 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.”

3. Applicable Jury Instructions

The following jury instructions, contained in Appendix A, would be applicable in a criminal prosecution and provided to the factfinder to determine whether the State met the required burden of proof. Therefore, these instructions are highly relevant to the Team's analysis and conclusion:

1. WPIC 16.01 - Justifiable Homicide by a Peace Officer
2. WPIC 16.05 - Necessary
3. WPIC 2.09 - Felony
4. WPIC 2.16 - Peace Officer
5. WPIC 120.07 - Lawful Arrest and Probable Cause
6. WPIC 16.02 - Justifiable Homicide – Defense of Self and Others
7. WPIC 2.04.01 - Great Personal Injury
8. WPIC 16.07 - Justifiable Homicide – Actual Danger Not Necessary
9. WPIC 16.03 - Justifiable Homicide – Resistance to a Felony

VIII. ANALYSIS AND CONCLUSION

1. Summary of 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 that could be raised under the evidence, would justify conviction by a reasonable and objective factfinder. 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.”³²

The KCPAO declines to file charges against the involved officer because the independent investigation and the Team's analysis reveal that the involved officer's actions were lawful and justifiable as either Justifiable Homicide by a Peace Officer, Justifiable Homicide in Defense of Self or Others, or both. These defenses contain related but distinct concepts and definitions. Criminal charges should be declined because the defenses are of such nature that prosecution

³² KCPAO Filing and Disposition Standards.

would result in a complete defense for the accused and there is no substantial evidence to refute either affirmative defense.

2. Justifiable Homicide by a Peace Officer

a. Graham v. Connor

In Graham v. Connor, the seminal case on evaluating police use of force, the United States Supreme Court determined that the test to determine whether the force used by the police was “reasonable” is not capable of a “precise definition or mechanical application.”³³ Instead, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.³⁴ In other words, the reasonableness of whether the officer’s use of force is justified is determined by “the totality of the circumstances.”³⁵

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.³⁶ “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.”³⁷ However, the inquiry is an objective one. The question is whether the officer’s actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.³⁸

³³ Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989).

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ Id. at 396-97.

³⁸ Id. at 397.

b. 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.³⁹

Homicide is also 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.⁴⁰

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.⁴¹ Among the circumstances which may be considered by peace officers as a “threat of serious physical harm” are the following:

- 1 The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening; or
- 2 There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.⁴²

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.⁴³ Necessary means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended.⁴⁴

³⁹ RCW 9A.16.040(1)(b); WPIC 16.01.

⁴⁰ RCW 9A.16.040(1)(c)(i); WPIC 16.01.

⁴¹ RCW 9A.16.040(2).

⁴² Id.

⁴³ RCW 9A.16.040(4).

⁴⁴ RCW 9A.16.010; WPIC 16.05.

c. Analysis Regarding Justifiable Homicide by a Peace Officer

The evidence in the independent investigation showed the involved officer used deadly force 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. Here, APD officers attempted to arrest Ellingson for outstanding arrest warrants, which Witness Officer 1 previously confirmed were valid. By attempting to arrest Ellingson on his warrants, the officers were in the process of executing a legal process, an order of a court, and their legal duty.

The evidence in the independent investigation also showed there was probable cause for the involved officer to reasonably believe that Ellingson had committed, had attempted to commit, was committing, or was attempting to commit various felonies. Specifically, there was probable cause for the involved officer to believe that Ellingson was attempting to commit a felony, such as murder, manslaughter, or assault, when Ellingson turned and pointed, what appeared to be, a firearm at the officer while fleeing arrest.

The evidence in the independent investigation showed there was probable cause for the involved officer to believe that Ellingson, if not apprehended, posed a threat of serious physical harm to an officer or others. This defense provides two explicit examples that may be considered by peace officers as a threat of serious physical harm. First, a threat of serious physical harm may include circumstances where the suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening. Second, a threat of serious physical harm may include circumstances where there is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.

Based upon the ICV and Civilian Witness 1's surveillance camera, the officers attempted to arrest Ellingson shortly before 9:00 pm. Images from the ICV and Civilian Witness 1's surveillance camera depict the area where the attempted arrest and use of force occurred was very dark. In addition, it appeared, based on video, photographs taken at the scene, and the officers' reports, that Ellingson wore dark clothes when he fled officers. Further, photographs taken of Ellingson's CO₂ pistol at the scene support the inference that his pistol was dark and appeared to resemble an actual semiautomatic pistol. Therefore, it is highly likely that the factfinder would find that Ellingson's actions caused the involved officer to have probable cause

to believe Ellingson, if not apprehended, posed a threat of serious physical harm to the officer or others.

The evidence in the independent investigation showed that the involved officer 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. A factfinder would likely find that the involved officer acted in good faith because, under an objective standard, when considering all the facts, circumstances, and information known to the involved officer at the time, 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. Further, a factfinder would also likely find that the involved officer's use of deadly force was necessary because no reasonable effective alternative to the use of force appeared to exist and the amount of force used was reasonable to effect the lawful purpose intended.

As described above, when the involved officer used force, he was attempting to arrest Ellingson for his arrest warrants. Based upon the investigation and his statement, the involved officer would very likely have been aware of the lack of quality lighting, Ellingson's dark clothes, Ellingson's movement while fleeing, Ellingson pointing the CO₂ pistol at the involved officer, and Ellingson discharging the CO₂. Additionally, it is likely that a factfinder would be provided with demonstrative examples of black semiautomatic pistols. A cursory internet search for "real black semiautomatic pistol" depicts several types of genuine firearms that closely resemble Ellingson's CO₂ pistol. Based on the totality of the circumstances, it is very likely that a factfinder would find the involved officer's testimony credible if he stated he believed Ellingson was in possession of genuine black semiautomatic handgun.

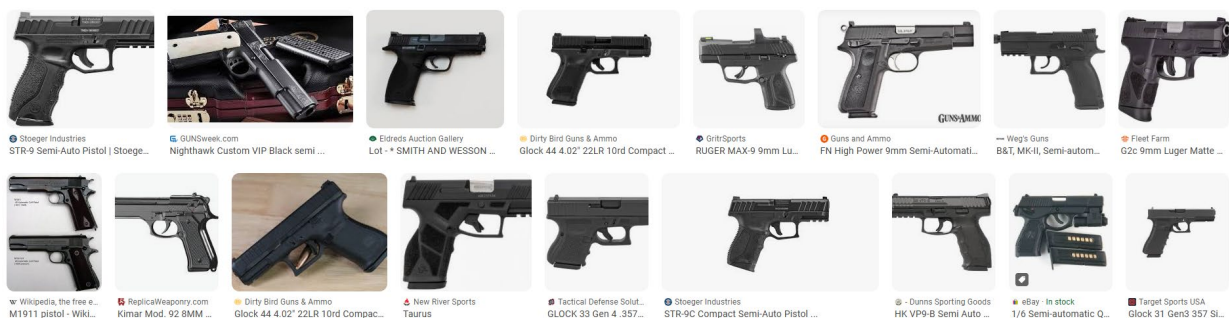


Figure 9 - Google image search results for "real black semiautomatic pistol."

Therefore, based on the anticipated admissible evidence and testimony, which is corroborated by several witnesses including video evidence, the involved officer's actions were lawful and justifiable and there is insufficient evidence to prove criminal charges beyond a reasonable doubt or refute this defense beyond a reasonable doubt.

3. Justifiable Homicide in Defense of Self or Others

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

The legislature recognizes that the defense of Justifiable Homicide by a Peace Officer established a dual standard with respect to the use of deadly force by peace officers and private citizens, and further recognizes that private citizens' permissible use of deadly force under the defense of Justifiable Homicide in Defense of Self or Others is not restricted and remains broader than the limitations imposed on peace officers.⁴⁵

The defense of Justifiable Homicide by a Peace Officer allows a peace officer to use deadly force against another person only when necessary to protect against an *immediate* threat of serious physical injury to the officer or another person.⁴⁶ An immediate threat of serious physical injury or death means that, based on the totality of the circumstances, it is objectively reasonable to believe that a person has the present and apparent ability, opportunity, and intent to immediately cause death or serious bodily injury to the peace officer or another person.⁴⁷

However, the defense of Justifiable Homicide in Defense of Self or Others is also applicable to peace officers.⁴⁸ Under this defense, 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 there 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.⁴⁹ Great personal injury includes an injury that the slayer reasonably

⁴⁵ RCW 9A.16.040 [1986 c 209 §3].

⁴⁶ RCW 10.120.020(2). See also, Graham, 490 U.S. at 396.

⁴⁷ RCW 10.120.020(2).

⁴⁸ RCW 9A.16.040(5)(a).

⁴⁹ RCW 9A.16.050(1); WPIC 16.02.

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.⁵⁰

The Washington Pattern 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.”⁵¹ Additionally, a person is entitled to act on appearances in defending themselves, 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.⁵²

The reasonable person standard as used in this instruction does not expressly require the factfinder 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 factfinder would be required to take the involved officer’s training and experience into account to determine how a reasonable person would have acted. Therefore, the same evidence and testimony used to determine whether the involved officer acted as a reasonable peace officer under the previous instruction is also relevant to this instruction.

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

As described above, the evidence in the independent investigation showed the involved officer reasonably believed that Ellingson intended to commit a felony, to inflict death, or to inflict great personally injury upon the involved officer. Specifically, when Ellingson pointed, what appeared to be, a genuine firearm at the involved officer, in addition to the surrounding circumstances, a factfinder would likely find that Ellingson intended to commit a felony, to inflict death, or to inflict great personally injury.

The evidence in the independent investigation showed that the involved officer reasonably believed that Ellingson’s actions constituted an imminent danger of such harm being

⁵⁰ WPIC 2.04.01.

⁵¹ WPIC 16.02.

⁵² WPIC 16.07.

accomplished. Under the broader standard of imminence, it is even more likely that the factfinder would find that Ellingson's actions, as described earlier, caused the involved officer to reasonably believe that Ellingson's threats would be carried out. Importantly, this portion of the analysis requires the factfinder to consider the information the involved officer knew at the time of the incident, not in hindsight.

The evidence in the independent investigation showed that the involved officers employed such force and means as a reasonably prudent person would under the same or similar conditions as they reasonably appeared to the involved officer.

Therefore, based on the anticipated admissible evidence and testimony, which is corroborated by several witnesses including video evidence, the involved officer's actions were lawful and justifiable and there is insufficient evidence to prove criminal charges beyond a reasonable doubt or refute this defense beyond a reasonable doubt.

IX. KING COUNTY INQUEST PROGRAM

Pursuant to Executive Order PHL 7-1-6 EO, the KCPAO shall inform the King County Inquest Program Manager in writing whenever the KCPAO becomes aware of a person's death following an interaction with law enforcement or while in the custody of law enforcement. The KCPAO previously complied with this requirement.

Appendix A

1. 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.

2. 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.

3. WPIC 2.09 Felony—Designation Of

_____ is a felony.⁵³

⁵³ Whether a crime is a felony is a matter of law for the court to decide.

4. WPIC 2.16 Peace Officer—Definition

Peace officer means a duly appointed city, county, or state law enforcement officer.

5. WPIC 120.07 Lawful Arrest—Definition

[An arrest is lawful if made pursuant to an arrest warrant.] [An arrest is [also] lawful if the arresting officer had probable cause to believe that the person arrested had committed the crime of (name of crime) [in the officer's presence]. “Probable cause” means facts that would cause a reasonably cautious officer to believe that the person had committed that crime. In determining whether the facts known to the officer justified this belief, you may take into account the officer's experience and expertise.]

6. 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 felony⁵⁴ or to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger⁵⁵ 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.

⁵⁴ 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).

⁵⁵ 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.”

7. 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.

8. 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.

9. 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 felony⁵⁶ 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.

⁵⁶ 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)