

# 10/10/18 POLICE CIVILIAN REVIEW BOARD

## Investigation Report

Internal Affairs Case Number S 2018-0006

Complainant: (Race/Gender)	C- Michael Zahn (W/M: Deceased)
Alleged Policy Violation:	Excessive Force: OIS
Subject Officer: (Race/Gender)	S- Det. Blake Noble (W/M)
Subject Officer's Years of Service:	S- 10 years (Two Agencies)
Date of Alleged Incident:	9/5/18
Date Investigation Requested:	9/6/18
Date Filed with Internal Affairs	9/6/18
Date Investigation Completed:	10/10/18
Panel Members:	Catalina Cardona Kevin Parke Amber Liechty Dennis Busch
Date of Panel Meeting:	10/16/18
Interviews Conducted:	2

**It should be noted that the narratives contained in this report are summaries that have been paraphrased from interviews. They should not be interpreted as verbatim transcripts. The narrative is intended to accurately communicate the substance of the major points in each interview.**

### **Synopsis:**

On the day in question, officers were called to a local motel to deal with an unruly person. The officers, S and W, encountered C. After calming down the situation and sending C on his way, the officers checked their databases and learned he was a wanted person. They attempted to get him to stop, a short foot chase occurred at which time C was seen with a handgun in his hand. *(Note: this weapon was recovered at the scene and was matched to the weapon which resulted in the suicide death of C.)* The evidence shows that C fired the weapon into an occupied building, to

likely break the glass in order to allow entry since the door to the building was locked. S, fearing for his life and the life of others, returned fire, but did not strike C. The building was evacuated and a Tactical Team called to the scene, but prior to encountering C, C shot himself and died.

The following comes from the DA's letter, in part it states:

For the reasons discussed below, the DA's Office believes filing criminal charges against Officer Noble would be entirely inconsistent with the evidence presented. Officer Noble made a reasoned, split-second decision to fire his service weapon only after seeing Mr. Zahn pull out a firearm in a populated downtown area of Salt Lake City. When interviewed by Protocol Investigators, Officer Noble testified that he saw Mr. Zahn's weapon (which Officer Noble was able to describe in almost exact detail) and fired only because, "Out of concern that [Mr. Zahn] would go in [the building] and take hostages or kill people inside [the building], I attempted to stop [Mr. Zahn] and fired." In other words, only because he "reasonably believe[d] that the use of deadly force [wa]s necessary to prevent death or serious bodily injury[3] to the officer or another person." Utah Code § 76-2-404(1)(c); *see also id.* at -404(1)(b) (authorizing deadly force where a law enforcement officer "reasonably believes that deadly force is necessary" to prevent a suspect's escape and the officer had probable cause to believe the suspect posed "a threat of death or serious bodily injury to the officer or to others if apprehension is delayed").

The "reasonableness" of Officer Noble's decision to use deadly force is but further established by Mr. Zahn firing his weapon to break into an adjacent small business (with two employees inside) and, within approximately 30 minutes thereafter, taking his own life with that same gun.

Officer Noble's weapon discharge on September 5, 2018, constituted the "use of a dangerous weapon," which is defined under Utah law as "a firearm or [] object that in the manner of its use or intended use is capable of causing death or serious bodily injury." Utah Code Ann. § 76-2-408(1)(a), (d). It also constituted the use of "deadly force" within the meaning of Utah law. *See, e.g.,* Utah Code Ann. § 76-2-402(1)(b) ("deadly force" defined as "force intended or likely to cause death or serious bodily injury").

Officer Noble's weapon discharge did not, however, comprise an "officer-involved critical incident." That term is defined in statute to include, as relevant here, "the use of a dangerous weapon by an officer that causes injury to any person." Utah Code Ann. § 76-2-408(1)(d)(i) (emphasis added). As noted above, neither Mr. Zahn nor anyone else was injured due to Officer Noble's use of deadly force. This incident thus meets the first, but not the second, prerequisite to involvement by the DA's Office under section 408(1)(d)(i).<sup>4</sup>

Regardless, the OICI Investigative Protocol agreement between your agencies and ours (dated December 2015) allows a participating agency to invoke the protocol voluntarily and request intervention by

the DA's Office. SLCPD did that in this case. Specifically, Chief Brown-in the interest of full transparency in light of Officer Noble's use of deadly force in a populated area of downtown Salt Lake City-asked OICI Protocol Investigators and the DA's Office to treat this as they would any OICI as defined by Utah state law. Both the Protocol Investigators and we have done so.

- (a) the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.

Based on this statute, the legal defense of "justification," then, may be available where a law enforcement officer "reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person." Utah Code§ 76-2-404(1)(c). That affirmative defense may also be available where a law enforcement officer "reasonably believes that deadly force is necessary" to prevent a suspect's escape and the officer had probable cause to believe the suspect posed "a threat of death or serious bodily injury to the officer or to others if apprehension is delayed." *Id.* at§ 76-2-404(1)(b). In determining whether the use of deadly force was "justified" under Utah law, courts may consider several factors, including: (i) the nature of the danger; (ii) the immediacy of the danger; and (iii) the probability that the unlawful force would result in death or serious bodily injury. *See* Utah Code Ann. § 76- 2-402(5).

Although Utah statutory law does not fully differentiate standards of "reasonableness" as between law enforcement officers and civilians, *compare* Utah Code§ 76-2-402(1) (universal application), *with* Utah Code§ 76-2-404(1) (application to law enforcement officers only), the Supreme Court of the United States did exactly that in *Graham v. Conner*, 490 U.S. 386 (1989). In *Graham*, the Supreme Court instructed that "reasonableness" for law enforcement officers must be assessed in light of a "reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396 (internal citations omitted). The Supreme Court held that this determination "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests . . . against the countervailing governmental interests at stake." *Id.* Finally, the *Graham* court instructed (*id.* (internal citations omitted; emphases added)):

#### **FACTS DEVELOPED IN OICI INVESTIGATION<sup>7</sup>**

On September 5, 2018, Michael Zahn committed suicide after leading the police on a foot chase near Pioneer Park, from outside the Homewood Suites Hotel (located at 423 West 300 South) to a small commercial building to which Mr. Zahn gained entrance by climbing over a fence and shooting out a glass side door (located at 333 South Rio Grande). At the time of the foot chase, Mr. Zahn, a convicted felon, had

an outstanding arrest warrant for a firearms-related parole violation. Prior to that day, it was later determined by Protocol Investigators in the course of their witness interviews, Mr. Zahn told friends and family he "wouldn't go back" to prison.

The September 5 chase began after Officer Noble and his partner that day, Detective Steve Winters-who had minutes earlier responded in uniform to a 911 call to clear Mr. Zahn and three companions from a room inside the Homewood Suites-discovered Mr. Zahn's criminal history and also the outstanding arrest warrant. They located Mr. Zahn outside and across the street from the Homewood Suites and, at approximately 4:17 p.m., approached Mr. Zahn to place him under arrest. Rather than speak to the officers, Mr. Zahn began running, first going south down 400 West and then turning into an alley near 330 South. Body worn camera footage from Officer Noble indicates he yelled "police" and "stop" as he chased Mr. Zahn.

In the alley, Mr. Zahn climbed over a fence to enter the small back courtyard off a commercial building located at 333 South Rio Grande. Officer Noble heard the sound of Mr. Zahn scaling the fence, located where Mr. Zahn had done so, and radioed, "He's in a courtyard between 300 South, 400 West." Within moments, Officer Noble shouted, "Hey! Stop right there, he's got a gun!" When interviewed later by Protocol Investigators, Officer Noble was able to precisely describe the gun wielded by Mr. Zahn at that moment.

Mr. Zahn then fired his gun. At that time the direction of his shot was unclear, based on Officer Noble's body worn camera footage, but surveillance video from the building next door later revealed Mr. Zahn shot out a glass side door in the commercial building before diving head first from the courtyard into the building. Officer Noble responded with two shots of his own, both fired at Mr. Zahn in rapid succession. Neither bullet hit Mr. Zahn or anyone else.

Officer Noble immediately radioed, "Shots fired! He's got a gun!," "He ran into the building!," and "Need containment on this whole building, he shot through the glass!" Additional officers responded to the scene.

Officers later determined that, after gaining access to the business, Mr. Zahn spoke briefly with the owner and one employee of the business, asking them how to escape. Mr. Zahn then proceeded to the upper level of the business. The business owner and employee both exited the building unharmed, told officers what they had seen, and took cover away from the building.

By approximately 4:43 p.m., officers were able to enter the building. There they found Mr. Zahn already deceased, with what appeared to be a point blank gunshot wound to the head. Nobody else was in the building when Mr. Zahn was found.

**Michael Zahn, herein referred to as C, is the complainant and provided the following:**

The evidence shows that C shot himself, fatally, at the end of this incident. Obviously, he could not contribute to this review but due to the nature of the incident, an OIS, an automatic review was triggered.

**Off. Blake Noble, herein referred to as S, is the subject of this matter and provided the following:**

S's comments/observations were included in the DA's report and will not be repeated herein.

**Det. Steven Winters, herein referred to as W, is a police officer, a witness and stated:**

W was interviewed by the DA's office and his observations are incorporated in the above.

**Evidence:**

Multiple videos captured portions of these events and are described below, when not covered previously, above:

These videos are being retained for future use, if needed. The description above adequately summarizes the information that can be gleaned from the various videos and from the various angles available.

**Allegations:**

Due to the nature of the incident, an automatic review was triggered. The incident is being reviewed as an Excessive Force matter.

**Definitions**

Unfounded: The reported incident did not occur.

Exonerated: The employee's actions were reasonable under the circumstances.

No determination is possible: There is insufficient evidence to support a conclusion as to whether or not the employee violated policy.

Sustained: The employee's action(s) are in violation of the policy or procedure of the Police department.

**Analysis and Recommendation:**

In reviewing the available evidence, including the DA's report and that of the investigating outside agency, the facts as known are well summarized above. In many violations, of interest to the CRB, there can be differing considerations in arriving at conclusions of a violation of State Law vs a violation of the SLCPD's Policy and Procedure manuals. This matter is not one of those types of situations.

S fired at C after C fired his weapon first. S explained that he fired at C, but did not strike him, out of his belief that either his life, or the life of others, was in peril. The issue to be decided by the Panel is very straight forward: based upon what S knew at the time, was his response, firing his weapon, reasonable? The nature of this allegation is a bit murky as no force was actually used by S upon C as S's rounds did not strike C so this matter may be better considered an *attempted* use of Deadly Force. As summarized above, the DA has concluded that no charges will be filled due to the fact that the law requires two elements to be present. As that report stated:

Officer Noble's weapon discharge did not, however, comprise an "officer-involved critical incident." That term is defined in statute to include, as relevant here, "the use of a dangerous weapon by an officer that causes injury to any person." Utah Code Ann. § 76-2-408(1)(d)(i) (emphasis added). As noted above, neither Mr. Zahn nor anyone else was injured due to Officer Noble's use of deadly force. This incident thus meets the first, but not the second, prerequisite to involvement by the DA's Office under section 408(1)(d)(i).<sup>4</sup>

CRB's review of this incident is similar in scope to that of the DA but addresses policy in addition to the law.

**Panel Findings:**

As to the allegation that S used "Excessive Force" by firing at C, the Panel makes a finding of "Exonerated" on this matter.

The Panel makes a finding that this matter is/is not in the public eye and therefore recommends that this report be made public.

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Kevin Parke

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10/16/18