JEAN PETERS BAKER
Jackson County Prosecuting Attorney

January 25, 2020

SAC Timothy Langan
FBI Field Office
1300 Summit
Kansas City, MO 64105

Chief Rick Smith
Kansas City Police Department
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Major James Baker
Shawnee Police Department
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Family members of Civilian
Kansas City, Missouri

Re: Officer-involved shooting on February 26, 2020

All interested parties:

On June 18, 2020, the Jackson County Prosecutor's Office Use of Force committee reviewed the investigation of the fatal shooting of a Civilian[1] in Kansas City, Missouri occurring on February 26, 2020. This incident involves each of your departments, the Federal Bureau of Investigations (FBI), Kansas City, Missouri Police Department (KCPD) and the Shawnee,

[1] The victim of the use of force will hereinafter be referred to as the "Civilian" for purposes of this report, however, he was identified as David William Irving, black male, 35 years of age and resident of Kansas City, Missouri.

Kansas Police Department (SPD) and we specifically reviewed the conduct of three officers.[2] Based on the investigation and our analysis, our committee concluded the evidence does not support the filing of criminal charges against each of these officers.

Summary of Facts

On February 26, 2020, a Fugitive Apprehension Team, consisting of multiple police agencies, met to discuss plans to apprehend Civilian. Civilian was wanted for questioning regarding his involvement in a non-fatal shooting that occurred at an area Popeye's Chicken on December 31, 2019.[3] Irving was developed as the primary suspect from a weekly Shooting Review meeting,[4] held in January and again on February 26th, led by Kansas City, Missouri Chief Rick Smith. Civilian remained under investigation, but KCPD was unable to locate him. The Department of Justice (DOJ) agreed to participate in the Shooting Review through a partnership coined Operation Relentless Pursuit, with a goal of decreasing violent crime in Kansas City. This partnership was bolstered by other local police agencies adding personnel for the apprehension of wanted individuals.

A fugitive team was assembled and members of this team met outside of Alcazar Apartments at 3906 Baltimore, Kansas City, Missouri, where surveillance efforts last tracked Civilian's whereabouts. It was determined that a pick-up order was previously issued for Civilian and that Civilian had a pending warrant for an alleged parole violation.

Upon arrival at the Alcazar Apartments, law enforcement engaged the apartment manager and other witnesses for Civilian's location. Officers started their search on the sixth floor where Civilian's girlfriend was believed to reside; however, intelligence eventually led them to Apartment 110.[5] Officers further believed that Civilian was armed and dangerous from the intelligence briefing conducted by members of the KCPD and intelligence gathered from occupants at the Alcazar Apartments.[6] A female occupant of Apartment 110 allowed the officers entrance into the apartment. Multiple residents were inside the apartment in the living room area. After clearing the living room and kitchen, three officers from the fugitive team entered a hallway and bedroom.

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[2] The officers subject to review include FBI Special Agent [redacted], hereinafter referred to as Officer 1, TFO [redacted], assigned to the Kansas City, Missouri Police Department, referred to as Officer 2 and TFO [redacted], assigned to the Shawnee, Kansas Police Department, referred to as Officer 3. Notification was previously made to each agency of the decline.

[3] *See* KCPD reports for Incident #KC19098716, pages 1-20, facts surrounding this shooting are as follows: at approximately 4:52 PM, a victim was located on the lobby floor of Popeye's Chicken with gunshot wounds to his left thigh and right leg. The victim was working at the restaurant when he was approached by a customer. The customer and victim began to argue and engaged in a physical altercation when the customer produced a handgun, firing 2-3 shots at the victim before fleeing the area. The suspect shooter was identified by witnesses as Fo or Foe and later identified as Civilian.

[4] The Shooting Review is an initiative by KCPD to discuss strategies around recent unsolved shootings and homicides with partner agencies.

[5] *See* Report 89B-KC-3240936, page 1 of 2.

[6] *See* Report 297I-HQ-A3241055 and KCPD reports from witness interviews of tenants and visitors in the Alcazar Apartments.

Upon entering the bedroom, one of the officers called out for Civilian to come out, using his first name. Each of the three officers entering the bedroom had their duty weapons drawn. The mattress on the bed was quickly cleared by officers, and then the officer's attention was drawn toward a closet.[7] The closet did not contain a door, but contained a tall clothes/laundry basket seated on top of a garbage bag filled with items. Officer 1 reported that he removed the laundry basket with his left hand while maintaining his gun drawn in his right hand. Immediately upon removing the laundry basket, Officer 1 describes the encounter with a person hidden in the closet as "the face of a black male looking back at me."[8] The Civilian was in a crouched position on the floor and surrounded by trash bags of clothing. The officer reported seeing Civilian's right hand resting on his knee, but he was not able to see his left hand.[9] Believing this might be the individual they were seeking, Officer 1 gave multiple commands to the individual in the closet to show his hands. The officer believes he said, "show me your hands" and "let me see your hands" but the individual did not comply.[10] Officer 1 maintained eye contact with Civilian during the encounter and he recalled others providing commands. The officer further described Civilian looking directly at him, but not complying with the multiple commands he was given. Then the individual in the closet raised his left hand and pointed it directly at him, raising a handgun directly at him.[11]

Officer 3 described similar events in his statement to investigators. He reported once the laundry basket was removed, an individual was visible but still partially shrouded by trash bags.[12] Officer 3 stated commands were provided by Officer 2 to show his hands, but despite repeated commands the individual in the closet would only show his right hand.[13] Officer 2 then shined his flashlight directly onto the individual's face in an attempt to distract or disorient him and threatened him with his taser for failure to comply with the command to show his left hand.[14] At that point, Civilian pulled his left hand up, pointing a handgun in the direction of the officers and Officer 3 responded with four to five gunshots at Civilian.[15]

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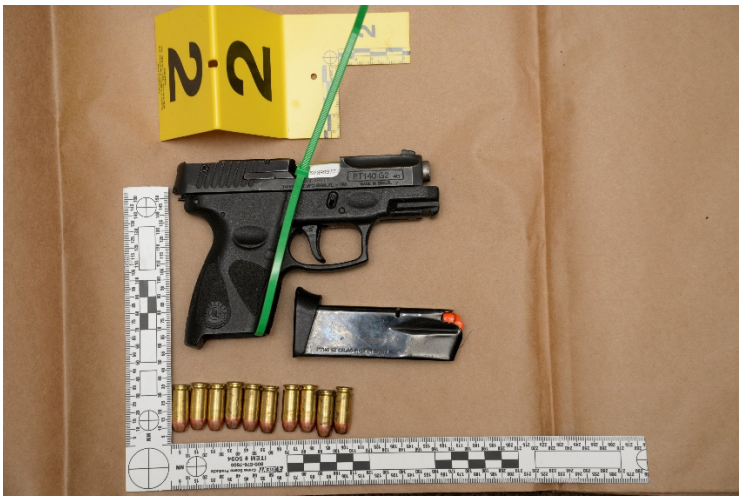
[7] *See* 297I-HQ-A3241055, page 4 of 6, Officer 3 describes the incident clearing the bed. He describes Officer 2 holstering his weapon, moving the mattress and box spring to check under the bed, but his attention was quickly diverted to Officer 1 who was facing a bedroom closet without doors, yelling commands, "police, show me your hands."
[8] *See* Report 297I-HQ-A3241055, page 12 of 15.
[9] *See* Report 297I-HQ-A3241055, page 12 of 15.
[10] *Id.*
[11] *See Id*., pages 11-13.
[12] See 297I-HQ-A3241055, interview of Officer 3, page 4 of 6.
[13] *Id.*
[14] *Id.* on page 5.
[15] *Id.*



Taurus pistol recovered from the crime scene[16]

Officer 3 believed the other two officers also fired in that moment. This officer described removing the weapon from Civilian's hand by another officer, noting that Civilian's finger was still in the trigger guard of the weapon. Immediately upon removing the weapon, Officer 3 moved additional trash bags from the closet that were blocking the path to Civilian in order to render aid. Officer 3 performed chest compressions with other officers until paramedics arrived.[17]

Closet location of where the civilian was found by officers

[16] *See* Lab No. 2020-00488-3, page 2 of 3, swabs from the Taurus pistol, noted as Item #2, are 1.0 quintillion times more likely to include Civilian as the source of the DNA.
[17] *Id.* at page 6.

Multiple rounds were fired by three officers striking Civilian in his upper body, torso, chest and multiple shots to his head.[18] After being shot, Civilian slumped into the corner of the closet, but the handgun remained in his hand though the gun was now pointed toward the window of the bedroom and away from the officers. Once the weapon was dislodged from Civilian's hand, officers pulled him from the closet and began to render aid. Specifically, a female officer, not engaged in the shooting, began life-saving measures. While aid was rendered other officers contacted 911 for medical services and cleared the path for EMS. Though life-saving efforts were also performed by EMS at the scene, Civilian passed away within moments of EMS's arrival.

There is no video depicting the moments leading up to the shooting or the shooting incident and no microphones that capture audio of the events. According to officers who provided their individual accounting of the events that lead to the shooting death of Civilian, none of the officers fired their weapons until Civilian pointed a handgun from his left hand at the officers. The officers consistently stated that officers continued to provide commands to show the left hand while taking additional steps to gain compliance with those commands by shining a flashlight at Civilian and threatening use of their taser. Each of those statements are consistent with the accounting provided by the three shooting officers and with the physical evidence recovered from the scene.

While unknown to the officers during the encounter with Civilian, a long gun was recovered from the bedroom. That long gun was determined to belong to Civilian from DNA reports linking him to the weapon.[19]

Applicable Law

Our examination of this officer's use of force is governed by Missouri law, and the applicability of legal defenses set forth under Missouri's statutes and caselaw. We analyzed Section 563.046, RSMo, governing the use of force by a law enforcement officer when effectuating an arrest. This provision specifically authorizes an officer to use the physical force as he or she reasonably believes is immediately necessary to effect the arrest or to prevent an

[18] *See* Report 297I-HQ-A3241055 and reports from the Jackson County Medical Examiner, dated 2/28/20 who noted ten (10) entry wounds to Civilian and one graze wound.
[19] *See* Lab No. 2020-00488-3, dated 5/20/2020, swabs from item 43, American Tactical rifle, are 2.1 quadrillion times more likely to include Civilian as the source of the DNA.


American Tactical rifle found at the crime scene


American Tactical rifle recovered by police

escape from custody.[20] This statute, however, requires that the officer have a reasonable belief that the person being arrested has committed or is committing a crime.[21] Should an officer determine that force is necessary to effect an arrest, the officer may only use a level of force that is reasonably necessary to effect the arrest or prevent the escape and the officer must have a good faith belief that the person has committed a crime.[22]

This analysis leads us to review whether the individual sought by officers poses a significant threat of death of serious physical injury in the circumstances at hand. Therefore, we also reviewed Section 563.031, RSMo, governing the use of force in defense of persons, providing that a person may … use physical force upon another when and to the extent he or she reasonably believes [is] necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful force by such other person. 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. [23] This standard does not depend upon whether the belief turned out to be true or false. And under Missouri law this standard goes a step further by providing that an officer has no legal duty to retreat or desist from his efforts because of resistance or threatened resistance by the person they are attempting to arrest.[24]

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. This standard will be seen from the eyes of each individual and those views are shaped through their individual experiences. However, under the eyes governed by the law, it is the perspective of a reasonable officer that governs.[25]

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[20] Section 563.046, RSMo, Missouri Approved Instructions ("MAI") 406.14; See *Tennessee v. Garner,* 471 U.S.1 (1985) limiting deadly force to prevent escape unless probably cause exists that the subject poses a significant threat of death or serious physical injury to the officer or others.

[21] *Id.*

[22] *Id.*

[23] 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 hindsight. This analysis must also allow for the split-second decision that often occur in these tense, uncertain, and rapidly evolving situations*); Graham* v. *Connor*, 490 U.S. 386, 395-397 (1989) (holding that in determining the constitutionality of an officer's use of force and held that an officer is only entitled to use deadly force when a review of the circumstances confronting that officer show that his/her actions were objectively reasonable. Further, 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.)

[24] MAI 406.14.

[25] MAI 406.14. *See Garner*, 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 hindsight. This analysis must also allow for the split-second decision that often occur in these tense, uncertain, and rapidly evolving situations).

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.[26]

Legal Analysis and Conclusion

A review guided by the surrounding facts of this case and governing law lead us to decline criminal charges against all of the officers involved. The evidence supports the conclusion that Civilian was armed with a deadly weapon and was not complying with the multiple warnings of the officer at the time of the shooting. Under Missouri law and facts known to each of the three officers at the time of the shooting, the officers conduct is legally reasonable. One of the shooting officer's described seeing Civilian's eyes looking directly at him and then Civilian's handgun pointed at him. In reviewing a case for criminal responsibility, the actions taken by the officers to use deadly force must be guided by Missouri law rather than a desire for a different outcome. The officers were not legally required, under these facts, for Civilian to discharge the weapon at them before employing their own force. As outlined, the Court has provided guidance regarding the evaluation of an officer's conduct by stating the officer will be judged from the perspective of a reasonable officer on the scene. These police officers were forced to make split-second judgments during their encounter with Civilian. Those judgments resulted in the tragic loss of life to Civilian, however, those decisions are not overcome by longstanding legal protections afforded to police officers under these circumstances.

It is my legal assessment that no criminal charges should be filed against any of the officers who acted within the limits contained under Missouri law. I offer my condolences to the Civilian's family and loved ones who lost a valued member of their family.

Sincerely,

Jean Peters Baker

Jean Peters Baker
Prosecutor for Jackson County

[26] *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).