

Use of Force – Non-Fatality

Joaquin Delgado

Valley Independent Investigation Team



King County Prosecuting Attorney

Public Integrity Team

April 13, 2023



Decline Memorandum

Use of Force – Non-Fatality:

Joaquin Delgado

I. OVERVIEW

On March 23, 2021, Kent Police Department (“KPD”) officers identified a stolen white Chevy van at Campus Park in Kent. When they attempted to pull the van over the driver, later identified as Joaquin Delgado (“subject”), led them on a high-speed chase through the city of Kent. At one point Involved Officer #1 setup a spike strip with the intent to disable the van. The subject saw the spike strip and turned right in order to avoid the strip, nearly striking Involved Officer #1. Involved Officer #1 radioed that the suspect drove at him. The officers, including Involved Officer #1, continued to pursue the van another four tenths of a mile to SE 209th where the van crashed into a ravine at a dead end of this residential street. The subject fled on foot. Acting Sergeant #1, Officer #2 and Officer #3 pursued the subject on foot as he fled through the ravine. Involved Officer #1 stood on top of the ravine and fired one shot missing the subject, likely hitting the dirt in the ravine. Two of the other officers fired tasers. Although Involved Officer #1 did not provide a statement in the criminal investigation, based on his comments captured on body-worn video (“BWV”), he fired because the subject assaulted him with a car earlier in the pursuit and he thought the subject was a threat to a resident he saw across the ravine.

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. RCW 10.114.01. The King County Prosecuting Attorney’s role in deadly use of force incidents is to ensure the investigation is thorough and complete and determine whether sufficient admissible evidence exists to support filing criminal charges. Although Mr. Delgado did not sustain substantial bodily

harm, or great bodily harm, this investigation was completed by Valley Independent Investigation Team (“VIIT”) and provided to KCPAO and we, in turn, have decided to review it for criminal liability.

The Public Integrity Team has determined that the investigation into the March 23, 2021 officer involved shooting by KPD Involved Officer #1 is complete. As detailed in the discussion below, the Team has concluded that the evidence presented is insufficient to support criminal charges against Involved Officer #1. Accordingly, the KCPAO declines to file criminal charges in this matter based on the evidence presently available.¹

This determination is based entirely on the relevant criminal laws, rules of evidence governing criminal proceedings, and the criminal burden of proof in Washington. Additionally, the current determination that the evidence is insufficient to support criminal charges against Involved Officer #1 does not limit administrative action by the Kent Police Department, or any other civil action. The Team expresses no opinion regarding the propriety or likely outcome of any such actions.

II. INVESTIGATION AND EVIDENCE

A. Items Reviewed:

- Narrative police reports for underlying crime (KPD # 21-3247)
 - Acting Sergeant #1
 - Sergeant #1
 - Officer #2
 - Officer #3
 - Officer #4
 - Officer #5
 - Officer #6
 - Officer #7
 - Officer #8
 - Officer #9
 - Officer #10
 - Assistant Chief of Police

- Narrative police reports from OIS Investigation (APD # 21-02900)
 - Detective #1’s Police Report, dated 4/26/21

¹ KCPAO is prohibited from basing a filing decision on any compelled statement from Involved Officer #1. Garrity v. New Jersey, 385 U.S. 493 (1967). As such, KCPAO did not review any administrative statement that Involved Officer #1 may have given in the course of his department’s internal investigation into the shooting.

- Detective #2's Summary of 9/8/22 interviews with Officer #2 & Acting Sergeant #1
- NIBN Lead Notification
 - Email from NIBIN Technician to Detective #1 regarding comparison.
- Medical Records - After Visit Summary – UW Medicine (Joaquin Delgado)
- Auburn PD – Evidence Log
- 3D Map of location
- Criminal History of Joaquin Delgado
- June 8, 2022 email from Detective #1 summarizing his interview with resident/witness Civilian #1
- Audio Interviews of:
 - Subject, Joaquin Delgado
 - Civilian #2
 - Civilian #3
 - Officer #2 (by Investigator #1 June 30, 2022 – admin. investigation)
 - Officer #3 (by Investigator #1 June 30, 2022 – admin. investigation)
 - Acting Sergeant #1 (by Investigator #1 June 30, 2022 - admin investigation)
- Video:
 - Ring video from resident at xxxxx SE 209th St.
- BWV of Officers:
 - Involved Officer #1
 - Acting Sergeant #1
 - Officer #2
 - Officer #3
- SPD FIT Detective #1's Frame by Frame Footage of Officer #2's BWV
- Photos:
 - Scene photos, ofc. processing photos, aerial diagrams, subject at hospital.
- CAD/Radio Traffic

///

///

B. Incident Scene:

The location of the officer-involved shooting (“OIS”) was SE 209th St. The closest cross street is 120th Pl SE. The incident occurred in the daytime. The lighting was good. The road was dry. This street is in a residential neighborhood and runs east to west. The street ends in a cul-de-sac with a steep drop off to a ravine that runs north to south. The ground in the ravine was wet and muddy and there was dense vegetation. The subject was apprehended on the east side of the ravine in the backyard of xxxxx SE 208th St. The residence was under construction at the time of the incident. The residents lived on site in a recreation vehicle and in the garage which are directly west of the house. Present on scene were Involved Officer #1’s squad car, an uninvolved blue sedan, and the subject van. The other squad cars had been moved when the Valley Independent Investigative Team (“VIIT”) responded.



Figure 1: Overview of scene.

C. Timeline of Events:

- 8:06AM –
 - 6K9 Acting Sergeant #1 attempting to stop stolen van near Campus Park.
 - Multiple Kent PD patrol units advise they are enroute to back.
- 8:08AM -
 - 6K9 advising PIT attempt- speeds of 40, but subject jerking the wheel.
 - Northbound 104th in the 23200 block with speeds at 70 MPH.
 - Light traffic and maintaining lane.
- 8:11AM -
 - 7K71 Involved Officer #1 deploys spike at 215th/SE 108th.
 - 7K71 advises the driver drove at him.

- 6K9 advises the van is now dragging the spikes.
- 6K9 advises PC for attempted Assault 1.
- 8:14AM -
 - 6K9 advises foot pursuit eastbound through yards.
 - 6K9 advises 1 in custody with multiple taser deployments.

III. INVESTIGATION SUMMARY

A. VIIT Response

VIIT was called out to the scene. Auburn PD was assigned as the lead investigative agency. Detective #1 was assigned as lead investigator. He responded to Kent Police Department at 9:30AM. He was briefed on the incident by KPD Assistant Chief of Police who advised that Involved Officer #1 did not report the incident over the radio and that KPD command staff was later informed of the OIS. At 10:25AM Detective #1 processed Involved Officer #1 who was accompanied by his guild attorney. Detective #1 and Auburn detectives then drove to the scene. Detective #4 and Detective #5 responded to the hospital to take a statement from the subject. Detective #1 and Detective #6 canvased the neighborhood around the scene where they interviewed local residents who may have witnessed the incident. Detective #2 and Detective #3 processed the scene with the assistance of a UAV for aerial views. Detective #5 later test fired Involved Officer #1's gun and one of the casings along with the casing recovered at the scene was sent to the WSP crime lab for ballistics comparison.

B. Officer Processing:

Involved Officer #1 was processed by Detective #1. He was armed with a Smith and Wesson M&P 2.0 handgun (serial no. NFU9638) with an optic sight and mounted flashlight. One round was chambered. The magazine has a 17-round capacity. 16 bullets were in the magazine. He had two extra magazines with 17 round capacities. Both contained 17 rounds. His firearm was later test fired and found to work properly. Detective #1 submitted the casings for comparison at WSP's request and received a warm lead. However, WSP later advised that the correct procedure is to submit a request for microscopic comparison instead of a NIBN request.



Figure 2: Photographs of Involved Officer #1 during processing, as well as his firearm and round count.

C. Body Worn Video:

Acting Sergeant #1's body camera video –

At the end of the vehicle pursuit, it shows him exiting his patrol vehicle and running up to the edge of the embankment as Delgado is exiting his van. Acting Sergeant #1 appears to initially point his firearm toward the direction of Delgado for a brief moment, then the firearm is lowered, and he starts to run after Delgado. In view of the camera is Officer #2, who is to the left of Acting Sergeant #1. Officer #2 is seen pointing his Taser in the direction of Delgado. As Acting Sergeant #1 runs around Officer #3, you can hear two distinct popping sounds. The first is soft in tone but then immediately a louder pop sound is heard. After the subject is detained, Acting Sergeant #1 and Involved Officer #1 have the following exchange captured on Acting Sergeant #1's BWV.

Acting Sergeant #1: I thought. I heard your shot, but I thought it was a taser.

Involved Officer #1: No.

Acting Sergeant #1: No because we're all, "Tase, tase, pop."

Involved Officer #1: You guys tried to tase, but he kept running.

Acting Sergeant #1: Right.

Involved Officer #1: And I see some lady back here...

Acting Sergeant #1: Yeah.

Involved Officer #1: So, the fact that he already tried running... He literally tried running me down.

Acting Sergeant #1: I'm still, I'm still recording you.

Involved Officer #1: Yeah.

Acting Sergeant #1: Yeah, but well, and, and how you almost got fucking hit by him earlier so.

Involved Officer #1: Yeah. So it just, I don't know what he's going to, you know?

Acting Sergeant #1: Yep.

Officer #2's body camera video-

One can see him exit his vehicle and run up to the edge of the embankment. Involved Officer #1 is to his right directly behind the subject-van. One can see Delgado exiting his vehicle and initially fall to the ground just past his driver door area. He gets up and starts to run away from the officers. As Delgado is about 10-15 feet from the van one can see what appears to be a Taser being held by Officer #2 extend out toward the area of Delgado. You then hear a soft pop sound followed immediately by a louder distinct pop sound. After the arrest, Officer #2 and Acting Sergeant #1 discussed whether or not one of the sounds they heard was a taser or a gunshot. When they arrived on scene Involved Officer #1 told them that he was waiting for his union representative.



Figure 3: To the right, Involved Officer #1 in a shooting stance with Mr. Delgado, to the left, running away after exiting the truck and falling down. Photograph from frame extraction of Officer #2's BWV done by SPD FIT Detective #1.

///

///

Officer #3's body camera video-

You can see Involved Officer #1 standing on the edge of the embankment directly behind the van with both his hands extended out holding what appears to be a handgun. He is positioned toward the van and appears to be looking in the same direction. As Officer #3 approaches the area, one can see Officer #2 to the left of Involved Officer #1 along the embankment as Acting Sergeant #1 is running around to chase after Delgado. One can hear two distinct popping sounds. Officer #3 is seen running down the embankment toward Delgado while Involved Officer #1 is still standing with his arms extended out toward the area of the van. Officer #3, Officer #2 and Acting Sergeant #1 all continue to run after Delgado down a path. Because their body cameras are forward facing, one cannot see the actions of Involved Officer #1 during the foot pursuit.



Figure 4: Still from BWV of Officer #3 showing officers running after the suspect (left) and Involved Officer #1 (right) in a shooting stance firing his weapon.

D. Officer Witnesses Statements:

Officer #2: Officer #2 was interviewed on June 30, 2022 as part of an administrative investigation into Involved Officer #1's use of force. Officer #2 stated that it was well after the subject was arrested that he and Acting Sergeant #1 realized that Involved Officer #1 had fired his weapon and not a taser. When asked why he initially thought the shot fired by Involved Officer #1 was from a taser instead of a firearm he stated, "Uh, I felt at that time that from the

facts and circumstances that I had been presented and that I saw and everything that I experienced, I had never gotten to the point of, um, lethal deadly force, so I assumed everybody else was on the same wavelength, and I was like there's no way that somebody shot a gun.” Officer #2 stated that when the subject exited the van, his hands were out in front of him and it was apparent to Officer #2 that he did not have a weapon in his hands. When asked what threat the subject posed to the officers or the public when fled on foot, Officer #2 stated, “Uh, I, I felt that he needed to be apprehended. I felt that he posed a, uh, I mean, he was, he posed a threat of fighting, um, upon capture, which he did. Um, but I did not feel that he posed an imminent threat of great bodily injury or death.”

Acting Sergeant #1: Acting Sergeant #1 was also interviewed on June 30, 2022 as part of an administrative investigation into Involved Officer #1’s use of force. When asked if he believed deadly force was necessary he stated, “If I would've seen a weapon on him or in his hand, that probably would have changed things, but in my mind, the weapon that he was armed with was the car. The car was disabled, and now he's just fleeing, and like I said, there's, there's PC for assault, but in my mind, the threshold of- I'm, I'm not going to shoot that guy for trying to run away.” When asked why he initially believed that he heard a taser he stated, “I just didn't believe that someone would've shot, basically...Cause in my mind, in, in my mind, I'm assuming that everybody is on the same page, and in my mind at, my decision was made that I'm not going to shoot the guy.” Involved Officer #1 did not air that shots were fired. This upset Acting Sergeant #1 for a variety of reasons, one was that the officers would have checked the subject for a gunshot wound earlier and also checked the safety of the residents in the house across the ravine who may have been down range from Involved Officer #1 gunfire.

Officer #3: Officer #3 was also interviewed on June 30, 2022 as part of an administrative investigation into Involved Officer #1’s use of force. He stated, that when the suspect-van crashed at the dead end, Officer #2 parked and Officer #3 parked to his left. He observed Officer #2 and Acting Sergeant #1 run after the subject. He first heard a taser deployed and then to his right he heard a pop, which was louder than a taser. He did not think it was a gunshot, in part, because they are trained to fire more than one shot when deadly force is necessary. He said that he didn’t know who was to his right, but BWV shows that it was Involved Officer #1. Officer #3 continued to pursue the subject through the ravine on foot. He said that he noticed a residence

across the ravine and did not see any people there, but his attention was focused on the pursuit. He thought the proper level of force was non-lethal, or as he stated, "What we were doing. Pursuing him on foot."

Officer #9 Report: Like Involved Officer #1, he did not join in the foot pursuit. Instead, he began taking photographs and confirmed the van was stolen. He then began taking additional photographs of the vehicle and walked toward the top of the embankment. Involved Officer #1 told him to watch his step and pointed toward the ground. He requested Officer #9 mute his body worn camera for a private conversation. While Officer #9's camera was muted Involved Officer #1 stated something along the lines of, his body camera fell off near 116th Ave....he fired a round and something about the guy trying to hit him. Officer #9 wrote that once he heard this information he immediately unmuted his body worn camera. He verified Involved Officer #1 was ok and continued processing the vehicle.

E. Involved Officer:

Involved Officer #1 did not provide a statement to KCPAO despite our request to his attorney for a statement.

F. Subject's Statement:

Joaquin Delgado: He was interviewed while in the hospital. He admitted that he knew the van was stolen. He said that he took off when he saw the police because he was scared. He said that he did not intend to hit the officer with his car; he was attempting to avoid hitting the spikes. He estimated that the van came 3-6 feet from hitting the officer. He understood why the officer may have thought he was being assaulted. At the dead end he ran. He heard a taser, slipped and got up. He initially did not mention hearing a gunshot but later in the interview said that he did hear a gunshot and said he wanted to file a complaint. He heard the officers order him to stop. He said that he was tackled by cops when he fell. The officers said, "Stop resisting!" But he was not resisting. He suffered an abrasion to his lip. He was tased twice in left leg (calf). He said the officers continued to punch him after he was detained. The officers later cut off his clothes to see if was shot. He claims the officers told him they wanted him to be cold and suffer. This is not borne out by the body worn video, which shows Officer #2 cutting his pants off after Fire

arrived. Officer #2 was told of the OIS and wanted to see if Delgado was shot. After his clothes were removed he was immediately given two blankets. Mr. Delgado admitted that he had a small work-knife in pocket. At the end of the interview he asked if the officers were alright.

G. Civilian Witness Statements:

Civilian #1 - resident xxxxx SE 208th St.

He was interviewed at the prosecutor's request around June 2022. He is a resident of the house across the ravine that was under construction where the subject was arrested. He recalls being awoken to the sounds of sirens with his wife and teen in a detached building next to the house. Although he does not recall his wife being outside initially, he did remember calling his sister who had left on foot to work just prior, walking to the bus stop nearby. He called her because he was nervous something may have happened with her because he did not know if she left the house yet. She told him she did not know what was going on because she had to catch her bus and had to walk. Detective #1 did not ask Civilian #1, but believed she was likely at the residence at the very beginning, but quickly left because she had to catch her bus down the road.

Civilian #3 – resident at xxxxx SE 209th St. (fourth from end of cul-de-sac).

He heard sirens and from his front window he saw van but stayed inside to keep he and his family safe. He did not see the incident. He did not hear the shot.

Civilian #2 – resident at xxxxx SE 209th St (second from end of cul-de-sac).

He heard police sirens. He looked out front bedroom window over a fence and 4 or 5 squad cars and then saw a Chevy van go into the ravine. Once the Chevy was out of sight, he heard a loud pop. He did not hear any officers yell any orders.

///

///



Figure 5: Civilian #2's Vantage point. Still shot from video interview of Civilian #2 taken by Detective #1.

Civilian #4 - resident at xxxxx SE 209th St (last house before the ravine). KPD Sergeant #1 interviewed him the day of the OIS. He was in his home when he heard the sirens of police cars coming by his home. He heard voices yelling and he heard a single gunshot.

H. Civilian Video:

Ring Video -xxxxx SE 209th St. (Resident – Civilian #4)-

This residence is located at the end of the cul-de-sac on the southside of the street, where the shooting occurred. It captures Mr. Delgado driving the stolen van with five squad cars behind him. It does not show Mr. Delgado crashing or the shooting, but officers are heard yelling followed by the loud sound of Involved Officer #1's gun being fired.

I. Prior Officer Involved History of Involved Officer #1:

On November 4, 2020, approximately 5 months prior to this incident, Involved Officer #1 responded to a domestic violence call for suspect Darren Butrick whose wife called 911 to report her husband was drunk and being physically abusive. After police responded, Mr. Butrick armed himself with an assault rifle fitted with a laser scope. Butrick pointed the laser out of the window, fired at least 7 rounds towards police and was shot and killed by officers. Involved Officer #1 is one of the officers who returned fire at Mr. Butrick. That investigation was submitted to our office and is currently under review (File # 033-749341).

J. Prior Kent PD Officer Killed While Deploying Speed Spikes

On July 22, 2018, Kent Police Officer #11 was struck and killed by a patrol car while deploying spike strips during a vehicle pursuit. Acting Sergeant #1 and Officer #2 brought the death of their colleague up during their administrative interview when discussing Involved Officer #1 nearly being struck by Mr. Delgado.

K. Underlying Criminal Case

The subject was charged for the underlying crimes, Attempting to Elude and Taking a Motor Vehicle in the Second Degree, in Cause No. 21-1-03107-5 KNT. Subsequently, he was charged in an unrelated case with Felony Harassment for threatening someone with a knife and brandishing the butt of a pellet gun. (Cause No. 21-1-03364-7 KNT). He pled guilty on October 1, 2021 to the charges in both cases. He was sentenced to a residential Drug Offender Sentencing Alternatives (“DOSA”) program; he is in compliance.

IV. FACTUAL ANALYSIS

At approximately 8:06AM on March 23, 2021, Kent Police Department Acting Sergeant #1 observed an occupied stolen van parked at 9700 block of Canyon Drive in the city of Kent. A records check revealed that the van was reported stolen the day prior. Acting Sergeant #1 notified dispatch of his location and began following the vehicle on Canyon Dr. Once backing officers arrived, Acting Sergeant #1 activated his emergency lights in an attempt to conduct a traffic stop of the vehicle. The driver, later determined to be Joaquin Delgado, then increased his speed and continued northbound on 94th Avenue South from SE 248th Street. Mr. Delgado took the officers on a 4 ½ mile chase through business and residential areas in a north easternly direction ultimately ending with him crashing into a ravine near SE 209th Steet and 120th PL SE. The vehicle fled in an evasive manner, speeding, failing to stop at marked intersections and traffic control lights, and passing other vehicles on the road. More than halfway into the pursuit, at the intersection of SE 208th Street and 116th Ave SE, Involved Officer #1 setup a spike strip with the intent to disable the fleeing subject’s vehicle. To set up the spike strip, Involved Officer #1 walked into the street on SE 208th Street and deployed the spike strip. He then retreated to 116th Ave SE while holding the cord to which the spike strip was attached. As the suspect vehicle drove E/B down 208th Ave SE he approached the intersection where Involved Officer #1

was located. Mr. Delgado turned right at 116th Ave SE avoiding the spike strips and coming within 6 feet of hitting Involved Officer #1. Involved Officer #1 quickly moved out of the path of the fleeing vehicle and onto the sidewalk to avoid being struck. He moved so rapidly that his BWV camera fell off. Involved Officer #1 reported over dispatch that the driver tried to hit him. Mr. Delgado continued evading police driving southbound on 116th Ave SE leading the officers through a residential neighborhood before turning southbound on SE 120th PL. He finally turned eastbound onto SE 209th Street, a dead-end street. Mr. Delgado drove through the dead-end and into a ravine, which disabled his vehicle. This was approximately 3 minutes after Delgado nearly struck Involved Officer #1. He got out of the car and continued fleeing on foot. As Delgado got out of the vehicle and began running away from officers, officers made repeated and continuous verbal commands for Delgado to stop. Acting Sergeant #1 pointed his firearm at Delgado but did not shoot. Officer #2 aimed his taser at Delgado and discharged it. Acting Sergeant #1, Officer #2 and Officer #3 chased Delgado on foot. Involved Officer #1 stood at the top of the ravine and fired one shot, which can be seen on Officer #2's and Officer #3's BWV.



Figure 6: To the right, Involved Officer #1 in a shooting stance with Mr. Delgado, to the left, running away after exiting the truck and falling down. Photograph from frame extraction of Officer #2's BWV done by SPD FIT Detective #1.



Figure 7: Still from BWV of Officer #3 showing officers running after the suspect (left) and Involved Officer #1 (right) in a shooting stance firing his weapon.



Figure 8: Photo of stolen truck. The orange cone marks where bullet casing from Involved Officer #1 was found.

Neither Acting Sergeant #1 nor Officer #2 realized that Involved Officer #1 fired his gun. When both realized that he did, BWV shows them both being surprised that he did so. Delgado was eventually caught up to by pursuing officers across the ravine in the backyard of a home under construction. Delgado was non-compliant and had to be subdued by way of non-lethal force tactics and was eventually taken into custody by being placed into handcuffs and searched incident to arrest. Involved Officer #1 is seen on Officer #9's BWV clearing the car and then waiting at the top of hill near the squad cars. He asks Officer #9 to mute his audio and points out the spent bullet casing, which was photographed. After the arrest, BWV shows Involved Officer #1 telling Acting Sergeant #1: "You guys tried to tase, but he kept running... And I see some lady back here... So the fact that he already tried running... He literally tried running me down... Yeah. So it just, I don't know what he's going to, you know?"

When Delgado was searched incident to arrest, a sheathed knife was recovered and a pair of pliers were found in the ravine near the crashed van. BWV shows that when Involved Officer #1 fired Delgado was not holding any weapons, nor did Involved Officer #1 mention seeing Delgado holding a weapon in his brief conversation with Acting Sergeant #1. Further investigation revealed that there were in fact people living on the property under construction across the ravine. However, they all appeared to be inside at the time of the incident. When KPD officers knocked on her door after the arrest, the female resident appeared to have been woken up by the police knocking. The male resident later told police that his sister who lived with them may have been up and walking northbound to a bus stop on SE 208th Street at the time of the foot chase. This may have been the woman that Involved Officer #1 said he observed across the ravine.

Officer #2, Acting Sergeant #1, and Officer #3 were interviewed on June 30, 2022 as part of an administrative investigation into Involved Officer #1's use of force. None of them thought that deadly force was appropriate given the facts and circumstances of the incident.

V. LEGAL STANDARD

In making any charging decision, the King County Prosecutor's Office is bound by state law in effect at the time of the incident. The applicable laws in this incident are as follows:

A. Assault in the Second Degree – Deadly Weapon

A person is guilty of assault with a deadly weapon in the second degree when he intentionally assaults a person with a deadly weapon. (WPIC - 35.19). A gun is a deadly weapon. (WPIC – 2.06). An assault is an intentional shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. (WPIC 35.50 – Assault).

///

///

B. Reckless Endangerment (RCW 9A.36.050 / WPIC 35.33)²

A person is guilty of this crime if they act recklessly and that such reckless conduct creates a substantial risk of death or serious physical injury to another person.

A person is reckless or acts recklessly when he knows of and disregards a substantial risk that wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

C. Sufficiency of Evidence (RCW 9.94A. 411)

Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder.

D. Deadly Force Used in Good Faith (RCW 9A.16.040 / WPIC 16.01)

RCW 9A.16.040(4) states that a peace officer shall not be held criminally liable when using deadly force in good faith. Good faith is an objective standard. The pertinent question is whether a reasonable officer, similarly situated, considering all the facts and circumstances and the information known to the officer at the time, would believe that using deadly force was necessary to prevent death or serious physical harm to the officer or another individual.

The legislature outlined the limited circumstances when deadly force in good faith can be used. The instance applicable in this incident is subsection 1(c)(i) which says that using deadly force is justified when, acting in good faith, when it is used to apprehend an individual who the officer believes has committed a felony. However, the officer must also have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or another individual. One circumstance to consider is whether or not the suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening.

² This crime cannot be charged because the two-year statute of limitation has passed. However, as discussed below, there is insufficient evidence to establish this crime was committed.

VI. ANALYSIS AND CONCLUSION

Involved Officer #1's conduct does not meet the good faith standard under RCW 9A.16.040. His initial decision to draw his weapon was not unreasonable as he was not the only officer who initially drew his firearm. Before holstering his firearm, Acting Sergeant #1 also drew his service weapon when Mr. Delgado fled on foot. However, at the time the shot was fired, the suspect did not reasonably pose a threat of serious physical harm to him or others and none of the other officers present believed deadly force was appropriate. However, there are other factual and evidentiary issues present as described below.

A. Involved Officer #1's State of Mind

Concerning his mental state, just minutes prior to fire his weapon he was nearly struck by the subject's van. Five months prior to this incident, Involved Officer #1's was also shot at with an assault rifle by another criminal suspect in different incident. In that incident, the suspect had a laser sight on his assault rifle and pointed it at the officers as they sought cover behind their squad cars. Although Involved Officer #1 did not provide a voluntary statement, two KPD officers mentioned in their administrative interviews that less than three years earlier a colleague of theirs, KPD Officer #11 was killed during a similar incident when deploying spike strips. Involved Officer #1 was more than likely aware of this incident, as he was hired less than five months after Officer #11 was killed.

B. Evidence That Shot Was Intentional or Reckless

In order to prevail on an assault or reckless endangerment charge, the State must present sufficient evidence to prove beyond a reasonable doubt that the shot fired by Involved Officer #1 was not an accidental discharge. The evidence is insufficient to establish beyond reasonable doubt that he fired intentionally or recklessly. Here, just minutes earlier he was nearly struck by the subject's car. Unlike the other three officers, he stayed back instead of pursuing the subject on foot as the other officers did. As he stood at the top of the ravine, he appeared unsteady. After drawing his firearm, for an unknown reason Involved Officer #1 only fired one shot despite not striking the suspect. According to Officer #3, officers are trained to fire more than one shot when deadly force is necessary. Involved Officer #1 did not inform dispatch that he fired his weapon. Involved Officer #1 made statements trying to justify the shot, but never said the shot was

purposeful. He stated: “You guys tried to tase, but he kept running...And I see some lady back here...So the fact that he already tried running... He literally tried running me down...Yeah. So it just, I don't know what he's going to, you know?”

C. Evidence of Where Involved Officer #1 Aimed

Additionally, there is insufficient evidence of where Involved Officer #1 was aiming at the time the shot was fired. The bullet from Involved Officer #1 was not recovered. Involved Officer #1 BWV camera was dislodged earlier, so his perspective is not captured on video. The only footage is from other officers BWV and establishing where he was aiming based on those videos is speculative. KCPAO cannot prove beyond a reasonable doubt that Involved Officer #1 aimed his firearm at the subject, as opposed to somewhere else. Involved Officer #1's conversation with Acting Sergeant #1 on this issue was ambiguous. As mentioned earlier, Involved Officer #1 acknowledged firing his weapon, but he does not specially say that he tried to shoot the subject.

In sum, when considering the totality of the evidence and the most plausible reasonable defenses, there is insufficient evidence to demonstrate beyond a reasonable doubt that Involved Officer #1 intentionally or recklessly fired his weapon at Mr. Delgado. Intent is an essential element to both charges. Because this fact cannot be demonstrated to the highest level required by law, criminal charges are not supported.