

**REPORT OF THE DEPARTMENT OF JUSTICE  
DELAWARE STATE POLICE USE OF FORCE**

**SUBJECT/ DECEDENT: Lionel Waters  
OFFICER: CPL. Lloyd McCann**

**DATE OF INCIDENT: December 20, 2015**

**Dated: August 1, 2016**

## Scope of the Investigation

This is the final report of the Delaware Department of Justice, Office of Civil Rights and Public Trust, on the investigation of the use of force by Corporal Lloyd McCann (“Cpl. McCann”) of the Delaware State Police Department against Lionel Waters (“Mr. Waters”). Investigators from the Office of Civil Rights and Public Trust examined the crime scene and also reviewed evidence, reports written by officers who responded to the scene and witness interviews. Attorneys with the Office of Civil Rights and Public Trust reviewed the use of force for the Department of Justice.

## Purpose of the Department of Justice Report

The Department of Justice determines whether a law enforcement officer’s use of force in which a death occurs constitutes a criminal act. The Department of Justice does not establish or enforce internal police policies concerning the proper use of force by law enforcement officers. Law Enforcement Agencies are responsible for establishing and enforcing guidelines for the use of force by their officers and for determining whether an officer’s actions were consistent with such guidelines in a given case. This report expresses no opinion whether the officer’s actions complied with departmental policies or procedures concerning the use of force set by the Delaware State Police Department or whether, with the benefit of hindsight, the officer could have proceeded differently.

## Facts

On December 20, 2015, at approximately 10:06 p.m., the Dover Police Department (“Dover PD”) requested assistance in locating a subject (hereinafter “RW”) wanted on a warrant for violating a Protection from Abuse (“PFA”) order. At approximately 10:20 p.m. Cpl. McCann and Troopers Brian Holl and Andrew Osgood were dispatched to a residence on Milford Harrington Highway in Milford, Delaware to assist the Dover PD’s efforts to locate RW, who was reported to be staying at the residence. On the way to the residence, Cpl. McCann obtained the details of the warrant assist and was advised that RW had a history of assaults. Cpl. McCann pulled up RW’s photo on his computer and confirmed through DELJIS that RW’s last reported address was the address to which they were dispatched.

The Troopers arrived on scene at approximately 10:29 p.m. Cpl. McCann went directly to the front door and knocked. He received no response. Trooper Holl went to the window to the right of the front door and Trooper Osgood went to the rear of the home. Cpl. McCann and Trooper Holl announced themselves as police officers from the Delaware State Police. All of the Troopers were dressed in full Delaware State Police uniforms.

Cpl. McCann joined Trooper Holl at the window and they saw a young female coming from the kitchen toward the living room inside of the house. She opened an interior door in a hallway and disappeared from sight. Shortly thereafter, a black male (later identified as Mr. Waters) appeared and approached the window where the Troopers were standing. The lighting in the house was poor, and the window was partially covered by a dark curtain. Mr. Waters was only visible from the chest up; the officers could not see his hands. Mr. Waters refused to open the door.

Trooper Osgood returned to the front of the house when he heard the other officers talking to someone in the house. Mr. Waters continued to refuse requests to come outside and would not identify himself. The Troopers reported that they believed they were talking to RW and referred to Mr. Waters as RW as they spoke. Trooper Holl who had investigated a prior theft at the house in which RW and Mr. Waters had been victims, also thought he was talking to RW. In an effort to gain cooperation, Trooper Holl mentioned that he was one of the Troopers who had assisted them in the prior theft investigation. Cpl. McCann stated that the person at the window matched the photo of RW that he had looked up on the way to the house. The Troopers reported that Mr. Waters responded argumentatively, used obscenities, told the Troopers that he was not the person they were looking for and told them to get off of his property. Because the person in the house was not cooperating and the officers thought they were talking to RW, the officers decided to secure the perimeter and to obtain a search warrant. They then turned to leave and Cpl. McCann said they would get a warrant if they needed to. As they walked away toward their vehicles, they heard the front door open and turned to see the subject who they thought was RW standing in the doorway in sweatpants and no shirt. Mr. Waters did not identify himself but asked the Troopers what they wanted. Trooper Osgood asked Mr. Waters to come outside to talk to them. As Trooper Osgood started to walk toward Mr. Waters, Mr. Waters announced that he had a weapon.<sup>1</sup> He also stated that there were children inside the house. The Troopers reported that Mr. Waters had taken a “bladed stance,” standing with his left shoulder forward and his right hand held behind his back.

The Troopers immediately fanned out and took defensive positions. Trooper Holl was to the left of Mr. Waters, Trooper Osgood to the right and Cpl. McCann was centered on the front door where Mr. Waters was standing, about 12-15 feet from Mr. Waters. At first, Trooper Osgood did not see the weapon, but as he moved to the right of where he had been standing, he saw the top of a pistol in Mr. Waters’ right hand. Trooper Osgood drew his service pistol and announced to the other Troopers that Mr. Waters had a gun. Cpl. McCann who was almost directly in front of Mr. Waters also reported seeing the gun in Mr. Waters’ right hand, with the barrel of the gun pointing out to the left from behind Mr. Waters’ back. Trooper Holl could not see the weapon from his position but heard Mr. Waters announce that he had a weapon and believed that he did. All of the Troopers commanded Mr. Waters to drop the weapon multiple times. Mr. Waters told the officers that he did not have to drop the weapon. Trooper Osgood told Mr. Waters he was disobeying a lawful order of a police officer and told him not put the children in the house in danger and to “just put the weapon down.” Trooper Osgood also told Mr. Waters that if he moved he was going to get shot. At one point during the exchange, one of the Troopers reported hearing Mr. Waters say that he would not point the gun at them [the officers] but that he was not going to put the gun down. Cpl. McCann reported that Mr. Waters said he would drop the weapon, but Mr. Waters did not do so and continued to ignore the officers’ commands.

Cpl. McCann stated that he feared that the situation would escalate quickly into a shootout with the subject; he also knew that there was at least one other female in the house. Although Cpl. McCann believed that he would be justified in using deadly force, he thought he might be dealing with someone who was mentally ill, based upon the way Mr. Waters was acting. Because he had lethal force coverage from the other officers, Cpl. McCann made a decision to switch from his

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<sup>1</sup> At 10:34 p.m. Trooper Holl radioed in and requested a restriction on radio communications because the subject had announced he had a weapon and would not show his hands.

service pistol to his TASER. Trooper Osgood heard a click and saw Cpl. McCann switch to the TASER. Cpl. McCann deployed his department-issued TASER X26 (“TASER”) from a distance of approximately 15-20 feet, striking Mr. Waters, who was standing in the doorway. The Troopers reported seeing the effect of the TASER deployment. Mr. Waters’ body tensed and his right hand moved forward; after 1-2 seconds, his weapon fell to the floor in the area of the door’s threshold and Mr. Waters fell backwards into the house. As Cpl. McCann and the other Troopers began to approach the subject, Cpl. McCann observed Mr. Waters rolling over and trying to sit up. Cpl. McCann believed that Mr. Waters was trying to reach for his weapon and deployed the TASER a second time. The effect of the TASER caused Mr. Waters to fall back onto the floor and Trooper Holl moved in and kicked the weapon away from Mr. Waters. The Troopers reported that Mr. Waters continued to actively resist as they directed him to put his hands behind his back and attempted to handcuff him. Mr. Waters was on his stomach with his hands underneath him, attempting to slide forward as the officers were trying to take him into custody. Because the situation was unfolding rapidly, the officers did not know who else was in the house, and they could hear screams coming from inside the home, Cpl. McCann made the decision to deploy his TASER a third time to gain control of Mr. Waters.<sup>2</sup>

After the final TASER deployment, the Troopers handcuffed Mr. Waters. Cpl. McCann stayed with Mr. Waters while Troopers Osgood and Holl began clearing the house. As other officers arrived on the scene, Cpl. McCann directed an officer to secure the gun in his vehicle and then to stay with Mr. Waters while he assisted the other Troopers in clearing the house. Cpl. McCann stated that Mr. Waters was breathing when Cpl. McCann left to assist the other Troopers. Several minutes later, when Cpl. McCann returned from securing the house, he and the other officers present observed that Mr. Waters appeared to be having difficulty breathing. They rolled him into a recovery position on his right side with his knees bent. By this time, they had identified Mr. Waters and called out his name but Mr. Waters was unconscious and non-responsive. Another officer on the scene determined that Mr. Waters did not appear to be breathing and did not have a pulse. Officers rolled Mr. Waters onto his back and began CPR. Cpl. McCann requested an AED and applied the AED patches. The AED advised them to administer a shock and then to return to CPR. Officers performed CPR until the paramedics arrived and took over.<sup>3</sup> Mr. Waters was transported by ambulance to the hospital. Mr. Waters did not regain consciousness and died on January 9, 2016.<sup>4</sup>

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<sup>2</sup> All three cycles of current from the TASER were delivered via the 2 probes that struck Mr. Waters during the first deployment. Trooper Holl radioed in the TASER deployment approximately one and one half minutes after the request for the restriction.

<sup>3</sup> There are no in car or body camera videos of the use of force encounter; however, Cpl. McCann’s dash camera and audio turned on just before officers rolled Mr. Waters into recovery position and began CPR. The video does not show the officers administering aid but the audio confirms the sequence of events.

<sup>4</sup>Mr. Waters’ blood alcohol level was 0.250. His cause of death was determined to be “Sequelae of Hypoxic-Ischemic Encephalopathy due to Cardiac Dysrhythmia during physical exertion.” “Contributing factors” included “acute ethanol intoxication and recent conductive electrical weapon discharge.” The manner of death was ruled an accident.

Officers recovered a fully loaded Jiminez Arms .380 caliber pistol with a chambered round and a magazine containing 10 additional rounds at the scene. A trace of the gun revealed that Mr. Waters purchased the weapon legally.<sup>5</sup>

### Conclusion

The Department of Justice concludes that the degree of force used in this case does not constitute a use of “deadly force” as defined by Delaware law. Deadly force is a legal term defined by Delaware statute as, “force which the defendant uses with the purpose of causing or which the defendant knows creates a substantial risk of causing death or serious physical injury.”<sup>6</sup> Serious physical injury is defined as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ”<sup>7</sup> An electronic control device [TASER] is not included within the definition of a deadly weapon.<sup>8</sup> It is separately defined in the in the criminal code as “a device intended to incapacitate a person, including but not limited to a neuromuscular incapacitation device.”<sup>9</sup> The facts developed during the investigation clearly establish that Cpl. McCann did not intend to cause death or serious physical injury. Rather, Cpl. McCann deliberately switched from his service pistol to his TASER with the specific intent of preventing the situation from escalating to deadly force.

After a thorough investigation and review of all statements and reports, it is the conclusion of the Department of Justice that, as a matter of Delaware law, the use of force by Delaware State Police Corporal Lloyd M. McCann was not a criminal act because use of such force was justified.

Section 464 of Title 11 of the Delaware Code generally defines the legal use of force in self- protection and provides that “[t]he use of force upon or toward another person is justifiable when the [officer] believes that such force is immediately necessary for the purpose of protecting the [officer] against the use of unlawful force by the other person on the present occasion.” Additionally, Section 465 of Title 11 of the Delaware Code defines the use of force for the protection of other persons. It provides that, “[t]he use of force upon or toward another person is justifiable to protect a third person when the [officer] would have been justified under § 464 of this title in using force to protect the [officer] against the injury the [officer] believes to be threatened to the person whom the [officer] seeks to protect.” Finally, Section 467 of Title 11 of the Delaware Code provides that “[t]he use of force upon or toward another person is justifiable when the [officer] is making an arrest or assisting in making an arrest and believes that such force

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<sup>5</sup> Two of the juveniles who were inside of the house were interviewed during the investigation and confirmed that the Troopers announced themselves as police officers and told Mr. Waters to open the door. One of the juveniles also confirmed that Mr. Waters had a gun in his hand when he came up the stairs from his bedroom. The other juvenile heard Mr. Waters tell the officers that he had a weapon.

<sup>6</sup> 11 Del. C. §471(a).

<sup>7</sup> 11 Del. C. §.222 (26)

<sup>8</sup> 11 Del. C. §.222 (5)

<sup>9</sup> 11 Del. C. §.222 (10)

is immediately necessary to effect the arrest.” Each of Cpl. McCann’s TASER deployments constituted a justified use of force.

At the time Cpl. McCann initially discharged his TASER, he believed that he was dealing with RW, who was wanted on an arrest warrant for a PFA violation and had a history of assaults. The person Cpl. McCann believed to be RW, announced that he had a weapon, had the gun held behind his back and refused all commands to drop the gun. Cpl. McCann and the other Troopers were attempting to arrest RW [Mr. Waters] and stated that they feared for their safety. Cpl. McCann made a conscious decision not to use deadly force and instead deployed his TASER, striking Mr. Waters and causing him to fall and drop the weapon. As Cpl. McCann approached Mr. Waters to take him into custody, he observed Mr. Waters attempting to sit up within reach of the gun that had fallen at his side. Cpl. McCann, again in fear for his safety and that of the other officers, deployed the TASER a second time. As the Troopers attempted to handcuff Mr. Waters, he continued to actively resist and attempted to slide forward. Due to screams coming from inside the house, Cpl. McCann believed they could not continue to physically struggle with Mr. Waters and deployed the TASER a third time to get him handcuffed and under control.

Under Delaware law, it is Cpl. McCann’s subjective state of mind that is of critical importance in determining whether his use of force was justifiable. The specific factual issue is whether Cpl. McCann actually believed each time he intentionally deployed his TASER that such action was necessary to protect himself or others from death or serious physical injury or to effect Mr. Waters’ arrest, so long as he was not reckless or negligent 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.

As Cpl. McCann and the other officers turned away from the residence to secure the perimeter and obtain a search warrant for the premises, the person the officers thought to be RW unexpectedly appeared at his door and announced that he had a weapon. Cpl. McCann and Trooper Osgood both observed the weapon Mr. Waters held behind his back in his right hand. Mr. Waters refused multiple commands to drop the gun. Believing that he had sufficient lethal force cover from the other officers, Cpl. McCann made a decision to switch from his service weapon to his TASER to subdue Mr. Waters and take him into custody without the use of deadly force. Cpl. McCann was interviewed and stated that he was in fear for his safety, the safety of the other officers, and the safety of the individuals inside the home when he deployed his TASER. Troopers Osgood and Holl also stated that they feared for their safety. Cpl. McCann’s primary purpose in deploying his TASER a third time was to effect Mr. Water’s arrest. Cpl. McCann and the other Troopers were, during the entire encounter, attempting to place Mr. Waters under arrest. Mr. Waters actively resisted their efforts; first, by refusing to identify himself, displaying a weapon and refusing commands to drop the weapon and, second, by physically struggling with the officers’ attempts to handcuff him. The statutory justifications for the use of force are independently sufficient to support the use of force. Because he did not employ deadly force, Cpl. McCann’s belief that he needed to use his TASER to effect Mr. Waters arrest is sufficient justification for the third TASER deployment even if he was not in fear for his own safety and the safety of the other officers.

The investigation of the facts and circumstances fully supports the reasonableness of Cpl. McCann's belief that his life and the lives of others were in danger and that the use of force was necessary for self-protection, the protection of others and to take Mr. Waters into custody. That belief was not formed recklessly or negligently. As a result, Cpl. McCann's use of force was justified and is not subject to criminal prosecution.