

OFFICER INVOLVED SHOOTING REVIEW
WAYNE CREACH
INCIDENT DATE: August 25, 2010
DEPUTY BRIAN HIRZEL

PERTINENT FACTS

On August 25, 2010, Deputy Mark Speer responded to 14208 E 4th in Spokane Valley, in response to a shooting call put out by Deputy Hirzel. He arrived approximately 54 seconds after the call for medics went out. As he approached he could see Deputy Hirzel standing just to the west of his patrol car, pointing his gun towards the ground, not directly at the body, at a 45 degree angle in a guard position. He parked just west of where Hirzel was standing and could see a male, later identified as Wayne Creach, laying on the ground with blood on his chest. Deputy Hirzel said Mr. Creach had just confronted him with a gun. Speer could see a large handgun 2 feet from Mr. Creach's left foot.

Hirzel then said we need to treat Mr. Creach for his gunshot wound. He then said, "Who the fuck is this guy?" Deputy Speer, in a later interview with Det. Brian Hamond of the SPD, who was assigned as the lead investigator,

said Deputy Hirzel said "This guy came out with a gun while I was sitting there. Who the fuck is this guy?"

Speer said Deputy Hirzel said "We need to help this guy immediately. We need to get medics here." He sounded panicky. Deputy Hirzel then asked if Speer had a CPR mask so Speer started looking in his trunk. Other deputies began arriving. Hirzel asked if anyone had some "quick clot". Hirzel had his trunk opened and appeared to be looking for something. Speer helped him look for the quick clot.

Speer noticed that some uniformed personnel were working on Mr. Creach. Medics arrived within two minutes and took over treating Mr. Creach. Mr. Creach was pronounced dead at 23:27 by Dr. Alto via telephone. Deputy Speer noted that he had contact with Wayne Creach on 4-14-08. It involved Wayne Creach chasing a male who had stolen a plant and holding the thief at gunpoint. Deputy Speer counseled Mr. Creach afterwards that it would be safer if he simply called 911 and did not chase suspects with a loaded gun. Mr. Creach told him he would defend his property and had the right to bear arms anytime he wanted.

Deputy Todd Miller arrived after Deputy Speer to Deputy Hirzel's Code 6 – which is an officer needs immediate assistance call. He saw Mr. Creach lying on the ground with a handgun by him. Hirzel asked them to start CPR. Miller gloved up and checked Mr. Creach's pulse in his right arm, finding a slight pulse. A WSP trooper, Barry Marcus, then checked and found none. Miller rechecked and found none as well. Medics then arrived and took over.

Deputy Speer then alerted Miller to a woman arriving in her night gown, later identified as Imogene Creach, Wayne Creach's wife. He walked her back to her house and asked her what happened. She said she saw Wayne Creach get up out of bed and thought he was using the bathroom. When he did not come back right away she went to check on him because he is diabetic. He was not in the bathroom. She then heard hollering outside near the greenhouses and then heard a gunshot. She then called 911. She said her husband owned rifles and a handgun and normally took his handgun with him when he went outside to check on things.

Det. Marty Hill of the Spokane Police Department also later interviewed Mrs. Creach that night. She told him the same thing but also added that she woke up around 11:04 pm and while she was on the phone to 911, her clock

saying 11:06 pm, she could see police vehicles arriving. She also said when she heard the commotion outside in the parking lot, she could see a car in the parking lot, heard someone scream or yell something unintelligible, and then she heard a shot. She also said in a more detailed interview the same night that she heard a "pop, pop, pop." She described the voice as excited. There was an oscillating fan on in her bedroom.

She told Det. Hill that her husband normally uses the handgun to enforce his authority as the property owner. She said her husband would confront people stealing from their greenhouse two to three times per year. He would always carry his gun when checking out suspicious circumstances.

Deputy Miller also noted that he had been at the CV Scope at Evergreen and Riverside at about 2307. When he left the Scope to go assist Deputy Hirzel he heard one gunshot.

Deputy Olson arrived after Deputies Speer and Miller and the WSP Trooper Marcus. He asked Deputy Hirzel if he was the one involved in the shooting. Hirzel said yes and Olson then transported him to the station.

Sgt. Doug Lawson was at the Valley Precinct when he heard Deputy Hirzel call a Code 6 over the air. Lawson then started walking towards his car to respond. A few seconds later he heard Hirzel say something like "Shots fired, start medics." When he arrived he saw Hirzel getting into Deputy Olson's patrol car. Lawson asked Hirzel how many shots were fired and in what direction. Hirzel told him one shot and it hit the male in the chest.

Lawson could see fire personnel attending to Mr. Creach. He saw a pistol lying on the ground near Mr. Creach's feet, as well as a flashlight by his side.

Deputy Getchell contacted area residents to see if they heard anything.

Joann Gerke from 308 S Best said she was smoking in her garage when she heard a loud bang. Larry Cameron from [REDACTED] said his back door was open and he heard a gunshot. He then went outside and saw all the lights and sirens.

Det. Hollenbeck from the Spokane Police Department was called out as part of the Officer Involved shooting Protocol. He noted that there was a full moon and a clear sky. There was a mercury vapor light on a power pole

between the Creach's house and the business property, a street light on the northwest corner of 4th and Best, a street light on the northwest corner of 4th and Reese, a street light on the southwest corner of 4th and Reese Lane and a porch light at 14309 E. 4th.

Deputy Hirzel's unmarked, dark blue police cruiser was parked facing north and backed up to the sidewalk between the two greenhouses. It was running with the car's spotlight shining on the decedent. The parking lights were on and the driver's side door and the trunk were open.

Mr. Creach's body was 6 to 10 feet west of the open car door. A handgun was found 3 to 5 feet south of the body. A single .45 caliber Speer casing was about 5 feet north of the decedent. A dark grey metallic Maglite flashlight was on the right side of Mr. Creach's body, near his right hand. It was later found to be operable. Its light was found to be able to shine 62'5".

Mr. Creach was lying on his back with his head facing north. His hands were at his side and his feet were straight and facing south. He had on a pair of dark green slacks, a black belt and LL Bean moccasins. He had no shirt on and a single entry gunshot wound was visible in the center of his chest.

Stippling appeared to be around the entry wound. It appeared Mr. Creach had been moved during medical intervention as a blood pool was found 2 to 3 feet northeast of his head.

Det. Hollenbeck inspected the Colt .45 caliber pistol, model 1911, later identified as Mr. Creach's gun. It had no round in the chamber and seven .45 caliber cartridges in the magazine.

Det. Hollenbeck later inspected Deputy Hirzel's patrol car. Finger prints were lifted but none identified as belonging to Mr. Creach. A Colt AR-15 and a shotgun were inventoried. The AR-15 had 28 .223 cartridges in the magazine and none in the chamber. An additional AR-15 magazine with 28 cartridges was also found. The Mossberg shotgun contained five 12 gauge .00 buck shotgun shells in the tube and none in the chamber. There were an additional four shells in the stock.

Det. Hollenbeck interviewed Jeff Black who lives at [REDACTED] Black said he was getting a drink of water around 2315 when he heard a single shot.

Det. Morrison from the WSP attended the autopsy of Mr. Creach. He saw a single gunshot wound to the chest. Dr. Howard removed a single bullet from the lower right back of Mr. Creach. The bullet travelled front to back, left to right, at a slightly downward trajectory.

Det. Hamond conducted interviews with responding officers. Trooper Barry Marcus said he was the third or fourth unit to respond. He said he got there 30 or 40 seconds after the call as he was at Sprague and Adams when it went out. He said when he got there he could see Mr. Creach lying on the ground. Deputy Hirzel was asking if anyone had a CPR mask or a first aid kit and was looking in his trunk. Medics arrived shortly after Trooper Marcus.

Deputy Getchell told Hamond that he was at Park and Reuter clearing a DV call when he heard Deputy Hirzel say "code 6." He said Hirzel sounded startled. He got in his patrol car just as shots were fired. When he arrived Deputy Hirzel was leaving the scene with Deputy Olson.

He told Hamond he was familiar with Mr. Creach. He had been at a call two years ago when a bag of fertilizer had been stolen from Mr. Creach's business. When he arrived, the suspect had fled and he contacted Mr.

Creach, who had a wheel gun on his hip. Mr. Creach told him he had heard something and went outside to investigate. Deputy Getchell told him to be careful about pulling guns on people. Mr. Creach told him he was going to protect his property, that he was from Oklahoma and was able to wear his gun in his holster in the open.

Deputy Bodman also reported a similar incident to Det. Hamond when he had responded to a prowler call at the Plant Farm one or two summers ago. It was around 1:00 am. Mr. Creach had a revolver in the holster. Deputy Bodman spoke to him about coming out with a gun when the police are responding to his business on a call. Mr. Creach said something to the effect that it was his property and he was going to protect himself. Deputy Bodman also told Mr. Creach not to touch his gun and Mr. Creach replied words to the effect, "It's my property."

Other officers had prior contact with Mr. Creach as well. Deputy Strelzoff responded to a call on 4-14-08 a little after midnight. The greenhouse alarm had gone off. Mr. Creach saw a man riding his bike away from the front of the greenhouse. Mr. Creach got in his car and stopped the male at 8th and McDonald. He pointed his .45 caliber pistol at him and told him to get in his

car or he would blow his head off. He then drove him back to his house and kept him until police arrived.

Lynn Hurst called police to tell them he had contact with Wayne Creach approximately two years ago. He said he was looking for flowers for his mother's yard and stopped by the Plant Farm on a Sunday about 4 pm. It was daytime but the business was closed. He said Mr. Creach came out of the blue and said "If you're stealing, I'll shoot you." He told Mr. Creach he was not stealing, he had a check for \$600 and was shopping for plants.

Scott Tschirgi from the Spokane Valley fire Department was called out to the Plant Farm on a gunshot wound. There were multiple police cars there when he arrived. He could see Mr. Creach lying on the ground. They turned on their light to illuminate the area and proceeded to Mr. Creach. He was 6 to 8 feet from a patrol vehicle – he said he knew so because there were obvious marker lights on the front, push bars and numerous antennas. They started chest compressions. AMR then arrived on the scene. Mr. Creach's head was to the north and a pistol was 2 to 3 feet from his left foot. A Maglite flashlight was almost underneath him on the right side near the hip, upper chest area.

At one point, one of the AMR medics assisted his two partners, Tag Baugh and Kevin Dunne, by lifting Mr. Creach by the head/shoulder area to open the airway. They consulted with a doctor from Valley Hospital and CPR efforts were ceased. He heard one of the deputies say when asked what happened, "he did something we've told him a thousand times not to do" in reference to Mr. Creach.

Andrew Gray, a paramedic with AMR, responded to the scene. Fire personnel were performing CPR on Mr. Creach when he arrived. He saw one gunshot wound to the chest. He also saw a gun just to the left of Mr. Creach's foot. He believes he may have dropped a backboard on the gun when he set it down.

Kevin Dunne responded with the Valley Fire Department. When he arrived he could see a deputy kneeling on the right side of Mr. Creach. He began CPR with his partner Tag. He found no pulse. After several minutes they called Dr. Alto and he pronounced Mr. Creach dead.

At 0230 on August 26, 2010, Det. Hamond conducted a tactical interview of Deputy Hirzel. Hirzel told him he fired one shot to the south. He said Mr. Creach did not fire any shots. He said he never touched Mr. Creach other than he "delivered one strike to the left knee of the victim before the shot" with his baton. He said the victim may have had a flashlight that would be found at the scene.

Deputy Hirzel's duty weapon, a Glock model 21, a .45 caliber semi automatic handgun, was inspected. The magazine was removed and one round was found to be in the chamber. There were twelve rounds in the magazine, meaning one round had been fired as a duty weapon carries 14 rounds.

Deputy Hirzel's uniform was also collected. Det. Hamond found small to medium size drops of blood spatter on his right boot, indicating a directionality of left to right, and 90 degree medium spatter on his lower right leg.

A review of records from 8-25-10 showed that Sandy McAlpine, who lived at [REDACTED], requested prowler checks because her son had been threatened by at least ten males. The son felt the group would return around 01:00. At 20:19 Deputy Hirzel was dispatched on the prowler check. He arrived on scene at 20:23 and closed at 20:27. He returned again for a second prowler check at 23:05.

The CAD and other records show Deputy Hirzel signaled "code 6" at 23:07:15 and reported shots fired at 23:07:25. At 23:07:35 "shots fired, need medics" was logged. Imogene Creach called 911 at 23:07:53. Deputy Speer arrived at 23:08:19, followed by Deputy Miller at 23:08:38.

Deputy Moen arrived at 23:09, Sgt. Lawson at 23:10. At 23:13, Deputy Olson advised he would be taking Deputy Hirzel to the Valley Precinct. Sgt. Lawson reported CPR started at 23:15. At 23:17 AMR showed to be on scene.

Det. Hamond listened to the radio recording of Deputy Hirzel. Hirzel stumbled several times announcing his identifier, "Baker 606", then

immediately announced a “Code 6”, a request for immediate assistance. Ten seconds later Deputy Hirzel announced “shots fired, need medics.”

Spokane Valley Fire Department records showed they responded at 23:09 on 8-25-10. Resuscitation efforts were ceased at 23:27.

American Medical Response (AMR) received the call at 23:09, dispatched at 23:10, and was on scene at 23:15.

Deputy Hirzel’s computer was examined by John Schlosser, a computer expert for Spokane County, and the last recorded time was Deputy Hirzel accessing a document at 23:06:15.

The surrounding neighborhood was canvassed. Kevin Connor, who lives at [REDACTED], said he heard a couple of gunshots around 10:30 or 11. His mother, Amy Hall, said she heard three shots, described as a “pop, pop, pop” around the same time.

Vicki Stewart, who lives at [REDACTED], heard one gunshot just before 11 pm. Rietha Beirouty, who lives at [REDACTED], heard one shot.

Rich Courser, who lives at [REDACTED] said about 11:07 pm he heard a loud bang. He went outside and looked at the Plant Farm parking lot across the street. He saw a car parked in the lot, backed into the lot pointing north, with a spotlight pointing kind of towards the ground. His sister-in-law was with him and she thought she could see a body on the ground.

Jane Perkins, who was working at the Orchard Crest Retirement Home, at 222 S. Evergreen Road, was outside with a co-worker around 11 pm. She reported hearing two shots, the first sounded like a "pop", the second was much louder. She then heard sirens.

Wayne and Ella Linewebber, at [REDACTED], reported hearing one gunshot at 11:30 pm, followed by sirens. Ella reported also hearing three gunshots around 8 pm.

Larry Cameron, at [REDACTED] reported hearing one gunshot between 11 and 11:10 pm, then seeing police cars across the street at the nursery.

Ken Hansen, who lives at [REDACTED], said he was initially outside about 2100. The neighbor's kids appeared to be having a party with loud music and setting off fireworks. He went back inside. About 2300 he heard three gunshots followed by a fourth gunshot from what he thought was a different gun. He then heard sirens.

Jean Inman, who lives at [REDACTED] thought she heard either two or three gunshots or firecrackers between 10:45 to 11:15 pm.

Rafael Mesa-Perez, who lives at [REDACTED] thought he heard one gunshot at the time of the shooting.

Larry Cameron, who lives at [REDACTED], heard one gunshot then looked out his window and saw police cars at the Plant Farm.

Deputy Hirzel gave his first full interview to Det. Hamond on 9-3-10. He said he went to the area of 14114 E. 4th to conduct a requested prowl check. He was in an unmarked police car, a Ford Crown Victoria with push bars in the front and multiple antennas on the top. He was dressed in a tan shirt with green pants, regular deputy clothing.

After the prowler check, he parked in the Plant Farm parking lot at 14208 4th. He said he backed in based on officer safety factors and to give him a good view of foot and vehicle traffic near the prowler check complainant's home.

He worked on writing a ticket from a previously investigated traffic accident on his computer inside his patrol car. His driver side window was open. A flash of light to his left caught his eye. He saw Mr. Creach approach him with a handgun in his right hand held down to his side. Deputy Hirzel said he did not feel he had time to get out of his car so he drew his weapon while inside from a seated position.

He said he identified himself as a police officer and several times commanded Mr. Creach to drop his gun. Mr. Creach responded several times that he did not have to and was not going to, saying he had things stolen from him before.

Deputy Hirzel said he first saw Mr. Creach when he was about 30 feet away and that Mr. Creach kept walking towards him as he commanded him to drop his weapon, until Mr. Creach was two to two and one half feet away

from his driver's door. He said he continued to order Mr. Creach to drop his weapon and back away. Mr. Creach then put the handgun in his waistband behind his back and backed up several steps.

Deputy Hirzel said he then got out of his car and told Mr. Creach that he should not walk up on a police officer armed with a gun. He said he told Mr. Creach to "Keep your hands where I can see them." Deputy Hirzel said he had his gun pointed at Mr. Creach and ordered him to the ground. Mr. Creach said he did not have to and was not going to.

Deputy Hirzel said he closed space on Mr. Creach, drew his baton with his left hand and hit Mr. Creach in the left knee with a backhanded strike. Mr. Creach buckled slightly, then righted himself and reached behind him with his right hand to where Deputy Hirzel saw him put his gun. He saw Mr. Creach's arm coming out from behind his back and as soon as he saw the grip of the handgun, he fired one shot, hitting Mr. Creach in the chest.

Deputy Hirzel told investigators that he thought Mr. Creach was going to shoot him at that point. He said Mr. Creach bent forward and fell, rolling onto his back. Dust was found on Mr. Creach's left knee.

Deputy Hirzel could not remember if he radioed Code 6 before or after he hit Mr. Creach with the baton. He said after he shot Mr. Creach, he radioed, "Shots fired, shots fired, medics needed." Deputy Speer was the first to arrive. He then got latex gloves from his trunk and a CPR mask from a container on his bag on his front passenger seat. Deputy Olson then arrived and told him he needed to be transported from the scene.

Deputy Hirzel said he did not use his flashlight and that he normally does not use his taser, which was on his front seat. Deputy Hirzel said he first was in fear for his life when he saw Mr. Creach approaching with a gun from 30 feet away. He did not recall turning on the spotlight.

A second interview was conducted with Deputy Hirzel on 9-9-10. When asked how he drew his baton, he said he grabbed it with his thumb down and palm out and drew it out so that it was extended out from his arm, rather than along his forearm. He then drew it across his body and delivered a backward strike to Mr. Creach's outer left knee. He then reholstered his baton,

A third interview was conducted on 9-15-10. Deputy Hirzel again demonstrated how he used the baton. When told they had not found any forensic evidence of a baton strike, he maintained he used a baton and did not know if it may have been a weak strike or if Mr. Creach had moved. He said he had his gun in his right hand. He used his baton because he wanted Mr. Creach to go to the ground so he could control the situation since Mr. Creach was still armed. He said he did not use his vehicle for cover because he wanted to maintain the mobility open space gave him. He did not use mace or his taser because a person can still use deadly force and he felt he was in a deadly force situation.

WSP Scientist Glenn Davis tested Deputy Hirzel's firearm and found it to working properly. Stippling occurred between one and four feet but not at distances greater than five feet. Ejection pattern tests showed Hirzel's firearm ejected cartridges to the right and back.

Casing pattern analysis tests and the Total Station measurements were used to try and determine where Deputy Hirzel was when he fired at Mr. Creach. WSP Det. Ryan Spangler indicated that the general position of the muzzle

was west of the patrol vehicle approximately two-thirds north of its length from the rear bumper. The distance from the muzzle to Mr. Creach's knees was 5'8.38". The distance from the muzzle to Creach's waist was 4'.29". Given that the stippling occurred between 4' to 5', Det. Hamond, as well as WSP Det. Morrison, concluded this was consistent with the position that Deputy Hirzel said he was in when he fired.

WSP Patrol Scientist William Schneck tested Deputy Hirzel's baton and uniform pants and Mr. Creach's pants. Wood fibers found in Mr. Creach's pants were not consistent with wood from Deputy Hirzel's baton. Fibers found on Deputy Hirzel's baton were not consistent with Deputy Hirzel's or Mr. Creach's pants. There was no evidence of fiber crush damage on Mr. Creach's pants. Schneck explained this could mean any of the following: no strike occurred; the strike was in an area on the back of the leg or on a leg muscle that would soften the blow and prevent fiber crush; the amount of force used was not enough to leave an impression.

WSP Scientist Kristy Barr found that the blood on Deputy Hirzel's boots and pants were from Mr. Creach. DNA of mixed origin was found on Deputy Hirzel's baton. The major profile matched Deputy Hirzel. Mr.

Creach could not be included or excluded as a potential contributor. She explained that this means it was still possible Mr. Creach could have been hit by the baton but his DNA was simply not detected.

DNA found on Mr. Creach's pistol was also of mixed origin. Mr. Creach was the major profile and Deputy Hirzel was excluded as a potential contributor.

Dr. John Howard from the Spokane County Medical Examiner's Office conducted the autopsy of Mr. Creach on 8-26-10. He was 5'7' tall and weighed 192 pounds. (By way of reference, Deputy Hirzel is 5'6' tall) He died from a penetrating gunshot wound to the chest. Some stippling was present on the chest near the entrance wound.

In an interview with Det. Hamond, Dr. Howard said small marks on Mr. Creach's left leg and thigh, one above the left knee, the others below the left knee, could have been caused from the tip of a baton if the strike was not solid. Dr. Howard also stated that two parallel marks that ran roughly parallel to the femur could have been caused by the inside edges of the pant seam if a Baton strike were delivered along that seam. Dr. Howard also

indicated that Mr. Creach died rapidly and that injuries received after the shot was fired might not bruise.

Dr. Howard also told Det. Hamond the trajectory of the bullet was consistent with someone slightly bending at the waist as he reached behind himself.

He also felt that the gravel and abrasions on Mr. Creach's knees were consistent with him falling on his knees then rolling onto his back. Mr. Creach was diabetic, but the glucose and ketone findings were normal and there was no evidence of an acute diabetic factor at the time of the shooting.

LEGAL ANALYSIS

RCW 9A.16.040 controls the analysis when an officer uses deadly force.

Homicide or the use of deadly force is justified under subsection (1)(b)

“[w]hen necessarily used by a peace officer to overcome resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty.” Subsection (1)(c) states homicide or the use

of deadly force is justified “[w]hen necessarily used by a peace officer or person acting under the officer’s command and in the officer’s aid: (i) [t]o arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony.”

Subsection (2) states that “In considering whether to use deadly force under subsection 1(c) of this section, to arrest or apprehend any person for the commission of any crime, the peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others. Among the circumstances which may be considered by peace officers as a “threat of serious physical harm” are the following: (a) The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could be reasonably be construed as threatening; or (b) There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.”

A probable cause standard is used to scrutinize a decision to use deadly force. Probable cause is basically having facts and circumstances within an

officer's knowledge to cause a person of reasonable caution to believe the ultimate fact.

Subsection (3) states that a 'peace officer shall not be held criminally liable for using deadly force without malice and with a good faith belief that such act is justifiable pursuant to this section.'

There have been many cases that deal with the use of force by law enforcement and a citizen's response to it. Since the drawing of a weapon by police on a person may legally constitute an arrest, see State v. Belieu, 112 Wn.2d 587, 773 P.2d 46 (1989), a review of such cases is appropriate. In State v. Valentine, 132 Wn.2d 1, 935 P.2d 1294 (1997), the Washington State Supreme Court addressed the issue of whether someone can use force to resist an unlawful arrest. The court noted, after undergoing a lengthy historical review, how society had changed and stated "Peace officers are today lethally armed and usually well trained to efficiently effect arrests. Resultantly, the resister's chances of success are seriously diminished unless he counters with equal or greater levels of force. The inevitable escalation of violence has serious consequences for both participants and innocent bystanders." Valentine at 19.

“Briefly stated, a far more reasonable course is to resolve an often difficult arrest legality issue in the courts rather than on often hectic and emotion laden streets. Modern urbanized society has a strong interest in encouraging orderly dispute resolution. Confronting this is the outmoded common law rule which fosters unnecessary violence in the name of an obsolete self-help concept which should be promptly discarded.” Valentine at 19.

“In sum, we hold that, although a person who is being unlawfully arrested has a right, as the trial court indicated in instruction 17, to use reasonable and proportional force to resist an attempt to inflict injury on him or her during the course of an arrest, that person may not use force against the arresting officers if he or she is faced only with a loss of freedom.”

Valentine at 21. This means that even a person who feels they are being arrested unlawfully has no right to use force and must obey the officers commands and not resist.

This issue was also addressed in State v. Bradley, 141 Wash.2d 731, 10 P.3d 358 (2000). “Numerous cases have held a person may use force to resist arrest only if the arrestee *actually*, as opposed to *apparently*, faces imminent

danger of serious injury or death. The Court of Appeals in *State v. Westlund*,
13 Wash.App. 460, 467, 536 P.2d 20, 77 A.L.R.3d 270 (1975), first
articulated the policy rationale for this rule:

[T]he arrestee's right to freedom from arrest without excessive force that falls short of causing serious injury or death can be protected and vindicated through legal processes, whereas loss of life or serious physical injury cannot be repaired in the courtroom. However, in the vast majority of cases, as illustrated by the one at bar, resistance and intervention make matters worse, not better. They create violence where none would have otherwise existed or encourage further violence, resulting in a situation of arrest by combat. Police today are sometimes required to use lethal weapons for self-protection. If there is resistance on behalf of the person lawfully arrested and others go to his aid, the situation can degenerate to the point that what should have been a simple lawful arrest leads to serious injury or death to the arrestee, the police or innocent bystanders." Bradley at 737-738.

The court stated "*Holeman* and *Westlund* involved lawful arrests.

Demonstrating the importance we place on "orderly and safe law enforcement," we extended the *Holeman/Westlund* rule even to allegedly unlawful arrests, specifically affirming *Holeman* in *State v. Valentine*, 132 Wash.2d 1, 20-21, 935 P.2d 1294 (1997), a case involving an alleged unlawful arrest. Thus, the established rule for use of force in self-defense cases involving arrests requires the person face a situation of actual, imminent danger, not just apparent, imminent danger." Bradley at 738.

In State v. Mierz, 127 Wash.2d 460, 475, 901 P.2d 286 (1995), the court expressed a strong policy favoring the rule of law over the law of the street: “[I]n many cases the law enforcement officer and the citizen may both have sincere or reasonable beliefs about the lawfulness of the entry or arrest. Encouraging citizens to test their beliefs through force simply returns us to a system of trial by combat. The proper location for dealing with such issues in a civilized society is in a court of law.”

Another issue is what the deputy’s status was when he was on the Plant Farm property after the business was closed. The parking lot had an open ingress and egress without any barriers to entry. Under tort law, a person on someone’s property has one of three statuses: they are a licensee, an invitee or a trespasser.

In Strong v. Seattle Stevedore Co., 1 Wn.App.898, 466 P.2d 545 (1970), the court found that a municipally paid firefighter on a premise as a fire fighter is an invitee because their presence provides an economic benefit to the possessor of the land. The same analysis and result would apply to a law enforcement officer who is performing their duties, which include routine patrol and crime prevention, to include residential and business inspections. (See attached patrol policy 400 of the Spokane County Sheriff’s Office).

Deputy Hirzel was parked and observing the area on a requested prowling check from a neighboring residence. This provides an economic benefit by deterring criminal activity. Therefore, his status is that of an invitee, and certainly no lower than a licensee, meaning he was legally on the property.

CONCLUSION

Deputy Hirzel was on routine patrol, in full uniform, in an unmarked Ford Crown Victoria police vehicle, equipped with push bars in the front, a spotlight on the driver's side, numerous antennas on the roof, and a full complement of police equipment in the interior, to include a mounted computer and a shotgun. He was in a place he was legally entitled to be while doing a requested neighborhood prowling check. The fact he is in an unmarked patrol car is ultimately of no consequence to his later use of force.

While sitting in his police car working on a previous traffic investigation, he was approached by the property owner, Mr. Wayne Creach. They did not

know each other. Mr. Creach was armed with his .45 caliber pistol. From all indications, Mr. Creach has on a number of occasions approached people on his property while armed so it was not unusual for him to be armed.

Deputy Hirzel indicated when he saw Mr. Creach approaching with his gun by his right side, he armed himself and identified himself as a police officer and ordered Mr. Creach to drop his gun. He did not feel he had time to exit his police car, so he remained seated at that time.

Mr. Creach, according to Deputy Hirzel, said he did not have to and would not put down his gun. This appears to be consistent with reported behavior from Mr. Creach during other armed events on his property. Deputy Hirzel reported that he continued to order Mr. Creach to put away the gun and back away as he was a few feet away from Deputy Hirzel. Deputy Hirzel reported that Mr. Creach finally put the gun in his waistband behind his back and backed away.

Deputy Hirzel reported that he then exited his police car, his gun still aimed at Mr. Creach. He ordered Mr. Creach to the ground because he did not feel

safe as long as Mr. Creach still had access to his gun and wanted to control the situation better. Deputy Hirzel said Mr. Creach refused to get on the ground, which again does not appear to be inconsistent with past behavior.

Deputy Hirzel stated he then drew his baton with his left hand, his gun still in his right, and backhanded Mr. Creach in his left knee with his baton, hoping to force Mr. Creach to the ground so he could gain control of the situation. The medical examiner, Dr. Howard, later found bruising near the left knee that he said could be consistent with a baton strike.

Deputy Hirzel said Mr. Creach then buckled and reached behind his back. Deputy Hirzel said he could see the butt of Mr. Creach's gun coming out from behind his back. He said he then fired a single round, which was all that was found at the scene, which struck Mr. Creach in the chest, apparently from four to five feet away. He said he felt, given Mr. Creach's failure to comply with his previous orders, he was going to be shot.

Under the law as it relates to use of deadly force by police officers, an officer is justified in using deadly force during an arrest if he reasonably

feels that person is committing or attempting to commit a felony. Deputy Hirzel had reasonable grounds to feel he was about to be assaulted. He had probable cause to believe Mr. Creach posed a threat of serious physical harm since Mr. Creach threatened “a police officer with a weapon” or displayed “a weapon in a manner that could be reasonably construed as threatening”.

Deputy Hirzel was justified in his use of force.

Additionally, a police officer cannot be held criminally liable for using deadly force if he acts without malice and with a good faith belief that such act is justified. Malice is defined as “an evil intent, wish, or design to vex, annoy, or injure another person.” WPIC 2.13. There is no indication that Deputy Hirzel acted with malice towards Mr. Creach. They had no prior history and did not know each other. This appears to be a tragic situation where an officer, because he felt he was about to be shot, felt no other recourse but to use deadly force after Mr. Creach repeatedly failed to comply with the officer’s commands. Under these facts, Deputy Hirzel cannot be held criminally liable for his use of deadly force.

JACK DRISCOLL

CHIEF CRIMINAL DEPUTY