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JACKSON COUNTY PROSECUTING ATTORNEY

November 28, 2017

Chief Richard Smith
Kansas City Police Department
1125 Locust
Kansas City, Missouri 64106

**Re: Law Enforcement-involved shooting on
 October 8, 2016 at 44th Street and Meringston Avenue¹**

Chief Smith:

This office convened its Use of Force Committee on multiple occasions to examine the facts and circumstances surrounding the shooting of a civilian² by two officers during an attempted stop. Based on the investigation and the law, our Committee has concluded that there is insufficient evidence to show that the officers were not legally entitled to use the force they applied. As such, charges will not be filed in this matter against the officers.

Summary of Facts

In the early morning of October 8, 2016, officer 1 and officer 2 were uniformed officers working in a marked police vehicle.³ Officer 1 was the driver of that vehicle and officer 2 was the passenger.⁴ Between 2:51 a.m. and 2:54 a.m., the officers' in-car computer gunshot detection alert system ("Shotspotter") notified them of a sequence of gunshots starting at 3701 Wabash Avenue and ending at 4301 Wabash Avenue.⁵ The sequence and location of shots suggests that the shooter was moving.

The following map illustrates the sequence of the shots:

¹ Citations to the investigative file will be identified as O.I.S. CRN: 16-075438 followed by the specific bates stamped page number.

² The victim of the use of force will hereinafter be referred to as the "civilian."

³ O.I.S. CRN 16-075438 (see original report, dash camera, and dispatch call log).

⁴ O.I.S. CRN 16-07548 (see officer statements)

⁵ O.I.S. CRN 16-075438 (see original report, dash camera, and dispatch call log). The gunshot alert detection system used by the officers in this matter was "Shotspotter." This is a program that uses acoustic sensors which are spread out over various areas and allow for the detection and locating of gunshots. See http://www.shotspotter.com/system/content-uploads/ShotSpotter_FAQ_July_2016.pdf.





At approximately 2:54 a.m., the officers traveled south on Prospect Avenue and, as they turned west on 43rd Street, they observed a gray Mercury Sable driven by a man who would later be identified as the civilian Heading eastbound on 43rd.⁶ As the officers turned west on 43rd Street they activated their vehicle's spotlight on the Sable and the surrounding street and sidewalk.⁷ When the officer illuminated the driver's side of the Sable, the civilian looked directly at the officers, then quickly looked away and left the area.⁸ The officers then traveled a short distance west on 43rd Street before noticing no other vehicular or pedestrian traffic in the area of the final Shotspotter notification.⁹ They then turned back toward Prospect to locate the Sable.¹⁰ At that point, the officers saw the Sable leave the area at a high rate of speed.¹¹ Eventually, the officers located the vehicle and, despite the police vehicle's lights and sirens being activated and no other traffic in between the police vehicle and the Sable, the Sable did not stop.¹² The radio traffic, as relayed by officer 2 to dispatch during the pursuit, stated that the police vehicle was traveling at 70 mph per hour.¹³ The officer's in-car dash camera showed that their vehicle's speed hit 73 mph during the pursuit.¹⁴ The pursuit lasted approximately 2 minutes and covered .9 miles.¹⁵

⁶ O.I.S. CRN 16-07548 (officer statements and dash camera (1—looking out)).

⁷ O.I.S. CRN 16-07548 (dash camera (1)).

⁸ O.I.S. CRN 16-07548 (officer statement (1)).

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

At approximately 2:57 a.m., the civilian, followed closely by the officers, turned onto 44th Street at or near Meringston Avenue.¹⁶ The below pictures show this unique portion of roadway:



This roadway is a dead end. After the paved roadway ends, there is a grassy area and a low retaining wall. The paved roadway slopes downward from the grassy area to the intersection of 44th Street to Meringston Avenue as shown in this picture:



The Sable passed the paved roadway and came to rest on the grassy portion of 44th Street.¹⁷ The patrol vehicle stopped within a car length of the driver's side rear of the Sable.¹⁸ As the officers' vehicle came to rest, officer 2 is heard on his police radio stating "hold the air...we are going to be foot bail."¹⁹ The term "foot bail" is commonly used by law enforcement to describe a foot chase/pursuit. The officers immediately exited their vehicle and shouted commands. As they did so, the Sable began to roll down the sloped roadway towards the passenger side of the now parked police vehicle.²⁰

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

The police vehicle's video and audio system captured some portion of this event but it did not capture the entire event.²¹ The exterior dash camera captured activity directly in front of the front windshield.²² This view showed the Sable stop, start to roll backwards, and veer or circle around the police vehicle.²³ The time stamp on that video shows that a little over 13 seconds elapsed from the time officers began to exit their vehicles to the conclusion of shooting. This view showed that the civilian was looking over his shoulder and turning the wheel as the vehicle rolls backwards as shown below.²⁴



The exterior dash camera shows that Officer 1 fired his weapon multiple times.²⁵ These shots were fired while officer 1 was standing near the driver's side of the police vehicle and traveled across the front hood of the police vehicle towards the front driver's side of the Sable.²⁶ As the shots began, as evident from the audio and the smoke from Officer 1's shots across the front hood, the Sable and civilian moved out of the exterior camera's view.

This camera's audio also captured some of Officer 2's actions. As Officer 2 exited the passenger side of the police vehicle, he said, "[h]e's trying to hit me."²⁷

²¹ O.I.S. CRN 16-075438 [dash 1 and dash 2]

²² Id.

²³ Id.

²⁴ Id.

²⁵ O.I.S. CRN 16-07548 (dash camera (1))

²⁶ Id.

²⁷ O.I.S. CRN 16-07548 (dash camera (1 and 2.

The interior dash camera mainly captured the interior passenger seat through the back of the car with some view of the area outside the passenger side windows.²⁸ This camera showed that after Officer 1 initially fired, he then continued to “track” or follow the movement of the Sable and he moved to the rear of the police vehicle.²⁹ When he arrived at the rear of the vehicle, Officer 1 fired an additional round of shots at the drivers’ side front of the Sable.³⁰ This view does not show what if anything the civilian was doing at the time of this second round of shots.³¹

The interior camera shows Officer 2 exit the vehicle and the Sable moved parallel to the police vehicle.³² Once again, it appears that the civilian steered the wheel of the Sable as it is moving.³³ This view also shows that there is some space between the passenger side of the police vehicle and the Sable, which is seen traveling parallel to the police vehicle in a circular manner.³⁴ As the Sable approached the side of the police vehicle, Officer 2 made repeated attempts to close the police vehicle’s passenger door. Then, Officer 2 is seen firing his weapon multiple times at the driver’s side of the Sable.³⁵ The first of those shots struck the back driver’s side window of the Sable and, as Officer 2 continued to fire and as the Sable continued to move backward, the shots moved closer to the front driver’s side door/window.³⁶ Again, the civilian’s actions immediately prior to Officer 2’s shots are not captured by this view.³⁷

There is no camera view that shows the civilian raising a gun.³⁸

²⁸ Id.

²⁹ O.I.S. CRN 16-07548 (dash camera (1 and 2 and [REDACTED] statement))

³⁰ Id.

³¹ Id.

³² Id.

³³ Id.

³⁴ O.I.S. CRN 16-07548 (dash camera (2))

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

In the end, the Sable did not make contact with the police vehicle and it ended up rolling to a stop perpendicular to the police vehicle.



The crime scene investigation revealed that Officer 1 fired a total of 10 shots and Officer 2 fired five times.³⁹ The Sable had 11 separate bullet holes to the exterior portion of the vehicle as show below:⁴⁰



In addition, there was a bullet defect on the steering wheel.⁴¹ Following the shooting, both officers are heard giving commands to the civilian to stop the car.⁴² Officer 2 then reported to dispatch that shots have been fired.⁴³ After this, the officers yell "gun, gun" and one of them is heard saying "he has a gun on his lap."⁴⁴ The shooting officers were soon joined by other

³⁹ O.I.S. CRN 16-07548 (CS report)

⁴⁰ Id.

⁴¹ Id.

⁴² O.I.S. CRN 16-07548 (dash camera (1))

⁴³ O.I.S. CRN 16-07548 (dash camera (1))

⁴⁴ O.I.S. CRN 16-07548 (dash camera (1))

responding officers.⁴⁵ A silver and black Ruger 9mm caliber semi-automatic pistol was recovered from the driver's seat of the Sable where the civilian was sitting.⁴⁶ The officers who recovered the weapon stated that it was between the civilian's legs with the muzzle of the gun pointed down and the handle of the weapon was pointed up.⁴⁷ A picture of that weapon is shown below:



As evident from this picture, taken at the scene, the weapon was recovered with blood on it presumably produced by the civilian's wounds. The officers then placed the civilian in handcuffs and began to render first aid until emergency medical personnel arrived.⁴⁸ Officer 1 stated that the officers cut off the civilian's clothes and, using medical gauze from officer 1's trauma kit, they began to apply pressure to the gunshot wounds.⁴⁹

The civilian had multiple gunshot wounds, including wounds to face, neck, upper back, and both hands. He received medical care at the scene and was taken to Research Medical Center where he received additional treatment over the course of his stay in the hospital.

Following the shooting, the officers and the civilian gave their individual accounts of the events. Officer 1 stated that he and his partner responded to the Shotspotter notification by traveling to the area of 44th and Prospect.⁵⁰ The Sable was the only vehicle traffic in the area.⁵¹ Upon observing the Sable, the civilian "stared" at the officers raising their suspicion that he "was

⁴⁵ Id.

⁴⁶ O.I.S. CRN 16-07548 (officer statements)

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ O.I.S. CRN 16-075438 (Officer1 statement).

⁵¹ Id.

a possible suspect” in the shooting.⁵² After making a U-turn to locate the Sable, officer 1 noted that the Sable “accelerated and drove off at a high rate of speed.”⁵³ After the car pursuit ended at 44th and Meringston, officer 1 stopped the police vehicle behind the Sable and the officers planned to conduct a felony car check which officer 1 describes as a police procedure wherein the occupants of a vehicle are ordered out of the car at gun point and handcuffed.⁵⁴ Officer 1 noted that his gun was drawn when he exited the vehicle and as he did so, the civilian’s car began to “slowly” reverse within several feet of the police car.⁵⁵ He then heard Officer 2 “yell” that “he’s about to [be] struck by the vehicle.”⁵⁶ Officer 1 stated that he pointed his gun at the civilian and added that he could see the civilian looking back “towards officer [2’s] direction.”⁵⁷ More specifically, Officer 1 stated that the civilian raised his “right hand across his chest” with a weapon while looking backwards over his shoulder at Officer 2. When this happened, Officer 1 fired several shots and he believed that Officer 2 then started firing.⁵⁸ Officer 1 then stated that as the Sable continued to move, he “no longer had a view or a safe shot of the [civilian]” and therefore he “retreated back around the back side of the vehicle.”⁵⁹ When he did so, he saw that Officer 2 “was still shooting and the [civilian] was still rolling backwards and [because] Officer [2] was being...being pinned in the back of the vehicle and I fired I believe three or four more times.”⁶⁰ Officer 1 also stated that he believed that Officer 2’s “life was still in danger” because of the “proximity” between the Sable and Officer 2 and because the civilian still had a gun in his hand.⁶¹

Officer 2 stated to investigators at the scene that the Sable “came toward him as if to strike him.”⁶² He also stated that he could see the “[Sable’s] tires spinning in the wet grass.”⁶³ Officer 2 later gave a more formal statement regarding the entire event.⁶⁴ He noted that the Shotspotter notifications led them to the area of 44th and Prospect.⁶⁵ Officer 2 added that he believed that “someone had been driving down Wabash shooting in the neighborhood you know, at different houses.”⁶⁶ When they turned on 44th, the Sable was the only car in the area and therefore they attempted to stop that car but it “started taking off.”⁶⁷ The car pursuit ended at 44th and Meringston and when he exited the police vehicle, the Sable “began to back up”

⁵² Id.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² O.I.S. CRN 16-075438 Supp 19

⁶³ Id.

⁶⁴ O.I.S. CRN 16-075438 ([REDACTED] statement).

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

causing the officers to give commands to “stop.”⁶⁸ Officer 2 noted that he planned to conduct a felony car check which he described as commanding the driver of the vehicle to take his keys out of the car, show their hands, walk backwards towards the sound of the officers voice, and place them and any other occupants on the ground in handcuffs.⁶⁹ Nonetheless, Officer 2 stated that he was unable to do this because the Sable “kept coming back in my direction on my side” which caused him to yell “I think he’s going to hit me.”⁷⁰ Officer 2 recalled that he quickly accessed his gun and then he heard Officer 1 shooting and “that made him focus on the [civilian]” who had a gun raised and was looking over his shoulder and coming back in my direction with the gun.”⁷¹ Like Officer 1, Officer 2 stated that the civilian had a weapon in his right hand. Officer 2 also stated that he could see the front driver side window was partially down and “[he] thought [the civilian] was going to come back and start shooting at me, so I began to fire until eventually [I] saw that he had slumped over on his end of the car.”⁷² When asked to elaborate on specific details, Officer 2 stated that the Sable was moving back slowly and that the Sable appeared close enough to reach and touch. He added that he felt that there was no place for him to “maneuver” and that at any time the vehicle would move closer and he would be struck.⁷³ When asked specifically why he fired his weapon, he stated:

“[y]ou know, when I saw him coming back with his firearm I was-I knew he’d already shot down the neighborhood and he was going to try to do anything he could to get away, and that included shooting me if he had too or I was going to get-if he had hit me with his car he could have done that to at any time. I was scared that he was going to shoot me or run me over with the car.”⁷⁴

During the hospital stay, the civilian was interviewed by investigators. The civilian stated that he turned on a dead end and when he looked over his shoulder he saw the police and they started to shoot.⁷⁵ When asked about what was happening before turning onto the dead end, the civilian stated he was coming from the area of 41st and Garfield and was headed home to 76th Street in Raytown.⁷⁶ He also noted that “nothing” was going on prior to his getting to the dead end.⁷⁷ The civilian denied that he owned the firearm that was recovered from the Sable and he denied any knowledge that there was a firearm in the car.⁷⁸ He also added that he had no information on the shell casing recovered from the backseat of the Sable.⁷⁹

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Id.

⁷⁴ Id.

⁷⁵ See Statement of Civilian.

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.

The crime scene investigation of the underlying shooting reported by Shotspotter resulted in the recovering of multiple shell casings. That investigation further revealed that one shell casing recovered near 39th and Wabash matched the gun that was recovered from the Sable.⁸⁰ So, the gun recovered from the civilian's vehicle was used in the shooting detected by Shotspotter prior to the officers encounter with the civilian.

Following a preliminary review of the investigative file, including the videos and the statements of the parties, key witnesses were subpoenaed to come before the grand jury and testify under oath concerning the events of this matter to continue the investigation of the circumstances involved. Because no charges are being filed, this office is legally prohibited from discussing the substance of the testimony by any parties before the Grand Jury.

Applicable Law

Any examination of use of force by a law enforcement officer in the State of Missouri must analyze the applicability of the legal defense set forth in Section 563.046, RSMo. Under Missouri law, the use of force by a law enforcement officer in making an arrest or in preventing an escape is legal in some circumstances.⁸¹ First, the officer must have a reasonable belief that the person being arrested has committed or is committing a crime.⁸² Second, if an officer determines that force is necessary to effect an arrest, the officer can only use a level of force that is reasonably necessary to effect the arrest or prevent the escape.⁸³ When it comes to the use of deadly force, there are specific rules that apply. In Missouri, a law enforcement officer can only use force that the officer knows will create a substantial risk of causing death or serious physical injury when the officer reasonably believes that the person being arrested is attempting to escape by using a deadly weapon or when the person being arrested may endanger life or inflict serious physical injury unless arrested without further delay.⁸⁴ Further, even then, an officer can only use this heightened level of force when he/she reasonably believes that the use of such force is immediately necessary to effect the arrest or prevent the escape.⁸⁵

In the context of use of force, the term "reasonable belief" is specifically defined as a belief based on reasonable grounds that could lead a reasonable person in the same situation to the same belief.⁸⁶ This standard is based upon the holding in Graham v. Connor. In Graham, the

⁸⁰ Id.

⁸¹ Section 563.046, RSMo, Missouri Approved Instructions ("MAI") 306.14; See Tennessee v. Garner, 471 U.S.1 (1985) (holding that deadly force may be used to prevent escape where probable cause exists that shows that the subject sought poses a significant threat of death or serious physical injury to the officer or others).

⁸² Id.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ MAI 306.14 [3]. See Tennessee, 471 U.S. 11-12 (holding that a proper analysis of whether the deadly force used was constitutional must include an examination of the totality of the circumstances, including the payment of careful attention to facts and circumstances involved from the perspective of a reasonable officer on the scene and not through the lens of 20/20

Court articulated specifics that must be considered in determining the constitutionality of an officer's use of force and held that an officer is entitled to use deadly force when a review of the circumstances confronting that officer show that his/her actions were objectively reasonable.⁸⁷ The Court noted that a proper analysis of the reasonableness of the force used must examine the totality of the circumstances, including the paying of careful attention to facts and circumstances involved from the perspective of officer on the scene not through the lens of 20/20 hindsight.⁸⁸ Lastly, the Court instructs that this analysis must allow for the split-second decisions that often occur in these tense, uncertain, and rapidly evolving situations. The Court then stated that any analysis of the circumstances and facts must include a discussion of: (i) the severity of the crime at issue, (ii) whether the victim of the force posed an immediate threat to the safety of the officer or others, and (iii) whether the victim is actively resisting or attempting to evade arrest by flight.⁸⁹

In multiple cases since then, the Court has made clear that whether the use of force – including the use of deadly force – is excessive is a fact-specific question that requires considering whether the use of force was unreasonable in light of the events as viewed from the perspective of the officer.⁹⁰

It should also be noted that this standard does not depend upon whether the belief turned out to be true or false. Lastly, it should be noted that under the applicable law, an officer has no legal duty to “retreat or desist” from his efforts because of resistance or threatened resistance by the person being arrested.⁹¹

As such, in this matter, the officers were not entitled to shoot at the civilian *unless* they reasonably believed *either* that (1) the civilian may have inflicted serious physical injury unless arrested without delay; *or* (2) the civilian was attempting to escape by use of a deadly weapon. Even then, the officers were authorized to shoot at the civilian *only if* they reasonably believed that shooting him was immediately necessary to effect the arrest or prevent the escape.⁹²

Finally, we must be guided by the appropriate charging standard which mandates that “[a] prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.”⁹³

hindsight. This analysis must also allow for the split-second decision that often occur in these tense, uncertain, and rapidly evolving situations);

⁸⁷ 490 U.S. 386, 395 (1989).

⁸⁸ *Id.* at 397 (internal citation omitted).

⁸⁹ *Id.* at 396.

⁹⁰ See, e.g., *Mulenix v. Luna*, 136 S. Ct. 305 (2015); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Scott v. Harris*, 550 U.S. 372 (2007).

⁹¹ MAI 306.14.

⁹² *Id.*

⁹³ ABA STANDARDS FOR PROSECUTION FUNCTION 3-4.3(a) (2015); See MO. SUP. CT. R. 4-3.8(a).

Analysis and Conclusion

Our Committee has concluded that the State cannot overcome the officers' legal defense as set forth in Section 563.046, RSMo in this circumstance beyond a reasonable doubt. Our legal obligation requires us to focus on whether the decision to use force was reasonable from the perspective of the officer. Therefore, we are legally required to search for evidence which shows that the belief formulated by the officers at the time of the event was unreasonable.

The anticipated evidence at trial concerning how the officers formed their belief would be that they: (i) responded to an electronic notification that shots were being fired; (ii) saw that the civilian was the only person in the area; (iii) made eye contact with the civilian, who stared at them and then fled; (iv) attempted to stop the civilian to investigate the shooting; (v) chased the civilian with their lights and siren activated as he fled at a high rate of speed; (vi) believed the civilian was stopping his vehicle; (vii) did not anticipate that the Sable would start moving backwards; (viii) gave the civilian commands that were not followed; (ix) saw that the civilian had his front driver's side window partially down; (x) feared that Officer 2 would be struck by the Sable; and (xi) stated that they believed the civilian raised a gun and pointed it at an officer and then they fired their weapons.⁹⁴ As this is the anticipated evidence that the force was reasonable, we are left to attempt to find evidence that shows that the belief formed and the force used was not reasonable. We will begin our discussion with the video evidence.

As the Sable moves off camera, the civilian's right hand appears to be maneuvering the steering wheel.⁹⁵ None of the video evidence shows the civilian holding, let alone pointing, a weapon. Both of the civilian's hands have gunshot wounds and the steering wheel has bullet defect.⁹⁶ This, in combination with the fact that the weapon recovered from the civilian's lap has no gunshot defect, would support the argument that the civilian could not have been holding the gun when he was shot.⁹⁷ But the question of whether the State can prove beyond a reasonable doubt that the gun was not being handled or raised by the civilian is different than the question this committee is legally required to answer: can the State prove beyond a reasonable doubt that the officers were unreasonable in believing that the civilian was raising a weapon?

There is no video evidence to contradict the officers' accounting of the events that led up to the shooting or the moments immediately prior to the first shots being fired. Significantly, the individual vantage points of the officers are not captured by the dash camera footage and, as noted, the Sable moves off camera as the shooting starts. Further, to clearly observe the civilian's hand in the video, the video must be slowed down. This is critical because this committee is legally obligated to view these events through the eyes of the officers involved, accounting for split second decision making, and without the addition of 20/20 hindsight, to determine if the

⁹⁴ O.I.S. CRN 16-07548 (dash camera (1 and 2 and [REDACTED] and [REDACTED] statements))

⁹⁵ O.I.S. CRN 16-07548 (dash camera (1))

⁹⁶ O.I.S. CRN 16-07548 (misc reports)

⁹⁷ Id.

officers' beliefs are unreasonable.⁹⁸ Based on that perspective, the video evidence does not overcome the officer's legal defense and this committee must now examine the statements of the officers to determine if there is evidence that shows that the officers were unreasonable in believing that the civilian was looking over his shoulder at Officer 2 and raising a weapon.

Great care was applied to analyzing the officers' statements. In Missouri, a prior inconsistent statement may be offered as substantive evidence.⁹⁹ The committee examined Officer 2's first statement at the scene immediately after the shooting. Based on that statement, the video evidence, the audio evidence of Officer 2 yelling that the car was going to strike him prior to the shots being fired, and the officers not identifying that the civilian had a gun until after the shooting,¹⁰⁰ it would appear that the reason the officers actually fired their weapons was the vehicle moving backwards and almost striking Officer 2. The video evidence, including the slow speed of the Sable and the parallel path that it traveled next to Officer 2 would raise a serious question as to whether this vehicle's movement and proximity to Officer 2 would be a sufficient legal basis to use deadly force.¹⁰¹ Thus, the critical issue here was whether there was a reasonable belief that the civilian raised the gun.

The officers agree that Officer 1 fired the first shots. In his formal interview, Officer 2 expanded on his first statement and detailed his fear of being struck by the vehicle and his attention being drawn to the civilian by Officer 1's shots, and then he also noticed that the civilian raised a gun and was pointing it in his direction.¹⁰² Thus, both officers' state that they fired because the civilian raised a gun in Officer 2's direction.¹⁰³ The fact that neither officer identified a gun at the time of the shooting raises some questions. But these statements are not specifically inconsistent and, more importantly, they are not enough to show that the belief formed by the officers was unreasonable.

This committee is aware that the officers involved in this event have been the subjects of previous officer involved shooting investigations. Officer 1 was investigated for shooting into a

⁹⁸ In Aipperspach v. McInerney, 766 F.3d 803, 807 (8th Cir. Mo. 2014), the responding officers were confronted with a suspect who held what appeared to be a handgun [actually, it was a BB gun], refused repeated commands to drop the gun, pointed it once at Sergeant Jones, and then waved it in the direction of officers deployed along the ridge line in an action *they perceived* as menacing [actually, he was falling down]. In these circumstances, objectively reasonable officers had probable cause to believe that Al-Hakim posed a threat of serious physical harm to the officers. See Estate of Morgan v. Cook, 686 F.3d 494, 496 (8th Cir. Mo. 2012) (upholding the determination that probable cause to use deadly force existed after an officer twice ordered a victim to drop a [kitchen] knife and the victim stood up, with the knife pointed downward and his arm at his side and raised his right leg as if to take a step in the officer's direction).

⁹⁹ See Section 491.074, RSMo.

¹⁰⁰ It should be noted that there is no legal requirement that the officers give a simultaneous reporting that an individual has a weapon during an event. Rather this is done to merely alert other officers or persons that an individual is armed.

¹⁰¹ O.I.S. CRN 16-07548 (dash camera (1))

¹⁰² O.I.S. CRN 16-07548 (Officer 2 statement)

¹⁰³ O.I.S. CRN 16-07548 (Officer 2 statement)

stopped motor vehicle because he believed that the vehicle's occupant was reaching for an object in the center console and then Officer 1 heard the sound of shots. Likewise, Officer 2 was investigated for shooting at a moving motor vehicle after a short pursuit. Based on the law and circumstances in those matters, charges were not sought against these officers. In undergoing our legal analysis, this committee specifically considered the prior uncharged acts to determine how, if at all, they could be admitted into evidence for the fact finder to consider when determining whether the officers acted on an unreasonably formed belief.

In Missouri, a criminal defendant's prior uncharged acts can only be admitted for a specific purpose related to the charged offense. They cannot be used to show that the defendant is prone to act in some specific way.¹⁰⁴ Even if this type of evidence is relevant for a specific purpose, it may be excluded if a court determines that it is too prejudicial or may cause the jury to be confused as to what specifically it must find the defendant guilty of. "[W]ell-established law requires the State to try a defendant only for the offense for which he is on trial."¹⁰⁵ This rule recognizes the significant risks that attend such evidence.¹⁰⁶

"Evidence of uncharged crimes is logically relevant if it carries a legitimate likelihood of proving the defendant guilty of the charged crime."¹⁰⁷ "The same evidence is legally relevant if its prejudicial effect is outweighed by its probative value."¹⁰⁸ In Missouri, courts have found that uncharged acts may be admissible if they tend to establish motive, intent, absence of mistake or accident, identity, or a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other.¹⁰⁹ Some courts have admitted uncharged acts that are part of the circumstances or the sequence of events surrounding the current offense charged and therefore may be admitted to present a complete and coherent picture of the events that transpired.¹¹⁰

The law makes clear that this committee is prohibited from using these prior acts to show that the officers have a propensity to shoot or use deadly force. There is no question as to who the shooting officers are, and therefore there is no need for identity or common scheme evidence. Further, the State anticipates that the officers will assert their right to use force in the defense of

¹⁰⁴ State v. Ellison, 239 S.W.3d 603, 607 (Mo. banc 2007)

¹⁰⁵ State v. Batiste, 264 S.W.3d 648, 650-651 (Mo. App. W.D. 2008) (quoting Ellison, 239 S.W.3d at 606.)

¹⁰⁶ (1) [T]hat [it] will mislead or confuse the jury, (2) that the jury will give undue weight to the "if he did it once, he'll do it again" inference, (3) that the defendant will be made to defend, not just against the charges brought, but against all of his prior, similar behavior which, for whatever reason, was not prosecuted by the State, and (4) that the jury, in its rush to punish the defendant for his past acts--which the jury must infer have gone unpunished--may overlook the fact that the State has failed to prove the defendant was guilty of the charges brought; and See Batiste, 264 S.W.3d at 650-651 State v. Berwald, 186 S.W.3d 349, 358 (Mo. App. W.D. 2005) (quoting State v. Bernard, 849 S.W.2d 10, 22 (Mo. banc 1993)).

¹⁰⁷ State v. Pennington, 24 S.W.3d 185, 189 (Mo. App. W.D. 2000)

¹⁰⁸ Id.

¹⁰⁹ Ellison, 239 S.W.3d at 607.

¹¹⁰ State v. Payne, 135 S.W.3d 504, 507 (Mo. App. W.D. 2004).

themselves and therefore there is no question they acted intentionally and without mistake or accident. Likewise, because of this, there is no issue regarding motive. Lastly, because the prior acts involve different parties and different events, proof of those acts are not needed to give a “complete and coherent picture” of a series of events. As such, it is doubtful, at best, that the prior acts of the officers would be admitted into evidence to show that their beliefs were unreasonable.

This committee next turned to an examination of the civilian’s account of this incident to determine what evidence could be offered to show that the officers’ beliefs were unreasonable. The civilian’s statement does not match the physical evidence or the video evidence. Despite his denials, the dash camera footage shows that he did in fact flee from officers when they attempted to stop him to investigate the underlying shooting.¹¹¹ As for the shooting, the civilian stated only that he was shot while he was merely backing up and looking over his shoulder. While the civilian denied any knowledge of the presence of a firearm in his car, a gun was, in fact, recovered with blood on it from the civilian’s own lap.¹¹² In light of the physical evidence, these denials put the civilian’s credibility in serious jeopardy. Any further changes to the civilian’s prior statement about these events would further severely impact his credibility.¹¹³¹¹⁴

In sum, the parties’ statements show that the civilian and the officers agree that immediately prior to the shooting, the civilian was looking back over his shoulder while he backed his vehicle down the street. The parties disagree on what, if anything else, the civilian was doing as he backed up. Without other evidence to show that the officers were incorrect, the officers’ account that the civilian raised a weapon is not controverted.

This committee did not come to this decision lightly. Our citizens, irrespective of their standing as individuals, suspects, or criminal defendants, must be safe from the improper use of force by law enforcement. The committee also recognizes that law enforcement officers undertake a dangerous job with difficult decisions which often have lasting consequences. Officers are forced to make quick decisions under the most stressful circumstances when their lives and/or the lives of others are in jeopardy.

In the end, it is possible that the civilian was slowly maneuvering his vehicle around the officers and looking over his shoulder in an attempt to get out of the dead end street and continue to evade the offices’ attempts to stop/arrest him. However, this committee’s sole purpose is to determine whether the officers’ beliefs, and the actions that followed, were reasonable and thus lawful, not whether they were ultimately correct or whether they were the most appropriate actions. In doing so, we are guided by the applicable caselaw which states that the officers’

¹¹¹ O.I.S. CRN 16-07548 (dash camera (1))

¹¹² O.I.S. CRN 16-07548 (sup reports and CS reports)

¹¹³ See Section 491.074, RSMo.

¹¹⁴ Lastly, ballistic testing showed that the weapon recovered from the civilian’s lap was fired in the location of the Shotspotter notification that brought the officers and the civilian together. See O.I.S. CRN 16-07548 (Lalli report). If admitted, this evidence would bolster the officers’ belief that the civilian posed a threat.

actions “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hind-sight.”¹¹⁵ “The calculus ... must [allow] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”¹¹⁶ The officers had a total of 13 seconds to process the information they had which was that the civilian, who was the suspect of a shooting, fled from them, ignored their commands, backed his vehicle up in a circular manner, and made a movement which appeared as if he were looking over his shoulder while raising a weapon and pointing it at Officer 2. Under those circumstances, it was objectively reasonable to believe that the civilian may have inflicted serious physical injury to Officer 2 unless arrested without delay. Accordingly, both prongs of the analysis are met and the State does not have evidence which shows, beyond a reasonable doubt, that the beliefs formed were unreasonable.¹¹⁷

Based on the law, the facts and the evidence in this matter, this Committee does not believe that the State is legally authorized to file charges against these officers.

Sincerely,



Jean Peters Baker

Prosecutor for Jackson County

cc:

Thomas Porto, The Popham Law Firm

Virginia Murray, General Counsel, Kansas City Missouri Police Department

¹¹⁵ Graham, 490 U.S. at 396-97.

¹¹⁶ Id.

¹¹⁷ ABA STANDARDS FOR PROSECUTION FUNCTION 3-4.3(a) (2015); *See* MO. SUP. CT. R. 4-3.8(a).