

Use of Force Non-Fatality Investigation

Johnny S. Marshall

Valley Independent Investigation Team

Tukwila Police Department CTP 22-2399



King County Prosecuting Attorney

Public Integrity Team

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## DECLINE MEMORANDUM

**This memorandum has been approved by the King County Prosecuting Attorney to be published on the website of the Prosecuting Attorney's Office Public Integrity Team.<sup>1</sup>**

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<sup>1</sup> <https://kingcounty.gov/en/dept/pao/about-king-county/about-pao/team-leadership/organizational-structure/criminal/mainstream/public-integrity-team>

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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.<sup>2</sup> The independent investigation is conducted in the same manner as a criminal investigation and must be completely independent of the involved agency.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

### 2. Scope of the Memorandum

The KCPAO's decision 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

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<sup>2</sup> RCW 10.114.011. See also WAC 139-12-010.

<sup>3</sup> WAC 139-12-010.

<sup>4</sup> RCW 36.27.020(4).

<sup>5</sup> 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.

<sup>6</sup> Id. See also WAC 139-12-010.

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.

The KCPAO's 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. However, topics that are relevant to matters outside the scope of this memorandum, such as department policy, procedures, or training, may be included and reviewed in this memorandum to the extent those topics are relevant to assessing whether the police action was justified or if there was a criminal action such that criminal charges should be filed.

### 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 April 13, 2022, Renton Police Department officers were dispatched to a King County Metro Park and Ride due to reports that a male, later identified as Johnny S. Marshall, was openly displaying a firearm, which caused multiple civilians to be concerned. Officers located Marshall and attempted to communicate with him, which included commands to show his hands, however, Marshall did not comply. Officers utilized a less lethal weapon, but it had no effect on Marshall. Marshall removed a firearm from his pocket, which was later determined to be a realistic-looking BB gun. Two officers discharged their firearms at Marshall, which struck him. Officers administered life savings efforts and Marshall was transported to a hospital for treatment.

**III. INVESTIGATION MATERIALS**

1. Police Reports – Tukwila Police Department 2022-2399
2. Police Reports – Auburn Police Department 2022-3685
3. Police Reports – Des Moines Police Department 2022-0920
4. Police Reports – Federal Way Police Department 2022-4380
5. Police Reports – Kent Police Department 2022-5056
6. Police Reports – Port of Seattle Police Department 2022-22267
7. Police Reports – Renton Police Department 2022-3838
8. Police Reports – Renton Police Department 2022-20080
9. Civilian Statements
10. Computer Aided Dispatch
11. Mobile Data Terminal
12. Crime Scene Investigation
13. Medical Records
14. Involved Officer Information
15. Subject Information
16. 911 Call and Police Radio Traffic
17. Audio
18. Body Worn Video
19. Other Video
20. Photos
21. Miscellaneous

**IV. FACTUAL SUMMARY<sup>7</sup>**

1. Facts Prior To The Use Of Force

The following information is based upon several sources, including, but not limited to, witness observations, police reports, the Renton Police Department (RPD) computer aided

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<sup>7</sup> The Factual 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

dispatch (CAD) report, recorded police radio, 911 recordings, and body worn video (BWV) cameras from April 13, 2022.

At approximately 11:08 am, Civilian Witness 1 called 911 and reported that a male, later identified as Johnny S. Marshall (Marshall),<sup>8</sup> was on a King County Metro bus and holding a firearm.<sup>9</sup> Civilian Witness 1 reported that Marshall had not made any threats and exited the bus. Civilian Witness 1 reported that Marshall was a black male, in his 20s, wearing a baseball cap, black hoodie, black parka, red sweatpants, and brown shoes. Further, Civilian Witness 1 reported that Marshall held the firearm in his right hand, and it appeared to be a .45 caliber handgun.

At approximately 11:18 am, RPD Witness Officer 2 was dispatched and arrived at the location Civilian Witness 1 described. Witness Officer 2 did not immediately observe anyone matching Marshall's description in the area.

At approximately 11:22 am, a King County Metro bus driver called the King County Communication Center and reported Marshall was sitting at the Metro Park and Ride in bus bay #1 holding a firearm. The caller provided a description, which substantially matched the description Civilian Witness 1 provided of Marshall. The caller reported it was unclear if the firearm was real or fake, Marshall had not threatened anyone, and Marshall was not waving the firearm around.

At approximately 11:29 am, King County Sheriff's Office Witness Officer 1 was dispatched to investigate the calls. Within minutes, RPD officers, including Involved Officer 2,

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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.

<sup>8</sup> Marshall's identity was not established when police were initially dispatched. Unless stated otherwise, the witnesses did not identify Marshall by name or recognize him. However, because Marshall's identity is not at issue for purposes of this memorandum, the individual that the witnesses described will be referred to as Marshall for clarity throughout the memorandum.

<sup>9</sup> Per RCW 9.41.010(20) and (23), a *firearm* or *gun* is a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder. In general usage, *firearm* and *gun* may be used synonymously. Firearms may be further classified as handguns or long guns. A *handgun*, which may also be referred to as a *pistol*, is generally designed to be held and fired with one hand. Handguns are further divided into two categories - semi-automatic and revolver. A *semi-automatic* has an internal, unmoving chamber. A *revolver* has a cylinder with multiple chambers. Conversely, a *long gun* is generally designed to be held by both hands and braced against the shoulder. Long guns include rifles, shotguns, and machine guns.

Witness Officer 2, and Involved Officer 1, were also dispatched to assist. The dispatcher notified Witness Officer 1 that other officers would respond to assist him.

When Witness Officer 1 arrived, he did not immediately observe Marshall. However, Witness Officer 1 believed he may have seen Marshall sitting by himself. To confirm this, he parked his vehicle and used binoculars to observe the Park and Ride. While doing so, Witness Officer 1 observed three RPD officers arrive.

At approximately 11:32 am, Witness Officer 2 arrived at the Park and Ride. He reported that he observed Marshall and noted he matched the physical description provided earlier. Witness Officer 2 moved to the southern end of the Park and Ride so he could get a better view of Marshall. Although Witness Officer 2 was a significant distance away from Marshall, he reported he observed Marshall sitting in a bus shelter on the northwest side of the Park and Ride. Witness Officer 2 reported he saw Marshall was holding something in his right hand and the object was similar in shape to a pistol. Specifically, Witness Officer 2 noted that Marshall appeared to be “holding onto the grip, while looking down the barrel . . .” Moments later, Involved Officer 2 and Involved Officer 1 arrived at Witness Officer 2’s location.

Witness Officer 2 explained to Involved Officer 2 and Involved Officer 1 what he observed, and he asked if either officer had binoculars. Witness Officer 2 noticed Marshall was looking directly at the officers, so Witness Officer 2 and Involved Officer 1 raised their arms in the air and twisted their wrists to communicate to Marshall that he should also put his hands in the air. They observed Marshall waive to them with his left hand and he slid his right hand near his right leg by the bench. Witness Officer 2 shouted to Marshall that he should raise both his hands, but Marshall just waived with his left hand again.

Involved Officer 2 observed Marshall through his binoculars. He reported that Marshall was sitting on the transit center bench and he appeared to match the physical description previously provided. He also observed Marshall had nothing in his left hand, but his right hand was in his pants pocket, and it appeared he was grabbing something inside his pants.

Witness Officer 1 drove into the Park and Ride and parked behind one of the RPD patrol vehicles. He noted the RPD officers were approximately 100 yards away from Marshall, one officer was watching Marshall with binoculars, and another officer was using a public address system to give Marshall commands.

As Witness Officer 2 gave Marshall commands using the public address system, he noticed another civilian walking towards the officers. Witness Officer 2 gave the person commands to move away from the area, but the person did not comply. Witness Officer 2 gave the person another set of commands and described the person's clothing to get their attention. This time, the person complied with Witness Officer 2's commands. Shortly after, a third person entered the area. Witness Officer 2 repeated what he did previously, giving the third person commands to move away from the area and described their clothing. The third person also complied with Witness Officer 2's commands.

Officers continued trying to communicate with Marshall. For example, they explained to Marshall that they were investigating a report he was in possession of a firearm, and they wanted to see his hands. Marshall stood and started walking towards the officers. Witness Officer 2, using the public address system, ordered Marshall to stop and show his right hand, which was still inside his pocket. Marshall did not comply, so Witness Officer 2 repeated his order and announced a description of Marshall's clothing to indicate to Marshall that Witness Officer 2 was talking to him. However, Marshall still did not comply with his commands and continued walking towards the officers.

Involved Officer 2 moved from the other officers and took cover behind a bus so he could watch Marshall via his binoculars. Involved Officer 2 noted Marshall had "stood up from the bench, put his left hand back into his pocket, kept his right hand in his sweats pocket, stared at me, and walked across the four bus lanes and pickup zones right towards me." Involved Officer 2 reported he believed Marshall was armed with a firearm and not complying with officers' commands, so Involved Officer 2 drew his firearm and held it in a low-ready position.

Involved Officer 1 drew his firearm, held the firearm in a low-ready position, and he took cover behind a vehicle. He also requested dispatch to "close the air" so radio traffic was minimized.

The bus that Involved Officer 2 used for cover pulled away, which left him without cover. Involved Officer 2 moved to a different location, where he could use a trash bin as cover. He noted he was approximately 15 yards from Marshall and Marshall still focused his attention on Involved Officer 2.

Involved Officer 2 gave Marshall commands to slowly remove his left hand from his pocket. Later, Involved Officer 2 reported he commanded Marshall to remove his left hand first because he already believed that Marshall was holding an object with his right hand. This would assess Marshall's willingness to comply with commands and it would eliminate Marshall's left hand as a risk so officers could focus on his right hand.

Involved Officer 2 repeated his commands to Marshall, but he did not comply. Instead, Marshall stated he wanted to kill himself. Involved Officer 2 asked Marshall if he heard him correctly and Marshall confirmed he wanted to kill himself. Involved Officer 2 used his radio to update the other officers about what Marshall said.

Given Marshall had not complied with the officers' verbal commands, Witness Officer 2 retrieved a 40mm less lethal launcher from his patrol vehicle.<sup>10</sup> By the time Witness Officer 2 retrieved the launcher, Marshall was within 10 to 15 yards of the officers.

Witness Officer 2 reported he heard Involved Officer 2's statement regarding Marshall wanting to kill himself. Witness Officer 2 took cover behind his patrol vehicle and ordered Marshall to put down his firearm. Witness Officer 2 warned Marshall he would be hit with the less lethal weapon if he did not comply and Marshall kept his right hand in his pocket. Witness Officer 2 aimed at Marshall's right hand and announced, "40! 40! 40!" Witness Officer 2 discharged the launcher at Marshall, which glanced off him and did not have any effect on Marshall. Witness Officer 2 reloaded the launcher and gave Marshall another set of commands, which he ignored. Witness Officer 2 discharged the launcher at Marshall a second time, which struck him and had no effect on Marshall.

## 2. Facts During The Use of Force

Officers continued to give Marshall commands and Involved Officer 2 noted he saw Marshall's right hand moving around inside his pocket. Witness Officer 2 reported he was reloading the launcher when he observed Marshall quickly remove a black pistol from his pocket

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<sup>10</sup> A 40mm less lethal launcher fires a soft impact baton round.

and moved it in an “upward motion.” Witness Officer 2 believed Marshall intended to discharge the firearm towards the officers.

Involved Officer 2 saw Marshall remove the firearm from his pocket and move it in an upward motion. As he removed the firearm, Involved Officer 2 saw Marshall looking in the direction of Witness Officer 2 and Involved Officer 1. Involved Officer 2 reported he believed Marshall was going to discharge the firearm at the other officers, so he discharged his firearm at Marshall.

Involved Officer 1 reported he observed Marshall remove a “black and brown pistol” with his right hand and raise it. Involved Officer 1 reported he believed Marshall was an immediate threat and discharged his firearm at Marshall.

Witness Officer 1, who also had his firearm drawn, reported he observed Marshall holding a firearm in his right hand. He described the movement of Marshall’s right arm like a sidearm throw and Marshall moved the firearm towards the front of his body. Although Witness Officer 1 believed Marshall was about to shoot at the officers, he believed he could not safely discharge his firearm without putting the other officers in danger.

### 3. Facts After The Use of Force

After Involved Officer 2 and Involved Officer 1 discharged their firearms at Marshall, he fell to the ground. The officers approached him, and Involved Officer 1 observed Marshall’s firearm was on the ground. Involved Officer 1 moved the firearm away from Marshall while the officers provided Marshall medical aid.



*Figure 1 – VIIT photograph of Marshall's firearm.*

As other officers arrived, they relieved Involved Officer 2 and Involved Officer 1. Medics subsequently arrived and took over medical aid. One of the medics noted that Marshall suffered gunshot wounds to his right upper arm, his right side, his right upper hip, and his left buttock. Medics transported Marshall to Harborview Medical Center where he was treated for his injuries.

## **V. INDEPENDENT INVESTIGATION**

### **1. Independent Investigation Team**

Other officers arrived and they secured the incident scene and rerouted traffic away from the area. As required by law, an independent investigation team was notified about the use of force and requested to respond to the scene to conduct an independent investigation.<sup>11</sup>

The Valley Independent Investigation Team (VIIT) was contacted, the Tukwila Police Department was identified as the lead agency conducting the independent investigation, and Investigator 1 was designated as the lead investigator. VIIT divided assignments between

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<sup>11</sup> RCW 10.114.011. See also WAC 139-12-010.

themselves, such as interviewing witnesses, officer processing, crime scene investigation, and evidence collection.

## 2. Officer Processing

### a. General Information

Consistent with standard protocol, the VIIT determined which officers used force and processed those officers. 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, officer processing typically consists of four parts:

- 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.
- Investigators identify which weapons were involved during the use of force and document the condition of those items.
- Investigators determine and document the number of firearm cartridges, if applicable, in the involved officer's firearm, loaded magazine, and any spare magazines.<sup>12</sup>
- Investigators collect firearms, equipment, uniforms, and other items as necessary.

### b. Officer Processing During The Current Incident

Investigators determined that Involved Officer 2 and Involved Officer 1 discharged their handguns. Based upon the photographs taken by investigators, the involved officers wore RPD uniforms, which were obviously marked with the word "Police" and other law enforcement insignias that clearly identified them as law enforcement.

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<sup>12</sup> 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 inside 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.



*Figure 2 – VIIT photograph of an involved officer.*

While examining an involved officer's firearm, investigators determine if the firearm is loaded, whether there is an unfired cartridge in the chamber of the firearm, whether there are unfired cartridges in the magazine loaded into the firearm, and whether there are unfired

cartridges in the involved officer's spare magazines. Based on this examination, investigators can estimate how many cartridges were discharged during the use of force. Crime scene investigators also seek to collect discharged cartridge casings located at the use of force scene to ensure that all the involved officer's discharged cartridges are accounted for.

At times, however, there is a discrepancy between the number of discharged cartridges estimated during officer processing and the number of discharged cartridges casings recovered at the scene. This is likely due to the involved officer's preferred loading procedure. Regarding handguns, officers generally fill their loaded magazine to maximum capacity, insert the magazine into their handgun, load a cartridge into the chamber, remove the magazine, and place another cartridge into the magazine so that the loaded magazine is at maximum capacity in addition to the cartridge in the chamber.<sup>13</sup> However, it is also common for officers to not load a magazine to its full capacity to ensure that the spring located inside the magazine functions properly.

c. Involved Officer 2

Weapon Examined: Glock 17 Generation 5, 9mm semi-automatic pistol		
Cartridge Location	Unfired	Capacity
Chamber	1	1
Loaded Magazine	15	20
Spare Magazine	20	20
Spare Magazine	20	20
Spare Magazine	20	20
Total	76	81

During officer processing, Involved Officer 2 reported to VIIT he had not topped off his magazine, so his handgun was loaded with 20 cartridges, which would indicate that he discharged 4 cartridges.

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<sup>13</sup> A process referred to as "topping off a magazine."

d. Involved Officer 1

Weapon Examined: Sig Sauer P320, 9mm semi-automatic pistol		
Cartridge Location	Unfired	Capacity
Chamber	1	1
Loaded Magazine	14	21
Spare Magazine	21	21
Spare Magazine	21	21
Total	57	64

During officer processing, Involved Officer 1 reported to VIIT he had topped off his magazine, so his handgun was loaded with 21 cartridges, which would indicate that he discharged 7 cartridges.

## 3. Civilian Witnesses Statements

a. Civilian Witness 1

Civilian Witness 1 provided a statement to VIIT and reported he boarded a bus at the Kent Transit Center. He sat down behind a male, Marshall, who “seemed a little bit out of it” and saw his eyes were glossy. At one point, Civilian Witness 1 looked over the seat and observed Marshall “cradling a .45 pistol.” Civilian Witness 1 calmly walked to the front of the bus and informed the driver what he observed. Civilian Witness 1 reported Marshall did not look threatening, however, he was not certain what Marshall was going to do with the firearm. He exited the bus a couple of stops later and called 911. Civilian Witness 1 described the firearm as dark in color. He did not hear Marshall say anything, but he observed Marshall moving his lips, which caused Civilian Witness 1 to believe Marshall was talking to himself.

b. Civilian Witness 2

Civilian Witness 2 provided a statement to VIIT and reported he is a King County Metro bus operator. On April 13, 2022, he observed a black male, Marshall, standing by the bus stop. As he went further into the Park and Ride and stopped at a red light, he observed the police surrounding Marshall with their guns drawn. Civilian Witness 2 thought he should leave the area. As he looked at the red light, he heard 5 or 6 gunshots and observed Marshall fall to the ground.

Civilian Witness 2 left the area. Civilian Witness 2 reported to VIIT that he was far away from the officers and Marshall, so he did not hear any of their conversation and he did not observe a firearm in Marshall's hand.

c. Civilian Witness 3

Civilian Witness 3 provided a statement to VIIT and reported he is a King County Metro bus operator. On April 13, 2022, he arrived at the Park and Ride and observed several police cars and heard someone talking over a loudspeaker. Civilian Witness 3 exited his bus and observed police officers using the loudspeaker to communicate with people inside the bus shelter. Civilian Witness 3 overheard the officers tell a couple of individuals to leave the area. Next, the officers yelled instructions to a person they described as, "in red sweatpants." Civilian Witness 3 stated it was obvious who the officers were talking to, and they instructed the male, Marshall, several times to take his "hands out of his pocket." Civilian Witness 3 noted Marshall did not comply with the officers' commands and the officers stated they were there due to a report of a weapon.

Civilian Witness 3 observed Marshall walking across the roadway and towards the officers who were at the rear of a bus. Civilian Witness 3 again heard the officers giving Marshall commands, such as to not come any closer. However, Civilian Witness 3 reported, "Again, he did not comply with anything that was being said." Next, Civilian Witness 3 observed the bus pull away and Marshall came to a stop, however, Civilian Witness 3 could only observe Marshall from the shoulders and up due to his vantage point. Civilian Witness 3 was not certain what the officers specifically said, but he continued to hear the officers ordering Marshall to not take anything out of his pocket. Civilian Witness 3 could still only observe Marshall from the shoulders and up, but he next heard 5 to 6 gunshots. Civilian Witness 3 saw Marshall fall to the ground and officers quickly approached him to provide him with medical assistance.

d. Civilian Witness 4

Civilian Witness 4 provided a statement to VIIT and reported he is a King County Metro bus operator. On April 13, 2022, he drove into the Park and Ride and observed a male, Marshall, standing in a "stop zone." As Civilian Witness 4 was about to open the door to the bus, he saw that Marshall was holding a firearm in his left hand. Civilian Witness 4 attempted to remain calm

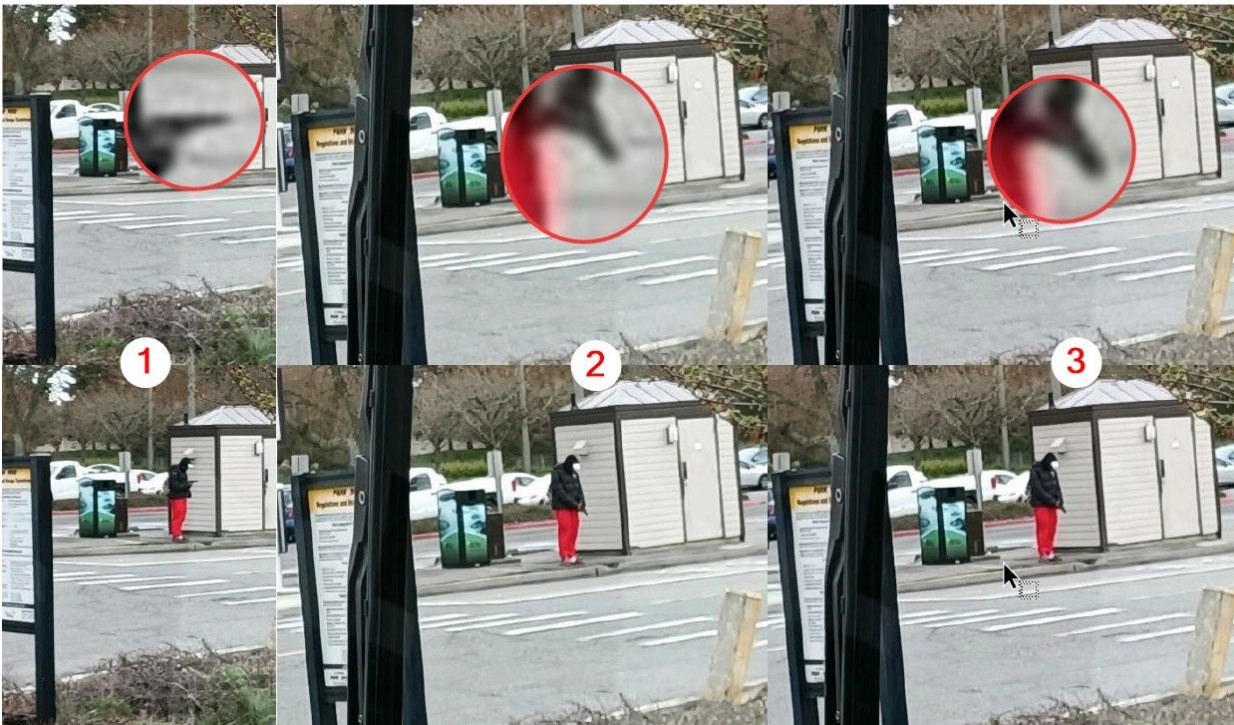
and looked away. Civilian Witness 4 also observed a female standing in the “stop zone” but she was located towards the rear of his bus. The female and Marshall walked past each other, and she entered the bus. Civilian Witness 4 drove away from the area and found a safe location to park. The female reported she was afraid because she thought Marshall would shoot her if she ran. Civilian Witness 4 called the control center to report the incident.

When asked more details about Marshall’s firearm, Civilian Witness 4 reported that it was a small black handgun, and Marshall kept the firearm in a “ready position.” When he demonstrated this position, the investigator noted Civilian Witness 4 mimicked holding a firearm in his left hand with his right hand placed over his left hand. Civilian Witness 4 reported he left the area prior to police arriving.

e. Civilian Witness 5

Civilian Witness 5 provided a statement to VIIT and reported he is a King County Metro bus operator. He reported he was present at the Park and Ride on April 13, 2022, and he assumed the investigators wanted to speak with him regarding the male with a firearm. Civilian Witness 5 reported that he also took photos of the male, which he provided to VIIT.

Investigator 1 reviewed the photos Civilian Witness 5 took. In all three photos, Investigator 1 observed a male, wearing a black hooded jacket, red sweatpants, and light-colored shoes, holding an object in his right hand. The male’s elbow was bent at 90 degrees with the object held directly out in front of him. Investigator 1 noted the shape of the object was consistent with a handgun and the male’s head was tilted slightly forward, which appeared similar to looking through the firearm’s sights.



*Figure 3 – Three photographs taken by Civilian Witness 5 and sent to Investigator 1. The first row of photos contains zoomed in portions of the second row of photos.*

Civilian Witness 5 also reported he did not know if Marshall's firearm was real or fake. However, he reported he was alarmed when he observed Marshall pointing the firearm under his own chin. When Marshall held the firearm to his chin, Civilian Witness 5 remembered thinking to himself, "Just put it away."

Civilian Witness 5 reported his bus was empty at the time because he was taking his break. He reported he did not see Marshall attempt to get on any of the buses or interact with anyone. Due to his concern about Marshall's behavior, Civilian Witness 5 left before he observed anything else.

f. Civilian Witness 6

Civilian Witness 6 provided a statement to VIIT and reported she is a King County Metro bus operator. She reported she was present on her bus located at the Park and Ride, taking her break. A male with a stroller ran towards her bus and hollered at her to open the door so he could get on the bus. She told him that she was on her break and he would need to find a different bus.

The man told Civilian Witness 6 that her supervisor advised him to get on the bus because there was a “young guy” with a firearm across the street.

Civilian Witness 6 looked over and observed a “kid” with a firearm. Civilian Witness 6 allowed the male with the stroller to enter the bus while she continued to watch the kid, Marshall. Initially, Civilian Witness 6 could not determine what Marshall was holding, but she realized that it was a firearm when it was positioned alongside his leg and pointed towards the ground. Civilian Witness 6 checked the time and realized it was time to begin her route. As she drove towards the bus zone, she observed another male sitting near Marshall and she believed the male said something to Marshall who was fidgeting with the firearm. Civilian Witness 6 observed Marshall shrug his shoulders in a manner consistent with someone saying, “Who cares?” or “I don’t know.”

Civilian Witness 6 observed police cars arriving in the area and she pulled into the bus zone to pick up other passengers. She looked in her left mirror and observed Marshall walking across the street toward the side of her bus. She then looked in her right mirror and observed a police officer pointing a firearm at Marshall.

Civilian Witness 6 reported she heard the officer say several times something like, “Take your hands out of your pocket.” When asked to describe what she saw Marshall doing with the gun, she demonstrated an action that Investigator 1 recognized as the act of pulling the slide back on a semi-automatic pistol.

#### 4. Crime Scene Investigation

Investigators conducted a crime scene investigation, documented the location of various items that appeared to have evidentiary value, and collected various items as evidence. After marking the location of evidentiary items, investigators utilized a Faro 3D Scene Scanner to document the scene. Investigators noted that some of the evidence markers shifted slightly due to wind present during the investigation.

#### 5. Washington State Patrol Crime Laboratory

The Washington State Patrol Crime Laboratory compared fired cartridge casings found at the scene to known fired cartridge casings discharged from the involved officer’s firearms. The

scientist who conducted the analysis opined that, of the 11 fired cartridge casings found at the scene, 4 were discharged by Involved Officer 2's firearm and 7 were discharged by Involved Officer 1's firearm.

#### 6. Video Evidence

The involved officers were equipped with BWV cameras during the use of force. Screenshots relevant to the Team's analysis are included below, including, if relevant, statements captured by the BWV. Regarding BWV, the Team utilized Axon.com products, such as Evidence.com and Axon Investigate, to analyze the video. Based upon BWV, all gunshots discharged by the involved officers occurred within three seconds and officers promptly provided medical aid after discharging their firearms.



*Figure 4 – Screenshot from Involved Officer 2’s BWV. Involved Officer 2 ordered Marshall to stop moving and asked if he had something in his hand while Involved Officer 2 moved backwards.*

*Figure 5 Magnified image of Marshall’s right hand in his right pants pocket.*



*Figure 6 - Involved Officer 2 has retreated from Marshall, who is not visible, and used a trash can for cover. He continued to give Marshall clear commands, such as “Slowly take your left hand out of your pocket.” As Involved Officer 2 spoke, Marshall said something, and Involved Officer 2 asked Marshall if he just said that he wanted to kill himself. Shortly afterward, Involved Officer 2 radioed the other officers with this information. Involved Officer 2 asked Marshall to “not do this” and that “we want to get you help...”*



*Figure 7 – Involved Officer 2 warned Marshall that Witness Officer 2 was going to discharge the 40mm less lethal launcher. After the projectile struck Marshall, it bounced into the street (circle), and Marshall had little reaction. Involved Officer 2 continued to ask Marshall not to “do this” and that “we don’t want to do this . . .”*



*Figure 8 – Involved Officer 2 continued telling Marshall to take his hand out of his pocket. He specified for Marshall to first take his left hand out of his pocket.*



Figure 9 – Witness Officer 2 discharged the 40mm less lethal launcher at Marshall a second time. Marshall momentarily raised his left leg when he was struck, but the projectile had little effect otherwise.



Figure 10 - Marshall moved his right hand and Involved Officer 2 shouted, "Dude don't!"

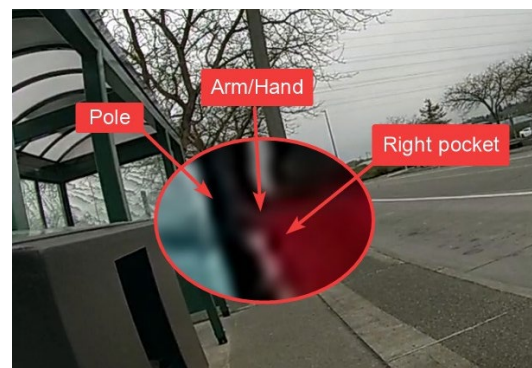
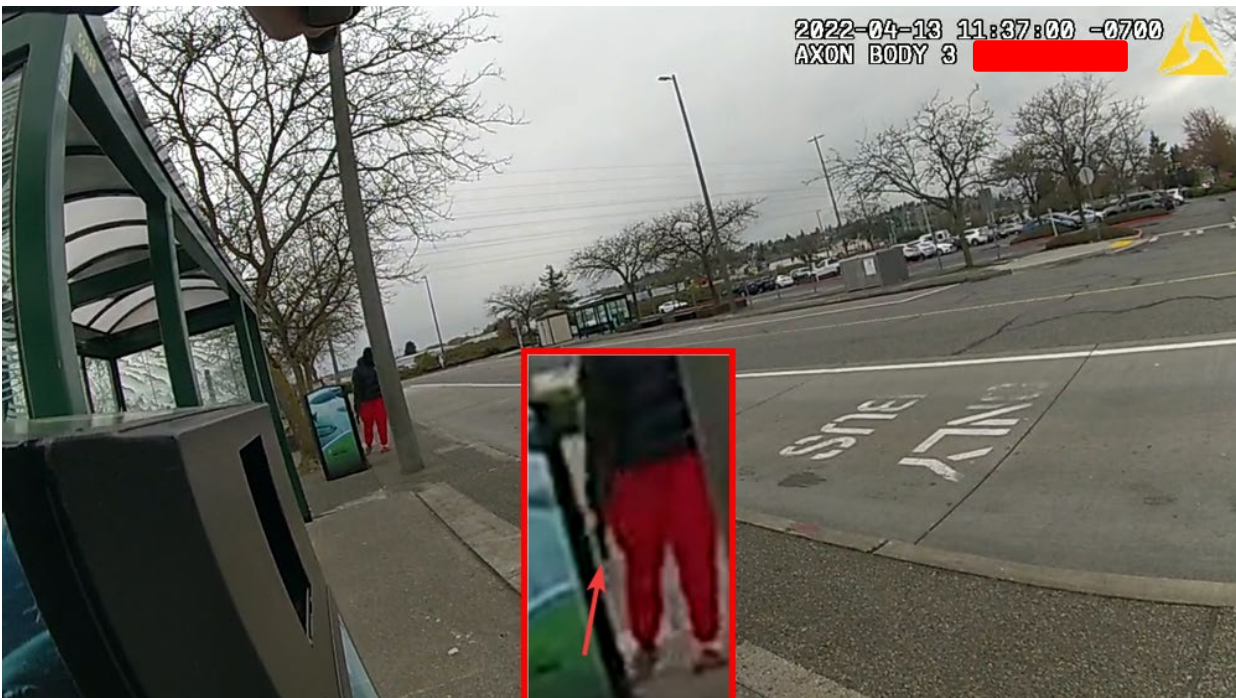
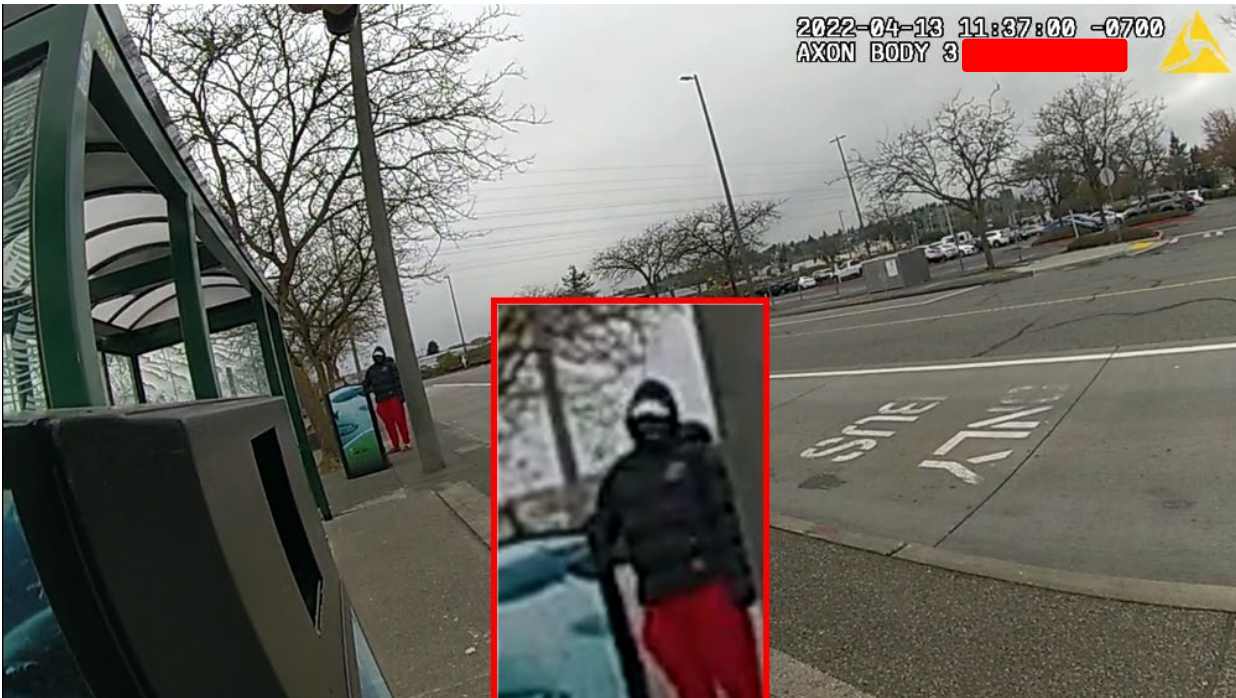


Figure 11 - Magnified image of Marshall's hand.

The following sequence of photographs are also screenshots from Involved Officer 2's BWV. As shown in the BWV timestamp, the entire sequence was approximately 3 seconds, which captured the moment Marshall removed the firearm from his pocket through the use of force. Each screenshot contains a magnified portion of Marshall's right hand and firearm.









7. Medical Records

a. Harborview Medical Center

Investigator 1 reviewed Marshall's medical records from Harborview Medical Center pursuant to a search warrant. According to the records, Marshall sustained multiple gunshot wounds to his right chest, groin, and buttocks. After treatment, Marshall was discharged from the hospital. Further, the records contained information provided by Marshall, such as:

On interview, pt<sup>14</sup> says that he was feeling suicidal at the time of the shooting. He says that it just started yesterday and that he was not trying to get himself shot by the police. He says his intent as just part of a 'a plan' but he will not elaborate what the plan was saying "I can't tell you." He says that he was feeling the SI<sup>15</sup> for about a day. He denies currently feeling suicidal. When asked how he feels about being alive right now he says "I don't care."

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<sup>14</sup> Patient.

<sup>15</sup> Suicidal ideation.

On another day, Marshall reported:

“Today on interview, pt says he feels good. He says he thinks he is getting better physically during this hospitalization. He says that this episode was a suicide attempt and he was hoping the police would kill him because of "a bunch of things going on" which he wouldn't elaborate on. He says he is "not feeling any type of way" about the incident at this time. He says he has had "dreams" in the past which is what he was referring to when he talked about his castle. He says he has had all kinds of dreams like this but denies having had any in the hospital. He denies voices in the hospital. He says he feels safe. He denies current SI and says he does not want to hurt himself. He says it's hard to tell if the zydis<sup>16</sup> is doing anything but he denies dizziness or daytime sleepiness.”

Marshall's medical records also indicated a history of schizophrenia and family reported Marshall had missed his medication for the past month. Toxicology results indicated that Marshall's urine was positive for methamphetamine and cannabis.

## 8. Involved Officer's Statement

### a. 5<sup>th</sup> Amendment Protections

Under current law the independent investigation must be conducted in the same manner as a criminal investigation.<sup>17</sup> Moreover, one of the primary purposes of the independent investigation is to “inform any determination of whether the use of deadly force met the good faith standard and satisfied other applicable laws and policies.”<sup>18</sup> Thus, a law enforcement officer, like any other citizen, is protected by the 5<sup>th</sup> Amendment of the United States Constitution, which prohibits compelling a person to be a witness against themselves.<sup>19</sup> A law enforcement officer, like any other citizen, can choose whether or not to voluntarily waive their 5<sup>th</sup> Amendment protection and provide a statement to criminal investigators.

The involved agency, however, may compel an involved officer to provide a statement in an administrative investigation for the purpose of determining if the involved officer's actions were in accordance with the agency's policy and training. If an involved officer refuses to

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<sup>16</sup> Refers to Zyprexa Zydis, which is a medication prescribed to treat various mental health conditions.

<sup>17</sup> WAC 139-12-010.

<sup>18</sup> Id.

<sup>19</sup> U.S. Const. amend. V.

provide a statement during an administrative investigation, their refusal may result in consequences such as termination.

While the involved officer's statements may be used against them in an administrative or civil proceeding, such compelled statements are inadmissible against an officer in a subsequent criminal trial.<sup>20</sup> 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.<sup>21</sup> Therefore, the investigators conducting the independent investigation may not receive any compelled statements from an involved officer or any investigative content that was informed by such compelled statements.<sup>22</sup>

b. Compelled Statements Taken During The Current Incident

Although the compelled statement and information derived from such a statement cannot be used to support criminal charges against an involved officer, a credible compelled statement provides insight into the potential testimony of an involved officer. At times, such a statement may be useful to the Team in analyzing a use of force incident and may be used in support of a finding of no criminal liability for the officer's actions. In the current incident, the Team did review the involved officers' compelled statements.

c. Involved Officer 2

In his statement, Involved Officer 2 described his role in the use of force incident. Involved Officer 2 was wearing a police uniform, which has the word "Police" in large letters on the front and back, a police badge, and RPD patches. He graduated from the police academy in January of 2018.

At approximately 11:20 am, he was dispatched to the Metro Park and Ride to investigate a male holding a handgun. When he arrived, he went to Involved Officer 1's and Witness Officer

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<sup>20</sup> Garrity v. State of N.J., 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L. Ed. 2d 562 (1967).

<sup>21</sup> U.S. v. North, 910 F.2d 843, 857-858 (D.C. Cir., 1990).

<sup>22</sup> WAC 139-12-030.

2's location. As he exited his patrol vehicle, Witness Officer 2 pointed Involved Officer 2's attention to Marshall and asked Involved Officer 2 if he had binoculars, which he did. Using his binoculars, Involved Officer 2 observed Marshall sitting with his left hand placed on his lap and his right hand in his pocket. Involved Officer 2 told the other officers what he observed and said that, if Marshall had a firearm, it was likely in his right pocket.

Involved Officer 2 overheard Witness Officer 2 using his public address system to direct other civilians away from the area. He heard Witness Officer 2's commands to Marshall to show his hands, but he did not comply, which furthered Involved Officer 2's suspicion that Marshall may have a firearm in his right pocket.

Involved Officer 2 moved to a different position to observe Marshall with his binoculars, which was approximately 40' away from Marshall. Involved Officer 2 observed Marshall stand, put his left hand back into his pocket, kept his right hand in his pocket, and walked in Involved Officer 2's direction. In response, Involved Officer 2 put his binoculars in his pocket and drew his firearm. Involved Officer 2 started giving Marshall commands to stop walking towards him, but Marshall did not comply. The bus that Involved Officer 2 was using for cover drove away and Marshall continued walking towards Involved Officer 2. At this time, Involved Officer 2 estimated they were 15' apart. Involved Officer 2 continued to give Marshall commands, but he did not comply.

Involved Officer 2 heard Marshall make a comment about wanting to kill himself. He attempted to establish rapport with Marshall by telling him the officers did not want to hurt him and that they can get him help. Involved Officer 2 notified the other officers about Marshall's statement, which prompted Witness Officer 2 to retrieve his 40mm less lethal launcher. Involved Officer 2 observed Witness Officer 2 discharge the 40mm less lethal launcher at Marshall, which had little effect on him. Witness Officer 2 discharged the 40mm less lethal launcher at Marshall a second time, which also had little effect on him. After he was struck by the 40 mm less lethal launcher, Involved Officer 2 observed Marshall looking in the direction of Involved Officer 1 and Witness Officer 2 while Marshall's shoulders were squared towards Involved Officer 2. While staring in Involved Officer 1's and Witness Officer 2's direction, Involved Officer 2 observed Marshall's right hand move around his pocket. Involved Officer 2 observed Marshall removing an object out of his pocket, which he recognized was a black object that appeared to be

in the shape of a firearm. At no time did Involved Officer 2 observe Marshall dropping the firearm or attempting to drop it on the ground. As Marshall lifted his arm with the firearm, Involved Officer 2 discharged his firearm towards Marshall. As he approached Marshall to provide medical aid, Involved Officer 2 observed another officer kick Marshall's firearm away so that it was not within his reach while they provided him aid.

d. Involved Officer 1

In his statement, Involved Officer 1 described his role in the use of force incident. Involved Officer 1 was wearing a police uniform, which has the word "Police" in large letters on the front and back, a police badge, and RPD patches. He graduated from the police academy in January of 2020.

At approximately 11:31 am, he was dispatched to the Metro Park and Ride to investigate a male holding a handgun. The dispatch information contained the male's description and stated he was not threatening anyone. Involved Officer 1 recalled a similar call earlier that day involving a male near the Renton Transit Center who had a firearm. Involved Officer 1 was not dispatched to that call.

At approximately 11:32 am, Involved Officer 1 arrived at the Park and Ride. He did not observe the described male, but he saw Witness Officer 2 parked in the parking lot, so Involved Officer 1 drove to Witness Officer 2. Once parked, Witness Officer 2 and Involved Officer 1 observed a male, Marshall, who matched the description previously provided by the dispatcher. Later, while using Google Maps, Involved Officer 1 opined that Marshall was approximately 150' away from the officers.

Witness Officer 2 instructed Marshall to show his hands, which were concealed inside his pockets. Witness Officer 2 and Involved Officer 1 also demonstrated holding their hands up and away from their bodies. In response, Marshall removed his left hand from his pocket but kept his right hand inside his pocket. Involved Officer 1 interpreted this to mean that Marshall heard the commands, but he intentionally did not comply. About this time, Involved Officer 2 and Witness Officer 1 arrived at their location.

Witness Officer 2 used his public address system to give Marshall commands. He instructed Marshall to show his hands and not walk towards the officers. In response, Marshall

walked towards the officers' location with both his hands concealed in his pockets. Concerned that Marshall was not following Witness Officer 2's commands and was possibly armed with a firearm, Involved Officer 1 drew his firearm and held it in the low-ready position. Involved Officer 1 moved to a different position while Involved Officer 2 moved to a different position approximately 20' to the right of Involved Officer 1. Witness Officer 2 and Witness Officer 1 were approximately 10' behind and to the left of Involved Officer 1.

Marshall continued to approach the officers while Witness Officer 2 gave Marshall clear commands to take his hands out of his pockets. Due to the threat he perceived, Involved Officer 1 pointed his firearm at Marshall when he was approximately 20' away from himself and Involved Officer 2. From this distance, Involved Officer 1 observed Marshall's facial expression appeared to look blankly towards the officers.

Involved Officer 1 saw Marshall change the path he was walking, which eliminated Involved Officer 2's position of cover. Witness Officer 2 stopped giving commands over the public address system and used his voice to provide commands. While this occurred, Involved Officer 1 heard Involved Officer 2 say something to the effect of, "Please don't make me do this."

Involved Officer 1 heard Involved Officer 2 announce over the radio that Marshall said he wanted to kill himself. Witness Officer 2 retrieved a 40mm less lethal launcher and warned Marshall he would be struck. Marshall did not respond and Witness Officer 2 discharged the 40mm less lethal launcher at Marshall, which struck him in the abdominal area. Marshall exhibited minimal response and Witness Officer 2 loaded and discharged the 40mm less lethal launcher. Marshall exhibited minimal response.

A few moments later, Involved Officer 1 observed Marshall remove a black and brown pistol from the right side of his clothing with his right hand. This caused Involved Officer 1 to believe that Marshall was going to discharge his handgun towards the officers, so Involved Officer 1 discharged his handgun towards Marshall. When Marshall fell to the ground, Involved Officer 1 observed the pistol was just west of Marshall. Involved Officer 1 and the other officers approached Marshall and provided him medical aid. As Involved Officer 1 approached Marshall, he used his foot to slide the pistol away so that it was not within arm's reach of Marshall.

## **VI. POTENTIAL IMPEACHMENT INFORMATION**

Law enforcement agencies are required to report misconduct that an officer has engaged in that affects their credibility.<sup>23</sup> In turn, each county prosecutor is required to develop and adopt a written protocol addressing potential impeachment disclosures pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and subsequent case law.<sup>24</sup> The Team has confirmed that, to its knowledge, there is no potential impeachment information regarding the involved officers who used deadly force in this incident.

## **VII. LEGAL STANDARD AND APPLICABLE LAW**

### **1. Burden of Proof**

In a criminal prosecution, the State must prove each element of a criminal charge to the factfinder by competent evidence beyond a reasonable doubt.<sup>25</sup> 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.<sup>26</sup>

In addition, the State must disprove the existence of a defense that negates an element of the crime to the factfinder beyond a reasonable doubt.<sup>27</sup> 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.<sup>28</sup>

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:

- Justifiable Homicide by Peace Officer<sup>29</sup>

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<sup>23</sup> RCW 10.93.180(2)(a)(ii).

<sup>24</sup> RCW 10.93.180(1)(a).

<sup>25</sup> RCW 9A.04.100; WPIC 4.01.

<sup>26</sup> KCPAO Filing and Disposition Standards.

<sup>27</sup> WPIC 14.00.

<sup>28</sup> KCPAO Filing and Disposition Standards.

<sup>29</sup> RCW 9A.16.040; WPIC 16.01.

- Justifiable Homicide Defense of Self or Others<sup>30</sup>
  - Justifiable Homicide Resistance to Felony<sup>31</sup>
2. Applicable Law Regarding Justifiable Homicide By A Peace Officer

This incident occurred on April 13, 2022. 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.<sup>32</sup>

3. 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:

1. WPIC 16.01 - Justifiable Homicide by a Peace Officer
2. WPIC 16.05 - Necessary
3. WPIC 2.09 - Felony
4. WPIC 2.16 - Peace Officer
5. WPIC 120.07 - Lawful Arrest and Probable Cause
6. WPIC 16.02 - Justifiable Homicide – Defense of Self and Others
7. WPIC 2.04.01 - Great Personal Injury
8. WPIC 16.07 - Justifiable Homicide – Actual Danger Not Necessary
9. WPIC 16.03 - Justifiable Homicide – Resistance to a Felony

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<sup>30</sup> RCW 9A.16.050(1); WPIC 16.02.

<sup>31</sup> RCW 9A.16.050(2); WPIC 16.03.

<sup>32</sup> For offenses committed on or prior to December 6, 2018, the former version of WPIC 16.01, based upon RCW 9A.16.040, required the prosecution to prove the officer acted with malice. For offenses committed between December 7, 2018, and February 3, 2019, RCW 9A.16.040, based upon Laws of 2019, Chapter 1, § 7, removed the malice standard and required the prosecution to prove the officer did not act in good faith. There are no pattern jury instructions for offenses committed between December 7, 2018, and February 3, 2019. For offenses committed on or after February 4, 2019, the current version of WPIC 16.01, based upon RCW 9A.16.040, requires the prosecution to prove the officer did not act in good faith. RCW 9A.16.040(1)(a) utilizes the malice and good faith standard, but this section only applies when a “public officer applied deadly force in obedience to the judgment of a competent court.”

## VIII. ANALYSIS AND CONCLUSION

### 1. Summary Of 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 factfinder. 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.”<sup>33</sup>

The KCPAO declines to file charges against the involved officers because the independent investigation and the Team’s analysis reveal the involved officers’ actions were lawful and justifiable as either Justifiable Homicide by a Peace Officer, Justifiable Homicide in Defense of Self or Others, or both. These defenses contain related but distinct concepts and definitions. Criminal charges should be declined because the defenses are of such nature that prosecution would result in a complete defense for the accused and there is no substantial evidence to refute either affirmative defense.

### 2. Justifiable Homicide By A Peace Officer

#### a. 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.”<sup>34</sup> 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

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<sup>33</sup> KCPAO Filing and Disposition Standards.

<sup>34</sup> Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989).

attempting to evade arrest by flight.<sup>35</sup> In other words, the reasonableness of whether the officer's use of force is justified is determined by "the totality of the circumstances."<sup>36</sup>

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.<sup>37</sup> "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."<sup>38</sup> 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.<sup>39</sup>

b. Law Regarding Justifiable Homicide By A Peace Officer

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.<sup>40</sup>

Deadly force is also justifiable when necessarily used by a peace officer meeting the good faith standard to arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony.<sup>41</sup>

In considering whether to use deadly force to arrest or apprehend any person for the commission of any crime, the peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others.<sup>42</sup> Among the circumstances which may be considered by peace officers as a "threat of serious physical harm" are the following:

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<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id. at 396-97.

<sup>39</sup> Id. at 397.

<sup>40</sup> RCW 9A.16.040(1)(b); WPIC 16.01.

<sup>41</sup> RCW 9A.16.040(1)(c)(i); WPIC 16.01.

<sup>42</sup> RCW 9A.16.040(2).

- The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening; or
- There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup>

c. Analysis Regarding Justifiable Homicide By A Peace Officer

First, the evidence in the independent investigation supports the conclusion the factfinder would find the involved officers used deadly force 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. This conclusion is based on evidence that officers gave Marshall numerous lawful orders that would allow them to investigate the 911 calls regarding Marshall holding a firearm.

Similarly, the evidence in the independent investigation supports the conclusion the factfinder would find there was probable cause for the involved officers to reasonably believe Marshall had committed, had attempted to commit, was committing, or was attempting to commit various felonies, such as assault and murder. This conclusion is based on evidence that Marshall was suspected of possessing a firearm, refused to comply with the officers' commands, removed a firearm from his pocket, and raised the firearm.

Second, the evidence in the independent investigation supports the conclusion the factfinder would find there was probable cause for the involved officers to believe that Marshall, if not apprehended, posed a threat of serious physical harm to an officer or others.

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<sup>43</sup> Id.

<sup>44</sup> RCW 9A.16.040(4).

<sup>45</sup> RCW 9A.16.010; WPIC 16.05.

This defense provides two explicit examples that may be considered by peace officers as a threat of serious physical harm. First, a threat of serious physical harm may include circumstances where the suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening. Second, a threat of serious physical harm may include circumstances where there is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.

It is likely that the factfinder would find that Marshall's actions caused the involved officers to have probable cause to believe that Marshall, if not apprehended, posed a threat of serious physical harm to an officer or others. This conclusion is based on evidence that it would have been likely impossible for the officers to know that Marshall's firearm was, in fact, a BB gun. Numerous other witnesses described seeing what appeared to them to be a firearm. Other witnesses even observed that the firearm appeared to be a .45 caliber handgun.

Third, the evidence in the independent investigation supports the conclusion the factfinder would find the involved officers used deadly force with a good faith belief their actions were necessary to prevent death or serious physical harm to the officer or another individual.

Regarding good faith, a factfinder would likely find the involved officers acted in good faith because, under an objective standard, when considering all the facts, circumstances, and information known to the involved officers 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. This conclusion is based on evidence that the involved officers observed that Marshall matched the description of the individual that others observed possessing a firearm, that Marshall refused to comply with the officers' commands, and displayed a firearm in a threatening manner. Officers used de-escalation tactics, such as verbal communication, time, distance, and cover to slow down the situation. Further, officers used a less lethal weapon in an attempt to resolve the situation.

Regarding whether the use of deadly force was necessary, a factfinder would also likely find the involved officers' use of deadly force was necessary because no reasonable effective alternative to the use of force appeared to exist and the amount of force used was reasonable to effect the lawful purpose intended.

Therefore, based on the anticipated admissible evidence and testimony, which is corroborated by several witnesses including video evidence, the KCPAO declines to file charges against the involved officers. The independent investigation and the Team's analysis support the conclusion that the involved officers' actions were lawful and justifiable as either Justifiable Homicide by a Peace Officer, Justifiable Homicide in Defense of Self or Others, or both.

3. Justifiable Homicide In Defense Of Self Or Others

a. Law Regarding Justifiable Homicide In Defense Of Self Or Others

The legislature recognized that the defense of Justifiable Homicide by a Peace Officer established a dual standard with respect to the use of deadly force by peace officers and private citizens, and further recognizes that private citizens' permissible use of deadly force under the defense of Justifiable Homicide in Defense of Self or Others is not restricted and remains broader than the limitations imposed on peace officers.<sup>46</sup>

The defense of Justifiable Homicide by a Peace Officer allows a peace officer to use deadly force against another person only when necessary to protect against an *immediate* threat of serious physical injury to the officer or another person.<sup>47</sup> An immediate threat of serious physical injury or death means that, based on the totality of the circumstances, it is objectively reasonable to believe that a person has the present and apparent ability, opportunity, and intent to immediately cause death or serious bodily injury to the peace officer or another person.<sup>48</sup>

In comparison, the defense of Justifiable Homicide in Defense of Self or Others is also applicable to peace officers.<sup>49</sup> Under this defense, 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 there 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

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<sup>46</sup> RCW 9A.16.040 [1986 c 209 §3].

<sup>47</sup> RCW 10.120.020(2). See also, Graham, 490 U.S. at 396.

<sup>48</sup> RCW 10.120.020(2).

<sup>49</sup> RCW 9A.16.040(5)(a).

appeared to the slayer.<sup>50</sup> 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.<sup>51</sup>

The Washington Pattern 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.”<sup>52</sup> Additionally, 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.<sup>53</sup>

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

b. Analysis Regarding Justifiable Homicide In Defense Of Self Or Others

First, the evidence in the independent investigation supports the conclusion the factfinder would find that the involved officers reasonably believed that Marshall intended to commit a felony, to inflict death, or to inflict great personal injury upon an officer or others. This conclusion is based on evidence that Marshall refused to comply with the officers’ commands and produced what appeared to be, a firearm.

Second, the evidence in the independent investigation supports the conclusion the factfinder would find the involved officers reasonably believed that Marshall’s actions

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<sup>50</sup> RCW 9A.16.050(1); WPIC 16.02.

<sup>51</sup> WPIC 2.04.01.

<sup>52</sup> WPIC 16.02.

<sup>53</sup> WPIC 16.07.

constituted an imminent danger of such harm being accomplished. Moreover, under the broader standard of imminent danger, as opposed to immediate danger, it is even more likely that the factfinder would find that Marshalls's actions, as described above, caused the involved officers to reasonably believe that Marshall's threats would be carried out.

Third, the evidence in the independent investigation supports the conclusion the factfinder would find the involved officers employed such force and means as a reasonably prudent person would under the same or similar conditions as they reasonably appeared to the involved officers.

Therefore, based on the anticipated admissible evidence and testimony, which is corroborated by several witnesses including video evidence, the KCPAO declines to file charges against the involved officers. The independent investigation and the Team's analysis support the conclusion that the involved officers' actions were lawful and justifiable as either Justifiable Homicide by a Peace Officer, Justifiable Homicide in Defense of Self or Others, or both.

# **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 2.09 Felony—Designation Of

\_\_\_\_\_ is a felony.<sup>54</sup>

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<sup>54</sup> Whether a crime is a felony is a matter of law for the court to decide.

4. WPIC 2.16 Peace Officer—Definition

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

5. 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.]

## 6. WPIC 16.02 – Justifiable Homicide – Defense of Self and Others

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

Homicide is justifiable when committed in the lawful defense of the slayer or any person in the slayer's presence or company when:

(1) the slayer reasonably believed that the person slain intended to commit a felony<sup>55</sup> or to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger<sup>56</sup> of such harm being accomplished; and

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

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

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<sup>55</sup> For purposes of the defense, the use of deadly force appears to be limited to the resistance of violent felonies that threaten human life or may result in great personal injury. See *State v. Nyland*, 47 Wn.2d 240, 287 P.2d 345 (1955).

<sup>56</sup> Regarding imminent danger, the WPIC commented:

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

7. WPIC 2.04.01 – Great Personal Injury

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

8. WPIC 16.07 – Justifiable Homicide – Actual Danger Not Necessary

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

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

### 9. WPIC 16.03 – Justifiable Homicide – Resistance to a Felony

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

Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony<sup>57</sup> upon the slayer or in the presence of the slayer.

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

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

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<sup>57</sup> For purposes of the defense, the use of deadly force appears to be limited to the resistance of violent felonies that threaten human life or may result in great personal injury. See State v. Nyland, 47 Wn.2d 240, 287 P.2d 345 (1955)