Use of Force Non-Fatality Investigation
Subject – Nikolao Leuluaialii
Involved Agency- KPD

Investigative Agency - VIIT
RPD Incident # 23-1672

King County Prosecuting Attorney
Public Integrity Team

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DECLINE MEMORANDUM

Non-Fatal Use of Force Investigation
Nikolao Leuluaialii

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

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

The Revised Code of Washington requires the prosecuting attorney to represent the State of Washington and to prosecute all criminal actions in which the state or the county may be a party.[3] In addition to exercising its prosecutorial discretion to initiate criminal proceedings, the prosecuting attorney is required to review certain incidents regarding police use of force and to determine if sufficient evidence exists to support the filing of criminal charges. 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.[4]

2. Scope of the Memorandum

The KCPAO's determination whether the police action was justified or if there was a criminal action such that criminal charges should be filed is based entirely on the investigation materials provided to the KCPAO, relevant criminal laws, rules of evidence governing criminal proceedings, the applicable burden of proof, and the KCPAO's Filing and Disposition Standards. This determination is not intended to address matters outside the scope of this memorandum including, but not limited to, administrative action by the involved agency, any civil action, or

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[1] RCW 10.114.011. See also WAC 139-12-010.
[2] WAC 139-12-010.
[3] RCW 36.27.020(4).
[4] Id. See also WAC 139-12-010.

any inquiry, or other proceeding. Compared to a criminal prosecution, these proceedings involve different areas of the legal system, utilize different standards of proof, and may include evidence that is not admissible in a criminal prosecution. The KCPAO expresses no opinion regarding the propriety or likely outcome of any such actions. Topics that are relevant to matters outside the scope of this memorandum, such as department policy, procedures, or training, are included and reviewed to the extent those topics are relevant to assessing whether a similarly situated reasonable peace officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm.[5]

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 February 9, 2023, at 10:55 AM, Des Moines Police Department (DMPD) officers contacted the driver of a truck who they observed in the Planet Fitness parking lot at S 272nd St. and Pacific Highway S in Des Moines. The driver and his passenger appeared to be sleeping inside the truck. When the driver woke up, he fled from police in the truck and led them on a vehicle pursuit where he attempted to carjack one vehicle before successfully carjacking another vehicle at gunpoint.

Police followed the suspect-car on Pacific Highway through the cities of Des Moines, Kent, and Federal Way. NorCom, the consolidated 911 call center for agencies in south King County, patched together the three departments' radio traffic, as they often do during incidents that cross city boundaries.

Involved Kent Police Department (KPD) Involved Officer 1 entered the southbound pursuit at Pacific Highway and S 226th St. The Subject then made a U-turn and drove northbound at Pacific Highway and S 172nd St. Officers continued to pursue. The Subject ran a red light and

[5] RCW 9A.16.040(4) (Good Faith Standard- Justifiable homicide or use of deadly force by public officer).

struck another car at Pacific Highway and S 254th St but continued driving northbound driving into opposing traffic before crashing again this time into two other cars at the intersection of Pacific Highway and S 224th St, which disabled his vehicle. He then exited that vehicle and attempted to carjack another vehicle at gunpoint when Involved Officer 1 parked his patrol car in the northbound lanes of Pacific Highway, exited, and fired one westbound shot at the Subject, missing him and possibly striking a nearby building on the west side of the street. The Subject immediately surrendered and was arrested without further incident.

III. INVESTIGATION AND EVIDENCE

1. Involved Agency Reports
    a. Kent Police Department Reports – Incident No. 23-1799
    b. Des Moines Police Department Reports – Incident No. 23-0366
2. VIIT Reports
    a. VIIT Officer Processing Documents
    b. VIIT Evidence Log
    c. Federal Way Police Department Reports – Incident No. 23-1751
    d. Renton Police Department Reports – Incident No. 23-1672
    e. Port of Seattle Police Department Reports – Incident No. 202300009366
    f. Auburn Police Department Reports – Incident No. 23-01490
    g. Tukwila Police Department Reports – Incident No. 230000794
3. Montage Reports
4. Computer Aided Dispatch Reports
5. Interview Transcripts
6. Body-Worn Camera Footage
7. In-Car Camera Footage
8. Search Warrant & Application No. 23-0-60453-1
9. Photos
10. Video Surveillance
11. Miscellaneous
    a. Kirkland Police Department Reports - Incident No. 23-5146
    b. Taser Log

IV. TIMELINE

The following information is based upon several sources, including, but not limited to, witness observations, police reports, the computer aided dispatch (CAD) report, Body-Worn and In-Car Video Footage, and surveillance video footage.

Time	Action
10:55	DMPD Witness Officer 1 observed a suspicious vehicle at Planet Fitness in Des Moines.
10:55	Witness Officer 2 added to incident.
10:56	Witness Officer 3 added to incident.
10:56	Witness Officer 1 radios, "2 PASSED OUT W/ DMG TO DIRVER SIDE LOCK."
10:56	Witness Officer 4 and Witness Officer 5 are added as backing officers.
11:00	Driver flees N/B on 16th Ave S. Officer breaks passenger window out with baton.
11:13	Involved Officer 1 enters vehicle pursuit at 226/PAC.
11:15	Suspect “N/B ON PAC ... 90 MPH COMING 260/PAC”
11:16	Traffic accident at S 254th St. and Pacific Highway.
11:16	Witness Officer 4 reports, “NB PAC PASSING 250TH NO TRFC 80 MPH”
11:16	Witness Officer 4 reports, “KDM/PAC EYES ON VEH”
11:17	Witness Officer 4 reports, “NB IN SB LN ON PAC APPR 226.”
11:18	Unidentified officer reports, “ATT TO CARJACK ANOTHER VEH”
11:18:10	Traffic accident at 224/PAC.
11:18:11	Involved Officer 1 drives past 224/PAC in N/B lanes.
11:18:17	Involved Officer 1 parks patrol car and exits.
11:18:17	After the Subject unsuccessfully attempts to carjack the driver of another car, Involved Officer 1 fires one shot at armed Subject who runs around the hood of car from driver’s side to passenger side .
11:18:31	Involved Officer 1 reports, “Shots fired. I need a supervisor,” as other officers handcuff Subject.

V. INVESTIGATION SUMMARY[6]

1. Independent Investigation

The Valley Independent Investigation Team (VIIT) was dispatched to investigate this officer-involved shooting because two of its member agencies were involved. Renton Police Department (RPD) acting as the lead investigator. The other agencies divided investigative responsibilities between themselves.

2. Law Enforcement Witnesses

a. Witness Officer 1

Officer Witness Officer 1 works for DMPD. On the day of the incident, he was the acting patrol sergeant. At approximately 10:40 AM, Witness Officer 1 was conducting patrol in the Planet Fitness parking lot at 27073 Pacific Highway S when he observed what he described as a suspicious dark colored Ford F-350. He ran the license plate. It returned to a person named Civilian Witness 1. Witness Officer 1 looked up Civilian Witness 1's photo on the Department of Licensing database and it did not match the male driver or female passenger of the car. He wrote that there was also damage to the driver's side door mechanism, which in his experience is a sign of forced entry. He then decided to contact the occupants, but first waited for backup Witness Officer 4 and Witness Officer 2 to arrive. They placed "rat traps"[7] under three of the truck's wheels to deflate the tires if the driver decided to drive away. Witness Officer 1 knocked on the driver's window, and the driver immediately tried to drive away but found the truck was in park. Once in gear, the male driver drove away over a curb and grass and northbound on 16th Ave S. The rat traps were successful. Officers followed the suspect-truck at a distance first northbound

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[6] The Investigation Summary is based upon the investigation and evidence outlined in Section III. When necessary, the Team will identify the source of the information. It is common for witnesses, including law enforcement officers, to provide multiple statements about the events witnessed. Similarly, it is common for multiple witnesses to provide information about the same event. If a witness provides multiple statements and the statement contains material and substantial differences that could affect the investigation or analysis, the Team will identify information that is materially and substantially different. However, if the information has a de minimis effect on the investigation or analysis, the differences may not be identified. Similarly, although some events may be observed by more than one witness, the Team may not summarize each witnesses' statement unless it has a material and substantial effect on the investigation and analysis.

[7] A "rat trap" is a pocket-sized tire deflation device used by law enforcement to prevent a pursuit before it begins.

Pacific Highway S and then southbound on Pacific Highway and into the parking lot of Dollar Tree in Kent.

When Witness Officer 1 observed the suspect-truck in the middle of the parking lot near Dollar Tree it appeared stationery. As Witness Officer 1 was making his way through the parking lot towards the suspect-truck, he observed the male driver (Subject) in close proximity to an Asian male in a silver Honda Pilot (WA-Plate: BDR6443). The male Subject observed Witness Officer 1 and then ran back to his truck and began to flee again. He exited the parking lot onto Pacific Highway S and proceeded southbound in the northbound lanes. The owner of the Honda Pilot later told police that the Subject attempted to carjack him. Witness Officer 2, Witness Officer 4, and Witness Officer 6 pursued the suspect-truck. The truck then turned into and stopped at an Arco Gas Station on Pacific Highway S. The Subject and his female companion then carjacked the driver of a white Honda Accord at gunpoint and drove southbound on Pacific Highway S.

Witness Officer 1 then authorized a vehicle pursuit. Witness Officer 6 radioed that he spotted the Honda Accord at Pacific Highway S. and S. 272nd St. Police cars positioned themselves behind the Honda Accord, which turned northbound on Pacific Highway S. The Subject passed Witness Officer 1, who was at the Dollar Tree. Witness Officer 1 joined the pursuit. At S 254th St., the Subject drove through an intersection against a red light and crashed into a Chevrolet Impala sedan driving with a green light. The Subject then entered the southbound lanes going in the wrong direction on S 224th St. and tried to split two cars waiting at the intersection for the light to turn green causing severe damage to both cars.

Witness Officer 1 pulled up just south of the collision. As he pulled up, he saw the Subject exit the driver’s door of the Honda Accord, holding a black handgun. The Subject immediately began to run towards a white Nissan Altima that was occupied. As Witness Officer 1 exited his patrol vehicle and began running towards the Subject, he heard the sound of a single gunshot. Once he heard the gunshot, he observed the Subject running back around the front of the Nissan Altima, still holding a handgun. Witness Officer 1 pointed his own handgun directly at the Subject who was running in his direction. Witness Officer 1 announced, “Drop the gun right now. Get on the f*cking ground." The Subject observed Witness Officer 1 and then dove to the ground, tossing the handgun on the ground at the same time. At this point, Witness Officer 1

and Kent Police Department officers converged on the Subject and they were able to take him into custody. He stood with the gun at the location where the Subject tossed it to preserve it as evidence. Other officers then took the female passenger into custody.

Kirkland Police Department called Witness Officer 1 back shortly after the pursuit ended and advised that the initial suspect-truck, the Ford pickup, was reported stolen, though there was a delay in the owner reporting it.

b. Witness Officer 2

Witness Officer 2 assisted Witness Officer 1 in contacting the occupants of the Ford pickup truck in the Planet Fitness parking lot. When the Subject started the truck's ignition to drive away, Witness Officer 2 holstered his gun and retrieved his baton from his vest. He wrote in his report that he did so because he was unable to see the male driver' s left hand and the driver was actively resisting commands. As a result, he sought to gain better visibility and access to the inside of the cab. He struck the passenger side window once, breaking it into pieces. However, he was unable to safely unlock the door through the broken window in order to open the door before the driver sped away. As the truck drove away, Witness Officer 2 heard the front passenger side tire start to leak air from the tire deflation device that he placed.

3. Civilian Witnesses

a. Civilian Witness 2 and Civilian Witness 3

Both witnessed the collision and confirmed that the suspect's white sedan, at a high rate of speed, ran a red light at Pacific Highway S at S 254th St. Civilian Witness 2 also stated that he had a dashcam that might have captured the incident. Civilian Witness 2 later provided the investigators with the video footage which supports his statement. Below are frames from video footage from Civilian Witness 2’s dash camera showing Leuluaialii, driving the stolen white Honda Accord through the intersection against a red light without slowing down and striking a blue Chevrolet Impala, turning left onto Pacific Highway S. Leuluaialii drove off northbound without stopping.

Figure 1: Civilian dashcam footage of Suspect-vehicle crashing into blue vehicle at Pacific Highway at S 254th St.

b. Civilian Witness 4

Civilian Witness 4 told investigators that he was in Seattle for a layover and was traveling in a yellow cab when a white Honda going the wrong direction crashed into the taxicab in which he was a passenger. Andre looked back and observed the male driver get out of the Honda holding a handgun. Civilian Witness 4 explained the driver pointed the gun with a straight arm south toward where he last observed the police vehicles. The suspect then ran north. Civilian Witness 4 ducked down and heard a gunshot coming from where the male was last seen running. Civilian Witness 4 explained that he only heard one gunshot and believed it came from the suspect who was north of him and not the police which he observed south of his location. Civilian Witness 4 heard officers yelling "get on the ground" and the male was running in the other direction. When Civilian Witness 4 looked out the back window again the police had the suspect in handcuffs.

c. Civilian Witness 5

He and his wife were the occupants of the Nissan Altima that Leuluaialii attempted to carjack after he crashed the stolen white Honda Accord at Pacific Highway S and S 224th St. Civilian Witness 5 told the police that he and his wife were stopped at a red light when the Subject pointed a gun at him and tried to get into his car. The interviewing officer said that Civilian Witness 5's wife, who was his front passenger, appeared shaken up after the incident. She told police that she was having chest pains and looked very pale. Medics treated her on scene.

d. Civilian Witness 6

Civilian Witness 6 told police that he was stopped in his truck at Pacific Highway S and 224th St. when he heard a car crash and noticed a male holding a gun get out of the crashed car. His truck was behind Civilian Witness 5's white Nissan Altima. Civilian Witness 6 saw the male run around and waive the gun around. Civilian Witness 6 saw the man point the gun at the window of Civilian Witness 5's car. Civilian Witness 6 said that when he saw the police arrive, he backed up, pulled forward, and drove away from the scene. Civilian Witness 6 stated he was concerned the guy would have shot or killed the police.

4. Video Evidence

Police and civilian video captured the events. Below is a chronological display of events incorporating frames from all video footage investigators were able to recover.

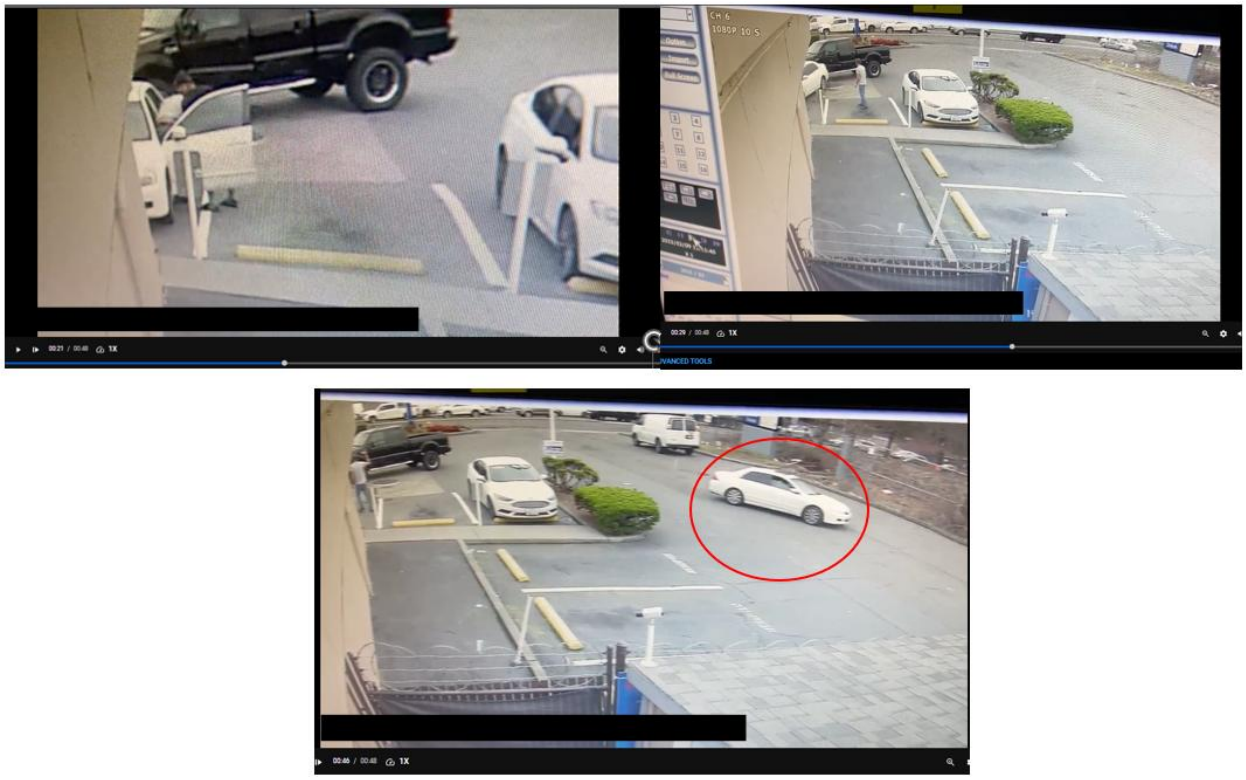

Figure 2. Surveillance footage of suspects in Dollar Tree parking lot having just exited the black Ford truck and carjacking white Honda Accord before driving off.

One half mile north of the Dollar Tree at the 25400 block of Pacific Highway S., civilians Civilian Witness 2 and Civilian Witness 3 were stopped at a red light where they witnessed the Subjects' stolen white sedan run a red light at a high rate of speed and crash into another car. Civilian Witness 2 captured the collision on his dashcam and provided the footage to investigators. The Subject continued to elude the police, heading northbound at a high rate of speed in the southbound lanes of travel on Pacific Highway S.

Figure 3. Subject running a red light at Pacific Highway and S 254 St., crashing the stolen Honda Accord into the blue sedan before driving off.

Figure 4. Officers then followed the vehicle north on Pacific Highway S. until it crashed, and came to a stop, which occurred at in the 22400 block of Pacific Highway South.

Figure 5. Footage from business located at 22323 Pacific Hwy S on northeast corner of intersection. The Subject, circled in red, is seen attempting to carjack the white sedan. Involved Officer 1, circled in yellow, fires at the Subject as the Subject runs to the passenger side of the car.

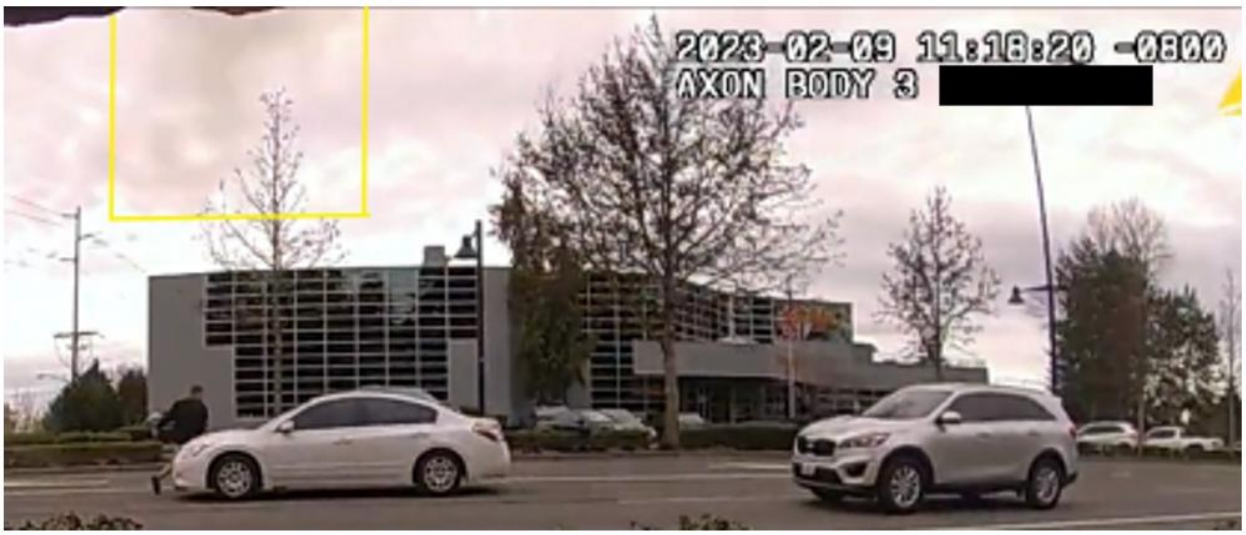

Figure 6. Involved Officer 1's BWC footage showing the Subject having just attempted to carjack the driver of the white car at gunpoint, now running around the hood to the passenger side still armed. Gun powder exiting Involved Officer 1's barrel is highlighted by the yellow box. Involved Officer 1 shot right after exiting his patrol car, so the relevant footage from his BWC is extremely short.

5. Recovered Evidence

One fired cartridge casing or fired cartridge casing (FCC) was recovered next to the driver's side door of Involved Officer 1's patrol car.

Figure 7: Photos of the FCC.

The Subject's firearm was recovered at the scene. The make of the firearm was a Taurus. The model was a G3 9mm.

Figure 8: Photo of the Subject's firearm recovered on the scene.

6. Officer Processing

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

- 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.
- Investigators collect firearms, equipment, uniforms, and other items as necessary.

Investigator 1 and Investigator 2 from Renton Police Department processed Involved Officer 1 who was armed with a Smith and Wesson M&P 9mm pistol equipped with iron sights, a Trijicon RMR red dot sight and a Streamlight TLR1-HL weapon light; both were working properly. The pistol was secured in a Safariland duty holster located on his belt. The pistol had a magazine seated in its magazine well.

The load capacity for the magazine was listed at 17 rounds. Involved Officer 1's firearm had 16 rounds loaded in the magazine with an additional round in the chamber of the firearm.

The 2 additional pistol magazines had a load capacity of 17 rounds. The first of the 2 additional pistol magazines contained 18 rounds and the second magazine contained 17 rounds. It is unclear whether the amount of rounds in the spare magazine, 18, is a miscount or if Involved Officer 1 was somehow able to load the magazine past capacity. However, the video evidence definitively shows that Involved Officer 1 fired just one round from this firearm.

7. Ballistics Report

A Washington State Patrol (WSP) forensic scientist authored a ballistics report. The report states that WSP test-fired the handgun possessed by Involved Officer 1 and it was operable. The forensic scientist then compared the FCC from Involved Officer 1's service weapon to the FCC recovered at the scene and concluded they matched one another.

VI. SUMMARY OF INVESTIGATION

At 10:55 AM, DMPD Officer Witness Officer 1 viewed a suspicious black Ford F350 truck parked in front of the Planet Fitness gym located at 27073 Pacific Highway S in Des Moines. The driver and passenger were sleeping inside the truck.

Witness Officer 1 ran the license plate. It returned clear and valid and came back to a black 2006 Ford F350 truck. However, the Department of Licensing photograph of the registered owner did not match the driver or passenger.

At 10:57 AM, backing Witness Officer 4 and Witness Officer 2 arrived on scene and approached the truck from the passenger side. Both officers placed "rat trap" devices, tire deflating hollow spikes designed to rapidly deflate tires, under both rear tires and the front passenger tire. After the devices were in place, Witness Officer 2 approached the front passenger door when he noted that the female was starting to wake up. At the same time, Officer Witness Officer 1 knocked on the driver's door window which caused both occupants to wake up. Witness Officer 2 ordered the female passenger to put her hands in the air, which she did. The driver appeared dazed and attempted to start the truck, which he eventually was able to do. Officer Witness Officer 1 ordered the male driver to put his hands in the air, but the male driver

refused to comply with commands. Witness Officer 2 then used his baton to shatter the passenger window in an attempt to open the passenger door, but he could not open the door. The male suspect then put the truck in drive and drove the truck over curbs and vegetation as he fled northbound on 16th Ave S.

At 11:03 AM, Officer Witness Officer 1 requested that Kirkland PD attempt to contact the owner of the suspect-truck to determine whether the car was stolen. At the same time, Officer Witness Officer 1 told dispatch that he was keeping an eye on the vehicle from a distance. Officers continued to follow the vehicle until it pulled into the parking lot of a Dollar Tree at 26100 Pacific Highway S. Officers were able to see both the driver and front passenger exit the truck on foot. Officers then observed the suspects quickly getting back into the truck and fleeing southbound on Pacific Highway S.

At 11:10 AM, Officer Witness Officer 1 contacted an elderly male located in the Dollar Tree parking lot, who said the occupants of the truck tried to carjack him by pulling him out of his parked car. The carjacking was thwarted when suspects saw police enter the parking lot and decided to flee.

At 11:12 AM, the suspect-truck was seen pulling into the parking lot of an Arco Gas Station, located at 27202 Pacific Highway S., where the driver used a black pistol to carjack a male and female of their 2007 White Honda Accord, which is aired over police radio.

At 11:13 AM, at Pacific Highway and S 226th St, Involved Officer 1 joined the vehicle pursuit of the stolen white Honda.

At 11:14 AM, Witness Officer 6, driving an unmarked police vehicle, observed the stolen Honda Accord make a U-turn. As the light turned green, the suspects began traveling north on Pacific Highway S. As soon as the Honda Accord started to drive, Witness Officer 4 pulled in behind the vehicle and activated his emergency lights and sirens on his marked police vehicle. Once Witness Officer 4 turned on his sirens, the stolen Honda Accord accelerated to speeds as high as 100 MPH.

At 11:16 AM, additional officers joined the pursuit. At a high rate of speed, the Subject crashed into a vehicle in the intersection at and Pacific Highway S and S 254 St but continued to flee. The suspects continued to elude the police, heading northbound on Pacific Highway S at a high rate of speed driving against traffic in the southbound lanes.

At 11:18:10 AM, officers followed the suspect-vehicle north on Pacific Highway S until it crashed into two cars at the Pacific Highway and S 224th St and came to a stop. One second later Involved Officer 1 drives through the intersection of Pacific Highway and S 224th St. The Subject-driver, armed with a gun in his right hand, exited the stolen Honda and attempted to carjack a Nissan Altima. The Subject initially went to the driver's door if the Nissan but was unable to open the door.

At 11:18:17 AM, Involved Officer 1 stops his patrol car in the northbound lane of Pacific Highway parallel to the Subject and exits. At this moment, the Subject ran to the passenger side of the Nissan and attempted to gain access to the vehicle while still holding the pistol.

At 11:18:20 AM, Involved Officer 1 fired his service weapon once, missing the Subject. The Subject then fell to the ground next to the front passenger door and surrendered.

VII. LEGAL STANDARD AND APPLICABLE LAW

1. Burden of Proof

In a criminal prosecution, the State must prove each element of a criminal charge by competent evidence beyond a reasonable doubt.[8] 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.[9]

In addition, the State must disprove the existence of a defense that negates an element of the crime beyond a reasonable doubt.[10] 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.[11]

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[8] RCW 9A.04.100; WPIC 4.01.
[9] KCPAO Filing and Disposition Standards.
[10] WPIC 14.00.
[11] KCPAO Filing and Disposition Standards.

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 or Use of Deadly Force by Peace Officer[12]
- Defense of Self or Others (applies to non-homicide charges)[13]

2. Applicable Jury Instructions

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

- WPIC 2.16 - Peace Officer
- WPIC 16.01 - Use of Deadly Force by a Peace Officer
- WPIC 16.05 - Necessary
- WPIC 17.02 Lawful Force - Defense of Self, Others, Property
- WPIC 120.07 - Lawful Arrest and Probable Cause

3. Summary of Conclusion

The KCPAO declines to file charges against Involved Officer 1 because the Independent Investigation and the Team's analysis reveal that the involved officer's actions were in self-defense, defense of others, or justifiable uses of deadly force by a peace officer.[14]

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[12] RCW 9A.16.040.
[13] RCW 9A.16.020(3).
[14] State v. Miller, 141 Wash. 104, 105–06 (1926).

4. Use of Deadly Force by a Peace Officer

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

i. RCW 9A.16.040(1)(c)(1) – Deadly Force, Used in Good Faith, To Arrest a Person Who Is Committing a Felony

An officer is permitted to use deadly force on a suspect when apprehending the suspect, if the officer reasonably believes the suspect has committed or is attempting to commit a felony and deadly force is used in good faith.[15]

A peace officer acts in good faith if 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. Good faith is an objective standard considering all the facts, circumstances, and information known to the officer at the time the officer used deadly force.[16] 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.[17]

However, the involved officer must also have probable cause to believe that the suspect, if not apprehended, poses a "threat of serious physical harm" to others. A threat of serious physical harm may include instances where there is probable cause to believe the suspect committed any crime involving the infliction or threatened infliction of serious physical harm.

Serious physical harm is defined as an injury the involved officer reasonably believes would produce severe pain and suffering.[18] This standard requires a less severe injury than great bodily harm, which, for instance, is the level of injury required to prove first-degree assault. Unlike serious physical harm, great bodily harm requires an injury that creates the probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.[19]

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[15] RCW 9A.16.040(c)(1).
[16] Id.
[17] RCW 9A.16.010; WPIC 16.05.
[18] State v. Walker, 136 Wn.2d 767(1998). WPIC 2.04.01.
[19] RCW 9A.04.110.

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

In Graham v. Connor, the seminal case on evaluating whether a police officer's use of force violated a person's constitutional right against unreasonable search and seizure, the United States Supreme Court determined that the test to determine whether the force used by the police was "reasonable" is not capable of a "precise definition or mechanical application."[20] Instead, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[21] In other words, the reasonableness of whether the officer's use of force is justified is determined by "the totality of the circumstances."[22]

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[23] "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."[24] However, the inquiry is an objective one. The question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them.[25]

c. Analysis Regarding Use of Deadly Force by a Peace Officer

i. Prong (1)(c)(1) Deadly Force, Used in Good Faith, To Arrest a Person Who Is Committing a Felony

The evidence in the investigation showed that Involved Officer 1 used deadly force in good faith to apprehend the Subject who likely would have seriously injured other people if not stopped. Here, Involved Officer 1 was attempting to arrest the Subject who was attempting to

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[20] Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989).
[21] Id.
[22] Id.
[23] Id.
[24] Id. at 396-97.
[25] Id. at 397.

carjack another civilian at gunpoint, a felony. He also had probable cause to believe that the Subject , if not apprehended, would seriously injure others.

Based on all the facts and circumstances known to Involved Officer 1, a similarly situated reasonable officer would believe that the use of deadly force was necessary to prevent serious physical harm. Having just crashed the car he was driving, the Subject was now cornered by police, which appeared to make him desperate and the situation volatile. This caused him to attempt to steal another car at gunpoint, a felony. When that attempt proved unsuccessful, still armed, he ran around the hood of that vehicle towards the car's passenger side putting the female passenger's safety in jeopardy. The Subject's prior behavior, including continuing to flee after having previously crashed into another car, demonstrated that he was willing to place others in danger in order to escape capture. Therefore, it was reasonable for Involved Officer 1 to believe that the Subject intended to threaten or injure the female passenger of the car in order to escape detention and would further harm others if allowed to escape in the Nissan. Because the Subject was armed and previously showed a willingness to threaten other civilians with the gun, it was reasonable for Involved Officer 1 to believe that no less force than deadly force would have stopped the threat the Subject posed to others. In fact, his force was successful. After he discharged one round, the Subject immediately surrendered. Because Involved Officer 1 used deadly force in good faith to apprehend a felon who posed a threat of serious physical harm to the community, the KCPAO declines to file criminal charges against him.

ii. Defense of Self or Others

a) Law Regarding Defense of Self or Others

The legislature recognizes that the defense of Justifiable Homicide or the Use of Deadly Force by a Peace Officer does not restrict an officer from asserting self-defense/defense of others, which remains broader than the limitations imposed by that defense.[26]

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

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

reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.[27]

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.[28]

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.[29]

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful.[30]

b) Analysis Regarding Defense of Self or Others

As described above, based on the facts, when Involved Officer 1 fired his gun, he could have reasonably believed that the Subject was about to injure the occupants of the car the Subject was attempting to steal. Additionally, the amount of force he used was no more than necessary meeting possible deadly force with deadly force and ceasing to fire once the Subject threw his gun to the ground and was no longer a deadly threat. As a result, Involved Officer 1 acted in lawful defense of others.

VIII. CONCLUSION

Therefore, based on the anticipated admissible evidence and statements, criminal charges against Involved Officer 1 are not supported by the facts. The KCPAO declines to file criminal charges.

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[27] RCW 9A.16.020(3); WPIC 17.02.
[28] WPIC 16.05.
[29] WPIC 17.02.
[30] Id.

Appendix A

1. WPIC 16.01 - Justifiable Homicide by a Peace Officer

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

Homicide or the use of deadly force is justifiable:

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

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

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

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

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

2. WPIC 16.05 – Necessary

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

3. WPIC 17.02 – Lawful Force – Charges Other than Homicide

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

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

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

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 16.07 – 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.