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October 17, 2017

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LETTER DECLINING PROSECUTION AFTER INVESTIGATION

RE: *Officer-Involved Shooting on June 14, 2016 by Austin Police Department Officer James Harvel causing injury to Ray Ojeda*

Dear Chief Manley:

The Office of the Travis County District Attorney has reviewed the Austin Police Department Special Investigation Unit (APD SIU) investigation of the above-referenced matter and concluded our independent review of the officer-involved shooting in which Austin Police Department Officer James Harvel shot Ray Ojeda. This letter is to inform you of my decision to decline prosecution of criminal charges against Officer Harvel. My decision does not limit or address administrative action by the Austin Police Department, or other civil actions, where non-criminal issues may be reviewed and where different rules and lower levels of proof apply.

The District Attorney's Office has reviewed the investigation of the Austin Police Department into this incident pursuant to the officer-involved shooting protocol that is attached and posted on the DA official website.¹ A copy of this letter will also be posted on the DA official website.

Based on the available evidence and under applicable Texas law,² I am convinced that a jury following the law would not convict Officer Harvel, because the evidence proves the use of force was justified under Texas law as a lawful exercise of self-defense, defense of third persons, and

¹ <https://www.traviscountytexas.gov/district-attorney/cru>

² In arriving at this conclusion, I have relied upon the legal guidelines governing the use of force/deadly force in Texas as set forth in sections 9.32, 9.33 and 9.51 of the Texas Penal Code, the case authority construing that provision, and the United States Supreme Court case authority governing law enforcement use of force. (See applicable laws in Appendix)

was a lawful use of force to effect an arrest. The following sets forth the facts determined during our review and provides the legal analysis underlying my decision.

OJEDA'S CALLS TO 911

On June 14, 2016 at 4:03 a.m., Ray Ojeda made the first of two calls to 911. The first call lasted thirty-three minutes and thirteen seconds. Portions relevant to our analysis include the following:

Ojeda called 911 asking that the police be sent to him at Odom Elementary School. He said he had a gun and that he was "waiting for y'all." He denied wanting to shoot at the police and said he only wanted them at his location. He declined to identify himself but said he could be identified by his wallet. When asked if he wanted to hurt himself or somebody else, he initially replied, "We'll find out," but also stated, "I don't want to hurt nobody." In addition to the gun, Ojeda said he also had a machete.

The call taker asked Ojeda if he was trying to commit suicide by cop. He replied, "No, I can't, I can't tell you that" and laughed. He eventually identified himself as "Ray." Asked again whether he was going to harm an officer, he replied "It just depends." He denied drinking, doing drugs, or feeling depressed that day. Asked again if he was trying to get himself hurt or killed, he replied "It doesn't even matter." Ojeda repeatedly refused to give his last name, saying only that he had his wallet with him and that "Y'all will find out." When asked why he was making the call to 911, he would only say that the officers would find out once they got there. He said he had a note with him, and that the officers would have to look for it like an Easter egg hunt.

The call taker explained to Ojeda that because he had weapons with him but refused to tell her why he needed the police, there was a possibility he could get hurt. He replied, "Oh well." When asked why he had weapons if he wasn't planning on harming anyone, he replied, "Because I might use them." He denied taking any medications, or not taking any medications he was prescribed to take.

The call taker asked Ojeda to put his weapons down. He initially refused, but then claimed to have put the machete down. He then said "I'm ready for y'all to come over here." The call taker asked what he wanted the police to do when they got there. Ojeda replied, "Um, we'll find out." He then advised he had picked up his machete again. He also claimed to have fired his gun into the ground before calling 911. He said he didn't care whether he got hurt or not, then disconnected the call.

At approximately 4:43 a.m., Ojeda made his second call to 911, this one lasting ten minutes and twenty-two seconds. A different call taker answered. Ojeda requested the police again. He reiterated that he had a loaded gun and a machete. He again refused requests to put the gun down. When asked why he was refusing to put the gun down, Ojeda replied "because I am ready." The call taker asked Ojeda what he was ready for, to which Ojeda replied, "You will find out pretty soon anyway so it doesn't matter."

The call taker told Ojeda that help was there for him, but he needed to come out peacefully. Ojeda repeated that he had been shooting his gun in the ground, and he continued refusing to put the gun down. He said he didn't want help, and that he wanted "y'all to come so stuff can happen."

He eventually claimed to have put the gun down, but continued refusing to put the machete down, saying he would decide whether to do that. The call taker advised Ojeda that a police officer would be calling him. After that, the call taker disconnected the call.

INITIAL POLICE RESPONSE

While Ojeda was on the phone with 911, patrol officers began arriving and forming a perimeter around Odom Elementary. Requests were made to dispatch a hostage negotiator, a canine unit, the SWAT team, EMS, and AIR1 (one of APD's helicopters). APD's public information office was notified. Personnel from AISD were contacted and requested to check camera feeds to look for persons in and around the school. Efforts were made to determine Ojeda's then-unknown identity. A search of the phone number used by Ojeda linked it to a person on Facebook named Ray Ojeda. Officers found a post on Ojeda's Facebook page made the same day at 3:53 p.m. reading, "I'm shoot at the llaws fuck em" (*sic*), with a subsequent post from Ojeda one and a half hours later reading, "Rip ray ray" (*sic*). This information was disseminated to on-scene officers.



Screenshot from Ojeda's Facebook page prior to the incident.

On-scene officers also received periodic updates on what Ojeda was telling the 911 call takers as seen in the below excerpt from the computer-aided dispatch (CAD) report:

Comments

Date	Time	User	Type	Conf.Comments
6/14/2016	05:35	AP5096	Response	comp adv he is in the elem school and has a gun. is waiting for officers.
6/14/2016	05:44	AP5096	Response	[Notification] [AUSTIN PD]-Problem changed from Nature Unknown Urgent to -Gun HS by AUSTIN PD
6/14/2016	05:58	AP5684	Response	f890 clr
6/14/2016	06:27	AP7176	Response	CCC
6/14/2016	06:33	AP7520	Response	Backed up F805 with F803
6/14/2016	06:48	AP2657	Response	wc5 clr
6/14/2016	06:56	AP7520	Response	Backed up F805 with F804,F802
6/14/2016	07:02	AP5096	Response	comp very argumentative with 911.
6/14/2016	07:37	AP5096	Response	adv he is between the basketball courts and the track (?)
6/14/2016	07:38	AP7520	Response	HAVE COMP STAY ON 21 AS LONG AS POSSIBLE
6/14/2016	07:46	AP5684	Response	f890 check aids for security cameras to verify if suspect is inside the building
6/14/2016	08:04	AP5096	Response	comp ref to say why he wants ofers out.
6/14/2016	08:14	AP7520	Response	SHM HALO NEED ANY INFO YOU HAVE ON [REDACTED] REF 161660189
6/14/2016	08:23	AP5096	Response	says he has a handgun. says maybe the gun is loaded.
6/14/2016	08:41	AP5096	Response	will not say if he is suicidal or not.
6/14/2016	09:05	AP7176	Response	219 ON 21 W AISD REF CAMERAS
6/14/2016	09:07	AP5096	Response	comp is h/m wearing blk hat. blk shirt, bj...
6/14/2016	09:17	AP5096	Response	also wearing blk sweater.
6/14/2016	09:48	AP7520	Response	F802 STAGING S 1ST / FLORNOY
6/14/2016	09:55	AP5096	Response	comp walking around - can hear him walking but states he is only walking in a circle near the track.
6/14/2016	10:00	AP7520	Response	RE. (From: HALO8 Kaiser, Robert AP4686) already checked it and there is nothing ===== In Reply To Msg below ===== NEED ANY INFO YOU HAVE ON [REDACTED] REF 161660189
6/14/2016	10:30	AP7520	Response	SM DISP K9 F805
6/14/2016	10:37	AP5096	Response	says his name is ray - says he is older than a student....
6/14/2016	11:31	AP5096	Response	will only let me guess - says he is between 18-21
6/14/2016	11:40	AP5096	Response	says he may try to harm one of our officers.
6/14/2016	12:05	AP5096	Response	states no drugs/alcohol.
6/14/2016	12:06	AP7176	Response	AISD ADV THAT NO ONE SEEN ON CAMERA/BUT QUALITY IS LOW
6/14/2016	12:28	AP7176	Response	AISD WILL MONITOR CAMS
6/14/2016	12:30	AP5096	Response	reiterating that he is on the track at the school
6/14/2016	12:37	AP5096	Response	wph2 is the address abv....
6/14/2016	13:37	AP5096	Response	comp adv'g that he is not promising to be peaceful.
6/14/2016	13:52	AP5096	Response	won't say if he wants to die or if he wants to hurt someone.
6/14/2016	14:07	AP7176	Response	ODOM ELEMENTARY SCHOOL
6/14/2016	14:29	AP5096	Response	now wants to know where officers are - saying he promises he won't hurt them.
6/14/2016	14:52	AP5096	Response	first said he is across from odom elem, then says he is on the track / near the basketball courts.
6/14/2016	15:01	AP5096	Response	stating now that he has a gun and a machete
6/14/2016	15:44	AP7520	Response	Backed up F805 with 1316
6/14/2016	16:17	AP5096	Response	comp still won't answer any questions about himself - says if officers won't show themselves, he is going to go to another place.
6/14/2016	16:36	AP5096	Response	hear whistling or something squealing
6/14/2016	16:46	AP5096	Response	comp no longer responding but can hear him walking
6/14/2016	16:59	AP6595	Response	NEG PD12 ON 21 THRU CAD / VDEX
6/14/2016	17:25	AP5096	Response	keeps saying we'll be able to id him because he has his wallet.
6/14/2016	17:47	AP7476A	Response	CCS CHECKING SUBSCRIBER INFO
6/14/2016	17:54	AP5096	Response	says he doesn't want us to know who he is until we check his id
6/14/2016	18:09	AP7520	Response	F802 AND F803 COMING IN OFF FLORNOY ON FOOT
6/14/2016	18:36	AP5096	Response	adv officers will find out why he is doing this ... says he has a note to explain.
6/14/2016	19:09	AP7520	Response	Secondary Location for F802: TURTLE CREEK BLVD / COUGAR DR, TURTLE CREEK BLVD / COUGAR DR,AUSTIN, TX 78745
6/14/2016	19:10	AP7520	Response	Secondary Location for F803: TURTLE CREEK BLVD / COUGAR DR, TURTLE CREEK BLVD / COUGAR DR,AUSTIN, TX 78745
6/14/2016	19:29	AP5096	Response	adv we will have to hunt for the answers, he is not going to tell me why he is doing this.
6/14/2016	20:00	AP7520	Response	LT48 OFFICERS SETTING PERIMETER
6/14/2016	20:26	AP7176	Response	AIR1 PAGED
6/14/2016	20:31	AP5096	Response	trying to talk comp into putting the wpns down - is refusing
6/14/2016	21:11	AP5096	Response	comp threatening to hang up with 911.

As officers continued arriving they began shutting down roads leading to the perimeter. Individuals seen in the area were monitored from a distance with their descriptions and locations broadcast over the radio in an effort to differentiate Ojeda from persons who could be potential victims.

A reverse 911 call went out to 1,404 residents informing them of a SWAT call in the area of Odom Elementary and advising them to stay indoors and not leave their residences until the area was safe. Residents were also advised to call 911 to report suspicious activity.

AIR1 arrived on scene at approximately 5:25 a.m. and quickly located Ojeda on the grounds of Odom Elementary using the aircraft's infrared imaging equipment. Ojeda was standing alone near the running track as seen in the center of the screenshot below:



The pilot continued flying above the scene while the tactical flight officer (TFO) monitored Ojeda. Ojeda could be seen holding what appeared to be a phone against his ear. The TFO continued to broadcast Ojeda's actions to officers on the ground for the remainder of the incident.

OJEDA'S CONVERSATION WITH HOSTAGE NEGOTIATOR

Officer Thomas Villarreal responded to the page for a hostage negotiator. After the second 911 call taker disconnected the call with Ojeda, Officer Villarreal called Ojeda directly. The entirety of Officer Villarreal's sworn statement is relevant to our analysis and is copied below:

My name is Thomas Villarreal #5680, my date of birth is [redacted], my work address is 715 E 8th St. My work phone number is [redacted] I work for the Austin Police Department.

I've been an officer for almost 10 years with APD. I was a Hostage Negotiator for 2.5 years. I quit the HN team back in December. I'm assigned to the E700s. This month we're working Friday to Monday. I was working Edward sector when I heard my dispatcher call for a negotiator to Frank radio. I waited for about 30 seconds before asking our dispatcher if they got an HN, and was advised that they had not. I switched over to Frank radio and was put on the call.

I asked for LT Carpenter's phone number so I could be in contact with him. I called him and told him that I was willing to help. I was told by the LT that it was a young male who claimed to have a machete and a gun. I explained to him that I was no longer on the negotiation team but that I could still assist if he needed me to. I asked the LT if SWAT was in route. After being told that they were not, I requested that they call SWAT. I explained that the negotiation team would normally deploy only with SWAT and advised

the LT that I thought it'd be a good idea to at least brief a SWAT supervisor to see if they would respond. I also wanted a full negotiation team to respond to work the call. I heard the LT request a SWAT supervisor to call him.

I made it to the scene and was to the east of the scene off of South 1st St. I found the LT and Sgt Wroblewski, who were in a vehicle together. I made contact with the two of them and was briefed on the situation. I was told that it was a guy named 'Ray' who was 19 years old. I was told that Ray had a loaded gun and a machete. I told the LT that normally we would wait for SWAT to have containment before we begin negotiating, but I told the LT that I was here to help and that if he gave me an order to do it, then I would do it. The LT told me that Ray was on the phone with a 911 call taker or dispatcher. LT told me that he was going to get the person off the phone with Ray so that I could make contact with him. I asked the Sgt if he had a react team, and he said he had two guys together and that a less lethal was coming from the South Sub. He told me to wait a minute and he would have a react team. I took the Corporal shield from my car and gave it to his officers. I asked the Sgt if he was comfortable with a three-man react team, and he said that he was. I initially jumped in the backseat of the LT's patrol car to call the suspect, so that the Sgt could give his officers real-time updates as to what the suspect was doing or saying. I quickly found out that it was far too loud in the vehicle with the LT talking to people and the in-car radio being too loud. The Sgt got out of the car and I moved to the front seat.

During this call, I had my DMAV on and used my personal cell phone. I got back into the car and made the first phone call to Ray. My first call to him was at 4:54 am. Ray answered and we talked for 36 minutes. At the time, I was a little shocked that he talked that long. I told him who I was and explained that I was there to help him. We talked about a lot of stuff. He told me he was from Uvalde and that he had been in Austin for 10 years. One thing that stuck out to me was that when we were talking about family, he told me that he loved his family which is why he came over to where he was, because he didn't want them to get hurt. I asked him if he wanted to hurt police officers. He said that he respected police and that he didn't want to hurt officers or want his family to be hurt. He didn't seem intoxicated – he seemed lucid. He went from being calm to aggressive. It was windy and the phone would break up occasionally.

Ray said that he didn't need help. He told me several times that he had a gun and that he had shot rounds off. He wanted to know where we, the police, were and why we weren't on scene yet. I asked him if he wanted to see officers. He said yes and asked what it would take to get them there. At one point he said that "I don't want to kill you guys" then almost immediately said that he wanted to shoot us. He then said that he knows where to shoot officers to where he won't kill us. I asked him point blank if he wanted to die today. He said he didn't want to die, but that if it "happens, it happens". He said that he didn't want to harm himself or anyone else. He never said what it was that he wanted. The focal point of our conversation was him wanting to know where the officers were. I felt that Ray didn't care about building rapport. He tried to disconnect with me several times but I was able to keep him on the phone. At one point he said he would go somewhere else and would do something to make us go over there. When asked what he would do, Ray would not give straight answers and would instead give veiled threats.

As we spoke, Ray had told me that he wasn't married but had multiple girlfriends. He never stated if there a crisis going on his life at the moment. There was zero doubt in my mind what he wanted, which was a violent confrontation with police. Once Air 1 and SWAT were on scene, he asked if the helicopter was ours. I told him that it was, and he said that

he wished he could shoot the helicopter, but said that his bullets wouldn't reach. He told me multiple times that he had a 9mm pistol which he had shot rounds from already. He asked me what it would take to get police there, then stated that he would just walk out to Stassney, which was about half a mile away. When asked what he would do when he got to Stassney, he just said, "Oh, you'll see." Ray got upset with me and I tried to get him to give me a promise of non-violence. Before he would give this to me, he hung up on me. An Intel officer (possibly Officer Dennis) was with me for a long while, also gathering information to get out to others.

I called him back at 5:31 am, about two minutes from when he hung up on me. It rang several times before going to voicemail. I left a message on his voice mail identifying who I was and for him to call me back. I gave him my phone cell number. Officer Butler showed up on scene around this time. I waited two more minutes and made the third call at 5:33 am. It again went to voicemail and I left another message. I looked for Officer Butler but I could not find him. I later found out that he was tasked with getting in the Bearcat with SWAT. Officer Dennis was still with me. At 5:36 am, I made my fourth call to Ray. It rang a couple times before he answered. I could tell he was amped up. I didn't know why he was amped up. I tried to bring him back down by apologizing for upsetting him at the end of our last conversation. During this phone call is when he said he wanted to shoot Air 1. I was on the phone with him for 11 minutes. The conversation was much of the same as the first conversation, with him being more agitated. He told me multiple times that he had shot rounds off. I asked the LT if anyone had heard any shots, to which he replied that no one had heard any shots fired. Ray and I talked in circles.

I heard Officer Dennis talking with the SWAT officers. I heard Alpha 1 on the radio and was told by Officer Dennis that SWAT could see Ray. At one point, Ray told me that he would put the machete and gun down and walk out to us. He told me at one point that he was standing up and he asked me if I could see him. I either misunderstood Officer Dennis or I got bad information but I told Ray that I was aware that officers could see him standing up. Ray then told me that I was full of shit and that I didn't know what I was talking about. Ray said that he had been sitting the entire time and that he was not standing. That hurt our conversation a little bit. He hung up on me abruptly after about 11 minutes of talking.

Around this time, Officers Thomas and Moreno showed up, both of whom are on the negotiator team. I asked them where the Command Post was located so we could get off the street. I told Officers Thomas and Moreno to walk and talk with me to the CP, which they did, along with Officer Dennis. Officer Lowe got to the CP relatively quickly and I briefed them on the rapport I had built with Ray. We had been off-line for about 10 minutes. Someone stated that he was north bound on a street and was moving. I asked if I should call him to get him from moving around and was given the go-ahead.

The last call to him was at 5:59 am. I put my cell phone on speaker phone for Officer Thomas to hear. The phone rang a couple of times and Ray answered the phone, but he did not talk to me for about four to seven seconds. I could hear him moving in the background. I wrote down the notes about the following interaction about 30 seconds after the shooting. When Ray finally acknowledged me on the phone, he told me something along the lines of "I see you all." I attempted to tell Ray that I was glad that he could see the officers. I was attempting to use this fact as a positive police action to build rapport with Ray. Before I could finish my statement, Ray said something along the lines of "get ready". I asked him what he was talking about, to which he replied "you'll see." About five to seven seconds later, I heard on the radio that shots had been fired. My radio was turned off so I was not

sure what had happened. I heard someone in the CP post say that we were back on-line and that shots had been fired. At one point, I could hear Ray groaning. I could hear movement and groaning. According to the call log on my cell phone, this call lasted five minutes.

During our contact, Ray was never despondent. He never cried. He was upset and angry a lot of the time. During my 2.5 years as an HN, I've found that the vast majority of people are upset about something and want to talk to burn off their frustration by talking about it. I could never get out of Ray what it was that he was angry about. My gut feeling was that he was going to attempt to commit suicide by cop.

I opened the door to the area of the CP where some lieutenants were and told them that I still had Ray online. I was told to leave it connected. Once I heard that tactical medics were on scene, I disconnected the phone.

Because I'm an appointed vice president on the APA, I asked Officer Thomas to call APA President Ken Cassaday to brief him on the situation.

THE CRITICAL CONFRONTATION

For thirty minutes AIR1 tracked Ojeda as he roamed in the vicinity of the running track while speaking with Officer Villarreal over the phone. At 5:55 a.m., Ojeda jumped over the chain link fence surrounding the school and walked southeast on Sahara Ave. He made his way to the next intersection and turned left, now heading northeast on Cougar Dr. AIR1, as well as SWAT snipers positioned nearby, relayed Ojeda's movements to ground officers. Because Ojeda moved off of school grounds and into the residential neighborhood, officers became increasingly concerned that Ojeda posed a threat to persons in the area.



Ojeda's approximate path after leaving school grounds, starting at green dot and ending at red dot.

While still walking northeast on Cougar Dr., two SWAT armored vehicles (BearCat 1 and BearCat 2) began slowly approaching Ojeda from behind. Each BearCat either carried or was followed on foot by SWAT officers, explosive ordinance disposal (EOD) officers, tactical medics, and a hostage negotiator. As seen on AIR1's video, Ojeda appeared to become aware of the presence of the BearCat vehicles and turned to face them at 5:58:51 a.m. BearCat 2 was closest to Ojeda, and BearCat 1 was following behind BearCat 2. As the driver of BearCat 2 moved closer to Ojeda, the driver turned on the vehicle's headlights and illuminated Ojeda. Ojeda was observed wearing a black shirt or hoodie with long sleeves. His right sleeve was pulled down over his right hand, partially concealing it. An officer in BearCat 2 used the vehicle's loudspeaker to instruct Ojeda to put his hands in the air with nothing in them. BearCat 2 continued slowly moving toward Ojeda. Ojeda then raised his right arm away from his body and held it outstretched toward BearCat 2 for approximately five seconds. He is seen by multiple officers to have something in his hand. At 5:59:06 a.m., Officer Harvel fired his rifle at Ojeda one time, striking him in the upper right abdomen. Ojeda fell to the ground.



Ojeda raising outstretched right arm in the direction of BearCat 2 prior to being shot.



Close-up from previous photo.



Officer Harvel was standing to the left of and behind this BearCat when he fired at Ojeda. The orange cone marks the location where Harvel's fired .223 cartridge casing was found.



Officer Harvel's approximate view at the time he fired at Ojeda.



Officer Harvel's fired .223 cartridge casing.

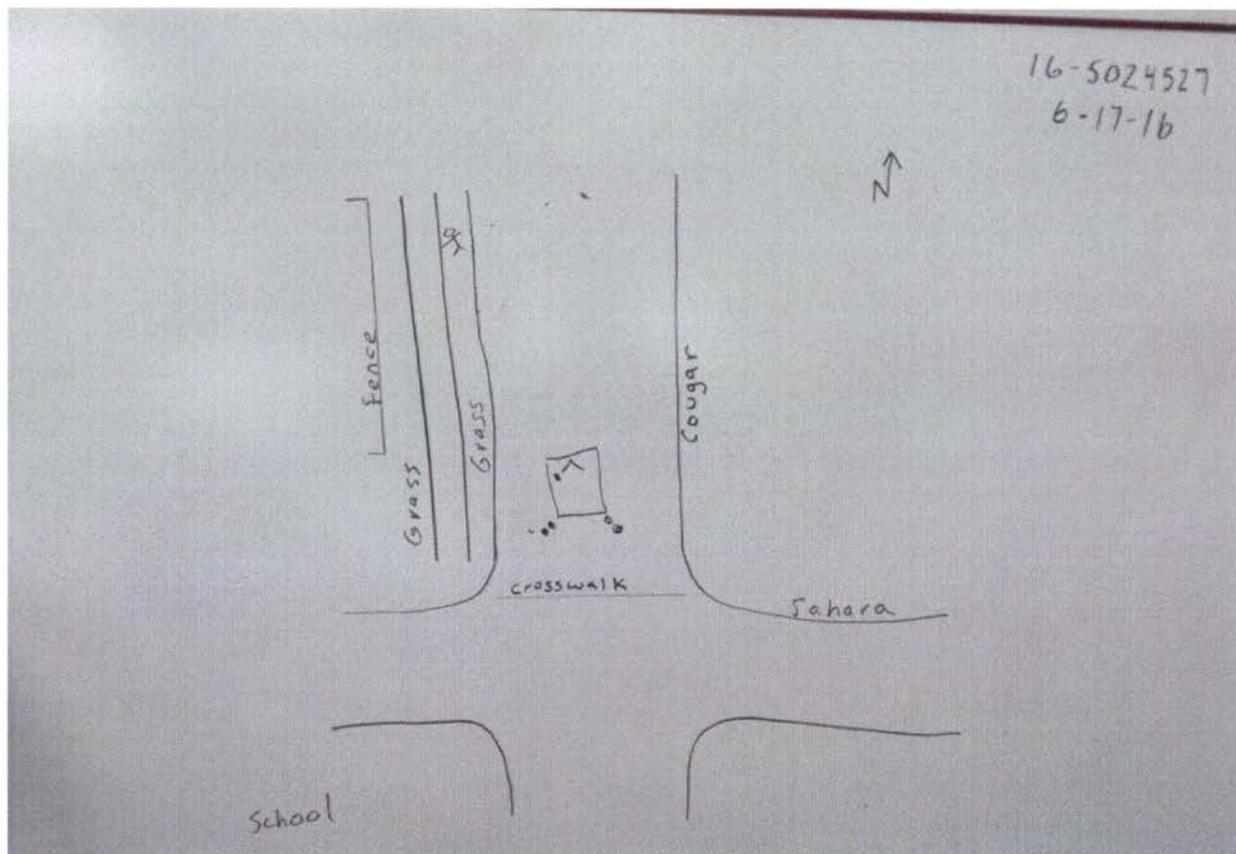
Officer Harvel continued to hold Ojeda at gunpoint while on the ground. Ojeda was ordered over the loudspeaker to show his hands and pull down his right sleeve. Ojeda complied. Pulling his right sleeve down, Ojeda exposed a machete that had been concealed there, with the tip of the blade toward his shoulder, and the handle toward his hand. He was ordered to throw the machete away from him and he complied. SWAT members then approached Ojeda using shields for protection and frisked him for additional weapons. Finding none, Ojeda was handcuffed and tactical medics were allowed to begin first aid. Paramedics transported Ojeda to St. David's South Austin Medical Center where he was treated and eventually released.



Ojeda complying with order to throw the machete away from him after removing it from right sleeve.



Ojeda's machete.



Shooting scene diagram drawn by Officer Harvel during his interview with APD SIU.

OFFICER HARVEL'S STATEMENTS

Officer Harvel completed a “walk-through” (a limited first-person verbal narrative of events made at the scene of the shooting) in the hours after the event in the presence of his attorney and multiple agency representatives, including the District Attorney’s Office. Officer Harvel also gave subsequent interviews to APD Internal Affairs and the APD Special Investigations Unit.

Relevant excerpts from the transcript of Officer Harvel’s SIU interview are below:

174 A: So that morning pager goes off. I was sleeping. I’m trying to think what
 175 time that was. It was like... it was 4:45ish. Pager went off. I’d been
 176 sleeping. Got up, got dressed, went downstairs, ate a bowl of cereal.
 177 Went outside, got in my vehicle, started driving towards the scene. I
 178 was coming from Cedar Park, so it was a pretty long drive. Arrived on
 179 scene, parked, geared up. They had already sent out a hasty team. On
 180 the drive there too I was listening to the radio, so I was hearing what
 181 was going on. Basically from my understanding, there was a fellow at
 182 Odom Elementary School with a pistol and a machete, and he was
 183 threatening to, um, to shoot, police officers. So, show up on scene.

* * *

212 From watching down
213 Turtle Creek towards the school, I overhear - and I don't know which
214 officers again, reiterating that this guy has a pistol, and then pointing it
215 at the helicopter I heard that on the air, that he had a pistol and that he
216 was threatening to shoot officers. He begins the - from the radio traffic I
217 hear that he begins moving around. I don't know if it was an open area
218 of the school or exactly what it was, but that he was moving around
219 and actually starting to move towards the road. Now, they had put out
220 a reverse 9-1-1 call telling residents to stay inside of their house, but
221 we still had vehicles leaving. There was a lot of chatter on the radio
222 over, "We need this road blocked off. We need that road blocked off.
223 There's cars moving freely down these roads," so at this point there's
224 real high threat to the public if this guy is walking around with a gun.
225 We don't know - we know he said he was going to shoot an officer or
226 intending to, but if he was to indirectly just - just shoot randomly and
227 not be on his sights, miss, you can hit moving cars, anything that's out
228 there. So it was - it was starting to become a little more hazardous of a
229 situation. So Sergeant Elsworth directed the driver of the BearCat to
230 turn and start moving up Cougar Avenue where he was moving
246 times, "He's the guy right in the middle of the road?" "Yes." "It's the guy
247 right in the middle of the road?" "Yes." At that time I still couldn't see
248 him very well. It was dawn. The sun hadn't quite came out yet, and he
249 was a pretty good distance. As we moved closer, the subject walked
250 kinda in a southwest direction towards the corner of the fence that you
251 have on the diagram there.

252
253 Q: Mm-hm.

254
255 A: And as he did, I - I believe we crossed Sahara. We were just on the
256 other side of Sahara on the north side of it, and with a flashlight on my
257 rifle, I - I lit the flashlight up, and I can see him better. As I lit up the
258 subject, I saw him with his arm, right arm outstretched and his head
259 down towards his hand as if he was looking through the sights of a
260 pistol. I could see what looked like to me a semi-automatic pistol in his
231 because the radio traffic was saying that snipers had seen him moving
232 into or towards that road. Um, we start driving northbound on Cougar
233 towards Sahara I believe that was the intersection they were saying
234 that they saw him at. And as we were moving up they have the
235 BearCat blacked out, no lights on it, and so it was hard for me to see
236 what was going on ahead. I could see a person standing in the road
237 and a police car directly behind them. And I believe - I don't know what
238 street it was, but the next street north of Sahara is where that police
239 car was. So I can see the fellow right in the middle of the road. He was
240 in, it looked like all black. And at first I thought it was an officer, um,
241 and I was thinking to myself, "Man, it's going to be bad if this guy
242 comes out with that officer behind him." We're basically looking at each
243 other. Um, as we were moving closer, I heard I believe it was Brad Ray
244 who's the driver of the BearCat say that the subject was the person
245 standing in the middle of the road. And I clarified that two or three

261 hand. It was black about, yay long about, eight – eight, ten inches
262 looked like sticking out of his hand, um, I believed it was a pistol
263 semiautomatic pistol. I believed that he was - he was in a shooting
264 stance and he had his eyes down like he was looking down the sights.
265 At that time, for concern of my safety, the safety of everyone around
266 me on that BearCat that wasn't directly behind it. I was worried about,
267 like I said, vehicles. As we were approaching the subject, someone
268 behind us as well - I was focused on the subject, but someone behind
269 us in that, in the group of SWAT officers actually said that they saw a
270 vehicle backing out. They said at least twice, "There's a vehicle
271 backing out on Cougar. There's a vehicle backing out on Cougar." I
272 don't know if it was ahead of us or behind us, but that also entered my
273 mind as, um, if this guy squeezes off a round. Even if he misses us, it
274 could hit the vehicle. Um, as I said in the walk-through, there's a lot of
275 houses around there. Almost every call out we go to we're constantly
276 having to tell people calling patrol saying, "Hey, move these people
277 away. People are so just curious of what's going on. They'll see people
278 behind an armored vehicle seeking protection, yet, they'll walk out and
279 want to film it. So I didn't know if there were people peeking out their
280 windows, so like I said, not only the threat that was presented to us,
281 but the threat to other - the entire neighborhood right there, at least on
282 that street entered my mind. And I made a quick decision to try to stop
283 that threat, um, and fired one shot and the subject fell to the ground
284 there in the grass. And I continued to cover on him. S.W.A.T. made a
285 quick plan. We ended up moving up and placing the subject in custody.
286 And after he was placed in custody, um, Sergeant Elsworth asked who
287 it was that actually took the shot. I told him that it was me. There were
288 plenty of officers there to take care of the scene. He asked me to come
289 with him. We go back to the command post, and we walk back to the
290 command post and started the investigation from there.

OTHER SWORN STATEMENTS

Several other APD officers gave statements detailing their involvement in this event. Portions of their statements relevant to our analysis are below.

Officer Bryan Black

Officer Bryan Black was deployed as a SWAT team sniper. From various positions on the ground, Officer Black monitored Ojeda with night vision equipment. After Ojeda climbed over the school fence, Officer Black climbed into BearCat 2 and continued to monitor Ojeda from the open turret hatch on top of the vehicle. Excerpt from Officer Black's statement:

I immediately recognized the man I was seeing as the same person I observed early in the school courtyard. The description that I remember was that he was an 18-19 year old male, wearing a cowboy hat and long sleeved jacket that looked black through night vision. At first when I saw him from the turret I could not tell if he had anything in his hands. His hands were down by his side. I recall that he was bladed off with his right side toward the Bear Cat and then he raised his right arm up pointing it straight at the Bear Cat as if he had a weapon like a pistol in his hand.

As we were approaching the subject he was walking back and forth in the street. One time he had made his way more on the passenger side of the Bear Cat and then made his way back to the driver's side. There were a couple times he did this as he was in the street. He was facing us and not really walking away from us anymore. The Bear Cat was moving very slowly toward him.

I could never really tell what he was doing with his hands. It looked like he was holding something but I couldn't tell at the time what it was. I didn't see a long object like a machete. I wasn't looking through night vision at this point and we were really close to him. It was still dark and couldn't get a good view of what was in his hands. I also did not hear him say anything but the hostage negotiator and the officers walking behind the Bear Cat were giving him commands. The commands I remember hearing were "show me your hands" and "get on the ground". I even made those commands myself about four or five times.

When the suspect bladed off and raised his hand in the Bear Cat's direction is when I heard a shot go off. The suspect fell to the ground. His chest had been toward the Bear Cat but when he bladed he moved to angle his body off in what could be called a fighting stance. His right foot was forward with his left foot behind and the way he brought his hand up it looked like he was pointing a gun at us. He was standing more along the west curb of Cougar when this happened. I was looking through the port of the turret at the time the shot when off. The shot came from my left and I only heard one. I did not shoot the suspect because I was not on a very stable shooting platform as I was standing on equipment inside of the Bear Cat. Only the upper half of my body was exposed but I was behind the turret lid.

Officer Graig Butler

Officer Graig Butler was assigned to the incident as a hostage negotiator. During the earlier stages of the event, he worked alongside Officer Villarreal (whose statement was included above.) As BearCat 2 began driving toward Ojeda, Officer Butler entered the vehicle with the intent to communicate with Ojeda over the vehicle's loudspeaker. Excerpt from Officer Butler's statement:

The Sniper stated the subject walked to the intersection of Sahara and Cougar and he lost all sight of him. Officer Ray was then given the directions to go northbound on Cougar Drive from Turtle Creek Blvd. When we made the turn we saw the subject walking northbound. He was not able to see us at that time. The information given over the radio was that he wanted to see officers. There was a police unit further north on Cougar Drive with flashing lights. We were on Cougar Drive traveling approx.. 2 miles per hour. He left the side walk and walked to the center of the street. At this time, he is approx.. 20 yards north of Sahara on Courgar. He stopped and was initially facing away from us. I think he heard the Bear Cat coming up behind him and he turned facing the Bear Cat. I could see the subject was a male unknown race, with an empty olive colored left hand, (skin tone like mine) and his right hand appeared black as if something black was in it or

a glove. There was no skin visible on the right hand. We were closing distance and trying to get a better view of him and what was in his hand. The spot light was then turned on. It is unclear who turned on the light. Sgt Ellsworth asked that I began PA (Public Address). I delayed about 10-15 seconds because there was a dead mic. We were able to get the PA turned on properly to begin direction. I gave directions as follows:

I identified us as "This is the Austin Police Department", I referred to him by name as "Ray". I then directed Ray to either put your hands in the air or show me your hands. I don't recall which term I used. I then observed the subject kept his left hand on left side and walked laterally and forward to try and see beyond the spotlight. This is the same time I observed the subject raised his right hand and I said what came to my mind. I informed everyone he is pointing something at us. I said this loudly, twice. I yelled this into the PA for everyone to hear. I wanted everyone to know what I was seeing. The way he was walking is the way someone would target you with a one handed pistol grip. I saw a black object in his hand. This was still being pointed at us. I then heard a shot taken. I did not know what type of shot was taken because I was inside the vehicle. The shot was taken outside the vehicle. I am not sure if it was a rifle shot, hand gun or a less lethal shot. I then noticed the subject appeared to have been shot in the abdomen because he doubled over as though he went to clutch his abdomen. I saw him then fall over into the grass. The black object was still in his hand at that time. I then gave verbal commands to roll over and put your arms out like an airplane. The subject then complied but began to put his hands back to his back like he was being handcuffed. The grass was higher and we could not see what was in his hands so I was asked to give commands for him to crawl out of the grass onto the street. The subject did not comply with my command. I was asked to tell him to pull his right sleeve up with his with left hand so we could see what was in his right hand. The subject complied after 3-4 times of giving that direction. He was then lying on his side facing me. He reached over with his left hand and pulled his sleeve up. I was able to see a black handle sticking up and there was something metal up the sleeve. He reached up and pulled a long machete from his sleeve and threw it over. He had the sleeve of his shirt pulled over the machete and the only thing sticking out was the black handle of the machete on the palm of his hand.

From a distance this appeared to be a handgun or anything dark in color that could fit in your hand. Based on the statements made by the subject earlier, I felt this was a firearm. I gave the subject direction to throw the machete further away. He either could not or would not comply, so SWAT officers made the decision to approach with the shield. When they approached the subject was secured and then medical treatment was provided to him by the tactical medics. They were positioned with the SWAT team. He was placed in a litter and carried away to wait for Ems at the intersection of Sahara and Cougar.

Sgt. Brandon Ellsworth

Sgt. Brandon Ellsworth was on-call for any SWAT callout and responded to the scene. Excerpt from Sgt. Ellsworth's statement:

Fearing we would lose sight of the suspect and the fact that he was entering a highly populated residential area surrounding the school we moved both Bearcats and officers toward the suspect as he was moving. I confirmed with the sniper that the suspect was walking NB and he had crossed the intersection of Sahara. Bearcat 2 was the lead element in our response and I was walking behind the vehicle as we approached the suspect. I heard Officer Brad Ray, the driver of Bearcat #2, say the suspect was in the street. To gain a visual of the suspect I got onto the back skids and leaned into the vehicle to look through the windshield to see the suspect. Several other officers had taken up position covering on the driver's side and passengers side of the Bearcat as we moved down the street. I saw the suspect was wearing dark clothing and I could initially just see a dark figure standing in the street from approximately 100 yards away. As we moved closer I told the Hostage Negotiator, Officer Greg Butler, to start making announcements over the PA. We were still moving and officers outside the Bearcat began giving verbal commands for the suspect to show his hands. The PA started as well and Officer Butler also repeated this commands for the suspect to show his hands. Through the windshield I saw the suspect look at the Bearcat and immediately extend his right arm out as if he was pointing a handgun at our position. I have years of firearms training and experience and this suspect postured his body in a way as if he were aiming a handgun in our direction. I saw that the suspect was taking an aggressive stance as he had his right arm extended in our direction. The suspect was wearing an oversized dark colored sweatshirt and the sleeves appeared to cover his hands. I could not see a weapon in his hand, because his ~~hand~~ was partially obscured by oversized sweatshirt, but I was anticipating the suspect firing a round in our direction due to all the intel I had received up until this point and with the fact he took a shooting posture instead of following any verbal commands given by the officers. I was inside an armored vehicle, but I also knew several officers were standing behind this vehicle trying to have some armored protection while also maintaining a visual on the suspect. I also saw this suspect appeared to be moving (from east to west) while his arm was extended and I believed his was attempting to track or identify an officer to shoot at.

I then heard a single shot fired from behind Bearcat 2 and I saw the suspect fall out of sight onto the ground. I moved up into the Bearcat to see the suspect and I saw him on the ground. Officers from behind the Bearcat continued to give the suspect verbal commands and we came up with a quick plan to move up to the suspect take him into custody.

Officer Will Ray

Officer Will Ray was on-call with the SWAT team and responded to the scene. Officer Ray drove BearCat 2 toward Ojeda when contact was made. Excerpt from Officer Ray's statement:

I moved the Bearcat approximately 2-3 blocks down Turtle Creek. There were approximately 7 to 9 personnel either riding on the exterior skids of the Bearcat or on the ground to the rear of the vehicle. These personnel were a combination of SWAT members, EOD officers and medics. We got to Turtle Creek and Cougar and Sgt Ellsworth and Team Leader Garcia conferred for a couple of minutes. The snipers updated us that the suspect was now on Cougar Drive and he had left the school grounds and was approaching a residential area. When they found out he was heading towards a residential area it was decided that we needed to approach the suspect to attempt to contain him.

I drove north on Cougar slowly with officers following behind. At this point, I could only see a silhouette of the suspect. As we got to within about 25 yards of the suspect I turned on the headlights of the Bearcat. At this point, I could see the suspect and he appeared to be a heavy set Hispanic male. He was wearing blue jeans and a dark long sleeved shirt or possibly a hoodie. I could see that the sleeve on the suspect's shirt or hoodie was pulled down over his right hand partially concealing his hand. The hostage negotiator got on the PA system and began to give verbal commands for the suspect to put his hands up in the air with nothing in his hands.

We continued to slowly move towards the suspect in the Bearcat. I then observed the male raise his right hand towards the Bearcat. It appeared that the suspect had something in his right hand as his fingers appeared to be closed around an object and not open. I heard a gunshot from the left side of the Bearcat (drivers side). I observed the suspect flinch and then fall to the ground. The suspect fell on his back and side and then rolled over on to his stomach.

Officer Michael Ridge

Officer Michael Ridge was on-call with the SWAT team and responded to the scene. His role was driver of BearCat 1. Excerpt from Officer Ridge's statement:

I responded to the scene of the incident and was alone in Bearcat 1 until I arrived in the area of South 1st, near the school in question. Once at the command post, I started getting our ballistic shields readied, readied out less lethal launchers and put my tac vest on and suited up.

After finishing these tasks, I got back into the driver's seat of Bearcat 1 and drove to what I believe was the Northeast side of the school. I had one EOD officer and 2 other SWAT members riding on the outside skids of the Bearcat at that point. I then made a right turn to the North side of the school and got behind Bearcat 2. I stayed behind Bearcat 2 about 2 car lengths. I heard an update on the radio concerning the suspect having jumped a fence and now standing on the sidewalk.

I then moved to the right of Bearcat 2 to be on it's passenger side and then heard another update about the suspect walking on the street. I took it to mean that he was walking south to north. I then moved back to the left side of Bearcat 2 to provide cover. By this time, Bearcat 2 had illuminated the subject with their exterior lights. I physically saw the subject in question and he was wearing all dark clothing to include a dark baseball cap and dark hoodie or a big shirt, I can't be sure. I could tell it was a male.

As Bearcat 2 was illuminating the suspect I saw what I believe was his right hand raise up and point something in the direction of the personnel behind Bearcat 2. I'm not sure which hand it was but I saw the suspect raising his hand up in the direction of Bearcat 2 in a threatening manner as if he had a firearm.

I then saw one muzzle flash from the direction of Bearcat 2 and saw the suspect's body curl forward as if he was going to fall forward. I did not see the suspect fall as I was moving the vehicle at that point. I flared out to the right of Bearcat 2 and saw the suspect was down on the ground.

Officer Boone Scholibo

Officer Boone Scholibo was on-call with the SWAT team and responded to the scene. Officer Scholibo rode on BearCat 2 as it approached Ojeda. Excerpt from Officer Scholibo's statement:

east portion of the school ground. I don't know by who, but Officer Ray was asked to begin driving the BEARCAT toward the subjects last updated location. Officer Harvel and I were walking in a single file line, still on the driver side, alongside the BEARCAT, which was traveling at a low rate of speed.

As we were walking northbound on Cougar Lane nearing the intersection of Turtle Creek and Cougar Lane (north-east), I observed a subject standing in the middle of the roadway. The subject was illuminated by an unknown source of light. We were still on the south side of the intersection when I first saw him and I believe other officers had seen him by this time, too. The BEARCAT continued toward the subject in the middle of the roadway and I continued to walk alongside; Officer Harvel was still in front of me. As I walked toward this subject I observed him to be wearing a dark colored hoodie with the hood over his head and dark colored pants. The subject was "bladed" with only the right side of his body facing me. The left side of his body was obscured to me. As we neared the location of this subject (within yelling distance), Officers began to yell commands at the subject. BEARCAT 2 stopped beyond the north side of the intersection of Cougar Lane and Turtle Creek. The subject was approximately 15 to 20 yards away from the BEARCAT and our location. I would consider the subjects location to be a closer distance. The subject turned his body to face the BEARCAT and our location while still standing in the middle of the roadway. The subject then walked toward the curb line, no longer standing in the middle of the roadway, and "bladed" his body again. The subject "bladed" his body the exact way as previously indicated by only showing his right side. His left side was obscured. At this moment I observed the sweatshirt/hoodie of the subject's right arm was covering his right hand. The lighting made it difficult to completely see his right hand, but it appeared as though the sleeve had been pulled down over his hand. The entire time commands were being given to the subject by other officers with the BEARCAT. While "bladed", the subject raised his right hand at what I felt to be the direction of Officer Harvel and me. At this moment I felt the subject was concealing a firearm of some kind and was going to shoot us. Pretty quickly after the subject raised his right hand at us, I heard Officer Harvel shoot. The subject went to the ground on his belly pretty quickly and retracted his arms underneath his body. I remember more verbal commands from the officers with the BEARCAT directed at the subject on the ground. Officer Harvel and I held the subject on the ground with lethal

coverage while other SWAT members retrieved a ballistic shield from the BEARCAT and brought it to our location. Officer Harvel and I were on the same line as another and the ballistic shield was placed directly in front of me.

A plan was derived at this moment to approach the downed subject with a “heavy head”— meaning two ballistic shields in front and all other officers behind the shields. This plan came to fruition and I was directly behind the SWAT officer carrying the ballistic shield on the left. We then moved up toward the downed subject where I held lethal coverage on him. Officer Shemo came around me to frisk the subject and to place him into flex cuffs.

Matthew Hicks

Matthew Hicks is employed as a paramedic with Austin/Travis County EMS. Additionally, he is trained to respond with SWAT team deployments as a tactical medic. He is not a law enforcement officer and carries no weapons. Mr. Hicks was riding inside of BearCat 2 as it made contact with Ojeda. Excerpt from Mr. Hicks’ statement to APD SIU:

As we progressed down the street, we spotted a silhouette of a man standing off to the left of the street on the sidewalk. As we got closer to the subject, he began to move out to the center of the street where he stood still. Someone gave the command to stop the bearcat and Brad stopped. The headlights of the bearcat were on at this point and now we could see more of the subject. It looked like he was wearing a long sleeved hooded sweater/jacket. As the subject stood there, the negotiator in the passenger seat started giving commands over the PA to comply with the Austin Police Department. At the same time the SWAT officers were also shouting commands to get on the ground and drop whatever was in his hand. The subject then raised his right arm and was pointing an unknown object at the bearcat. I could see the subject pointing something at the bearcat and was anticipating shots to be fired at us, assuming he had a gun in his hand. I even started to duck down a little in anticipation of shots coming at us even though the bearcat is armored. The subject’s sleeves were covering his hand and I could not see what he was holding. The subject had his hand up for approximately 5 seconds before I heard a single shot go off from the rear driver side of the bearcat. Immediately after I heard the shot, I saw the subject get hit in the abdomen region and then take a step to his right and fall face down on the grass next to the sidewalk.

RAY OJEDA INTERVIEW

APD SIU Detectives Parker and Pelayo interviewed Ojeda at 2:07 p.m. on June 15, 2016, while Ojeda was still at St. David’s South Austin Medical Center. Ojeda was neither under arrest nor under any form of law enforcement detention. Nevertheless, Ojeda was read his *Miranda* rights prior to substantive questioning about the incident. Ojeda agreed to waive any such rights and speak with the detectives.

Ojeda explained that the night of the incident, he was dealing with emotions relating to recent personal loss. When asked why he called 911 requesting police, Ojeda gave alternate explanations, including that he was “mad and sad and frustrated with everything,” “pissed off,” that he was “pretty much” asking for help, and that he didn’t know why he did it. He admitted to

drinking beer and taking Xanax.

He recalled much of the incident, including speaking with the 911 call takers and the hostage negotiator, seeing AIR1, and seeing the BearCat. He acknowledged he knew it was police officers who confronted him and ordered him to put his weapons down. He denied ever having a gun but acknowledged telling the police he had one and that he had shot it into the ground. He denied threatening to shoot the police, wanting to hurt anyone, or wanting the police to hurt him. He denied ever pointing his arm at police. He did not believe anything should happen to the officer who shot him and believed the officer was being safe and doing his job. Excerpts from the transcript of Ojeda's interview:

207 Q: Okay. So, um, do you mind just telling us, you know, what happened,
208 what led up to that - to the shooting.
209
210 A: Honestly, I was -I was just mad and sad and frustrated with everything
211 because I mean, well I have - I have a girlfriend who we just ended up
212 breaking up and I mean, I - she's had my baby a long time ago but my
213 baby never made it.
214
215 Q: Oh wow.
216
217 A: Yeah, and then, I mean, well and I had another - I had another baby
218 too that didn't make it either. That was just recently, like, the first one
219 was about two years ago.
220
221 Q: Mm-hm.
222
223 A: And the other one was with another girl and recently - recently just
224 happened. She lost her baby. I was just - I was just all really in my
225 feelings. I mean I wasn't - I didn't want to hurt nobody, that wasn't my

226 intention.
227
228 Q: Okay.
229
230 A: To hurt anybody, but I just - I mean I made the wrong decision. I just - I
231 had a lot on my mind and when all this happened it just made me think
232 about everything else and my - my grandma she passed. I mean it was
233 a lot of stuff going through my head.
234
235 Q: Okay. Mm-hm.
236
237 A: I was just.
238
239 Q: What are you 19 years old?
240
241 A: Yes, sir.
242
243 Q: Sounds like a lot - a lot of stuff to go on for a 19-year-old.
244
245 A: Yeah.
246
247 Q: So, and, um, so, um, this happened - started happening early
248 yesterday morning.
249
250 A: Yes, sir.
251
252 Q: Okay, um, about what - 4:00 or something like that?
253
254 A: Um, I'm pretty sure, I honestly don't know.
255
256 Q: But it was sort of early?
257
258 A: Yeah, it was early.
259
260 Q: So what, um, so you called 911 yourself?
261
262 A: Yes.
263
264 Q: Can you tell me a little bit about that?
265
266 A: I was just said that, um, for the police to come where I was.
267
268 Q: Mm-hm.
269
270 A: And I just told them I had a gun and wanted to shoot it. I was just

271 pissed off and pretty much, I was just talking to them.

272

273 Q: Okay.

274

275 A: I was very respectful, I wasn't mean or anything. It's just - I just didn't
276 care at the time.

277

278 Q: Okay.

279

280 A: But I mean I do, I don't - I don't want to commit suicide, I'm not like that
281 type of person - I'm smarter than that. But I mean, like I said,
282 everybody makes bad decisions, that was one of them I regret though.

283

284 Q: You regret doing that?

285

286 A: Yes, I don't want to do that. I mean, I don't want to hurt anybody you
287 know what. I'm not that type of person - I've a very nice person - good
288 person.

289

290 Q: Mm-hm. Have you - have you ever done anything like that before?

291

292 A: No, sir.

293

294 Q: No. Have you ever - I understand you called 911 because you - you
295 wanted the police to come - come there. Why did you want the police
296 to come?

297

298 A: Honestly, I was so - I don't know, I just - I honestly don't know.

299

300 Q: Were you - were you trying to ask for help? Were you - you figured the
301 police could help you or?

302

303 A: Pretty much yeah. I honestly don't know.

* * *

896 Q: So what - what do you think should happen to the police officer that
897 shot you?

898

899 A: Nothing.

900

901 Q: Nothing.
902
903 A: They're just - they're just being safe. What I said I mean, they don't
904 know if I really had a gun or not. I mean, I don't want to press charges
905 'cause they're just doing - they're just doing their job. So what if I did -
906 they could - I said I had a gun. So I mean if I - if I would have known
907 that too, I mean, I would - I would have done the same thing.
908
909 Q: So you're - you're saying you never gave the officers an opportunity to
910 see that you did not have a gun?
911
912 A: Well I didn't.
913
914 Q: I know, but you never really gave them an opportunity right? So, you
915 feel that the officer shot you because he feared you had a gun?
916
917 A: Yeah, well it - to be safe. They don't want no incident to happen.

* * *

1025 Q1: Were you looking for some sort of attention that night?
1026
1027 A: Maybe, yeah, I guess you could say that.
1028
1029 Q1: Where - what was - were you - were you sad that night?
1030
1031 A: Yeah, I was emotional.
1032
1033 Q1: You were emotional.
1034
1035 A: Yeah I was mad, I was sad, everything was going through my mind.
1036
1037 Q1: That was going through your mind?
1038
1039 A: Yeah, but I would never hurt myself. I'm not that kind of person. I
1040 wouldn't - I wouldn't hurt anybody else.

FIREARM AND TOOLMARK ANALYSIS

APD Firearm and Toolmark Examiner Steven Aston responded to the scene and collected evidence, including Officer Harvel's rifle, the magazine contained in the rifle, the ammunition contained in the rifle and magazine, and a single .223 caliber fired cartridge case found on the ground behind Bearcat 2.

Mr. Aston examined Officer Harvel's pistol at the scene and concluded it was consistent with not having been fired in the incident. Having not been fired, the pistol was neither collected nor microscopically examined.

After leaving the scene, Mr. Aston was called back to examine what appeared to be a bullet defect (a hole or dent or other marking left from a bullet impact) in a cylindrical metal fencepost that was behind Ojeda when Officer Harvel fired. Using a chemical test, the defect tested positive for the presumptive existence of lead. This defect was likely caused by the bullet after passing through Ojeda's torso. The area surrounding the fencepost was searched for bullet fragments but none was recovered.

Mr. Aston later examined the rifle, a Larue Tactical model LT-15 5.56 caliber single-action, semi-automatic, short-barrel rifle in the APD firearms lab and found it to have no unauthorized modifications or configurations. Mr. Aston test-fired the rifle and found it to function normally and be capable of discharging live rounds.

Mr. Aston also microscopically examined the fired cartridge case found on the ground behind BearCat 2. The fired cartridge case was positively identified as having been fired from Officer Harvel's rifle.



Metal fencepost likely struck by Officer Harvel's bullet after passing through Ojeda.



Defect in fencepost. Pink tip on chemical field test indicates the presumptive presence of lead.

CHARGES AGAINST RAY OJEDA

Representatives from APD and the District Attorney's Office agreed that no charges would be filed against Ojeda.

LEGAL ANALYSIS

A person commits the offense of aggravated assault if he intentionally, knowingly, or recklessly causes bodily injury to another person and uses or exhibits a deadly weapon during the commission of the assault.³ "Deadly weapon" includes, among other things, a firearm.⁴ A "firearm" is any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.⁵

Officer Harvel admits to intentionally causing bodily injury to Ojeda by shooting him with a rifle. Officer Harvel's rifle is a firearm by design and thus meets the definition of a deadly weapon. Without further consideration of other facts or available legal defenses, a preliminary analysis shows Officer Harvel's conduct in shooting Ojeda with a rifle meets the elements of aggravated assault and thus could subject him to criminal prosecution.

³ Tex. Penal Code § 22.01(a)(1); 22.02 (a)(2)

⁴ Tex. Penal Code § 1.07(a)(17)

⁵ Tex. Penal Code § 46.01(3)

It is, however, a defense to criminal prosecution if a person's conduct is justified.⁶ Potential justifications for Officer Harvel's conduct, and thus potential legal defenses to criminal prosecution, include self-defense, defense of third persons, and what is commonly referred to as the law enforcement justification. Each justification is discussed below.

Self-defense:

A person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force.⁷

Use of deadly force in self-defense:

A person is justified in using *deadly* force against another if the actor would be justified in using force against the other as described above, and when and to the degree the actor reasonably believes the deadly force is immediately necessary to protect the actor against the other's use or attempted use of unlawful deadly force.⁸ A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force.⁹

Use of force or deadly force in defense of third person:

A person is justified in using force or deadly force against another to protect a *third person* if under the circumstances as the actor reasonably believes them to be, the actor would be justified in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect, and the actor reasonably believes that his intervention is immediately necessary to protect the third person.¹⁰

Law enforcement justification:

A peace officer is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest, if the actor reasonably believes the arrest or search is lawful or, if the arrest or search is made under a warrant, he reasonably believes the warrant is valid; and before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested.¹¹

Deadly force law enforcement justification:

⁶ Tex. Penal Code § 9.02

⁷ Tex. Penal Code § 9.31(a)

⁸ Tex. Penal Code § 9.32(a)

⁹ Tex. Penal Code § 9.32(c)

¹⁰ Tex. Penal Code § 9.33

¹¹ Tex. Penal Code § 9.51(a)

A peace officer is justified in using *deadly* force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest, if the use of force would otherwise be justified and the actor reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force, or the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed.¹²

Application of the Law to the Facts:

The duration of time from Ojeda's first 911 call to Officer Harvel's shot was almost two full hours. During that time, multiple attempts were made to bring the event to a peaceful resolution. Ojeda was asked to disarm, was guaranteed safety if he complied, was offered help, and was initially monitored from a distance so as not to force a confrontation. It was only when Ojeda left school grounds and entered the residential neighborhood that officers closed in. This change in tactics from waiting and negotiating with Ojeda to preventing his movement into the neighborhood showed restraint and was a reasonable exercise of police authority.

Officer Harvel could reasonably have had, and does claim to have had, an apprehension that Ojeda was armed with a handgun and posed a threat of injury to anyone near him, and to police in particular. Ojeda intimated to the 911 call takers and the hostage negotiator that he might shoot at the police. Ojeda's Facebook post was a statement of future intent to harm the police ("I'm shoot at the llaws fuck em" (*sic*)). Ojeda described the handgun as a "Glock" and claimed to have shot it into the ground. Ojeda refused multiple requests to put his weapons down. Although Ojeda did at one point claim to have put the gun down, responding officers cannot reasonably be expected to immediately stop considering Ojeda to be a deadly threat. Ojeda's movement from the fenced-in school grounds to a residential neighborhood posed a greater risk of harm to officers and to the public by virtue of closer proximity.

When confronted by BearCat 2, Ojeda disregarded orders to put both hands in the air with nothing in them. The video from AIR1 shows Ojeda instead appeared to "blade off" or take a shooting stance, then raise his outstretched right arm and point it in the direction of officers accompanying BearCat 2. Several officers and a paramedic witnessing the event in real time believed Ojeda was preparing to shoot. Given the low-light situation and the totality of Ojeda's words and actions over the previous two hours, it could have reasonably appeared to Officer Harvel that Ojeda was about to shoot and commit the potential offenses of aggravated assault, attempted murder, or murder.

The above facts known to Officer Harvel at the time he shot Ojeda form the basis of Officer Harvel's justification for his actions and thus his defense to prosecution. These facts tend to support a jury finding that Officer Harvel acted in self-defense and in defense of third persons because he reasonably believed that deadly force was immediately necessary to protect himself, other officers, and unknown citizens in their homes against Ojeda's attempted use of unlawful deadly force.

The above facts further tend to support a jury finding that Officer Harvel acted with law

¹² Tex. Penal Code § 9.51(c)

enforcement justification because he reasonably believed that deadly force was immediately necessary to arrest Ojeda and reasonably believed the conduct for which Ojeda's arrest was authorized included the attempted use of deadly force, or Officer Harvel reasonably believed there was a substantial risk that Ojeda would cause death or serious bodily injury to Officer Harvel or another if the arrest was delayed.

CONCLUSION

Criminal liability against Officer Harvel for aggravated assault is established only if the evidence proves beyond a reasonable doubt that all elements of the offense have been committed.¹³ Further, if Officer Harvel produces some evidence of justification, the State must prove beyond a reasonable doubt that the offense was committed without any legal justifications raised by the evidence.¹⁴

We believe the evidence shows Officer Harvel has three legal justifications for his conduct that would likely prevail at trial. We believe a jury would find that Officer Harvel reasonably interpreted Ojeda's actions in raising his outstretched arm as an attempted use of deadly force against himself, other officers, and citizens in nearby homes. We believe a jury would find that Officer Harvel's single shot at Ojeda was a reasonable use of deadly force in self-defense, a reasonable use of deadly force in defense of third persons, and a reasonable use of deadly force to effect an arrest. That Ojeda did not in fact have a handgun at the time he was shot is of no consequence as Ojeda led officers to believe that he did. The law does not require that Ojeda *actually* pose a risk of deadly harm but only that Officer Harvel reasonably believe that he did.

For the above reasons, we conclude that criminal charges against Officer Harvel are neither appropriate nor supportable under the law. Consequently, we will seek no indictments. We are closing our review and will take no further action in this matter.

We have released a press packet of evidence that we reviewed in making this decision. The packet includes offense reports, forensic reports, officer statements, witness statements, photos, videos, and other miscellaneous evidence. The packet is available to the press as well as any interested citizen. This decision will be posted on the Travis County District Attorney website and will be accessible under Ray Ojeda and the date of the incident, June 14, 2016.¹⁵

Very truly yours,



Margaret Moore

¹³ Tex. Penal Code § 2.01

¹⁴ *Saxton v. State*, 804 S.W.2d 910 (Tex. Crim. App. 1991); *Jenkins v. State*, 740 S.W.2d 435 (Tex. Crim. App. 1983)

¹⁵ <https://www.traviscountvtx.gov/district-attorney/cru>