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**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH**

<p>AARON JAMES and TIFFANY JAMES, Heirs and Proposed Personal Representatives of the Estate of Zane James,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>CASEY DAVIES and COTTONWOOD HEIGHTS;</p> <p style="text-align: right;">Defendants.</p>	<p style="text-align: right;">Case 2:19-cv-00341</p> <p style="text-align: center;">MOTION TO STRIKE OR SUMMARILY DENY DEFENDANTS' MOTION TO DISMISS AND TO ENTER A DEFAULT JUDGMENT IN FAVOR OF PLAINTIFF ON LIABILITY, OR IN THE ALTERNATIVE, TO STAY AND COMPEL EVIDENCE</p> <p style="text-align: right;">Judge Howard C. Nielson, Jr. Magistrate Judge Dustin B. Pead</p>
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MOTION

Plaintiffs move the Court as follows:

1. Strike or Summarily Deny the MTD & Enter a Default Judgment.

For an Order striking or summarily denying Defendants' Motion to Dismiss, and entering a default judgment on liability on the grounds that Defendants have perpetrated an

intentional spoliation of evidence, like unto a fraud on the Court, by concealing crucial evidence of a video of the actual shooting of Zane James, such that the Complaint (Doc. 2), Defendants' MTD (Doc. 9), and the Opposition (Doc. 16) were all based on false and omitted facts.

2. **Stay and Compel Evidence.** In the alternative, for an Order staying any decision on Defendants' Motion to Dismiss (MTD), Doc. 9, currently pending before the Court, and an Order compelling Defendants to immediately turn over any and all video of the shooting of Zane James.

MEMORANDUM IN SUPPORT OF MOTION

Plaintiffs have in the past few days learned crucial new information that justifies this Motion. This information affects the underpinnings of the defense and profoundly undermines the credibility of Defendants' pending Motion to Dismiss, and other representations made to the Court. This evidence suggests an intentional concealing of evidence that would likely defeat Defendants' claims in the MTD. The withholding of or concealing a video of the actual shooting of Zane James is like unto fraud on the Court as well as a fraud on the District Attorney, who officially investigated the fatal shooting of Zane James.

FACTS

The following facts are relevant to this motion:

1. **05/29/2018 - Date of Shooting.** Zane James was fleeing law enforcement after being pursued as a suspect for two armed robberies with an airsoft (toy)

gun in the early morning hours of May 29, 2018. He crashed his motorbike in a residential neighborhood in Cottonwood Heights, Utah at approximately 6:00 a.m. As Zane was limping away from the crash site, Officer Davies pulled up, leveled his pistol at Zane, gave no warning, and shot four times, hitting him in the back twice. The shooting caused Zane's death two days later. Doc. 2.

2. Representation of No Video of the Shooting. It was represented by Cottonwood Heights on several occasions that there was no video of the actual shooting.

a. James' GRAMA Request. The James family made several GRAMA requests for all video and other documents relevant to the shooting. See Exhibit 1. They were told by several Cottonwood Heights employees that there was no video of the actual shooting. Exhibit 2.

b. Tiffany James Affidavit. Tiffany and Aaron James made direct requests to Cottonwood Heights City Officials for all videos, which would include body and dash cam videos. They were told that videos of the shooting did not exist. See Exhibit 2, Tiffany James Affidavit.

c. Public Statements by Chief Russo. The Cottonwood Heights Police Department (CHPD) Police Chief, Robby Russo, made a statement to Channel 2 on October 9, 2018, where he said, "Davies [the shooting officer] was on his way to work when the shooting happened. – He'd not yet made it to the police station to pick up his camera." Exhibit 3, Report of News Story by KUTV News, Salt Lake City, Utah.

d. D.A. Sim Gill's Investigation & the 5th Amendment. As

is customary, another agency always investigates officer-involved shootings, sometimes referred to as an "Officer Involved Critical Incident" or OICI, which describes the Zane James shooting. On October 8, 2018, nearly 6 months after the shooting, District Attorney Sim Gill issued his OICI report. See Exhibit 4. Gill reported that his investigators followed OICI protocol in obtaining evidence including video footage of the scene. Gill's report states the following under the bold heading of "Physical Evidence":

Officer Davies was not wearing a body-worn camera during the OICI. Protocol investigators determined that no video recording of the OICI exists as far as they know at this time. Protocol investigators obtained and reviewed the recordings from CHPD Officers Harris' body-worn camera. Officer Harris' body-worn camera recorded Officer Kawa asking Officer Davies: "Where's the gun at?" to which Officer Davies replied: "He kept reaching with his left hand up in that front area." The body-worn camera also recorded Officer Betenson saying: "He was reaching in the front."

Exhibit 4, p. 10 (emphasis and double emphasis added). Other post-shooting "body-worn" camera recordings were provided. But video[s] of the actual shooting were withheld.

Defendant Casey Davies refused to give a statement under oath to Mr. Gill, "as is his constitutional right." Exhibit 4, p. 6.

3. Plaintiffs' Reliance on "No Body Cam." Plaintiffs' Complaint

was filed on May 16, 2019. See Doc. 2. Plaintiffs relied on the fact that there allegedly was no body camera *footage of the actual shooting* ("no video recording of the OICI exists"). The Complaint states, "Davies was not wearing a lapel camera, as CHPD policy required." Doc. 2, ¶57. The Complaint further states that Officer Betenson was "not wearing his lapel

camera, or had it turned off.” Doc. 2, ¶58. Plaintiffs further relied on the report of Sim Gill of October 8, 2018 (Exhibit 4), which referenced Davies’ and Betenson’s body cameras as “not on during the chase and shooting.” Doc. 2, ¶103. Plaintiffs’ Complaint affirmed that “Officers Davies and Betenson did not have body or dash cam on at the time of the shooting, despite having policy for this procedure.” Doc. 2, ¶105. In a nutshell, Plaintiffs repeatedly relied on the CHPD representations to the Jameses and to D.A. Gill that neither Davies nor Betenson had a body or dash cam recording of the shooting.

4. **D.A. Sim Gills’ Reliance on “No Body Camera.”** We have quoted the paragraph above from District Attorney Sim Gill’s report indicating that there was no body cam video of the shooting available. His investigators would have gathered all the information available to present to Mr. Gill before that report was written, so obviously video footage of the shooting was withheld from District Attorney Gill.

5. **Defendants Rely on False Statements Re: No Body Camera.** Defendants filed their MTD (Doc. 9) on June 18, 2019, just about a month exactly after the Complaint was filed. On pps. 1-2 of that Motion, Defendants noted:

The *Salt Lake District Attorney’s Office investigated* the shooting, but declined to file criminal charges against Cottonwood Heights Police Officer Casey Davies *on the basis he could likely show he feared he was in imminent danger of serious bodily injury or death* at the time of the shooting.

Emphasis added. This particular statement references the Complaint, Doc. 2, ¶¶97-103, which refers to the lack of body camera footage of the shooting. Of course, an actual video of the shooting, to a high degree of certainty, would substantiate or disprove whether

Defendant Davies had a reasonable fear that “he was in imminent danger of serious bodily injury or death,” as Defendants’ Motion to Dismiss claims.

As additional reasons for the dismissal, Defendants’ MTD Memorandum notes that Davies and Betenson “both claimed that James’s hands appeared to reach for something toward the front of his body while he was running.” Doc. 9, p. 4. Body camera footage of the shooting could easily have disproven these Defense claims. In other words, the Defense attempts from the outset to prevail by *relying on lack of body camera footage* of the actual shooting, which obviously influenced District Attorney Sim Gill in finding that the shooting was legal.

6. Plaintiffs Relied on False Representations About No Body Camera. Plaintiffs likewise relied upon Defense representations of lack of a body camera. Plaintiffs’ Complaint recites, “Neither officer had an active lapel camera at the time of the shooting. Doc. 2, ¶¶57-58.” Plaintiffs’ Opposition to Defendants’ MTD, p. 4, ¶10. Plaintiffs’ Argument further notes that “Betenson was not wearing a body camera on the scene.” Doc. 16, p. 26.

7. Defense Counsel’s Role. We want to make it clear that we are not alleging that Defense counsel knew or affirmatively participated in the misrepresentations alleged herein. We believe Defense counsel was probably unaware of the misrepresentations.

8. Recent Facts Indicating the Existence of a Video of the Shooting. Tiffany James, mother of Zane James and a Plaintiff herein, has had multiple conversations

with reliable individuals who are part of Cottonwood Heights government. Exhibit 2. These individuals have told Tiffany that there is indeed a video of the actual shooting, as opposed to just post shooting video. Apparently, the shooting video was shown in 2018 to the entire Cottonwood Heights City leadership and to others. If these facts are true, and we sincerely believe that they are, that would mean that the Defendant and other CHPD officers and leadership, together with the City Attorney, the entire City Council, and possibly others, were all aware in 2018 of a video of the actual shooting.

ARGUMENT

I. STRIKE OR SUMMARILY DENY THE MTD & ENTER JUDGMENT IN FAVOR OF PLAINTIFF

Tremendous prejudice has been introduced by Defendants' deliberate withholding of video evidence from Plaintiffs, the D.A. and this Court. Plaintiffs obviously have not seen the video. But the only reason Defendants would withhold such evidence is because it is harmful to their defense. The taint of this willful omission is threaded through the fabric of this case. There is no legal mechanism or remedy that could equitably cure the damage caused by Defendants' actions other than striking or summarily denying Defendants' MTD, followed by the entry of a default judgment on liability.

Plaintiffs, Defendants, D.A. Sim Gill, and this Court have all been operating under the false premise that no video evidence of the actual shooting exists. The recent facts suggest Defendants' deliberate withholding or hiding of this evidence. A video of the

shooting would likely confirm Plaintiffs' version of the facts and would fundamentally change the case.

It has been long established that a video of the events is the best evidence of the facts. *Scott v. Harris*, 550 U.S. 372 (2007). "When opposing parties tell two different stories, one of which *is blatantly contradicted* by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380.

The video undoubtedly shows that Zane was the victim of illegal deadly force. Why else would Defendants have hidden it? Under *Scott v. Harris*, Defendants could never argue contrary to the video in either an MTD or in a summary judgment motion. "Respondent's version of events is so utterly discredited by the [video] record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such *visible fiction; it should have viewed the facts in the light depicted by the videotape.*" *Scott*, 550 U.S. at 380-381 (emphasis and bracketed word added).

Judge Campbell in the District of Utah has noted "If a videotape of the incident is in the record, anything depicted in the video that contradicts and makes unbelievable the [party's] characterization of the incident overrides the conflicting testimony." *Harper v. Rose*, 2012 WL 1150463 *4 (D. Utah 2012) (bracketed word added; citing *Scott v. Harris*, 550 U.S. at 380).

In this case, the video of the shooting will establish the facts beyond any reasonable dispute. It is therefore important for Plaintiffs to see the video of the shooting before responding to any MTD.

In the interest of justice this Court should strike or summarily deny Defendants' MTD because Defendants have willfully withheld evidence from Plaintiff and from the Court. Their actions demand that the Court rectify this injustice. Denying Defendants' MTD is appropriate and proportional when compared to their grievous acts and misrepresentations to Plaintiffs and to this Court.

Entering a default judgment on liability is also an appropriate remedy in this case. Where a Defendant deliberately withholds and/or misrepresents the circumstances of Zane's wrongful death, the wrong can only be cured by rendering a default judgment on liability and by allowing this case to go forward only as to Plaintiffs' damages. The James family deserves to have a chance to show how Zane's killing at the hands of CHPD has forever altered their lives. They must live with that loss every day. Courts have allowed judgments on liability as a sanction for deliberate misconduct by a Defendant and for failing to follow court rules or any order of the court. *See Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992); *Salba Corp., N.A. v. X Factor Holding, LLC*, 2015 WL 3635742; *Gripe v. City of Enid, Okl.*, 312 F.3d 1184 (10th Cir. 2002); *Lee v. Max Intern., LLC*, 638 F.3d 1318 (10th Cir. 2011). It is altogether fitting that this court consider this as the best remedy to move forward and thus should strike or summarily deny the MTD and enter a judgment on liability in favor of Plaintiffs.

II. STAY

Defendants' Motion to Dismiss was argued before the Court prior to the pandemic, on October 15, 2019. No Decision has been entered as of this writing. Because of the nature of the material presented in this Memorandum, Plaintiffs sincerely request that the Court stay any further consideration of that Motion until the underlying facts are investigated and determined. We believe that the Defendants have caused or contributed to a serious spoliation of evidence, like unto a fraud on the Court, as well as a fraud on the Plaintiffs by withholding crucial information that could easily be determinative of the MTD in this case. For a host of reasons, largely because the video was not produced, it appears that the video would likely prove that Defendant Davies used illegal deadly force by shooting Zane James in the back when there was no immediate danger to himself or others, because Zane James had no weapon in his hands.

It is evident that Plaintiffs could and would have pleaded the case differently, i.e. that there was a video of the shooting which showed that shooting Zane in the back did not comply with the law. We would likely have attached the video. Furthermore, Defendants probably could not have filed a Motion to Dismiss in good faith because they would have to have conceded that the shooting was illegal.

III. ALTERNATIVE RELIEF

In the alternative, if the Court is reluctant to strike or summarily deny the MTD and enter a default judgment at this point, Plaintiffs request the following relief:

1. Stay any action on the MTD *until limited discovery has occurred*.

2. Allow Plaintiffs to take depositions under oath of the Mayor of Cottonwood Heights, Police Chief Robby Russo, Lieutenant Dan Bartlett, City Manager Tim Tingey, former City Manager John Park, City Attorney Shane Topham, Defendant Casey Davies, Bryan Betenson (now a former CHPD officer) and each of the four members of the City Council.

These depositions would be no more than one hour each and limited to whether there exists a video of the shooting, when that information became known to the deponent, and any efforts to intimidate the deponent, or cause a cover up of the video.

3. The Court should also order the immediate production of any and all videos of the shooting be provided to Plaintiffs' counsel, Robert B. Sykes at Sykes McAllister Law Offices.

Should the Court choose this option, Plaintiffs' counsel can determine for the Court the existence of the desired videotapes and who was involved in covering up that evidence or causing it not to be produced.

CONCLUSION

Plaintiffs have not seen the video[s]. But based on good faith representations to Plaintiffs, Plaintiffs ask that the Court consider this new evidence and take immediate action. Plaintiffs are not filing this motion to cause any undue burden or delay but are filing this motion because they believe they have ethical and legal obligations of candor to this Court. The duty of candor demands that this information be brought forward. The sources of this information are credible. The allegations contained within this pleading are made in

good faith and it is Plaintiffs' intention that the Court see them this way. The allegations in this Motion are not meant to sensationalize or dramatize the sordid facts that they contain. Plaintiffs present this motion strictly out of a duty to always conduct themselves with candor to the Court.

PRAYER FOR RELIEF

Plaintiffs pray that in light of the evidence presented in this Motion, this court will:

1. For an Order granting Plaintiffs' Motion to Strike or Summarily Deny Defendants' Motion to Dismiss and Entering a Default Judgement on Liability against Defendants.
2. In the alternative, for an Order staying the MTD and compelling production of the videos.
3. In the alternative, for an Order granting limited discovery, including an Order compelling immediate production of the video[s] of the shooting, and allowing limited depositions.

DATED this 11th day of August, 2020.

SYKES MCALLISTER LAW OFFICES, PLLC

/s/ Robert B. Sykes
ROBERT B. SYKES
Attorney for Plaintiffs

Cottonwood Heights Police Record Request GRAMA

2277 E Bengal Blvd; Suite B, Cottonwood Heights, Utah, 84121

Phone: (801) 944-7100

Fax: (801) 944-7105

Requestor Information:

Name: Aaron M. James Date of Birth March 16, 1975

Street Address: 2881 East Palma Way

City: Cottonwood Heights State: UT Zip Code: 84121

Daytime Phone: 801-719-9132 Email: amjames25@hotmail.com

REQUESTED RECORD STATUS (check all that apply)

- ☐ I am an involved party in a traffic accident.
- ☐ I am the subject/involved party of the requested record.
- ☐ I am the provider of the information in the requested record.
- ☒ I am the parent or legal guardian of the subject of the requested record.
- ☒ I have a "Power of Attorney" or notarized release from the subject of the record or from the provider of the information in the requested record. (Documentation Required)
- ☐ I would like to inspect (view) the records.
- ☐ Other-Please Explain _____

CHPD Case Number(s) 1) 16X007387 ← 16X004948 → Unknown Case # - Zane James Suspect in Investigation for Cottonwood Heights (2016)
 Rec Center Theft; 2) C14858377 → Zane James Dec 24, 2016; 3) 18X003056 # - Zane James Cottonwood Heights Police Shooting May 29, 2018.

Description of the Requested Record(s) Please Be Specific All records/documents associated with cases identified above including but not limited to, video, photos, witness testimony, officer statements, radio communication transcripts and support documents

PLEASE READ THE FOLLOWING BEFORE SIGNING THIS REQUEST

The records that may be provided to you, subsequent to your request, may contain information that is classified as "protected", "private", or "controlled", and may only be disclosed under certain circumstances, UCA 63G-2-302, UCA 63G-2-303, 63G-2-304, and 63G-2-305.

I will allow a maximum of ten 10 working days to compile the record, or 5 days with written documentation that shows why I am entitled to an expedited response as per UCA 63G-2-2-204 (3)(b).

I understand I may be responsible for the fees associated with the research and copies of this report in accordance with Cottonwood Heights Fee Schedule.

Signature

Date and Time of Request

Preparer: AS Fee Due: \$105.00 Date Requestor notified: 12-11-18Released by: WTDL #177648139 Release Date: _____

Denied by: _____ Denied On: _____ Due To: _____ Code: _____

Cottonwood Heights Police Record Request GRAMA
 2277 E Bengal Blvd; Suite B, Cottonwood Heights, Utah, 84121
 Phone: (801) 944-7100 Fax: (801) 944-7105

Requestor Information:

Name: Aaron M. James Date of Birth March 16, 1975
 Street Address: 2881 East Palma Way
 City: Cottonwood Heights State: UT Zip Code: 84121
 Daytime Phone: 801-719-9132 Email: amjames25@hotmail.com

REQUESTED RECORD STATUS (check all that apply)

- ☐ I am an involved party in a traffic accident.
☐ I am the subject/involved party of the requested record.
☐ I am the provider of the information in the requested record.
☐ I am the parent or legal guardian of the subject of the requested record.
☐ I have a "Power of Attorney" or notarized release from the subject of the record or from the provider of the information in the requested record. (Documentation Required)
☒ I would like to inspect (view) the records.
☒ Other-Please Explain I WOULD LIKE COPIES OF THE DOCUMENTS
BEING IDENTIFIED BELOW.

CHPD Case Number(s) N/A

Description of the Requested Record(s) Please Be Specific Current CHPD Policies and Procedures and
associated guidance documents and support materials associated with CHPD Policies and Procedures.

training materials / related to cited cases -
guidelines

PLEASE READ THE FOLLOWING BEFORE SIGNING THIS REQUEST

The records that may be provided to you, subsequent to your request, may contain information that is classified as "protected", "private", or "controlled", and may only be disclosed under certain circumstances, UCA 63G-2-302, UCA 63G-2-303, 63G-2-304, and 63G-2-305.

I will allow a maximum of ten10 working days to compile the record, or 5 days with written documentation that shows why I am entitled to an expedited response as per UCA 63G-2-2-204 (3)(b).

I understand I may be responsible for the fees associated with the research and copies of this report in accordance with Cottonwood Heights Fee Schedule.

Signature [Signature] Date and Time of Request Nov 13 2018 4:00pm
 Preparer: [Signature] Fee Due: \$105.00 Date Requestor notified: 12-11-18
Aaron James
 Released by: WDL #177648139 Release Date: _____
 Denied by: _____ Denied On: _____ Due To: _____ Code: _____

Michael J Peterson, Mayor

COTTONWOOD HEIGHTS POLICE DEPARTMENT

E. Robby Russo, Chief



December 11, 2018

Aaron M. James
2881 East Palma Way
Cottonwood Heights, UT 84121

RE: Request for Records (x2)

Your First Request:

*"1) Unknown Case # - Zane James Supect in Investigation for Cottonwood Heights (2016) Rec Center Theft" – Case Determined by Records Officer to be **16X004948**.*

"2) C14858377 – Zane James Dec 24, 2016" –

*Citation Number given, Related Case Number Determined by Records Officer to be **16X007387**.*

*"3) **18X003056** # - Zane James Cottonwood Heights Police Shooting May 29, 2018".*

"All records/documents associated with cases identified above including but not limited to, video, photos, witness testimony, officer statements, radio communication transcripts and support documents."

Regarding Case #16X004948:

Associated records/documents-police report

Video-no video available

Photos-15 photos, 1 audio interview

Witness testimony – Court Process, not a police record.

Officer statements-all available officer statements will be included in police report

Radio communication transcripts-included in police report

Support documents-all available media and/or documentation enclosed

Regarding Case #16X007387

Associated records/documents-police report

Video-Processing in progress. Specialist Jones will contact you with Fees

Photos-30 photos

Witness testimony- Court Process, not a police record.

Officer statements-all available officer information will be included in police report

Radio communication transcripts-included in police report

Support documents-witness statements

Regarding Case #18X003056

Associated records/documents-police report

Video- Processing in progress. Specialist Jones will contact you with Fees

Photos-36 photos

Witness testimony- Court Process, not a police record.

Officer statements-included in police report

Radio communication transcripts-included in police report

Support documents-No other documents available

2277 East Bengal Blvd, Suite B Cottonwood Heights, UT 84121

Your Second Request:

"I would like copies of the documents... Current CHPD Policies and Procedures and associated guidance documents and support materials associated with CHPD Policies and Procedures".

Regarding "guidance documents and support materials", Peace Officers in the State of Utah receive their certification through POST or Utah Peace Officer Standards and Training. POST contact information provided.

Utah Peace Officer Standards and Training
410 West 9800 South
Sandy, UT 84070
801-256-2300

The remainder of this request has been denied based on the following:

Effective 3/22/2018

63G-2-301. Public records.

- (3) The following records are normally public, but to the extent that a record is expressly exempt from disclosure, access may be restricted under Subsection [63G-2-201\(3\)\(b\)](#), Section [63G-2-302](#), [63G-2-304](#), or [63G-2-305](#):
- (a) administrative staff manuals, instructions to staff, and statements of policy;

Additionally, under Utah law, discovery may not be distorted into a "fishing expedition," and must "be confined within the proper limits of enabling the parties to find out essential facts for its legitimate objective." *State Road Comm. V. Petty*, 412 P2d 914, 918 (Utah 1966). The request is overbroad and unreasonable. The resources needed to comply with this request constitute an undue burden.

Per 63G-2-201(8)(a) In response to a request, a governmental entity is not required to:

- (ii) compile, format, manipulate, package, summarize, or tailor information;

You have the right to appeal this denial. If you are aggrieved by this response, pursuant to Utah Code Ann. § 63G-2-401 and Cottonwood Heights Code of Ordinances § 2.200.250, you may file a written appeal with the Chief of Police, Chief Robby Russo, at 2277 East Bengal Blvd, Suite B Cottonwood Heights, UT 84121, within 30 days of the date on this letter.

If you have any questions, you may contact me at 801-944-7031.

Regards,

Julie Sutch CH523
Officer Records Division/Evidence
Support Services Specialist
Cottonwood Heights Police
jsutch@ch.utah.gov
801-944-7031

2277 East Bengal Blvd, Suite B Cottonwood Heights, UT 84121

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

AARON JAMES and TIFFANY JAMES,
Heirs and Proposed Personal Representatives
of the Estate of Zane James,

Plaintiffs,

vs.

CASEY DAVIES, and COTTONWOOD
HEIGHTS;

Defendants.

Case 2:19-cv-00341

**AFFIDAVIT
OF TIFFANY JAMES**

Judge Howard C. Nielson, Jr.
Magistrate Judge Dustin B. Pead

STATE OF UTAH)
) ss.
County of Utah)

1. My name is Tiffany James. I am a resident of Cottonwood Heights, Utah.

My address is 2881 East Palma Way, Cottonwood Heights, Utah 84121.

2. I am the mother of Zane Anthony James. My son, Zane, was shot on May 29, 2018 by Cottonwood Heights Police Department officer Casey Davies. Aaron James is my husband. Aaron and I are the Plaintiffs in a lawsuit (Case No. 2:19-cv-341) against Cottonwood Heights, Utah and Cottonwood Heights Police Department (CHPD).

3. Aaron and I met, in person, with the Cottonwood Heights Mayor and City Manager at City Hall on November 12, 2018 to request that the City complete an internal investigation into our son's shooting death because we believed that additional information existed that was not provided to the District Attorney for his criminal investigation.

4. In that conversation with the Mayor and City Manager, we expressed our alarm that Officer Casey Davies was supposedly "off duty" at the time of the shooting and that he did not have a dashcam or bodycam operating when he shot our son.

5. We also expressed to them our concern that certain eyewitness testimony, that we knew to exist, may not have been provided to the District Attorney during his investigation of the shooting, because it was not included in the District Attorney's report of October 8, 2018.

6. The Mayor and City Manager indicated they were sorry they could not speak to us due to the potential for litigation and they further stated that their camera policy was not mandatory.

7. Aaron and I then requested records from the Cottonwood Heights Police Department regarding our son's shooting (Case 18X003056) as part of a GRAMA request dated November 13, 2018. We specifically requested all video associated with the case.

8. We received a response on December 11, 2018 that the processing of requested video was "in progress." Later, I was provided only video of the aftermath of the shooting.

9. We then, separately, asked the Mayor, the City Manager and the CHPD Police Chief for video of the shooting. My husband and I were told by each of them that neither Officer Davies nor Officer Betenson were wearing bodycam equipment at the time of the shooting. Further, they said Cottonwood Heights had no other video in their possession than what had been given to us as part of our GRAMA request.


10. I relied on these discussions with Cottonwood Heights officials as well as the information provided through our GRAMA request as being a true and complete explanation of the facts as we attempted to understand the full story surrounding our son's shooting death.

11. I forwarded the information we had been able to gather to our attorney who also relied upon that information as being a true and complete explanation.

12. On and around August 4, 2020, it was reported to me in multiple conversations with reliable individuals who are part of Cottonwood Heights government that, contrary to what I had been told, Cottonwood Heights was indeed in possession of camera footage of Zane's actual shooting by Officer Davies. These sources explained to me that they had seen the video and knew of multiple Cottonwood Heights personnel who had also seen the video.

13. At no time have I seen or been officially notified of the existence of this video, notwithstanding our GRAMA request in November 2018. Learning of the existence of this video was a total and complete surprise.

DATED this 11th day of August 2020.



TIFFANY JAMES, Affiant

Personally appeared before me this 11th day of August 2020, Tiffany James, signer of the foregoing instrument, who duly acknowledged to me that she executed the same.





Notary Public in and for the State of Utah

2 KUTV

WATCH

96°93°95°

Search Site

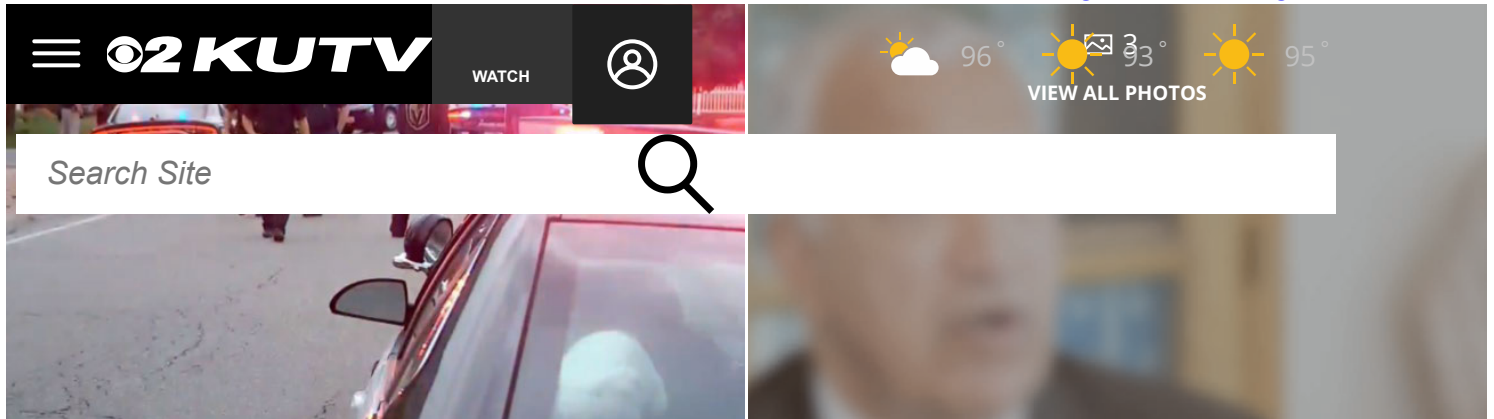
ADVERTISEMENT

No criminal charges for Cottonwood Heights officers who fatally shot robbery suspect

by Cristina Flores
Tuesday, October 9th 2018

AA





Salt Lake County District Attorney Sim Gill said after investigating, he will not pursue criminal charges against Cottonwood Heights Police Officer Casey Davies, who shot and killed Zane Anthony James on May 29. (Photo: KUTV)



(KUTV) — Salt Lake County District Attorney Sim Gill said after investigating, **he will not pursue criminal charges against Cottonwood Heights Police Officer Casey Davies**, who shot and killed Zane Anthony James on May 29.

Zane was suspected in two robberies and was running from police, reportedly concealing his hands and “reaching” when Davies shot him.

Gill said Davies would be able to claim successfully at trial that he believed the “use of deadly force was necessary to prevent death or serious bodily injury to the officer or another person.”



investigation. Gill said he exercised his

96° 93° 95°

Search Site

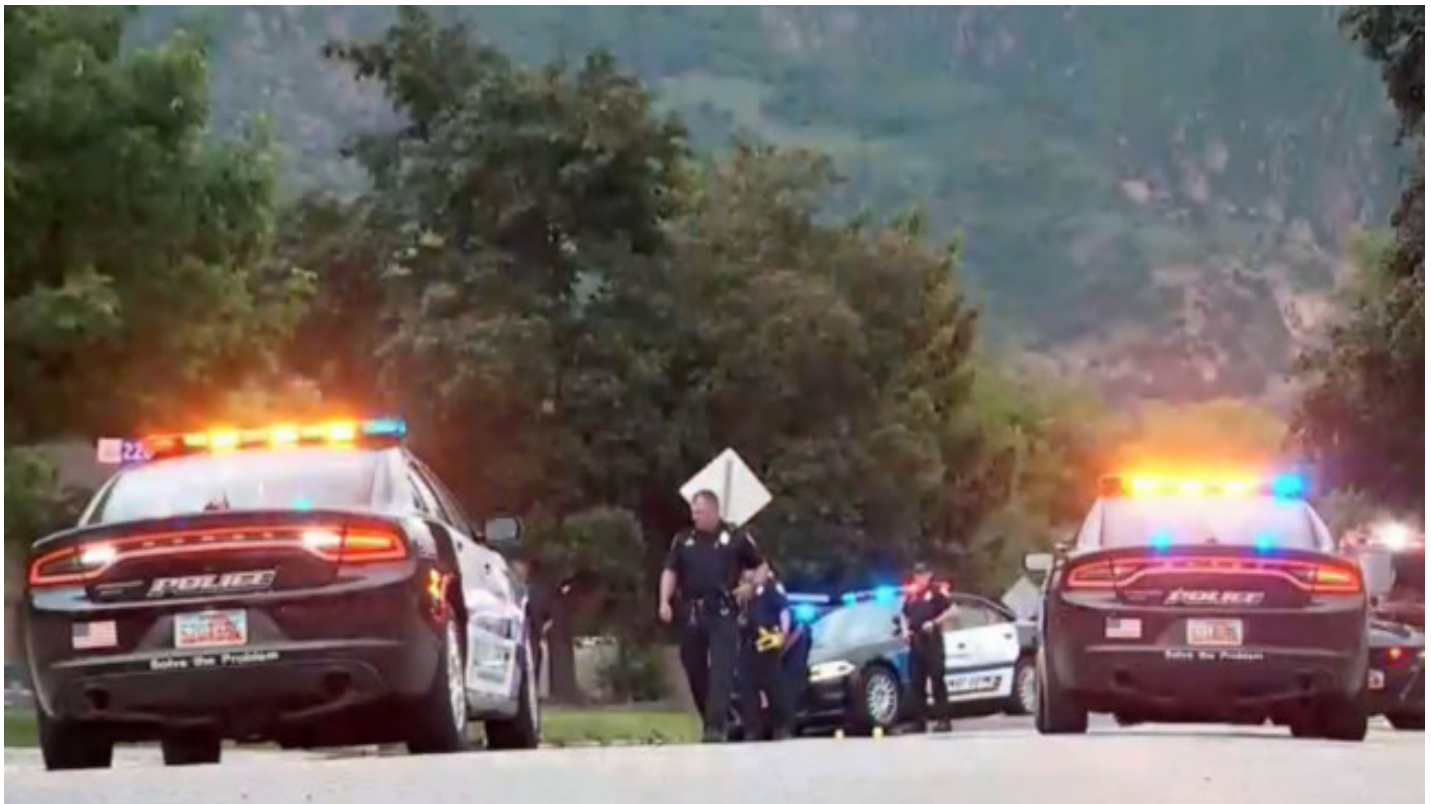


Cottonwood Heights Police Chief Robbie Russo said Davies was on his way to work when the shooting happened — he'd not yet made it to the police station to pick up his camera.

James was the suspect in two early morning robberies on May 27 in Sandy.

In both cases, a man showed a gun to hold up staff at grocery stores, then took off with cash.

Later that morning, according to the DA's report, the robbery suspect was spotted in Cottonwood Heights.



Salt Lake County District Attorney Sim Gill said after investigating, he will not pursue criminal charges against Cottonwood Heights Police Officer Casey Davies, who shot and killed Zane Anthony James on May 29. (Photo: KUTV)

Officer Betenson from Cottonwood Heights pursued the suspect, who was on a motorcycle.

Davies joined the chase.



"As the driver ran, officers saw him reaching into and digging through his pockets and clothing,"

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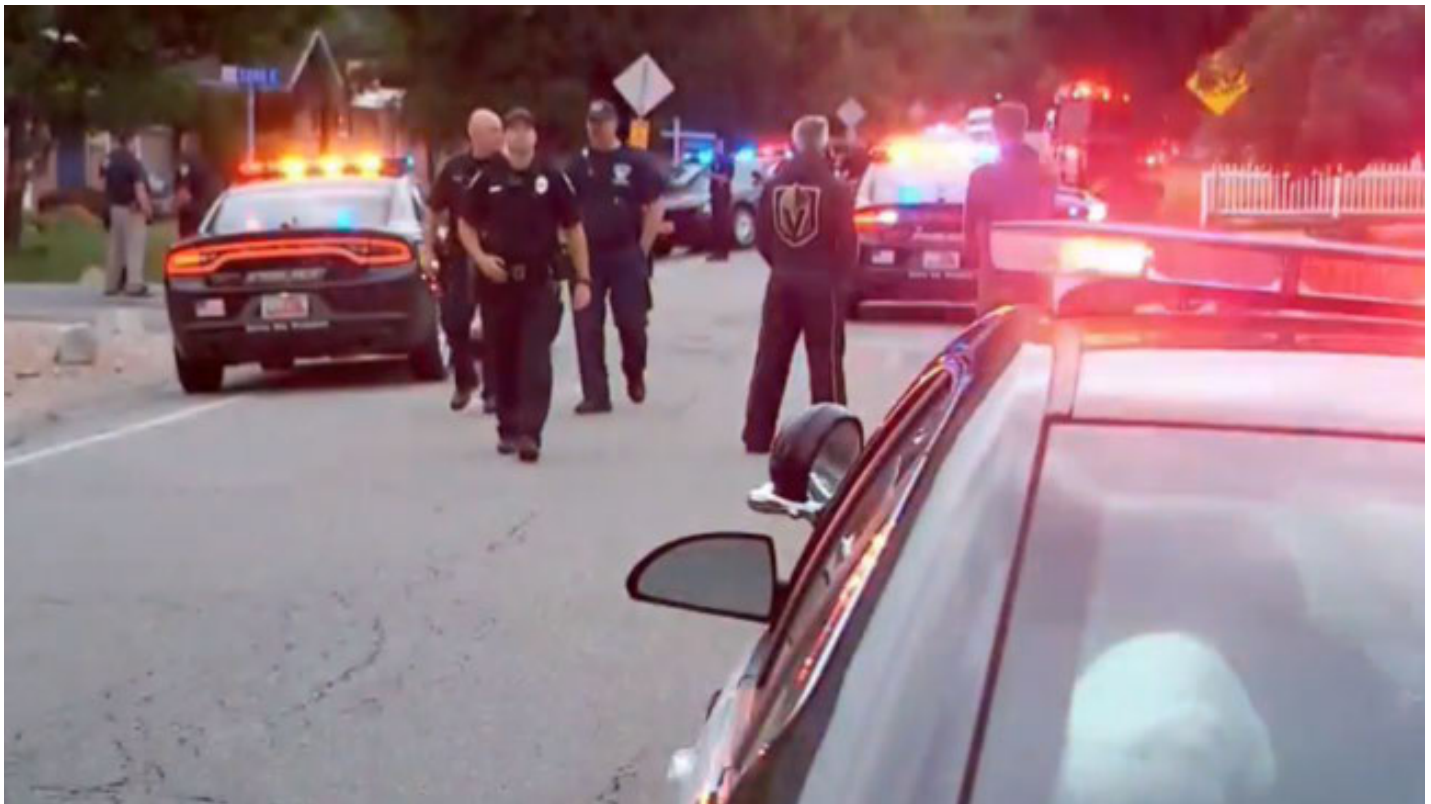


The officers ordered James to stop, but he continued to dig through his pockets.

After the shooting, officers found a BB gun on the suspect.

Russo issued a statement regarding Gill's findings.

"Mr. Gill's ruling is consistent with the CHPD's own internal affairs investigation, which concluded that Officer Davies acted within policy and with the boundaries of the law," Russo said in a statement.



Salt Lake County District Attorney Sim Gill said after investigating, he will not pursue criminal charges against Cottonwood Heights Police Officer Casey Davies, who shot and killed Zane Anthony James on May 29. (Photo: KUTV)

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Salt Lake County District Attorney Sim Gill said after investigating, he will not pursue criminal charges against Cottonwood Heights Police Officer Casey Davies, who shot and killed Zane Anthony James on May 29. (Photo: KUTV)

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Gill said he made his decision based on physical evidence and statements from other police officers who responded to the scene.

One officer's body camera video was also submitted as evidence, but that video did not show the shooting.



Ralph Chamness
Chief Deputy
Civil Division

Lisa Ashman
Administrative
Operations

SIM GILL
DISTRICT ATTORNEY

Jeffrey William Hall
Chief Deputy
Justice Division

Blake Nakamura
Chief Deputy
Justice Division

October 8, 2018

BY HAND DELIVERY

Chief Mike Brown
Salt Lake City Police Department
475 South 300 East
Salt Lake City, UT 84111

Chief Robby Russo
Cottonwood Heights City Police Department
2277 Bengal Blvd
Cottonwood Heights, UT 84121

Re: *Officer Davies' Use of Deadly Force*
Incident Location: 6675 South 220 East, Cottonwood Heights, Utah
Incident Date: May 29, 2018
DA Case No.: 2018-1284
SLCPD Case No.: 18-93824
CHPD Case No.: 18X003056

Dear Chief Brown and Chief Russo:

This letter addresses Cottonwood Heights Police Department ("CHPD") Officer Casey Davies' discharge of his firearm at Zane Anthony James on May 29, 2018. Mr. James died from the injuries he sustained as a result of Officer Davies' use of deadly force.

Officer Davies' actions resulting in Mr. James' death 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). As a result, the law enforcement agency with jurisdiction over Officer Davies' conduct, CHPD, initiated what is known in Utah as the "Officer Involved Critical Incident" ("OICI") protocol. *See* Utah Code Ann. § 76-2-408(2)-(3). Accordingly: (i) a law enforcement agency other than the agency employing Officer Davies, here, Salt Lake City Police Department ("SLCPD"), was called in to investigate Officer Davies' weapon discharge; and (ii) SLCPD's independent investigative findings were presented to the Salt Lake County District Attorney's Office ("D. A.'s Office"), which has the constitutional and statutory mandate to screen such matters for possible criminal charges.¹

¹ Utah Const. Art. VIII, section 16; Utah Code Ann. §§ 17-18a-203; *see also id.* at § 77-2-2(1) (defining "screening" as the "process used by a prosecuting attorney to terminate an investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or

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SUMMARY OF FACTS AND FINDINGS²

The following facts were developed from the OICI protocol investigation. Should additional or different facts subsequently come to light, the opinions and conclusions contained in this letter may likewise be different.

On May 29, 2018, Zane Anthony James led police on a chase through Cottonwood Heights City, Utah. Mr. James, a suspect in two recent armed robberies earlier the same day and at least one prior pursuit, crashed the motorcycle he fled on. As Mr. James continued to flee on foot, officers saw him reaching into and digging through his pockets and clothing. Officers ordered Mr. James to stop. Mr. James continued to conceal his hands and reach in his pockets. Officer Davies fired his weapon at Mr. James, who later died from gunshot wounds. Officers later found a black and silver semi-automatic style handgun in Mr. James' pocket which officers later discovered was a pellet gun.

Based on the facts presented, and as further detailed below, we do not intend to file criminal charges against Officer Davies. Assuming Officer Davies' trial testimony, if any, would be consistent with the physical and photographic evidence collected by protocol investigators, as well as the statements provided by witnesses, we believe Officer Davies would be legally entitled to the affirmative defense of "justification" under Utah State law. In other words, that Officer Davies would be able to claim successfully at trial that he believed the "use of deadly force [wa]s necessary to prevent death or serious bodily injury to the officer or another person." Utah Code Ann. § 76-2-404(1)(c).

RELEVANT LEGAL STANDARDS

As relevant here,³ law enforcement officers such as Officer Davies are legally "justified" in using deadly force when (*see* Utah Code Ann. § 76-2-404(1) (emphases added)):

cause a prosecution to be diverted"). "Commencement of prosecution" is further defined as "the filing of an information or an indictment." *Id.* at § 77-2-2(3).

² The factual background and the conclusions set forth in this letter are based on the evidence of which we are currently aware. If additional facts become available, these conclusions may change.

³ Also relevant, but less so given Officer Davies' status as a law enforcement officer, is the articulation of "justification" in Utah State law that applies to individuals more generally, including civilians (*see* Utah Code § 76-2-402(1) (emphases added)):

- (a) A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force.

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- (b) effecting an arrest or preventing an escape from custody following an arrest, where the officer reasonably believes that deadly force is necessary to prevent the arrest from being defeated by escape; and
 - (i) the officer has probable cause to believe that the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury; or
 - (ii) the officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed; or
- (c) 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 injury⁴ 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

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- (b) A person is justified in using force intended or likely to cause death or serious bodily injury [i.e., deadly force] only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person’s imminent use of unlawful force, or to prevent the commission of a forcible felony.

⁴ “Serious bodily injury” is defined, in turn, as “bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.” Utah Code § 76-1-601(11).

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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)):

Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.

RELEVANT ETHICAL STANDARDS

The D. A.’s Office files cases that satisfy ethical standards and considerations in addition to legal standards for filing.⁵ Honoring ethical standards ensures that everyone affected by the criminal justice system—suspects, defendants, victims, the community, and the system itself—is treated fairly, honorably, and respectfully.

Among the ethical standards we consider before the D. A.’s Office will commence a case is whether there is a reasonable likelihood of success at trial. It is not enough that the technical elements of crime may be met if, when presenting those facts to a jury, the prosecution strongly believes no reasonable jury would unanimously convict the defendant based on those facts. Accordingly, any screening decision by the D. A.’s Office includes careful consideration of the various factors a jury may consider when weighing testimony, evaluating evidence, applying the law, and rendering a verdict.

FACTS DEVELOPED DURING OICI INVESTIGATION

As noted previously, following Officer Davies’ use of deadly force, CHPD properly initiated the OICI protocol, *see* Utah Code Ann. § 76-2-408(2)-(3), such that: (i) protocol investigators were called in to conduct an independent investigation of Officer Davies’ weapon discharge; and (ii) the protocol investigation’s independent investigative findings were presented to the D. A.’s Office to screen for possible criminal charges.

⁵ Among the legal standards a prosecutor must follow is the requirement that “probable cause” must exist to believe an offense (i) was committed and (ii) was committed by the accused. *See, e.g.,* Utah R. Crim. P. 4(b). In making that determination, the DA’s Office must evaluate all evidence that will be legally admissible for or against the accused, but may disregard evidence that likely will not be admissible at trial (e.g., a coerced confession).

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The following facts were developed from the OICI protocol investigation. Should additional or different facts subsequently come to light, the opinions and conclusions contained in this letter may likewise be different.

On May 27, 2018 at about 11:20 p.m., CHPD Officers Croft and Betenson watched a motorcycle make a U-turn at 1850 East, Creek Road in Cottonwood Heights. The officers saw the motorcycle did not have any lights. Officer Croft turned on his overhead lights to stop the motorcycle but the driver sped off and fled. Officer Croft noted that the motorcycle driver was a white male wearing dark clothing and a backpack, and the motorcycle was a dirt bike style with a loud, high-pitched muffler. Officers did not pursue the motorcycle at that time due to safety concerns for the public and the rider. Furthermore, the equipment violation observed was insufficient cause to pursue based on the CHPD pursuit policy.

On May 29, 2018 at about 3:20 a.m., a white male with a "scruffy" face, wearing a dark jacket and tan pants, black Vans shoes and purple gloves displayed a black and silver handgun and robbed the Smith's grocery store located at 2039 East, 9400 South in Sandy, Utah. The store employees called the police and reported the armed robbery.

Less than three hours later that same morning, at 6:04 a.m., a white male with "some facial hair," wearing a black hoodie displayed a silver handgun and robbed the Macey's grocery store at 7850 South, 1300 East in Sandy, Utah. Store employees called the police and reported the armed robbery.

About five minutes later, at 6:09 a.m., CHPD Officer Betenson heard and then saw a motorcycle in the area of Camino Way and 2300 East. Officer Betenson described the motorcycle and rider to dispatch and turned on his overhead lights to pull over the motorcycle for an equipment violation. The rider sped off and fled. Officer Betenson terminated the pursuit and didn't follow. Very shortly thereafter, Sandy City Police officers, who were monitoring CHPD radio traffic, broadcast over the police radio that they believed the motorcycle driver Betenson described, and who fled, was a suspect in armed robberies at a Macey's and a Smith's grocery store hours earlier.

Officer Betenson re-initiated the pursuit of the motorcycle and gave chase. Officer Betenson pursued the motorcycle through a neighborhood. CHPD Officer Davies joined the pursuit and took the lead. The officers followed the motorcycle north on 2300 East and then west on 6675 South.

At about 6:12 a.m., the motorcycle driver wrecked at 6675 South and 2200 East. The driver immediately got up and ran from the officers. As the driver ran, officers saw him reaching into and digging through his pockets and clothing. Officers ordered the driver to stop and show his hands but the driver continued to dig in his pockets and clothing with his hands.

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As the driver was in the front yard of a home at 2209 East, 6675 South, Officer Davies fired two shots at the driver, subsequently identified as Zane Anthony James. Both shots hit Mr. James who was transported to the hospital and eventually died from the injuries.

Witness Statements

Officer Davies

Officer Davies, on the advice of his attorney, did not answer questions or provide a statement or offer information about the OICI to protocol investigators, as is his constitutional right to do so.

Officer Betenson

On May 29, 2018, OICI protocol investigators interviewed CHPD Officer Betenson. Officer Betenson said that on May 29, 2018, CHPD Officer Garcia contacted Officer Betenson and asked him to look at a call on his computer: a reckless driving call on a motorcycle with no lights driven by a male with a dark jacket. Officer Betenson said he thought it may be the motorcycle driver who had fled from him two days ago. Officer Betenson said he first heard and then saw the motorcycle at about 7600 South and Highland Drive. Officer Betenson as the motorcycle driver passed him, he looked right at Officer Betenson and slowed and made a U-turn. Officer Betenson said he believed the driver was the same person who previously fled from him.

Officer Betenson said he turned around to follow the motorcycle and turned on his overhead emergency lights to stop the driver. Officer Betenson said the motorcycle driver sped off and fled. Officer Betenson said he terminated the pursuit and didn't follow the driver. Officer Betenson said he broadcast the description of the driver and his motorcycle, his location and said it was the same person who fled from him previously.

Officer Betenson said he heard a Sandy Police officer on the radio say that the motorcycle driver was likely a suspect in two armed robberies earlier that morning, the second of which had just occurred. Officer Betenson said he drove in the direction the motorcycle driver fled and soon saw him again. Officer Betenson said he reengaged the pursuit and was soon joined by CHPD Officer Davies who took the lead. Officer Betenson said the pursuit went north on 2300 East and turned west on 6675 South.

Officer Betenson said the motorcycle driver hit a speed bump and wrecked. Officer Betenson said immediately after the motorcycle went down, the driver got up and ran. Officer Betenson said he and Officer Davies tried to block the driver with their cars but the driver continued to run away. Officer Betenson said as the driver ran, he saw the driver's arms go from a running motion to his hands reaching for something in the front of his body. Officer Betenson

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said as the male was reaching for something and running, Officer Betenson said he saw at least one paper money bill fall from the male's front.

Officer Betenson said that when the driver got to the front yard of the home at 2209 East, 6675 South, the driver was digging for something in his pockets. Officer Betenson said he couldn't see the driver's hands.

Officer Betenson said he heard Officer Davies fire his gun and heard two or three shots. Officer Betenson said he approached the driver who was on the ground, face down. Officer Betenson said the driver's hands were in front of the driver, under the driver's body. Officer Betenson said he had to pull the driver's hands out from under him and put him in handcuffs.

Officer Betenson said he and other officers started first aid on the driver. Officer Betenson said as they administered first aid, one of the officers pulled a black and silver handgun out of the male's front pocket.

OICI protocol investigators asked Officer Betenson if the driver did anything to make Officer Betenson consider using deadly force. Investigators asked whether the driver's actions caused Officer Betenson to consider using deadly force. Officer Betenson replied that when the driver reached in his front for something he was concerned. Officer Betenson said he was worried that he couldn't see the driver's hands and that he knew the driver had reportedly just used a handgun in an armed robbery.

Protocol investigators asked Officer Betenson if Officer Davies had not fired at the driver what would Officer Betenson have done. Officer Betenson replied that he would have drawn his weapon out of his holster and fired at the driver.

Officer Kawa

On May 29, 2018, OICI protocol investigators interviewed CHPH Officer Kawa. Officer Kawa said he heard Officer Betenson on the radio call out that he saw a suspect who had recently fled from him. Officer Kawa said he heard Officer Betenson say that he terminated the pursuit of the motorcycle when the driver fled.

Officer Kawa said he heard Sandy City police officers on the radio say that the motorcycle driver Officer Betenson just saw was a suspect in an armed robbery earlier that morning. Officer Kawa said he heard Officer Betenson on the radio say that he was reengaging the pursuit and heard the pursuit's direction of travel. Officer Kawa said he started to drive towards the pursuit. Officer Kawa said he heard an officer on the radio say that the motorcycle wrecked and then that shots were fired and the driver was down.

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Officer Kawa said he arrived in the area of the OICI and saw several police officers near the driver with guns drawn. Officer Kawa said the suspect was lying face down and handcuffed. Officer Kawa said he heard Officer Davies say that the suspect reached for something on the left side of the suspect's body. Officer Kawa said he heard Officer Davies say that he believed two of his shots hit the suspect and one missed.

Officer Kawa said he searched the suspect's left side and pulled out a handgun. Officer Kawa said he was not sure whether the gun was in a pocket; Officer Kawa said he found a hole in the suspect's clothing and pulled the gun out. Officer Kawa said the gun did not feel or weigh like a normal firearm would, nor did the gun have normal handgun markings on the outside. Officer Kawa said that the magazine appeared to be for "BBs." Officer Kawa said he set the gun on the grass and rendered first aid with other officers until other medical personnel arrived.

Officer Croft

On May 29, 2018, OICI protocol investigators interviewed CHPD Officer Croft. Officer Croft said he heard Officer Betenson on the police radio say that he had encountered a suspect who had fled from him the other day and was fleeing again. Officer Croft said he heard Officer Betenson initiate a pursuit and then quickly terminate it.

Officer Croft said he heard Sandy City Police officers on the police radio say that the motorcycle driver that Officer Betenson just encountered was a suspect in two armed robberies, one of which just occurred. Officer Croft said he heard Officer Betenson resume the pursuit and heard Officer Davies join the pursuit. Officer Croft said he heard Officer Betenson call out the pursuit's location and Officer Croft said he joined the pursuit.

Officer Croft said he arrived in the area where the pursuit ended and got out of his patrol car. Officer Croft said he drew his handgun and approached on Officer Davies' left side. Officer Croft said he saw Officer Betenson off to his right. Officer Croft said he did not see or hear the gunshots.

Officer Croft said he asked Officer Davies if he was ok. Officer Croft said Officer Davies replied that he was good. Officer Croft said he asked Officer Davies what happened. Officer Croft said Officer Davies replied that the suspect was reaching. Officer Croft said he asked Officer Davies where the suspect's gun was. Officer Croft said Officer Davies replied that the gun was still on the suspect.

Officer Croft said he and the other officers kept their weapons pointed at the suspect until the suspect was handcuffed. Officer Croft said he got a trauma kit from his vehicle and went to the suspect. Officer Croft said while he and the other officers performed first aid, Officer Kawa rolled the suspect on his side and Officer Kawa searched the suspect's clothing. Officer Croft said Officer Kawa pulled a handgun out of the suspect's clothing. Officer Croft said the gun

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looked like a Smith & Wesson brand chromed .40 caliber firearm with a black polymer frame and chrome slide. Officer Croft said the gun was marked with "40" on the slide.

Sgt. Ricks

On May 29, 2018, protocol investigators interviewed CHPD Sgt. Ricks. Sgt. Ricks said he had just pulled into the police department when he heard Officer Betenson say on the radio that a motorcycle driver was fleeing from him and he was pursuing the driver. Sgt. Ricks said he asked Officer Betenson his location, speed and the location of the motorcycle driver. Sgt. Ricks said Officer Betenson said he was trying to catch up to the fleeing motorcycle and Sgt. Ricks said he told Officer Betenson to terminate the pursuit.

Sgt. Ricks said immediately after he told Officer Betenson to stop the pursuit, he heard Sandy City Police officers on the radio say that the motorcycle driver was likely the suspect in an armed robbery that had just occurred. Sgt. Ricks said he heard Officer Betenson resume the pursuit. Sgt. Ricks said he drove his patrol car to the area where the pursuit was occurring.

Sgt. Ricks said that while he was driving to join the pursuit, he heard an officer on the radio say the motorcycle driver was down. Sgt. Ricks said he assumed that the motorcycle driver crashed, so Sgt. Ricks said he asked police dispatchers to send medical personnel to the area.

Sgt. Ricks said when he arrived at the OICI scene, he saw who he presumed was the motorcycle driver face down on the ground. Sgt. Ricks said he made contact with Officer Davies and they both approached the suspect. Sgt. Ricks said as he got close to the suspect, he saw a black and gray handgun lying on the grass.

Sgt. Ricks said Officer Davies gave a public safety statement to Sgt. Ricks; Officer Davies told Sgt. Ricks he fired three or four times in a northwest direction. Sgt. Ricks said he placed Officer Davies in his police car as additional officers secured the OICI scene.

Officer Harris

On May 29, 2018, protocol investigators interviewed CHPD Officer Harris. Officer Harris said she heard Officer Betenson on the police radio say that he was behind a motorcyclist who had fled from Officer Betenson earlier in the week. Officer Harris said she also heard a Sandy Police officer on the radio say that the motorcycle driver was a suspect in an armed robbery that had just occurred in their city. Officer Harris said she heard Officer Betenson on the radio say that he was pursuing the fleeing motorcyclist.

Officer Harris said she heard Officer Betenson on the radio state the progress of the pursuit and heard Officer Betenson say the motorcyclist had crashed. Officer Harris said she

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drove her patrol car towards the location of the pursuit. Officer Harris said while en route to the pursuit, she heard an officer on the radio say that shots had been fired.

Officer Harris said she arrived at the OICI scene and saw a suspect face down on a lawn, handcuffed. Officer Harris said as she approached the suspect, she saw officers looking over the suspect for injuries and one of the officers pulled a handgun out of the suspect's left side area. Officer Harris said as the officer pulled the gun out of the suspect's clothing, she heard Officer Davies say: "that's where he was reaching."

Physical Evidence

Officer Davies was not wearing a body-worn camera during the OICI. Protocol investigators determined that no video recording of the OICI exists as far as they know at this time. Protocol investigators obtained and reviewed the recordings from CHPD Officers Harris' body-worn camera. Officer Harris' body-worn camera recorded Officer Kawa asking Officer Davies: "Where's the gun at?" to which Officer Davies replied: "He kept reaching with his left hand up in that front area." The body-worn camera also recorded Officer Betenson saying: "He was reaching in the front."

OICI protocol investigators obtained and reviewed surveillance video from a 7-11 convenience store at 9400 South Raintree Dr. The video recorded the events of May 29, 2018. The video recorded a male who entered the store at about 3:10 a.m. The video shows a man wearing a dark pullover with a hood and tan pants. According to the clerks, the man entered the store and asked for a plastic grocery bag. The video recorded the man riding a small motorcycle with yellow or gold forks.

OICI protocol investigators obtained and reviewed surveillance video from a Smith's grocery store at 2039 East, 9400 South in Sandy, Utah. The video recorded the events of May 29, 2018. The video recorded a male who entered the store at about 3:20 a.m. The video shows a man who appears to be the same person shown in the 7-11 video discussed above. The Smith's video shows the man with a silver colored handgun in the store. According to store employees, the man asked to exchange money and pulled a handgun and demanded cash. The employees said the man left the store on a dirt bike style motorcycle.

OICI protocol investigators obtained and reviewed surveillance video from a Macey's grocery store at 8750 South, 1300 East in Sandy, Utah. The video recorded the events of May 29, 2018. The video recorded a male who entered the store at about 6:04 a.m. The video shows a male wearing a hoodie and tan pants; the man appears to be the same person shown in the 7-11 video and the Smith's video discussed above. The video shows the man with a silver handgun. According to store employees, the man asked to exchange four five dollar bills for a twenty dollar bill. The employee said when the till opened, the man displayed a handgun and demanded

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all the cash which the employee gave the man. Store personnel said the man left on a small dirt bike style motorcycle.

OICI protocol investigators reviewed photographs taken of Mr. James' clothing, some of which was removed by medical personnel at the OICI scene. Some of the photographs show large amounts of cash in the pocket of Mr. James' dark pullover. The photos also show Mr. James' tan pants and other articles of clothing which appear to be those worn by the man depicted in the surveillance video recordings discussed above.

OICI protocol investigators reviewed photographs of Mr. James' motorcycle where it came to rest in the street. Photographs of the motorcycle appear to depict the same motorcycle as that shown in the surveillance videos discussed above and consistent with the description provided by Officer Betenson and the employees of the stores that were robbed earlier that morning.

OICI protocol investigators inspected, documented and photographed the scene of the shooting and the surrounding area. Investigators photographed and examined the gun that Officer Kawa removed from Mr. James' clothing.

LEGAL ANALYSIS

As noted previously, Officer Davies declined to provide a statement to investigators, as is his constitutional right. Without Officer Davies' explanation of his use of deadly force against Mr. James, we don't know his reasons for his decision to fire his weapon. We are therefore left to infer the rationale for Officer Davies' decision to use deadly force based on other evidence we received, as well as the reasonable inferences to be drawn from that evidence. In similar situations where a shooting officer has not provided a statement, we have proceeded in this manner. In doing so, however, we have never strayed from the objective evidence or testimony of other witnesses, nor do we do so here.

In considering whether to charge Officer Davies with a criminal offense, we try to ascertain whether Utah's broad affirmative defense of "justification," particularly as applied to law enforcement officers, effectively precludes criminal prosecution based on the facts before us. In other words, whether Officer Davies could establish at trial that he believed the "use of deadly force [wa]s necessary to prevent death or serious bodily injury to the officer or another person." Utah Code Ann. § 76-2-404(1)(c).

As discussed more fully above, statements provided by other officers on scene, as well as the reported and recorded statements of Officer Davies, together with physical evidence recovered at the scene, all point toward a statutory defense of "justification." Specifically, the police officers responded to and were aware of two armed robberies in which witnesses saw Mr. James with a gun; police officers reasonably believed the motorcycle driver they pursued was the

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armed robber; witness officers saw Mr. James reaching into his waistband and making motions consistent with drawing a weapon from a waistband; and Mr. James' gun was found on in his clothing in the area he was reaching when he was shot.

Here, if criminal charges were brought against Officer Davies, the D. A.'s Office would be required to prove beyond a reasonable doubt that Officer Davies, intentionally and without legal "justification" as defined by statute, shot and killed Mr. James; in other words, that Officer Davies did not "reasonably believe[] that the use of deadly force [was] necessary to prevent death or serious bodily injury to the officer or another person," e.g., officer Davies himself and/or other police officers on scene. *See* Utah Code § 76-2-404(1)(c) (emphases added).

As the United States Supreme Court instructed in *Graham*, assessing "reasonableness" in the Fourth Amendment context "requires careful attention to the facts and circumstances of each particular case, including . . . whether the suspect poses an immediate threat to the safety of the officers or others." 490 U.S. at 496 (emphases added). Assuming the witnesses officers mentioned above would testify consistently with their prior statements and facts described above, and assuming Officer Davies (if he testified at all) would articulate a fear for his safety and the safety of his fellow officers (consistent with the fears expressed by witness officers) we believe Officer Davies could successfully argue he "reasonably" believed the "use of deadly force [wa]s necessary to prevent death or serious bodily injury to . . . another person." Utah Code Ann. § 76-2-404(1)(c). We further believe, based on the foregoing, that no reasonable jury would unanimously conclude that Officer Davies did not reasonably believe that deadly force was necessary to prevent his death or serious bodily injury or that of his fellow officers.

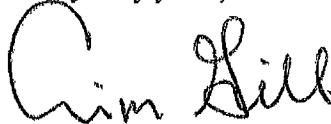
In short, paying "careful attention to the facts and circumstances" of this case, and considering the totality of the evidence and reasonable inferences to be drawn therefrom, we conclude Officer Davies' use of deadly force likely falls within the definition of "justification" set forth in Utah State law.

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CONCLUSION

As noted previously, the facts and conclusions set forth in this letter are based on the evidence of which we are currently aware. If additional facts become available, these conclusions may change. Based on all the totality of evidence presented to date, however, and the reasonable inferences to be drawn from that evidence, we conclude Officer Davies could likely establish at trial that he believed the "use of deadly force [wa]s necessary to prevent death or serious bodily injury to the officer or another person." Utah Code Ann. § 76-2-404(1)(c). In that event, Utah State law would effectively immunize him from criminal liability in connection with this incident. Accordingly, we do not intend to pursue criminal charges against Officer Davies.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sim Gill". The signature is written in a cursive, flowing style.

Sim Gill
Salt Lake County District Attorney