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March 5, 2021

RE: Officer Flores' Use of Deadly Force
Incident Location: 6303 S. Stokewater Dr., Taylorsville, Utah
Incident Date: March 21, 2020
DA Case No.: 20-A92
SLCPD Case No.: 20-52456
UPD Case No.: 20-30347

Dear Chief Brown and Sheriff Rivera:

This letter addresses Unified Police Department of Greater Salt Lake ("UPD") Officer Omar Flores' use of deadly force against Bryan Ulysses Pena-Valencia on March 21, 2020. Mr. Valencia died from the injuries he sustained as a result of Officer Flores' use of deadly force. Officer Flores' discharge of his firearms constituted the "use of a dangerous weapon," which is defined under Utah law as "a firearm or ... object that, in the manner of its use or intended use is capable of causing death or serious bodily injury." Utah Code Ann. § 76-2-408(1)(a),(d). As a result, UPD initiated what is known in Utah as the "Officer Involved Critical Incident" ("OICI") Protocol. See, Utah Code Ann. § 76-2-408(2)-(3). An investigative task force, led by members of the Salt Lake City Police Department ("SLCPD"), and comprising members of law enforcement officers employed by agencies other than UPD, was called in to investigate the Officer Flores' use of deadly force. After the investigation, on April 27, 2020, the task force's investigative findings were presented to the Salt Lake County District Attorney's Office ("D.A.'s Office"), which has the constitutional and statutory mandate to screen such matters for possible criminal charges¹.

¹ Utah Const. Art. VIII, section 16; Utah Code Ann. §§ 17-18a-203; *see also id.* at § 77-2-2(1) (defining "screening" as the "process used by a prosecuting attorney to terminate an investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted"). "Commencement of prosecution" is further defined as "the filing of an information or an indictment." *Id.* at § 77-2-2(3). Also, "Upon review of all facts and testimony taken concerning the death of a person, the district attorney or county attorney having criminal jurisdiction shall determine if the decedent died by unlawful means and shall also determine if criminal prosecution shall be instituted." U.C.A. 26-4-21 (2).

SUMMARY OF FACTS AND FINDINGS

The following summary of facts was developed from the OICI protocol investigation. Should additional or different facts subsequently come to light, the opinions and conclusions contained in this letter may likewise be different.

Early in the morning on March 21, 2020, Officer Omar Flores and Officer Shane Scrivner followed a vehicle that fled from the officers to the intersection of 6200 South and 3200 West in Salt Lake County, Utah. As he looked southbound down 3200 West, Officer Flores saw that the vehicle had crashed at about 6300 South. Officer Flores saw the driver's door was open and no one was in the car.

Officer Flores drove southbound on 3200 West and saw a man running away from the vehicle and away from his police car. Officer Flores got out of his police car and yelled "Stop! Police!" Officer Flores chased the man as he climbed a fence in the neighborhood. Officer Flores followed the man through a backyard where they eventually both stopped where two fences came together at a ninety-degree angle. Officer Flores fired his Taser at the man twice, but it appeared to have no effect. The man stood facing Officer Flores and next to the fence corner. The man reached into the pocket of his hoodie and Officer Flores told him to show his hands or Officer Flores would shoot the man. The man withdrew his hand, holding an object which the man threw over the fence.

Officer Scrivner arrived on scene and joined Officer Flores with the man, the two officers forming a ninety-degree angle with the man between them. Officer Scrivner said he yelled: "Show me your hands! Show me your hands! Police!" Officer Flores said he also continued to order the man to show his hands and get on the ground, but the man did not follow his orders.

The officers said that the man suddenly diverted his attention from Officer Flores to Officer Scrivner. Officer Flores said he "immediately felt an overwhelming fear for my partner's life and my own." Officer Flores said he yelled as loud as he could: "Show me your hands or you will be shot!" and "Do not fucking reach, I will fucking shoot you!"

Officer Flores said the man "did not comply and quickly moved both of his hands down towards the left side of this waist." Officer Flores said he "thought or believed [the man] was reaching for a firearm and [Officer Flores] would be shot." Officer Flores said: "I feared my partner would be shot. I feared for the lives and safety of the public and neighbors in the area. I fired my firearm multiple times and watched the suspect fall to the ground." Medical personnel arrived and treated the man but he died from his gunshot wounds.

As we discuss in more detail below, the facts of this case do not support a justified use of deadly force. We conclude that Officer Flores' articulated belief that deadly force was necessary to prevent the death or serious bodily injury of another was not a reasonable belief. However, as we also outlined below, we believe the facts of this case do not support a criminal charge against Officer Flores because we believe they give rise to a reasonable doubt that Officer Flores acted

with a criminal intent. We discuss the legal and ethical standards that apply to this case and a potential prosecution of Officer Flores for his use of deadly force and explain why we decline to file a criminal case.

RELEVANT LEGAL STANDARDS

As relevant here,² law enforcement officers such as Officer Flores are legally justified in using deadly force when (*see* Utah Code Ann. § 76-2-404(1) (emphases added)):

- (b) effecting an arrest or preventing an escape from custody following an arrest, where the officer reasonably believes that deadly force is necessary to prevent the arrest from being defeated by escape; and
 - (i) the officer has probable cause to believe that the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury; or
 - (ii) the officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed; or
- (c) the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.

Based on this statute, the legal defense of justification, then, may be available where a law enforcement officer “reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury[³] to the officer or another person.” Utah Code § 76-2-404(1)(c). That affirmative defense may also be available where a law enforcement officer “reasonably believes that deadly force is necessary” to prevent a suspect’s escape and the officer had probable cause to believe the suspect posed “a threat of death or serious bodily injury to the officer or to others if apprehension is delayed.” *Id.* at § 76-2-404(1)(b). In determining whether

² Also relevant, but less so given Officer Flores’ status as law enforcement officers, is the articulation of “justification” in Utah State law that applies to individuals more generally, including civilians (*see* Utah Code § 76-2-402(1) (emphases added)):

- (a) A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person’s imminent use of unlawful force.
- (b) A person is justified in using force intended or likely to cause death or serious bodily injury [i.e., deadly force] only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person’s imminent use of unlawful force, or to prevent the commission of a forcible felony.

³ “Serious bodily injury” is defined, in turn, as “bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ or creates a substantial risk of death.” Utah Code § 76-1-601(11).

the use of deadly force was “justified” under Utah law, courts may consider several factors, including: (i) the nature of the danger; (ii) the immediacy of the danger; and (iii) the probability that the unlawful force would result in death or serious bodily injury. *See* Utah Code Ann. § 76-2-402(5).

Although Utah statutory law does not fully differentiate standards of “reasonableness” as between law enforcement officers and civilians, *compare* Utah Code § 76-2-402(1) (universal application), *with* Utah Code § 76-2-404(1) (application to law enforcement officers only), the Supreme Court of the United States did in *Graham v. Conner*, 490 U.S. 386 (1989). In *Graham*, the Supreme Court instructed that “reasonableness” for law enforcement officers must be assessed in light of a “reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396 (internal citations omitted). The Supreme Court held that this determination “requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests . . . against the countervailing governmental interests at stake.” *Id.* Finally, the *Graham* court instructed (*id.* (internal citations omitted; emphases added)):

Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” . . . 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.

RELEVANT ETHICAL STANDARDS

The DA’s Office files cases that satisfy ethical standards and considerations in addition to legal standards for filing.⁴ Honoring ethical standards ensures that everyone affected by the criminal justice system—suspects, defendants, victims, the community, and the system itself—is treated fairly, honorably, and respectfully.

Among the ethical standards we consider before the DA’s Office will commence a case is whether there is a reasonable likelihood of success at trial. It is not enough that the technical elements of crime may be met if, when presenting those facts to a jury, the prosecution strongly believes no reasonable jury would unanimously convict the defendant based on those facts. Accordingly, any screening decision by the DA’s Office includes careful consideration of the various factors a jury may consider when weighing testimony, evaluating evidence, applying the law, and rendering a verdict.

⁴ Among the legal standards a prosecutor must follow is the requirement that “probable cause” must exist to believe an offense (i) was committed and (ii) was committed by the accused. *See, e.g.,* Utah R. Crim. P. 4(b). In making that determination, the DA’s Office must evaluate all evidence that will be legally admissible for or against the accused but may disregard evidence that likely will not be admissible at trial (e.g., a coerced confession).

Under Utah State law, a jury is instructed: “Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If the evidence leaves you firmly convinced that the defendant is guilty of the crime charged, you must find the defendant “guilty.” On the other hand, if there is a real possibility that he is not guilty, you must give the defendant the benefit of the doubt and return a verdict of ‘not guilty.’” In this case, as we discuss below, we believe that Officer Flores’ articulated beliefs, together with Officer Scrivner’s statements and all the evidence of which we’re aware, support a reasonable doubt whether the facts meet the elements of Criminal Homicide, Murder. In cases which we believe a reasonable doubt is supported by the facts of the case, ethical obligations require us to decline to file criminal charges.

FACTS DEVELOPED DURING OICI INVESTIGATION

As noted previously, after the use of deadly force by law enforcement officers from UPD, that agency properly initiated the OICI protocol. SLCPD members led a task force of protocol investigators, including members of the D. A.’s Office, to conduct an independent investigation of the officers’ weapons discharge. The protocol investigation’s independent investigative findings were presented to the D. A.’s Office to screen for possible criminal charges.

The following facts were developed from the investigation of the matter. Should additional or different facts subsequently come to light, the opinions and conclusions contained in this letter may likewise be different.

Early in the morning on March 21, 2020, UPD dispatchers received two calls, one from a woman and one from a man, both saying they heard gunshots in the area. The woman said she heard five to six gunshots and then squealing tires as though a vehicle was driving away quickly. The man who called said he heard about twelve gunshots and then saw a vehicle speed away possibly toward Bangerter Hwy. and 6200 South in Salt Lake County, Utah. Dispatchers broadcast an “attempt to locate” a dark colored vehicle, possibly a truck, that may have been involved in reported gunshots. There was no evidence or indication the gunshots came from the vehicle, nor any information about who was in the vehicle.

Four UPD police officers, Officer Omar Flores, Officer Shane Scrivner, Officer Nehring, and Officer Rodriguez⁵, responded to the call. Officer Flores and Officer Scrivner drove towards the home of a person they considered could have been involved in the shots-fired call. After passing the home and seeing nothing, the officers turned into a city park nearby.

The officers drove into the smaller of two parking lots and saw a dark colored Cadillac⁶ parked in the larger parking lot. They decided to investigate. The most direct route between the

⁵ Officer Nehring and Officer Rodriguez were not involved in the shooting. Officer Rodriguez arrived at the scene after the shooting. His body-worn camera recorded his actions after the shooting.

⁶ There’s no evidence of which we’re aware that connects the Cadillac with the earlier reports of gun shots. After the shooting, UPD Officer Maycock’s body-worn camera (which recorded none of the shooting) recorded a

two parking lots was a walkway that connected them, so the officers drove their patrol cars on the walkway towards the vehicle in the large parking lot. The officers saw the vehicle start to move away from them.

Officer Scrivner turned on his overhead lights to stop the vehicle, but the Cadillac accelerated and ran the stop sign between the parking lot and 6200 South. The vehicle drove eastbound quickly away from the officers. Officer Scrivner turned off his overhead lights and did not pursue, but he and Officer Flores followed the vehicle.

Officer Flores passed Officer Scrivner and followed the car as it climbed the hill on 6200 South approaching 3200 West. Officer Flores saw the vehicle prepare to turn onto 3200 West and lost sight of the vehicle. Officer Flores continued in the vehicle's direction and, as he got to the intersection of 6200 South and 3200 West, he looked southbound down 3200 West and saw that the car had crashed at about 6300 South. Officer Flores saw that the car was disabled near the sidewalk on the west side of the street. Officer Flores saw the driver's door was open and no one was in the car.

Officer Flores turned headed southbound on 3200 West and saw a man running away from the Cadillac and away from his police car. Officer Flores broadcast on the police radio that he was chasing a man on foot running away from the car that had crashed. Officer Flores drove up close to the man who stopped running and started to climb a fence in the neighborhood.

Officer Flores got out of his police vehicle, identified himself as "Police!" and told the man: "Stop!" The man continued to climb the fence, eventually making it over to the other side. Officer Flores followed and went over the fence, too. Now in the backyard of a residence, Officer Flores saw the man trying to walk down a flight of stairs in the sloped backyard of the house. Officer Flores drew his Taser and yelled: "Stop running or you will be Tased!" The man said: "OK, OK," but continued to run. Officer Flores followed the man down the flight of stairs and yelled: "Stop and get on the ground!" The man reached at gate at the edge of the yard and started to climb the gate. As he did so, the man said: "OK, OK, I give up," but continued to climb the gate. Officer Flores fired his Taser but it appeared to have no effect. Officer Flores said the man took a step towards Officer Flores and Officer Flores fired the second Taser cartridge, but it also appeared to have no effect. The man stood, facing Officer Flores and was "motioning towards his waistband." Officer Flores again told the man to get on the ground, but the man did not comply. Officer Flores said the man put his hand in the pocket of his hoodie, removed something⁷ and threw it over the fence.

discussion between him and another UPD officer checking the wrecked Cadillac. Apparently referring to the shooting, Officer Maycock says: "I missed all of this, none of it came across on [the police radio channel [to which Officer Maycock was listening.]]" An unidentified says: "Ok, so, [an officer] had a blacked-out Dodge truck running from them, possibly involved in their shooting. [Officer] Scriv[ner] calls out [on the radio] that *this* car—completely unrelated—is fleeing from him eastbound 6200 South. They reacquire it, it crashes, they run out on foot, chase him on foot, shooting over here."

⁷ Investigators determined the object Mr. Valencia threw over the fence was his wallet.

Officer Scrivner arrived on scene and joined Officer Flores with the man, the two officers forming a ninety-degree angle with the man between them. Officer Scrivner said he approached the man and Officer Flores from the side to form what Officer Scrivner called a "Tactical L." Officer Scrivner said he yelled: "Show me your hands! Show me your hands! Police!" Officer Flores said he also continued to order the man to show his hands and get on the ground, but the man did not follow his orders and instead swayed side to side while staring at Officer Flores.

The officers said that the man suddenly diverted his attention from Officer Flores to Officer Scrivner in what Officer Flores called "a very fast movement of his head." Officer Flores said the man's "eyes were wide," and Officer Flores said he "immediately felt an overwhelming fear for my partner's life and my own." Officer Flores said he yelled as loud as he could: "Show me your hands or you will be shot!" Officer Flores said the man "shifted his eyes and attention back on [him.]" Officer Flores said he yelled: "Do not fucking reach, I will fucking shoot you!"

Officer Flores said the man "did not comply and quickly moved both of his hands down towards the left side of this waist." Officer Scrivner said: "Instantly, when it happened, he, very quickly—it wasn't like slowly so we could yell more commands, like more intent—it was just very quickly, like: grab, reach." A protocol investigator asked "reach for what?" To which Officer Scrivner replied: "His waistband. The middle section. For sure. It wasn't his back, it wasn't his leg, it was his waistband."

Officer Flores said he "thought or believed [the man] was reaching for a firearm and [Officer Flores] would be shot." Officer Flores said: "I feared my partner would be shot. I feared for the lives and safety of the public and neighbors in the area. I fired my firearm multiple times and watched the suspect fall to the ground." Other police officers arrived and rendered first aid to Mr. Valencia Pena, but he died from his gunshot wounds.

Photos of the shooting scene show Mr. Valencia's body lying near the corner of two fences that join perpendicularly. Although we're not aware of any video recording of the shooting, nor do we have specific indications of distance, based on a review of the scene, it appears both officers were likely between ten to twenty feet away from Mr. Valencia at the time of the shooting.

Witness Statements

Officer Flores

UPD Officer Flores declined to be interviewed or answer questions. He did provide a written statement to protocol investigators. In his statement, Officer Flores wrote that on March 21, 2020, at about 3:35 a.m., he received an "attempt to locate broadcast via dispatch regarding the last known direction of a suspect vehicle involved in a shooting that occurred. Assisting officers and I were at the Kearns substation when we all received the broadcast." Officer Flores wrote that dispatched provided information that "the vehicle was possibly dark in color and 'blacked out' traveling west bound on 5400 South from the Taylorsville area."

Officer Flores wrote that he “conducted an area search starting from approximately 4250 W[est,] 5415 S[outh] and traveled westbound.” Officer Flores wrote: “Officer Scrivner was directly behind me, my other area partners also left the substation in different directions. I did not see any vehicles traveling westbound. I decided to check nearby parks, parking lots, and businesses for the suspect vehicle.”

Officer Flores wrote that he “drove to Lodestone park near 6252 W 6200 S and entered from the east entrance of the park with Officer Scrivner.” Officer Flores wrote that the two officers “turned all exterior lights on our patrol cars off to tactically enter the park.” Officer Flores wrote that he “located a dark vehicle on the opposite side of the park, matching the description of the suspect vehicle from the broadcast we received. The vehicle was in the south parking lot of the park.”

Officer Flores wrote that as he “started driving towards the vehicle, Officer Scrivner was able to get ahead of [him.]” Officer Flores wrote that he “crawled up a curb onto a sidewalk and Officer Scrivner utilized a wheelchair ramp.” Officer Flores wrote that the two officers: “drove onto the sidewalk to drive around the central park pavilion towards the vehicle. The driver in the vehicle immediately turned the vehicle on and started to leave the parking stall.

Officer Flores wrote that he saw that the “vehicle had a taillight out, the vehicle drove southbound to leave the park towards 6200 S.” Officer Flores wrote that “Officer Scrivner followed the vehicle, but the vehicle started to speed up. Officer Scrivner attempted to conduct a traffic stop on the vehicle by initiating his emergency lights. The vehicle failed to yield and fled eastbound on 6200 S.”

Officer Flores wrote that he “reacquired the vehicle as it traveled eastbound on 6200 S, the vehicle was traveling too fast for [him] to safely follow the vehicle.” Officer Flores wrote that he “attempted to get closer to get license plate information, [he] was able to see the license plate for a brief moment, and [he] broadcast the information over the radio.”

Officer Flores wrote: “Once I relayed the license plate information, I backed off the vehicle due to the excessive speeding. The vehicle continued eastbound on 6200 S. As it was reaching the top of a hill at 3200 W[est,] the vehicle appeared to prepare for a turn at the top of the hill at the intersection of 6200 S[outh,] 3200 W[est].”

Officer Flores wrote that as he was “crossing Bangerter Highway, [he] lost sight of the vehicle when it was near 6200 S[outh,] 3200 W[est] at the top of the hill.” Officer Flores wrote: “I arrived at the intersection and looked southbound onto 3200 W. I noticed the vehicle had crashed at approximately 6300 S[outh,] 3200 W[est] and was disabled near the sidewalk on the west side of the street. I saw the driver’s side of the vehicle open, the other doors were closed. I initiated my emergency lights as I turned southbound onto 3200 W[est] towards the vehicle. I saw a male running southbound from the vehicle and no other people were running from the vehicle.”

Officer Flores wrote he “relayed information on my radio the suspect crashed, was running southbound, and wearing grey.” Officer Flores wrote: “I closed the distance between the running suspect by driving. I passed the suspect vehicle and looked inside, I did not see any other occupants inside. The suspect stopped running and started climbing a fence. I placed my patrol car in park and jumped out of my vehicle.”

Officer Flores wrote that he “identified [himself] and gave verbal commands to the suspect, ‘Police, stop!’” Officer Flores wrote: “The emergency lights on my patrol car were still on. I was wearing a standard police uniform with police identifiers, my last name and equipment.”

Officer Flores wrote: “The suspect did not follow my commands and attempted to jump the fence. The suspect was unable to jump the fence the first time. The suspect looked at me and tried jumping the fence again. I commanded the suspect again, ‘Stop!’ The suspect did not follow my commands and was able to get over [the fence.] I was able to catch up to the suspect and jumped the fence.”

Officer Flores wrote that the “fence led to the backyard of a house. The yard was sloped and led downhill, the suspect was trying to walk downstairs on the hill in a westbound direction. The backyard of the house was dark, but a small light was on nearby allowing some light to filter in. Officer Flores wrote: “I drew my taser and told the suspect, ‘Stop running or you will be tased.’” Officer Flores wrote: “The suspect began to say, ‘Okay...’ but continued running westbound.” Officer Flores wrote that, as he “ran down the stairs towards the suspect, [he] gave the suspect commands, ‘Stop and get on the ground.’ The suspect ran towards a gate and said, ‘Okay, okay I give up!’ The suspect said this while he tried climbing the gate.”

Officer Flores wrote: “The suspect was unable to get up the gate and I deployed my taser. The suspect faced me and appeared unphased by the taser. I yelled, ‘Stop! Get on the ground!’ The suspect took a step towards me and did not get on the ground. I tased the suspect with the second cartridge in my taser. The suspect was facing me, still standing, and motioning towards his waistband. I yelled, ‘Get on the ground!’ The suspect did not obey my commands.”

Officer Flores wrote: “I threw my taser on the ground and drew my firearm in fear the suspect was armed. I pointed my firearm at the suspect and gave him verbal commands, ‘Put your hands in the air!’ The suspect said, ‘Okay...’ and put his hands up near the sides of his head. I told the suspect, ‘Get on the ground!’ The suspect did not comply and remained standing. The suspect’s right hand quickly dropped down into the pocket of his hoodie. I thought the suspect was reaching for a weapon. The suspect was wide eyed and kept saying, ‘Okay...’ I immediately felt scared. I thought as if the suspect was going to shoot me.”

Officer Flores wrote: “I ordered the suspect, ‘Take your fucking hand out of your pocket, now! Do it now! Get on the ground! You will be shot!’ The suspect said ‘Okay, okay, okay...’ and attempted to take his hand out. The suspect’s hand appeared to be stuck in the pocket. I placed

my finger on the trigger, began to pull, and yelled, 'SHOW ME YOUR HANDS! YOU WILL BE SHOT!'

Officer Flores wrote that "the suspect was able to get his right hand out of his pocket and threw his hand upward past his head. I could see he was holding something in his hand, the suspect immediately threw the object into the air behind him. I heard the object hit the ground in the neighboring yard south of the yard we were in." Officer Flores wrote: "I once again yelled at the suspect to, 'Get on the ground!'

Officer Flores wrote: "I saw the suspect shift his entire body towards his left side. The suspect was taking small steps back and forth. I was unable to see the left side of his body. I could only see part of the front and the entire right side of the suspect's body. The suspect remained standing. The suspects hands were near the middle of his body, slightly moving down. I saw my partner, Officer Scrivner, approaching us on my left side." Officer Flores wrote that he "continued giving commands for the suspect to show me his hands [and to] get on the ground."

Officer Flores wrote that "the suspect's hands were lowering to and from his chest to his waist. The suspect remained standing and did not get on the ground. The suspect said, 'Okay...calm down, okay...'"

Officer Flores wrote: "I felt as if the suspect was either concealing and/or taking a defensive position by moving to his side the way he did and based off his mannerisms. I felt as though the suspect was trying to manipulate me and catch me off guard by being verbally compliant in saying 'Ok. I give up.' etc., while being noncompliant with his physical actions to my commands, in order to harm me or my partner."

Officer Flores wrote: "The suspect was maintaining eye contact with me during this interaction. I continued giving commands to, 'Show me your hands! Get on the ground!' The suspect suddenly diverted his attention from me to my partner in a very fast movement of his head. The suspects eyes were wide, I immediately felt an overwhelming fear for my partner's life and my own. I yelled as loud as I could, 'Show me your hands or you will be shot!' The suspect shifted his eyes and attention back on me. I continued to yell and told the suspect 'Do not fucking reach, I will fucking shoot you!'"

Officer Flores wrote: "The suspect did not comply and quickly moved both of his hands down towards the left side of this waist. I thought or believed he was reaching for a firearm and I would be shot. I feared my partner would be shot. I feared for the lives and safety of the public and neighbors in the area. I fired my firearm multiple times and watched the suspect fall to the ground. I continued to cover the suspect with my firearm while he was on the ground. Assisting officers quickly arrived in the backyard and took over the scene."

Officer Scrivner

On March 21, 2020, protocol investigators interviewed UPD Officer Scrivner with his attorney present. Officer Scrivner said he was on duty in Kearns, Utah, working a graveyard shift that started the previous afternoon. Officer Scrivner said he and other officers were at the UPD Kearns substation when they heard police radio dispatchers broadcast an “attempt to locate” (“ATL”) request for a vehicle traveling westbound. Dispatchers broadcast a report of shots being fired in the area of 6200 South and Bangerter Hwy. The ATL was for a westbound traveling vehicle. Officer Scrivner said the ATL asked officers to look for a dark colored “darked-out⁸” vehicle, possibly a truck, The ATL was broadcast in connection with a report of gunshots fired in the area of 6200 South and Bangerter Hwy.

Officer Scrivner said he and Officers Flores, McKay, and Rodriguez left the substation and got into their police cars. Officer Scrivner said he and the other officers loaded the information from dispatchers into their in-car computers and drove to the area of 6200 South and Bangerter Hwy. Officer Scrivner said he, Officers Flores, [23:32] and Officer McKay traveled westbound on 5400 South. Officer Scrivner said he and Officer Flores continued westbound as Officer McKay turned southbound on 5600 West.

Officer Scrivner said he and Officer Flores briefly turned direction to follow a truck he soon determined was not related to the ATL. Officer Scrivner said he and Officer Flores turned southbound on Copper City Drive to go investigate a possibility that a person known to Officer Scrivner and Officer Flores may have been involved in the reported shots-fired incident.

Officer Scrivner said he and Officer Flores drove past the home of the person of interest and they made a right turn into the nearby Lodestone Park. Officer Scrivner said they turned into the northeast entrance of the park’s smaller parking lot. In the larger parking lot, accessed by 6200 South, Officer Scrivner said he saw a dark colored, parked car. Officer Scrivner said to access the larger parking lot from the smaller, the officers had to drive their cars on a walkway that connected the two parking lots. Officer Scrivner said he drove first followed by Officer Flores and the two officers drove their police vehicles on the walkway towards the larger parking lot.

Officer Scrivner said as the two officers drove on the walkway, the parked vehicle in the larger lot started moving. Officer Scrivner said his senses “went up a little bit,” and he thought it was “weird” that the vehicle started to move. Officer Scrivner said he noticed the car had a light on the right rear side of the vehicle. Officer Scrivner said the vehicle moved away from his patrol car.

Officer Scrivner said he thought: “ok, I already have a stop, because it’s in a park after hours, it’s got a taillight out, super weird, there’s not a lot of traffic out on the street right now, especially with the the corona virus and the lockdown and all that.” Officer Scrivner said he

⁸ Officer Scrivner said he believed the “darked-out” description in the ATL meant that the vehicle was traveling at night without headlights or running lights.

went to stop the vehicle; he said he waited for the vehicle to make the turn onto 6200 South and for Officer Flores to catch up.

Officer Scrivner said he turned on his overhead emergency lights and as soon as he did so, the vehicle accelerated and drove through the stop sign with “wheels screeching, spinning” and drove eastbound on 6200 South. Officer Scrivner said he called out on the radio that he had a black Cadillac CTS evading him going eastbound on 6200 South and he turned off his overhead lights.

Officer Scrivner said he could see the vehicle driving eastbound on 6200 South for a long way. Officer Scrivner said he let UPD Taylorsville units and/or Officers Rodriguez and McKay know the vehicle was headed towards them. Officer Scrivner said Officer Flores drove past him and got closer to the Cadillac. Officer Scrivner said followed Officer Flores and they drove eastbound on 6200 South. Officer Scrivner said Officer Flores broadcast on the radio that the Cadillac “blew the red light at Bangerter.” Officer Scrivner said he heard Officer Flores broadcast on the radio that the Cadillac turned right on 3200 West.

Officer Scrivner said he heard Officer Flores say: “vehicle abandoned, they’re boogying on foot, 3200 West.” Officer Scrivner said he arrived at the abandoned Cadillac and parked behind it. Officer Scrivner said he saw Officer Flores’ car parked ahead of them. Officer Scrivner said he heard Officer Flores broadcast on the radio: “he’s climbing a fence” or “he’s hopped a fence.”

Officer Scrivner said he got out of his patrol car and walked past the Cadillac. Officer Scrivner said the car’s windshield wipers were running and the airbags had deployed. Officer Scrivner said the motor was still running and smoking and it looked to Officer Scrivner like the vehicle broke the front axle. Officer Scrivner said he noticed the license plate was taped on with blue tape. Officer Scrivner said he heard on the police radio that the vehicle was not reported as stolen.

Officer Scrivner said he could hear Officer Flores yelling and could hear voices. Officer Scrivner said he didn’t know how many people ran from the car or how many people were involved with the incident. Officer Scrivner said he heard: “pop, pop,” and thought it might be a Taser deployment, but from the sound he couldn’t be sure—he thought it could also be gunshots. Officer Scrivner said he didn’t know what was going on.

Officer Scrivner said he called out to Officer Flores: “Where are you?” Officer Scrivner said Officer Flores replied: “Over the fence.” Officer Scrivner said he heard Officer Flores challenging someone, yelling: “Stop! Police! Show me your hands! Show me your fucking hands!” Officer Scrivner said he jumped the fence and saw Officer Flores and a man in a corner where two fences meet. Officer Scrivner said he saw Officer Flores with his handgun pointed at the man. Officer Scrivner said he also drew his handgun and ran towards the corner.

Officer Scrivner said the man and Officer Flores were standing facing each other about ten feet apart. Officer Scrivner said Officer Flores was facing south and squared off with the man; the man's body was turned towards the west, but his head was directed towards Officer Flores. Officer Scrivner said when he approached the two, he was on Officer Flores' left. Officer Scrivner said he saw Officer Flores' Taser on the ground. Officer Scrivner said he didn't know whether the man had in fact been Tased. Officer Scrivner said he approached the man and Officer Flores from the side to form a ninety-degree angle, or, what Officer Scrivner called a "Tactical L." Officer Scrivner said he yelled: "Show me your hands! Show me your hands! Police!" Officer Scrivner said he yelled to Officer Flores: "Prone him out! Prone him out!" Officer Scrivner said he yelled to the man: "Drop to your knees! Drop to your fucking knees!"

Officer Scrivner said the man looked at Officer Scrivner and made eye contact with him. Officer Scrivner said the man had "like a thousand-yard stare." Officer Scrivner said it seemed like the man was looking "though" him. Officer Scrivner said he had seen that look before, sometimes in people with mental health⁹ and intoxication issues. Officer Scrivner said the man looked at him for perhaps a second or two but it was long enough to make a "tunnel vision" eye contact with Officer Scrivner.

Officer Scrivner said the man looked back at Officer Flores and said: "Chill out, or calm down, bro, or something like that." Officer Scrivner said it looked to him like the man was going through a "thought process." Officer Scrivner said the man had a leg slightly lifted off the ground and his body was slightly hunched over. Officer Scrivner said, to him, it looked like the man was making a decision.

Officer Scrivner said once the man said this, he looked and "he does this, he's like this. His hands, I could see his hands, and then he goes like this, real quick, and that's when I hear four gunshots. And he instantly drops down a little bit from where he was crouching, and then he kind of like looks--he's looking at [Officer Flores], like, eye contact and the eyes just kinda, you can see the life, almost like turning the lights down, like they're out." Officer Scrivner said he called for medical help to arrive and broadcast his approximate location on the police radio.

Officer Scrivner said other officers and personnel arrived at the scene. Officer Scrivner said he went back to his car to get gloves. As he walked around, Officer Scrivner said Officer Flores said: "Why did he do that? I told him. Why?" Officer Scrivner said he could see shock in Officer Flores' face. Officer Scrivner said he asked Officer Flores if he was ok, if he was good? Officer Scrivner said Officer Flores said: "Yea" and was "in total shock."

Protocol investigators asked Officer Scrivner to describe the man's actions with his hands. Officer Scrivner said: "His hands weren't up, like, how we usually want people when we're conducting a high risk stop to be, like: 'Hands up.'" Officer Scrivner said he and Officer Flores were trying to get the man to go through the steps of a high risk stop: to turn around, drop to one's knees. Officer Scrivner said the officers were ordering the man to show his hands but

⁹ Officer Scrivner said he had seen the thousand-yard stare "in people with 10-96 issues," which is a reference to police radio ten code, in which "10-96" is code for a person with a mental disorder.

he was being “very evasive with his hands.” Officer Scrivner said the man’s hands: “weren’t up, they weren’t out, they were very close to his proximity, his torso, his chest, and it looked like, in my opinion, especially when he said what he said, it was like he was distracting, like going through that thought process of what he was going to do.” Officer Scrivner said the man “didn’t turn, he was just super defensive, in the corner, like, hiding something, is what I would imagine somebody, if they were going to hide, would do.”

Officer Scrivner said: “Instantly, when it happened, he, very quickly—it wasn’t like slowly so we could yell more commands, like more intent—it was just very quickly, like: grab, reach.” A protocol investigator asked “reach for what?” To which Officer Scrivner replied: “His waistband. The middle section. For sure. It wasn’t his back, it wasn’t his leg, it was his waistband.”

Witness P. T.

Protocol investigators interviewed a man to whom we refer as “P. T.” who lives on the street on which the Cadillac crashed. P. T. said he was awake and heard a car skid and hit something. P. T. said he opened the blinds on his window and saw a car up against the curb. P. T. said he saw a police car with emergency lights on coming toward the wrecked car.

P. T. said he saw a man get out of the car and run while carrying something in his arms. P. T. said the man ran down the street and jumped the fence of the house directly across the street from his bedroom window. P. T. said he saw the first officer jump the fence, then he saw another officer arrive and also jump the fence. P. T. said he heard an officer yell: “Stop or I’ll fucking shoot you.” P. T. said this was followed by three rapid shots. P. T. said he saw other officers arrive and go into the yard.

Witness C. P.

Protocol investigators interview a woman to whom we refer as C. P. who said she was awake and heard a commotion going on outside with people yelling at each other. C. P. said she went into the kitchen to get a better look and heard someone yell: “Fuck you.” C. P. said she heard more yelling but could not make out what was being said.

C. P. said she closed the curtains on the window and heard four or five gunshots. C. P. said she went out the back door with her husband and saw two officers on top of the neighbors’ fence. C. P. said she saw more police officers arrive and take a section of fence down where they had jumped it. C. P. said she heard sirens for the ambulance as it arrived.

Physical Evidence

Protocol investigators inspected and photographed the OICI scene, and reviewed body-worn camera recordings. Investigators also located and obtained surveillance camera recordings from a nearby building.

Body-Worn Camera Recordings

Officer Flores was wearing a body-worn camera earlier that evening. His body-worn camera recorded a traffic stop and DUI investigation some time earlier. Officer Flores' body-worn camera did not record this incident and his statement did not explain why. Investigators determined that Officer Flores' body-worn camera became detached from his uniform during the foot pursuit and likely as Officer Flores went over the fence as he followed Mr. Valencia over the fence. Investigators recovered one of Officer Flores' magazines from the ground near the fence and likely in the area where Officer Flores went over the fence. This magazine was stored in Officer Flores' magazine pouch on his duty belt. Investigators believe that, as Officer Flores went over the fence, the same dynamics that caused his magazine to fall from his duty belt likely dislodged his body-worn camera before Officer Flores encountered Mr. Valencia at the ninety-degree angle fence where the shooting occurred.

Officer Scrivner was not wearing a body-worn camera during the incident. As far as we know, no video recording exists of the shooting or the events leading up to it. Protocol investigators reviewed the audit logs of body-worn cameras issued to UPD members including Officer Flores and determined no anomalies occurred with body-worn camera recordings during the relevant time in question; in other words, no one deleted or edited a recording of the shooting and related events. Insofar as protocol investigators could determine, no video recording of the shooting exists.

Officer Rodriguez was wearing a body-worn camera. He arrived after shortly the shooting. The first thirty seconds of the recording has no audio, as is consistent with the buffering feature of an Axon brand body-worn camera. His body-worn camera recording begins as he runs through a yard towards the scene of the shooting. As his audio joins the video recording, the camera shows Mr. Valencia's body on the ground next to the fence, and an officer standing about eight feet away from Mr. Valencia with his firearm drawn and pointed at Mr. Valencia. Officer Rodriguez's body-worn camera shows him securing Mr. Valencia as he waits for other officers to assist with first aid. Five minutes of recording elapses before Officer Rodriguez begins CPR. Medical personnel arrive at eight minutes and thirty seconds into the recording.

Officer Downloads

OICI Protocol investigators examined Officer Flores' and Officer Scrivner's weapons and police equipment they used and possessed during the OICI. The magazine from Officer Flores' weapon had eleven cartridges remaining in it; the weapon had one cartridge in the chamber. Officer Flores' other magazines were filled to capacity, each containing seventeen cartridges. Investigators determined it was likely Officer Flores fired six times at Mr. Valencia.

Officer Scrivner's weapon was downloaded and determined not to have been fired in the incident, which appears consistent with all the other information of which we're aware.

Both Officer Flores and Officer Scrivner had tactical flashlights affixed to their weapons; both lights functioned normally during inspection. In body-worn camera recordings made after the shooting, officers' tactical lights can be seen on the weapons.

Autopsy

Dr. Brent Davis with the Utah Office of the Medical Examiner performed the autopsy of Mr. Valencia's body. Dr. Davis said he observed six gunshot wounds that entered Mr. Valencia's right side and traveled to the left. Dr. Davis said that, based on the injuries and wounds, Dr. Davis believes Mr. Valencia's arms were down and to the side of his body and not raised when he was shot.

LEGAL ANALYSIS

The scope of this review, and the OICI Protocol investigation related to it, is narrow in its scope and purpose: to determine whether the facts of this case, when applied to the law, warrant the filing of a criminal charge against an officer who used deadly force. While there may be many ways to consider the propriety of officer's use of deadly force (i.e., a tortious action, a civil rights review, a policy consideration, etc.) our review only considers one: do our legal and ethical obligations as a public prosecution office compel a criminal charge against the officer?

In considering whether to charge law enforcement officers who use deadly force with a criminal offense, we try to ascertain whether Utah's broad affirmative defense of justification, particularly as applied to law enforcement officers, effectively precludes criminal prosecution based on the facts before us. In other words, we ask whether an officer could establish at trial that he or she reasonably believed the use of deadly force was necessary to prevent death or serious bodily injury to the officer or another person.

This is a challenging case. For reasons we discuss further below, we cannot say that this shooting and killing of an unarmed man, who never presented even a facsimile of a weapon or even an object which could have been mistaken for a weapon, or in a manner in which a fair inference would suggest a weapon, is a justified use of deadly force. On the other hand, we believe Officer Flores' statements describing his thought process and decisions reflect his honest beliefs and likely would provide a jury a reasonable doubt of whether Officer Flores unlawfully caused the death of Mr. Valencia. We don't believe a jury would convict Officer Flores of murder or another criminal charge, the elements of which square with the facts of this case.

In this case, although Officer Flores testified about his observations, inferences, beliefs, and conclusions that caused him to decide to use deadly force, he was nevertheless factually, objectively wrong about the necessity for him to use deadly force. Mr. Valencia did not and could not have threatened Officer Flores or Officer Scrivner with death or serious bodily injury because Mr. Valencia did not have the means to do so. Mr. Valencia did not have a gun and

could not have shot either officer. Even though Officer Flores testified that he believed deadly force was necessary, it was not.

As illustrated by this case, an officer cannot reasonably believe deadly force is necessary when 1. he or she is mistaken about the necessity, and 2. the facts of the incident leave significant room for interpretation of the subject's threat—including his intentions—and the meaning of his actions. To be reasonable, an officer's perception of a threat of death or serious bodily injury must be based on either direct evidence of such a threat; or, without direct evidence, circumstances so clear and compelling that little room for an alternative reasonable interpretation exists.

Where circumstances create inferences of a threat of death or serious bodily injury to the officer, those circumstances must be comprised of facts that, taken together, create a scenario in which an objective, reasonable officer would conclude that deadly force is necessary. For example, if officers respond to a man-with-a gun call, and third-party witnesses inform an officer they saw the subject with a gun, and the subject conceals a hand in a pocket when the officer orders the subject to show his hands, it may be reasonable for the officer to infer the subject has a gun, even though the officer is not privy to direct evidence of the gun. And if the subject quickly withdraws his hand from the pocket while holding an object, it may be reasonable for the officer to believe deadly force was necessary to prevent the officers death, even if it turns out later the subject was unarmed. In such instances, the officer's mistaken belief about the subject was nevertheless a reasonable mistake because the circumstances supported reasonable inferences such that an objective, reasonable officer likely would make the same mistake. In such instances, we've concluded that, although mistaken, the officer reasonably believed that deadly force was necessary, and we've determined the affirmative legal defense of justification applies. In these instances, an officer who is factually mistaken about the necessity to use deadly force can nevertheless justifiably use deadly force when the thing or circumstances that caused the officer to believe deadly force was necessary left little room for interpretation—when one outcome seemed clear to the officer.

To cite another example, when a subject presents a realistic facsimile of a deadly weapon, or at least presents an object or acts in a certain way that, under the specific conditions of the case, presents at least the reasonable appearance of a threat, the interpretation of the situation presented to the officer left little room for alternative reasonable inferences. In other words, when a subject presents a facsimile of a firearm, although the shooting officer is mistaken about the necessity to use deadly force (shooting and killing a subject with a realistic but fake gun isn't necessary) the officer's belief nevertheless may be reasonable because the officer couldn't be expected to know the gun was fake, or a subject behaved in such a way under circumstances creating an outcome that seemed very likely to occur—not a scenario in which eventualities other than a threat of deadly force also seem probable and supported by the facts.

In previous cases, when, for example, an officer had reason to believe the subject was armed with a gun, and the subject presented an object that wasn't a gun, but did so under circumstances consistent with the use of a gun—the subject drew the item from a waistband, the

subject pointed the object in officers' direction, as so on—we've concluded those uses of force to be justified because we could point to specific attributes of the encounter that left little room for alternative reasonable interpretations. In such instances, even though an officer was ultimately mistaken about the need to use deadly force, we found that the mistake was reasonable, because the facts created a totality of circumstances in which an objective, reasonable officer likely would have made the same mistake, and we can point to the specific fact or facts that created the totality of circumstances from which reasonable (albeit mistaken) inferences were drawn. The ability to point to specific facts (as those mentioned in the above hypothetical examples) that create a totality of circumstances in which reasonable inferences can be drawn provides the basis for a review to conclude that a mistaken use of deadly force was nevertheless reasonable and therefore, justified. Conversely, it's unreasonable to make inferences (and base decisions on those inferences, and consequently act in accordance with those decisions) without specific, articulable facts to support those inferences. Without a set of facts from which reasonable inferences can be drawn—where room for alternative interpretations of a subject's action exist—an officer may not be able to reasonably infer a threat of death or serious bodily injury.

In this instance, Officer Flores cannot (or at least did not) point to a reason why he thought Mr. Valencia had a gun. Officer Flores did not say that he saw part of a gun, the outline of a gun, items commonly associated with guns (i.e., a holster, a magazine, cartridges, etc.); as far as we know, Mr. Valencia said nothing about having a gun or using a gun; Officer Flores did not say he saw Mr. Valencia drop an object and pick it up; Mr. Valencia was not carrying anything in his hands. Indeed, when he was shot, Mr. Valencia didn't even make a drawing motion or act like he was drawing a gun or a weapon from his waistband. Officer Flores used deadly force, because, in his words: "The suspect did not comply and quickly moved both of his hands down towards the left side of this waist. I thought or believed he was reaching for a firearm and I would be shot." We read this to mean that Officer Flores used deadly force to prevent Mr. Valencia, not from drawing or producing a gun, but to stop Mr. Flores from reaching for—what Officer Flores said he believed—was a gun. Although Officer Flores articulated the totality of the circumstances that combined to cause him to believe that Mr. Valencia's actions were intended and designed to do one thing—produce a gun—we're not persuaded that these circumstances were sufficient to make Officer Flores' belief reasonable. Therefore, we cannot conclude Officer Flores' use of deadly force was justified.

Police officers are state [government] agents and hold a special status of respect in our community. They are often asked to engage with individuals who pose a threat of harm to our community of citizens and the very officers who must engage with them. Given the dangers inherent in these encounters, policy makers afford police legal protections for their use of deadly force and the use of force in general.

The underlying policy concerns balancing officer safety, safety of the community, and a member of the public must be weighed carefully by the circumstances of each situation. Police do not have an independent status outside of the community they are obligated to serve and protect, and, ultimately, they are to serve and protect both the deserving and undeserving. The integrity—indeed the legitimacy—of our society depends on the fidelity to our community of

citizens and a vigilance to ensure that any state-sanctioned force is used both discretely [appropriately] and only when absolutely necessary. This burden to use force both appropriately and only when absolutely necessary falls upon the officer and not the citizen.

To some, this may seem an unfair burden to place on an officer; but one can fairly ask: Who should bear this burden—the officer who is trained, equipped, and authorized in certain circumstances to use that force? Or the citizen who the state is obliged to protect and from whom the state ultimately derives its authority?

When there are two equally competing impulses, we should be compelled to act in favor of the outcome which preserves life rather than destroys it. Anticipatory shootings such as this—shootings which anticipate the threat of death or serious bodily injury before the likelihood of the realization of the threat can be assessed—cannot be sustained when the officer guesses wrong under circumstances in which (mistaken) inferences are not supported by the facts. Nor do we diminish the very real dangers that confront law enforcement and the need for officers to be able to anticipate a threat of death or serious bodily injury. We do not suggest an officer must actually be threatened with death or serious bodily injury before the officer's use of deadly force will be deemed reasonable. But if an officer uses deadly force before he or she is actually threatened with death or serious bodily injury, and it turns out the subject wasn't capable of actually threatening death or serious bodily injury and the officer was mistaken about the need to use deadly force, then our determination of whether the mistake was reasonable will turn on the objective facts supported by evidence upon which inferences were based, or the lack of facts from which unsupported inferences were unreasonably drawn.

Although the Supreme Court case of *Graham v. Conner* discusses uses of force in a civil rights context, the discussion regarding the objective nature of a reasonable belief is instructive and distinguishes a reasonable belief for a justified use of force from a subjective (but fact-based) belief that gives rise to a reasonable doubt of a criminal act, as discussed below. “As in other Fourth Amendment contexts, however, the ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *Scott v. United States*, 436 U. S. 128, 436 U. S. 137-139 (1978); see also *Terry v. Ohio*, [] at 392 U. S. 21 (in analyzing the reasonableness of a particular search or seizure, ‘it is imperative that the facts be judged against an objective standard.’) An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.” *Graham*, 489 (citations omitted.) Our conclusion that Officer Flores’ belief was unreasonable arises from *Graham*’s objective standard that evaluates the “facts and circumstances confronting [him], without regard to [his] underlying intent or motivation.” *Id.*

Our analysis does not engage in hindsight or second-guessing. Our analysis considers the unfolding of events as they happened during the incident and considers each fact as it arose and whether Officer Flores’ inferences were supported by the facts. For instance, although Officer Flores and his colleagues initially were dispatched on a “shots fired” call, there isn’t any

evidence that Mr. Valencia was involved in the “shots fired” incident. There’s no evidence that Mr. Valencia had a gun as he fled in his car from the officers; no evidence that he was armed as he ran through the neighborhood; no evidence that he had a gun when he stopped at the fence. While there were bits of information available to Officer Flores, they did not compel one likely outcome or conclusion; namely, that Mr. Valencia had a gun. The information available to Officer Flores could have supported other conclusions—that Mr. Valencia had an innocuous object in his waistband, perhaps much like the wallet he had in his pocket which Mr. Valencia had only just removed¹⁰ from his pocket and discarded.

As we studied the events as they unfolded and in the sequence in which they unfolded, we could not find a fact that supported an inference that compelled the conclusion that Mr. Flores was armed with a gun, let alone that he intended to use it against the officers. Indeed, when Officer Flores shot Mr. Valencia, Mr. Valencia wasn’t drawing anything from a place of concealment—he was ostensibly reaching for something. But to infer he was reaching for a gun requires an inference for which we cannot find supporting facts, and therefore an inference we cannot say was reasonable, because other conclusions—ones in which Mr. Valencia did not and could not threaten death or serious bodily injury—could also be drawn from the same set of facts. But to be clear, we do not incorporate the fact that Mr. Valencia could not, in point of fact, threaten the officers with death or serious bodily injury because it turned out he was unarmed—to do so would be to employ hind-sight and second guessing in our analysis. Rather, we leave aside the fact that Mr. Valencia was unarmed, and only look to the facts available to Officer Flores and upon which he made inferences (or, more correctly, the unsupported inferences not based on objective facts) that led to Officer Flores’ decisions and ultimately his use of deadly force.

Just because we cannot conclude that Officer Flores’ use of deadly force was based on a reasonable belief does not mean we must therefore file criminal charges, which, elementally, require us to show some level of criminal intent by Officer Flores. Nothing in the facts of this case indicate a criminal intent by Officer Flores. Officer Flores’ mental state involved a mistake resulting from unsupported inferences, but a mistake, nonetheless. While some mistakes may constitute a criminal violation of the law, the statutes make clear the actor’s requisite mindset in

¹⁰ Ironically, had Officer Flores shot Mr. Valencia when Mr. Valencia pulled out his wallet, our analytical task would have to have considered this action as part of a mistaken perception and belief that Mr. Valencia posed a threat. It would not be inconceivable for Officer Flores to have perceived such an act—pulling an object out of his pocket—as consistent with a threatening gesture.

order for a mistake to constitute a crime. For example, some offenses require an actor to act recklessly¹¹, or with criminal negligence¹² in order for a mistake to constitute a crime.

Here, we're not aware of any evidence to support a claim that Officer Flores was aware of a substantial risk that Mr. Valencia was not armed, or that he should have been aware of a substantial risk that Mr. Valencia was not armed such to such a degree that it represented a gross deviation from that of an objective, reasonable officer. If, hypothetically, the evidence supported a conclusion that Officer Flores shot Mr. Valencia even though he said to himself: "There's a substantial risk this man might not be armed," such facts might support a claim that Officer Flores acted recklessly with regard to his use of deadly force. Or, hypothetically, if the evidence supported a conclusion that, under the same conditions, any other officer should have known that Mr. Valencia was not armed, such facts might support a claim that Officer Flores acted with criminal intent, if the facts also supported a finding that Officer Flores' conduct constituted a gross deviation from what an ordinary officer would do in the same situation. Although we concluded above that Officer Flores' inferences were not supported by the facts of the situation and his mistake was therefore unreasonable, it does not necessarily follow that a jury would conclude that Officer Flores acted with a criminal intent or that he was not honest in his statements that he believed he needed to use deadly force. Sometimes, mistakes are just that, and the facts of this case do not support a finding of criminal intent. When mistakes are made without criminal intent, often the proper forum for redress, if appropriate, may be found through civil remedies, or in the administrative arena, although we express no opinion on the merits of this matter in either forum or others. But the facts of this case do not support a remedy in the criminal justice system.

Where a reasonable doubt will likely lie in the minds of jurors, our ethical obligations prevent us from filing a criminal charge. In this case, all the evidence upon which we could rely

¹¹ Utah law outlines jury instructions for reckless conduct: "A person acts 'recklessly' when [he][she] is aware of a substantial and unjustifiable risk that: certain circumstances exist relating to [his][her] conduct, but [he][she] consciously disregards the risk and acts anyway; or [his][her] conduct will cause a particular result, but [he][she] consciously disregards the risk and acts anyway. The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation. 'Conduct' means either an act or an omission." MUJI CR 304A, citing U.C.A. 76-2-103(3)(2015). Also: "A person acts 'recklessly' when [he][she] is aware of a substantial and unjustifiable risk that certain circumstances exist relating to [his][her] conduct, but [he][she] consciously disregards the risk and acts anyway. The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation. 'Conduct' means either an act or an omission." MUJI CR 304C, citing U.C.A. 76-2-103(3)(2015).

¹² Utah law outlines jury instructions for criminally negligent conduct: "A person acts with criminal negligence when [he][she] should be aware that [his][her] conduct creates a substantial and unjustifiable risk that a particular result will occur. The nature and extent of the risk must be of such a magnitude that failing to perceive it is a gross deviation from what an ordinary person would perceive in that situation. 'Conduct' means either an act or an omission. MUJI CR 306C, citing U.C.A. 76-2-103(4)(2015). "The concepts of 'recklessness' and 'criminal negligence' are similar in that both require the presence of a substantial and unjustifiable risk. They differ in that it is reckless to act if one is aware of the risk, while it is criminally negligent to act if one should be aware of the risk. In either event, the behavior must be a gross deviation from what an ordinary person would do under the same circumstances." MUJI CR307.

and base a criminal prosecution against Officer Flores comes from his statement and the testimony of Officer Scrivner. Because neither officer wore a body-worn camera and we're not aware of any video recording or any other witness to the incident, we're left with the evidence and conclusions derived from the officers' statements. The paucity of additional evidence also prevents us from articulating and establishing a criminal intent.

In this case, even though we conclude Officer Flores' subjective belief that deadly force was necessary was not a reasonable belief, we also believe a jury would be able to rely on Officer Flores' explanation of the totality of circumstances under which he made the decision to use deadly force. We add this to the fact that we're not aware of any evidence to support a belief that Officer Flores used deadly force with a criminal intent—quite to the contrary, we believe Officer Flores used deadly force because he believed he and his partner were about to be shot. Where an officer subjectively believes he faces a threat of death or serious bodily injury, and that subjective belief is not the product of pure imagination, unconnected to the reality of the situation, but rather a belief that can sequentially be followed and relates to objective facts at least tenuously, when viewed through the lens of our burden to prove a criminal case beyond a reasonable doubt, a subjective belief may provide a jury a reasonable doubt that an officer acted unlawfully. In such a scenario, a jury's recourse is to return a verdict of not guilty against the officer.

Officer Flores' subjective belief—as distinguished from our analysis of an objectively reasonable belief—is his belief, albeit factually mistaken, that he needed to use deadly force against Mr. Valencia to prevent death or serious bodily injury. His subjective belief, arising from his perceptions of the events, may support a reasonable doubt that Officer Flores acted with a criminal intent necessary to sustain a criminal conviction. We don't believe the facts of this case would overcome a defense's case of reasonable doubt because we acknowledge Officer Flores' beliefs, though not objectively reasonable for reasons outlined above, are nevertheless at least tenuously supported by the facts as we understand them to be. As importantly, we have no objective, empirical evidence to refute the officers' statements and accounts of the incident, so we must consider the weight of Officer Flores' statements at face value and consider their impact on a jury weighing the balance of evidence. At trial, it would be the prosecution's burden, not Officer Flores,' to prove beyond a reasonable doubt that Officer Flores did not believe he needed to use deadly force. In a criminal case, when the defense of reasonable doubt tips the scales in an officer's favor, legal obligations require the jury to acquit the officer and, by extension, ethical obligations prevent us from filing a case.

CONCLUSION

As noted previously, the facts and conclusions set forth in this letter are based on the evidence of which we are currently aware. If additional facts become available, these conclusions may change.

Based on the facts presented, and as outlined in more detail above, we conclude Officer Flores' use of deadly force does not meet the elements to qualify for the affirmative legal defense of justification. However, we believe a jury would likely determine that Officer Flores believed he needed to use deadly force. Such a finding would likely raise a reasonable doubt that Officer Flores acted with criminal intent—a necessary element to satisfy for a conviction. Although we don't conclude that Officer Flores' use of deadly force satisfies the elements of a justified use of deadly force, we nevertheless decline to file a criminal charge against him in this case.

Very Truly Yours,



Sim Gill,
Salt Lake County District Attorney