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May 5, 2016

Chief Thomas E. Bennett
Suffolk Police Department
120 Henley Place
Suffolk, Virginia 23434

RE: Officer Involved Shooting. Officer James Babor on December 28, 2015, 200 Block of Causey Avenue, Suffolk, VA.

Dear Chief Bennett:

The above matter was referred to this office for review. The review by this office will concentrate solely on issues of criminal liability. This office will not comment upon any civil, administrative, or procedural issues. Those issues do not fall under the purview of the Office of the Commonwealth's Attorney. As part of our investigative report, the names of the non-law enforcement witnesses are redacted for their protection and privacy. Further, this office recognizes the tragedy that occurs with every shooting. Our sympathies are expressed to the family and friends of the deceased.

Facts

At approximately 5:00 p.m. on the evening of December 28, 2015 Suffolk Police Department dispatch put out a call involving a man with a gun chasing and threatening three (3) teenagers. Officer Babor, who was on another call, overheard the transmission. Sgt. Beers of the Suffolk Police department acknowledged the call and marked en route. Officer Babor, not hearing another unit responding for backup, responded to the location to back up Sgt. Beers.

The initial call that Officer Babor heard was that a male caller stated that "a white male was chasing him with a gun" near the intersection of Causey and Maryland Avenues.

While en route to the scene Officer Babor heard the following transmissions based on information from the male caller who was still on the phone with Suffolk Police dispatch (and is identified as Civilian Witness One below):

- Person with a hand gun was chasing the caller.
- The caller would state that the person with the gun was no longer chasing him, then immediately would tell dispatch that the person with the gun was chasing him again.
- The caller stated that the person was chasing him and threatening to shoot him.

- Dispatch related a full physical description of the person with the gun, over the air.

The caller identified himself and remained on the phone, in contact with the Suffolk Police dispatch throughout the event. Through the caller's phone, the dispatcher could hear an individual, later identified as Corey Achstein (Achstein), yelling at the caller.

While responding to the scene, Officer Babor was receiving information from dispatch both orally and on his computer. However, Officer Babor was unable to view the information on his computer screen while he was operating his vehicle.

Upon arriving on scene, Officer Babor, who was the first officer at the location, did not see any person other than one individual that he believed matched the description of the person with a gun threatening the caller and others. Prior to making contact with the individual, Officer Babor verified the description of the individual by checking the call narrative on his computer screen in the patrol vehicle. After reading the description of the individual with the gun on his computer screen, Officer Babor was "absolutely" sure that was the same person he was viewing in the street, and later identified as Achstein.

Officer Babor exited his vehicle, with his police dog in his left hand and his gun in his right hand held to his side. He, then, walked towards the front of his vehicle and Achstein who was more than 30 feet from the officer. Achstein continued to walk away from Babor as Babor tried to approach. Officer Babor gave Achstein several voice commands attempting to communicate with Achstein. Achstein refused to respond or comply with the commands. Officer Babor could not see a weapon. However, based on the caller remaining on the phone with dispatch and the actions of Achstein not complying with Officer Babor's commands, Officer Babor maintained the belief that the Achstein still had the weapon on his person.

Based on this belief, during the initial interaction, Officer Babor raised his weapon and told Achstein that if he did not comply he, Officer Babor, would shoot. At this point Achstein stated, "go ahead and shoot me," to which Officer Babor replied that he, Officer Babor, did not want to shoot. This desire voiced by Achstein to be shot increased Officer Babor's level of awareness and increased the Officer's fear for his safety. Officer Babor stated that his level of concern was based on what he now perceived as a noncompliant person, Achstein, who was reported as having a gun and threatening others with that gun. This noncompliance with commands, coupled with Achstein's confrontational attitude, and statement of a desire to be shot, gave Officer Babor the belief that Achstein was armed and was considering "suicide by cop." These observations resulted in Officer Babor's rising concern and the raising of his level of awareness toward a potentially deadly situation for himself and the other officers who were arriving on the scene.

After additional commands Achstein laid on the ground, on his back, with the top of his head facing Officer Babor. As Achstein was moving to lie on the ground, Officer Babor heard a metallic sound to his left. Officer Babor did not see what made that sound. Further, due to the seriousness of the threat to the public and others, Officer Babor maintained his focus on Achstein. At this point Officer Babor had not seen the gun. However, he maintained his belief that there was a gun involved and Achstein had the gun on his person.

Officer Abrigo would state that she saw Achstein throw an object that she thought was a gun just as she arrived on the scene, but she did not relay that information to Officer Babor. Officer Abrigo asked Officer Babor if Achstein had been "tazed." Officer Babor responded, "No, I haven't done anything to him." Officer Abrigo based this question on seeing Achstein on the ground moving around in a jerky manner. Officer Babor communicated to Officer Abrigo that they needed to wait for backup because Achstein is supposed to have a gun.

As the Officers were maintaining distance and covering Achstein, Achstein sat up quickly. At this point, Officer Williams was approaching from the opposite direction towards Achstein. Officer Williams' police vehicle had its headlights on and blue lights activated and flashing. These lights were pointing in the direction of Officers Babor and Abrigo. Officer Williams was driving toward Achstein so that Achstein was facing the oncoming headlights.

Officer Babor observed Achstein's hands quickly drop to his waist, out of view of Officer Babor. At the same time, Achstein was twisting towards Officers Babor and Abrigo. Officer Babor believing that Achstein was reaching for a gun, and perceiving a threat to himself and Officer Abrigo, Officer Babor fired one shot which struck Achstein in the upper back. It is important to note that there was nothing between the police officers and Achstein at the time of the shooting and the distance between Achstein and Babor was approximately 30 feet. Moreover, Officer Babor told Achstein six (6) times to show me your hands from the time he came into contact with Achstein, until the time he fired the one (1) shot, including several times immediately before firing the shot.

Officer Babor later stated that his thought process which resulted in firing of the shot was that "...he's going for a gun to shoot me and her..." "...I need to stop him." Officer Babor stated that he aimed for center mass, to stop the threat. Officer Babor stated that he only fired once, because after the first shot Achstein's hands went above his head, and Achstein said "you shot me."

The scene was secured with Achstein being treated and transported by rescue for further medical treatment. Achstein died from his injuries.

When Officer Babor was asked about why the dog had not been released, he replied that initially, when Achstein was on the ground, Officer Babor thought releasing the dog would be excessive. When Achstein started moving his arms towards his waist and twisting, Officer Babor thought that this was a deadly force situation. "If you have a gun, which I thought he had a gun and was going to shoot an officer, my dog is not the answer. Deadly force is your appropriate response to that."

A metallic pellet gun was found approximately ten 10 feet from where Achstein had been laying on the ground. It was a replica of a handgun, with no indication that it was not a real firearm.

It is important to note that the time from Officer Babor's arrival on the scene to the shooting of Achstein was a total of approximately 83 seconds.

Independent witnesses were interviewed as part of the Suffolk Police Department's investigation.

Civilian Witness One was one of the persons threatened by Achstein who called 911. He stated he and friends were walking down the road when Achstein yelled at them to "shut the fuck up, before I come outside and whip y'all ass." He states they replied "Com'on outside" where Achstein replied, "Hold on, let me grab this Glock." He states that Achstein began to chase them, pointing a gun at them.

Civilian Witness Two was one of the persons threatened by Achstein. He stated that Achstein stated to him and the others, "I'm going to pull my Glock out if ya'll keep playing." Then, Achstein came out and we ran a little and he [Achstein] started walking toward us. Achstein said, "I'm, I'm chase you down. I'm not playing no more." He saw a black gun and then this witness ran out of the area.

Civilian Witness Three was a person threatened by Achstein. He stated that during the verbal altercation Achstein stated that "I'm gonna kill ya'll or something like that". When he saw Achstein come down he stated that they told Achstein they would call the police. Achstein replied, "Go ahead and call them. I don't care who you get, can get your mom or your daddy, I'm still going to kill them."

Civilian Witness Four stated he/she observed Achstein on the night of the incident walking on Causey Avenue. He/She stated he/she heard Achstein state to the group mentioned above that, "I'll fucking kill you."

Civilian Witness Five stated that he/she was outside near the intersection of Causey Avenue and Maryland when he/she heard yelling. He/She heard the individual, later identified as Achstein, cursing and yelling racial slurs. He/She observed Achstein raise a black gun and pointed it at the "kids".

Civilian Witness Six stated that he/she observed Achstein threatening and cussing and hollering at three young teenagers. He/She stated that Achstein was threatening to kill the teenagers. He/She observed Achstein point a gun down the street. He/She stated that when police arrived the officer was trying to talk to Achstein. Achstein was screaming and hollering at the officer (Babor). He/She further stated that Achstein was "acting crazy."

Civilian Witness Seven stated that he/she heard yelling out in the street, and then observed Achstein pacing back and forth and that Achstein was ranting, lots of cuss words, "you mother fuckers, niggers, I'll kill you." He/She observed a pistol in Achstein's hand. He/She states that when police arrived he/she heard a lot of yelling, and he/she thought Achstein got on the ground, but states it was dark and he/she could not see clearly.

Civilian Witness Eight stated that he/she had been with Achstein most of the day. He/She had taken Achstein to several places including the ABC store where Achstein purchased a fifth of Aristocrat (a brand of liquor). He/She drove Achstein home at approximately 5:00 p.m., prior to the above events, due to Achstein's high level of intoxication, stating that Achstein was "definitely drunk."

Finally, the toxicology report stated that Achstein had an alcohol content of .255% by weight by volume. The state presumes a person is driving under the influence of alcohol at a rate of .08% blood alcohol level. Achstein's blood alcohol level was more than three (3) times that amount. Also, present in Achstein's toxicology report is Diphenhydramine (a type of antihistamine) at the level of .025 mg/L.

Questions Presented

The question to be resolved is whether Officer Babor's use of deadly force was justified under the facts and circumstances presented.

Law and Analysis

Under well-established law, a person may use deadly force when he reasonably fears, **under the circumstances as they appear to him**, that he or another is in danger of being killed or that he or another is in danger of great bodily harm. **The facts of the situation must be viewed from the reasonable perspective of the person using deadly force.** The law is supported by findings of the United States Supreme Court.

To determine whether a law enforcement officer is justified in using deadly force we refer to *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, the U.S. Supreme Court concluded that Law Enforcement Officers can use deadly force in making an arrest where the police have probable cause to believe that the suspect poses a threat of death or serious bodily harm to the police or to the public. *Garner* states the "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or

threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”

The U.S. Supreme Court, in *Graham v. Connor*, 490 U.S. 386 (1989), presented some of the circumstances that should be part of the analysis in deciding the reasonableness of the force that the Officer uses against the suspect. “Because ‘[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,’ *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), however, 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 he is actively resisting arrest or attempting to evade arrest by flight.” These are not the only factors, nor are they treated as if they are dispositive in and of themselves. As noted by the Court in *Davenport v. Causey*, 521 F.3d 544 (6th Cir., 2008): “While these are the most common considerations, they are not ‘a magical on/off switch that [constitute] rigid preconditions’ to determine whether an officer's conduct constituted excessive force. *Scott v. Harris*, ___ U.S. ___, 127 S.Ct. 1769, 1777, 167 L.Ed.2d 686 (2007). Another consideration is ‘the number of lives at risk’ from the suspect's conduct, as well as the ‘relative culpability’ of those at risk.”

The Court in *Graham* and other decisions emphasized that the perspective to evaluate the actions of the officer is from that of the “reasonable officer on the scene.” The U.S. Supreme Court cautioned against using hindsight to judge the officer’s actions. In *Graham*, the Court found that “[t]he reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. ... The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.” In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court stated “the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective ... We set out a test that cautioned against the ‘20/20 vision of hindsight’ in favor of deference to the judgment of reasonable officers on the scene.” The Court has recognized that officers have to make quick decisions based on a variety of factors that the officers are presented with at the time the decision needs to be made.

The Court concluded that in determining what is reasonable belief in light of the Officer’s perception, reasonable belief can be shown even if it is a mistaken belief. As noted in *Saucier* the Court stated “[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed. ... Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution.” The fact that it is a mistaken belief does not detract from its reasonableness when considering the facts and the compressed time frame of his decision to act. This point was noted in the *Saucier* opinion where the Court stated: “The same analysis is applicable in excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.”

The law in Virginia regarding the defense of self and others is equally clear. The Court stated, in *Diffendal v. Commonwealth*, 8 Va. App. 417 (1989), that “[t]he common law in this state has long recognized that a person who reasonably apprehends bodily harm by another is privileged to exercise reasonable force to repel the assault.” Further, in *Foster v. Commonwealth*, 13 Va. App. 380 (1991), the Court ruled that “[o]ne must reasonably apprehend death or serious bodily harm to another before he or [Page 386] she is privileged to use force in defense of the other person.”

This perception of fear of bodily harm to others was, also, emphasized in the case of *Mullenix v. Luna*, 577 U.S. ____ (2015) decision, where the U.S. Supreme Court, cited the case of *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (*per curiam*) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)), and held the response by law enforcement that an officer did not violate clearly established law when he shot a fleeing suspect out of fear that he endangered ‘other officers on foot who [he] *believed* were in the immediate area,’ ‘the occupied vehicles in [his] path,’ and ‘any other citizens who *might* be in the area.’ The Court upheld as reasonable the response by law enforcement to shooting at the suspect’s vehicle six (6) times and rejected the notion that the deputy should have first tried less lethal methods, such as spike strips. ‘[C]onsidering the unpredictability of Long’s behavior and his fleeing in a marked police cruiser,’ the Court held, ‘we think the police need not have taken that chance and hoped for the best.’ The Court further stated that for qualified immunity not to apply, the constitutional question would have to be “beyond debate”. Put simply, the court stated that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law”. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Finally, in deciding whether deadly force can be used, the officer should, from the officer on the scene perspective, believe that he has probable cause to arrest the suspect. Section 19.2-81G of the Code of Virginia, 1950 as amended, states in part: “Such officers may also arrest without a warrant for an alleged misdemeanor not committed in their presence involving ... (iv) brandishing a firearm in violation of § 18.2-282 ...”

The facts relayed to Officer Babor from dispatch support an arrest for brandishing based on the statements of those being threatened. Also, if the informer is a disinterested citizen who is either a victim of or eyewitness to, a crime, police properly may give more weight to the informer’s information than they would to information from a ‘criminal’ informer, whose motives are less likely to be pure.”

Application of the Law to the Instant Case

This office reviewed all of the facts and circumstances of this case including statements from both law enforcement officers and civilian witnesses. Further, this office viewed on multiple occasions, the available video of the incident by Officer Babor’s camera. Finally, this office researched and took into account the relevant statutes and case law involving this situation.

Applying the above factors to this case, and based on the legal standards set forth in the above section, it can be determined that Officer Babor had developed probable cause and reasonable belief that Achstein was a deadly threat. This conclusion is based on:

1. Officer Babor’s knowledge of the incidents prior to his arrival;
2. Officer Babor’s information of Achstein chasing and threatening citizens with a weapon;
3. The fact that this information was supported by an identifiable witness who remained in communication with Suffolk Police dispatch throughout the event;
4. Officer Babor’s observations upon his arrival at the scene;
5. Officer Babor’s interaction with Achstein;
6. Officer Babor’s perception at the time of his interaction with Achstein;
7. Officer Babor’s hearing a metallic sound;
8. Officer Babor’s repeatedly telling Achstein to show me your hands (six (6) times) including several times immediately before firing the shot;
9. The actions of Achstein quickly sitting up, reaching for his waist, and twisting towards Officers Babor and Abrigo;
10. Officer Babor’s belief that Achstein was reaching for a weapon and that he and his partner were in danger of death or serious bodily harm.

These perceptions by Officer Babor at the time of the incident were reasonable and justified his use of deadly force to stop the threat which he perceived Achstein presented.

The legal standard for charging and successfully prosecuting an on duty police officer with homicide or manslaughter is high. It requires the state to consider the case, not from the perspective of 20-20 hindsight, but of a "reasonable police officer" in the heat of the moment. The key word for police in use of force situations is "reasonableness". Were an officer's actions "objectively reasonable" as the situation appeared to him at that moment? (See *Graham v. Conner*).

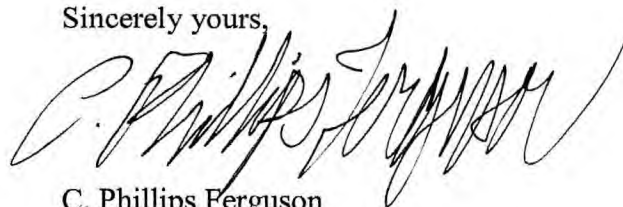
The facts in the recent U.S. Supreme Court case of *Mullenix*, reinforced the discretion that is granted to law enforcement in having to make split second decisions and made clear that courts should not second guess those decisions with 20-20 hindsight.

In short, based on all the facts, evidence, and established law, I find that Officer Babor's use of deadly force was justified and does not constitute criminal misconduct. Therefore, this Office declines to prosecute any charges against Officer Babor.

This office does recognize that this is a tragic situation. We empathize with the Achstein family and friends and extend our condolences to them for their loss. We would like to assure all those involved that a thorough investigation was conducted and all evidence was considered prior to issuing this finding.

Thanking you, I am

Sincerely yours,

A handwritten signature in black ink, appearing to read "C. Phillips Ferguson". The signature is fluid and cursive, with a large, sweeping flourish at the end.

C. Phillips Ferguson
Commonwealth's Attorney