Use of Force Non-Fatality Investigation

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Independent Force Investigation Team-King County

KCSO, Incident # C23020068

King County Prosecuting Attorney

Public Integrity Team

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DECLINE MEMORANDUM

NON-FATAL USE OF FORCE
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WARNING – This memorandum contains images and descriptions of violence that may be offensive and disturbing to some readers. The images and descriptions are included to provide the reader with the most accurate information regarding the topic of this memorandum.

I. INTRODUCTION

1. Purpose of the Memorandum

The King County Prosecuting Attorney's Office (KCPAO) is mandated by law to analyze certain incidents regarding police use of force and to determine if the action was justified or if there was a criminal action such that criminal charges should be filed.[1] Because the investigation and analysis are mandatory if specific criteria are met, the KCPAO's review of an incident does not implicitly signal that the use of force was either justified or that criminal charges are appropriate. Instead, the KCPAO is required to assist independent investigations involving police use of deadly force to enhance accountability and increase trust to improve the legitimacy of policing for an increase in safety for everyone.[2]

Pursuant to the Law Enforcement Training and Community Safety Act, an independent investigation must be completed when the use of deadly force by a peace officers results in the death, substantial bodily harm, or great bodily harm.[3] The independent investigation is conducted in the same manner as a criminal investigation.[4]

2. Status of the Independent Investigation

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

3. Scope of the Memorandum

The KCPAO's determination if the police action was justified or if there was a criminal action such that criminal charges should be filed is based entirely on the investigation materials provided to the KCPAO, relevant criminal laws, rules of evidence governing criminal proceedings, the applicable burden of proof, and the KCPAO's Filing and Disposition Standards.

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[1] Except as required by federal consent decree, federal settlement agreement, or federal court order, where the use of deadly force by a peace officer results in death, substantial bodily harm, or great bodily harm, an independent investigation must be completed to inform any determination of whether the use of deadly force met the good faith standard and satisfied other applicable laws and policies. RCW 10.114.011. Similarly, if the Office of Independent Investigation is the lead investigation agency, the prosecutorial entity must review the investigation. RCW 43.102.020. 2021 c 318 § 101.

[2] Id. See also WAC 139-12-010.

[3] RCW 10.114.011. See also WAC 139-12-010.

[4] Id.

This determination is not intended to address matters outside the scope of this memorandum including, but not limited to, administrative action by the involved agency or any other civil action. The Team expresses no opinion regarding the propriety or likely outcome of any such actions.

II. OVERVIEW

On the evening of June 17, 2023, Washington State Patrol (WSP) Involved Trooper 1 was patrolling Interstate 90 (I-90) west of Snoqualmie Pass when his agency was asked by another agency from Kittitas County to assist them in apprehending a driver traveling westbound on I-90 over the pass. Involved Trooper 1 and his partner, who were driving separately, were told that the suspect was drunk and wanted for a felony domestic violence assault. On the troopers' second PIT maneuver [5] they boxed in the suspect car. The car attempted to get away by driving into the vehicle of the Involved Trooper 1's partner. As Involved Trooper 1 got out of his car to approach the suspect's door, the suspect quickly backed into Involved Trooper 1's car in an attempt to escape. Involved Trooper 1 said that the encounter caused his heartrate to elevate and the suspect's behavior caused him to fear for his life. At that moment, Involved Trooper 1 approached the suspect, unholstered his firearm, and accidentally discharged it, striking the suspect in the back. Involved Trooper 1 and his partner gave the suspect lifesaving care. The subject was then transported to the hospital and ultimately survived his injuries.

III. INVESTIGATION AND EVIDENCE

The Prosecuting Attorney's Office reviewed police reports from King County Sherriff's Office, Kirkland Police Department, Lake Forest Police Department, Ellensburg Police Department, and Issaquah Police Department. It also reviewed WSP's computer aided dispatch log, the Involved Trooper's voluntary interview, photography of the scene, the subject's medical records, civilian interviews, a crime laboratory report, In-Car Video, and Washington State Patrol's Use of Force Policy.

[5] PIT stands for Precision Immobilization Technique.

IV. INVESTIGATION SUMMARY

1. Independent Investigation Team Call Out

The Independent Force Investigations Team - King County (IFIT-KC) was activated because a trooper from WSP, a member agency of IFIT-KC, was involved in a shooting. This was a cool late Spring night with temperatures around 51 degrees. The weather was a misty rain and the pavement was wet. KCSO, a member of IFIT-KC, was the lead investigative agency.

2. Timeline (based on Computer Aided Dispatch Report)

2155 hours - a 911 caller reported the vehicle was at I-90 westbound at Mile Post (MP) 66 driving fast and erratic.

2158 hours - dispatch reported that the driver was wanted on PC for assault, drving a silver Hyundai, an drank an entire bottle of vodka.

2159 hours - vehicle traveling at a high rate of speed passing MP 61.

2211 hours – traveling westbound at MP 47 with variable speeds. This location is west of the Snoqualmie Summit near the Tinkham Road. It sounds as if the primary pursuing units were east-side dedicated and the pursuit was handed off to the west-side dedicated troopers at the summit.

2222 hours - the troopers had reached MP 32 and were requesting spike strips.

2225 hours - vehicle at MP 25 going 90 MPH. Trooper 1 was at Exit 25 and a request for spikes was broadcast for MP/Exit 22 (Preston) (Exit 25 or MP 25 is the intersection of HWY 18 and I-90. Snoqualmie Parkway turns into HWY 18 once it crosses I-90).

2226 hours- suspect almost collided with another vehicle.

2227 hours - permission granted for high speed PIT was broadcast followed by an attempted PIT maneuver.

2228 hours – “ramming Patrol Car" was then broadcasted.

2229 hours - Trooper 1 announced "shots fired."

3. Interviews

a. David Gardipe

On June 17, 2023, Detective 1 interviewed Mr. Gardipe at Harborview Medical Center under *Miranda*. Mr. Gardipe said he was blacked out drunk while driving from Ellensburg to the greater Seattle area. He said police were chasing him and at around Preston he refused to stop, they conducted a PIT maneuver on his car and then shot him. Detective 1 asked him why he was at Harborview and he answered, "I was shot." Detective 1 asked him how that happened and he said, "I was speeding, I got pulled over. I wouldn't stop, so they pitted me. I was moving too much and they shot me I think." Detective 1 asked him where this happened and he said it was around North Bend on I-90. He told Detective 1 that he started speeding once "they" got behind him and he was coming from Ellensburg. He said that "I was black out drunk." Detective 1 asked him what he had been drinking and he said, "cheap liquor" and did not say exactly what it was. Detective 1 asked him about any weapons that could be in the car and he said there were not any weapons in the car. When Detective 1 asked if he could remember anything about who shot him he said that he was having a tough time remembering details.

b. Interview of Trooper 1

Through his attorney, he declined a request to be interviewed.

c. Interview of Involved Trooper 1

Involved Trooper 1 did not provide a statement on scene. However, on August 16, 2023, Involved Trooper 1 sat for a voluntary interview at the King County Prosecutor’s Office where he was interviewed by Detective 1. Regarding what led to him firing his gun, he said that he was initially responding to a request to clear debris on I-90 near Snoqualmie Pass when he heard radio traffic advising him that there was a DUI driver headed westbound over the pass. Shortly after, he heard an update from another agency that the suspect was displaying erratic driving. Later, the agency advised there was probable cause to arrest the driver for Second Degree Assault – Domestic Violence. Because second degree assault – DV could involve a weapon or strangulation, he was prepared for the suspect possibly being armed. The other agency said they were following the suspect but were losing him and requested that WSP assist in apprehending the driver because he was getting away.

From his sideview mirror, he observed the suspect driving westbound and began following the suspect car with his lights and sirens on. The suspect did not stop. Involved Trooper 1 requested permission to follow the suspect from his sergeant who granted permission, though he told the trooper that permission was unnecessary. The trooper kept his distance from the suspect car to keep safe. The suspect stuck his hand out of the open window and flipped Involved Trooper 1 off multiple times. The suspect continued to drive unsafely weaving from side to side across all lanes of traffic with inconsistent speed between 60 to 110 mph.

Involved Trooper 1's partner took the primary role on the radio and followed behind so Involved Trooper 1 could pursue the suspect car. Involved Trooper 1 asked his partner to hold traffic back on I-5. He radioed for and was given permission to disable the suspect car with a PIT maneuver at 60 mph. The suspect slowed down from 80 mph to 60 mph and Involved Trooper 1 struck the driver's side back bumper of the suspect's car pushing the car left back into middle of the roadway. Involved Trooper 1 said that had he struck the right side of the suspect car, the suspect's car would have slide off the roadway to the right into the forest. The maneuver worked and the car stopped perpendicular to traffic. Involved Trooper 1's partner boxed the suspect car in from the front, and Involved Trooper 1 from the back. The driver accelerated into his partner's driver side which made Involved Trooper 1 concerned for his partner's safety. He could not see the suspect's hands. His heart was beating rapidly. Involved Trooper 1 exited his patrol car. As he unbuckled his seatbelt, the belt caught on the cord to his radio unit which was pinned to his chest. The radio, which was connected to his belt ripped off and was dragging on the ground as he quickly ran towards the suspect's driver side door. He kicked the radio forward as he approached the suspect. At this point he was concerned for his life and his partner's life. Per department policy which permits troopers to draw their weapon if they are concerned the suspect could be armed and the situation could turn deadly, he unholstered his gun. The suspect appeared dangerous based on the conduct he exhibited behind the wheel, his unwillingness to be arrested, and that probable cause existed for second degree assault. As Involved Trooper 1 unholstered his firearm he let go of the microphone cord he was dragging and right when he cleared the firearm from the holster he heard a pop and the suspect say, "I give up!" He believes that he discharged his firearm right after the gun cleared his holster, but before he could present the gun. At this moment he was directly behind the center pillar or B-Pillar of the suspect car. He said that he does not remember putting his finger on trigger, aiming the gun, or pulling trigger. The only aspect of firing his weapon that he remembers is clearing his holster. He said that he won an

award for being the best shooter in his police officer academy class. He believes the cause of the accidental discharge was either sympathetic nervous system reaction or lack of fine motor skills due to the high stress level. He had no other explanation for it. He said after the shot the suspect, his partner asked him if he fired his weapon and he responded by saying, “Yes, accidental discharge.” He proceeded to take the suspect out of the car and provide lifesaving care. The suspect had a through and through bullet wound from his back to his chest.

He told Detective 1 that the lone shot was an accidental discharge. He did not want to shoot the suspect and did not have a reason to shoot him. If he intended to use deadly force he said he would have shot at least twice, which he is trained to do. Here, he only shot once. He showed genuine remorse for what occurred. For instance, when giving medical aid to the suspect Involved Trooper 1 said he thought, "Oh my god. What have I done?" Even though he could not get his rubber gloves on he still gave medical aid because contacting any communicable disease was less important than saving the subject’s life whom he accidentally shot. When asked what he intended to happen, he said:

> So my, my intention was to get to the driver's door where I can see the suspect. Where I can see his hand to make sure that there is no threat, there is no weapon presented…So I was approaching driver's door and, while I was behind the B-pillar at approximately 45 degree angle, that's when the, the, the shot fire… [M]y idea was having my firearm ready in case there is a threat, and engage the threat if needed, and just give a verbal commands to open your door, open the window, show me your hands, get out of the car. And then once someone is out of the car, we typically holster the, the firearm…

4. <u>Officer Processing</u>

Detective 1 and Detective 2 conducted interviews, round counts and photographs with Involved Trooper 1 and Trooper 1. Involved Trooper 1 had one round unaccounted for and Trooper 1 had none.

Figure 1: Left, Trooper 1 duty belt showing where a trooper's radio is usually positioned and how the radio's cord is threaded through a trooper's shirt. Right, Involved Trooper 1's duty belt, which is missing his radio.

5. In-Car Video

The patrol cars of Involved Trooper 1 and Trooper 1 were outfitted with in-car videos (ICV). Neither trooper had body-worn video cameras. The ICV shows Involved Trooper 1 performing a PIT maneuver. However, before the troopers could pin Gardipe's car in between them Gardipe was able to regain control and continue driving westbound. A few seconds later, Trooper 1 performs another PIT maneuver on Gardipe's car and then pulls in front of Gardipe. Involved Trooper 1 pulls in behind Gardipe which pins in Gardipe's car. Gardipe then accelerates into the driver side door of Trooper 1's car. Involved Trooper 1 then exists his car and approaches the driver side of Gardipe's car. As Involved Trooper 1 exited his car the suspect backed up into Involved Trooper 1's car.

Figure 2: ICV from Involved Trooper 1'S car facing W/B on I-90. Trooper 1's car is the farthest car in the frame. Gardipe's car is pinned between the two troopers' cars. Involved Trooper 1 can partially be seen on the left with his gun drawn approaching Gardipe's door. His ICV does not capture him firing his gun. However, right before this frame, when Involved Trooper 1 is out of frame, his gun is heard going off one time; he then enters the frame and demands to see Gardipe's hands.

The audio from the video is described here:

Involved Trooper:	Hands! Hands!
Gardipe:	I'm going to die.
Involved Trooper:	Get out of the car! Get out of the car! Fuck. Fuck.
Trooper 1:	Shots fired?
Involved Trooper:	Yup
Involved Trooper:	Accidental discharge.
Trooper 1 :	Hey, keep breathing. We need aid.
Involved Trooper:	Fuck.

6. Photographs

Kirkland PD and KCSO personnel helped mark, gather, and photograph evidence at the scene. Below are some of the pertinent photographs at the scene.

Figure 3: Westbound view of the scene on I-90. Trooper 1's car is the perpendicular patrol car at the top of the photo. The suspect car is behind Trooper 1's car, and Involved Trooper 1's patrol car is behind the suspect car. The spent cartridge casing from Involved Trooper 1 gun was recovered near the driver side door of Trooper 1's car.

Figure 4: The spent cartridge casing from Involved Trooper 1 gun was recovered at the driver side door of Trooper 1's car marked by evidence placard 1.

Figure 5: Photograph of the suspect car. The back driver side window was shattered by the bullet shot by Involved Trooper 1. The driver's window was rolled down throughout the incident.

7. Ballistics Report

A WSP Forensic Scientist test fired Involved Trooper 1's Smith & Wesson M&P9 M2.0 semiautomatic pistol and found that it was operable with functional safeties. Microscopic testing was performed comparing the cartridge casing from test firing Involved Trooper 1's firearm with the cartridge casing recovered at the scene of the officer-involved shooting. Both matched one another.

8. Washington State Patrol Policy Regarding Drawing Firearms

In November 2022, in response to the Attorney General releasing its Model Use of Force Policy, WSP revised its policy regarding under what circumstances officers can draw their firearms. Chapter 2.00.040(ii)(c) of that policy reads:

C. Pointing and Drawing a Firearm:

1. Officers should only point a firearm at a person when deadly force is authorized.
2. Officers should only draw a firearm in the close ready position (i.e., unholstered but out of the officer's visual field) when the officer makes reasonable observations based on the totality of the circumstances that the situation may evolve to the point where deadly force would be authorized.
3. When it is determined that the use of deadly force is not necessary, officers should, as soon as safe and feasible, lower, holster, or secure their firearm.

V. INVESTIGATION SUMMARY

At approximately 10:00 PM on June 17, 2023, WSP Involved Trooper 1 was on patrol on I-90 west of Snoqualmie Pass when his agency was asked to assist another agency from Kittitas County whose officers were following the driver of a car suspected of having just committed a felony Domestic Violence assault in Ellensburg, taking a vehicle without permission, and was driving westbound on I-90 erratically and under the influence of alcohol.

Involved Trooper 1, who was positioned facing westbound on the shoulder of I-90, began to follow the suspect vehicle who was driving erratically at high speeds, swerving across traffic and intermittently turning off his headlights. The trooper turned on his lights and sirens demonstrating an intention to pull the car over, but the suspect refused to pull over instead sticking his middle finger out of his window towards the trooper. Involved Trooper 1 was

granted permission by his sergeant to disable the car using a PIT maneuver. He successfully stopped the suspect's car. However, the suspect was able to regain control of his car and continue driving westbound on I-90. Trooper 1 then performed another PIT maneuver. He and Involved Trooper 1 pinned in Gardipe's car preventing it from moving. The suspect accelerated forward into the Trooper 1 driver side door. As Involved Trooper 1 exited his car the suspect backed up into Trooper 1 's car. It is unclear if Involved Trooper 1 noticed this fact, but he said that when he exited his car his heartrate was rapid fearing for his and his partner's safety. As he stepped out of his car and approached the driver side door of the suspect, his police radio, which was attached to his shoulder, caught on his seatbelt, fell to the ground, and began dragging on the ground. He dropped his radio from his left hand and drew his firearm as he approached the car and when his gun cleared the holster, he accidentally fired his weapon one time, which went through the back driver side window of the car and struck the suspect in the back and exited through his left upper chest area. The trooper can be heard on in-car video cursing in frustration and responding to the other Trooper's question of whether he fired or not by saying "accidental discharge." During a subsequent interview, Involved Trooper 1 said that he accidentally fired his gun. He said that he did not have reason to shoot the suspect and felt terrible for having done so. He did not recall aiming or pulling the trigger. He stated that he won an award for being the best marksman in his police academy class. He surmised that the cause of him accidentally firing his weapon was either a lack of fine motor skills or a sympathetic reaction due to the stressful nature of the encounter. He and the other trooper immediately provided lifesaving medical aid to Mr. Gardipe who suffered a through and through gunshot wound to his back which exited his left-side chest. Involved Trooper 1 stated he was so nervous that he was unable to put on his nitrile gloves before providing medical aid but that he did not care because he owed it to the suspect to make sure he survived. Bellevue Fire Department transported the subject to Harborview Medical Center where he was treated and survived his injuries.

VI. LEGAL STANDARD AND APPLICABLE LAW

The State must prove each element of a criminal charge by competent evidence beyond a reasonable doubt.[6] 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.[7]

In addition, the State must disprove the existence of a defense that negates an element of the crime.[8] 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.[9]

To prove assault in the first or second degree, the State must prove, in part, that a defendant performed an intentional act. WPIC 10.01 states, "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes an element of a crime.

To commit the crime of discharging a firearm the State must prove that (1) the defendant willfully discharged a firearm and (2) That this act occurred in a public place or in a place where a person might be endangered as a result.[10] "A person acts willfully as to a particular fact when he or she acts knowingly as to that fact."[11]

To prove assault in the third degree assault with criminal negligence a person the State must prove that the defendant failed to be aware of a substantial risk that bodily injury may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.[12]

VII. ANALYSIS AND CONCLUSION

Under the KCPAO filing standards, violent crimes "will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense

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[6] RCW 9A.04.100; WPIC 4.01.

[7] KCPAO Filing and Disposition Standards.

[8] WPIC 14.00.

[9] Id.

[10] RCW 9.41.230 and WPIC 133.20 - Aiming or Discharging a Firearm—Definition.

[11] WPIC 10.05 – Willfully - Definition.

[12] WPIC 35.22 - Assault and Reckless Endangerment & WPIC 10.04 - Criminal Negligence.

that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder. Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such nature that, if established, would result in complete freedom for the accused and there is no substantial evidence to refute the affirmative defense."

Given the evidence presented in this investigation, there is insufficient evidence to prove that Involved Trooper 1 intentionally or willfully discharged his firearm when he shot Mr. Gardipe, as opposed to it being an accidental discharge.

Here, Involved Trooper 1 recalls drawing his firearm when he exited his car to confront Mr. Gardipe, which is within WSP policy which permits the drawing of a firearm if given totality of the circumstances the situation appears like it may evolve to the point where deadly force would be authorized. That type of situation existed in this police encounter. Specifically, Involved Trooper 1 was told there was probable cause that Mr. Gardipe had just committed a second degree assault involving domestic violence. It was unclear to him from the dispatch whether that crime involved the use of a deadly weapon. Moreover, the suspect fleeing and not refusing to pull over for police demonstrated that he was unwilling to be taken into custody and could pose a physical threat to troopers. Mr. Gardipe's continued unwillingness to give up after the first PIT maneuver and his attempted to drive into Trooper 1's door and then Trooper 1 's car to get away after the second PIT maneuver showed that he was willing to put other people's safety in jeopardy in order not to be captured.

Additionally, and more significantly, the evidence shows that Involved Trooper 1 did not intentionally discharge his firearm, but instead accidentally discharged his firearm as Mr. Gardipe suddenly struck the car that Involved Trooper 1 was standing beside. Nor does his conduct in this tense and possibly life-threatening situation amount to criminal negligence. As Involved Trooper 1 stated in his voluntary interview, the dynamic and uncertain situation caused him to have an elevated heartrate. When he exited his patrol car he rightfully feared for his safety and the safety of Trooper 1. The unpredictable situation was further complicated by the fact that when Involved Trooper 1 exited his car his radio fell to the ground and was dragging behind him. He recalls dropping his radio to unholster his firearm. During a potentially deadly encounter, this fact added an additional variable that distracted from the task at hand, which was to apprehend the suspect while safeguarding his wellbeing and that of his partner. According to Involved Trooper 1, his firearm discharged right after he cleared his weapon from his holster. Although his shot struck the subject, he said that he does not recall aiming, placing his finger on the

trigger, or pulling the trigger. Consistent with the shooting being unintentional, he stated that he was trained to shoot at least twice when using deadly force. Here, he only shot once. His reaction after the shooting, which is captured on ICV, is also consistent with his explanation that the shooting was accidental. Multiple times he yells the F-word in frustration after discharging his weapon showing shock that he fired his weapon. He also is heard telling Trooper 1 that it was an accidental discharge when asked if he fired his gun. He then immediately goes to render medical aid despite lacking the fine motor skills to put on nitrile gloves stating in his interview that risking his health was the least he could do after accidentally shooting the suspect. Adding further credibility to his statement, he stated that he did not have justification for shooting Mr. Gardipe. As such, KCPAO cannot prove beyond a reasonable doubt that Involved Trooper 1 intentionally fired his weapon.

Furthermore, the State cannot prove beyond a reasonable doubt that Involved Trooper 1's conduct constituted criminal negligence. Criminal negligence is defined by WPIC 10.04: "A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

As noted by the U.S. Supreme Court: "Police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving." In such situations, accidents can unfortunately occur.

Up until firing the weapon, Involved Trooper 1 followed agency policy to a tee. He asked for permission to pursue and was granted authorization; he then asked for permission to PIT maneuver the suspect car and was granted authorization; and he drew his weapon as dictated by agency policy in situations like this one. Although having his finger on the trigger was an arguably negligent act, given his elevated heartrate where he was pursing an DV suspect who was eluding police and just rammed his partner's patrol car and then rammed his own car as he stood beside it, cannot be said beyond a reasonable doubt that his actions in this "tense, uncertain, and rapidly evolving" situation rose to the level of criminal negligence. As a result, KCPAO declines to file criminal charges.