Use of Force – Fatality of
Viet Do Nguyen

Valley Independent Investigation Team
Federal Way Police Department, #22-7023

King County Prosecuting Attorney
Public Integrity Team

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LEESA MANION (she/her)
PROSECUTING ATTORNEY

King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

DECLINE MEMORANDUM

Law Enforcement Use of Force Fatality Regarding: Viet Do Nguyen

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 investigation into a death involving a member of any law enforcement agency in King County is

[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.

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 Team 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 June 13, 2022, Kent Police Officers were dispatched to a report that a vehicle was stopped in the road. The driver, later identified as Viet Do Nguyen, was unconscious, the engine was on, and the vehicle's brake lights were activated. When officers attempted to wake Nguyen, he was unresponsive. Concerned for his safety, officers broke open the driver's window and

[5] Executive Order PHL 7-1-5 EO.
[6] Id.

attempted to remove Nguyen from the vehicle. Nguyen awoke and resisted the officers' commands to exit the vehicle. During the struggle, Nguyen armed himself with a firearm. Two officers discharged their firearms, striking Nguyen. Officer provided medical attention, but Nguyen was pronounced deceased at the scene by medics.

III. INVESTIGATION AND EVIDENCE

1. Independent Investigation Team Reports
2. Police Reports – Auburn Police Department 22-05908
3. Police Reports – Des Moines Police Department 22-1451
4. Police Reports – Federal Way Police Department 22-7023
5. Police Reports – Kent Police Department 22-7856
6. Police Reports – Port of Seattle Police Department 22-36278
7. Police Reports – Renton Police Department 22-6042
8. Police Reports – Tukwila Police Department 22-3814
9. Civilian Statements
10. CAD/MDT
11. Other Police Reports
12. Search Warrants
13. Crime Scene Investigation
14. Crime Laboratory
15. Medical
16. Involved Officer Information
17. Subject Information
18. 911 Call and Radio
19. Audio
20. Body Worn Video
21. In-Car Video
22. Other Video
23. Photos
24. Miscellaneous

IV. INVESTIGATION SUMMARY[7]

1. Initial Investigation and the Use of Force

On June 13, 2022, at approximately 4:11 a.m., Civilian Witness 1 called 911 to report that a black BMW with no license plates was stopped in the middle of the road on Pacific Highway South in Kent. Civilian Witness 1 reported that she was behind the car, honking her horn, but the driver, later identified as Viet Do Nguyen (Nguyen), was not responding. Moments later, Civilian Witness 1 stated that the BMW was moving very slowly and she expressed concern that Nguyen might be intoxicated. The 911 recording captured Civilian Witness 1 yelling at Nguyen, asking if he was alright, but he did not respond. Civilian Witness 1 stated, "something's going on with him… he's just sitting here" and she told the 911 operator that she would park behind the BMW with her hazard lights on to ensure that Nguyen's vehicle was not struck by another car.

The following information is based upon the Kent Police Department (KPD) computer aided dispatch (CAD) report and recorded police radio:

Time	Action
4:13:52 a.m.	Involved Officer 1 was dispatched to investigate Nguyen for driving under the influence.
4:25:42 a.m.	Involved Officer 1 and Involved Officer 2 arrived at Nguyen's location.
4:28:32 a.m.	Involved Officer 1 reported they were trying to wake the driver up. Involved Officer 3 reported he was enroute to assist.
4:29:20 a.m.	Involved Officer 4 reported she was enroute to assist.

[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.

4:29:41 a.m. Involved Officer 1 reported Nguyen was unconscious, the vehicle was running, and Nguyen's foot was on the brake.

4:32:54 a.m. Involved Officer 1 reported that they may have to forcibly break the vehicle's window so that Nguyen could receive medical attention.

4:33:08 a.m. Involved Officer 1 reported he observed a methamphetamine pipe and ammunition inside the vehicle's center console.

4:34:34 a.m. Involved Officer 2 reported that Nguyen was awake and it appeared that he was trying to flee. Involved Officer 2 requested additional units to respond urgently.

4:35:23 a.m. Involved Officer 4 reported she was arriving to the location.

4:35:29 a.m. Involved Officer 2 reported he had Nguyen's car pinned in with his patrol vehicle "to hold it in," that [Involved Officer 1]'s fighting with him, and "hurry up!"

4:36:29 a.m. Involved Officer 2 reported that Nguyen's door was open and Involved Officer 1 and Involved Officer 4 were struggling with Nguyen.

4:36:56 a.m. Involved Officer 2 reported "[Nguyen's] got a gun, he's got a gun."

4:38:27 a.m. Involved Officer 2 reported "shots fired, shots fired." Moments later an officer requested that medics respond.

4:41:27 a.m. Involved Officer 1 responded that Nguyen was "down."

4:42:25 a.m. An officer reported that officers were performing CPR on Nguyen and applied tourniquets to his left and right arms.

5:05:57 a.m. Involved Officer 2 reported that medics arrived.

5:06:06 a.m. Involved Officer 2 reported that medics pronounced Nguyen deceased.

2. Independent Investigation Conducted by the Federal Way Police Department

As other officers from KPD and other departments arrived, the police secured the incident scene and rerouted traffic away from the area. The Valley Independent Investigation Team was requested to respond to the scene and to conduct an independent investigation. Federal Way Police Department Investigator 1 was assigned as the lead investigator.

The four officers involved in the incident were transported to the KPD where independent investigators photographed the officers and examined evidence. During this process, investigators observed Involved Officer 1, Involved Officer 3, and Involved Officer 2 were uninjured. Involved Officer 4 sustained a minor laceration on her left little finger. All four

officers were wearing their KPD uniforms, including patches and markings that identify them as police officers. All four officers were equipped with body cameras, which were previously removed so that the contents could be downloaded and viewed by the independent investigation team. All four officers were equipped with Tasers, which were not used during the use of force.

Regarding the officers' firearms, investigators observed that all four officers were armed with Smith and Wesson M&P 9mm pistols. Involved Officer 4's and Involved Officer 2's firearms were each fully loaded with seventeen rounds of ammunition in the seated magazine and one round in the chamber, which suggested that neither officer discharged their firearm during the incident.

Involved Officer 1's firearm was loaded with thirteen rounds of ammunition in the seated magazine (seventeen round capacity) and one round in the chamber, which suggested that he discharged three to four rounds depending on his loading procedure. Involved Officer 1's two secondary magazines were each loaded with seventeen rounds, which suggested he did not reload his firearm during the use of force.

Involved Officer 3's firearm was loaded with seventeen rounds of ammunition in the seated magazine (seventeen round capacity) and one round in the chamber. One of his secondary magazines contained twelve rounds of ammunition, which suggested he discharged five or six rounds depending on his loading procedure and that he conducted a tactical reload during the use of force.

Investigator 1 viewed the crime scene and observed four KPD vehicles. One KPD vehicle was facing north and its bumper was against the BMW's front bumper. Another KPD vehicle was facing southbound and its bumper was against the BMW's rear bumper.

Figure 1 - Nguyen's BMW blocked by two KPD vehicles.

Crime scene investigators collected eight 9mm cartridge cases from the scene, which appeared to be consistent with the type of ammunition found inside the KPD officers' firearms. Investigators also located a Glock Model 19 9mm pistol, reportedly possessed by Nguyen. It had been removed from the floorboard Nguyen's vehicle and placed on the roof of the vehicle by an involved officer. This pistol was fitted with an unregistered auto sear, which effectively converts a semiautomatic pistol into a fully automatic pistol. Investigators determined this firearm was reported stolen to the Lynwood Police Department on January 7, 2021.

Figure 2 - Firearm found in Nguyen's possession.

Figure 3 - Close up image of auto sear.

3. Body Worn Camera Video

Investigator 1 reviewed the videos downloaded from the officers' body worn cameras along with the CAD report and recorded police radio.

Time	Action
4:11 a.m.	Involved Officer 2 arrived at the scene and spoke with Civilian Witness 1, who was parked directly behind Nguyen's BMW. Civilian Witness 1 reported she was parked behind the BMW for fifteen minutes and believed the driver was unconscious.

Figure 4 - BMW (in blue square) stopped in road.

Figure 5 - Nguyen unresponsive in driver's seat.

Time	Action
4:26 a.m.	Involved Officer 1 arrived at the scene and Civilian Witness 1 drove away. Involved Officer 2 and Involved Officer 1 approached the BMW and observed the engine was running, the vehicle was in gear, Nguyen was unresponsive, he was the only occupant inside the BMW, and his foot was on the brake pedal. Additionally, the officers observed the BMW's doors were locked and the windows were in the closed position. Both officers loudly announced themselves as police officers and knocked on the windows. Nguyen lifted his head briefly, looked around, and passed out.
4:28 a.m.	Involved Officer 1 expressed concern that if Nguyen woke up, he may roll into traffic. He recommended they place one of their vehicles in front of the BMW to block its path.
4:29 a.m.	Involved Officer 4 announced over the police radio that she was enroute. Involved Officer 1 placed his vehicle's bumper against the BMW's front bumper with his emergency lights activated. Additionally, Involved Officer 1 activated his vehicle's siren while Involved Officer 2 continued knocking on the BMW's window.
4:31 a.m.	Involved Officer 1 stated he was concerned that Nguyen may need medical attention and suggested the officers may need to break the window to perform a welfare check on Nguyen. The dispatcher advised that the fire department would be dispatched and staged nearby.
4:32 a.m.	Involved Officer 1 advised over the radio that he observed a "meth pipe" and loose ammunition lying in the BMW's center console.
4:33 a.m.	Nguyen regained consciousness and looked around. Involved Officer 1 commanded him to, "Open your door! Open your door, police!" Additionally, Involved Officer 2 stated, "It's okay, it's the police department!"
4:34 a.m.	Nguyen did not respond to the officers' commands to turn off the car and open the door. Instead, Nguyen pressed on the accelerator in an apparent effort to drive away. He was unable to leave because the BMW was blocked by the KPD vehicles. However, as Nguyen continued to press on the accelerator the BMW moved slightly, so Involved Officer 2 entered his vehicle and used his vehicle to hold Nguyen's vehicle in place. He also requested priority assistance for additional officers. As Nguyen continued to attempt to drive away, Involved Officer 1 said, "I'm gonna smash it. Fuck that. I need you to get out. Get out. Get out of the fucking car!" Involved Officer 1 used his flashlight to break the BMW driver's window while he repeatedly ordering Nguyen to exit the car. Once Involved Officer 1 broke open the window, he drew his firearm and yelled for Nguyen to get out. He

told Nguyen that he "was under arrest" and Nguyen replied, "Why?" Involved Officer 1 also commanded Nguyen to show his hands, but Nguyen screamed something unintelligible, he continued to rev the car's engine, and he turned the wheel to free the BMW.

4:35 a.m. Involved Officer 4 arrived at the scene and attempted to pull Nguyen from the driver's seat. Nguyen resisted by bracing his feet against the vehicle's frame and holding the steering wheel. While struggling to pull Nguyen out of the vehicle, Involved Officer 4 repeatedly ordered Nguyen to get out of the car and she commanded him to stop reaching inside the vehicle.

4:36 a.m. Involved Officer 3 arrived at the scene and assisted Involved Officer 1 and Involved Officer 4 who were struggling to remove Nguyen from the vehicle. Nguyen continued to resist the officers and screamed something to the effect of, "She's got a gun!" Involved Officer 3 told Nguyen, "If you don't let go, I'm going to punch you in the face." It appears that Involved Officer 3 struck Nguyen twice and yelled, "He's reaching!" Involved Officer 4 yelled at Nguyen, "Don't fucking reach!"

4:37 a.m. The officers continued to struggle with Nguyen. Involved Officer 1 struck Nguyen twice in the leg with his flashlight and Nguyen continued to resist the officers. Nguyen screamed, "There's a gun! I've got a gun! There's a gun on you!"

Involved Officer 4 commanded Nguyen to stop reaching and yelled, "Don't fucking bite me!"

4:38 a.m. Involved Officer 4 and another officer yelled, "He's got a gun!" Given the dynamic nature of the struggle, the exact moment or exact location where Nguyen retrieved the firearm is unclear. For instance, there were various instances in the officers' videos where Nguyen's hands were no longer on the steering wheel, not being held by an officer, and not visible to the video viewer. Additionally, there are several times in the video where Nguyen is leaning towards the passenger seat, the dashboard, and towards the open driver's door, which compounds the difficulty in seeing how Nguyen retrieved the firearm or determining where the firearm was originally located prior to it being first visible by Involved Officer 4. However, the officers' various commands – ranging from "Give me your hands!" to "Don't reach!" – correlate with the moments when Nguyen's hands were not visible or being controlled by an officer. Additionally, the officers' sense of urgency and concern is audibly different during the moments where Nguyen's hands were visible versus when his hands were not visible or he was "reaching." These facts, taken together, make it appear that Nguyen armed himself with a firearm during the struggle, when his hands were not visible or under control, and between the time that Involved Officer 4 yelled, "Don't reach!" and "He's got a gun!"

In response, Involved Officer 3 and Involved Officer 1 unholstered their firearms and yelled for Involved Officer 4 to move back. As she did, Involved Officer 1's body worn camera captured a moment when a handgun was pinched in between Nguyen's right armpit.[8] The pistol appeared upside down (the magazine pointed upwards) and with the grip towards the front of his body, and the muzzle towards his back (the muzzle pointed toward the passenger side of the BMW). As Involved Officer 4 moves away from the driver's door, it appears that Nguyen's left hand is reaching towards his right armpit and he placed his left hand on the firearm. If Nguyen's handgun was holstered at the moment it was captured on body worn video, it would have been in a position where it was possible for Nguyen to unholster the handgun with his left hand while gripping the holster with his right armpit. With Involved Officer 4 outside the driver's door, Involved Officer 1 and Involved Officer 3 discharged their firearms at Nguyen, striking him.

The officers took Nguyen's firearm and placed it on the BMW's roof. The officers handcuffed Nguyen, searched him for additional weapons, and began medical aid while additional officers and medics arrived.

[8] Nguyen's firearm appeared to be held in a black nylon holster, but the retention strap was not fastened, which allowed the weapon to slide out of the holster, down the front windshield of the BMW, and rest on the windshield wipers after it had been removed from the BMW by officers.

Figure 6 - Nguyen holding onto and turning the steering wheel while Involved Officer 1 commanded him to exit the vehicle.

Figure 7 - Nguyen holding onto steering wheel while officers attempt to remove him from the vehicle.

Figure 8 - Screenshot of firearm pinched in between Nguyen's right armpit with, what appears to be, his left hand grabbing the firearm.

4. Civilian Witnesses

Investigators interviewed Civilian Witness 2 who reported she was on her way to work and saw the KPD vehicles' emergency lights. She noted that the BMW was pinned in from the

front and back by KPD vehicles.Civilian Witness 2 drove passed the vehicles, but she observed glass flying out of the vehicle and observed the officer "really struggling with the person."Civilian Witness 2 rolled down her window and heard "yelling," such as "stop, stop" and she heard someone screaming.Civilian Witness 2 reported that she did not hear or see any gunshots.

The next day,Civilian Witness 2 sent an email to one of the investigators that interviewed her to add that "the reason I knew there was a person inside of the vehicle was because when the yelling was going on, there was also the sound of the vehicle being revved up, like someone was pushing down on the gas petal [sic] aggressively."

Investigators also interviewed Civilian Witness 3 who reported that he observed the officers giving CPR to a man lying on the ground.

Investigators also interviewed Civilian Witness 4 who reported he drove by and observed two police vehicles on either side of the BMW with their emergency lights on. He also observed an officer by the driver's side of the car but could not tell if the officer was reaching inside the vehicle. It did appear to him that the window was down. He denied seeing or hearing any gunshots.

Investigator 1 interviewed Nguyen's sister. She stated that Nguyen was homeless and struggled with an addiction to methamphetamine. She also stated that Nguyen was recently arrested in Shoreline, where he was found passed out in a car with the engine running. To her knowledge, Nguyen did not carry a firearm, was not suicidal, and he had not made any threats regarding law enforcement.

Investigator 1 also spoke with the owner of the firearm in Nguyen's possession. The owner stated that he did not know Nguyen and he stated that the weapon was not equipped with an auto sear at the time it was stolen.

Investigator 1 also spoke with a friend of Nguyen who reported that when Nguyen left her home prior to this incident, he appeared drowsy and she objected to him driving, but Nguyen insisted.

5. Search of BMW

Investigators requested a search warrant to search the BMW, which was granted by a judge. Inside the center console, investigators located 3.23 grams of methamphetamine and a

small bag containing twenty-one pills marked with “M30,” which commonly contain fentanyl. Investigators also located multiple 9mm cartridges inside the vehicle and two fired 9mm cartridges that bore distinctive firming pin impressions unique to Glock pistols. Investigators also located checks, deposit bags, and business records belonging to other individuals.

Figure 9 - Suspected methamphetamine found inside BMW.

Figure 10 - M30 (suspected fentanyl) and ammunition found inside BMW.

Figure 11 - Methamphetamine pipe located inside BMW's console

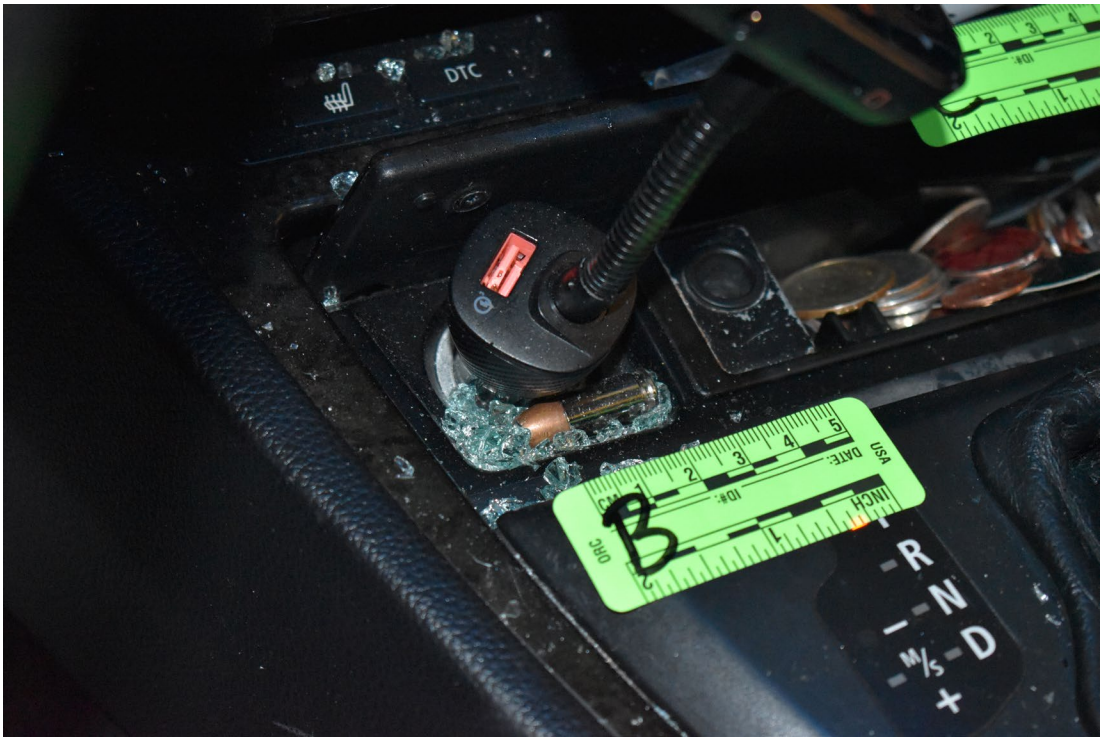

Figure 12 - Loose ammunition found in BMW's console.

6. Forensic Testing

Investigators requested that Nguyen's firearm be examined for fingerprints and DNA. While no fingerprints of value were located on the firearm, Nguyen's DNA was found on the firearm. Specifically, his DNA was located on the firearm's grip, slide, and trigger. Investigators test fired Nguyen's firearm and determined the weapon only functioned in fully automatic mode.

When investigators reviewed the body worn videos of the involved officers, they determined that Involved Officer 4's camera was turned off and on during the incident. Although the entirety of the incident was captured on the other officers' cameras, investigators requested the camera's manufacturer examine Involved Officer 4's camera to determine what caused the camera to turn off and on. The manufacturer determined that the camera's power slide switch could be moved with approximately one third of the force required of tested stock samples. Thus, Involved Officer 4's camera was more sensitive to pressure and physical shock, which could cause it to shut down easier than another camera of the same model. Involved Officer 4's camera turned off while she was reaching inside the BMW, attempting to remove Nguyen from the vehicle. Given the extent of the struggle, it is likely that this caused the camera's power slide to transition to the off position.

7. Medical

The King County Medical Examiner's Office performed an autopsy of Nguyen, which opined the cause of death was multiple gunshot wounds sustained in a confrontation with police and the manner of death is homicide.[9] The pathological diagnoses included evidence of:

- A penetrating gunshot wound of the head.
- Six penetrating gunshot wounds of the left arm and torso.
- A perforating gunshot wound of the left arm and torso.[10]

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[9] 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.

[10] 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.

The Washington State Patrol Toxicology Laboratory performed a drug analysis of Nguyen's blood. The results showed that Nguyen's blood tested positive for amphetamine (.043 mg/L) and methamphetamine (1.1 mg/L).

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.[11] 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.[12]

In addition, the State must disprove the existence of a defense that negates an element of the crime.[13] 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.[14] Therefore, the State may be required to disprove one or more of the following defenses:

- Justifiable Homicide by Peace Officer;[15]
- Justifiable Homicide Defense of Self or Others;[16]
- Justifiable Homicide Resistance to Felony;[17]

2. Applicable Law

This incident occurred on June 13, 2022. Therefore, the applicable Justifiable Homicide by a Peace Officer instruction would require the State to prove the officer acted without good faith.[18]

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[11] RCW 9A.04.100; WPIC 4.01.
[12] KCPAO Filing and Disposition Standards.
[13] WPIC 14.00.
[14] Id.
[15] RCW 9A.16.040; WPIC 16.01.
[16] RCW 9A.16.050(1); WPIC 16.02.
[17] RCW 9A.16.050(2); WPIC 16.03.
[18] 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

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 Officer[19]
- Necessary[20]
- Justifiable Homicide – Defense of Self and Others[21]
- Great Personal Injury[22]
- Justifiable Homicide – Actual Danger Not Necessary[23]
- Justifiable Homicide – Resistance to a Felony[24]

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 any of the involved officers 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

Whether a police officer can use force, and what level of force, depends on a variety of factors, including what type of crime the officer is investigating and whether the subject has a

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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."

[19] WPIC 16.01.
[20] WPIC 16.05.
[21] WPIC 16.02.
[22] WPIC 2.04.01.
[23] WPIC 16.07.
[24] WPIC 16.03.

weapon. Initially officers contacted Nguyen to investigate whether he was driving under the influence, which is a gross misdemeanor.[25] As Nguyen struggled with the officers, there was also probable cause that Nguyen was resisting arrest, which is a misdemeanor.[26] Until Nguyen armed himself with a firearm, Involved Officer 1, Involved Officer 3, and Involved Officer 4 were permitted to use physical force, but not deadly force, to effect an arrest.[27] In the current incident, the officers use of physical office was appropriate. Nguyen refused to obey the officers' lawful commands to exit the vehicle and not make further attempts to flee. Initially the officers' level of force consisted of attempting to pull Nguyen out of the car. As Nguyen continued to disobey the lawful order to exit the vehicle, the officers appropriately used physical force to remove him from the car. However, until the officers saw that Nguyen was in possession of a firearm, they would only have been permitted to use physical force, not deadly force, to effect the arrest.

The moment the officers observed Nguyen in possession of a firearm, the Team's analysis changes to whether any of the involved officers were permitted to use deadly force. Deadly force is justifiable when necessarily used by a peace officer meeting the good faith standard to arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony.[28]

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.[29] 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 matter that could reasonably be construed as threatening; or
- There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.[30]

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[25] RCW 46.61.502.
[26] RCW 9A.76.040.
[27] RCW 10.120.020.
[28] RCW 9A.16.040(1)(c)(i); WPIC 16.01.
[29] RCW 9A.16.040(2).
[30] Id.

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.[31] A peace officer acts in good faith, an objective standard, when considering all the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.[32]

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.[33] "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."[34]

When the officers saw that Nguyen armed himself with a firearm, it was reasonable for the officers to believe that Nguyen was committing or attempting to commit a felony.[35] Additionally, the investigations shows that there was probable cause for the officers to believe that Nguyen, if not apprehended, posed a threat of serious physical harm to the officers. Prior to Nguyen producing the firearm, officers possessed information that led them to suspect that Nguyen may be under the influence of alcohol or drugs. Additionally, Nguyen was not compliant with the officers' requests to open his door, he attempted to drive away from the officers, and he continued to physically resist officers after Involved Officer 1 broke open the BMW's window. These actions would lead a similarly situated reasonable officer to believe that Nguyen did not intend to comply with the officers' orders. It was also reasonable for the officers to believe, in conjunction with his prior behavior, that Nguyen intended to threaten or harm the officers when he armed himself with a firearm. Although the firearm was pinched in Nguyen's armpit, upside down, and facing the opposite direction, it is unlikely that the officers had the ability to observe

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[31] RCW 9A.16.010; WPIC 16.05.
[32] RCW 9A.16.040(4).
[33] Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989).
[34] Id. 490 U.S. at 396-97.
[35] Probable cause existed for multiple felonies, including Assault in the First Degree (RCW 9A.36.011), Assault in the Second Degree (RCW 9A.36.021), and Assault in the Third Degree (RCW 9A.36.031).

this in real time. Further, given that the officers did not have full control over Nguyen's arms and hands, it is possible that he could have taken hold of the firearm.

The investigation also shows that the use of deadly force was necessary and done in good faith. Involved Officer 1 and Involved Officer 3 used their firearms in response to the threat that Nguyen posed and discharged their weapons until it reasonably appeared that Nguyen no longer posed a threat to them. Once the officers determined there was no longer a need to use deadly force, they began to render aid.

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.[36] 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.[37]

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

Given that Nguyen refused to comply with the officers' orders and escalated the risk of violence by arming himself with a weapon, it was reasonable for them to believe that Nguyen could inflict great personal injury with a handgun.

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[36] RCW 9A.16.050(1); WPIC 16.02.
[37] WPIC 2.04.01.

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

VII. RECOMMENDATION FOR INQUEST

An inquest is mandatory to determine the manner, facts, and circumstances of Nguyen'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.

[38] WPIC 16.02.
[39] WPIC 16.07.

VIII. 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 felony[40] or to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger[41] 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.

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

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

WPIC 2.04.01 – Great Personal Injury

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

WPIC 16.07 – Justifiable Homicide – Actual Danger Not Necessary

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

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

WPIC 16.03 – Justifiable Homicide – Resistance to a Felony

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

Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony[42] upon the slayer or in the presence of the slayer.

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

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

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