

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT OF FLORIDA
SEMINOLE COUNTY

STATE OF FLORIDA)	
)	
Plaintiff,)	
)	No.
v.)	
)	
)	
MATTHEW DANLER)	
)	
Defendant.)	
_____)	

I. Introduction

My name is Roy R. Bedard. I reside in Tallahassee, Florida, where I am full-time professional law enforcement, civilian and corrections trainer. I am the owner and president of RRB Systems International, a police and public safety product and training corporation headquartered in Tallahassee, FL that conducts law enforcement, corrections and public safety training throughout the world. I am a listed subject matter expert in *Use of Force* and *Defensive Tactics* by the Florida Department of Law Enforcement. I have been previously qualified as an expert in police procedures, police use of force, combat stress and self-defense in both civil and criminal courts. I have been retained to provide expert analysis of the evidence submitted in the case of the State of Florida v. Matthew Danler.

II. **Qualifications and Background**

I have taught a variety of professional training courses over the last thirty years including classes in police and corrections procedures, police management and police civil liability throughout the US and abroad. I have taught civilian self-defense courses at the Florida State University for the Center for Participant Education and Florida Institute of Martial Arts. I have taught advanced defensive tactics to academies, corrections and law enforcement agencies throughout Florida and many other parts of the nation. I have provided training and policy development to the Federal Law Enforcement Training Center and Federal Bureau of Prisons. I have developed police tactics training courses and hold patents, trademarks and copyrights on a variety of police equipment and law enforcement training. I have produced law enforcement related films and television shows which are used in colleges and law enforcement academies across the state and nation. These productions address the areas of use of force; police procedure, non-lethal uses of force; and issues involving civil and criminal liability.

I received a bachelor's degree from the Florida State University in Criminology and Criminal Justice in 1999. I received a master's degree at the Florida State University in Sports, Exercise and Performance Psychology in 2014. I am currently completing a Ph.D. in the same discipline. Since 1987, I have served as a full-time police officer, police trainer and reserve police officer. I began my profession at the Florida State University as a patrol officer. I have been active with the Tallahassee Police Department since 1990 and retired in December 2015. I have participated in most of my full-time police career as a field-training officer. I retain my police standards with the Florida Department of Law Enforcement (FDLE) Criminal Justice Standards and Training Commission (CJSTC)

I am an adjunct trainer at the Florida Public Safety Institute since 1987, in Havana

Florida providing training services for basic, advanced and specialized law enforcement and corrections officials.

I am certified as a police officer and police instructor by Florida's Criminal Justice Standards and Training Commission (CJSTC). I serve as a task force member to the *Use of Force and Defensive Tactics Development Committee* for police and corrections officers of the State of Florida at the Florida Department of Law Enforcement in Tallahassee, Florida. I write defensive tactics and use of force curriculum for all law enforcement and corrections candidates who wish to become licensed in the State of Florida.

I have previously appeared as an expert witness in a variety of civil and criminal cases, having been qualified in both state and federal courts as an expert in use of force, police procedures, self-defense and combat stress. My experience and publications are described more fully in the curriculum vitae prepared by me and attached to this report.

III. MATERIALS REVIEWED THAT ASSISTED IN FORMING OPINIONS.

- FDLE Case Number OR-27-0266, Investigative summary
- Video capture of shooting event from officer body cameras
 - AXON_Body_Video_2016-09-01_0558.mp4
 - AXON_Body_Video_2016-09-01_0559.mp4
 - AXON_Body_Video_2016-09-01_0610.mp4
 - AXON_Body_Video_2016-09-01_0624.mp4
 - AXON_Body_Video_2016-09-01_0728.mp4
 - AXON_Body_Video_2016-09-01_0732.mp4
 - INV-18 Deputy Martins' body camera.mp4

- INV-21 Deputy Alicea's body camera
- Deputy Alicea's body camera_1.mp4
- Deputy Alicea's body camera_2.mp4
- Deputy Alicea's body camera_3.mp4
- INV-23 Video Recorded Interview of Beatrice Sheppard-Scott
- INV-26 Officer Danler Body Camera
- Officer Danler Body Cam 1.mp4
- Officer Danler Body Cam 2.mp4
- INV-37 Officer Salemi Body Camera
- Officer Salemi Body Cam 1.mp4
- Officer Salemi Body Cam 2.mp4
- Audio files
 - INV-2 Radio Traffic 20162450589_8A_0555 TO 0800 HRS.mp3
 - INV-3 20162450589.mp3
 - INV-3 20162450600.mp3
 - INV-3 20162450605.mp3
 - INV-4 Chris Salemi.MP3
 - INV-5 Edward Heim.MP3
 - INV-7 Interview of Beatrice Scott.mp3
 - INV-8 Sworn Interview with Christine Nickolas.MP3
 - INV-10 Sworn statement with Isaiah Nickson.MP3
 - INV-12 Interview of Sgt. Sacco.mp3
 - INV-17 Sworn statement from Patricia Martins 09-01-16 1006hrs.MP3

- INV-19 Sworn statement from Jessica Alicea 09-01-16 1038hrs.MP3
- INV-22 Sworn statement from David Monks 09-01-16 1026hrs.MP3
- INV-24 Detective George.MP3
- INV-25 Interview of Officer Stephan Seiltgen.mp3
- INV-38 Recording of Dexter Campbell.MP3
- Images
 - Photo 1-6 Beatrice.jpg (consecutive)
 - DSC_0174.jpg – DSC_0420.jpg (consecutive)
 - DSC_0001.jpg – DSC_0173.jpg (consecutive)
- Report by Chris Lawrence of Elgin Security Consultants, Inc.
- Nine photographs of vehicle

In addition to the above materials I relied on the following texts and treatises that I find authoritative in the area of police use of force and defensive tactics.

Bandura, A. (1977). *Self Efficacy: The exercise of control*. NY: Freeman.

Bar-Haim, Y., Lamy, D., Pergamin, L., Bakermans-Kranenburg, M., & Uzendoorn, M. (2007).

Theat related attentional bias in anxious and non-anxious individuals: A meta analytic study. *Psychological Bulletin*, 133, 1-24.

Breedlove, S. &. (2013). *Biological Psychology: An introduction to Behavioral, Cognitive and*

Clinical Neuroscience (7th ed.). Sundaerland, MA, USA: Sinauer Associates, Inc.

Eysenck, M., Derakshan, N., Santos, R., & Calvo, M. (2007). Anxiety and cognitive control

performance:Attentional control theory. *Emotion*, 7, 336-353.

Grossman, D., & Christenson, L. (2007). *On Combat: The Psychology and Physiology of Deadly*

Conflict in War and Peace. New york: Little Brown and CO.

- Kinnaird, B. A. (2003). *Use of Force: Expert Guidance for Decisive Force Response*. Looseleaf.
- Lazarus, R. S., & Folkman, S. (1984). *Stress, Appraisal and Coping*. New York, NY, USA: Springer Publishing.
- Meloy, R. (2006). Empirical Bias and forensic application of affective predatory violence. *Australian and New Zealand Journal of Psychiatry, 40*, 539-547.
- Nieuwenhuys, A., Savelsbergh, G. J., & Oudejans, R. R. (2012). Shoot or Don't Shoot? Why Police Officers Are More Inclined to Shoot When They Are Anxious. *Emotion, 12*(4), 827-833.
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- Tenenbaum, G., & Bar-Eli, M. (1993). Decision Making in Sport: A Cognitive Perspective. In *Handbook of Research in Sport Psychology*. NY, NY: MacMillan.
- Tenenbaum, G., & Razon, S. (2008). Integrating Emotions, Perceptions, Cognitions and Motion Under Perceived Pressure Conditions. *Interservice/Industry Training, Simulation, and Education Conference (I/ITSEC)*.
- Zahn, M. B. (2004). *Violence: From Theory to Research*. Cincinnati, Oh: Lexis-Nexis Group.

IV. SUMMARY OF EVENT

1. On September 1, 2016 at 5:54am, Caller Dexter Campbell contacted the Oviedo Police Department and said, “*send the police.*” When the call taker asked what was wrong, Campbell said, “*just do like I say,*” and hung up.

2. During two separate call backs by the Oviedo Police Department, the call was forwarded to a voicemail. No other information regarding the call could be gathered.
3. Officer Mathew Danler of the Oviedo Police Department in Oviedo, Florida responded to the 911 hang up call at 996¹ Sharon Court.
4. Back-up officers included Officer Chris Salemi, and Officer Ed Heim, also both employed by the Oviedo Police Department.
5. When officers arrived, they approached the residence with their lights off and parked in the street that ran along the front of the residence.
6. The street was a cul-de-sac, affording only one way in and out to the residence in question.
7. At 5:58:59 they got out on foot and observed a black Chrysler vehicle parked to the outside of the designated parking spots in front of the residence.
8. The Chrysler was backed in, with the front of the vehicle facing towards the roadway.
9. Unbeknownst to the officers, the vehicle was occupied by driver Jason Scott and the passenger was Scott's estranged wife Beatrice Shepard-Scott.
10. Jason Scott had earlier in the evening knocked on Sheppard-Scott's door at 990 Sharon Court and insisted that she accompany him to his vehicle to talk.
11. As the officers approached the residence, Officer Danler said that he noticed the door of the residence ajar. This captured his attention and he alerted the other officers by saying, "door."
12. As officers advanced towards the residence, Jason Scott revved the engine of the Chrysler, drawing the attention of the officers to the vehicle.

¹ This address was mistakenly reported for 990 Sharon Court.

13. According to Officer Salemi, all officers were alarmed by the sudden noise of the revving engine and they unholstered their firearms as a defensive measure.
14. Officer Danler's position in the roadway may have been compromised by a silver Chevrolet S-10 pick-up to his right side. The image of the vehicle is picked up on his lapel camera moments before Scott's vehicle began moving.
15. According to Officer Danler, the vehicle suddenly accelerated toward him. He said that he perceived that it was attempting to strike him.
16. Both Officer Salemi and Officer Heim said they observed the vehicle accelerate in the direction of Officer Danler.
17. Officer Danler quickly drew his weapon and discharged six rounds into the vehicle, aiming at or into the driver's side window.
18. According to Officer Salemi, as the vehicle accelerated towards the officers, he held his gunfire because his line of sight to the accelerating vehicle was obstructed by the officer's patrol vehicles that were parked in the roadway.
19. At 5:59:36, 37 seconds after the officers first called out on scene, Officer Salemi called for emergency traffic because shots had been fired.
20. Officer Danler was wearing a shoulder lapel camera and captured the video event on video. The audio track was not recorded.
21. While still on the scene, Officer Danler would later describe to Sergeant Sacco that he observed the vehicle turn its wheels towards him and accelerate towards him.²
22. Danler claimed that he was in fear for his safety.

² See FDLE Investigative Summary report, Interview with Sgt. Daniel Sacco, pg. 7.

23. Officer Heim recalled Officer Danler move quickly backwards as he discharged rounds at it.
24. The driver Jason Scott was struck in the arm and in the abdomen as the projectiles entered into the vehicle's passenger compartment.
25. During and after the shooting, the black Chrysler continued to drive away at a high rate of speed. The vehicle was 'blacked out' as it fled the scene without its lights on. At one point, an officer claimed that he observed the Chrysler driving on the wrong side of the roadway.
26. The passenger, Beatrice Shepard-Scott, had also suffered injuries. She "jumped out" of the vehicle at 330 Reed Ave. She ran to her aunt Minnie Alexander's home and knocked on the door. She would later be located at this address.
27. Shepard-Scott later notified officers that Jason Scott was wanted on an outstanding warrant.
28. Jason Scott survived his wounds.
29. Scott later claimed that he was not aware that the individuals who were approaching him were police officers.
30. This statement was rebutted by passenger Beatrice Sheppard-Scott who said that Jason Scott said to her, "*there go the police,*" before he took off.
31. On September 8, 2016 at 9:49am Special Agent Bill Lee contacted Danler's attorney Marty White to schedule a time for an interview. White told Lee that on advice of counsel, Danler was declining the opportunity to provide a statement.

32. The case was presented to the Seminole County Grand Jury and Officer Danler was subsequently indicted for two counts of Aggravated battery and one count of firing into a motor vehicle.

V. Preliminary Report

The State of Florida has indicted Officer Matthew Danler for two counts of aggravated battery and one count of shooting into a motor vehicle after firing at a black Chrysler vehicle that he claimed accelerated toward him as he was conducting official police business regarding the investigation of a 911 hang up call for service. Danler claimed that he used deadly force in defense of himself and implied that the force used was upon a well-founded and reasonable belief that his life was in imminent danger of death or great bodily harm.

I have been asked to review the evidence and to compare it with what is known about behaviors associated with accepted standards of use of force protected by law in the State of Florida. I rely upon the standards generally taught to police for investigating use of force (intrinsic and extrinsic to the police organization) and accepted models for determining *objective reasonableness* in use of force reviews.

I have been asked to analyze the elements of this use of force encounter to describe decision making criteria generally taught and understood by police officers in the State of Florida. This includes such areas as subject factors, relative positioning, proportionality of force, escalation and de-escalation concepts, force continuums, force matrices and formulations for determining objective reasonableness. I have relied upon scholarly literature when dealing with matters of empirical questions to describe the process of human decision making (cognitive) and behavior (motor) under stress and how stressful events can affect human performance. After an

exhaustive review of the documents and item provided to me and indicated in part III of this report, I proffer the following opinions and I attest that they are accurate to a reasonable degree of certainty based upon my education, training and experience.

A. Use of Force Reconstruction

Police, defense attorneys and prosecutors regularly rely upon use of force experts to review and interpret evidence contained in the record in order to reconstruct use of force encounters. The Use of Force Reconstructionist provides guidance and counsel for understanding evidence by ferreting out fact from fiction regarding the experience of dangerous or deadly encounters.

A ‘use of force’ is an event that deals primarily with human actions during acute bouts of violence. Most often use of force transactions involves aggressor(s) who use acquisitive or punitive violence to harm or threaten others, and defender(s) who rely on defensive or affective violence for self-protection against these harmful acts (Zahn, 2004). Cognitive psychology and cognitive neuroscience describe functions associated with emotions, aggression and stress that help discern between the two types of violence. There are many other intersecting areas of science that use of force reconstruction may rely upon including neurobiology, sociology, and anthropology (evolutionary psychology) to describe both conscious and unconscious behavioral responses to threats of violence. Many fight/flight behaviors motivate from subconscious processes (Breedlove, 2013) brought about by activation of the sympathetic nervous system, an area of scientific enquiry not commonly understood by laymen.

Uses of force are nearly always emotional events. Emotions mediate normative decision-making processes (Tenenbaum & Razon, 2008), adding to the complexity of observable human behavior under stress. In particular, fear and anger affects are engaged for the strict purpose of survival. The brain, central nervous system, autonomic nervous system (sympathetic, parasympathetic), peripheral nervous system, and endocrine system are all implicated in behavioral responses to threats. Somatic variables affect behavior, and behavioral variables also affect body responses (Breedlove, 2013).

A behavioral event (violence) may cause activation of the limbic system, resulting in an unusual array of automatic behaviors, perceptual distortions and memory deficits that must be calculated into the analysis for the purpose of lending subjective understanding (what the person did) to the objective review (what is legally permitted). In some cases, under such arousal the actor may lack agency, causing decisions to become involuntary.

Use of force reconstruction assists triers-of-the-fact by providing a special knowledge of police procedures and at times scientific basis for understanding human behavior under stress. Use of force reconstruction allows reviewers to juxtapose specific case information with legal theory, criminalistics, and forensic science to foster objectivity in measuring the reasonableness of a person's actions within the parameters of policy or law.

B. INVESTIGATING USE OF FORCE

All police use of force must be objectively reasonable.³ There is an implication in the construct of reasonableness that an officer's behaviors are completely within his control. In fact,

³ Graham v Connor, 490 U.S. 386

what an officer sees at any particular moment may not always be precisely or accurately understood by that officer until after a decision has been made. In cases where limited information is compounded by compressed time frames, cognitive decision-making may default to heuristic response. Memory can also be affected, resulting in uncertain or questionable recall by the officer. To this point, an officer's statements should be corroborated with physical evidence or other eye-witness statements where possible.

It has been observed that the less time a person has to analyze a perceived threat, and the more critical the potential outcome of that threat, the greater the possibility for error.⁴ For instance, there have been many incidents of police officers firing upon people who point firearms at them, only to find out later that the firearm wasn't loaded⁵ or that the firearm was a fake⁶. There are also incidents of officers firing upon persons who hold objects other than deadly weapons in their hands like cellphones⁷, spoons⁸ and towels.⁹

In other incidents, officers have fired upon persons whose overt or furtive movements (postural cues) suggested the presence of an attack. In Maryland for instance, a subject advanced on an officer, placed his arm behind his back and "whipped it around" reasonably suggesting that he was armed. In truth, he only pointed his index finger at the officer held in the grip position of a firearm. He was shot and killed by the officer who was forced to determine if the subject was armed in a fraction of a second.

4 Janis, I. & Mann, L. Decision Making: A Psychological Analysis of Conflict, Choice and Commitment. 1977, The Free Press, N.Y.
5 <http://www.13newsnow.com/story/news/local/mycity/newport-news/2015/07/04/deadly-officer-involved-shooting-in-newport-news/29692873/>
6 <http://www.policeone.com/officer-shootings/articles/8637066-Video-Texas-cops-fatally-shoot-man-who-pulled-replica/>
7 http://www.richmond.com/news/latest-news/henrico-police-officer-receives-silver-valor-award/article_abc64018-4308-11e3-b1c2-001a4bcf6878.html
8 <http://time.com/4009242/police-spoon-shooting/>
9 <http://www.latimes.com/local/lanow/la-me-ln-man-with-towel-on-arm-shot-in-head-by-lapd-20150620-story.html>

Unfortunately for that nineteen-year-old subject, his behaviors and movements were directly consistent with actual deadly threats that the officer was trained to recognize. Fortunately for the officer, this act was caught on video¹⁰ and the officer's shooting was found to be justified.¹¹ A similar incident occurred in Salem, N.H.¹² when a man made a "gun gesture" with his hand towards a police officer. The officer fired one round at him, but missed before he took him into custody. The man was later charged with criminal threatening and reckless conduct for intending to appear that he was armed. These stories are not for direct comparative purposes to this case but rather to objectively characterize the decision-making process police must undergo when facing perceived threats. In most cases involving police use of force, the reviewer cannot be certain what another person was actually thinking or intending when force was used against them. It is rare, in the hindsight of force, that a person willfully admits that they were trying to do the officer harm.

How often and why police officers fire at people under stressful circumstances are empirical questions. Thomas Aveni from the Police Policy Studies Council designed an original research piece to understand multivariate situational and behavioral predictors of police shootings involving felony-in-progress suspects, under circumstances meticulously designed to appear ambiguous. The study used 307 officers/deputies from six agencies who engaged 117 "unarmed" suspects.

The findings showed that officers are more likely to fire upon a person when that subject's actions are suggestive of "shoot" than when a subject's actions are to surrender without

10 <https://www.youtube.com/watch?v=jRKXa59PdEk>

11 <http://www.wbalv.com/news/video-to-be-released-in-reisterstown-police-shooting/35487232>

12 <https://www.bostonglobe.com/metro/2015/08/18/salem-police-fire-shot-man-who-made-gun-gesture-during-confrontation-injuries-reported/iziKzxpXXYolm3bRCqMwBP/story.html>

shooting, while holding an object in their hand. This was explained by the high correlation found in scenarios which had been assigned high “acting quotients” (AQ) for the amplitude of critical acting variables.

Acting quotients are compelling *movements* that were assigned values based upon their perceived danger. For instance, if an actor turned more quickly toward the camera in one scenario than another, a participating officer would react to that turn with more belief that it represented the initiation of a threat than if that turn had been performed less rapidly. Likewise, if the actor turns with his/her hands at waist level – where a secreted weapon is believed to have been accessed, the officer might be more inclined to shoot than if the actor turned with his/her hands held high, in more of a “surrender” posture.¹³ This study showed that the higher the acting quotient, the higher the correlation was for officer’s shooting “unarmed” suspects.

Many variables have been studied in the context of police involved shootings. Race for instance has been explored extensively. Other factors such as age, manner of dress, context of crime and subject behavior are of interest to researchers as well. But when these variables are controlled for, the research shows that officers use the actions of the subject as their primary source for identifying the substance of a threat.

In 1980, a study published in the American Academy of Political and Social Science identified a subject’s behavioral actions as predictive of the officer’s decision to use deadly force. Seven categories of classification were examined to include, 1.) using a weapon, whether a gun, knife, automobile or any other potentially lethal or injurious object for purposes of assault, 2.) threatening the use of but not actually using a weapon, whether by pointing or aiming it or by

¹³ Aveni, T. The MMRMA Deadly Force Project A Critical Analysis of Police Shootings Under Ambiguous Circumstances. The police Policy Study Council, 2008

indicating verbally that a weapon would be used, 3.) displaying a weapon while not threatening its use, either verbally or otherwise, 4.) assaulting an officer or civilian where no weapon is used, threatened, or displayed, 5.) appearing to reach for a weapon when no weapon is actually used, threatened, or displayed, and there is no assault, 6.) disobeying an officer's order, usually an order to freeze or halt, when no weapon is used, threatened, or displayed, and there is no assault, and 7.) other actions precipitating shootings to include accidental discharges at suspects.

The author concluded:

“In almost all instances, the suspect's act precipitating a shooting incident is the final act that caused the officer to fire, that is, that act but for which the shooting would not have taken place.”¹⁴

It is important to reiterate that an officer's decision to shoot during this examination was most highly correlated with the subject's behaviors just prior to being shot at. A person who takes actions perceived as threatening to a law enforcement officer is more likely to be engaged with deadly force than by any other predictive variable.

Law enforcement officers have been trained for decades to use force only when they reasonably believe the force to be necessary. This mandate does not require that their use of force be correct, but only that the decision to use force be grounded upon objective standards of response to resistance as accepted within the profession. This is how the profession defines and operationalizes reasonableness in use of force decision making.

¹⁴ Meyer, Marshall W. Police Shootings at Minorities: The Case of Los Angeles. American Academy of Political and Social Science, Vol. 452, The Police and Violence (Nov. 1980), pp. 98-110. . . in association with the American Academy of Political and Social Science

Social constructs of resistance and response predetermine appropriateness. Each category of resistance is matched with a corresponding category of response. The scale uses a theory of escalating and de-escalating behaviors that scale proportionality as defined in the model.

FDLE		MATRIX RECOMMENDED RESPONSE TO RESISTANCE AND LEVELS OF RESISTANCE						CJSTC 65		
R E S I S T A N C E	6 - Aggravated Physical	X	X	X	X	X	X	X	X	X
	5 - Aggressive Physical	X	X	X	X	X	X	X	X	
	4 - Active Physical	X	X	X	X	X	X	X		
	3 - Passive Physical	X	X	X	X	X	X			
	2 - Verbal	X	X	X	X					
	1 - Premise	X	X	X	X					
Legend: Checked area denotes approved training program response level. Only responses in checked area are approved. If in a different box, it is not an approved response.		Officer Presence 1	Communication 2	Physical Control 3	Intermediate Weapons 4	Impairing Control 5	Deadly Force 6			
RESPONSE LEVELS Incorporated by Reference in Rule 11B.27.001(4)(g)(II), F.A.C.										

With respect to this case, the responding officers all agreed that they perceived the sudden movement of the car in the direction of Officer Danler to constitute, at least for a brief period of time, *Aggravated Physical Resistance*, a category renamed by FDLE subject matter experts (SME) to *Deadly Force Resistance* in 2007¹⁵.

The Florida Department of Law Enforcement Criminal Justice Standards and Training Commission offers the following definition of Deadly Force Resistance:

*“Deadly force resistance is a subject’s hostile, attacking movements with or without a weapon that create a reasonable perception by the officer that the subject intends to cause and has the capability of causing death or great bodily harm to the officer or others. (DT501.2.B.4.)”*¹⁶

¹⁵ It should be noted that the FDLE CJSTC no longer requires basic recruit students to train to the depicted force continuum as it has been determined to be confusing to many agency policies that have constructed their own continuums. However, this continuum remains endorsed by the CJSTC.

¹⁶ See FDLE FL BRT Curriculum (2010) Vol. 2, pp. 206

Comparing this definition to the facts of the case under review, Officer Danler explicitly stated that he believed that the vehicle being operated by Jason Scott was heading directly for him. He said that the vehicle's pattern of movement suggested to him that the driver was trying to run him down. The other officers who were also in the roadway described the same movements and actions. They said that they too were preparing to shoot at the motor vehicle, but for an obstructed line of sight, held their fire.

The mere presence of a quickly accelerating motor vehicle away from police officers who are conducting an investigation, is not sufficient grounds to justify shooting at the motor vehicle. Deadly force cannot be used to effect arrests or prevent escapes.¹⁷ But a motor vehicle accelerating towards a police officer may constitute a perceived deadly threat. The ultimate question in this case is for triers-of-the-fact to determine if Officer Danler reasonably perceived that he was under deadly attack based upon the antecedent behaviors that Mr. Scott took when he noticed the police officers advancing on him.

Use of force investigations take into account that law enforcement officers regularly work in a tenuous environment where the facts and circumstances are rarely fully known but rapidly unfold. Officers regularly make split second decisions with limited knowledge of events. Because they work in an open skill environment,¹⁸ law enforcement officers are trained to recognize that cognitive conclusions can only be supported upon available information at any given moment, a concept taught to police officers as the "totality of the circumstances."¹⁹ Facts sometimes prove differently in hindsight than the officer reasonably believed them to be at the

¹⁷ Absent specific rules unique to adjudicated prisoners.

¹⁸ Schmidt, R.A. & Lee, T.D. (2011) *Motor Control and Learning: A Behavioral Emphasis*, Fifth Ed. Human Kinetics, pp. 23

¹⁹ See FDLE FL BRT Curriculum (2010) Vol. 2, pp. 205

time force was used. Jury instructions regularly ask triers-of-the-fact to place themselves in the officer's shoes at the moment force was used to prevent *hindsight bias*.²⁰

Since the Supreme Court ruling of *Tennessee v. Garner* (1985) and the subsequent ruling of *Graham v Connor* (1989), use of force in a police setting has changed from an Eighth Amendment analysis (cruel and unusual punishment) to a Fourth Amendment analysis (objective reasonableness). The Court was clear about this change of analysis when it declared: *the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.*" The Court in this context is referring specifically to the reasonableness of a particular use of force by police officers. Where it can be argued that individual officers may employ different tactics to approach calls for service, this is of no consequence to a criminal analysis of the officer's decision to use force. The use of force review determines to find if the officer's actions were objectively reasonable and consistent with existing policy, law and training.

For triers-of-the-fact to understand the appropriate motivations for why an officer used force, they must disregard the clarity of hindsight and focus directly on the evidence that was available to the officer at the time the force was used.

- "What motivated the defendant to use force?"
- "What did the officer reasonably believe at the time he/she used the force?"
- "Was the use of force proportional to the threat reasonably perceived by the defendant?"
- "Was the officer forced to act in light of rapidly unfolding circumstances that were tense and uncertain?"

20 Harley, E.M. (2007) Hindsight bias in Legal Decision Making, *Social Cognition*, Vol. 25, No. 1 pp. 48-63

C. SELF DEFENSE IN FLORIDA

At the time Officer Danler used deadly force, he was acting in the capacity of a police officer for the City of Oviedo, FL. The indictment however, suggests that that Officer Danler may have been acting outside of the scope of his duties at the time he fired his weapon, and if this is determined to be so – then a proper use of force review requires the appropriate elements of self-defense law from the perspective of a civilian actor. The following pages describe the legal considerations for use of force by civilians.

Florida statute 776 provides legal protection for *all* persons who use force to protect themselves, their property or others. The statute describes that a person is justified in using force, except deadly force against another when and to the extent that the person reasonably believes that such force is necessary to defend himself or another against the other’s imminent use of unlawful force.²¹

A person is further justified in the use of deadly force and does not have to retreat in the face of an assault if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm²² to himself or others or to prevent the commission of a forcible felony, so long as that person is not engaged in an unlawful activity and is attacked in any place where he or she has a right to be.²³

D. STATUTORY REGULATION

²¹ Florida Statute 776.012

²² Great bodily harm is generally described as that force which is likely to cause permanent disfigurement, broken bones, scarring and overnight hospital stays.

²³ Florida Statute 776.013(3)

In 2005, SB-436 and HB-249 expanded the provisions of Florida Statute 776.012 and created Florida Statute 776.013 removing the “duty to retreat” in the face of attack clause. This bill intended to create unambiguous protection for persons who used force in light of actual and perceived attacks. The language permitted that a defender be allowed to repel an attacker using any measure of force, including deadly force as a matter of self-defense.

The language is clear; *no person* or victim of crime should be required to surrender his or her personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.²⁴ Perhaps of equal importance, the current statute *prohibits prosecution and prohibits civil lawsuits against persons who have a reasonable claim of self-defense*. On September 1, 2016, the date that Officer Danler used deadly force against Jason Scott, there was no requirement that any person, in particular a police officer, run or flee from the threat of an attack *until his back is against the wall*.²⁵

[Citing F.S.S. 776.032]

(1) A person who uses force as permitted in s. 776.012 (in defense of self or others), s. 776.013 (for home protection), or s. 776.031 (forcible felonies) is justified in using such force and is immune from criminal prosecution and civil action for the use of such force... As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

²⁴ Senate Bill 436, 2005 legislature.

²⁵ The “back against the wall” standard had been in place as a matter of common law adopted from old English self-defense standards [Blackstone]

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1). It is important to note that Florida statute 776 considers a variety of circumstances described within the body of the statute to clarify previously ambiguous areas of self-defense law.

The Castle doctrine is an anachronistic construct codified in F.S.S 776.013 and it addresses persons who defend themselves from attack, most specifically while on their private property to include a dwelling, residence, place of business or vehicle. Statute 776.012 very obviously represents an expanded provision of the castle doctrine, and is often referred to as the “*stand your ground*” section of the statute. It allows force to be used defensively in *any* area that a person has a lawful right to be

At first look, the two subsections seem to overlap and contradict each other. However, upon closer inspection, there is a fine distinction between the language of 776.012 and 776.013 that considers the circumstances that evolve in a typical self-defense encounter. Whereas Section 776.012 justifies the use of force when necessary to defend against another’s imminent use of unlawful force, section 776.013 justifies the use of force when “a person is attacked.”

Though a subtle distinction, these two sections are important to clarify to understand the difference between an imminent threat and an actual attack. Triers of the fact have historically

argued about to what degree and under what circumstances force is considered appropriate. Because the affirmative defense of “self-defense” requires that defendants provide a reasonable explanation for when force is used, Florida Statute 776.013 explains that immunity is clearly provided to a person when “that person is attacked.” This statement requires a clear understanding of what actions constitute an attack under law. It seems reasonable to assume that an attack occurs during a physical contact with an aggressor. But what about if no physical contact is made, can a presumption of an attack still be levied against a person if there is no actual contact?

SB-436 and HB-249 (2005) speak to these provisions in the construction of Florida Statute 776.013 explaining that the unwarranted entry into a person’s private domain gives a presumption of fear or death or great bodily harm. To state it more plainly, a person attempting to unlawfully enter a private domain is automatically considered to be attacking the occupants within even though no direct contact has yet been made. Under jurisprudence, it is not necessary that a defender attempt to calculate the danger posed by an intruder’s conduct when his home or conveyance is forcibly entered. The mere act of attempting to unlawfully enter, by itself, justifies the use of force for protection, and even permits deadly force if there exist reasonable and factual grounds to believe that unless used, a forcible felony would be committed.²⁶

The use of deadly force to prevent forcible felonies has always been a remedy afforded by Florida Statute 776.012 and it is now further expounded upon in 776.013 and 776.031. Section 3 of 776.013 expands the right to use force against an attack regardless of where it

²⁶ See HB 249 CS (2005) Substantive Analysis Sec. 1 (B)

occurs, but it reminds us that a person who is attacked outside of their private property must not be engaging in unlawful conduct in order to use the immunity provision of this statute.

Statute 776.013 can be juxtaposed with 776.012 to prescribe self-defense allowances for persons who are being threatened but have not yet been attacked. If a person is not in a place that affords the prima facie protections of the Castle Doctrine, then it is naturally more difficult to defend and justify an appropriate use of force. Absent an attack on a person who is in the safety and security of his home or vehicle, a defender must carefully recount very specific facts and circumstances that gave them fear that an attack was imminent in a public location.

The language of Statute 776.012 is critical because it provides a justification for *anyone* who is forced to reasonably assess and predict a person's threatening behavior based solely upon that person's words, actions and demeanor. Without the benefit of being able to show an actual attack a defender must carefully calculate the aggressor's perceived intent and recount those behaviors as the basis for his affirmative defense. A defender must measure the threat presented to him and reasonably conclude that an aggressor intended to cause him physical harm and that physical harm must be imminent. The defender must postulate and later articulate a reasonable belief that is supported by evidence and/or witnesses to explain why he believed that his life was in imminent jeopardy of death or great bodily harm in order to justify the use of deadly force. He is not under this statute required or compelled to await *an actual physical attack* as described in 776.013 before being permitted the use of deadly force to protect himself. In plain language, he is not required to be harmed before shooting in self-defense.

E. DECISION MAKING UNDER STRESS

Within the human limbic system lies the amygdala, a small neurological structure contained within the medial temporal lobes of the brain. By utilizing the central nervous system, the amygdala can call upon additional latent resource of the body to help manage threats. When a threat is perceived, electrical impulses from the hypothalamus are sent to the pituitary gland that in turn secretes adrenocorticotrophic hormone (ACTH) to the adrenal glands to activate a discharge of catecholamines (stress hormones) into the system. Adrenalin (epinephrine, norepinephrine and cortisol) is secreted into the body through the bloodstream. These chemicals organically influence neural receptors, the vascular system and the person's motor ability. A rush of adrenalin assures that the person is more capable of defending himself against the perceived threat by providing increased strength, greater endurance, and enhanced perceptual abilities.

In an attempt to optimize the probability for survival, the mind suspends the operations of the comparatively slow cognitive processing associated with more advanced brain functioning (Grossman & Christenson, 2007) by dampening down the efficacy of the pre-frontal cortex. As a result, executive functioning is also suspended along with the advanced reasoning powers assigned to the frontal cortex.

Perceptions transition from thoughtfulness, reflection and reason to a process known as *heuristics*, mental shortcuts that look for experience based solutions and highly efficient problem-solving

techniques.
often
outcomes are
apparent.

“Intuition has many messengers but the clearest and most urgent is fear. Nothing in life gets attention as reliably as fear—and that’s the way the system is designed to work. Fear does some miraculous things when we perceive that we are in the presence of danger. First it gets our bodies ready for action with a dose of adrenalin. It heats up the lactic acid in our muscles for running or fighting, and it even gives us a chemical called cortisol that makes our blood clot more quickly in a fight. It’s an amazing system designed to be a brief signal that gets you to listen, address the risk, and move on.”

Gavin de **Becker** – *Fearless; Real truth about risks, safety and security in a time of terrorism*

The results are
unrefined. The
often brutally
Under the threat

of death or potential serious injury the midbrain can become vicious. During episodes of extremely high arousal, the high-minded constructs of morality, proportionality and fairness are quickly discounted. The organism has a singular objective and that is survival.

Escalating levels of arousal affect both conscious and subconscious processes of the mind. When anxiety increases, performance is also expected to increase—to a degree. However, when anxiety begins to exceed a person’s anxiety threshold, performance plateaus and begins a negative descent (see figure 1). If anxiety reaches an extreme state, panic sets in and performance and decision-making suffer catastrophically. (see figure 2).

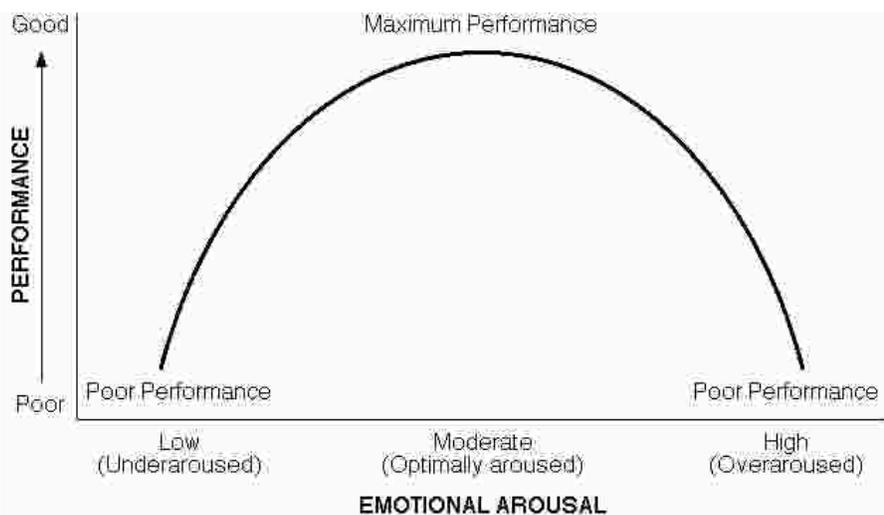


FIGURE 1: YERKS-DODSON (1908)

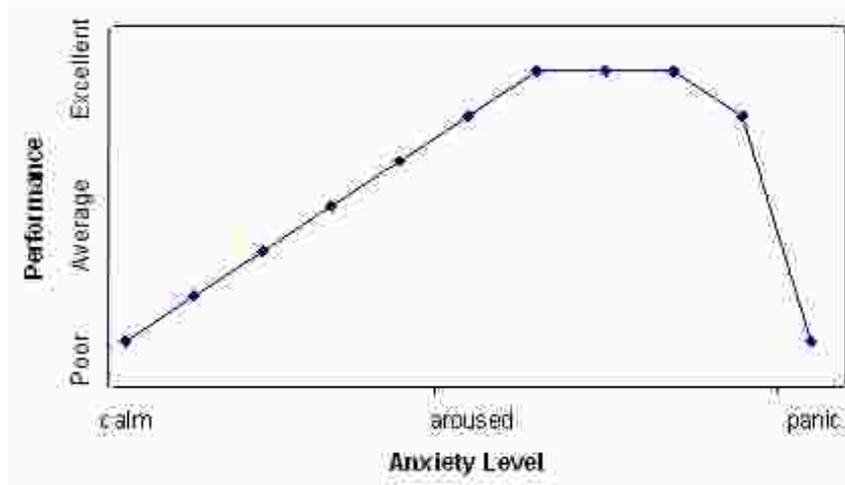


FIGURE 2: Catastrophe Model

These theoretical models of performance under pressure are important to lay the foundation of how extreme anxiety (stress) caused by fear can affect a person’s cognitive and physical skills beyond his or her ability to control.

In combat, acute anxiety (stress) often results in a physiological reaction commonly called the fight/flight phenomena. Though the phenome might suggest only two alternative choices to a perceived threat, in fact, there are four alternative choice selections available to a person who faces the potential of violence. These strategies modulate with increasing states of anxiety.²⁷ (See Figure 3)

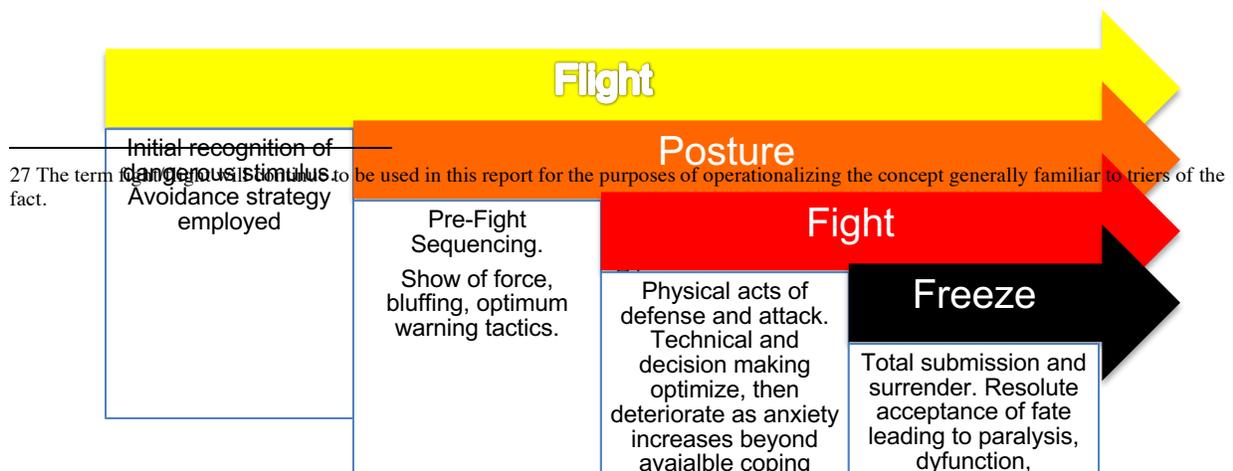


FIGURE 3: Fight/Flight Model

Anticipated actions and behaviors become less conscionable when the fight/flight processes are engaged. The survival mechanisms of the mind operate independently of conscious awareness and are not subject to vetting through the advanced cognitive processes of the cortex. From a legal perspective, these changes in brain functionality may compromise evidence of *mens rea* and make it difficult to objectively quantify an individual's intent.

F. FORCE TYPE

In self-defense investigations, it is important to frame the investigation by dissecting the event into smaller sections along a continuum. Offensive actions are most often countered with defensive actions and vice versa as a principle of performance psychology. This can be observed in the myriad of sporting events that rely on offense/defense pairing of opposing sides. Whether the sport is designed to provide an opportunity to play offense or defense (American football,

baseball, etc.) or the game naturally generates an offense or defense based upon the circumstances of the moment (basketball, soccer, boxing) it holds true that when one person or side is on the offense, it is natural for the opposing side to assume the opposite position.

During periods of combat this axiom also holds true. Along the continuum of the timeframe of a violent encounter there are moments when a fighter is either attacking or defending. When deadly force is used, it must be shown that the person used deadly force as a defensive measure for his or her own protection or the protection of another to be considered lawful.

Defensive force is called *affective violence* due to its strong link to emotions. (Zahn, 2004) Affective violence occurs reactively to offensive force or *acquisitive violence*. Both violence types leave unique signatures in the actions and behaviors of those who have used the force. Ironically, the actions and behaviors of defensive respondents are often the most extreme and may appear to the untrained eye as excessive. Defensive behaviors often manifest acts of emotional desperation brought about by high levels of arousal from fear. The result may be brutal consequences to the aggressor.

Multiple stab wounds, multiple gunshots or excessive tissue injury to the assailant is a common signature in self-defense cases.²⁸ Excessive injury as a defensive artifact is so common that it has been termed, “overkill” by many experts in self-defense.²⁹ The legal irony is that objectively reasonable force is typically described as a cognitive process that is measured rationally. It is rational to assume that if one punch, cut, stab wound or bullet is sufficient to end

28 I have consulted on several cases where multiple stab wounds and gunshots are present in the aftermath of a defensive encounter. See State of Florida v Aaron Little, CASE NO. 10-CF-015747 (RM), State of Oregon v Charles Joseph Lake CASE NO. 12-03-31093, State of Florida v Augustine Wylie CASE NO. 06-CF-019669, State of Florida v Amanda Arruda CASE No. 12-CF-15983, Commonwealth of Massachusetts vs. Eugenio Lopes/Defendant

29 Miller, R & Kane, L (2012) *Scaling Force; Dynamic Decision Making Under Threat of Violence*, YMAA Publications, Wolfeboro, **Also** Grossman, Dave & Christenson, L (2007) *On Combat; The Psychology and Physiology of Deadly Conflict in War and Peace*, Back Bay Books, Little Brown and Company, New York, Boston

the attack then that is where the defensive force should end. Anything beyond that would be typically considered excessive. This reasoning is grounded in ignorance to the complexities of performance psychology by discounting the human factors regarding the high arousal state of the fight and flight phenomena.

For trained law enforcement officers, the same stress response holds true.

“Researcher Alexander Jason reports that even under benign experimental conditions brain programming compels roughly 7 out of 10 officers to keep discharging rounds after being signaled to stop shooting. “In a real gunfight, under extraordinary stress and threat of death, an even much higher percentage would likely deliver extra shots,” Jason asserts.

On average, additional findings show, officers may “reasonably” fire 6 rounds or more into suspects who initially are standing and then begin falling and who, in fact, may already be mortally wounded. And that’s 6 rounds per officer involved in the confrontation.

Understanding why this occurs can be critical in shooting investigations and in criminal proceedings and civil lawsuits that allege excessive force by officers for firing ‘too many’ shots,” says Dr. Bill Lewinski, executive director of the Force Science Institute. “As Jason explains, so-called ‘extra’ shots are generally beyond an officer’s control. They’re more likely to be an involuntary reaction under stress than a conscious decision with malicious motivation.”³⁰

30 Taken from Force Science Research Center, March 3, 2010

Rather than counting wounds or bullet holes to decide if a person was reasonable in their use of defensive force, the question of reasonableness should remain on whether the person was using force *defensively* at the time he or she used force. To properly analyze the use of defensive force it is critical to recognize that *affective violence* is a reactionary, basal response to a perceived imminent threat that may be beyond the complete cognitive control of the actor.

Acquisitive violence is different than affective violence because it is not preceded by autonomic arousal. In fact, it is characterized by the *absence of emotion and threat*. This type of violence is generally controlled, crafty, cunning and cognitively planned. (Meloy, 2006) *Acquisitive violence* is offensive and predatory. It is motivated by the express purpose of obtaining something of value from another through the thoughtful and calculated use of force. *Acquisitive violence* has spawned powerful legislation throughout the fifty states. These laws are designed to protect citizens against predators, not to prevent persons in danger from using violence to protect themselves or others from predators. Laws such as assault, battery, manslaughter and murder fit within the schema of predatory violence, as do the crimes of robbery, rape and other types of *acquisitive violence*.

Comparing these two distinct violence types assists in the larger enquiry regarding a person's *motive* for violence. This is an important legal distinction that separates predatory crimes from all other acts of self-preservation or protection of others. For example, a police officer that kills a person to prevent him from committing a forcible felony would be said to have used *affective violence* to stop the threat rather than *predatory or acquisitive violence* demarcated by the intent of the attacker who was attempting to acquire something of value. Value is the defining feature of *acquisitive violence*. Value does not have to be tangible like a watch or wallet. It can be

intangible, like the feeling of power that one might derive from victimizing or injuring another person. For example, it could be the value that a suspect derives from escaping police custody or the value that a police officer may derive from exerting police powers.

I. THE ACCEPTED RULES FOR USING LAWFUL DEADLY FORCE: ABILITY, OPPORTUNITY, JEOPARDY

The use of deadly force is analyzed by breaking down the threat that resulted in the officer's decision to use force into three distinct sub-components—*ability*, *opportunity*, *jeopardy*.³¹

An officer who uses deadly force in defense of self or others must *reasonably believe* that a subject had the *ability* to cause death or serious bodily harm to the officer or another. Determining ability requires that the officer recount specific features of the threat that could, if allowed to fully transpire, result in that officer's or another person's death or serious bodily harm.

As an example, a person who holds an object that can pierce, penetrate, slash, cut, cause significant bodily trauma or in other ways leave broken bones, permanent disfigurement, scarring, or extended hospital stays is said to have the *ability* to cause death or serious harm. This would of course include the possession of conventional weapons like knives, guns, or explosives, but could also include any item that could be wielded to cause the type of injuries described from cement bricks to liquor bottles to ballpoint pens to automobiles. Further, determining a subject's ability to cause death or great bodily harm may extend to allow for something more ambiguous

31 FDLE CJSTC Florida Basic Recruit Training Program, Ch. 4. Vol. 2 Ver. 2014.07, pp.204

like an attacker's much larger size in relationship to a defending officer. Very large subjects inherently pose an elevated danger to smaller officers if the two should engage in a violent fight.

Next, an officer must *reasonably believe* that if the subject does possess the ability to cause death or serious bodily harm, then the subject must also have the **opportunity** to cause such harm due to the immediacy and proximity to the endangered other. For instance, a subject who possesses the **ability** to cause death with a sharpened knife, may lack the **opportunity** if the knives cutting abilities are mitigated by distance.

Where a person wielding a firearm may provide the officer a deadly opportunity to cause death or serious bodily harm from hundreds of yards away, a person wielding a knife would have no such opportunity at such a great distance. It is a rule of **opportunity**, that officers may not intentionally create their own exigencies, that is to say intentionally place themselves in harm's way needlessly and purposelessly then appeal to the idea that their life was in imminent danger. Law enforcement officers have no lawful requirement to retreat in the face of danger and their failure to do so should not be confused with the idea of creating an exigency.

Third, an officer must *reasonably believe* that he or another is in imminent **jeopardy** of death or serious bodily harm, by some other person's actions. How **jeopardy** is established is left to the officer's reasonable analysis of the events and an articulated explanation of the totality of circumstances that gave rise to his/her reasonable belief that the actions of another, if allowed to continue, would be likely to cause death or great bodily harm to another. It may be a visual observation, an auditory comment or some other perception that the actor perceives as very real. If for instance, an officer was to see someone shoot another person, then turn the gun towards him; his visual observations would suffice to show intent. If an officer were to hear a threat of

harm or death from another, under certain tense circumstances the mere uttering of the threat may be sufficient to take action under the jeopardy clause.

These three criteria make up the standard of care by which all acts of deadly force can be reasonably measured. In analyzing the shooting by Officer Matthew Danler, it helps to frame the threat accordingly. Due to Officer Danler's approach, he was placed in such close proximity to the accelerated vehicle that he was left with little time to understand the visual cues available to him. The video capture shows that this point is not in dispute. The fact that Jason Scott was in a moving automobile demonstrates that he had the *ability* to cause Officer Matthew Danler death or great bodily harm. The close proximity between Officer Danler and Scott's vehicle demonstrates that Jason Scott had the *opportunity*, to harm Officer Danler with the blunt impact of his automobile. The proximity of the threat and the aggressive forward actions of the vehicle as captured on the video by Officer Danler were reasonably interpreted to mean that Danler was in imminent *jeopardy*.

Considering the totality of the circumstances, in this close quarter environment Officer Danler had little time (a split-second according to the video) to run or seek cover from the vehicle rapidly advancing upon him. There is some evidence that the parked Chevy S10 picked up in the video camera during the approach, blocked his movement to the immediate right. Though we cannot be sure exactly what Mr. Scott's intentions were at the time he was shot, his actions and behaviors operating the motor vehicle were consistent with bonafide real life threats to life and limb that support deadly force reactions.

J. THE CASE OF OFFICER MATTHEW DANLER

This self-defense case involves a law enforcement officer who has been trained in use of force schemas that are familiar to the profession and the courts. The review will account for the paradigm of training and experience that a seasoned law enforcement officer is expected to have and the higher standard of expectations that should be imposed upon individuals with this unique education and experience.

Law enforcement officers regularly respond to violent events and must make judgments about who the level of threat they face, to what degree force is permitted, and how much force is allowed given the circumstances. When police investigate each other for the use of force they use accepted rubrics as previously described to determine if force is justified as a matter of law and policy. An important feature of the use of force transaction is understanding the subject/officer factors from the defending officer's point of view. As indicated in this report, these include several variables that underlie a person(s) ability to cause harm and/or defend himself. *Use of Force guidelines* provide guidance and direction and help reviewers objectively understand if an officer behaved correctly in the hindsight of an event.



Force guidelines: the decision making process

Figure 4-2

In reviewing the evidence, it appears as if Danler reasonably believed that, a.) he was suddenly assaulted by the vehicle without provocation, b.) screen captures of the vehicles wheels show that the vehicle's tires were aimed in the direction of Officer Danler from the perspective of his shoulder lapel camera capture, c.) The direction of the wheels and the auditory acceleration of the engine would reasonably lead a reasonable officer to anticipate that the vehicle was moving in his direction. d) According to witnesses and the evidence in the aftermath of the event, Danler moved out of the path of the vehicle to avoid being struck. It is not known the degree to which firing his weapon may have changed the trajectory of the vehicle as Scott would have likely had some reaction to the bullets coming through his door. In any case, it is clear from video that the decision to fire and the first shots were delivered as the vehicle was heading towards Officer Danler.

Some criticism can be made regarding Danler's tactics, but only in the hindsight of this

event. Officers may not intentionally create their own exigencies. In this case, Danler walked up to Scott's car, approaching it from the front. Danler stated that at the time he approached, he was unaware that anyone was in the vehicle, thereby mitigating the criticism that he should have tactically avoided being in the roadway and in front of it.

The question remains, was Officer Danler in fear of great bodily harm or death when he fired at the vehicle. Officer Danler implied that he was. To objectively understand if fear should have reasonably been perceived by Danler based upon the facts and circumstances presented, the review must consider Officer Danler's self-efficacy for coping with the sudden threat.

The Supreme court has spoken to self-efficacy by stating, "*the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight...The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.*"³²

Bandura defines *self-efficacy* as one's belief in one's ability to succeed in specific situations. Self-efficacy plays a key role in stress reactions and quality of coping in threatening situations (Bandura, 1977). The theory of self-efficacy goes to the anticipation of a decision as the decision maker must first consider the potential consequences of the decision made.

Self-efficacy is a temporal state susceptible to a variety of internal and external conditions. A person's belief that they may succeed in a specific situation can change in a moment. Fatigue, injury or other forms of debilitation can affect self-efficacy and ultimately the

³² Graham v Connor, 490 U.S. 386 (1989)

calculus of the decision not yet made. Several people viewing the exact same set of facts and circumstances will nearly always appraise the event slightly differently based upon their level of self-efficacy (Lazarus & Folkman, 1984).

Where use of force reviews err, is when they emphasize the outcome of the force rather than the cognitive process that drives decision making. By focusing on the process, the objective reviewer can divest him/herself of the tendency towards 20/20 hindsight and the associated hindsight bias that results. The justification for using force is that an actor (police or civilian) be able to articulate a reasonable belief that they were in *imminent* danger of death or great bodily harm by the actions of another.

The definition of *imminent* is often misstated or misunderstood to mean “active” and/or “ongoing.” But the leading authorities for defining terms offer no such description. Merriam/Webster defines the term as, “*ready to take place; especially: hanging threateningly over one's head*”, The Cambridge dictionary defines the term to mean, “*coming or likely to happen soon.*”

The distinction between “active, ongoing” and “ready to take place, likely to happen” is critical to use of force evaluations. What may be only fractions of a second in real time can turn a lawful use of force into a criminal indictment. The distinction is a split-second analysis of danger that can move the needle from low probability to near certainty. Legislatures in all fifty states have recognized that the burden placed upon an actor is too high if the standard of evaluating an attack relies on absolute certainty. Rather, legal doctrine permits actors to make deadly force judgments based upon high probability, that is to say that the likelihood of death or serious bodily harm is more likely than not based upon available information. Self-defense law allows

actors to use force only to stop threats. Once a threat has been neutralized and the actor is no longer in danger, then the actor's continuous use of any further force is considered excessive.

Though Danler exercised his Constitutional right to not give a criminal interview, he did make a few statements prior to his indictment. Danler described that he believed he was being attacked and that he would likely suffer imminent bodily harm if struck by the motor vehicle. The video evidence shows that Danler was nearly in front of the vehicle and very close to it when it rapidly accelerated. Though Danler cannot be expected to understand Scott's intent with the motor vehicle, he was able to reasonably calculate that he was in jeopardy. The following images were captured from the online video posted at <https://www.youtube.com/watch?v=VBsrm9XxTEA>.³³

	
<p>Figure 4. Immediately upon approaching the vehicle it begins to accelerate. Officer Danlers shadow is cast on the street. The vehicles front wheels are beginning to turn in his direction. (9.4 secs)</p>	<p>Figure 5. The vehicle is clearly continuing to head in Officer Danlers direction. The wheels show more rubber on the front face suggesting they are still turning to the left. Danler's full shadow is now nearly fully in front of the accelerating vehicle (10.2secs +800 ms).</p>

³³ The original captured video was provided to me on CD. The compression of that video created impoverished, grainy, digitized images when the video was reduced in speed to still frames.



Figure 6. The full rubber of the front face of the tire can be seen in the wheel well, demonstrating that the vehicle is continuing to accelerate to the left where Danler is standing. The front frame of the vehicle is lifted up demonstrating the rapid lurching forward of the vehicle under intense acceleration. Danler's shadow is now making contact with the front center of the vehicle's bumper (10.4 secs + 200 ms.).



Figure 7. Officer Danler's lapel camera begins to blur due to the light reflection of the flashlight bouncing off the vehicle's paint and chrome. The vehicle is so close to Danler that the light refracts intensely on the vehicle's surface, causing it to blur the optics of his lapel camera (10.5 secs + 100ms).



Figure 8: It is likely that Danler has begun to move backwards. Small swirling circular lines on the screen show that the lapel camera is in motion. The proximity of the vehicle to Officer Danler is so close that the useful visual field of vision for the camera can only capture the front wheel and fender. The wheel is still positioned to the left in the direction where Officer Danler is standing. By now Danler has drawn his weapon and has begun to engage the target. The refraction of the light due to the close proximity has caused a deeply impoverished image. (10.9 sec. +400ms)



Figure 9: The wheel begins to straighten as Officer Danler continues to move backwards thereby creating more space. By now, Danler has drawn his weapon and is in the process of engaging the charging vehicle with gunshots. His hand can be seen with the weapon extended in the top right corner. It is here that he likely begins to fire. (11.1 secs. + 200ms)

	
<p>Figure 10: The threat has passed. Officer Danler's torso twisted to follow the vehicle's trajectory. There is no further extension of the firearm that can be seen in the video and based upon the previous one arm isosceles shooting stance, it is likely that the shooting has stopped. (12 secs. + 900ms)</p>	

From the time that the vehicle first accelerated to the time that it was no longer a direct threat, a total of 2.6 seconds passed. While the vehicle still appears to be coming towards Officer Danler (Figure 5) he begins to fire approximately 200 milliseconds later.

The Point of No Return

It is noted that several bullets pierced Scott's car through the side of the vehicle, suggesting that the car was not a direct danger to Danler when he fired his shots.

In 2015, researchers published a journal article entitled, *The point of no return in vetoing self-initiated movements* (Schultze-Krafta, et al., 2015). The article reflected research findings for spontaneous movements measure by EEG. Through the use of brain scans, decisions can be observed as they culminate from thought to action. It has been repeatedly shown that spontaneous movements are preceded by early brain signals. By observing readiness potentials (RP) the research question intended to examine the possibility of "stop signals" after the onset of the RP.

In other words, is it possible for the mind to cancel a motor decision after a response choice (RC) has been taken. This data sheds powerful light on why humans often continue to fire weapons at threats that may have otherwise objectively ended. The conclusion was that a stop signal could only interrupt (veto) an action if it occurred within 200ms of the RC. In simple terms, the ability to veto a motor action must occur earlier than a fifth of a second of an action being taken-- or the action will play out involuntarily.

By reviewing the shooting frame-by-frame it can be seen that the vehicle was still on a trajectory towards Officer Danler when he extended his weapon and began to fire his shots. From the time that the vehicle is still in front of Danler, approximately 200 milliseconds pass before it veers right and pulls away from his trajectory. In this short time period, Danler would not be able to veto the motor commands to fire. This would reasonably explain why the shots from Officer Danler's weapon entered into the side of the vehicle as Scott pulled the vehicle straight.

The Decision-Making Process

Evaluating the quality of decision making (DM) requires attention to the process, and that process must be independent of the outcome. DM is composed of constituent parts that include environmental scanning, pattern recognition, anticipation, information processing, response selection and last chance adjustments upon uncertain upcoming demands (Tenenbaum & Bar-Eli, 1993). These constituent perceptual-cognitive components must be cognitively coordinated under fast temporal conditions and emotional/pressure interference.

The entire coordinated process begins with visual attention to *stimulus in the environment*. For example, a police officer is trained to remain vigilant to environmental stimuli, always looking for potential threats in the environment. Any given stimulus must be cognitively

appraised as benign, challenging or threatening. Matthew Danler is a trained law enforcement officer who was required to appraise the actions of Jason Scott in a compressed amount of time. The focal point of the camera remained fixated on the tire throughout the episode. It appears from the location of the camera image that Danlers body remained oriented on the vehicle's front left tire, suggesting that he was visually attending to the tire, trying to understand the direction the car was heading as it drove towards him.

Was it reasonable that Danler was afraid when he fired his shots? Anytime anxiety is elevated, reaction to a stimulus appears to be more profound. For example, a 2012 research study showed that when well trained police officers reacted to a threat while under high anxiety, they showed a response bias toward shooting, implying that they accidentally shot more often at suspects that surrendered. The study concluded that when officers were anxious, they were more inclined to respond on the basis of threat-related inferences and expectations rather than objective, task-relevant visual information (Nieuwenhuys, Savelsbergh, & Oudejans, 2012).

There is no legal requirement that a person rightfully estimate the amount of injury that they may suffer before using force. The state does however require that a person estimate if the force that they are about to use is reasonable and necessary in light of the facts and circumstances available to them at that time. This requires that a person reasonably appraise the available stimulus to anticipate what will happen next.

Attentional control, the starting point for DM is diminished as anxiety increases. (Bar-Haim, Lamy, Pergamin, Bakermans-Kranenburg, & Uzendoorn, 2007). More attention is directed to threat-related stimuli while the goal-directed system is diminished, requiring more effort to inhibit distraction and actively direct attention toward task-relevant information

(Eysenck, Derakshan, Santos, & Calvo, 2007). This can inhibit attentional shifting and amount to perceptual distortions and magnified reactions to threats. This may account for the automatic response of Danler's back-peddling away from the threat rather than being able to scan the environment, locate a safe place to position himself and cognitively direct his body to that location.

The anticipatory considerations for examining Danler's decision making in this case include.

- Should Matthew Danler have reasonably perceived a threat directed at him by Jason Scott?
- Was there good cause for Matthew Danler to have low self-efficacy when aggressively confronted by an accelerating automobile?
- Is there evidence that Matthew Danler attempted to avoid physical contact by using other means to address the threat, rather than just firing into the automobile. In other words, was Danler moving out of the way while he was firing?
- Was it reasonable that Matthew Danler should have perceived that if the attack were allowed to continue that he would suffer bodily harm or worse?
- Did Danler ever use offensive force against the vehicle or were the shots defensive in nature?

These questions should be viewed through the lens of Matthew Danler based upon the conditions that the reviewer has been made aware of. Proper reviews do not select anticipatory responses based upon least harm or minimal force options, but rather to consider what was objectively reasonable as an appropriate response to the perceived danger.

In a similar case, the Eleventh Circuit found that deputies were entitled to qualified immunity for shooting and killing a motorist who drove his vehicle in the direction of a deputy standing nearby.³⁴ Several other cases have been reviewed by U.S. Appellate courts with the same general conclusions.³⁵

Had Matthew Danler continued shooting as the vehicle had clearly passed him by, his use of force would have likely been considered unreasonable.³⁶ The evidence shows however, that Danler stopped firing as the vehicle was no longer capable of causing him harm.

Motive v. Intent

William F. Buckley once quipped “*the man who pushes an old lady into the path of a hurtling bus is not to be distinguished from the man who pushes an old lady out of the path of a hurling bus on the grounds that, after all, in both cases someone is pushing old ladies around.*” Buckley’s example is a whimsical description of the unique difference between motive and intent and how logic and reasoning can be tainted by moral indignation. For some, police involved shootings may invoke feelings of morally indignation, regardless of the circumstances.

Use of force decision making must be viewed within the context and parameters of statutory law. Many criminal violations in the United States require *mens rea*, evil intent or guilty mind. This is why teasing apart intent from motive is so critical in use of force

³⁴ McCullough v. Antolini, #08-10176, 559 F.3d 1201 (11th Cir. 2009),

³⁵ Thomas v. Durastanti, #07-3343, 607 F.3d 655 (10th Cir.2010), Jenkins v. Bartlett, #06-2495, 487 F.3d 482 (7th Cir. 2007)

Marion v. City of Corydon, #08-2592, 559 F.3d 693 (7th Cir. 2009), Swann v. City of Richmond, #07-1981, 2009 U.S. App. Lexis 1479 (Unpub. 4th Cir.), Costello v. Town of Warwick, #06-5138, 2008 U.S. App. Lexis 8378 (Unpub. 2nd Cir.), Hathaway v. Bazany, #06-50602, 507 F.3d 312 (5th Cir. 2007), Williams v. City of Grosse Pointe Park, #05-2409, 496 F.3d 482 (6th Cir. 2007), Sanders v. City of Minneapolis, Minn., #06-1356, 474 F.3d 523 (8th Cir. 2007),

³⁶ Smith v. Cupp, #04-5783, 430 F.3d 766 (6th Cir. 2005), Sigley v. City of Parma Heights, #05-3035, 437 F.3d 527 (6th Cir. 2006),

analysis. Unlike most other violations of law, crimes of violence can be justified or excusable if a person provides a salient and reasonable motive for their decision. In other words, a person can have intent to cause harm or even kill another if the motive was to prevent him/herself or another from suffering death or grievous bodily harm. This is the essence of the self-defense, defense.

By my review of the evidence in this case, I can find no support for the indictment that Matthew Danler set out to unlawfully batter Jason Scott or his passenger Beatrice Sheppard-Scott. Danler, at all times remained reactive to the ongoing and persistent physical threat as he reasonably appears to have perceived it. There is no evidence that Danler used any force to intentionally and without justification inflict harm on Scott or Sheppard-Scott. The conclusion that Danler intended to batter Scott and his passenger can only be inferred from the teleological view that both passengers suffered injuries. In other words, establishing intent in this case for aggravated battery relies solely on the outcome of the event, rather than the process. It is my opinion that every shot fired by Danler was in defense of himself.

A reliable discussion about the *amount of force* must then be directed back to the accepted standards that can be found in the force continuum for the purpose of evaluating proportionality. In this case, Danler knowingly used deadly force to fend off a rapidly accelerating motor vehicle, a deadly force threat.

This distinction between motive and intent is regularly described in police involved shootings. Indeed, police officers are trained to understand the difference between shooting to stop (motive) and shooting to kill (intent). In my experience reviewing thousands of police shootings, when the question, “were you trying to kill him?” comes up in open trial (or grand

juries I have attended), the defendant officer denies the implication and insists that he/she was merely trying to stop the person. This is a consistent training criteria commonly applied throughout the United States.³⁷

Policy considerations

A number of police agencies have adopted policies restricting the practice of shooting at or from moving vehicle. For example, the Los Angeles Police Department has crafted the following language:

“Firearms shall not be discharged at a moving vehicle unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle. For the purposes of this Section, the moving vehicle itself shall not presumptively constitute a threat that justifies an officer’s use of deadly force. An officer threatened by an oncoming vehicle shall move out of its path instead of discharging a firearm at it or any of its occupants. “

This policy text contains a list of reasons for its adoption, but policy generally centers on civil concerns rather than criminal ones. Officers who violate policy are subject to discipline defined by the agency. Single policy violations, depending on the nature of the violation, may result in extreme consequences. In some cases, less egregious policy violation may result in severe consequences if the violation is within the context of progressive discipline

³⁷ Former Washington Officer says he was not shooting to kill. http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/12/former_washington_officer_says.html
“We Shoot to stop a Threat. We Don’t shoot to kill.” <http://www.statesmanjournal.com/story/opinion/columnists/dick-hughes/2015/10/11/shoot-stop-threat-shoot-kill/73754148/>

from past acts.

The US Department of Justice, prominent policing experts and most major police departments discourage shooting at motor vehicles. In particular, there is grave concern for innocents who may be in the cabin of the vehicle as shots penetrate the interior. The City of Oviedo police department provides, *“Special circumstances: A member of the Department shall not use deadly force when there is a likelihood of serious injury being inflicted upon persons other than the individual against whom the member is authorized by laws, and this directive, to use deadly force. The use of firearms is not condoned in instances where the consequences would be likely to outweigh the police purpose served. The safeguarding of human life shall outweigh all other considerations [G.O. 801, pg.3].” Prohibitions: “Using deadly force when circumstances do not provide a high probability of striking the intended target, or when there is substantial risk to the safety of innocent bystanders or police officers 801B, p. 5.”*

Officer Danler’s decision to shoot at the vehicle was made after he saw a female occupant hovering over the center console. Danler later said that he directed his shots into the driver side window, allegedly to avoid striking her (Danlers IA interview, pg. 20]. Experience in the field has taught police that even shooting the driver dead would not likely stop the vehicle, but rather raise the probability of the vehicle crashing as it careened out of control. State created emergencies quickly arise when police rob an otherwise mindfully navigating driver of the ability to avoid collision with people, objects, etc. There is no doubt that firing into the vehicle created a substantially higher risk to the safety of the vehicle occupant(s). Shooting at vehicles raises the probability of hitting innocents inside the car

with bullets or shrapnel as has happened in this case. Even when officers in the past have appealed to the claim that they did not know anyone else was in the vehicle it has generally not provided good cover in civil actions.

The agencies need to investigate police involved shootings are integral to addressing potential policy violation and it appears here that the decision to fire into the vehicle was not consistent with Oviedo Police policy. Still, policy violations, by themselves, are not considered criminal, and in this case the presence of an innocent occupant does not mitigate the deadly force features previously described.

Summary of Opinions

1. Officer Matthew Danler was at all time acting under color of law as a sworn law enforcement officer for the City of Oviedo, FL.
2. Danler was in the process of answering a hang-up 911 call and had little information to understand the circumstances surrounding this call for service. 911 calls historically range the spectrum from accidental to homicidal.
3. Officer Danler was likely trained at the academy and in-service to develop situational awareness skills when responding to calls for service.
4. Danler's approach to the scene with his lights off and "blacked out" is a common officer safety practice when responding to calls for service at night. There remains a debate among experts as to whether the concealment value of an officer's arrival outweighs the high-profile announcement that the police are present.
5. Matthew Danler could not know the reason that Scott's car abruptly and without warning

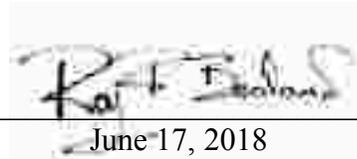
began to accelerate in his direction.

6. A video capture from Danler's lapel camera shows that the vehicle was heading in the direction of Danler when he began to fire, that the front wheels were generally pointed in his direction, that the distance between Danler and the motor vehicle was rapidly closing so as to give the driver the ability and opportunity to strike Danler.
7. It is reasonable that the calculus of Danler's decision-making, suggested that he was in imminent jeopardy of being run over.
8. A firearm is not an effective response for stopping a motor vehicle in motion.
9. Firing at the vehicle, with the known presence of an innocent may be construed as a policy violation.
10. The majority opinion in professional law enforcement is that shots should not be fired at or from moving vehicles. Most policies nationwide reflect this or similar language.
11. The violation of policy is not a violation of law and is more appropriately actionable in a civil hearing than a criminal one.
12. The charges of aggravated battery require an individual's intent to actually and intentionally touch or strike another person against the will of the other; or intentionally cause bodily harm to another person. It appears that Officer Danler's actions were motivated as an effort to stop the motor vehicle from charging in his direction rather than intended to batter anyone inside. These actions are protected by F.S.S. 776.013 & 776.032.
13. The decision to shoot at a threat while under pressure often leads to a mindless heuristic of involuntary force. It is common to see individuals under the spell of high arousal shoot

multiple shots at individuals after the decision has been made to fire.

14. When a response choice (to shoot) has been made, a veto must be given within 200ms or the behavioral action will take place.
15. At the time the vehicle was moving in the direction of Officer Danler, he extended his weapon to address the threat by means of gunfire.
16. Within approximately 200ms of making the decision to fire, the vehicle slightly pulled to the right, taking it out of the direct path of Danler.
17. In such a short time frame, Danler would not reasonably be able to prevent the motor action of pulling the trigger of his extended weapon.

These are my findings based on the relevant evidence submitted to me. As additional information is made available and as new facts may be uncovered during the discovery process, my professional opinions may change to reflect the newfound information; however, the opinions expressed herewith are current and are based upon the information reviewed and my experience as of this date.



June 17, 2018