

Use of Force Non-Fatality Investigation
Subject: Leil, Brian

SPD Force Investigation Team
Incident #2020FIT-0022



King County Prosecuting Attorney
Public Integrity Team

October 1, 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 The independent investigation is conducted in the same manner as a criminal investigation and must be completely independent of the involved agency.²

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.³ In addition to exercising its prosecutorial discretion to initiate criminal proceedings, the prosecuting attorney is required to review certain incidents regarding police use of force and to determine if sufficient evidence exists to support the filing of criminal charges.⁴ Therefore, the review of an incident by the King County Prosecuting Attorney's Office (KCPAO) does not implicitly signal that the use of force was either justified or that criminal charges are appropriate. Instead, the KCPAO is required to assist in an independent investigation involving police use of deadly force to enhance accountability and increase trust to improve the legitimacy of policing for an increase in safety for everyone.⁵

2. **Scope of the Memorandum**

The KCPAO's determination whether the police action was justified or if there was a criminal action such that criminal charges should be filed is based entirely on the investigation materials provided to the KCPAO, relevant criminal laws, rules of evidence governing criminal

¹ RCW 10.114.011. See also WAC 139-12-010. Note, when an officer's gunfire does not cause injury, at the investigative agency's request, the KCPAO will agree to review investigations for criminal liability as did here.

² WAC 139-12-010.

³ RCW 36.27.020(4).

⁴ 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.

⁵ Id. See also WAC 139-12-010.

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 October 15, 2020, at approximately 1:25 pm, a patrol car was flagged down near Westlake Ave. N and Thomas St. regarding a male carrying a burning torch. Several 911 callers reported a male walking in the street holding a large torch. At about 1:26 pm, Involved Officer 1 notified police dispatch that he located the male walking in the alley north of Denny Park. Moments later, Involved Officer 1 reported over the radio that the Subject (later identified as Brian Leil) threw the burning stick into his patrol car through the open driver's door window, setting his vehicle on fire. Involved Officer 1 was seated in the driver's seat when the Subject threw the lit torch into the car. Involved Officer 1 fired his duty weapon at the Subject through the car's front windshield. Involved Officer 1 then escaped the burning vehicle via the front passenger side door before the car became fully engulfed in flames. Subject Leil fled on foot, but was quickly located by police officers in a nearby parking garage and taken into custody. The Subject was not struck by Involved Officer 1's gunfire. Involved Officer 1 suffered minor burns and was later transported to Harborview Medical Center for treatment.

III. INVESTIGATION AND EVIDENCE

1. Force Investigation Report (2020FIT-0022)
2. Detective Statement Forms (2020FIT-0022)
3. Police Reports (2020-294498)
4. Seattle Fire Dept. Investigator's Scene Report
5. Civilian Interviews
6. Civilian Interview Transcripts
7. Computer Aided Dispatch
8. Crime Scene Investigation Reports
9. 911 Call/Police Radio Traffic
10. Audio Interviews
11. Body-Worn Camera and In-Car Camera Footage
12. Civilian Video
13. Photos
14. Training Documents
15. Miscellaneous

IV. INVESTIGATION SUMMARY⁶

1. Factual Summary

The following information is based upon several sources, including, but not limited to, witness observations, police reports, the Seattle PD computer aided dispatch (CAD) report, recorded police radio, and 911 recordings from October 15, 2020.

⁶ 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.

Time	Officer	Contents
12:54:12	Dispatcher	Dispatched Witness Officer 1 and Witness Officer 2 to attempted assault at Republican St. and 9 Ave N. Broadcasted, male was riding bicycle trying to hit people with a hammer. Suspect's description - white male, 20's, slim build, black hair, light color short sleeve shirt, jeans.
12:56:52	Dispatcher	Broadcasted victims were 2 black male city workers in wool hats and reflective jackets. One took off running eastbound.
12:58:48	Dispatcher	Stated was a hate crime, but victims had not been located.
1:00:23	Involved Officer 1	Broadcasted that he was with victims at Westlake and Thomas. Suspect walked eastbound on Thomas.
1:24:34	Involved Officer 1	A civilian flagged him down about a disturbance just west of Westlake and Thomas about a male with a stick on fire.
1:26:27	Involved Officer 1	Broadcasted, "Shots fired. He threw the stick at me."
1:27:01	Involved Officer 1	Broadcasted, "Going eastbound on John... White male, black shirt, same male from his previous assault call."
1:27:37	Involved Officer 1 Witness Officer 2 Witness Officer 3	Subject entered the parking garage, mid alley, 1 block east, ½ block north of the alley. We are entering the parking garage. One at gunpoint, trying to get him on the ground.
1:29:32	Involved Officer 1	Involved Officer 1 reported that his car was totally engulfed in flames.
1:29:56	Witness Officer 2 Witness Officer 3	Announced, one in custody, under control, taser deployed, would like to see fire at the alley.

2. Investigation

The SPD Force Investigation Team responded to the scene and investigated. Detective 1 was the lead detective on the police use of force investigation. The Crime Scene Investigation (CSI) Unit processed the scene.

3. Video Evidence

Involved Officer 1 was equipped with body-worn camera (BWC) and an in-car camera (ICV). Civilian video evidence of the incident was also obtained from Denny Park Lutheran

Church and Compass Apartments on Dexter Ave. N. Included below are screen shots of the incidents from all four sources.

Below are frames from the Compass Apartments shown in chronological order. The Subject is seen carrying a torch walking southbound up the alley towards Denny Park. Involved Officer 1's patrol car follows shortly behind him.

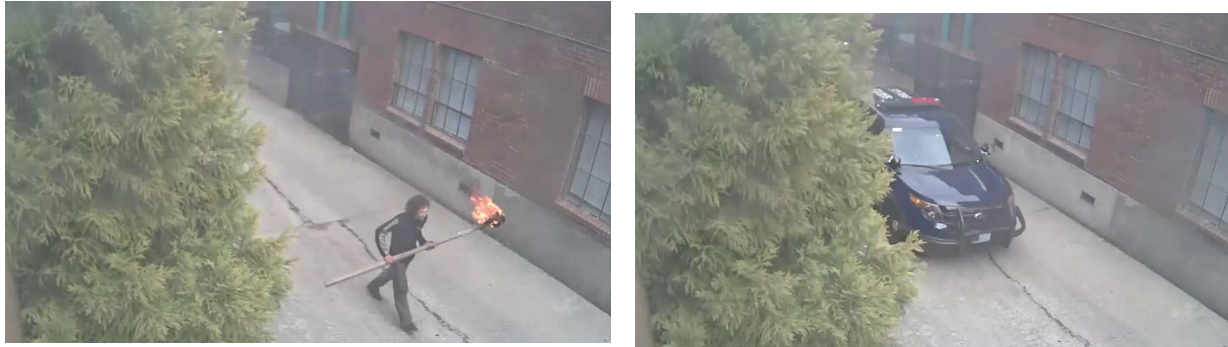


Figure 1. Subject walking southbound with police car following him just a few seconds behind.

Involved Officer 1's ICV shows his car approaching the Subject in the alley. When the car gets close to the Subject, the officer announces, "Police! Stop dude!" The Subject then turns towards the officer while holding a lit torch and runs rapidly towards the officer.



Figure 2. After noticing the patrol car's presence, the Subject turned around and ran towards the driver's side of the patrol car.

The Subject then ran towards the driver's side of the patrol car sticking the torch inside the car's cabin. Video from the apartments shows the torch inside the patrol car. The car then rolled in reverse with the torch wedged between the driver's door and car.

As the car rolled backward, Involved Officer 1's BWC footage shows him shoot his gun approximately ten times as he falls backward into the front passenger seat and out the door. The Subject runs southbound towards Denny Park as the officer fires his gun. One cannot tell from the video whether the smoke in the car had any negative effect on Involved Officer 1's vision or state of mind.







Figure 3. Sequence of video frames from Involved Officer 1 BWC footage showing the Subject approach his car, stick the lit torch into the driver’s side of the car, the officer shooting at the Subject through the windshield, and then falling out of the passenger side of the car.

Below provides a different vantage point of the encounter. These are video frames from the surveillance footage from the Compass Apartments on Dexter Ave. N. The officer’s patrol car is seen rolling backward with the torch wedged in the door. Bullet holes can be seen in the windshield as the incident progresses. These were caused by Involved Officer 1 firing his handgun at the Subject through the windshield. The interaction took roughly four seconds.





Figure 4. Again footage from Compass Apartments showing the patrol car rolling southbound down the alley with the lit torch inside the car.

This video frame is from a Denny Park Lutheran Church surveillance camera. As the police car comes to rest against the wall of the church, it is on fire and Involved Officer 1 falls backward out of the front passenger side door of the patrol car.



Figure 5. Video frame of Involved Officer 1 falling out of the passenger door after he fired at the Subject.

The Subject then fled southbound down the alley off camera and into Denny Park as Involved Officer 1 slowly stood up and gathered himself.

4. Subject's Interview

The Subject was interviewed while handcuffed. He said that he is homeless and uses methamphetamine daily, but supposedly not on the day of the incident. He appeared to be in crisis, making little sense and accusing others of being evil and the Anti-Christ. When redirected to speak about his interaction with police, he said that his intention was to head to Denny Park to

assault a man named Civilian Witness 1 who was physically abusing a female with whom the Subject was infatuated. He told police that he made the torch from scrap wood that he found and a shirt that he then nailed to the end of the scrap wood. He then poured oil on the rag to make the torch more flammable.

While walking down the alleyway, he lit the torch with a lighter that he already possessed. He recalled that when the police officer ordered him to stop, he threw the torch into the officer's car because he thought the officer was going to stop him before he could assault Civilian Witness 1, which he was intent on doing. He said that he wanted to attack Civilian Witness 1, and, if he was unable to do so, then be killed by the police.

5. Civilian Witnesses

a. Civilian Witness 1

Civilian Witness 1 said that he is also homeless. He recalled seeing the Subject the night prior and appeared to be acting normal. On the day of the officer-involved shooting (OIS), he recalled walking through Denny Park when he heard someone say, "Where you at you fucking ni**er? I'm going to kill you." He then went inside his tent and when he later got out of his tent the Subject swung a hammer at his head twice and also at his abdomen twice, missing all four times. Civilian Witness 1 asked him what his problem was. Other people were then able to subdue the Subject who later ran off when he was released. As the Subject ran off, he yelled the N-word and threatened to kill Civilian Witness 1. Civilian Witness 1 said the Subject previously accused him of prostituting Civilian Witness 2, which Civilian Witness 1 denied.

Thirty minutes later, he and Civilian Witness 2 got out of their tent and walked toward the alley where the OIS later occurred. They could hear the Subject yelling in the alley. From the south side of the alley on John St., he then saw the Subject walking down the alley towards him holding a lit torch. The Subject yelled at him, "I'm going to kill you, ni**er. I'm about to set you on fire. You're going to die now." Civilian Witness 1 then saw a police car behind the Subject in the alley driving towards the Subject.

The Subject noticed the police car, turned around to face the car, and ran towards the patrol car while holding the torch. The officer stepped out of his car and told the Subject to stop. That is when said the Subject threw the torch inside the officer's car, wedging it between the door and frame catching the car on fire. The officer then fired six to seven shots at the Subject.

The Subject then ran away towards Denny Park and was soon arrested by other police officers. Civilian Witness 1 believes that Involved Officer 1 presence saved his life. If Involved Officer 1 had not arrived in his patrol car, he believes that the Subject would have lit his tent on fire with him and his girlfriend Civilian Witness 2 inside.

b. Civilian Witness 2

Civilian Witness 2 said that she had only known the Subject for one week prior to the incident. However, he claimed to be in love with her. She thought the Subject was under a methamphetamine-induced psychosis the day he assaulted Civilian Witness 1.

When asked what transpired, she said that she was sleeping in her tent in Denny Park when she heard the Subject yelling racial epithets at her boyfriend, Civilian Witness 1. She recognized the voice as Brian, aka Gameboy. The Subject then threatened to kill Civilian Witness 1. She got out of her tent and saw other people subduing the Subject. She saw a hammer on the ground. Civilian Witness 1 later told her, "He tried to hit me with a hammer." The group of people released the Subject and the Subject ran off yelling the "N-word" at Civilian Witness 1. He accused Civilian Witness 1 of prostituting her and claimed that Civilian Witness 2 is mentally disabled.

Later in the afternoon, she heard the Subject yelling epithets and saw him walking down the alley holding a lit torch. She saw a police officer get the Subject's attention, then the Subject lunged at the police car with the torch. She then heard gunfire.

c. Civilian Witness 3

Civilian Witness 3 was walking from Denny Park up the alley leading from Thomas St. to John St. and saw the Subject holding a lit torch walking intently towards the Denny Park with a serious, stoic look on his face. He said that based on how aggressively the torch was burning, it appeared the torch had an accelerant on it. For his own safety, Civilian Witness 3 chose to enter his apartment building, but he continued to watch the Subject through his apartment window. When the officer drove down the alley and ordered the Subject to stop, the Subject ran towards the patrol car and threw the torch into the car from about twenty feet. He said the officer used restraint not to run the Subject over. He thought the officer could have easily burned to death alive. He then heard the officer fire a gun four to five times. He said the shots were in rapid

succession. He said that it all happened so fast. Based on his observations, he imagined the officer was afraid for his safety and instinctually pulled the trigger rapidly. He was surprised the officer was able to escape the car because he did not think there was a way out with the car on fire.

d. Civilian Witness 4

Prior to the shooting, Civilian Witness 4 was in his tent, located inside Denny Park. About ten to twenty minutes prior to the shooting he heard someone walking through the park yelling "Black lives don't matter" and "Fuck black lives." He stated that when he heard the gun shots, he came out of his tent, and saw the Subject standing only a few feet from the patrol car, which was on fire. He stated he saw the Subject start to run south through the alley and then east on John St. He saw the patrol car rolling backwards and a police officer hunched over behind the vehicle. He saw police officers then chase the Subject.

e. Firefighters

Four firefighters who responded to the fire were interviewed. None of them witnessed the assault on the officer, the OIS, or arrest of the Subject.

6. Scene Description

The officer-involved shooting occurred in an eighteen foot wide alley between the Compass Housing Alliance building at 756 John St. and the Denny Park Lutheran Church at 766 John St. The alley is located just north of Denny Park. The neighborhood is a mixture of apartments, condominiums, low-income and shelter residential housing, hotels, churches and various businesses, including offices for Amazon and Facebook.



Figure 6. Google map of incident scene.

The weather was partly cloudy; the temperature was 60 degrees; and the roads were dry. The pavement in the alley was still wet from Seattle Fire personnel putting out the vehicle fire. White foam from the fire suppression was visible on the pavement surrounding the vehicle.

The south side of the utility pole was scorched and it appeared that a tree to the south of the pole may have also caught fire, as the upper tree limbs were black.

Upon recovery, the Subject's wooden torch measured as approximately 7' 7" in length. It appeared to be made from two pieces of lumber that had been glued together prior to it being lit on fire.

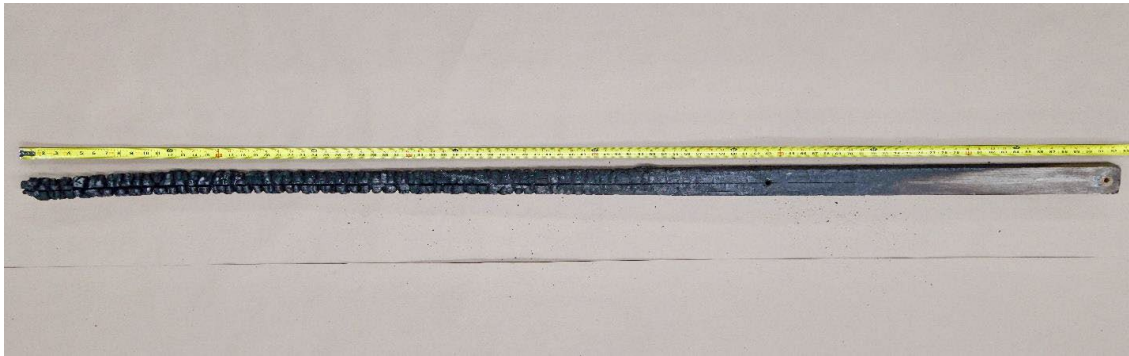


Figure 7. Wooden pole Subject used as handle for torch.

There were several reports of projectiles flying by and popping sounds of ammunition from the patrol vehicle as additional police and fire personnel arrived on scene. Ammunition can "cook off" in a fire because the heat of the fire exceeds the temperature needed for the gunpowder to ignite. Burned cartridge casings and bullets were located on the ground surrounding the patrol vehicle. They were also found south and north of the patrol vehicle. A total of thirty-eight burned cartridge casings were recovered from the alley. All of the bullets recovered had been separated from the casings, but did not have any visible rifling marks. Due to the destructive nature of the fire, CSI could not determine if any of the recovered bullets or cartridge casings had been fired.

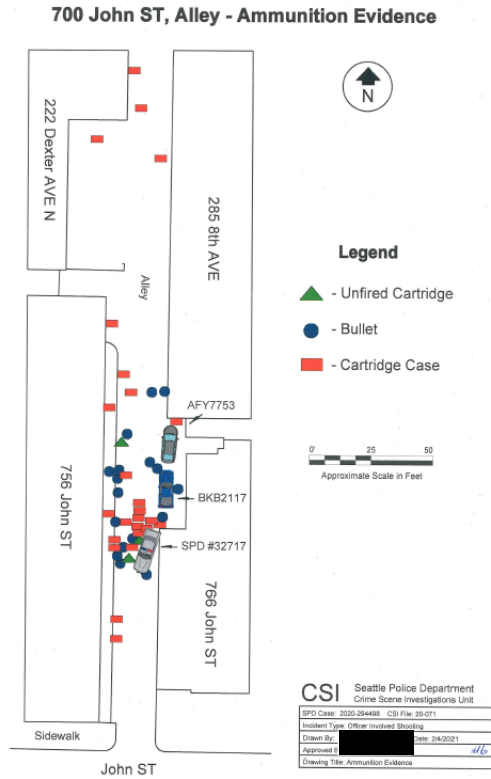


Figure 8. Diagram of evidence recovered at the incident scene.

All of the patrol car's windows were broken and missing from the vehicle, with the exception of the rear window, the right side rear cargo window and the right rear door wing window. The overhead light bar had melted. The front hood and right front tire had burned and melted. There was nothing salvageable from the vehicle for evidentiary purposes. There was what appeared to be a melted cellphone into the front cup holders. The rear seats and interior roof had burned out.



Figure 9. Photos of damage to Involved Officer 1's patrol car.

7. Processing of the Officer

Processing refers to the investigative steps of documenting the physical appearance and condition of uniforms and equipment of each involved officer. Depending on the specific facts and circumstances of the incident, processing typically consists of four parts:

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

Involved Officer 1's service weapon is a Glock Model 17 Gen 4 pistol (pictured below). It was covered in soot from the fire.



Figure 10. Involved Officer 1’s duty weapon with soot covering the firearm.

The Glock had a seated seventeen round capacity magazine and was loaded with nine unfired cartridges. One unfired cartridge was recovered from the chamber. Involved Officer 1 had two spare magazines on his external load-bearing vest. Both magazines had a seventeen round capacity and both were loaded with sixteen unfired cartridges. Due to the spare ammunition in Involved Officer 1’s car being “cooked off” the CSI unit was unable to definitively determine how many rounds Involved Officer 1 fired.

Involved Officer 1		
Location	Unfired Cartridges	Capacity
Chamber of handgun	1	1
Magazine – Inside handgun	9	17
Magazine – Spare #1	16	17
Magazine – Spare #2	16	17
Total	42	52

8. Involved Officer Statement

Involved Officer 1 was the only law enforcement witness to the shooting and did not provide a voluntary statement.

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.⁷ 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.⁸

In addition, the State must disprove the existence of a defense that negates an element of the crime beyond a reasonable doubt.⁹ 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.¹⁰

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:

- a. Lawful Force by Public Officer (applies to non-homicide charges)¹¹
- b. Defense of Self or Others (applies to non-homicide charges)¹²
- c. Justifiable Homicide or Use of Deadly Force by Peace Officer¹³

This incident occurred on October 15, 2020. The applicable pattern jury instruction for Justifiable Homicide by a Peace Officer requires the State to prove to the factfinder that the involved officer acted without good faith.¹⁴

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

⁷ RCW 9A.04.100; WPIC 4.01.

⁸ KCPAO Filing and Disposition Standards.

⁹ WPIC 14.00.

¹⁰ KCPAO Filing and Disposition Standards.

¹¹ RCW 9A.16.020(1), (2).

¹² RCW 9A.16.020(3).

¹³ RCW 9A.16.040.

¹⁴ WPIC 16.01.

required burden of proof. Therefore, these instructions are highly relevant to the Team’s analysis and conclusion:

- a. WPIC 2.16 - Peace Officer
- b. WPIC 16.01 - Justifiable Homicide or Use of Deadly Force by a Peace Officer
- c. WPIC 16.05 - Necessary
- d. WPIC 17.01 - Lawful Force—Public Officer or Others in Aid of Officer
- e. WPIC 17.02 - Lawful Force—Defense of Self, Others, Property
- f. WPIC 120.07 - Lawful Arrest and Probable Cause

VI. ANALYSIS AND CONCLUSION

1. Summary of Conclusion

Under the KCPAO filing standards, “Crimes against 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.”¹⁵

The KCPAO declines to file charges against the Involved Officer 1 because there is insufficient evidence to overcome possible defenses of lawful use of deadly force by a peace officer and self-defense.

2. Use of Deadly Force by a Peace Officer

a. Law Regarding Use of Deadly Force by a Peace Officer

- i. *RCW 9A.16.040(1)(b) – Deadly Force, Used in Good Faith, in Actual Resistance to the Discharge of a Legal Duty*

One instance where deadly force by a police officer is justified by law occurs when an officer necessarily uses deadly force in good faith to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or, in this case, the discharge of a legal duty.¹⁶

¹⁵ KCPAO Filing and Disposition Standards.

¹⁶ RCW 9A.16.040(1)(b); WPIC 16.01.

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 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.¹⁷ 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.¹⁸

In addition, a person is entitled to act on appearances in defending them, 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.¹⁹

ii. Graham v. Connor

In Graham v. Connor, the seminal case on evaluating police use of force, the United States Supreme Court determined that the test to determine whether the force used by the police was “reasonable” is not capable of a “precise definition or mechanical application.”²⁰ 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.²¹ In other words, the reasonableness of whether the officer’s use of force is justified is determined by “the totality of the circumstances.”²²

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.²³ Unlike a prosecutor who has the benefit of reviewing the incident in hindsight, “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

¹⁷ RCW 9A.16.040(4).

¹⁸ RCW 9A.16.010; WPIC 16.05.

¹⁹ WPIC 16.07.

²⁰ Graham v. Connor, 490 U.S. 386, 396 (1989).

²¹ Id.

²² Id.

²³ Id.

the amount of force that is necessary in a particular situation.”²⁴ However, the inquiry is an objective one. The question is whether the officer’s actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.²⁵

b. Analysis of Deadly Force, Used in Good Faith, in Actual Resistance to the Discharge of a Legal Duty

While Involved Officer 1 use of force was a response to the Subject’s actual resistance to the discharge of a legal duty, the investigation did not uncover evidence to show that firing a handgun at the Subject was necessary to prevent death or serious physical harm to the officer.²⁶ However, the evidence is also insufficient to prove *beyond a reasonable doubt* at trial that the officer’s use of deadly force was not in good faith. In less than four seconds from the start of the encounter the officer’s car was on fire and his life was in jeopardy. The Supreme Court noted in Graham, “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.”²⁷ The Subject’s action forced Involved Officer 1 to make a split second decision on whether he needed to fire his gun in order to protect himself. He did not have the luxury of “the 20/20 vision of hindsight” that a prosecutor or jury has.²⁸ In addition, the jury instructions relevant here states a person is entitled to act on appearances in defending themselves, if that person acts in good faith and on reasonable grounds, although it afterwards might develop that the person was mistaken as to the extent of the danger.²⁹ Further complicating the analysis of whether the State believes it could prove the case at trial, we do not know what Involved Officer 1’s safety concerns were since the investigation did not include a voluntary statement from Involved Officer 1 which would have allowed the KCPAO to assess the reasonableness of any safety concerns and whether

²⁴ Id. at 396-97.

²⁵ Id. at 397.

²⁶ RCW 9A.16.010; WPIC 16.05.

²⁷ Graham, *supra*, at 490 U.S. at 396-397.

²⁸ Id.

²⁹ WPIC 16.07.

deadly force was necessary. There is also no video clearly depicting what Leil was doing the moment Involved Officer 1 commenced firing at him. A court would likely give an acting in “Good Faith” jury instruction at trial. The State, not the defendant, holds the burden of disproving an affirmative defense beyond a reasonable doubt.³⁰ As a result, without more there is insufficient evidence to file criminal charges.

c. Law Regarding Defense of Self or Others

The legislature recognizes that the defense of Use of Deadly Force by a Peace Officer does not restrict an Officer from asserting self-defense/defense of others, which remains broader than the limitations imposed by the defense of Justifiable Homicide or Use of Deadly Force by a Peace Officer.³¹

The use of force upon another is lawful when used by a person who reasonably believes that they are about to be injured, or by someone lawfully aiding a person who he or 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.³²

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.³³

The person using force may employ such force and means 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.³⁴

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful.³⁵

³⁰ WPIC 17.02.

³¹ RCW 9A.16.040(5)(a) [1986 c 209 §3].

³² RCW 9A.16.020(3); WPIC 17.02.

³³ WPIC 16.05.

³⁴ WPIC 17.02.

³⁵ Id.

The reasonable prudent person standard as used in this jury instruction does not expressly require the factfinder to compare the involved deputy to a reasonable officer.³⁶ 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 likely the factfinder would be required to take the deputies’ training and experience into account to determine how a reasonable person would have acted. Therefore, the same evidence and testimony used to determine whether the deputies’ acted as a reasonable peace officer under the previous instruction is also relevant to this instruction.

d. Analysis Regarding Defense of Self or Others

As described above, there is insufficient evidence to disprove a claim of self-defense beyond a reasonable doubt at trial. Because the video footage provides an incomplete account of what occurred at the driver’s side door and the officer did not provide a voluntary statement, at trial we would be unable to prove beyond a reasonable doubt that Involved Officer 1’s decision to use deadly force was unreasonable.

VII. CONCLUSION

Therefore, based on the anticipated admissible evidence and testimony, there is insufficient evidence to disprove the likely defenses at trial beyond a reasonable double. Therefore, the KCPAO declines to file criminal charges against the officer.

³⁶ Id.

APPENDIX A

1. WPIC 16.01 - Justifiable Homicide and Use of Deadly Force 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 17.02 – Lawful Force – Charges Other than Homicide

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured, or by someone lawfully aiding a person who he 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 person using 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 has the burden of proving beyond a reasonable doubt that the force used by the defendant 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

3. 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.

4. WPIC 2.09 Felony—Designation Of

_____ is a felony.³⁷

³⁷ Whether a crime is a felony is a matter of law for the court to decide.

5. WPIC 2.16 Peace Officer—Definition

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

6. 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.]