REPORT OF THE DEPARTMENT OF JUSTICE

WILMINGTON POLICE DEPARTMENT USE OF DEADLY FORCE

SUBJECT: Jeremy McDole

OFFICERS: Senior Corporal Joseph Dellose
Senior Corporal Daniel Silva
Corporal Thomas Lynch
Corporal James MacColl

DATE OF INCIDENT: September 23, 2015

REPORT DATE: May 12, 2016

Introduction and Summary

Four Wilmington Police Department officers shot Jeremy McDole on September 23, 2015. The Delaware Department of Justice (DOJ) undertook an investigation to determine whether any of the four officers should be charged with a criminal offense. As detailed in this report, DOJ also examined whether, notwithstanding any potential violations of criminal law, there were deficiencies in the Wilmington Police Department's policies and/or training that should be corrected in light of Mr. McDole's shooting, to ensure that similar incidents do not occur in the future.

- Our investigation revealed serious deficiencies in the way in which the Wilmington Police Department prepares its police officers to deal with situations like the one that Mr. McDole presented, specifically with regard to use of force policies and training and policies for dealing with individuals with mental illness, disabilities, or cognitive impairments. Most significantly, we find that the "continuum of force" provisions of the Wilmington Police Department's use of force policy are effectively meaningless for police officers as currently written.

- With respect to three of the four officers – Senior Corporal (S/Cpl) Daniel Silva, Corporal (Cpl) Thomas Lynch, and Corporal (Cpl) James MacColl – DOJ did not find probable cause to charge them with a criminal offense. Through our investigation, we determined that these three officers believed – at the moment they discharged their firearms – that doing so was necessary to protect themselves, or others, against death or serious physical injury. Because of that belief, they were entitled under Delaware law to use deadly force to subdue Mr. McDole. Under Delaware's deferential legal standard for the use of deadly force by a law enforcement officer, their subjective belief that using deadly force was necessary to protect themselves or others immunizes them from criminal responsibility.

- With respect to the fourth police officer who discharged his firearm, Senior Corporal (S/Cpl) Joseph Dellose, the Attorney General did believe that the state should attempt to gather sufficient evidence to pursue a felony assault charge, based upon S/Cpl Dellose's conduct in immediately confronting Mr. McDole rather than communicating with officers who S/Cpl Dellose knew were already on the scene, and discharging his shotgun in the manner that he did. However, after hiring a former federal prosecutor from Pennsylvania to prepare a case for possible criminal prosecution and after consulting with two nationally recognized police use-of-force experts who had recently recommended criminal charges against the Cleveland police officer who shot Tamir Rice, and after receiving opinions from both of those experts that S/Cpl Dellose's actions did not constitute criminal conduct under the Delaware Code, DOJ concluded that it could not proceed with a criminal prosecution against S/Cpl Dellose given that the defense would present unchallenged expert testimony that S/Cpl Dellose's conduct was reasonable.

- Although DOJ is not able to pursue criminal charges against S/Cpl Dellose, it is DOJ's position that S/Cpl Dellose's conduct in this case was extraordinarily poor police work that endangered both the public and his fellow officers. DOJ does not believe that S/Cpl Dellose should be employed by the Wilmington Police Department in any role where he would be carrying a firearm in public.

Scope of Investigation

The scope of the investigation into Mr. McDole's death was much broader than the scope of prior investigations that have been undertaken by DOJ regarding police-involved shootings. There were a number of reasons for this. First, this case was the first police-involved shooting since Attorney General Denn assumed responsibility in January 2015 where there was a bona fide question as to whether the individual who was shot was armed with a weapon at or around the time of the shooting. This created a need for a broader factual investigation. Second, concerns were raised by Mr. McDole's family as to (among other things) (1) the integrity of the scene of the shooting (and, in particular, whether evidence may have been placed at the scene by Wilmington Police Department officers), (2) the possibility of prior contact between Mr. McDole and one or more of the officers involved, and (3) the possibility of additional video of the incident. All of these issues had to be thoroughly investigated by DOJ investigators, in addition to their investigation of the shooting incident itself. Third, a decision was made early in the investigation that, notwithstanding any issues of criminal liability, the shooting raised serious questions about the Wilmington Police Department's preparation of its officers, which DOJ should attempt to address through the use of outside experts for the future benefit of both the Wilmington Police Department and other Delaware police departments. All of these factors resulted in an investigation that was more extensive than other investigations of police-involved shootings.

Finally, the preliminary conclusion that DOJ should attempt to gather sufficient evidence to pursue a felony assault charge against S/Cpl Dellose required that DOJ (a) recruit, hire, and deputize a former federal prosecutor who was not a member of the Delaware bar to prepare the case for possible presentation to a Delaware grand jury, and (b) consult with two national experts with respect to police conduct who had supported criminal charges against a Cleveland police officer with respect to the shooting of Tamir Rice, in order to determine whether the facts collected by DOJ were sufficient to initiate a criminal prosecution against S/Cpl Dellose. DOJ first consulted with Jeffrey Noble, former Deputy Chief of the Irvine Police Department in California, who has been involved in over one thousand police use-of-force investigations and, in November 2015, authored an expert opinion on behalf of Tamir Rice's family that criticized the expert opinions of the Cleveland District Attorney and argued that the Cleveland police officer who shot Tamir Rice should be held responsible for his death. After reviewing all of the materials in the McDole case, Mr. Noble told DOJ that, in his expert opinion, S/Cpl Dellose's conduct did not violate Delaware's criminal statute. After receiving Mr. Noble's opinion, DOJ solicited a second opinion from Roger Clark, the former head of the Los Angeles Sheriff's Department's North Regional Surveillance and Apprehension Team. Mr. Clark has been retained as a consulting expert 1,400 times, the majority of

times for cases involving the use of force, and like Mr. Noble, authored an expert opinion last year on behalf of Tamir Rice's family that criticized the expert opinions of the Cleveland District Attorney and argued that the Cleveland police officer who shot Tamir Rice should be held responsible for his death. Like Mr. Noble, Mr. Clark reviewed all of the materials in this case, and told DOJ that, in his expert opinion, S/Cpl Dellose's conduct did not violate Delaware's criminal statute.

DOJ's investigation included:

- In the days immediately after the shooting, a broad-based neighborhood canvass involving multiple DOJ investigators to locate eyewitnesses, video or audio evidence, or any other information that would help DOJ prosecutors to understand all relevant facts from the incident in which Mr. McDole was shot. This canvass was accompanied by a public request through traditional media and social media for persons with information to come forward.

- Ballistic evidence was analyzed by Carl M. Rone of the Delaware State Police Forensic Firearms Services Unit. The evidence itself was gathered by the Wilmington Police Department and the Delaware Division of Forensic Science from the crime scene.

- Performance of an autopsy by the Delaware Medical Examiner's office. This autopsy, which was received by DOJ on January 28, 2016, included a post-mortem toxicology report.[1]

- Interviews of Wilmington Police Department officers who were at the scene of Mr. McDole's shooting and civilian witnesses. Some of these interviews were conducted by Wilmington Police Department officers and observed by DOJ investigators, others were conducted jointly between DOJ and WPD officers, and some were conducted by DOJ investigators outside the presence of WPD officers.

- Interviews by DOJ of members of Mr. McDole's family (accompanied by their legal counsel), followed by interviews of persons identified by those family members as potentially having relevant knowledge.

- Subpoenaing and reviewing thousands of pages of documents from the Wilmington Police Department, and hundreds of pages of documents from other third parties.

[1] Some elements of Mr. McDole's autopsy report will not be discussed in this report because they may constitute private health information under Delaware law.

- Microscopic examination of swabs taken from Mr. McDole's hands by the R.J. Lee group, an independent laboratory. The swabs themselves were gathered by the Wilmington Police Department at the scene.

- Video evidence, including a version of the cell phone video processed by the Federal Bureau of Investigation, providing a detailed review of the images captured by the cell phone video.

- Collection and review of video evidence from multiple stationary locations in the area of Mr. McDole's shooting.

- Retention of experts in police policies and training to review the policies and trainings of the Wilmington Police Department, in order to identify any relevant deficiencies relating to the incident involving Mr. McDole.

- Retention of an attorney from the Pennsylvania bar (a former federal prosecutor) sworn as a Delaware DOJ Special Deputy Attorney General to prepare the case for possible prosecution, in order to avoid any real or perceived conflicts presented by DOJ prosecutors presenting a case involving criminal charges against a Wilmington Police Department officer.

- Retention of two national experts in police practices to determine whether, if charges were filed, the State could rebut expert testimony expected from the defendant officer with respect to the justification of his conduct under Title 11, Section 464 of the Delaware Code. As noted above, the national experts retained by DOJ were the two experts retained by Tamir Rice's family who recommended criminal charges against a police officer in Cleveland, Ohio for the police shooting incident that led to Tamir Rice's death.

Applicable Law

The Delaware Criminal Code is written in a manner that provides a great deal of deference to police officers with respect to the use of deadly force, and allows for a review of the reasonableness of their use of deadly force toward a person they believe to be armed, only in very narrow circumstances. For this reason, criminal prosecution of a police officer for the use of deadly force under existing Delaware law – even in cases like this one where the judgment of one of the officers was extraordinarily poor – is extremely challenging.

The reckless use of deadly force by any individual in Delaware can result in a criminal conviction ranging from a felony assault to a homicide, depending upon the extent of the victim's injury. However, there are two defenses available to police officers

in such cases – one that is available to all Delawareans, and one that is unique to law enforcement officers.

The first defense available to a law enforcement officer is the "use of force for self protection." The Delaware Code states:

> (a) The use of force upon or toward another person is justifiable when the defendant ***believes*** that such force is immediately necessary for the purpose of protecting the defendant against the use of unlawful force by the other person on the present occasion.
>
> (b) Except as otherwise provided in subsections (d) and (e) of this section, a person employing protective force may estimate the necessity thereof under the circumstances ***as the person believes them to be*** when the force is used, without retreating, surrendering possession, doing any other act which the person has no legal duty to do or abstaining from any lawful action.
>
> (c) The use of deadly force is justifiable under this section if the defendant ***believes*** that such force is necessary to protect the defendant against death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat.

11 Del.C. § 464 (emphasis added).[2]

As noted in the sections of the Code emphasized above, this provision of the Delaware Code is entirely subjective in nature – in order to successfully assert it as a defense, a police officer need not establish that the use of deadly force was ***actually*** necessary to protect the officer against death or serious physical injury. All he must show is that he ***believed*** that to be the case at the time that he used deadly force, whether his belief was reasonable or unreasonable.[3]

There is one relevant exception to the deferential, subjective test described above.

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[2] This section of the Code also states that "the use of deadly force is not justifiable under this section if… (2) The defendant knows that the necessity of using deadly force can be avoided with complete safety by retreating…", but effectively excludes police officers by stating, "A public officer justified in using force in the performance of the officer's duties, or a person justified in using force in assisting an officer or a person justified in using force in making an arrest or preventing an escape, need not desist from efforts to perform the duty or make the arrest or prevent the escape because of resistance or threatened resistance by or on behalf of the person against whom the action is directed."

[3] The second justification defense available to police officers is found at 11 Del.C. § 467. Because we have determined that the defense under Section 464 cannot be rebutted beyond a reasonable doubt, we do not examine this further.

Title 11, Section 470(a) of the Delaware Code states:

> When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such relief would establish a justification under §§ 462-468 of this title but the defendant is reckless…in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of the use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which recklessness…suffices to establish culpability.

Thus, a police officer who uses deadly force based upon a sincere belief that such force was necessary to protect himself against death or serious physical injury, but was reckless in coming to that belief, is not entitled to the subjective test outlined in Section 464, and his use of deadly force can be reviewed to determine if it was reckless. "Reckless" is a term defined in the Delaware Criminal Code to mean, in relevant part, "A person acts recklessly with respect to an element of an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from the conduct. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation…." 11 Del.C. § 231(e).

Therefore, in order to successfully prosecute a police officer for the use of deadly force against Mr. McDole, the state would need to prove two things:

1. That the officer was aware of and consciously disregarded a substantial and unjustifiable risk in obtaining or failing to obtain information he needed to make a determination regarding the use of deadly force, and that the officer's disregard of the risk constituted a gross deviation from the standard of conduct that a reasonable person would observe in the situation; ***and***

2. That the officer's decision to use deadly force itself also involved a conscious disregard of a substantial and unjustifiable risk, such that the disregard constituted a gross deviation from the standard of conduct that a reasonable person would observe in the situation.[4]

[4] This high standard with respect to criminal liability for police officers who use deadly force varies among states. In the state of New York, for example, the criminal statute regarding police use of deadly force is materially different from Delaware's standard. In New York, a police officer is barred by the criminal code from using deadly force unless he "*reasonably believes* that such other person is using or about to use deadly physical force." New York Penal Law § 35.15 (emphasis added). Thus, in New York prosecutors and juries are permitted to assess the reasonableness of a police officer's decision to use deadly force in criminal actions, whereas in Delaware they are not.

Results of Factual Investigation

The following chronology of the facts surrounding Mr. McDole's death is drawn from three primary sources: interviews with witnesses after the incident occurred, review of audio evidence (the 911 call made by the woman who first saw Mr. McDole), and the Wilmington Police Department Communications Center (WILCOM) tape reflecting statements made by dispatchers and officers in real time (prior to, during, and after the incident), and video evidence derived from a cell phone video taken by a civilian during the incident. Although DOJ collected video from a number of other stationary sources around the site of the shooting, none of those videos appear to show any footage of Mr. McDole immediately preceding, following, or surrounding the incident.[5] Some of the stationary videos show officers – including S/Cpl Dellose – arriving in the area of the shooting and approaching the incident area, and one of the stationary videos appears to show[6] S/Cpl Dellose firing his shotgun (without Mr. McDole or any of the other officers in camera range), but the other videos do not show the area of the actual shooting. As further discussed below, the cell phone video appears to begin, based upon matching it up with the WILCOM recording, approximately one minute after the first police officer on the scene made contact with Mr. McDole. There is a second, short video taken from the same cell phone which shows Wilmington Police Department officers attempting to resuscitate Mr. McDole.

Mr. McDole's Activities Prior to the 911 Call

Mr. McDole's activities during the hours prior to the 911 call that summoned police to AutoZone (the area where the shooting occurred) did not factor into DOJ's analysis of the officers' criminal liability. The police officers' liability is based upon what they knew and believed at the time they discharged their weapons, and there is no evidence that any of the officers who discharged their weapons had any knowledge of Mr. McDole's activities prior to the 911 call when they arrived at the scene of the shooting.[7] His activities earlier in the day are discussed briefly here, and in more detail

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[5] Although they do not show any footage of Mr. McDole, the videos collected from the areas around the shooting are posted on the web site created by DOJ for viewing of photographic, video and audio evidence from this incident, http://attorneygeneral.delaware.gov/executive/Wilmington092315.shtml. Footage from approximately 3 p.m. to 3:30 p.m. is posted from these surveillance videos. The original cell phone video is also posted on the web site, as is a portion of the video enhanced by the Federal Bureau of Investigation in order to make more clear the footage of Mr. McDole just prior to his shooting.

[6] The stationary video was taken from the surveillance camera of a local business. The video films the officer in question from behind, but based upon S/Cpl Dellose's filmed actions in the cell phone video where he can be identified, the footage appears to be of S/Cpl Dellose.

[7] One witness has alleged that Mr. McDole claimed that a white police officer had been following him earlier in the day on the day that he was shot. However, to the extent that Mr. McDole's whereabouts earlier in the day are known, there is no evidence that any of

below, because of concerns expressed by Mr. McDole's family that the shooting incident may have been prompted by activities that occurred earlier in the day.

Mr. McDole appears to have spent part of the morning and possibly early afternoon of September 23 with an individual who identifies himself as Mr. McDole's godfather. As further detailed below, this individual was interviewed after Mr. McDole's shooting, and stated that he had been with Mr. McDole on the morning of September 23, and that he had wheeled Mr. McDole to the Browntown section of Wilmington that morning so that Mr. McDole could get a gun and PCP-laced cigarettes known to the individual as "dippers." This individual did not actually see Mr. McDole purchase a gun during that trip, but was not with him at all times. He claims to have left Mr. McDole's company before the incident outside AutoZone.

There is a Downtown Visions camera that shows Mr. McDole intermittently – from 11:54 to 12:56 – on September 23, 2015 on Rodney Street. In that video footage, he does not appear to be engaging in any unusual activity. There is no firsthand evidence (e.g. videotape, third party witness sightings) known to DOJ of Mr. McDole's activities immediately prior to the time when a woman called 911 to report that Mr. McDole had discharged a weapon.

The Original Call to 911

The original 911 call to police came from a woman near the AutoZone who also happened to be acquainted with Mr. McDole.[8] The woman who called 911 was interviewed subsequent to the incident, and described what she saw and heard that caused her to dial 911.[9]

When interviewed after the incident, the 911 caller stated as follows. She heard two gunshots while standing outside of a residence located to the rear of AutoZone. She heard a third gunshot, and simultaneously saw Mr. McDole's wheelchair tip over, causing Mr. McDole to fall to the ground. She saw Mr. McDole remain motionless for a short period of time, before he began trying to get back into his wheelchair. She did not

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the four officers were anywhere near Mr. McDole. DOJ's review of this issue included a review of each of the service calls that the four officers were involved in on September 23 prior to responding to the scene of Mr. McDole's shooting.

[8] As discussed in more detail below, some individuals made allegations to DOJ that the 911 call was placed by a woman named Kim as part of an effort to cover up a robbery of Mr. McDole. However, the identity of the person who called 911 is known to DOJ investigators, and it is not the individual who those individuals believe to have made the call.

[9] A second individual attempted to call 911 from the area where Mr. McDole was shot at around the same time as the first 911 call. The second individual had been with the first 911 caller when they heard gunshots. The second individual's call was disconnected before she could speak to an operator, but she was located at the scene and interviewed that day.

actually see a gun. The witness assumed from everything that she had heard and seen that Mr. McDole shot himself.

Based on this belief, the witness made the following call to 911, which is reproduced here in material part. (An audio recording of the entire 911 call is available on a web site that DOJ has established in connection with this report, http://attorneygeneral.delaware.gov/executive/Wilmington092315.shtml.) In reading the transcript, it is important to note that some of the statements captured on the tape from persons on both ends of the call – the caller and the operator – were being made to other persons in their physical presence, rather than to the person to whom they were speaking on the phone.

> CALLER: The ambulance on, what street is this?
> OPERATOR: Police, can I help you?
> CALLER: By Autozone on Lancaster and Scott. Yes we need police, we need an ambulance, a man just shot his self, by the, in the Autozone parking lot he shot his self.
> OPERATOR: He shot his self?
> CALLER: He was sitting and he shot his self and he rolling out of the wheelchair and he laying here on the ground.
> OPERATOR: Okay.
> CALLER: Please send the ambulance and the police, please.
> OPERATOR: Okay, okay I'm just, look I'm, I just you to stay on the line with me.
> CALLER: Okay, the Autozone at Scott Street.
> OPERATOR: Stay on the line with me, okay.
> CALLER: Autozone at Scott Street.
> OPERATOR: Stay on the line with me.
> CALLER: Please send somebody, oh my God! Please send somebody quick! Autozone and Scott Street.
> OPERATOR: He shot himself, ma'am?
> CALLER: Yes, yes! Please and he still has a gun, please and he is moving a little bit but he shot his self! He is on the ground and he's moving around and he has a weapon in his hand! Please get somebody here!
> OPERATOR: All right ma'am, we getting officers coming up there right now.
> CALLER: Back up [unintelligible], he still got a gun! Back up!
> OPERATOR: We got a shooting, or homicide, or suicide, the uh [unintelligible].
> CALLER: Hello! Back up because he still got a gun!
> OPERATOR: Yeah it looks like it. Looks like they saying he shot himself. At Autozone.
> CALLER: Say it again! Yes please he shot his…oh my God!
> OPERATOR: Autozone parking lot. He's down.
> CALLER: Yes, at the back gate. Please send somebody here.
> OPERATOR: All right ma'am, I'm going to transfer you over to the ambulance, he may have some, all right never mind I got you.
> CALLER: Oh, I can't!

OPERATOR: I got your phone number and everything, ma'am.
CALLER: The man still has a weapon in his hand.
OPERATOR: Okay.
CALLER: He's moving a little bit, I can't, I don't want to go close to him because I don't know if he's crazy or not.
OPERATOR: Yeah, I would say that he probably is if he did that.
CALLER: Oh my God, please can you just get the police here. Please get the cops here.
OPERATOR: He's still moving and the handgun's in his hand.
CALLER: Yes. He's right here in a wheelchair.
OPERATOR: Where did he shoot himself ma'am?
CALLER: He's trying to pull his self up into his wheelchair.
OPERATOR: Okay, where did he shoot himself, could you tell?
CALLER: I don't know, I'm not that close to him.
OPERATOR: Okay, okay.
CALLER: I'm standing here looking.
OPERATOR: Okay, okay
CALLER: He has a weapon in his hand. I'm not crazy, I'm not going next to him.
OPERATOR: He's pulling himself up in his wheelchair and he got it in his hand still.
CALLER: Yes.
OPERATOR: You see the police officers there?
CALLER: Please hurry up and get somebody here! Back up! Back up!
OPERATOR: Okay yeah, keep those people away. Keep them away for me.
CALLER: Back up. Please get the police here.
OPERATOR: All right Stevie just make sure they 1039, he still got the gun in his hand.
CALLER: Yo, he still got a gun in his hand, he shot his self. He shot, he was over there shooting and he shooting his self. He shooting his fucking self.
OPERATOR: All right ma'am, just keep those people back for me I appreciate it, thank you.
CALLER: He shooting his self. He got a gun.
OPERATOR: All right, watch yourself ma'am.
CALLER: He got a gun in his hand right there in that wheelchair and he shot his self.
OPERATOR: Please watch yourself
CALLER: Back up.
OPERATOR: I can't tell she doesn't know where he shot himself and he did shoot himself and he fell out of the chair but he pulled himself back up in it. So he's armed. I don't know he might try to take one of the guys out.
CALLER: Back up baby back up we ain't trying to get shot.
OPERATOR: Yeah watch the police officers too, ma'am. I can hear them coming up there. They're going to take him out.
CALLER: Oh my Jesus, don't kill him!

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The officers who responded to the 911 call were not privy to any of the above exchange. They heard only what is on the WILCOM audiotape, i.e. the dispatcher's voice and the voice of S/Cpl Silva, the first officer to respond to the scene (an audio recording of the WILCOM transmissions is also reproduced in its entirety at http://attorneygeneral.delaware.gov/executive/Wilmington092315.shtml). Nevertheless, the 911 call raised a concern at DOJ as to why the operator who took the call said "They're going to take him out," when there is no evidence that the operator had any communication with the police officers or other information that would lead him to make such a statement.

DOJ was able to locate and interview the 911 operator who took the 911 call. The 911 operator explained that his statement about the police "taking out" Mr. McDole was not made to police on scene or the 911 caller, but rather to his colleague in the dispatch room, and it was his speculation as to what might happen at the scene based on his belief from the phone call that Mr. McDole was holding a firearm and/or pointing it at police officers or civilians. He explained that it was faster to call out to the other dispatcher rather than making a computer entry due to the rapidly unfolding events.[10]

Wilmington Police Respond Following the 911 Call

The audio tapes of real-time communications between the officers and the Wilmington Police dispatcher, along with post-incident interviews with police officers (those who discharged their weapons and those who did not) and civilian witnesses, have allowed DOJ to reconstruct the portions of this incident that precede the widely-publicized cell phone video of the incident. In comparing radio dispatches from WILCOM to the video, it appears that officers first arrived at the scene and saw Mr. McDole approximately one minute before the cell phone video begins.

Following the receipt of the 911 call, Wilmington Police Department officers were first alerted to an incident by a call from WILCOM that stated "1700 block of Lancaster, 1700 block of Lancaster in AutoZone parking lot, for a possible IK, some mention it might be self-inflicted."[11] A number of units responded that they were en route. Dispatch then stated "Be advised the subject is down there, there is some mention he possibly still has the handgun in his hand."

The first officers to arrive at the scene, less than a minute after the call went out from WILCOM, were Senior Corporal Daniel Silva, a 19-year veteran of the Wilmington Police Department, and a rookie police officer with whom he was partnered that day. As S/Cpl Silva and his partner arrived at the scene, he broadcast to WILCOM "We are

[10] The 911 operator is heard using the same terminology later in the 911 tape, saying "I think they just took him out Stevie" to the dispatcher sharing a room with him.
[11] "IK" is an alphabetical code used by Wilmington Police Department to indicate shots fired.

coming up to the scene and will advise." Seconds later, he said "We're being flagged down on Tulip Street, we will advise."

S/Cpl Silva recounted the following day that as he and his partner arrived in the area of the AutoZone, they were flagged down by a woman who pointed to Mr. McDole and said "He's right there, he's still got the gun." In a later interview, the woman who had initially placed the 911 call confirmed that she was also the person who flagged down S/Cpl Silva. Two other officers, arriving soon after S/Cpl Silva, encountered a civilian witness repeatedly yelling (in one case) "baby get down, he has a gun!" and (in a second case) "he's got a gun."

Less than ten seconds after reporting that he was being flagged down, S/Cpl Silva radioed to WILCOM "we have a subject in a wheelchair, looks like he's taking off again here, stand by, will advise." S/Cpl Silva recounted the following day that when he first saw Mr. McDole, Mr. McDole was attempting to climb from the ground into a wheelchair. This was the first time that S/Cpl Silva became aware that Mr. McDole used a wheelchair. S/Cpl Silva also recalled that after Mr. McDole lifted himself back into his wheelchair, S/Cpl Silva began attempting to communicate with Mr. McDole. S/Cpl Silva claims that he repeatedly asked Mr. McDole to "let me see your hands," and that Mr. McDole first reached into a bag next to the wheelchair, and then began moving slowly in the wheelchair out of a grassy area where S/Cpl Silva first saw him. S/Cpl Silva's partner, who was also interviewed after the incident, provided an accounting of this initial contact with Mr. McDole consistent with S/Cpl Silva's account.

Approximately twenty seconds after radioing that he had seen Mr. McDole, S/Cpl Silva radioed to WILCOM "Stand by, this guy's reaching for something. It's unknown right now. The wheelchair is on Tulip Street."

S/Cpl Silva, concerned for his rookie partner and not wanting her to make, in his words, "an irrational decision," grabbed her by her gun belt and asked her to stay behind him as they both took cover behind some parked cars.

S/Cpl Silva then once again instructed Mr. McDole to put his hands up, while simultaneously radioing updates about the evolving situation to central dispatch. Approximately 15 seconds after his dispatch stating that Mr. McDole was reaching for something, S/Cpl Silva radioed to "have the units come in."[12] Approximately 30 seconds after this dispatch, S/Cpl Silva radioed "stand by, the subject is moving again, he's going to be coming right there in the middle of the street. Units down there east of us, west of us, stand by. He's reaching into his waist again. Stand by."

S/Cpl Silva's description the following day of events that appear to have been occurring during this series of radio transmissions is excerpted here at length:

[12] Shortly after this dispatch from S/Cpl Silva, the voice of what appears to be another male officer is briefly heard on the WILCOM recording, but the words are not audible.

INTERVIEWER: Okay when you're telling me that you're giving commands, what are you saying?

CORPORAL SILVA: I'm telling him to stop what you're doing, keep your hands up, let me see your hands, let me see your hands. I'm not approaching yet because I don't know what I have, I don't know what's going on with it. The lady screaming behind me that the witness he's got a gun, he's got the gun. I got nothing to go with besides what she's telling me, he's not reacting or acting the way I want him to react.

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INTERVIEWER: Okay. So you're giving commands, he doesn't hear you or responding, uh what are your concerns at this point?

CORPORAL SILVA: My concern is that he is looking for a gun. He is looking for whatever it is that the caller initially called in regards to. I gave more verbal commands then, let me see your hands, let me see your hands. I'm not approaching, you know uh advancing on him cause I don't know what he's got or what he's doing or he's disoriented or he's not responding whatsoever, not even with words, or his actions where he's just saw coming towards me.

INTERVIEWER: Could you see any other officers?

CORPORAL SILVA: I … once the scene, it felt like forever and then in reality, it was shorter than I think it was. Um I saw Officer [NAME REDACTED] come from my uh my side, my right side. And I couldn't see my partner, my rookie partner. I don't think she was behind the building. So [NAME REDACTED] was next to me and I told her hey just stay right here make sure we're okay, you know you're covering me in case we have to approach….

Corporal James MacColl arrived at the scene subsequent to S/Cpl Silva's arrival, but prior to any shots being fired. He responded to the initial dispatch notice of a possible self-inflicted gunshot wound in the AutoZone parking lot, along with a trainee officer who was with him that day. As Cpl MacColl was en route to the scene, he began to hear the above-referenced dispatches from S/Cpl Silva who had already arrived, reporting that the subject was in a wheelchair. Cpl MacColl parked his car, exited the car with his trainee officer, and began approaching on foot. As he exited the car, he could hear S/Cpl Silva shouting to Mr. McDole "show me your hands' or something to that effect," and he saw Mr. McDole in a wheelchair. As Cpl MacColl got closer, he saw S/Cpl Silva behind a car with a handgun pointed at Mr. McDole, and another officer moving forward in the middle of the street from the opposite direction with a shotgun pointed toward Mr. McDole. Cpl MacColl took cover behind the same car that S/Cpl Silva was using for cover, and joined S/Cpl Silva in yelling to Mr. McDole to "show me your hands." Cpl MacColl describes Mr. McDole as follows:

He's moving his arms in front of his body, uh, he's reaching to his legs and appears to be rearranging his legs on the chair. I don't know the extent of his injuries or (unintelligible) in the wheelchair. He appears to be moving his legs in the chair, he's putting his hands on the armrests of the chair and pushing his body completely off of the chair….He repositioned himself in the chair, um, he's not saying anything, he's not making eye contact with anyone.

Senior Corporal Dellose Fires His Shotgun

Some time after S/Cpl Silva arrived at the scene and began interacting with Mr. McDole and radioing other officers, Senior Corporal Joseph Dellose arrived at the scene. S/Cpl Dellose heard the WILCOM dispatch and heard that there had been a shot fired by the individual in question and perhaps a self-inflicted gunshot wound. He stated the next day that he had not been dispatched to the scene, but responded anyway. The day after the shooting, S/Cpl Dellose recalled hearing some of S/Cpl Silva's dispatches on WILCOM en route to the scene – he said "I vaguely remember someone saying on the radio that the subject was possibly in a wheelchair and that he was now, possibly westbound…."

S/Cpl Dellose parked his car at the other end of the block from S/Cpl Silva and the other officers who had already responded, and 'unracked' his shotgun. S/Cpl Dellose's description the following day of what he observed and did as he progressed up the street was, along with the cell phone video of his actions, the basis for the preliminary determination that the state should attempt to gather sufficient evidence to pursue a felony assault charge:

DELLOSE: At that point, I couldn't see a suspect, all I know is he was possibly on Tulip Street coming in my direction.
INTERVIEWER: Did you see any other officers?
DELLOSE: I could see other officers and they were further east on Tulip Street.
INTERVIEWER: Okay, at that point could you tell who they were?
DELLOSE: At this point, no, I really couldn't. I couldn't tell who they were.

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DELLOSE: Then the guys that were pointing out said no up a little further.
INTERVIEWER: Okay, did, as this was going on, is there still communication coming across your radio?
DELLOSE: At this point, if there is, I don't hear it, I was kind of deaf to it.

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DELLOSE: So I move up to where the people are pointing and I think it was like a silver-colored Mercedes sedan and I saw a guy sitting in a wheelchair and he was like directly behind the sedan.

INTERVIEWER: Okay
DELLOSE: I figured this may be the suspect right here.
INTERVIEWER: You said he's in a wheelchair?
DELLOSE: Yes, he was sitting in the wheelchair.
INTERVIEWER: All right.
DELLOSE: At that point I could hear, I could kind of see the other officers out of the corner of my eye and they were hollering. I don't know exactly what they were hollering, but they, I assume they were some kind of commands. At this point, I put my shotgun on target, told the suspect to, show me his hands, show me your hands, I believe that's what I was saying. I was screaming as loud as I could.

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DELLOSE: I could see his hands fidgeting you know by his waist.
INTERVIEWER: OK
DELLOSE: He wasn't responding to my commands. I could tell he looked at me, and at that point I could see his right hand and I could see that handle of a weapon of a gun.
INTERVIEWER: OK
DELLOSE: Again, I gave more commands he just didn't look like he was responding to anything. I couldn't see his hands, he kept moving around his waist. At that point, I felt I was in danger, my life was in danger if he picked up that gun and started shooting. He could shoot the other officers, he could shoot me, and bystanders that were point out to him, they were in the line of his fire as well. That's when I decided I had to fire one round.

In S/Cpl Silva's statement the day after the shooting, S/Cpl Silva disclosed that he was actually yelling at S/Cpl Dellose to retreat from where he was (in addition to yelling to Mr. McDole to show his hands).

The cell phone video does not provide a view of Mr. McDole from exactly the same perspective as S/Cpl Dellose's at the time of the shooting, and in particular, it is impossible to tell with certainty from the video whether the butt of a gun was or was not visible to S/Cpl Dellose. It should also be noted that at the moment of the shooting, the cell phone video pans to the ground. What is clear from the cell phone video is that (1) Mr. McDole's hands were on the arms of his wheelchair when he was shot, and (2) S/Cpl Dellose gave Mr. McDole two commands to "show me your hands" in the space of approximately two seconds before he discharged his shotgun.

S/Cpl Dellose's discharge of his shotgun fundamentally changed the dynamic of the incident involving Mr. McDole. Less than five seconds after S/Cpl Silva's last radio dispatch ("He's reaching into his waist again. Stand by."), S/Cpl Silva radioed into WILCOM "shots fired, shots fired, shots fired." In hindsight, it is now known that the "shots" referred to in this dispatch was the single shotgun shot from S/Cpl Dellose. Interviews with officers the following day, however, indicate that there was uncertainty as to who had discharged a weapon. Cpl MacColl reports that just as he was taking cover beside S/Cpl Silva, he heard a shotgun discharge, which he assumed to be S/Cpl

Dellose's shotgun though he did not see the gun fired, because it sounded like a shotgun and he did not see any other shotguns at the scene. But Cpl MacColl stated the following day that he did not see any immediate physical reaction from Mr. McDole that would have established that Mr. McDole had been shot – a statement that is consistent with the video. Similarly, S/Cpl Silva reported the next day that he did not know where the gunshot had come from, and thought that it might even have come from Mr. McDole.

Corporal Thomas Lynch responded with his partner to the initial dispatch call that indicated a possible self-inflicted gunshot by a person who still had a gun. Before Cpl Lynch had even arrived at the scene, the shotgun had been fired and S/Cpl Silva was broadcasting reports of "shots fired" to other officers. When Cpl Lynch arrived, he took up position and attempted to provide cover for the officer who had fired the shotgun, and began giving Mr. McDole commands.

As events unfolded from the moment of S/Cpl Dellose's single shotgun discharge, officers on the scene now believed that they were not only interacting with a person who possessed a gun and had discharged it prior to their arrival, but operating in an environment where live gunfire had just occurred and there was uncertainty as to whether the gunfire came from a fellow officer, Mr. McDole, or an unknown third party.

Events Following The Firing of the Single Shotgun Shot

The next WILCOM report from S/Cpl Silva, approximately 30 seconds after his report of "shots fired," stated "he's still in a wheelchair, not moving." The movement of officers and instructions given to Mr. McDole following S/Cpl Dellose's shotgun discharge are captured on the cell phone video. After some initial commands to Mr. McDole to "drop the gun" (which were consistent with the belief of some officers that he may have fired a gun), the audio on the cell phone video reflects multiple officers instructing Mr. McDole to "put your hands up." During the seconds prior to other officers discharging their firearms, multiple commands to Mr. McDole to "put your hands up" are heard on the video, and there are no further instructions to "drop the gun." The cell phone video depicts, and the officers recalled the next day, Mr. McDole responding to these commands by alternately repositioning himself in his wheelchair and moving his hands on the armrests of his wheelchair, prior to the act that prompted the other three officers to fire their weapons.

Approximately 22 seconds after reporting that Mr. McDole was still in his wheelchair and not moving, S/Cpl Silva radioed "shots fired, he's down." The time of these radio dispatches corresponds to the images on the cell phone video, reflecting that just under one minute elapsed from when S/Cpl Dellose discharged his shotgun to when the three other officers discharged their weapons at roughly the same time.

The three police officers who shot Mr. McDole approximately 52 seconds after the initial shotgun blast[13] have somewhat different recollections of what they saw that prompted them to shoot, but each of their decisions was based on a change in Mr. McDole's movement of his hands which is also reflected in the cell phone video. The officers' later recollections are less relevant for purposes of reciting what Mr. McDole did, given that Mr. McDole's actions were captured on videotape, than they are for purposes of recounting what the officers ***thought*** they were seeing, which is what is relevant to their potential criminal liability under Delaware's deadly force justification statute for law enforcement officers.

The videotape of the incident shows Mr. McDole reaching into his pants and beginning to pull his hands out of his pants just prior to the gunshots, as opposed to his gestures prior to that point on the videotape where his hands had been in view. The DOJ web site shows still photographs of Mr. McDole in the seconds before S/Cpl Silva, Cpl MacColl, and Cpl Lynch discharged their firearms, showing Mr. McDole reaching into his pants. An enlarged video segment (drawn from the original cell phone video) of this time period just prior to the officers firing their weapons is also included at the web site http://attorneygeneral.delaware.gov/executive/Wilmington092315.shtml. The full cell phone video is also included on the web site for purposes of comparison.

- In his interview the day after the shooting, S/Cpl Silva reported that after the first gunshot, Mr. McDole was "digging into" his right side, propping himself up in his wheelchair, and then "go[ing] into the center." S/Cpl Silva continued to give verbal commands to Mr. McDole. S/Cpl Silva stated, "[H]e's trying to like push up, he goes to the side again, props himself up in the chair and at this point, this is when I told myself, he's reaching for a gun, he's got to be reaching for a gun the way he's positioning himself and I made a conscious decision that I think he's got a gun." S/Cpl Silva said he placed "a lot of weight" in making that determination on the fact that the witness when he arrived at the scene told him that Mr. McDole had a gun. S/Cpl Silva said "Now at this point, he did, he did almost two or three times, the second or third time when he reached to the side and dropped himself to the chair again, he reached into the middle as if he was trying to grab something, and as he's coming up, he did one of these numbers with his fist, at that point, I thought he was coming out with a gun and I shot the first shot." S/Cpl Silva believes that he ultimately fired four times.

- Cpl Lynch, when interviewed the following day, recalled Mr. McDole putting his right hand inside his waistband, and believes that he saw a small black object coming up from Mr. McDole's underwear when Mr. McDole began to draw his hand out, which caused him to

[13] S/Cpl Dellose does not appear to have discharged his shotgun again after his initial discharge.

discharge his weapon. Cpl Lynch stated after the shooting that the initial report he had received that Mr. McDole was armed and had already discharged a weapon prior to the 911 call, the radio broadcast of "shots fired" as he was en route to the scene, and Mr. McDole's motions just prior to Cpl Lynch's discharge of his weapon led Cpl Lynch to believe that Mr. McDole was drawing a weapon.

- Cpl MacColl claims that he saw Mr. McDole "reach down to his right hand side with his right hand and he pulls his arm back and when he comes back he has a handgun in his hand….I couldn't tell you what make or model handgun it was, dark, black in color. As he comes back where I can view it, I began to fire."

Delaware criminal law – recognizing the exigent circumstances in which law enforcement officers often find themselves – does not require either accurate observations or accurate recollections by police officers who use deadly force. It simply requires that officers who did not act recklessly in gathering information truly believed that they needed to use deadly force.

As with the shooting itself, the officers' recollections of the moments immediately after Mr. McDole was shot differed somewhat the following day when they were interviewed, and in some cases differed from the videotape. The videotape of Mr. McDole's shooting shows him slowly falling out of his wheelchair and to the ground after he is shot.

- S/Cpl Silva recalled the following day that he and Cpl MacColl took Mr. McDole out of his wheelchair as Mr. McDole began falling off of it. He believes that as they were taking Mr. McDole to the ground, that Mr. McDole's pants came off and that he could see the barrel of a gun in Mr. McDole's underwear. He recalls giving orders to provide medical assistance to Mr. McDole, and then "backing away" from Mr. McDole.

- Cpl Lynch recalls Mr. McDole toppling out of the wheelchair as a result of the gunshots. He then approached Mr. McDole with a group of officers, saw Mr. McDole lying face-down, began to "check his pants and attempt to flip him over," and states that he observed the barrel of a handgun sticking out of the right side of Mr. McDole's boxers on the bottom as he was doing so. Cpl Lynch states that Mr. McDole's pants had fallen down to mid-leg, and that the officers had used Mr. McDole's pants to roll him over, and that they had done so slowly and deliberately in order to not disturb any firearm that might be concealed. Cpl Lynch said that he could not identify the type of gun until he later observed it lying on the ground. Cpl Lynch then proceeded to perform CPR on Mr. McDole.

- Like Cpl Lynch, Cpl MacColl recalled that "after the initial volley of fire [Mr. McDole] kind of slumps forward in his wheelchair and then falls over onto the ground." Cpl MacColl recalled that another officer rolled Mr. McDole onto his back, and that "There was a gun laying between his legs close to his right leg caught because his pants had fallen off when he fell off the wheelchair and the gun had gotten caught in the, his pants and his boxer shorts."

- Three officers who did not discharge their weapons also reported seeing a gun on Mr. McDole's person immediately after he was shot. One officer who had been at the scene but did not discharge her weapon recalls being the officer who first attempted to turn Mr. McDole over after he fell from his wheelchair. She recalls Mr. McDole's pants being partly down when she turned him over, and seeing a heavy object in his boxers as she turned him. She also recalls saying "where's the gun, where's the gun" as she was turning him. After seeing the heavy object in his boxers, she recalls that she reached in and grabbed a weapon. She picked up the gun and, at the instruction of another officer, put it down on the ground behind her, out of Mr. McDole's reach. She then began to assist performing chest compressions on Mr. McDole. A second officer who did not shoot her weapon was also present when Mr. McDole was rolled over, and reports seeing the barrel of a gun poking out of the right side of his boxer shorts after he was rolled over. A third officer who did not discharge her weapon recalls approaching Mr. McDole after he had been shot, and seeing a gun coming out of the bottom of Mr. McDole's boxers after other police officers had rolled Mr. McDole over.

- In addition to the above, swabs were taken of Mr. McDole's hands. These swabs were sent to R.J. Lee Group for microscopic analysis to determine if gunshot residue (GSR) was present on Mr. McDole's hands. After performing this analysis, R.J. Lee Group issued a report documenting the presence of GSR on Mr. McDole's right hand. While the presence of GSR on Mr. McDole's hand does not establish where or at what target he discharged a firearm – and there is no evidence that he discharged a firearm after police arrived in response to the 911 call – it is consistent with Mr. McDole having had a gun on his person and firing that gun at some time prior to the incident with the police.

In short, six officers – three of whom had discharged their weapons, and three of whom had not – stated on the day after Mr. McDole's shooting that they had seen a handgun on his person immediately after he was shot. One of those officers who had not discharged her handgun also stated that she was the person who had removed the gun from Mr. McDole's person as a safety precaution. (After being told by a member of Mr. McDole's family that there was evidence that the gun in question had been placed at the shooting scene after the shooting,

DOJ interviewed the persons who claimed to have this evidence, but as detailed below, no evidence was produced).

The gun recovered from Mr. McDole was later examined by the Wilmington Police Department and found to be "an 'Armscor' 38 cal. (6) six shot revolver….The cylinder had (4) four spent and (2) two unspent 'Winchester' 38 cal. Bullet cartridges." A trace on the gun was conducted by the federal Bureau of Alcohol, Tobacco, and Firearms, and the search determined that the gun had been legally purchased in South Carolina in 2009. The ATF conducted an extensive investigation into the changes in ownership of the gun since 2009, and ultimately discovered that the gun had been stolen from the glove compartment of the truck of the last known owner in South Carolina (and the theft reported to local police).

Mr. McDole died from injuries sustained from the multiple gunshots.

Questions Regarding Mr. McDole's Gun

DOJ received some second and third-hand reports during its investigation alleging that Mr. McDole either had no gun at the time he was shot, or had a different type of gun than the one that the Wilmington Police Department reported finding on his person. DOJ thoroughly investigated these claims, as they implicated the integrity of the shooting scene. After following up on each of these indirect reports, DOJ found no evidence to call into question the uniform testimony of the Wilmington Police Department officers at the scene with respect to Mr. McDole's gun, i.e. that the gun described in the ballistics evidence report was found in Mr. McDole's boxer shorts after he was shot.

DOJ did find evidence that Mr. McDole was in possession of a different handgun (specifically a .22 caliber handgun) at some time prior to his shooting. Witnesses at Hillside House report seeing Mr. McDole with such a weapon on the day prior to Mr. McDole being shot. Additionally, a patient at Hillside House told police following Mr. McDole's shooting that he had seen the butt of a gun protruding from Mr. McDole's backpack when Mr. McDole left Hillside House at approximately 8:30 a.m. on the day of the shooting; the patient alternately described the gun as looking either like "a 22" or "a miniature 45" based upon the size of the grip.

However, Mr. McDole's prior possession of a different gun does not contradict the testimony of the six police officers that he was in possession of a .38 caliber gun when he was shot. In fact, according to the statements of two witnesses, Mr. McDole had told an individual at Hillside House to whom he was trying to sell a gun that he had access to multiple types of firearms. Consistent with these post-incident statements, on September 21, 2015 – two days before the incident under investigation – Wilmington Police were summoned to Hillside House by hospital staff who were concerned about reports that Mr. McDole had a weapon in the facility. A report completed by responding officers indicated that a patient told police that Mr. McDole had displayed a .22 caliber handgun to the patient and told the patient that if the patient wanted to purchase a gun,

"Any kind you want I can get." Additionally, as was discussed above, the individual who was with Mr. McDole on the morning prior to his shooting said that Mr. McDole was seeking a different gun that morning. Therefore, information received by DOJ that the gun found on Mr. McDole's person after he was shot was different from the gun he was seen carrying earlier in the day is consistent with statements by Mr. McDole that he had access to different types of firearms, and the statement by the person who was with him the morning of the shooting that Mr. McDole was actively seeking a different gun on the day he was shot.

DOJ also investigated allegations that the gun officers stated they found on Mr. McDole's person was actually planted at the scene of the shooting by Wilmington Police Department officers after Mr. McDole was shot. Specifically, DOJ received second-hand allegations that a videotape existed of a gun being placed at the scene of Mr. McDole's shooting after the incident. However, when the person alleged to have such a video was asked, he denied having any such video or having witnessed such an incident. Multiple New Castle County paramedics and St. Francis EMTs who responded to the scene immediately after the shooting reported seeing a gun next to Mr. McDole on the ground.

In sum, despite diligently pursuing each source provided by persons alleging that the scene of Mr. McDole's shooting was altered, DOJ was not able to find any person who witnessed anyone tampering with the shooting scene or any video showing the shooting scene being altered – either in the immediate aftermath of the shooting or in the following hours. To the extent that specific people were alleged to have seen or filmed any such activity, they denied it when asked. Altering or preparing false physical evidence at a potential crime scene can be a criminal offense, and if any concrete evidence is produced in the future that this occurred in this case, DOJ will vigorously follow up on that evidence – but no such evidence has been provided or located to date.

Some of the reports that DOJ received regarding Mr. McDole having a different type of gun earlier in the day were commingled with allegations that he had been robbed just prior to his encounter with the Wilmington Police Department, and that the 911 call to the police had been an effort by one of those involved in the robbery to create a distraction from the robbery itself. The only person willing to give a recorded statement to DOJ investigators regarding this subject was a relative of Mr. McDole's.[14] Mr. McDole's relative claims to have seen Mr. McDole on the morning of the day when Mr. McDole was shot. Mr. McDole's relative claims that Mr. McDole spent the day with a person named "OJ" from New York, and that Mr. McDole and "OJ" came and went

[14] Other persons gave both formal and informal statements to DOJ investigators regarding a possible robbery of Mr. McDole that preceded the incident with the police, but when asked for the source of their information, they attributed the information to either Mr. McDole's relative or the individual who videotaped the shooting. Both the statement of Mr. McDole's relative and the statement of the individual who videotaped the shooting are described in full, with respect to the alleged robbery, in this report. In short, Mr. McDole's relative attributes the information to the man who videotaped the shooting, and the man who videotaped the shooting denies having seen any robbery.

several times during the day. Mr. McDole's relative claims that a girl or woman named "Kim" whose last name he does not know told him that "OJ" had robbed and shot Mr. McDole. Mr. McDole's relative did not see "OJ" shoot Mr. McDole, but believes "OJ" shot Mr. McDole because "if he didn't he would have been to my house afterwards, I haven't seen him since." Mr. McDole's relative claimed that an unknown man witnessed the robbery and assisted Mr. McDole back into his wheelchair. DOJ investigators later identified this unknown male as the individual who took the cell phone video. When the individual who took the cell phone video was interviewed by DOJ, he stated that he was detailing a car in a driveway adjoining Tulip Street, and that he went out into the street after he heard sirens and emerged to see police cars coming up and Mr. McDole in a wheelchair rolling out into the street. He denied witnessing a robbery or assisting Mr. McDole in any way. The individual who took the cell phone video specifically stated that he had not seen Mr. McDole before hearing the sirens.

Finally, Mr. McDole's relative alleged that a woman named "Kim" who lived near the AutoZone was involved in robbing Mr. McDole, and had called 911 in order to cover up the robbery. However, no 911 calls were received that day from a person named Kim, and the person who made the completed 911 call did not reside in the area of the shooting.

DOJ also located a person identified by Mr. McDole's family as having claimed on social media to have overheard S/Cpl Dellose boasting about having shot Mr. McDole. DOJ located the individual identified by Mr. McDole's family, and the individual said, when interviewed, that he had overheard S/Cpl Dellose using a racial epithet in a bar when discussing a shooting incident, but that S/Cpl Dellose had been referring to a prior shooting incident in which he had been involved rather than the incident involving Mr. McDole. The person interviewed stated that the only reference he recalled overhearing relating to Mr. McDole was S/Cpl Dellose stating that he was getting time off as a result of the shooting. The individual interviewed, who claims to have known S/Cpl Dellose for 15 years, believes that S/Cpl Dellose was intoxicated during the conversation that he overheard. DOJ contacted the person with whom the interviewee recalled S/Cpl Dellose having the conversation he overheard, and that second individual confirmed that the facts of Mr. McDole's shooting were not discussed during the conversation. The second individual was specifically asked if he recalled S/Cpl Dellose using a racial epithet, and said that he did not recall S/Cpl Dellose doing so.

Alleged Prior Encounter Between Mr. McDole and Wilmington Police Officers Involved in Shooting

DOJ received some second-hand reports from members of the community that Mr. McDole had been involved in a previous, hostile encounter with one of the officers involved in the shooting. DOJ conducted an exhaustive search to determine if Mr. McDole had met any of the officers in the past, including computerized searches of known interactions of Mr. McDole with Wilmington Police Department officers in the past, and incidents with the officers in question where the officers were either the subject of a citizen complaint or alleged that a citizen had acted inappropriately toward the

officer. There is no record of any such encounter. None of the individuals who DOJ interviewed claimed to have seen such an incident.

Legal Conclusions With Respect to Officers Silva, MacColl and Lynch

As noted above, all four of the officers who shot Mr. McDole were entitled under Delaware law to discharge their firearms without criminal consequences if they believed that such force was necessary to protect themselves against death or serious physical injury. 11 Del.C. § 464(c). The only relevant exception to this law is if the defendants were reckless in acquiring or failing to acquire information needed to form this belief about the need to protect themselves. 11 Del.C. § 470(a).

The State would not be able to establish that S/Cpl Silva, Cpl MacColl, or Cpl Lynch acted recklessly in acquiring or failing to acquire information necessary to make judgments about the need to discharge their firearms. Again, recklessness is defined in the Delaware Criminal Code as being aware of and consciously disregarding a substantial and unjustifiable risk, where the risk is of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. 11 Del.C. § 231(e). The evidence described above establishes that S/Cpl Silva responded to a call regarding a man who had discharged and was still in possession of a gun, that he took steps upon arriving at the scene to assess the situation and to attempt to communicate with Mr. McDole, and that he prepared to advance on Mr. McDole only after he heard a gunshot whose origin he could not precisely place. Cpl MacColl arrived at the scene just prior to the shotgun being discharged, and also describes being confused as to the origin of the gunshot noise. Cpl Lynch did not arrive at the scene until after the shotgun had been discharged, and heard S/Cpl Silva announce "shots fired" over the WILCOM broadcast. Given their belief that Mr. McDole was armed, the fact that a weapon had been discharged, the uncertain origin of the gunshot, the presence of multiple officers and civilians, and the officers' stated belief, as supported by the cell phone video, that Mr. McDole was reaching into his pants just prior to the shots being fired, it cannot be said that any of these three officers were aware of and consciously disregarded a substantial and unjustifiable risk, where the risk is of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation with regard to their efforts to acquire sufficient knowledge to form a belief about the necessity of using deadly force.

Given that these three officers did not act recklessly, as that term is defined in the Delaware Criminal Code, in acquiring the necessary information, the only way that they could be charged with criminal conduct for discharging their weapons would be if the state could prove that they did not believe that that such force was necessary to protect themselves against death or serious physical injury. There is no evidence to suggest that these three officers did not have a sincere belief in the necessity of discharging their firearms. Although their recollections of Mr. McDole's conduct just prior to their shooting are different, the officers all believed that Mr. McDole had a weapon and had already discharged that weapon at least one time, and they all observed Mr. McDole

reaching into his pants and beginning to draw his hand out just prior to discharging their weapons.

Consideration of Criminal Charges Against Senior Corporal Dellose

Unlike the other three officers who discharged their firearms, the Attorney General determined that probable cause could exist to pursue felony assault charges against S/Cpl Dellose, and that the state should determine the feasibility of bringing criminal charges.[15] Specifically, the Attorney General determined that S/Cpl Dellose's decision, after seeing other officers on the scene and eventually noting that they were yelling things he could not hear, to nevertheless advance immediately up the middle of the street without seeking cover or assessing the situation could constitute reckless conduct as that term is defined in the Delaware criminal code, and that his decision to discharge his firearm at Mr. McDole after giving Mr. McDole only two seconds to respond to verbal instructions could also constitute reckless conduct.

A determination of probable cause, however, is only the first decision that must be made by DOJ in deciding whether to charge a person with a crime. The second decision that must be made is whether there is any possibility that a conviction will result from such a charge. Although it is not binding on Delaware prosecutors, the American Bar Association's Criminal Justice Standards for the Prosecutorial Function provides a useful description of this responsibility:

> 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.

ABA Criminal Justice Standards (Fourth Ed.) § 3-4.3 (emphasis added). Therefore, having determined that the lower standard of probable cause could exist, the next decision for DOJ to make was whether admissible evidence would be sufficient to support a conviction of S/Cpl Dellose by a jury.

To ensure that this decision would be made in an impartial manner and, if a decision was made to present a case against S/Cpl Dellose to a grand jury, to ensure that the presentation appeared to be and was free of any bias because of DOJ's daily working relationship with the Wilmington Police Department, DOJ retained a former federal prosecutor from Philadelphia to act as a Special Deputy Attorney General exclusively for purposes of this case. Judson Aaron, who served as an Assistant United States Attorney in Philadelphia from 1995 through 2005 and is now in the private practice of law in the

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[15] "Probable cause" is defined in Delaware as a reasonable ground for belief of guilt, Maryland v. Pringle, 540 U.S. 366 (2003), *cited in* State v. Arnold, 2006 WL 488619 (Del. Super. 2006) (Graves, J.), lying somewhere between suspicion and sufficient evidence to convict. Thompson v. State, 539 A.2d 1052 (Del. 1988).

state of Pennsylvania, was appointed as a Special Deputy Attorney General for purposes of this case.

After carefully analyzing all the evidence, the Special Deputy Attorney General concluded that, given the prosecution's unshifting burden of proof, prosecuting a felony assault case against S/Cpl Dellose could only be successfully done if the prosecution was able to retain a credible expert to rebut the inevitable expert testimony from the defendant that S/Cpl Dellose's conduct was reasonable under the circumstances. Again, S/Cpl Dellose's subjective judgment that he needed to fire his weapon could only be questioned if it could be established that he had acted recklessly (under the rigorous standard established for criminal recklessness under Delaware law) in finding himself in the situation where he needed to make his decision whether or not to fire his gun, and the case would not be able to survive unrebutted testimony from a defense police expert that S/Cpl Dellose had acted reasonably in the time leading up to discharging his weapon.

DOJ then proceeded to conduct a national search for an expert who would be able to testify in support of a felony assault conviction. The first expert DOJ consulted with was Jeffrey Noble, former Deputy Chief of the Irvine Police Department in California and a law school graduate, who has been involved in over one thousand police use-of-force investigations and, in November 2015, authored an expert opinion on behalf of Tamir Rice's family that criticized the expert opinions of the Cleveland District Attorney and argued that the Cleveland police officer who shot Tamir Rice should be held responsible for his death. DOJ obtained Mr. Noble's name from public documents associated with the Tamir Rice case – Mr. Noble was one of two experts who offered expert reports on behalf of Tamir Rice's family arguing that the officer who shot Tamir Rice should face criminal charges. A review of Mr. Noble's report in that case suggested that he had specific expertise in the issue likely to be central in any prosecution of S/Cpl Dellose, i.e. proper precautions for an officer to take when arriving at a crime scene where there has been a report of a person holding a gun. Mr. Noble's role in the Tamir Rice case also indicated that he was willing, when the evidence supported it, to take expert positions adverse to police departments in use of force cases.

After reviewing all of the material evidence in DOJ's possession, Mr. Noble concluded that he could not testify that S/Cpl Dellose acted recklessly in the time leading up to and including the discharge of his shotgun. This finding by Mr. Noble had two implications for a possible criminal prosecution of S/Cpl Dellose. First and most obviously, it meant that an expert use-of-force witness known to have a conservative view of tactical approaches to situations like Mr. McDole's would not be able to provide testimony that was necessary for a successful criminal prosecution. Second, if the state did decide to pursue a criminal case with a different expert, the state would be obliged under federal and state law to disclose to S/Cpl Dellose that Mr. Noble did not believe S/Cpl Dellose's actions to have been reckless, and that information would be used in cross-examination of the state's witnesses, including any expert that DOJ was able to later retain.

DOJ sought a second expert, in order to ensure that it had thoroughly explored all

avenues toward pursuing a case where a determination had been made that probable cause could exist. The second expert consulted by DOJ, Roger Clark, was located in precisely the same manner as the first expert was located: he had submitted an expert report in the Tamir Rice case arguing that the officer in that case be charged with a crime. Mr. Clark was the former head of the Los Angeles Sheriff Department's North Regional Surveillance and Apprehension Team, had been retained as a consulting expert 1,400 times, the majority of them for cases involving the use-of-force, and, like Mr. Noble, authored an expert opinion last year on behalf of Tamir Rice's family that criticized the expert opinions of the Cleveland District Attorney and argued that the Cleveland police officer who shot Tamir Rice should be held responsible for his death.

After reviewing the case materials over a period of weeks, however, Mr. Clark also informed DOJ on May 1, 2016 that he too had concluded that S/Cpl Dellose's conduct was not reckless under the standard established by Delaware law.[16]

On May 2, 2016, having approached two credible experts who had previously demonstrated a willingness to offer use of force testimony adverse to law enforcement officers when appropriate, and having been informed independently by both experts that they did not believe criminal charges against S/Cpl Dellose were justified under Delaware law, DOJ determined that it could not successfully prosecute criminal charges against S/Cpl Dellose, and with that knowledge, that it could not properly or ethically initiate such charges.

Non-Criminal Aspects of Senior Corporal Dellose's Conduct

The fact that DOJ cannot pursue criminal charges against S/Cpl Dellose should not be mistaken for DOJ's approval of his actions on September 23. At best, S/Cpl Dellose's actions demonstrated extraordinarily bad judgment. S/Cpl Dellose knew that he was responding to an area where a person had already fired a gun and might still be armed. When he arrived, he saw other officers up the street, and at some point as he approached Mr. McDole he saw that the other officers were yelling. But rather than attempting to gain any knowledge of what the other officers he saw at the scene were doing or seeing, S/Cpl Dellose proceeded straight up the middle of the street and, upon encountering Mr. McDole, gave Mr. McDole approximately two seconds to comply with his instructions before shooting Mr. McDole. To the extent S/Cpl Dellose was surprised or alarmed by seeing Mr. McDole, this was a surprise of his own making.

It is a matter of public record that this is the second use-of-force investigation that

[16] Mr. Noble and Mr. Clark were asked to provide expert opinions only on the issue of whether S/Cpl Dellose 's conduct could constitute a crime under Delaware law. They were not asked to give opinions on the adequacy of the Wilmington Police Department's policies and procedures, S/Cpl Dellose's employment status, or his actions on the day in question except as to whether the actions constituted a criminal offense under Delaware law.

S/Cpl Dellose has been involved in over the past six years. In the prior case[17], although DOJ did not find that criminal charges were warranted against S/Cpl Dellose or any of the other officers involved, one of the officers interviewed described S/Cpl Dellose's conduct as similar in some ways to his conduct in the incident involving Mr. McDole – arriving separately from other officers on the scene, and advancing into an incident where gunfire had already been reported as another officer shouted at him to turn back because he was in the line of fire.

DOJ is not responsible for making personnel decisions for the Wilmington Police Department. But S/Cpl Dellose's extremely poor judgment in this situation, combined with the history described above, causes us to conclude that he should not be employed by the Wilmington Police Department in any job that involves the handling of a firearm in public.

Preventing Future Incidents

Mr. McDole's family has filed a civil action against the City of Wilmington relating to Mr. McDole's death, and issues involving the legal adequacy of the Wilmington Police Department's policies and training will presumably be litigated and resolved in the context of that lawsuit. However, DOJ's investigation into the criminal law issues presented by this shooting has caused it to carefully review the Wilmington Police Department's policies and training, and to conclude that improvements in those areas could materially reduce the possibility of future shootings by police officers.

1. **Use of Force Policy**.[18] The Wilmington Police Department's 'continuum of force' provisions in its use of force policy are effectively meaningless for police officers. The "Continuum" section of the Department's current Use of Force section states:

> The use of force should follow a prescribed continuum: physical presence, verbal direction, soft empty hand techniques, hard empty hand techniques, intermediate weapon…and finally, if necessary, the use of deadly force….*However, members should be mindful that the force needed to control an incident may not fall on the prescribed continuum sequentially in all circumstances. Therefore, members should use their discretion to quickly and safely apply the necessary level of force to meet situations involving arrest, safety of*

[17] A copy of the August 5, 2010 report on S/Cpl Dellose's prior use of deadly force can be found on the Department of Justice website at http://attorneygeneral.delaware.gov/documents/deadlyforce/WPD_Barnes,Pierce,Vanaman,Dellose,Cancila_WHITE.pdf.

[18] DOJ's discussion of policies and training materials in this section of this report is based upon the City of Wilmington's production of those materials in response to subpoenas requesting them. DOJ's report assumes that the City of Wilmington fully complied with the subpoenas.

citizens or officer self-defense.

Wilmington Police Department Directive 6.7 (May 22, 2015), Section IV (emphasis added). In other words, the Department has instructed officers that they have the discretion to ignore the continuum of force directive in any situations involving "arrest, safety of citizens or officer self-defense," which would likely cover virtually all of the situations where force might be employed, without any instruction as to how to use that discretion.

The vagueness of Wilmington's policy stands in stark contrast to policies such as the one adopted by the City of Seattle last year, entitled "De-Escalation" and addressing the same issues as Wilmington's but with far more guidance for responding officers:

> De-escalation tactics and techniques are actions used by officers, when safe and without compromising law enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance.
>
> When safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution.
>
> When time and circumstances reasonably permit, officers shall consider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on factors including, but not limited to:
>
> * Medical conditions
> * Mental impairment
> * Developmental disability
> * Physical limitation
> * Language barrier
> * Drug interaction
> * Behavioral crisis
>
> An officer's awareness of these possibilities, when time and circumstances reasonably permit, shall then be balanced against the facts of the incident facing the officer when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.
>
> Mitigating the immediacy of threat gives officers time to utilize extra resources, and increases time available to call more

officers or specialty units.

The number of officers on scene may increase the available force options and may increase the ability to reduce the overall force used.

Other examples include:

* Placing barriers between an uncooperative subject and an officer
* Containing a threat
* Moving from a position that exposes officers to potential threats to a safer position
* Decreasing the exposure to potential threat by using
    - Distance
    - Cover
    - Concealment
* Communication from a safe position intended to gain the subject's compliance, using:
    - Verbal persuasion
    - Advisements
    - Warnings
* Avoidance of physical confrontation, unless immediately necessary (for example, to protect someone, or stop dangerous behavior)
* Using verbal techniques, such as Listen and Explain with Equity and Dignity (LEED) Training, to calm an agitated subject and promote rational decision making
* Calling extra resources to assist or officers to assist:
    - More officers
    - CIT officers
    - Officers equipped with less-lethal tools
* Any other tactics and approaches that attempt to achieve law enforcement objectives by gaining the compliance of the subject

Seattle Police Department Manual Section 8.100. The Seattle 'continuum of force' policy contains a myriad of directives that would potentially have been relevant to the incident involving Mr. McDole, including its emphasis on slowing down and stabilizing a situation when safe and feasible, its emphasis on trying to determine the reason for a suspect's failure to comply when time and circumstances permit, and its discussion of threat containment, cover, concealment, and communication from a safe position for officers.

A second example of a use of force standard that, unlike the Wilmington Police Department's policy, provides concrete and useful guidance to officers is the policy that has been mandated for the Cleveland Police Department as part of a federal

legal settlement with the United States Department of Justice. The settlement agreement between the United States Department of Justice and Cleveland requires that Cleveland's use of force policy provides that:

> Officers will use de-escalation techniques whenever possible and appropriate, before resorting to force and reduce the need for force. De-escalation techniques may include verbal persuasion and warnings and tactical de-escalation techniques, such as slowing down the pace of an incident, waiting out subjects, creating distance (and thus the reactionary gap) between the officer and the threat, and requesting additional resources (eg. specialized CIT officers or negotiators). Officers will be trained to consider the possibility that a subject may be noncompliant due to a medical or mental condition, physical or hearing impairment, language barrier, drug interaction, or emotional crisis….

United States of America v. City of Cleveland Settlement Agreement, May 26, 2015, Paragraph 45(b).

Again, whether the City of Wilmington's policy – which was apparently sufficient for it to receive accreditation from the Commission on Accreditation for Law Enforcement Agencies (CALEA) – meets constitutional standards will be determined in the context of the civil litigation between the McDole family and the City of Wilmington. But even if the city's policy does meet minimum constitutional standards, the department and the city would be well served by the department's adoption of a more robust use of force continuum policy that would provide better guidance for its officers. The policy as written gives no concrete guidance to officers.

2. **Training and Policies on Interaction With Persons With Mental Illnesses or Disabilities**. The DOJ subpoenaed from the Wilmington Police Department, as part of its criminal investigation, thousands of pages of documents relating to training of its officers, and the Wilmington Police Department represented to DOJ that it had turned over all documents relating to training with respect to interaction with persons with mental illnesses or disabilities and training with respect to de-escalation generally. Not surprisingly, given the absence of explicit written policies in these areas, DOJ located no Wilmington Police Department training materials relating to specific de-escalation techniques of the types described in Seattle and Cleveland's policies above, nor did it locate any training materials relating to interaction with persons with mental illness or cognitive impairments other than a single training flier that related to interactions with persons who were acting in an outwardly aggressive fashion. The Wilmington Police Department indicates that it sends officers to a statewide crisis intervention training offered to all police agencies, but there is no indication that the four officers involved in this case attended. In addition, Wilmington advised that it sends 8 officers to the training 2 times per year. It appears that the program has

been in place since 2014; even at a rate of 16 officers per year, it would take 20 years for the Department's authorized officers to receive this training.

Because of the deficiencies in policy and training described above, Wilmington Police Department officers are currently working in an environment where they have little or no specific guidance on proper escalation and de-escalation tactics with respect to the use of force. It is DOJ's belief that Wilmington Police Department should remedy these deficiencies immediately.

Conclusion

At the conclusion of this extensive investigation, DOJ has determined that there are serious deficiencies in the way in which the Wilmington Police Department prepares its police officers to deal with situations like the one that Mr. McDole presented, and DOJ has also strongly recommended that Senior Corporal Joseph Dellose not be permitted by the Wilmington Police Department to be in a position in the future where he carries a gun. With respect to criminal charges, DOJ did not find probable cause to believe that Senior Corporal Daniel Silva, Corporal Thomas Lynch, or Corporal James MacColl had violated Delaware criminal law. With respect to S/Cpl Dellose, the Attorney General did believe that the state should attempt to gather sufficient evidence to pursue a felony assault charge. However, after consulting with two national police use-of-force experts who had recently recommended criminal charges against the Cleveland police officer who shot Tamir Rice, and receiving opinions from both of those experts that S/Cpl Dellose's actions did not constitute criminal conduct under the Delaware Code, DOJ concluded that it could not proceed with a criminal prosecution against S/Cpl Dellose given that the defense would present unchallenged expert testimony that S/Cpl Dellose's conduct was reasonable.