Use of Force Non-Fatality Investigation

Subject: Abdikarim Abdi

Valley Investigation Team

Auburn PD Incident # 19-01029

King County Prosecuting Attorney

Public Integrity Team

July 2, 2025

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I. INTRODUCTION

1. Purpose of the Memorandum

Pursuant to the Law Enforcement Training and Community Safety Act, an independent investigation must be completed when the use of deadly force by a peace officer results in death, substantial bodily harm, or great bodily harm.[1] [2] The independent investigation is conducted in the same manner as a criminal investigation and must be completely independent of the involved agency.[3]

The Revised Code of Washington requires the prosecuting attorney to represent the State of Washington and to prosecute all criminal actions in which the state or the county may be a party.[4] In addition to exercising its prosecutorial discretion to initiate criminal proceedings, the prosecuting attorney is mandated by law to review certain incidents regarding police use of force and to determine if sufficient evidence exists to support the filing of criminal charges.[5] Because the independent investigation and the prosecuting attorney's review are mandatory if specific criteria are met, the review of an incident by the King County Prosecuting Attorney's Office (KCPAO) does not implicitly signal that the use of force was either justified or that criminal charges are appropriate. Instead, the KCPAO is required to assist in an independent investigation involving police use of deadly force to enhance accountability and increase trust to improve the legitimacy of policing for an increase in safety for everyone.[6]

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[1] RCW 10.114.011. See also WAC 139-12-010.
[2] Upon law enforcement's request, he KCPAO will also review investigations into an officer's use of deadly force that does not result in death, substantial bodily harm, or great bodily harm, such as when an officer's gunfire does not cause injury.
[3] WAC 139-12-010.
[4] RCW 36.27.020(4).
[5] Except as required by federal consent decree, federal settlement agreement, or federal court order, where the use of deadly force by a peace officer results in death, substantial bodily harm, or great bodily harm, an independent investigation must be completed to inform any determination of whether the use of deadly force met the good faith standard and satisfied other applicable laws and policies. RCW 10.114.011. Similarly, if the Office of Independent Investigation is the lead investigation agency, the prosecutorial entity must review the investigation. RCW 43.102.020. 2021 c 318 § 101.
[6] Id. See also WAC 139-12-010.

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

3. Status of the Independent Investigation

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

II. OVERVIEW

On January 23, 2019, Kent Police Department Involved Officer 1 (now retired) fired one round at who was the getaway driver for an armed robbery, leading police on a short vehicle pursuit which ended in a cul-de-sac when the Subject crashed into a tree. The shot did not strike anyone. The driver of the car, Subject, Abdikarim Abdi was arrested. However, the suspected gunman, the passenger of the car, escaped on foot. No firearm was recovered from either the car or the Subject.

III. INVESTIGATION AND EVIDENCE

1. Valley Investigation Team Reports –
2. Auburn PD - 19-01029
3. Federal Way PD - 19-1057
4. Port of Seattle PD – 2019-00005656
5. Police Reports – Kent Police Department - 19-1115
6. Civilian Statements
7. Computer Aided Dispatch
8. Mobile Data Terminal
9. Other Police Reports
10. Search Warrant & Application
11. Crime Scene Investigation
12. Involved Officer's Compelled Report
13. Subject Information
14. 911 Call and Police Radio Traffic
15. Audio
16. Photos
17. Miscellaneous

IV. INVESTIGATION SUMMARY[7]

1. Factual Summary

At 0155 hours a citizen reported to 911 that an armed robbery had occurred at the AM/PM gas station on 1809 W. Meeker St in the city of Kent. The citizen said two men entered the store armed with guns.

[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.

At 0157 hours an AM/PM customer told police that two black males fled into a red four door sedan, possibly a late model Toyota Camry, and that the car fled on Military Rd towards Kent Des Moines Rd.

At 0158 hours, the 911 caller told the operator that one of the suspects was possibly holding a firearm in his hand but he was too far away to be sure.

Six seconds later, Involved Officer 1 dispatched to scene as backing officer.

At 0201 hours, Involved Officer 1 radioed that the Toyota ran a red light at the intersection of Military Rd S and S 272nd St and fled south into Federal Way. The suspect car nearly caused a traffic accident then turned eastbound onto S. 296th St, and then southbound onto S 296th Pl.

At about 0203 hours, Involved Officer 1 reported that the Toyota had crashed and that a suspect was fleeing on foot in a cul-de-sac.

At about 0203 hours (less than a minute later), Involved Officer 1 radioed that he had fired a shot, that no one appeared to have been hit, that one suspect was on the ground and compliant, and a second suspect was fleeing westbound on foot toward Military Rd S. Involved Officer 1 radioed that he fired at the suspect who reached for or been reaching for something.

2. Independent Investigation

The Valley Investigation Team (VIT) was requested to respond to the scene and to conduct an independent investigation. Auburn Police Department Investigator 1 was assigned as the lead investigator. Investigators from the VIT divided assignments between themselves. Federal Way Police Department detectives processed the incident scene for evidence, and Port of Seattle Police Department detectives canvassed the area for witnesses and video of the incident. Port of Seattle PD did not locate any exterior cameras that would have captured the incident. additionally, no residents claimed to have seen the incident.

3. Processing of the Officers

APD Investigator 2 processed Involved Officer 1. The detective reported that Involved Officer 1's handgun contained one unfired cartridge in the chamber, sixteen unfired cartridges in

the magazine, and that the magazine had a maximum capacity of seventeen cartridges.[8] Involved Officer 1's two spare magazines were each loaded with 17 unfired cartridges and had a maximum capacity of seventeen cartridges. If Involved Officer 1 filled his loaded magazine to capacity with an additional cartridge in the chamber, his handgun was loaded with eighteen cartridges, which would indicate that he discharged one cartridge, which is consistent with the evidence as only one fired cartridge casing was recovered at the scene.

Involved Officer 1		
Location	Unfired Cartridges	Capacity
Chamber of handgun	1	1
Magazine – Inside handgun	16	17
Magazine – Spare #1	17	17
Magazine – Spare #2	17	17
Total	51	52

4. Civilian Witnesses

- Civilian Witness 1

KPD Investigator 3 interviewed the store manager and victim Civilian Witness 1 with Civilian Witness 1's manager present to translate. He asked Civilian Witness 1 why he did not think Abdi was one of the subjects who had robbed the store. Civilian Witness 1 explained that Abdi's build was too heavy to be one of the gunmen. He also said that Abdi's skin complexion was darker than the suspects. However, Civilian Witness 1 told Investigator 3 that Abdi looked the same as a male who had been inside the store just prior to the robbery occurring. Officers reviewed the store's surveillance footage prior to the robbery and it appeared that Abdi had come into the store just prior to the robbery occurring.

[8] Handgun and rifle ammunition contain several distinct parts, which are often used interchangeably. A "cartridge" is a unit of ammunition, made up of a cartridge case, primer, powder, and a bullet. It may also be referred to as a "round" or "load." It is sometimes incorrectly referred to as a "bullet." The "cartridge case" is the container for all the components that comprise a cartridge. The "primer" is an explosive substance that ignites when struck to detonate the powder in a cartridge. The "powder" is the propellant in a cartridge." When a handgun or rifle is fired (also referred to as "discharged), the "bullet" is the projectile that is propelled by the force of gases produced by rapidly burning powder.

- Abdikarim Abdi-

Mr. Abdi initially invoked his *Miranda* rights upon being arrested, but later agreed to speak to investigators. During the interview, he stated that he was shot at by the officer and that he was just standing with his hands raised above his head. Abdi denied running from the vehicle and stated that he was just standing but then contradicted this by saying that he heard the shot and stopped moving. When questioned further on this point, he said that the movement was from him exiting the vehicle. He stated that the officer never ordered him to exit the vehicle. The detective asked Abdi why he would exit the vehicle without being ordered to do so and he stated that he thought that would be the safest thing to do. The detective asked him to clarify why he believed it was the safest action to immediately exit the vehicle after a high speed chase with the police. He responded by saying that in his opinion it was a safe decision.

5. Law Enforcement Witnesses

No other officers witnessed Involved Officer 1's use of force.

- Witness Officer 1-

Witness Officer 1 wrote that he arrived moments after the OIS and took a perimeter spot in the 30000 block of Military Rd while a K9 track for the outstanding suspect ensued. While the track was going on he used police database to search for information on the suspect vehicle. He learned that the registered owner of the vehicle was an older male. He had a young son that matched the description and had previously stolen his father's vehicle and not returned it. Witness Officer 1 then ran the name of the son with the information in the data base, Abdikarim A. Abdi (06-11-1999) and requested Kent Records send a DOL photograph. Which matched the male KPD had in custody.

6. Involved Officer Statement

Involved Officer 1 did not provide a voluntary statement. Though he did provide an administratively compelled statement. The investigation into this incident occurred prior to the date RCW 10.114.011 and WAC 139-12-030 were effective, which established the requirements for an independent investigation into police use of deadly force. As was often the practice of the involved agencies, the investigative material supplied to VIT and the KCPAO in this case include the involved officer's compelled statements.

Compelled statements are *inadmissible* against an officer if they are criminally prosecuted.[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.

Below is a summary of the key portions of Involved Officer 1's written statement:

Involved Officer 1 wrote that he heard dispatch report that a witness saw the robbery suspects, two black males, cross the street and get into a red 4-door sedan that looked like a Camry or other similar model of Toyota, and proceed towards Kent-Des Moines Rd on Military.

At the time when that robbery had been broadcast, Involved Officer 1 had been driving east on S 260th St from Pacific Hwy S. Involved Officer 1 decided to continue heading that way, towards Military Rd S to see if he could locate the suspect vehicle, as it had been reported to have been last seen headed west. As Involved Officer 1 neared the intersection of Military Rd S, Involved Officer 1 saw a vehicle, westbound on Reith Rd, also nearing the intersection. Involved Officer 1 noted that it appeared to have its headlights set to high-beam. The vehicle continued through the intersection and made a left turn to proceed south on Military Rd S. As it made the turn in front of him, Involved Officer 1 saw that the vehicle was a red, 4-door sedan, and it appeared that it could possibly be a Honda or Toyota. Involved Officer 1 could not see the occupants of the vehicle at that time, as the high beams of the vehicle had momentarily affected his eyesight.

Involved Officer 1 followed behind the vehicle as it continued south on Military Rd S. Headlights from oncoming cars illuminated the occupants and Involved Officer 1 could see that it appeared to just have a driver and front seat passenger. The driver, based on the outline,

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[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).

appeared to be a male with a spiky Afro hairstyle. At this point Involved Officer 1 believed that he had reasonable suspicion to stop and detain the driver and passenger to determine if they were involved in the armed robbery.

When Involved Officer 1 activated his vehicle's overhead lights, the suspect vehicle made no noticeable intent to yield to him, and Involved Officer 1 could see the driver quickly lean towards the passenger and raise his right arm for a quick moment. The vehicle then quickly increased speed. Involved Officer 1 notified the dispatcher of the situation as he continued south on Military Rd S. Involved Officer 1 also activated his siren at about this point. The suspect vehicle continued to increase speed. The traffic signal at the intersection of S. 272nd St was red as both cars neared. Against the red light, without slowing, the suspect vehicle drove through that intersection. One vehicle, westbound on S. 272nd St came close to colliding with the suspect vehicle. Involved Officer 1 slowed down at the intersection to make sure it was clear, and he then continued driving after the fleeing suspect vehicle. Involved Officer 1 believed he now had probable cause to arrest the driver for attempting to elude police, a felony. Involved Officer 1 caught up to the vehicle as it neared Star Lake Rd. The driver of the suspect vehicle hit the brakes as Involved Officer 1 neared, in what Involved Officer 1 interpreted as an attempt to get him to collide with the rear of it and possibly disable him, or to prevent him from performing a PIT maneuver. Speeds continued at 80 MPH or slightly above that as they neared the intersection of S. 288th St. The suspect vehicle maintained its speed and went into and through the intersection without making any attempt to stop or even slow down. A pickup truck traveling eastbound on S. 288th St almost t-boned the suspect vehicle, but the truck driver was able to apply its brakes and swerve around it. Involved Officer 1 slowed to clear the intersection and then continued after the suspect vehicle.

As Involved Officer 1 caught up to the suspect vehicle just as it was making a left turn to proceed east on S. 296th St into a cul-de-sac. Involved Officer 1 then saw a subject running on foot through the side yard of the house located on the northwest comer of S 296th St and S 296th Pl. He appeared to be a young, light skinned black or Hispanic male. He was wearing dark pants, a white, short- sleeved t-shirt, and he was carrying something dark-colored in one of his hands. It looked like it could have been a wadded-up jacket or shirt, which Involved Officer 1 reported to dispatch. Involved Officer 1 watched the suspect vehicle complete a U-turn in the cul-de-sac and

then drive towards him. The suspect car then veered slightly to Involved Officer 1's right, in an apparent attempt to pass him. Involved Officer 1 changed his course to block its escape, and the driver drove the vehicle partially up onto the sidewalk and then straight into a young tree planted in the grass alongside the sidewalk. The suspect vehicle came to an instant stop almost next to Involved Officer 1's vehicle. The suspect driver, who Involved Officer 1 saw was now alone in the vehicle, made eye contact with Involved Officer 1. The suspect then moved quickly to exit his vehicle, as did Involved Officer 1.

Involved Officer 1 wrote that he felt 100% certain, at this point, that the suspect vehicle and the suspect had been involved in the armed robbery at Arco AM/PM. He wrote that his primary concern as he got out of his police car, was that the suspect was still armed, and might be willing to shoot at him in a desperate attempt to elude capture. Involved Officer 1 unholstered his service weapon and ran to the front, driver's side of his patrol car, behind the safety of the engine block, to engage the suspect. He wrote that his goal at this point was to use verbal commands to try and deescalate the situation. Involved Officer 1 wanted this driver to surrender and allow Involved Officer 1 to arrest him without force. The suspect, who Involved Officer 1 saw was a young, black male with a spiky Afro hairstyle, ran from his vehicle and started to run to the south. Involved Officer 1 yelled, "Let me see your hands!" Involved Officer 1 wrote that he may have yelled, "Get down!" or "Get down on the ground!" but was not certain. Involved Officer 1 wrote that he used a commanding voice. When Involved Officer 1 yelled at him, the suspect stopped, with his hands still hidden in front of him with his back turned to Involved Officer 1. He did not appear to be willing to comply. He did not show his hands, but rather kept them in front of him. Involved Officer 1 perceived this as possibly very dangerous to his safety. Involved Officer 1 wrote that he was concerned that the suspect had a gun in his hands or in his waist area.

Involved Officer 1 wrote that he was trained that an armed suspect that turns on him from this position can shoot him faster than Involved Officer 1 can stop him with his own gun. Involved Officer 1 wrote that he wanted him to comply by either putting his hands in the air, so Involved Officer 1 could see them and see whether he had a gun, or get down on the ground so he could be arrested safely. At this point, Involved Officer 1 wrote, the driver had committed a felony crime, was refusing to obey Involved Officer 1's lawful commands, was intentionally

concealing his hands from his view, and was suspected of committing an armed robbery. Involved Officer 1 wrote that under the totality of the circumstances, he believed he had reasonable grounds to use deadly force to keep the suspect from killing or badly wounding him. The suspect was about 20 to 25 feet away from Involved Officer 1 at this point. Immediately after the suspect stopped running, and with no warning, the suspect whirled around at Involved Officer 1. Involved Officer 1 wrote that he had not given the suspect any commands that would cause him whirl around on him suddenly and that the suspect's hands were concealed. Involved Officer 1 wrote that he his concern was that the suspect had the gun in his hand and would shoot and kill him.

Involved Officer 1 wrote that in order to protect his life, he immediately fired one shot from his service weapon at the suspect. Involved Officer 1 wrote that he did this because the suspect's movement was sudden and he had not put up his hands up or showed them to Involved Officer 1. He appeared to be moving in a way that Involved Officer 1 did not interpret as that of a person who was surrendering, but rather like someone attempted to engage him. Because of this, and the fact that Involved Officer 1 felt that the suspect was still likely to be armed, Involved Officer 1 fired the single shot to end the perceived threat. As soon as Involved Officer 1 fired at the suspect, the suspect immediately dropped to the ground on his back, with his arms raised to the sky. The suspect dropped to the ground so quickly that Involved Officer 1 believed that his shot had hit the suspect. Still standing behind the engine block of his vehicle, Involved Officer 1 continued to point his gun at the now-prone suspect. Involved Officer 1 aired the situation to the dispatcher. Involved Officer 1 asked the suspect if he was injured. The suspect replied that he was not. Involved Officer 1 did not see any signs of him injury on the suspect, so Involved Officer 1 ordered him to remain laying on the ground until backup arrived to assist in the arrest.

7. Crime Scene Investigation and Search Warrants

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

Investigator 4 observed a patrol car stopped facing southeast on S 296th Pl at S 296th St. In front of the police vehicle was a red Toyota Corolla bearing Washington State license plate BMU8856 facing northwest on 296th Pl just before S 296th St. The Toyota had collided with a

tree on the sidewalk with enough force to activate the driver's airbag and cave in the front of the vehicle. Inside the vehicle on the front passenger side floorboard, Investigator 4 saw a mask, several items of dark clothing, shoes, loose currency, a Fanta soda bottle, and Swisher Sweets cigarillos. Based on information developed up to this point, it appeared that this was property stolen during the robbery.

Investigator 4 then observed a likely avenue of escape for the missing suspect. He saw an open gate at 2941 S 296th Pl. Directly behind the residence he observed several boards missing from a single spot in the fence.

The suspect vehicle was towed to Auburn PD's secure vehicle storage. Kent PD detectives obtained a search warrant for the vehicle in relation to their robbery investigation. VIT detectives documented the contents of the vehicle before Kent detectives accessed the car. APD Investigator 2 documented the vehicle's exterior and interior with photographs. Property obtained during the robbery was recovered, but no firearm was observed inside the vehicle.

Figure 1: Photo of the front passenger floorboard. Recovered were tobacco products and a white mask matching those taken and used in the robbery.

8. Video Evidence

There is no video evidence of the OIS. No civilian video of the incident was recovered, and the involved officer was not equipped with ICV or BWV cameras.

9. Underlying Crimes

The Subject and the two other suspects were charged with robbery. The Subject was also charged with attempting to elude a pursuing police officer (See. in 19-1-00087-9 KNT). He pled guilty to attempting to elude only.

V. LEGAL STANDARD AND APPLICABLE LAW

1. Burden of Proof

In a criminal prosecution, the State must prove each element of a criminal charge by competent evidence beyond a reasonable doubt.[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 beyond a reasonable doubt.[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, in addition to proving that the accused committed a crime, the State will be required to disprove one or more of the following defenses:

- Lawful Force by Public Officer (applies to non-homicide charges)[15]
- Defense of Self or Others (applies to non-homicide charges)[16]
- Justifiable Homicide or Use of Deadly Force by Peace Officer[17]

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[11] RCW 9A.04.100; WPIC 4.01.
[12] KCPAO Filing and Disposition Standards.
[13] WPIC 14.00.
[14] KCPAO Filing and Disposition Standards.
[15] RCW 9A.16.020(1), (2).
[16] RCW 9A.16.020(3).
[17] RCW 9A.16.040.

2. Applicable Jury Instructions

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

- WPIC 2.16 - Peace Officer
- WPIC 16.01 - Justifiable Homicide or Use of Deadly Force by a Peace Officer
- WPIC 16.05 - Necessary
- WPIC 17.01 - Lawful Force—Public Officer or Others in Aid of Officer
- WPIC 17.02 - Lawful Force—Defense of Self, Others, Property
- WPIC 17.04 - Lawful Force—Actual Danger Not Necessary
- WPIC 120.07 - Lawful Arrest and Probable Cause

VI. ANALYSIS AND CONCLUSION

1. Summary of Conclusion

Under the KCPAO filing standards, "Crimes again persons 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."[18]

The KCPAO declines to file charges against the involved officer because the independent investigation and the Team's analysis reveal that there is insufficient evidence to prove any criminal charges beyond a reasonable doubt or disprove applicable affirmative defenses, such as Deadly Force by a Peace Officer or Defense of Self or Others, beyond a reasonable doubt.

[18] KCPAO Filing and Disposition Standards.

2. Use of Deadly Force by a Peace Officer

a. Law Regarding Justifiable Homicide by a Peace Officer

i. RCW 9A.16.040(1)(b) – Good Faith Response to Actual Resistance to Discharge of Legal Duty

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.[19]

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.[20] 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.[21]

b. Relationship Between 4th Amendment Civil Rights Case Law, Police Training, and the "Similarly Situated Reasonable Officer" Standard

In Graham v. Connor, the seminal case on evaluating whether a police officer's use of force violated a person's constitutional right against unreasonable search and seizure, the United States Supreme Court determined that the test to determine whether the force used by the police was "reasonable" is not capable of a "precise definition or mechanical application."[22] Instead, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[23] In other words, the reasonableness of whether the officer's use of force is justified is determined by "the totality of the circumstances."[24]

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[19] RCW 9A.16.040(1)(b); WPIC 16.01.
[20] RCW 9A.16.040(4).
[21] RCW 9A.16.010; WPIC 16.05.
[22] Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989).
[23] Id.
[24] 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.[25] "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."[26] However, the inquiry is an objective one. The question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them.[27]

While the Legislature did not explicitly adopt this standard when enacting RCW 9A.16.040, defensive tactics training provided to police officers by their departments is almost universally developed based on this standard. Therefore, the KCPAO must consider the Graham factors when determining the sufficiency of the evidence, specifically 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 themself or others.

c. Analysis Regarding Justifiable Homicide by a Peace Officer

i. Prong (1)(b) – Good Faith Response to Actual Resistance to Discharge of Legal Duty

The evidence in the independent investigation showed Involved Officer 1 used deadly force to overcome actual resistance in the discharge of a legal duty.

The evidence establishes that the Subject was likely the getaway driver in an armed robbery and fled from police, blowing through multiple red lights, and nearly causing two traffic collisions at high speed, before entering a cul-de-sac and coming to stop upon crashing into a small tree.

At the time, Involved Officer 1 did not know what role the Subject played in the robbery, but reasonably believed that the Subject may be armed based on the calls to 911 that two armed suspects robbed an AM/PM employee before entering a red sedan.

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[25] Id.
[26] Id. at 396-97.
[27] Id. at 397.

After striking the tree, the Subject got out of his car without being ordered to do so and ran. Involved Officer 1 then exited his own vehicle and order the Subject to show his hands and get down on the ground while taking cover behind the driver side door of his police vehicle. He wrote that the Subject then stopped, and from some twenty to twenty-five feet, with his back to Involved Officer 1 and his hands concealed, the Subject quickly turned around to face Involved Officer 1. Involved Officer 1, who claimed to be in fear for his life, then fired one shot at the Subject, missing him.[28] The Subject was then taken into custody without incident. It is clear from the subsequent investigation that no gun was recovered on the Subject or in the car. The passenger who escaped on foot possibly took the gun with him when he fled the scene.

Involved Officer 1 wrote that he believed the Subject was likely armed, which based on the evidence was reasonable. He also wrote that when the Subject turned around, he believed that he might be shot. He also references completing police training regarding action being faster than reaction, specifically that a suspect can turn around and shoot before and officer can react and protect themself. The Team is aware of this type of training and, although is not scientifically validated in a peer review journal, that it is taught to many officers in their courses.

The question presented is whether Involved Officer 1's belief was in good faith, meaning that a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent serious physical harm. That is an open question given that Involved Officer 1 did not see the Subject holding a firearm before he shot. At trial the defense would likely attempt to admit expert testimony regarding reaction times and the training the officer was provided. Additionally, a person is entitled to act on appearances in defending themself, 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.[29] This is also a claim a prosecution would likely not be able to overcome given the actions of the Subject immediately prior to the OIS.

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[28] The Subject's statement to investigators that Involved Officer 1 shot at him when his hands were raised behind his head and that he did not make any sudden movements is incredible because his version of events is unreasonable, specifically that on his own accord he exited the car and put his hands up despite claiming that the officer never ordered him to do so. Further diminishing the credibility of his version of events is his dishonest and dangerous conduct just prior to the OIS, having willingly aided and abetted a violent theft-related felony and then driving recklessly putting numerous people's safety at risk.

[29] See. WPIC 17.04 - Lawful Force—Actual Danger Not Necessary.

Additionally, a prosecution would likely not proceed to this point without the use of Involved Officer 1's report, which cannot be used in a criminal prosecution against the officer since his agency compelled him to provide a statement. Fifth amendment case law prevents a prosecution based on an officer's statement that was compelled by his department, as was done here.[30] As a result, when only considering the likely *admissible* evidence, there is insufficient evidence to charge Involved Officer 1 with a crime. Specifically, there were no other witnesses to the OIS beside the officer and the Subject. Since Involved Officer 1's statement cannot be used, a prosecution would for forced to rely almost solely on the Subject's statement. Given the inconsistencies in the Subject's statement along with his lack of credibility having just aided and abetted an armed robbery, and lack of any evidence corroborating his account, it is extremely unlikely that a jury would convict Involved Officer 1 of any assaultive crime.

3. Conclusion

Therefore, based on the anticipated admissible evidence and testimony, there is insufficient evidence to prove criminal charges beyond a reasonable doubt or refute this defense beyond a reasonable doubt.

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[30] Garrity v. New Jersey, 385 U.S. 493, 498, 87 S.Ct. 616, 619, 17 L.Ed.2d 562 (1967).

Appendix A

1. WPIC 16.01 - Justifiable Homicide by a Peace Officer

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

Homicide or the use of deadly force is justifiable:

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

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

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

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

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

2. WPIC 16.05 – Necessary

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

3. WPIC 17.01 Lawful Force—Public Officer or Others in Aid of Officer

It is a defense to a charge of (fill in crime) that the force [used] [attempted] [offered to be used] was lawful as defined in this instruction.

The [use of] [attempt to use] [offer to use] force upon or toward the person of another is lawful when necessarily [used] [attempted] [offered] [by a public officer in the performance of a legal duty] [by a person assisting a public officer in the performance of a legal duty and acting under the direction of the officer] [by a person arresting one who has committed a felony and delivering the person arrested to a public officer competent to receive the person into custody].

The State has the burden of proving beyond a reasonable doubt that the use of force was not lawful. 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 [as to this charge].

4. WPIC 17.02 Lawful Force—Defense of Self, Others, Property

It is a defense to a charge of (fill in crime) that the force [used] [attempted] [offered to be used] was lawful as defined in this instruction.

[The [use of] [attempt to use] [offer to use] force upon or toward the person of another is lawful when [used] [attempted] [offered] [by a person who reasonably believes that [he] [she] is about to be injured] [by someone lawfully aiding a person who [he] [she] reasonably believes is about to be injured] in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.]

[The [use of] [attempt to use] [offer to use] force upon or toward the person of another is lawful when [used] [attempted] [offered] in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.]

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

The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the force [used] [attempted] [offered to be used] by the defendant was not lawful. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty [as to this charge].

5. WPIC 17.04 Lawful Force—Actual Danger Not Necessary

A person is entitled to act on appearances in defending [himself] [herself] [another], if [he] [she] believes in good faith and on reasonable grounds that [he] [she] [another] is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

6. WPIC 2.16 Peace Officer—Definition

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

7. WPIC 120.07 Lawful Arrest—Definition

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