# JEAN PETERS BAKER
# Jackson County Prosecuting Attorney

March 23, 2023

Via Electronic Mail: **mcw@wukelacom.com** and dupree@adupreelaw.com
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Via Electronic Mail: sean@mccauleyroach.com
Police Officers [redacted] and [redacted]
c/o _____
_____
_____
_____, Missouri _____

Via Electronic Mail:
Chief Adam Dustman
Independence Police Department
223 N. Memorial Drive
Independence, Missouri 64050

**Re:** **Law Enforcement-involved shooting on**
**March 11, 2022 at or near 24 Highway and Noland Road**[1]

All interested parties:

The Jackson County Prosecuting Attorney's Office convened its Use of Force Committee on multiple occasions to examine the circumstances surrounding the fatal shooting of a Civilian by an Independence, MO, Police Department on March 11, 2022 in Jackson County.[2]

The contemporaneously recorded audio and video demonstrates that Shooting Officer 1, the first one to fire his weapon, did so only after observing what he believed was the Civilian accessing and/or moving a pistol through an obstructed portion of the Civilian's damaged

[1] The main investigative file is identified as INDEPENDENCE O.I.S. CRN: 22-15499/MSHP CRN 220123314. A copy of this file will be maintained for release upon request in keeping with our policy.
[2] The victim of the use of force will be referred to as the "Civilian" and the shooting Independence Officers will be referred to as "Shooting Officer 1" and "Shooting Officer 2."

vehicle. Shooting Officer 2, the second one to react and/or fire his weapon, reports to seeing movement of a weapon in the vehicle, hears Shooting Officer 1 yell "gun" and fires.

The State is legally constrained by the available facts and law. While the facts of this investigation conclusively demonstrate that Shooting Officer 1 was ultimately wrong in his belief that the Civilian was moving a pistol, the law does not allow the State to analyze the reasonableness of the force used based on information learned after the incident has occurred. Rather, the law requires us to demonstrate, beyond a reasonable doubt, that the Officers' use of force was unreasonable in light of the facts and/or information known at the moment they used force. Because of this, there is insufficient evidence to overcome the Officers' available legal defenses. Accordingly, for the reasons stated more fully below, this office will not seek charges against Shooting Officer 1 or Shooting Officer 2.

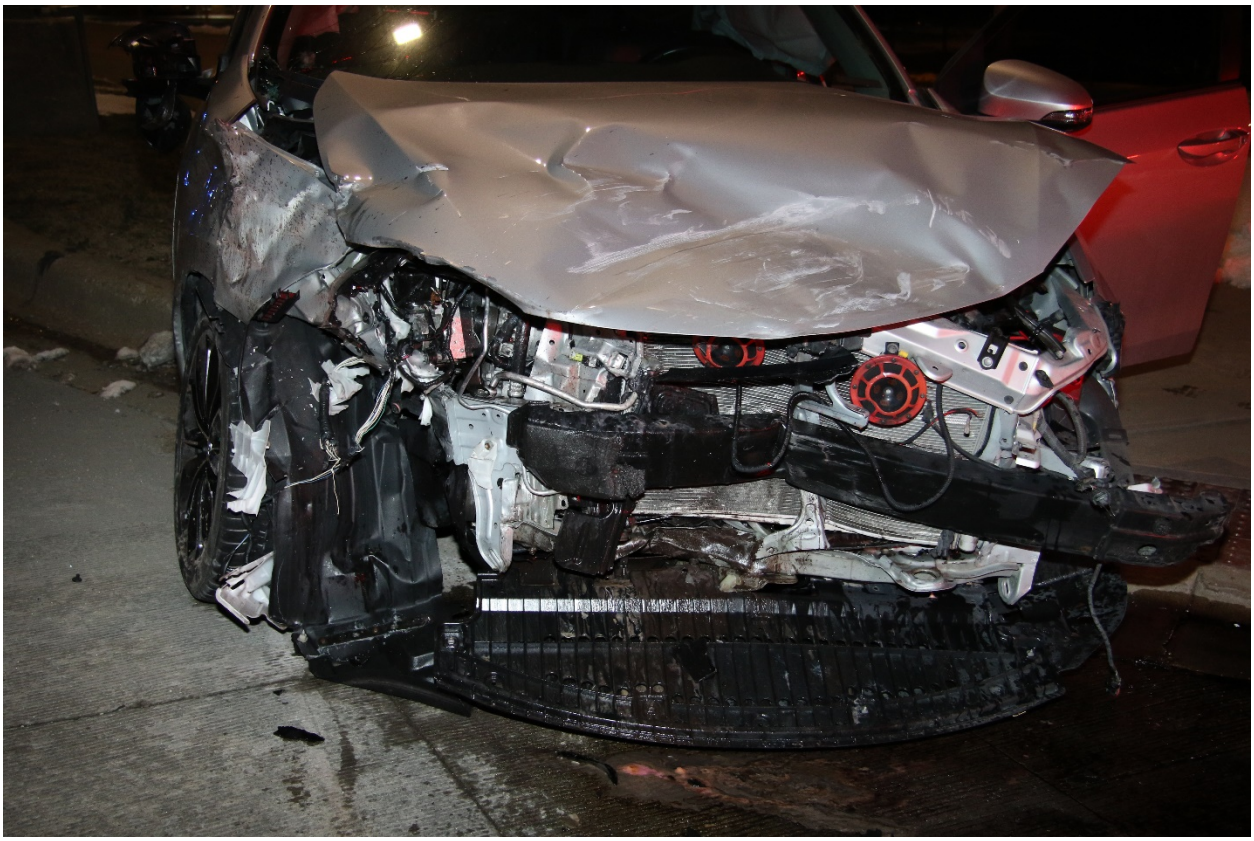
## Summary of Facts

On the night of March 11, 2022, just before 8:00 p.m., Independence Police were dispatched by a 911 call for a disturbance at 803 College Street. At that time, officers were informed that people were "banging" on the caller's door. In addition to this report, the civilian caller reported to 911 dispatch that the banging sounded as if the people outside were intending to kick in the door When officers arrived, a white Dodge fled from the driveway of 803 College Street, and, although officers attempted to pursue with lights and sirens, they quickly lost sight of the Dodge. The Civilian was the driver of the Dodge and inside that vehicle were two passengers, Witness 1, who was seated in the front passenger seat, and Witness 2, who was seated in the rear of that vehicle.

In her statement, Witness 1 noted that the Civilian, Witness 2, and she went to the residence at 803 College to get items back for Witness 2. When they arrived, some type of argument occurred. Witness 1 added that as they were about to leave, police showed up, and when police turned on their lights, the Civilian "drove really fast" and fled from police. As officers attempted to pursue in the direction that the Dodge was last seen traveling, they quickly came upon a crash involving the Dodge and another vehicle.

Less than a mile away, at the intersection of 24 Highway and Noland Road, the Dodge, traveling westbound, drove through a steady red light at a high rate of speed and collided with a silver Toyota. The collision between the Dodge and Toyota was significant. The Toyota was pushed across the intersection.[3] The Toyota was disabled, its airbags deployed, and it sustained extensive front end and passenger side damage. It came to rest on the west side of the intersection as shown below:

[3] A link to a video of this collision is available here: https://www.jacksoncountyprosecutor.com/DocumentCenter/View/2157/March-11-2022-IPD-OIS-Supplementary-Materials




INDEPENDENCE
POLICE

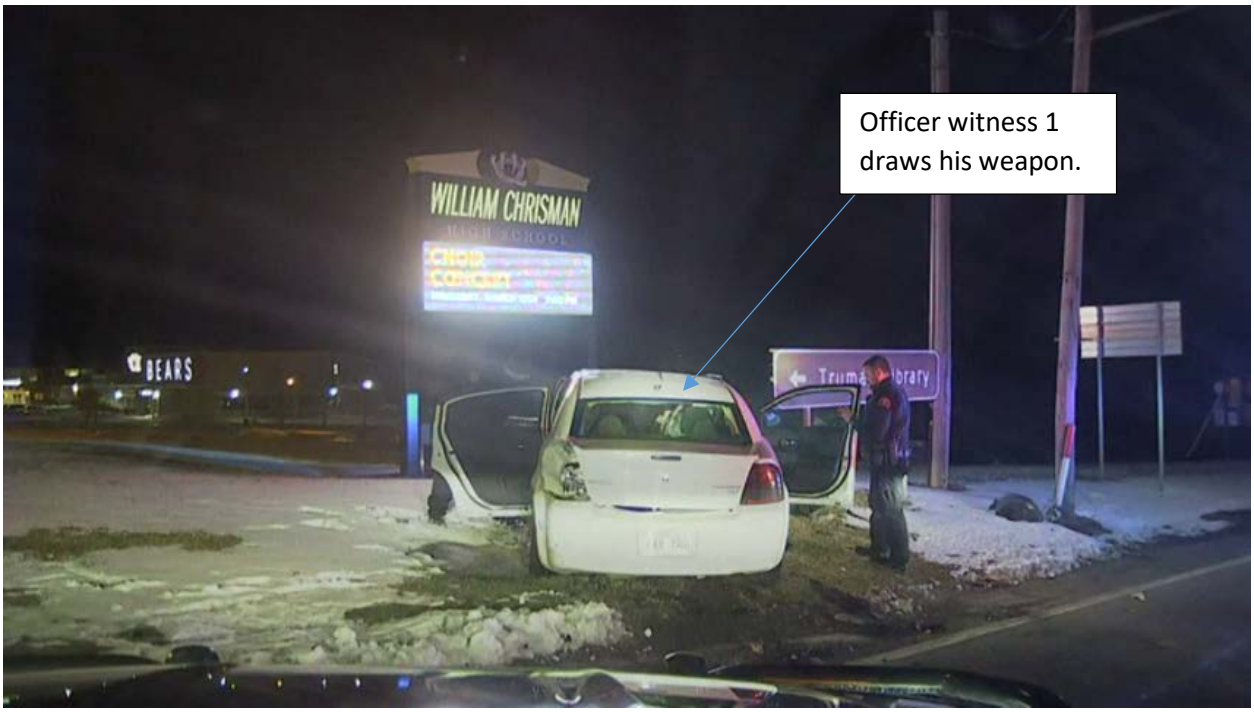
That collision disabled the Dodge which was left on the side of the road pointed northeast as shown below:


There was substantial damage to the front of the Dodge, including its front fender and front driver's door. The Dodge's front, side, and rear air bags had deployed:

The deployed airbags and extensive windshield damage decreased the available visibility for officers looking into the Dodge through the front windshield as shown here:

After arriving at the crash site, officers surrounded the Dodge with weapons drawn. Dash camera shows Shooting Officer 1 quickly remove Witness 2 from the rear driver's side of the Dodge. Witness 2 is taken east out of camera view by Shooting Officer 1. As Shooting Officer 1 does this, Shooting Officer 2 is seen standing at or near the front driver's side door closer to front of the vehicle focused on the Civilian while officers approach and surround the passenger side of the vehicle. At the same time, Officer Witness 1 crawls into the back driver's side of the Dodge.

In his statement, Officer Witness 1 stated that he climbed inside the vehicle to determine if there were any threats in the car and to examine the extent of the injuries to the Civilian. After entering the Dodge's rear seat, Officer Witness 1 is seen unholstering his weapon.




After directing Witness 1, the front seat passenger, to move out of the vehicle, Officer Witness 1 told investigators that he saw the Civilian's right hand moving and this hand was close to a silver assault style rifle that was lodged in the console area. After seeing this hand movement, he gave commands to the Civilian to "quit reaching or I'm going to shoot you." Because the Civilian stopped reaching, Officer Witness 1 reports that he began to holster his weapon and start his efforts to secure the assault style rifle by grabbing the "stock of it" and began to attempt to pull the rifle out. It was in an around this moment, that he heard someone on the exterior of the car say something like, "he's reaching again, he's reaching again.." and "he's got a gun…he's got a gun." Officer Witness 1 reported that, almost instantly, shots began to enter the Dodge while he was in the line of fire from his fellow officers requiring him to take cover in the backseat.

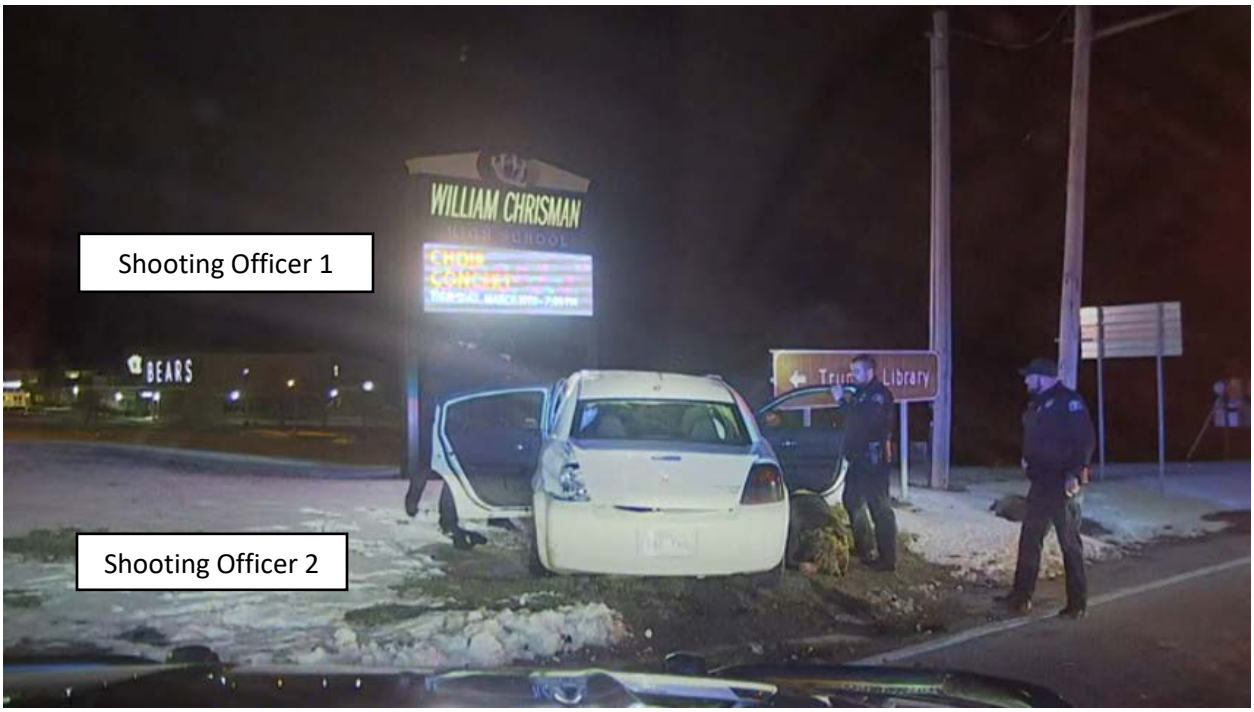
The video footage shows that Shooting Officer 1 did not see Officer Witness 1 climb into the Dodge. This footage also shows that no other officer communicated that Officer Witness 1 had entered the Dodge. The footage shows that, upon returning to the Dodge from moving Witness 2, Shooting Officer 1's attention is drawn to the Civilian when he hears someone yell "hey..don't move your f*cking hand!" This command appears to have been interpreted by Shooting Officer 1 as coming from one of the officers outside the vehicle. However, footage shows that it is coming from Officer Witness 1 inside the Dodge, and this command, although not verbatim, is wholly consistent with what Officer Witness 1 reported to investigators in his statement. Upon returning, Shooting Officer 1 took a position at or near the driver's side front window next to Shooting Officer 2. In his statement, Shooting Officer 1 described that when coming up to this area, he heard Shooting Officer 2 say something to the Civilian like "show his other arm, his right arm." At this point, Shooting Officer 1 began to try to get a better view of the Civilian and to do so, he began to look in the vehicle. In doing so, he noted "a lot of

obstructions" because of damage from the crash and because of the deployed airbags. Nonetheless, Shooting Officer 1 reported seeing what appeared to be the Civilian's right arm down towards his right leg.

He then stated "I saw the suspect's hand moving and it looked like he was pulling back towards his body and I observed a gun in his hand." At that point, he yelled, "Gun!" Shooting Officer 1 reported that, immediately thereafter, he fired because he was concerned that the Civilian was attempting to engage with him and Shooting Officer 2.[4]

Shooting Officer 2 also provided a statement. In his statement, Shooting Officer 2 noted that after Witness 2 was removed from the vehicle, Officer Witness 1 climbed into the back of the Dodge. Similar to Shooting Officer 1, Shooting Officer 2 reported an obstructed view into the Dodge. Nonetheless, he reported giving commands to the Civilian to show his hands which he described as continuing to "dip" or lower down to his waistband. From Shooting Officer 2's vantage point, he recalled Shooting Officer 1 returning to the front driver's side of the vehicle and, a short time later. He recalled Shooting Officer 1 yell "he's got a gun!" At that moment, Shooting Officer 2 reported that from his vantage point, he could see only the "butt stock" of a rifle which was starting to move as if it was moving upward. As the weapon started to move and as Shooting Officer 1 yelled "gun" and fired, Shooting Officer 2 fired.

The following picture shows the location of various officers, including Shooting Officer 1 and Shooting Officer 2 just prior to the shooting:




The evidence shows that Shooting Officer 1 fired his weapon 9 times at the Civilian. Shooting Officer 2 fired his weapon 13 times at the Civilian who was struck by multiple bullets. A rifle was ultimately recovered from the Dodge. As shown above, although Witness 1, the front

[4] A link to a video of the shooting is available here: https://www.jacksoncountyprosecutor.com/DocumentCenter/View/2157/March-11-2022-IPD-OIS-Supplementary-Materials

seat passenger in the Dodge, and Officer Witness 1 were in the path of the multiple shots fired by Shooting Officer 1 and Shooting Officer 2, neither were struck by the gunfire. Although aid was rendered, the Civilian died as a result of the gunshots from Shooting Officer 1 and 2.

## Applicable Law

This office has continually maintained that 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. In some circumstances, Missouri law permits a law enforcement officer to use force, even deadly force, in making an arrest or in preventing an escape.[5] First, the officer must have a reasonable belief that the person being arrested has committed or is committing a crime.[6] 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.[7] Moreover, the law does not require that an officer retreat or desist from his or her efforts because of resistance or threatened resistance by the person being arrested.

When it comes to the criminal review of a police officer's use of deadly force, specific rules apply. In Missouri, a law enforcement officer can use force that the officer knows will create a substantial risk of causing death or serious physical injury only 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.[8] Even then, an officer can use this heightened level of force only when he reasonably believes that the use of such force is immediately necessary to effect the arrest or prevent the escape.[9]

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. [10]

This standard is based upon the holding in Graham v. Connor. In Graham, the 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 actions were objectively reasonable.[11] The Court held 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

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[5] Section 563.046, RSMo, Missouri Approved Instructions ("MAI") 406.14; 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).
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] 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 decisions that often occur in these tense, uncertain, and rapidly evolving situations).
[11] 490 U.S. 386, 395 (1989).

involved from the perspective of officer on the scene not through the lens of 20/20 hindsight.[12] The Court instructed that this analysis must allow for the split-second decisions that often occur in these tense, uncertain, and rapidly evolving situations. The Court held 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.[13]

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.[14]

As specifically applicable here, this standard does not depend upon whether the belief turned out to be true or false.[15] And Missouri law goes further: an officer has no legal duty to "retreat or desist" from his efforts because of resistance or threatened resistance by the person being arrested.[16]

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.[17]

In addition to the instruction on use of force by a law enforcement officer, if charged, at trial, the Officers would also be entitled to the self-defense and defense of others instructions applicable to civilians. Similar to the use of force instruction, these instructions allow a person to legally use deadly force to defend themselves or others from what they reasonably believe to be the use or imminent use of force against them or another that would cause serious physical injury or death or to stop the commission of a forcible felony. Under these instructions, a person is not required to retreat before resorting to using force to defend against such an attack. Finally, the term reasonable belief is specifically defined to match the definition found in the use of force instruction. See MAI 406.06.

Finally, we must be guided by the appropriate charging standard for prosecutors 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."[18]

**Analysis and Conclusion**

[12] Id. at 397.
[13] Id. at 396.
[14] 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).
[15] MAI 406.14
[16] MAI 406.14.
[17] Id.
[18] ABA STANDARDS FOR PROSECUTION FUNCTION 3-4.3(a) (2015); See MO. SUP. CT. R. 4-3.8(a).

This office's responsibility is to seek justice for the victim and the accused in a criminal matter. This responsibility requires us to make decision on the evidence and law without fear or favor.

Under Missouri law, the evidence shows that the Officers are entitled to a specific justification defense for law enforcement officers using force.[19] The evidence shows that the Officers did have a legal basis to stop the Civilian and the occupants of the Dodge, i.e. a call for service involving a disturbance in which suspects who allegedly caused the disturbance fled from the scene at a high rate of speed.[20]

The next step in the analysis is to determine whether the force used in attempting to make the arrest was reasonable. Importantly, the law does not require that a belief be found to be true for it to be reasonable.[21] As noted, the applicable legal standard requires us to determine how the facts reasonably appeared to the Officers at the time of the shooting.[22]

The footage from the police vehicles shows that officers did give some commands after seeing movement from the Civilian that they were concerned about. The footage also shows that following the commands given by Officer Witness 1 and Shooting Officer 2's expression of concern about one of the Civilian's hands, Shooting Officer 1 reacted to some perceived movement from who he believes is the Civilian before firing his weapon.

Despite Shooting Officer 1's belief that the civilian was moving a pistol, the evidence shows that the Civilian did not have a pistol and it is undisputed that, while a rifle was recovered in close proximity to the Civilian, no pistol was recovered from the Dodge. However, as noted, the analysis does not conclude upon determining that Shooting Officer 1's belief turned out to be actually wrong. The law restricts the State to evaluating only what was known or reasonably believed prior to or at the time of the shooting. Thus, the fact that the Civilian did not have a pistol or, perhaps similarly, that it was debatable whether the Civilian in his post car accident state would have been able to access the rifle lodged in the console area of the Dodge is not, by itself, determinative of whether charges should be filed against the Officers.[24] Rather, the sole question is whether there is sufficient facts to show that the Officers were unreasonable in their beliefs.

Boiled down to its simplest terms, here, such evidence would be that the Officers knew that the Civilian did not have a pistol or that they knew that the Civilian was unable to access the rifle and still decided to fire their weapons at him. Nonetheless, the available evidence here is that the Officers did not know these things and that the Officers fired their weapons in reaction to movement that they believed involved a weapon, i.e. a pistol in the case of Shooting Officer 1 and a rifle in the case of Shooting Officer 2. Thus, there are insufficient established facts in this case to demonstrate that the Officers beliefs were unreasonable at the time of the shooting.

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[19] MAI 406.14 [Use of Force instruction].
[20] The specific violation would likely have been improper use of a turn signal pursuant to Section 304.019, RSMo.
[21] Id.
[22] Id. It should be noted that this is the same standard that applies in traditional, i.e. civilian and civilian, self-defense. As noted above, both of these defenses would likely apply to this case. MAI 406.06.
[24] MAI 406.14.

The facts of this case were highly unique.[25] Although it is not known, the timing of the events and the weight of the facts available to the State raise questions about whether the presence of Officer Witness 1 in the rear of the Dodge was mistaken by Shooting Officer 1 and Shooting Officer 2 for movement by the Civilian who appeared to disregard commands of officers.[26] Further, Officer Witness 1 reports having his service pistol drawn for part of this encounter adding to the mistaken belief of Shooting Officer 1 and Shooting Officer 2.

However, even under this unconfirmed scenario, the law would not afford the State an opportunity to charge for belief that was later demonstrated to be wrong even if that mistake belief ended in tragedy as here.[27]

Because of this, our Committee did not come to this decision lightly and this decesion should not be interpreted as a statement indicating that the State believes the "right or "just" thing happened. We must accept that our review of this incident is ethically and legally limited to a review of the appropriateness of crimnal charges. The Civilian was only 39 years old at the time of his death.He was a son, a brother, and a father. He was a member of our community, one of the people that this office has sworn to represent. We offer our deepest condolences and sympathy to the Civilian's family and loved ones.

Accordingly, we do not believe the facts and law support charges here.

Sincerely,

Jean Peters Baker

Jean Peters Baker
Prosecutor for Jackson County

[25] The State sought but was unable to obtain policies and procedures that were applicable to this specific factual circumstance.

[26] From the footage available, it appears that the officers did not openly or widely communicate that an officer was entering the Dodge. It would also appear that no officer had taken control of the scene in a lead role, adding to the disorientation by Shooting Officer 1 and Shooting Officer 2.

[27] In addition to not supporting charges for murder, the evidence does not support other homicide charges. The facts here do not show that the Officers “consciously disregarded” a risk that their conduct would cause death nor did they “fail to be aware of a substantial and unjustifiable risk that circumstance exist or a result will follow.” MAI 414.10 (Involuntary Manslaughter in the First Degree) and 414.12 (Involuntary Manslaughter in the Second Degree).