

Use of Force Fatality of
Derek Hayden

Seattle Police Department
Force Investigation Team, 2021FIT-0003



King County Prosecuting Attorney
Public Integrity Team

May 1, 2024



DECLINE MEMORANDUM

Law Enforcement Use of Force Fatality Regarding: Derek Hayden

May 1, 2024

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.¹ 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.²

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.³ The independent investigation is conducted in the same manner as a criminal investigation.⁴

Additionally, the KCPAO shall inform the King County Executive whenever the

¹ 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.

² Id. See also WAC 139-12-010.

³ RCW 10.114.011. See also WAC 139-12-010.

⁴ WAC 139-12-010.

investigation into a death involving a member of any law enforcement agency in King County is complete and also advise whether an inquest should be initiated in accordance with the King County Charter.⁵ 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.⁶

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 February 16, 2021, Port of Seattle Police Department officers observed Derek Hayden with a knife. Hayden told the officers that he needed their help and he needed them to "kill" him.

⁵ Executive Order PHL 7-1-5 EO.

⁶ Id.

The officers requested assistance from the Seattle Police Department. When Seattle Police officers responded, the officers followed Hayden. Involved Officer 1 and Involved Officer 2 arrived from the opposite direction. When Involved Officer 2 gave Hayden commands, Hayden turned towards Involved Officer 2 and advanced towards him with the knife raise in the air. Involved Officer 2 and Involved Officer 1 discharged their department-issued weapons. Hayden was struck by gunshots and police provided aid until medics arrived, but he was pronounced deceased.

III. INVESTIGATION AND EVIDENCE

1. Independent Investigation Team Reports
2. Police Reports – Seattle Police Department
3. Police Reports – Port of Seattle Police Department
4. Civilian Statements
5. CAD/MDT
6. Crime Scene Investigation
7. Autopsy and Toxicology
8. Involved Officer Information
9. Subject Information
10. 911 Call and Radio
11. Audio
12. Body Worn Video
13. In-Car Video
14. Photos

IV. INVESTIGATION SUMMARY⁷

⁷ 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.

1. Information Before and During the Use of Force

On February 16, 2021, at approximately 9:19 pm, Port of Seattle Police Department (PSPD) Witness Officer 1 and Witness Officer 2 were on patrol near the Seattle waterfront area. Derek Hayden (Hayden) approached their vehicle and told them, “I need you to help me. I need you to kill me.” The officers exited their vehicle and Witness Officer 2 called out that Hayden was holding a knife to his own neck. Witness Officer 2 drew his department-issued handgun and held it at low ready, while Witness Officer 1 retrieved a 40MM launcher, a less lethal alternative, from their vehicle. Witness Officer 2 spoke to Hayden, explaining that he wanted to help him and asked him to put the knife down. Hayden walked away from the officers, so they followed him on foot while Witness Officer 2 requested additional units from the Seattle Police Department (SPD). While the officers followed Hayden, they continued to tell him to “Put the knife down,” and “We want to help you.” Because Hayden continued to walk away from the officers, Witness Officer 1 continued to follow Hayden while Witness Officer 2 retrieved their patrol vehicle. Once Witness Officer 2 returned, the officers continued to follow Hayden and they attempted to “corral” him into an area with no other civilians. However, each time they got closer to Hayden, he would run further ahead to keep his distance from the officers. As Hayden and the officers approached the area near the Argosy Cruises, Witness Officer 1 observed Hayden cutting himself on the neck, which he broadcast via his radio.

SPD officers started to arrive and the officers formed a plan to engage Hayden who continued to ignore officers’ commands for him to drop the knife. SPD Witness Officer 3 attempted to make verbal contact with Hayden, but he did not appear to acknowledge Witness Officer 3.

SPD Involved Officer 2 and Involved Officer 1 arrived in their vehicle from the opposite direction of the officers who were following Hayden and they noticed the knife in Hayden’s hand. Given what he had heard via radio and dispatch notes, Involved Officer 2 believed that Hayden was a danger to himself and met the criteria for an involuntary commitment. Additionally, he felt that Hayden posed a threat to other civilians who were in the area. Involved Officer 2 exited his vehicle and ordered Hayden to “Stop!” As he gave this command, Hayden turned towards Involved Officer 2 while holding the knife to his throat. Involved Officer 2

stated, "You need to stop where you're at," but Hayden walked straight towards Involved Officer 2's position, holding both arms out to his side, and he stated, "Just do it." Witness Officer 3 observed Hayden advance quickly towards Involved Officer 2 with the knife above his head in an aggressive manner.

Involved Officer 2 backed up, but Hayden transitioned his grip on the knife to an overhand grip, holding the knife in his right hand with his right arm raised above his shoulder. Hayden moved toward Involved Officer 2, while Involved Officer 2 yelled, "Get on the ground!" Hayden moved from side to side while saying, "Do it! Do it!" Involved Officer 2 again yelled for Hayden to "Stop!" but Hayden continued toward Involved Officer 2 and said, "Please kill me." Involved Officer 2 discharged his department-issued rifle, striking Hayden. Involved Officer 1 also observed Hayden running towards Involved Officer 2's location and yelled, "Stop!" and "Drop the knife!" She also discharged her department-issued handgun at Hayden.

Although officers gave Hayden numerous commands to stop, Witness Officer 3 also observed that Hayden did not. Witness Officer 3 witnessed Involved Officer 2 backpedal into the middle of the street while Hayden continued to progress towards Involved Officer 2. Witness Officer 3 believed that Hayden was within striking distance of Involved Officer 2 and he saw Involved Officer 2 discharge his weapon at Hayden.

After Hayden was struck, an officer removed the knife from Hayden's hand and officers provided medical aid to Hayden until medics arrived. Medics continued providing aid, but eventually pronounced Hayden deceased.

2. Independent Investigation Conducted by the Seattle Police Department

As other officers arrived, the police secured the incident scene and rerouted traffic away from the area. The SPD Force Investigation Team (FIT) was requested to respond to the scene and to conduct an independent investigation. SPD Investigator 1 was assigned as the lead investigator. The FIT investigators divided assignments between themselves and began to process the incident scene.

3. Processing of the Officers

As part of standard practice, FIT investigators processed the involved officers and determined that Involved Officer 2 and Involved Officer 1 used their firearms during the use of force. Investigators determined that Involved Officer 2 discharged four cartridges from his rifle and Involved Officer 1 discharged three cartridges from her handgun.

4. Civilian Witnesses

Investigator 1 conducted a cavass of the area near the incident to determine if any businesses had surveillance video or other information relevant to the use of force. However, many of the businesses were already closed and did not have any employees on site at the time of the use of force. She also confirmed that none of the surveillance cameras located at Pier 56 captured the incident. Police did, however, interview other civilians who were in the area.

Civilian Witness 1 reported to police that she was drawn to her window by police lights. When she looked out of the window, she observed several police officers in a line following Hayden.⁸ She reported that Hayden was moving quickly and he abruptly changed direction, which was followed by gunshots.

Civilian Witness 2 reported to police that he observed Hayden with something in his hands before he was confronted by police. He also saw Hayden waving his hands in the air, followed by gunshots.

Civilian Witness 3 saw Hayden followed by officers in a line. She believed that Hayden had something in his hands, at one point his hands were raised and he may have been waving them. Once gunshots were fired, she saw Hayden fall to the ground and observed an officer kick something from the area of Hayden's hand.

Civilian Witness 4 heard a commotion outside and used his binoculars to see what was happening. He observed officers in a line walking behind Hayden and that Hayden was walking fast. He described Hayden as "agitated" and that he got within three to six feet of an officer prior

⁸ The civilian witnesses did not identify Hayden by name. However, for purposes of this memorandum, his name is used instead of referring to Hayden as an unknown individual.

to hearing at least two gunshots. He also observed an officer kick something away from the area of Hayden's hand.

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 inadmissible against an officer in a subsequent criminal trial.⁹ 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.¹⁰ 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.

Involved Officer 1 provided a compelled statement to the Seattle Office of Police Accountability (OPA). She reported that she drove to the scene while Involved Officer 2 provided her directions. She was aware that Hayden was armed with a knife, had the knife to his throat, had cut himself, and he was moving northbound toward the Argosy Cruise terminal. She explained that she and Involved Officer 2 did not devise a specific tactical plan, but they had previously worked together on calls involving weapons. She explained their goals were to prevent Hayden from accessing other civilians that he could harm, secure the scene, and to disarm Hayden. However, she did not know what, if any, crimes Hayden had committed. She did not remember other specific updates. When they got closer to the scene, Involved Officer 1

⁹ *Garrity v. State of N.J.*, 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562 (1967).

¹⁰ *U.S. v. North*, 910 F.2d 843, 857-858 (D.C. Cir., 1990).

observed patrol vehicles and three to four officers walking. She also saw Hayden walking in front of those officers. As they approached, Involved Officer 2 told her to stop the vehicle, which she felt was a far enough distance away so that they could still communicate with Hayden or other officers. Involved Officer 1 explained that if she had gone further on Alaskan Way, she would have bypassed Hayden, which could have given him access to civilians, officers, or time to harm himself. When she and Involved Officer 2 exited their vehicle, she did not hear the officers or Hayden say anything. She did not see civilians in the immediate area, but she was aware that this was a location where civilians could be. Involved Officer 2 ordered Hayden to stop, but he did not, and Hayden became focused on Involved Officer 2. Involved Officer 1 observed Hayden move towards Involved Officer 2 with the knife upheld, he was moving “aggressively,” and he said, “Just do it.” She believed that Involved Officer 2’s life was at risk, so she discharged her handgun.

Involved Officer 2 provided a compelled statement to OPA. He reported that he did not hear the radio update that a 40mm launcher was available and on scene, but he recalled hearing for the radio air to be held. He also stated that he did not discuss a specific tactical plan with Involved Officer 1 and while they drove to the scene, he was trying to determine where everyone was located. He did not know what, if any, crimes Hayden had committed. When they arrived, he saw the officers following Hayden, noting they were a “fair distance away.” He described Hayden as holding a knife and moving in a half-jog, half-walk, and, at times, holding the knife to his neck. He did not see any civilians in Hayden’s path. When asked why he decided to have Involved Officer 1 stop the vehicle where he did, he explained that given the area is a large tourist area, he thought they should attempt to contain Hayden and not drive past him. He referred to the “tactical L” that officers are trained on to contain and talk with a suspect. After Involved Officer 2 exited his vehicle, he closed the door and moved backwards to use the vehicle for cover. He observed Hayden move towards him while gripping the knife and pointing it downward. Although Involved Officer 2 attempted to move backwards, Hayden was advancing quickly and closing the distance between them. Involved Officer 2 discussed the prior training where officers are taught how fast a subject with a knife could attack them and believed Hayden was capable of stabbing him.

6. Video Evidence

Several officers, including Involved Officer 1 and Involved Officer 2, wore body worn cameras that captured various aspects of the incident.



Figure 1 - Screenshot from Involved Officer 2's and Involved Officer 1's vehicle showing Hayden's location when they arrived.



Figure 2 – Hayden begins to advance towards Involved Officer 2 after he announced himself.



Figure 3 – Screenshot from Involved Officer 2's body worn camera, showing Hayden advancing towards Involved Officer 2.



Figure 4 - Hayden continuing to advance towards Involved Officer 2 while holding a knife in his right hand.



Figure 5 - Hayden holding the knife with the blade extended outward.



Figure 6 - Screenshot showing the moment Involved Officer 2 discharged his weapon.

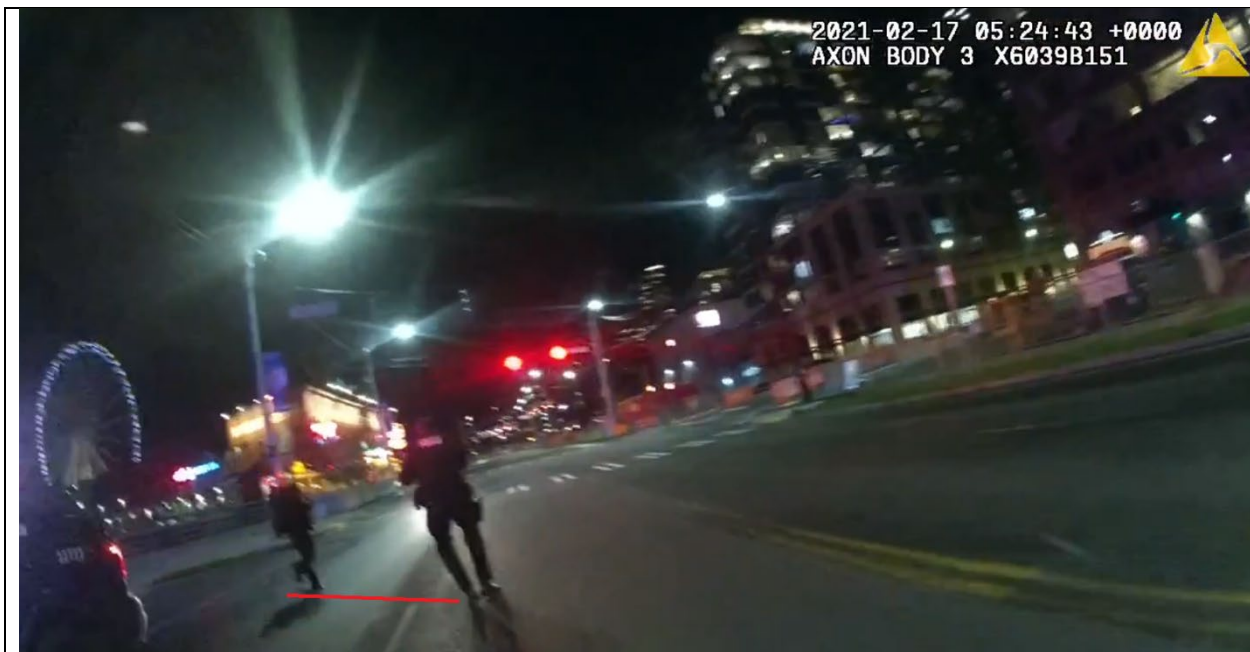


Figure 7 - Screenshot from an officer behind Involved Officer 2, showing the distance between Hayden and Involved Officer 2 the moment Involved Officer 2 used force.

7. Medical

The King County Medical Examiner's Office performed an autopsy of Hayden, which opined the cause of death is multiple gunshot wounds sustained in a confrontation with police and the manner of death is homicide.¹¹ Sharp force injury of the head and neck was also present. The pathological diagnoses included evidence of four gunshot wounds and four sharp force injuries:

- Penetrating intraoral gunshot wound;¹²
- Penetrating gunshot wound of right chest;

¹¹ 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.

¹² 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.

- Penetrating gunshot wound of right upper arm;
- Perforating gunshot wound of right wrist;
- Stab wound of right upper neck;
- Stab wound of left upper neck;
- Shallow incised wounds of right neck;
- Incised wound of right tongue.

The Washington State Patrol Toxicology Laboratory performed a drug analysis of Hayden's blood. The results showed that Hayden's blood tested positive for methamphetamine (.063 mg/L), and amphetamine (.034 mg/L).

8. Administrative Review

SPD FIT policies required supervisors to review the investigation, which included compelled statements. A reviewing sergeant noted that identified the tactical decision making of the involved officers should be addressed. In addition, the sergeant noted that the Seattle Police Officer Guild representative directed the involved officers to deactivate their body worn video without receiving authorization for the FIT investigator. In addition, the reviewing lieutenant noted that best practices for handling an involved officer's weapon after a use of force incident.

9. Seattle Office of Police Accountability

The OPA also conducted an investigation, which relied upon compelled statements.¹³ The OPA investigation determined that it appeared Involved Officer 2's gunshots struck Hayden, but Involved Officer 1's did not. Further, OPA determined that Hayden advanced towards Involved Officer 2 approximately nine seconds after he exited the patrol vehicle and Involved Officer 2 discharged his rifle five seconds after Hayden began advancing towards him.

OPA first examined whether Involved Officer 1 and Involved Officer 2 failed to properly de-escalate according to SPD policies. OPA determined the officers failed to properly de-escalate for three reasons. First, they did not engage in planning or tactical discussions with each other or other officers. Second, the decision to stop their vehicle where they did actually increased the likelihood that deadly force would be used because it focused Hayden's attention

¹³ 2021OPA-0094.

on Involved Officer 2. Third, the officers failed to properly use time, distance, and shielding to de-escalate.

OPA next examined whether Involved Officer 1 and Involved Officer 2 used improper deadly force. OPA noted that failure to de-escalate does not require, in and of itself, a determination that deadly force was used inconsistently with policy. Relying on previous investigations, OPA noted that when a subject's actions cause the officers to fear imminent bodily harm, the officer was entitled to use force to prevent this from occurring. Similarly, in this incident, OPA determined that Hayden's decision to advance towards Involved Officer 2 with the knife raised and pointed down permitted Involved Officer 2 to defend himself and permitted Involved Officer 1 to defend Involved Officer 2. Therefore, "while OPA finds that [Involved Officer 2's] actions and decision-making increased the likelihood that force would be used, it was not necessarily the causal factor behind [Hayden's] decision to advance towards [Involved Officer 2]. That decision was his alone." In conclusion, OPA recommended department-wide management actions regarding subjects with knives, other less-lethal tools, and public-facing communications.

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

¹⁴ RCW 9A.04.100; WPIC 4.01.

¹⁵ KCPAO Filing and Disposition Standards.

¹⁶ WPIC 14.00.

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:

- 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 February 16, 2021; 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

¹⁷ Id.

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.

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 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 2 or 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

The current incident illustrates a scenario where the initial police involvement occurred because of their community caretaking function and evolved into a situation where the involved officers were legally permitted to use deadly force. The community caretaking function, which is an exception to the warrant requirement, occurs when an officer engages in an investigation that is totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.²⁸ For instance, community caretaking may occur when police are requested to provide emergency aid or perform a routine check on health and safety.

In the current incident, Hayden approached Witness Officer 1 and Witness Officer 2, asked for their help, asked them to kill him, and held a knife to his throat. Based on their observations, Witness Officer 1 and Witness Officer 2 requested assistance from SPD. As officers arrived, Hayden ignored the officers’ commands to stop and put down the knife. Instead, Hayden continued to walk away from officers and harmed himself with the knife. While it would be reasonable for officers to be aware of and have some level of concern that Hayden could respond violently either to them or to other civilians, the officers did not use any force upon

²⁸ State v. Kinsy, 141 Wn.2d 373, 385, 5 P.3d 668 (2000).

Hayden while they continued after him. Given Hayden's apparent desire and ability to harm himself, the officers' actions in giving Hayden commands to stop and their effort to "corral" Hayden into a safer area is consistent with their community caretaking function. Moreover, peace officers are permitted to take a person into custody and deliver them to an evaluation and treatment facility when the officer has reasonable cause to believe that the person is suffering from a behavioral health disorder and presents an imminent likelihood of serious harm.²⁹

When the officers' initial intent was to seize Hayden under the community caretaking function, it would have been unreasonable to use deadly force. However, when Hayden advanced towards Involved Officer 2 while armed with a knife, the officers were permitted to act on the quickly changing circumstances.

Homicide or deadly force 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.³⁰ Homicide or deadly force 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.³¹ 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.³² 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

²⁹ RCW 71.05.153.

³⁰ RCW 9A.16.040(1)(b); WPIC 16.01.

³¹ RCW 9A.16.040(1)(c)(i); WPIC 16.01.

³² 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.³³

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.³⁴ 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.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

In the current incident, the investigation showed that officers, including Involved Officer 2, gave Hayden orders to stop and put down the knife. First, the investigation showed that there was probable cause for Involved Officer 2 and Involved Officer 1 to believe that Hayden was in the process of committing a felony when he advanced towards Involved Officer 2 with the knife held in the air.³⁸ Second, the evidence in the investigation showed there was probable cause to believe that Hayden, if not apprehended, posed a threat of serious physical harm to Involved Officer 2 when he advanced toward Involved Officer 2 with a knife and refused to obey commands to stop. Third, the evidence in the independent investigation showed that Involved Officer 2 and Involved Officer 1 used deadly force with a good faith belief that their actions were necessary to prevent death or serious physical harm to Involved Officer 2. For instance, the

³³ Id.

³⁴ RCW 9A.16.040(4).

³⁵ RCW 9A.16.010; WPIC 16.05.

³⁶ Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989).

³⁷ Id. 490 U.S. at 396-97.

³⁸ For example, probable cause existed for Assault in the Third Degree and Assault in the Second Degree.

evidence and testimony are highly likely to show that Hayden was armed with a knife, likely suffering from a mental health crisis, expressed suicidal ideations, refused to obey officers' commands, and advanced towards an officer while armed with a knife. The officers' initial intent was to provide aid to Hayden, but it would have been unsafe to allow Hayden to continue to close the distance between him and Involved Officer 2.

While compliance with SPD policy is not within the immediate scope of this memorandum, it is very likely that a trial judge would allow testimony regarding OPA's determination that Involved Officer 2 and Involved Officer 1 failed to de-escalate properly. However, as OPA noted, failure to de-escalate does not require, in and of itself, a determination that deadly force was used inconsistently with policy. Similarly, even assuming testimony is admitted that an officer failed to adhere to a policy, that fact, in and of itself, does not automatically render the officer's actions criminal. Therefore, the investigation and analysis show there is insufficient evidence to disprove justifiable homicide by a peace officer.

2. 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.³⁹ Great personal injury includes 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.⁴⁰

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

³⁹ RCW 9A.16.050(1); WPIC 16.02.

⁴⁰ WPIC 2.04.01.

on weapons, defensive tactics, and the use of force, it is prudent to assume the jury would be required to take Involved Officer 2's and Involved Officer 1's training into account. Therefore, the same evidence and testimony used to determine whether they acted as a reasonable peace officer are also relevant to this instruction.

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."⁴¹ 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.⁴²

As stated earlier, Involved Officer 2 and Involved Officer 1 possessed information that Hayden was armed with a knife, likely suffering from a mental health crisis, expressed suicidal ideations. Additionally, they observed Hayden ignore officers' commands and advance towards Involved Officer 2 with a knife raised in the air. Thus, the investigation and analysis show there is insufficient evidence to disprove justifiable homicide.

VII. RECOMMENDATION FOR INQUEST

An inquest is mandatory to determine the manner, facts, and circumstances of Hayden's death pursuant to Executive Order PHL 7-1-5 EO unless the Executive determines the role of law enforcement was de minimis and did not contribute in any discernable way to a person's death. Given the facts outlined in the investigation, it is the Team's belief that an inquest is required under the current Executive Order.

⁴¹ WPIC 16.02.

⁴² WPIC 16.07.

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 felony⁴³ or to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger⁴⁴ 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.

⁴³ 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).

⁴⁴ 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 felony⁴⁵ 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.

⁴⁵ 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)