

Use of Force – Fatality of
Castellano, Marcelo

Kirkland Police Department, 18-21956



King County Prosecuting Attorney
Public Integrity Team

September 13, 2023



DECLINE MEMORANDUM

September 13, 2023

Law Enforcement Use of Force Fatality Regarding:

Marcello Castellano

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 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 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.

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 complete and also advise whether an inquest should be initiated.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. 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.

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

⁴ Id.

⁵ Executive Order PHL 7-1-5 EO.

⁶ Id. `

II. OVERVIEW

On February 18, 2018, Redmond Police Department officers attempted to arrest Marcelo Castellano (Castellano) for several felonies. Officers contacted Castellano while he was sitting inside his vehicle, announced he was under arrest, and ordered him to exit his car. Castellano refused to exit and retrieved a handgun, which he pointed at the officers. Officers discharged several rounds at Castellano, striking him. Officers administered life savings efforts, but Castellano died a result of his injuries.

III. INVESTIGATION AND EVIDENCE

1. Force Investigation Reports
2. Officer Reports
3. Civilian Statements
4. Crime Scene Investigation
5. Search Warrants
6. Medical, Autopsy, and Toxicology
7. CAD/MDT
8. 911 Call and Radio
9. Audio
10. Video
11. Photos

IV. INVESTIGATION SUMMARY⁷

1. Initial Investigation

In February 2017, a confidential informant provided information to Redmond Police Department (RPD) Involved Officer 1 that an individual known as “Wicked,” later identified as Marcelo Castellano (Castellano), sold illegal narcotics. At the time, Involved Officer 1 and other RPD Pro-Act team members knew from other sources that Castellano sold large amounts of heroin and methamphetamine. Involved Officer 1 and the informant conducted a controlled purchase of narcotics from Castellano in February 2018. A different confidential informant told Involved Officer 1 that they had seen Castellano with a firearm and a large quantity of narcotics within the last thirty days. Involved Officer 1 also reviewed other police agencies’ reports for information regarding Castellano. Involved Officer 1 learned that in January 2018, an individual arrested for burglary admitted that he sold Castellano two stolen handguns in exchange for heroin. Additionally, in January 2018, an individual arrested for drug trafficking admitted that Castellano was his methamphetamine source and that he typically purchased several ounces of methamphetamine from Castellano at a time.

Based on this information, Involved Officer 1 coordinated an operation to arrest Castellano for the sale of narcotics to the confidential informant. During the planning, Involved Officer 1 informed the other members of the operation that he reviewed information confirming that Castellano was a Sureños gang member from East Los Angeles, he had previous convictions for crimes including burglary and narcotics, several individuals confirmed they observed Castellano with firearms, and that Castellano was known to always carry a pistol with him.

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.

On February 21, 2018, Involved Officer 1 and other officers successfully arrested Castellano. During a post-Miranda interview, Castellano admitted there was a handgun inside his vehicle and narcotics inside his home. He estimated that he sold approximately seven to eight pounds of methamphetamine and four pounds of heroin per week.

Involved Officer 1 served a search warrant on Castellano's home, which contained narcotics and drug paraphernalia consistent with narcotics trafficking. In addition, Involved Officer 1 observed items consistent with identify theft, such as credit cards and blank checks in other peoples' names and washed checks. Involved Officer 1 served a second search warrant on Castellano's home to seize the identity theft evidence. Involved Officer 1 also served a search warrant on Castellano's vehicle, a 2016 GMC Sierra truck. Inside the truck, Involved Officer 1 located a .25 caliber Beretta semi-automatic handgun, which contained a loaded magazine. Based on the evidence seized, Involved Officer 1 articulated in his report that there was probable cause to file charges on Castellano for VUCSA – Possession with Intent to Deliver Heroin and Methamphetamine and Unlawful possession of a Firearm. Involved Officer 1 continued his investigation into the identity theft evidence, and he developed probable cause to arrest Castellano for these additional crimes in March 2018.

On May 25, 2018, Involved Officer 2 asked Witness Officer 2, a uniformed patrol officer, if he could assist the Pro-Act Team in arresting Castellano. During the briefing, Witness Officer 2 learned about Involved Officer 1's investigation. In addition, he learned about Castellano's history of selling narcotics, possessing firearms, and his prior prison sentence. After the Pro-Act Team located Castellano, Witness Officer 2 attempted a traffic stop to arrest Castellano. He activated his emergency lights and stopped his vehicle in front of Castellano. When Witness Officer 2 exited his vehicle and ordered Castellano to exit, Castellano drove away. Witness Officer 2 did not pursue Castellano, but he overheard on his police radio that undercover police units observed Castellano driving in a reckless manner. Based on this information, Involved Officer 1 believed he possessed probable cause to also arrest Castellano for Attempting to Elude a Pursuing Police Vehicle.

On May 29, 2018, and June 13, 2018, Involved Officer 1 sought and received judicial permission to electronically surveil Castellano. In his application, Involved Officer 1 also noted that within one week of the arrest attempt on May 25, 2018, a confidential informant confirmed that Castellano was armed with a Glock-style handgun.

2. Use of Force Fatality on June 14, 2018

On June 14, 2018, RPD officers located Castellano and coordinated an arrest plan. The officers involved in the operation were briefed on the probable cause information that Involved Officer 1 developed, including concerns that Castellano was in possession of firearms, and that he previously eluded police a month prior.

At approximately 4:52 pm, RPD reported they were involved in a shooting at a Safeway, located at 14444 124th Ave NE in Kirkland. Kirkland Police Department (KPD) Witness Officer 3 arrived within four minutes and identified the RPD Pro-Act Team based on their police vests, which identified them as police officers. Witness Officer 3 took public safety statements from the involved officers while medics continued to provide medical treatment to Castellano. As other officers arrived, including the independent investigation team, Witness Officer 3 saw that the medics ceased lifesaving efforts because Castellano was deceased.

Based upon Witness Officer 3's initial investigation, the investigation team learned the following:

- Involved Officer 2 discharged two rounds and operated a Toyota 4 Runner.
- Involved Officer 3 discharged two rounds and operated a Chrysler Town & Country.
- Involved Officer 1 discharged three or four rounds and operated a Dodge Durango.
- Involved Officer 4 discharged two rounds and operated a Ford Expedition.
- Witness Officer 1 did not discharge any rounds and operated a Volkswagen Touareg.

3. Independent Investigation Conducted by the Kirkland Police Department

KPD Investigator 1 was assigned as the lead investigator and observed the processing and round count of the involved officers. After reviewing the involved officers' firearms, Investigator 1 determined that Involved Officer 2 discharged two to four rounds from his patrol rifle and zero

rounds from his handgun; Involved Officer 3 discharged up to four rounds from his handgun; Involved Officer 1 discharged up to four rounds from his handgun; Involved Officer 4 discharged up to three rounds from his handgun; and Witness Officer 1 discharged zero rounds from his handgun. The reason Investigator 1 could not definitively determine how many rounds some of the involved officers discharged during the processing is because officers sometimes do not load their magazines to full capacity due to concerns that the firearm or magazine may malfunction.

Investigator 1 reviewed the RDP Pro-Act investigation of Castellano that led to the attempted arrest. In addition, Investigator 1 learned that Castellano served a prison sentence in California; he served an 87-month federal prison sentence for distributing methamphetamine; and he was self-admitted gang member. Investigator 1 also noted a KPD police report from 2017 where a friend of Castellano reported that Castellano was threatening to shoot “shoot/blow his [own] head off.” Subsequent interviews conducted by Investigator 1 and other investigators confirmed that Castellano was aware that the RDP Pro-Act team was actively investigating him, that Castellano was concerned that a current court case may be prosecuted by the U.S. Attorney’s Office, that Castellano made comments that he would not go back to prison, and Castellano had done drugs within hours of the incident.

Investigators collected several pieces of evidence from the scene, including:

- Two .223 caliber casings, located on the passenger side of Castellano’s vehicle.
- Three .40 caliber casings, located between the rear of Involved Officer 4’s vehicle and the front of Involved Officer 3’s vehicle.
- Four .45 caliber casings, located near the front passenger tire of Involved Officer 3’s vehicle.
- Four 9mm caliber casings, located in the bed of Castellano’s truck and near the rear of his vehicle.
- Three fired bullets.
- A green and beige 9mm Springfield XDM firearm, loaded with a fully loaded magazine minus one round, and one round in the chamber of the firearm.

Investigators also served a search warrant on Castellano's truck and collected several pieces of evidence, including bullets, bullet fragments, and a nylon holster located in the driver console floorboard.

4. Civilian Witnesses

Investigators contacted several civilian witnesses present at the scene. For instance, Civilian Witness 1 recognized the involved officers as police based on the markings on their clothing. He heard commands such as, "Get down, get down!" and he saw that Castellano "just stood there, not complying whatsoever." He believed that Castellano knew the officers were speaking to him because he saw Castellano make eye contact with the officers.

Civilian Witness 2 was seated in his vehicle while gas pumped into his vehicle. He was located on the other side of the gas pumps from Castellano, facing the opposite direction. He heard police yell, "You're under arrest! This is the Police!" Additionally, he heard the officers say, "Show us your hands!" and "Gun!" repeatedly.

Civilian Witness 3 was parked facing the same direction of Castellano, but there was one row of pumps between them. He heard the officers yell, "Don't Move," and "Show me your hands," and "I don't see your hands."

Civilian Witness 4 was parked two bays from Castellano's vehicle and heard someone scream, "Gun down. You are under arrest."

Civilian Witness 5 finished pumping gas and sat down in her vehicle as the officers pulled in at a high rate of speed. She was three rows of pumps from Castellano's vehicle and heard an officer say, "He's got a gun!" Approximately thirty seconds later she estimated that she heard a dozen rapid gunshots.

Civilian Witness 6 was parked directly behind Castellano's vehicle, waiting for him to finish pumping gas. He heard officers say, "Put your hands up!" and "You are under arrest!" approximately three times. He also saw an officer try to open Castellano's vehicle, but Castellano reached over and locked it. He stated that right before the shooting, Castellano reached down as if to pick up something. After Castellano tried to pick up something, he heard an officer yell "He has a gun!" two times.

5. Witness Officer 1's Statement

After determining that Witness Officer 1 did not discharge his firearm, he provided a voluntary statement describing the RPD Pro-Act investigation and the shooting. As he and the involved officers surveilled Castellano, they used their cell phones to coordinate an arrest plan. Because the officers had reason to believe Castellano had a firearm in his car, they intended to surprise him by driving their vehicles into the gas station at varying angles.

Witness Officer 1 stated the officers converged on Castellano's vehicle and he approached the front passenger side of Castellano's vehicle. He observed Castellano's hands were not visible and that Castellano was grinning and shaking his head back and forth. Witness Officer 1 stated the officers yelled "Police!" and "Get out of the car!" but Castellano did not comply. Witness Officer 1 could still not see Castellano's hands, but he heard officers commanding Castellano to show his hands. Based on Castellano's position, Witness Officer 1 believed that Castellano's hands were in his lap area. Next, he observed Castellano raise a gun, with the gun pointing forward as Castellano continued to shake his head. He noted the gun appeared to be a black semi-automatic handgun. Witness Officer 1 yelled out, "Gun! He's got a gun!" followed by the other officers commanding Castellano to "Drop the gun!" Witness Officer 1 continued to see Castellano shaking his head and holding the gun forward, followed by gunfire.

Following the gunfire, Witness Officer 1 stated the officers continued to give Castellano verbal commands to show his hands, but it appeared that Castellano could not comply because of his injuries. Witness Officer 1 moved to the driver's side door, opened the door, and removed Castellano from the vehicle. As Witness Officer 1 opened the door he saw a semi-automatic handgun with a beige grip in the driver's pocket door, but he was not certain if this was the same gun he had observed earlier.



Figure 1 - Firearm inside the driver's door pocket of Castellano's vehicle.

During the interview after the incident, Investigator 1 asked Witness Officer 1 why he thought Castellano grinned, shook his head, and displayed a firearm. Witness Officer 1 opined that he believed that Castellano knew he faced a significant prison sentence if arrested and he likely did not want to go back to prison.

6. Video Evidence

A civilian in a nearby apartment complex recorded a portion of the incident. While the video did not record the actual shooting, the audio captured statements, such as “Hands up!”, “You’re under arrest!”, and “Hands up now!”

There were also several recordings from the gas station that captured portions of the incident. Investigator 1 reviewed the footage and noted several noteworthy portions:

- 04:49:52 After inserting the fuel pump into his vehicle, Castellano enters the cab of his truck.
- 04:50:57 The involved officers arrived and exited their vehicles.
- 04:51:07 Involved Officer 1 attempted to open Castellano’s door. The other officers are positioned throughout the scene.

- 04:51:11 Involved Officer 1 suddenly retreated toward the truck bed of Castellano’s vehicle. Involved Officer 4 appears to be shouting.
- 04:51:13 Involved Officer 1 extends his firearm in a shooting stance. The first potential fired round occurs between this time and 04:51:15, which is when a bullet defect appears on Castellano’s front windshield.

7. Involved Officers’ Statements

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.⁸ 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.⁹ 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.

a. Involved Officer 1

Involved Officer 1 summarized his investigation into Castellano. After the officers converged on Castellano’s vehicle, Involved Officer 1 exited his vehicle and went to the rear of Castellano’s vehicle and he heard officers yell, “Police! Showe me your hands, hands up!” Involved Officer 1 approached the left side passenger door and yelled, “Police! Show me your hands!” Involved Officer 1 tried to open the door, but it was locked. At this time, Involved Officer 1 looked into the driver’s window and could see Castellano holding a handgun in his

⁸ Garrity v. State of N.J., 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562 (1967).

⁹ U.S. v. North, 910 F.2d 843, 857-858 (D.C. Cir., 1990).

right hand, which he believed was the same firearm he saw in a picture of Castellano holding a firearm. Castellano raised the gun up, which was pointed in the direction of Involved Officer 4 and Involved Officer 3, and Involved Officer 1 saw Castellano moving his head in line with the gun, which is consistent with acquiring a target in the handgun's sights. At the same time, he heard other officers yell, "Gun! He has a gun!" Involved Officer 1 believed that Castellano represented an immediate danger and he also heard officers yelling, "Drop the gun!" Involved Officer 1 believed that Castellano posed an immediate threat and the only reasonable option was to discharge his firearm, which he did four times. After the gunshots stopped, Castellano eventually opened the door and Involved Officer 1 observed that Castellano's gun was in the driver's door pocket.

b. Involved Officer 3

Involved Officer 3 summarized his knowledge of Involved Officer 1's investigation into Castellano. After the officers converged on Castellano's vehicle, Involved Officer 3 exited his vehicle with his firearm in the "low ready" position and yelled, "Show me your hands!" and "You are under arrest!" He could not see Castellano's hands, but he observed Castellano reaching for something on the floorboard. Castellano had a direct line of sight to Involved Officer 3 by looking out the driver's door window. Involved Officer 3 and the other officers continued to issue commands to Castellano, which he did not acknowledge. When Involved Officer 1 was near the rear driver's side window, he heard multiple officers yell, "gun," which indicated to him that Castellano was in possession of a firearm. Officers continued to give commands, but Castellano did not comply. Involved Officer 3 saw the rear driver's side window shatter and he believed that Castellano shot at the officers. Involved Officer 3 thought that Castellano was trying to shoot and kill the officers, so he discharged two rounds at the driver's door. Involved Officer 3 did not see how Castellano's door opened, but he saw that Castellano was injured and he began first aid. After the medics arrived, Involved Officer 3 looked around the area and observed a handgun in Castellano's door pocket of the open driver's door.

c. Involved Officer 2

Involved Officer 2 summarized his knowledge of Involved Officer 1's investigation into Castellano. After the officer's converged on Castellano's vehicle, Involved Officer 2 heard

Involved Officer 1 loudly yell, “Police, you are under arrest, show me your hands.” As he took his assigned position, Involved Officer 2 heard one of the other officers shout, “He’s got a gun!” followed by several gunshots. Because Castellano’s vehicle was obscured, Involved Officer 2 moved to a position that allowed him to see the driver’s seat. Once Involved Officer 2 was near the passenger side front window, he saw Castellano looking straight ahead, straightening his right arm, and raising his arm up. Involved Officer 2 knew that Involved Officer 3 and Involved Officer 4 were in front of Castellano’s vehicle and he believed that Castellano intended to shoot at the officers, so he discharged two rounds from his rifle, which caused Castellano’s right arm to lower.

d. Involved Officer 4

Involved Officer 4 summarized his knowledge of Involved Officer 1’s investigation into Castellano. After the officers converged on Castellano’s vehicle, Involved Officer 4 exited his vehicle and yelled, “Show me your hands! Get your hands up!” approximately ten times. Involved Officer 4 had an unobstructed view of Castellano’s face, which was shaking back and forth while fixating on Involved Officer 4. Involved Officer 4 heard Witness Officer 1 yell, “He’s got a gun!” three times and he noticed that Witness Officer 1 had a concerned look on his face. Involved Officer 4 focused his attention back to Castellano, who was looking directly at Involved Officer 4. Fearing that Castellano would fire at him, Involved Officer 4 discharged two rounds from his handgun.

8. Forensics

The Washington State Patrol Crime Laboratory (the Lab) examined several pieces of evidence. The Lab confirmed that the casings recovered from the scene corresponded to the involved officers’ firearms.

9. Medical, Autopsy, and Toxicology

The King County Medical Examiner’s Office performed an autopsy of Castellano, which opined that three rounds entered Castellano from the back. Specifically, two rounds perforated

Castellano's lungs causing his death and an additional round perforated Castellano's back and shoulder. The cause of death is multiple gunshot wounds, and the manner of death is homicide.¹⁰

The Washington State Patrol Toxicology Laboratory performed a drug analysis of Castellano's blood. The results showed that Castellano's blood tested positive for amphetamine and opiates. Specifically, his blood contained morphine (.061 mg/L), amphetamine (.094 mg/L), and methamphetamine (.91 mg/L).

10. Redmond Police Department Internal Affairs and Standards

In March 2019, the Redmond Police Department concluded a comprehensive internal investigation regarding Involved Officer 1 and Involved Officer 2. The investigation confirmed that Involved Officer 1 and Involved Officer 2 committed department policy violations.¹¹ Prior to a Loudermill hearing, both officers resigned from their positions within the police department. The Team analyzed the internal investigation for each officer and confirmed that the investigation into and the use of force upon Castellano was not the subject of the internal investigations.

V. LEGAL STANDARD AND APPLICABLE LAW

The State must prove each element of a criminal charge by competent evidence beyond a reasonable doubt.¹² 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.¹³

¹⁰ 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.

¹¹ Internal Investigation 18IA-011, regarding Involved Officer 1 sustained violations of truthfulness; investigations, arrests and detentions; procedures for testifying; Brady definitions; and department response to officer's testimonial impeachment. Internal Investigation 18IA-010, regarding Involved Officer 2, sustained violations of conduct unbecoming; unsatisfactory work performance; conduct violations towards employees; failure to supervise/supervisory accountability; and truthfulness.

¹² RCW 9A.04.100; WPIC 4.01.

¹³ KCPAO Filing and Disposition Standards.

In addition, the State must disprove the existence of a defense that negates an element of the crime.¹⁴ 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.¹⁵ Therefore, the State may be required to disprove one or more of the following defenses:

- Justifiable Homicide by Peace Officer;¹⁶
- Justifiable Homicide Defense of Self or Others;¹⁷
- Justifiable Homicide Resistance to Felony;¹⁸

This incident occurred on June 14, 2018; therefore, the applicable Justifiable Homicide by a Peace Officer instruction would require the State to prove the involved officers acted with malice.¹⁹

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.”

Justifiable Homicide by a Peace Officer and Justifiable Homicide in Defense of Self or Others contain related but distinct concepts and definitions. The KCPAO declines to file charges against any of the involved officers because their actions were lawful and justifiable. The

¹⁴ WPIC 14.00.

¹⁵ Id.

¹⁶ RCW 9A.16.040; WPIC 16.01.

¹⁷ RCW 9A.16.050(1); WPIC 16.02.

¹⁸ RCW 9A.16.050(2); WPIC 16.03.

¹⁹ The former version of WPIC 16.01, which included the malice standard, is applicable to offenses committed on or prior to December 6, 2018. The current version of WPIC 16.01, which removed malice and applied the good faith standard, is applicable to offenses committed on or after February 4, 2019. There are no pattern jury instructions for offenses committed between December 7, 2018, and February 3, 2019.

independent investigation and the Team's analysis show the officers' actions complied with the affirmative defenses of Justifiable Use of Force by a Peace Officer and Defense of Self.

1. Justifiable Homicide by a Peace Officer

Under RCW 9A.16.040 in effect at the time, homicide is justifiable when used by a peace officer 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. In considering whether the use of deadly force under this prong, 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.

Among the circumstances which may be considered by peace officers 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.

A public officer or peace officer shall not be held criminally liable for using deadly force without malice and with a good faith belief that such act is justifiable pursuant to this section. In order to prove malice, the State must prove beyond a reasonable doubt that the officer acted with an evil intent, wish, or design to vex, annoy, or injure another person.²⁰ Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.²¹ A peace officer acts in good faith if a similarly situated reasonable peace officer would have acted similarly.

²⁰ RCW 9A.04.110(12).

²¹ Id.

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.²² “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.”²³

In the current incident, the evidence and testimony is highly likely to demonstrate the involved officers had probable cause to arrest Castellano for several crimes investigated by Involved Officer 1. In addition, there was also probable cause to arrest Castellano for a felony, such as Assault in the First Degree, when he raised his firearm in the officer’s directions. Given the involved officers’ statements, which is corroborated substantially by civilian statements and video, Castellano did not comply with the officers’ commands. It was reasonable for the officers to believe that Castellano displayed the firearm in a threatening manner and that he intended to inflict serious physical harm when he pointed his firearm at officers, shook his head back and forth, and ignored their lawful commands.

2. Justifiable Homicide in Defense of Self or Others

As applied to this incident, 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.²⁴ 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.²⁵

²² Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989).

²³ Id. 490 U.S. at 396-97.

²⁴ RCW 9A.16.050(1); WPIC 16.02.

²⁵ WPIC 2.04.01.

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 officers’ training into account.

Given that Castellano displayed a firearm at the officers, it was reasonable for the officers to believe there was an imminent danger that Castellano intended to commit a felony, to inflict death or to inflict great personal injury. Further, it also appears that the officers employed a reasonable amount of force in response to Castellano’s threatened actions.

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.”²⁶ 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.²⁷

VII. RECOMMENDATION FOR INQUEST

An inquest is mandatory to determine the manner, facts, and circumstances of Castellano’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.

²⁶ WPIC 16.02.

²⁷ WPIC 16.07.