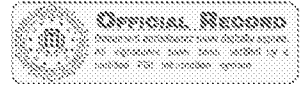


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# FEDERAL BUREAU OF INVESTIGATION

## Electronic Communication

**Title:** (U) Chicago Agent-Involved Shooting  
Incident: 03/25/2013

**Date:** 06/11/2014

**CC:**

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**From:** INSPECTION

**Contact:**

**Approved By:** STROUD SHAWN W  
David Paul Gelios  
Mark Alan Morgan  
Nancy McNamara

**Drafted By:**

**Case ID #:** 297-HQ-A1271285-D (U) SHOOTING INCIDENTS

**Synopsis:** (U) This communication was prepared to furnish the analysis, comments, and recommendations of the Shooting Incident Review Group (SIRG) with respect to the captioned shooting following the SIRG meeting held on 02/21/2014.

**Administrative Notes:** (U) This communication summarizes the Inspection Division's (INSD) Shooting Incident Report, dated 04/12/2013, prepared by Inspector-in-Charge Shawn W. Stroud.

**Enclosure(s):** Enclosed are the following items:

- 1. (U) Chicago SIRT Report dated 0/25/2013

**Details:**

(U//~~FOUO~~) On 03/25/2013, at approximately 12:30 p.m., three Chicago Field Office Agents,  while going to lunch and looking for a place to park at a parking lot located at 1220 South Ashland Avenue, Chicago, Illinois, noticed an individual kneeling near a sport utility vehicle. When the individual got into

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the driver's side of an adjacent [redacted] (herein referred to as sedan), repositioned it to the other side of the sport utility vehicle and got out, SAs [redacted] determined the individual was stealing hubcaps. SA [redacted] was driving and did not see what the individual was doing.

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(U//~~FOUO~~) SA [redacted] parked the Bureau vehicle and SAs [redacted] immediately got out and approached the sedan. Upon seeing the Agents approach, the individual stealing the hubcaps got back into the sedan. The sedan had three occupants, who were later identified as driver [redacted] front passenger [redacted], and rear passenger [redacted]. SAs [redacted] wanted to get the license plate of the sedan, identify the occupants, and then call the police. SA [redacted] positioned himself near the front passenger window of the sedan and SA [redacted] was near the back passenger window. SA [redacted] identified himself as law enforcement. SA [redacted] used his Blackberry and took a photograph of the two men while SA [redacted] issued commands to the occupants to turn off the engine and get out of the vehicle. The occupants of the sedan did not follow SA [redacted]'s directions. SA [redacted] who had gotten out of his Bureau vehicle, but lagged behind SAs [redacted] had returned to his car and repositioned it to the row near where the sedan was parked, a short distance away from the sedan. SA [redacted] stated he could clearly hear SAs [redacted] identify themselves as law enforcement officers and direct the occupants of the sedan to stop. SA [redacted] subsequently activated his vehicle emergency lights.

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(U//~~FOUO~~) [redacted] who was driving, appeared very fidgety to SAs [redacted] and [redacted] put the vehicle in reverse and abruptly backed the sedan out of the parking space into the driving lane. SAs [redacted] and [redacted] moved out of the way to avoid being struck by the sedan. SA [redacted] felt the situation had escalated and drew his service weapon. SA [redacted] exited his car and remained near the driver side door. Suddenly, the sedan lurched forward and to the left nearly hitting SA [redacted] again. The sedan stopped briefly, and then it swerved to the right, towards SA [redacted]. At this point, SA [redacted] perceived the

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direction of travel of the sedan as a direct threat to his safety and he commanded the sedan to stop. Subsequently, the sedan struck the left front bumper area of the BUCAR. As the sedan careened past the front driver side of the BUCAR, it was close enough for SA [redacted] to fear the sedan would hit him. SA [redacted] believed himself to be in imminent danger and indicated he made this determination based on the following: (1) he did not see the incident which prompted SAs [redacted] and [redacted] to initially approach the individual, but he did see SAs [redacted] and [redacted] confront the occupants of the sedan, identify themselves as FBI Agents, and start issuing commands; (2) he was unable to see the hands, gestures, or actions of the occupants of the sedan; (3) the sedan nearly struck SA [redacted] on two occasions; (4) one of his partners, who he worked with on a daily basis, perceived enough of a threat to draw his weapon; (5) the sedan had struck his BUCAR in an attempt to flee law enforcement, after all law enforcement personnel present identified themselves as such, orally and by activating emergency lights on [redacted]'s BUCAR, and were issuing commands to stop; and (6) [redacted] was in a position where he could turn the wheel of the sedan and crush SA [redacted] between the sedan and BUCAR. Since SA [redacted] felt in imminent fear for his life, he drew his handgun, a Glock 23, identified himself as an FBI Agent, and raised his left hand while issuing verbal commands to stop. When [redacted] failed to comply with the commands to stop, SA [redacted] fired 10 rounds at [redacted] and [redacted] were each hit once and suffered minor, non-life threatening wounds. SA [redacted] estimated the total time that elapsed between the first and last shot was only a few seconds.

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(U//~~FOUO~~) Following the shooting, the sedan left the parking lot at a high rate of speed. An ambulance crew parked in the parking lot observed the incident. The ambulance, with its emergency lights and siren engaged, pursued the sedan. The sedan crashed into a passenger car and light pole approximately a quarter of a mile away from the parking lot. Occupants of the passenger car sustained minor injuries and were briefly hospitalized. Upon observing the sedan leave the parking lot, the Agents returned to the BUCAR and followed in the direction the sedan was observed travelling. The Agents arrived at the

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crash scene approximately one minute after the crash. [redacted] was apprehended, and [redacted] left the accident scene before law enforcement arrived. [redacted] was later located and interviewed. [redacted] turned himself in to the FBI Chicago Field Office on 03/29/2013. FBI Chicago initiated an AFO case as a result of this incident. [redacted] was charged with violating Title 18, United States Code, Sections 111(a)(1) and (b), Assaulting, Resisting, or Impeding Certain Officers or Employees While Engaged In (or on account of the performance of) His/Her Official Duties. [redacted] were not charged.

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(U//~~FOUO~~) The shooting and crash scenes were processed by the Chicago Field Office ERT. SA [redacted]'s issued Glock 23 was rendered safe and entered into evidence. Ten .40 caliber shell casings were recovered which were consistent with the ammunition used in SA [redacted]'s weapon.

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The subject's sedan was processed by members of the FBI's Laboratory Shooting Reconstruction Team.

**SIRG Deliberations:**

(U//~~FOUO~~) A presentation of the known facts of the Agent-involved shooting, as detailed above, was made to the SIRG by IIC Stroud via a Power Point presentation. The Power Point included photographs of the scene as enhanced by the FBI Laboratory, an INSD Diagram of the scene, an enhanced copy of a video from the parking lot as taken while the incident occurred, and a copy of a video showing the vehicle of the subjects engaged in an auto accident.

(U//~~FOUO~~) The DOJ Deadly Force Policy provides a core principle that Agents "may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person."

(U//~~FOUO~~) The SIRG voted regarding the application of deadly force. Ten of 12 voting members determined the use of deadly force by SA [redacted] was in compliance with the DOJ Deadly Force Policy. The

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majority determined that SA [redacted] could have reasonably believed the use of deadly force was necessary because the subject ignored lawful commands to stop and while attempting to flee, almost struck SA [redacted] twice, hit a Bureau car, and almost ran over SA [redacted] causing him to move quickly to the side to avoid being hit by the vehicle. The vehicle was still in close proximity to SA [redacted] and the other agents, and presented an imminent danger to them when SA [redacted] fired the shots in a matter of seconds.

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(U//~~FOUO~~) Two of the voting members dissented, expressing the belief the application of deadly force in this instance was not in compliance with the Department of Justice's Deadly Force Policy. The dissenting members requested and were provided the opportunity to document the factors for their belief the application of DOJ's Deadly Force Policy was violated.

(U//~~FOUO~~) The dissenting opinion of [redacted] Special Legal Counsel, Civil Rights Division, USDOJ, was provided to INSD in a letter, which is noted as follows:

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To: Mark Morgan

*Deputy Assistant Director, Inspection Division*

From: [redacted]

*Special Legal Counsel, Civil Rights Division*

Date: February 24, 2014

Subject: Chicago 3/25/13

*At the February 21, 2014 FBI Shooting Incident Review Group meeting, I cast a vote that was one of two votes adjudging the non-fatal shooting by a Special Agent in Chicago on March 25, 2013, to be in violation of the Department's Deadly Force Policy. As Committee Chair, you advised that you were considering recording the majority vote - the shooting*

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*was within policy - along with the rationale of the dissenting voters. This memo presents a summary of my reasoning to assist the drafting of such report.*

*I concur with the effort to better articulate and record the decisions of the Group to provide an historical record that may assist future decisions by reference to the analysis employed in past matters. The facts of this matter and the Group's differing conclusions offer an excellent case study to archive.*

*Also, I have no objection to sharing my analysis with other Group members if you feel it is warranted.*

*In my view, whether DOJ Deadly Force Policy was violated in this matter presents a close question. My earlier decision on behalf of the Civil Rights Division, that there was insufficient evidence that the conduct might have violated the applicable criminal civil rights statute, 18 USC 242, was not a difficult one. There, the issue was whether sufficient evidence existed to support a conclusion that the shooter acted willfully - an essential element that was necessary to establish beyond a reasonable doubt to constitute criminal conduct. Willfulness requires the specific intent to do that which the subject knew to be unlawful. As indicated in the written declination, the evidence was not sufficient to establish that the shooter knew his conduct was unlawful and acted intentionally despite that knowledge. Additionally, a criminal violation demands proof of each element beyond a reasonable doubt.*

*The issue for the SIRG is whether the conduct violated a specific Department policy, the Department's Deadly Force Policy. I applied certain fair and reasonable procedures and standards that I believe should apply (although I have never seen them articulated) in making my decision as a voting member. [1]*

*Employing these standards, I concluded that:*

- 1. There was no evidence that the agent acted with malice or improper*

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*motives. Also, he was involved in a fast moving, dangerous situation. Based upon all the available information, it appears that he either fired his weapon to protect his own life from imminent danger (as articulated in the Policy at Principle I) or to prevent the escape of a suspect (Principle I.A.) or both.*

*2. Under Department policy, (Principle I) Department law enforcement officers may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person. And, (Principle I.A) deadly force may not be used solely to prevent the escape of a fleeing suspect.*

*3. The agent's proffered an explanation of his six reasons for using deadly force. I considered his explanation in the context of the entirety of his signed sworn statement, recorded statements of other witnesses, available factual and forensic evidence, and videos (primarily the ambulance video).*

*4. I concluded these critical facts were relevant (a) the agent had reason to believe that the initial criminal activity was the stealing of hubcaps; (b) the agent saw the encounter between the other two agents and the hubcap thieves in their car from a distance, to include an agent displaying his gun and an agent jumping out of the way of the suspect's car as it rapidly backed up in an effort to escape, arguably elevating the criminal activity to assault on a federal officer; (c) the driver sped directly at the agent and almost struck him and nearly pinned him between the suspect's moving car and the agent's parked car and the agent reasonably believed that the driver was attempting to run him over or indifferent as to whether that might occur; (d) the agent fortunately extricated himself from the front of the car and side-stepped himself into a position where he was directly alongside of the driver's window with his feet on the ground, upright, and in contact with the suspect's car; (e) as he did this, the agent upholstered his weapon and quickly pointed it at the driver through the window and fired; (f) the agent knew there were other individuals*

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*inside the suspect's car other than the driver ; (g) the agent fired ten shots apparently at the driver as he moved on foot to keep up with the car; and (h) the agent continued to fire after the car passed, as it was driving away from him, and when he was no longer in contact with the car.*

*4. The assessment warranted by these facts, in plain language, boils down to determining whether the agent fired all shots because he reasonably believed the use of deadly force was necessary to protect himself or fired shots solely to prevent the escape of the suspect. The first shots by the agent arguably were not necessary to protect him. However, given the rapid development of events, I believe the agent warrants the benefit of the doubt and therefore conclude by the preponderance of the evidence that it was reasonable for the agent to believe that it was necessary to shoot his weapon to protect his life as he extricated himself from the danger facing him and when he first fired. Nonetheless, also by the preponderance of the evidence, I conclude that the agent had sufficient information and time to recognize, and that he did recognize, that the imminent danger to him had passed when he fired the last of his ten shots. Significant to this conclusion is the agent's contention in a carefully constructed writing with benefit of counsel that he continued to fire at the driver of the car as the car passed him. The video shows the agent, stretching out his arm, aiming the handgun at the driver (consistent with firing the weapon) after the agent had separated from the car and the car was pulling away from him. Hence, at that point, there is no reason to shoot other than solely to prevent escape. Using deadly force solely to prevent escape violates policy.*

*5. Decision-making under these circumstances requires quick reaction, as it necessarily should, and once initiated it is difficult to disengage from such conduct. But, policy requires that our federal law enforcement officers make exactly these time-sensitive, difficult decisions. Here, the agent claimed that he was firing at a car as it passed. His contention is consistent with the video representation that the car has passed him and thus he has had sufficient time to*

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*recognize that he is no longer in jeopardy. The evidence supports the conclusion that, at least at this point in the incident, the agent is not firing to protect himself but solely to prevent the suspect's escape. It is equally important to decide when deadly force is no longer necessary as it is to decide when it is. Both decisions are required to be made under trying, rapidly unfolding circumstances.*

*6. If a part of the use of deadly force is not within by the Department policy, the use of force itself is not within policy. My conclusion that there was a violation of policy does not address whether the conduct met constitutional requirements, just as it does not dispute my prior finding that there is insufficient evidence of willfulness to support a criminal prosecution. The Department Deadly Force Policy, just as in the case of other Department policies, demands more of federal employees in my view than simple compliance with constitutional requirements. Finally, my vote as a member of SIRG is solely my conclusion and is not necessarily the view of the Department or the Civil Rights Division.*

(U//~~FOUO~~) The dissenting opinion of [REDACTED] Trial Attorney, Criminal Division, USDOJ, was provided to INSD in an E-mail, which is noted as follows:

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From: [REDACTED]@usdoj.gov>

To: Morgan, Mark Alan

Sent: Mon Feb 24 20:30:13 2014

Subject: My response re: Chicago hubcap shooting

*Well done, although I cannot conclude that the first shot(s) were at all justified. The sole reason for believing an escalation had occurred was one agent drawing his weapon. The gun wasn't pointed and nothing indicating urgency or escalation (such as "gun") was shouted. Also, the shooter shot from the side, there was absolutely no danger to him or anyone else at the time he chose to fire. Setting that aside, I*

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*also cannot square shooting 10 times into a vehicle that he knew was occupied with two others, by all accounts older innocents, as ever being justified under these circumstances. The fbi's training scenarios themselves say shooting at a subject who'd fired on agents before turning and running into a crowded restaurant is unjustified because the risk of injuring innocents outweighs the use of deadly force. That is the case here, and the precipitating event (a car pulling away from a suspicion of a local misdemeanor encounter, not even a federal felony) is almost non-existent, and surely not such that the use of deadly force was justifiable. Finally, I think your vote is more than just your own. I think you represent a division within the department.*

(U//~~FOUO~~) In rebuttal to the opinions expressed, the FBI provided the following information:

(U//~~FOUO~~) DOJ Attorney #1 stated during SIRG deliberations he considered the first couple of shots taken by the agent to be within the DOJ Deadly Force Policy and possibly the next few as well, but the last few shots were clearly outside the scope of the DOJ policy because the vehicle had passed the agent when it appeared SA [redacted] was extending his arm to shoot again. In DOJ Attorney #1's subsequent written submission, in which he noted the issue of whether the DOJ policy was violated in this case "presents a close question," DOJ Attorney #1 concluded:

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The first shots by the agent arguably were not necessary to protect him. However, given the rapid development of events, I believe the agent warrants the benefit of the doubt and therefore conclude by the preponderance of the evidence that it was reasonable for the agent to believe that it was necessary to shoot his weapon to protect his life as he extricated himself from the danger facing him and when he first fired. Nonetheless, also by the preponderance of the evidence, I conclude that the agent had sufficient information and time to recognize, and that he did recognize that the imminent danger to him had passed when he fired the last of his ten shots. Significant to this conclusion is the agent's contention in a carefully constructed

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writing with benefit of counsel that he continued to fire at the driver of the car as the car passed him. The video shows the agent, stretching out his arm, aiming the handgun at the driver (consistent with firing the weapon) after the agent had separated from the car and the car was pulling away from him. Hence, at that point, there is no reason to shoot other than solely to prevent escape. Using deadly force solely to prevent escape violates policy.

(U//~~FOUO~~) The United States Supreme Court has explained that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." Graham, 490 U.S.390, 396 (1989). The Court advised that "proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* The Court also stated that reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and that 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." *Id.* at 396-97. The ultimate question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

(U//~~FOUO~~) The opinion of DOJ Attorney #1 judges the situation with the vantage of 20/20 hindsight, as opposed to the perspective of a reasonable officer on the scene who is making a split-second decision in circumstances that are tense, uncertain and rapidly evolving.[2] Even with the opportunity to review an extensive factual record, including a videotape of the incident, DOJ Attorney #1 is not able to clearly identify exactly how many shots were justified versus how many were not in compliance with the DOJ policy but is instead relying upon

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the fact that the agent appeared in a videotape to extend his arm while separating from the car as it pulled away from the agent to determine that this was the point where the agent should have stopped shooting. The record indicates, however, that the shots were taken in a time frame amounting to seconds, and there was sufficient evidence to support a reasonable belief by SA [ ] that the occupant of the vehicle posed an imminent danger of death or serious physical injury to SA [ ] and the other agents. This imminent danger existed when the speeding car approached him directly from the front and immediately afterward, when SA [ ] in a manner that DOJ Attorney #1 analogized in his written prosecutive opinion to being like a matador avoiding a charging bull, managed to move from a position directly in front of the speeding car to a position immediately to its side when he fired the shots.

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(U/~~FOUO~~) Based upon the interviews of the agents, bystanders, and even the passengers in the subject/driver's vehicle, it is undisputed the agents identified themselves loudly as law enforcement officers and instructed the car to stop multiple times. When SA [ ] pulled up in his vehicle to attempt to block the exit in the parking lane, he heard the other two agents identifying themselves, and SA [ ] also activated the emergency lights on his vehicle. SA [ ] observed the vehicle back up a short distance and saw SA [ ] slap the front fender or hood on the driver's side with his hand. At that point, SA [ ] believed that there was a danger that SA [ ] and SA [ ] would be struck or run over due to their proximity to the moving vehicle. SA [ ] exited his vehicle and stood directly behind its door. As the other agents continued to identify themselves and direct the vehicle to stop, SA [ ] observed the vehicle lurch forward and turn to the right, almost hitting SA [ ] SA [ ] then saw one of the agents, later identified as SA [ ] draw his handgun and the driver then accelerate the vehicle back towards SA [ ] who also yelled for the driver to stop. The vehicle then struck the left front bumper area of the BUCAR and careened past the front driver side of the BUCAR. SA [ ] advised he could tell that the vehicle would pass within approximately two feet of where he stood and that he felt pinned

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by the driver side of the BUCAR after the vehicle had struck it. SA [redacted] backed away and because he felt in imminent danger for his life, he drew his weapon, identified himself as an FBI Agent, and raised his other hand while issuing verbal commands for the driver to stop. When the driver did not comply, SA [redacted] fired two to four rounds at the Driver. He heard the sound of breaking glass and continued backing away while firing another two to three rounds. As the vehicle continued past him, he fired an additional two to three rounds at the Driver and noticed bullet holes in the driver side rear door. SA [redacted] estimated the total time that elapsed between the first and last shot to be only a few seconds. One of the civilian witnesses, a former security guard, had also noted that "if [the] officer had not shot the suspect vehicle, it would have run the officer over."

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(U//~~FOUO~~) SA [redacted] advised that as the vehicle continued to the corner of the parking lot, he ceased firing because he believed that the distance between himself and vehicle was not appropriate for continued engagement, he was concerned about the traffic on the road in the proximity of the surrounding neighborhood, and his prior experience taught him to conserve ammunition in case the subject returned.

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(U//~~FOUO~~) The driver demonstrated a clear intent to ignore lawful commands from a law enforcement officer, almost hit SA [redacted] with the vehicle, struck a bureau vehicle, and then attempted to run over SA [redacted] while trying to flee. SA [redacted] could have reasonably believed that the threat from such an individual still existed even after he had moved to the side of the vehicle due to SA [redacted]'s close proximity to the vehicle when he fired the shots. SA [redacted] even cited as one reason for his belief that he was in imminent danger that "the driver of the Sedan was in a position where he could turn the wheel and crush me between the two cars and seemed to be proceeding to do so." In similar circumstances, courts have recognized the reasonableness of an officer's belief that imminent danger existed such that the use of deadly force was necessary. See e.g., Wilkinson v. Torres, 610 F.3d 546 (9<sup>th</sup> Cir. 2010) (officer could have reasonably

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believed that deadly force was necessary against the driver of a moving vehicle who ignored police commands and attempted to accelerate the vehicle within close quarters of two officers on foot in a "tense, uncertain, and rapidly evolving' situation); Thomas v. Durastanti, 607 F.3d 655 (10<sup>th</sup> Cir. 2010) (BATF agent's use of deadly force was reasonable because the agent could have reasonably perceived that the subject's vehicle posed an immediate threat to the agent when it was moving directly towards him and he was in a confined area, and at the time the agent fired the second shot, he had just been struck by the vehicle and spun around, so he could have reasonably perceived that the vehicle's threat had not passed); McCullough v. Antolini, 559 F.3d 1201 (11<sup>th</sup> Cir. 2009) (deputies could have reasonably concluded that the subject/driver of a vehicle posed a direct threat of serious physical injury justifying deadly force where an officer was pinned within a few feet between the subject's vehicle and his own and the subject revved the engine and began spinning the wheels of his vehicle, especially in light of the speed in which the incident unfolded); Robinson v. Arrugeta, 415 F.3d 1252 (11<sup>th</sup> Cir. 2005), cert. denied, 546 U.S. 1109 (2006) (even if hindsight showed that the officer could have perhaps escaped, the officer had probable cause to believe that a subject posed a threat of serious physical harm where the officer was standing in a narrow space between two vehicles, the subject disobeyed orders to put his hands up, the subject's vehicle was suddenly moving forward, and the officer had to make a split-second decision of whether he could escape before he got crushed).

(U//~~FOUO~~) When SA [REDACTED] did realize that the distance between him and the vehicle had increased and that the vehicle was continuing to the corner of the parking lot, he ceased firing because, at that point, he recognized that the imminent danger had passed. 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." Graham, 490 U.S. at 396-97. The fact that it may have taken SA [REDACTED] who had just

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jumped out of the way of a vehicle driven by a subject who had tried to run him down after hitting a bureau car and almost striking the other agents, a few seconds to realize that the vehicle might now be sufficiently far away such that the threat had passed, was not unreasonable.

(U//~~FOUO~~) Further, the subject attempted to run over SA [redacted] with his vehicle after the agents repeatedly identified themselves as law enforcement officers and FBI and ordered him to stop, which would give a reasonable agent probable cause to believe that the subject had just committed or attempted to commit an assault upon a law enforcement officer. The Supreme Court has advised that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. See Tennessee v. Garner, 471 U.S. 1, 12 (1985). Here, the subject was fleeing from an encounter where he had just attempted to inflict serious physical harm to SA [redacted] by running him over and still posed an imminent danger to him due to the close proximity of the vehicle to SA [redacted] while in the act of fleeing.

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(U//~~FOUO~~) DOJ Attorney #2 concurs with the opinion of DOJ Attorney #1 but opines the first shots by SA [redacted] would also violate the DOJ Deadly Force Policy because "[t]he sole reason for believing an escalation had occurred was one agent drawing his weapon" and "[t]he gun wasn't pointed and nothing indicating urgency or escalation (such as "gun") was shouted." This argument, however, does not appear to be factually accurate based upon the record. SA [redacted] observed far more than just SA [redacted] drawing his weapon and pointing it in an unclear direction before SA [redacted] used deadly force. As discussed previously, SA [redacted] did not even draw his own weapon until after he saw the vehicle almost hit SA [redacted] and then strike the BUCAR before proceeding directly towards SA [redacted] and he did not fire the weapon until he had managed to escape being run over by quickly moving from directly in front of the subject's vehicle to a position at its side.

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Further, the suggestion that SA [redacted] was required to shout something like "gun" to SA [redacted] before a reasonable law enforcement officer could have concluded that the situation had escalated or that danger existed does not take into account the types of tense and quickly evolving situations that officers face on the street. In the absence of facts suggesting a lack of imminent danger, the mere fact that an officer's partner pulls his/her weapon while confronting a subject would be enough to lead a reasonable officer to believe that the situation had just escalated in that his/her partner saw or heard something that caused the officer's partner to draw a weapon even if the officer did not see or hear what it was that caused the partner to react in that manner.

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(U//~~FOUO~~) DOJ Attorney #2 also advised that he "cannot square shooting 10 times into a vehicle that [the agent] knew was occupied with two others, by all accounts older innocents, as ever being justified under these circumstances." In support, DOJ Attorney #2 cites the FBI's training scenario where an agent shoots through a crowded restaurant at a subject who had fired previously on the agents. In this training scenario, the agents initially dived for cover when the subject shot at them and then pursued the subject into a nearby crowded restaurant. From the entrance of the restaurant, the agent observed the subject making his way through the crowd toward the rear exit. At that point, the agent fired at the subject. The training scenario advises the use of deadly force would violate the policy in that instance because although there is reason to believe the subject is fleeing the scene of a violent confrontation where he has just attempted to inflict death or serious physical injury, shooting into a crowded restaurant creates an unreasonable danger to the public that is not outweighed by the likely benefits. The scenario also noted pursuing an armed and dangerous subject under those circumstances would also create an unreasonable risk to the agent and, under the policy, agents are not required to assume unreasonable risks.

(U//~~FOUO~~) The training scenario cited is factually very different than the circumstances faced by SA [redacted]. A more closely analogous FBI

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training scenario is one in which an undercover Agent purchases cocaine from two subjects seated in an automobile in a deserted parking lot at 3:00AM. A team of agents moves in on foot to arrest the subjects, identifying themselves as law enforcement officers and asking to see their hands. The subjects' car suddenly veers towards them with the apparent intent to strike them, and the agents fire. The training scenario advises that the use of deadly force is permissible and that the subject is not using the vehicle merely to escape but rather as a weapon to attack the Agents. The training scenario advises that deadly force is permissible to protect the Agents and others in the vicinity and that the Agents would not be required to permit the subjects to escape from the vicinity of a violent confrontation where they have just attempted to inflict death or serious physical injury on the agents. Further, verbal warnings were given before the shots were taken and were ignored by the subjects. This training scenario also advises that consideration must be given to whether the use of deadly force creates a danger to third parties that outweighs its benefits.

(U//~~FOUO~~) The restaurant scenario clearly involves a situation that poses unreasonable risks to the public because the agent would be shooting at the subject through a crowd of innocent bystanders. In contrast, SA [REDACTED] faced circumstances where he believed there was an imminent danger to him from the nearby vehicle because the subject had demonstrated intent to use the vehicle as a weapon by running him over. While passengers were also present in the car, the balancing of interests regarding dangers to third parties is not so clear as the restaurant scenario because here, it was reasonable for SA [REDACTED] to believe that the passengers who were in the car were also involved in the criminal conduct, unlike a crowd of clearly innocent persons who were at a restaurant. In a split-second decision where SA [REDACTED] was in imminent danger of being seriously injured or killed by the driver of a vehicle which was still in close proximity to him, the use of deadly force was not unreasonable even if there were also passengers in the car.

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(U//~~FOUO~~) Finally, DOJ Attorney #2 argues that "the precipitating

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event (a car pulling away from a suspicion of a local misdemeanor encounter, not even a federal felony) is almost non-existent, and surely not such that the use of deadly force was justifiable." Again, this argument ignores the actual facts of the incident. SA [redacted] did not shoot at the subject because he was stealing hubcaps; he shot at him because the subject attempted to run him over with his vehicle and SA [redacted] believed, based upon all the facts and circumstances, that the subject still posed an imminent danger to him even after he had moved to the side of the vehicle instead of being directly in front of it due to the proximity of the vehicle to himself and the other agents. See generally Scott v. Harris, 550 U.S. 372 (2007) (deputy's use of deadly force to terminate a high speed chase of a subject who was fleeing the scene of a minor traffic offense was reasonable where the subject's flight itself posed a threat of serious physical harm to others); Durastanti, 607 F.3d at 668 (noting that a law enforcement officer who is faced with the possibility of danger has a right to take reasonable steps to protect himself regardless of whether probable cause to arrest exists).

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**SIRG Observations**

(U//~~FOUO~~) On 02/21/2012, the SIRG reviewed the Agent-involved shooting incident with the intent to:

1. **Evaluate the application of deadly force.** The SIRG voted regarding the application of deadly force. Ten of 12 voting members determined the use of deadly force by SA [redacted] was in compliance with the DOJ Deadly Force Policy. The majority determined SA [redacted] could have reasonably believed the use of deadly force was necessary and the vehicle presented an imminent danger to the involved Agents when SA [redacted] fired the shots. As a majority opinion, it was determined SA [redacted] was in compliance with the DOJ Deadly Force Policy.

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Two of the voting members dissented, expressing the belief the application of deadly force in this instance was not in compliance with

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the Department of Justice's Deadly Force Policy. The dissenting members requested and were provided the opportunity to document the factors for their belief the application of DOJ's Deadly Force Policy was violated.

2. **Provide the Director with an evaluative analysis, observations, and recommendations for corrective action concerning operational planning and execution, training, and/or safety issues.** The SIRG made the following observations and recommendations:

(U//~~FOUO~~) **SIRT Observation 1:** The Chicago Field Office Agent Involved Shooting Response Plan (AISRP) was not followed by Chicago Field Office personnel.

**Analysis:** (U//~~FOUO~~) On 03/29/2013, the SIRT reviewed the Chicago Field Office AISRP. The AISRP was dated November 2010. As cited verbatim in the Chicago Field Office AISRP Introduction Section, "The purpose of this document is to provide guidance to Chicago Division employees who may become involved in a shooting incident, either as a participant or one who responds to an incident. Checklists have been devised to prioritize actions of those involved." AISRP Section III (1) (b) "The Involved Agent - Notification Checklist" stated, "When an Agent becomes involved in a shooting either he or an Agent in his presence should notify the Chicago Radio Room and request any necessary medical or other assistance. Depending on exigent circumstances, it may be necessary to first notify Emergency Services - 911."

(U//~~FOUO~~) The SIRT determined, based on 12 interviews, neither the involved Agent nor an Agent in his presence provided notification of the incident to the Chicago Field Office Radio Room as outlined in the AISRP.

(U//~~FOUO~~) **SIRT Recommendation 1a:** SAC, Chicago Field Office should ensure all Chicago Field Office personnel are appropriately trained regarding the AISRP.

(U//~~FOUO~~) **SIRT Recommendation 1b:** SAC, Chicago Field Office should

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ensure the Chicago Field Office AISRP is reviewed and updated annually.

(U//~~FOUO~~) **SIRT Observation 2:** Intervention to enforce minor infractions of the law could fall outside the scope of employment.

**Analysis:** (U//~~FOUO~~) The 03/25/2013 Agent-involved shooting incident evolved from Chicago Field Office Agents engaging with a subject they believed was stealing hubcaps in violation of Illinois Compiled Statutes (ILCS) Subdivision 5., General Theft, Section 16-1., Theft. The Agents involved in the shooting incident stated it was not their intention to arrest the subject, but just to identify him, determine what he was doing, and provide the information garnered to the Chicago Police Department.

DIOG, Section 19.3.3 states the following regarding non-federal crimes:

*"There is no federal statutory authority for Agents to intervene in non-federal (state) crimes. FBI policy permits certain types of non-federal arrests in exigent circumstances.*

*As a general rule, an Agent should only make an arrest for a state crime if a serious offense (felony or violent misdemeanor) has been committed in his or her presence and immediate action by the Agent is necessary to prevent escape, serious bodily injury, or destruction of property.*

*Agents are also authorized to arrest a person who is the subject of an FBI Predicated Investigation when a state or local arrest warrant for that person is outstanding, and the person is encountered during the investigation and would likely escape if not arrested. Similarly, an Agent working with state or local law enforcement officers who request assistance to apprehend a nonfederal fugitive who has been encountered during the course of a federal investigation is authorized to provide the requested assistance when intervention is otherwise permitted for a state crime as described in the preceding paragraph.*

*In some states, there is legislative authority for an Agent to*

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*intervene in certain types of state crimes as a peace officer rather than as a private citizen. Deputization as a state peace officer allows a federal Agent to make arrests for state offenses with the authority and immunities of a law enforcement officer of the state or one of its subdivisions. Of greater significance is whether intervention by an Agent in a particular nonfederal crime falls within the scope of employment. Agents who intervene in serious nonfederal crimes committed in their presence or who arrest a state fugitive under the circumstances previously described will normally be considered to be acting within the scope of their employment. While the determination to provide legal representation depends on the facts and circumstances of each circumstance, the DOJ, as a general rule, will provide legal representation to Agents who act in accordance with this policy.*

*It is important to note that the DOJ has indicated that efforts to enforce minor infractions of the law, such as shoplifting or traffic violations, are not generally considered to be within the scope of employment. Civil actions against federal personnel concerning acts which fall outside the scope of employment will not be removed to federal courts, and employees in such circumstances will not be eligible for legal representation provided for by the DOJ. An Agent's status with respect to civil liability in such circumstances will depend on a particular state's law, which may require an employee to defend himself/herself as an ordinary citizen."*

(U//~~FOUO~~) The State of Illinois afforded federal law enforcement officers, to include the FBI, "Peace Officer Status," for the purposes of sections concerning unlawful use of weapons, for the purposes of assisting an Illinois peace officer in an arrest, or when the commission of *any offense* (emphasis added) under Illinois law is directly observed by the person. Therefore, under ILCS, the Agents were considered "peace officers" when they approached the subject stealing hubcaps. The theft of hubcaps, not exceeding \$500 in value, was a Class A misdemeanor in the state of Illinois.

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(U//~~FOUO~~) Being afforded Illinois "Peace Officer Status" means the Agents likely would not have to defend themselves against civil liability as an ordinary citizen; however, the Agents may not be provided legal representation by the DOJ due to the question of scope. As stated in the DIOG Section 19.3.3 referenced above, DOJ indicated efforts by Agents to enforce minor infractions of the law, such as shoplifting or traffic violations, are not generally considered to be within the scope of employment. Taking action to thwart the theft of hubcaps could be interpreted as the enforcement of a minor infraction of the law. To not be afforded federal representation in civil actions needlessly exposes Agents to state legal issues and procedures.

(U//~~FOUO~~) **SIRT Recommendation 2:** SAC, Chicago Field Office should ensure all Agents are trained regarding intervention in non-federal crimes, and potential liability attached thereto.

3. **Provide recommendations for administrative action if deemed necessary.** The SIRG recommended no administrative action be taken against SA [redacted] as a result of his involvement in this shooting incident.

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(U//~~FOUO~~) Deputy Assistant Director (DAD) Mark Alan Morgan, INSD, chaired the meeting and was a non-voting member. The following voting members were in attendance: Chief Inspector Robert J. Shields, Office of Inspections (OI), INSD; [redacted] Trial Attorney, Criminal Division, United States Department of Justice (USDOJ); [redacted] Special Legal Counsel, Civil Rights Division, USDOJ; Acting Section Chief [redacted], Criminal Investigative Division; Section Chief (SC) Roger Coe, Global Section, Counterintelligence Division; SSA [redacted] Squad CR-2, Washington Field Office; SSA [redacted] Practical Applications Unit (PAU), Training Division (TD); SSA [redacted] Investigative Law Unit, Office of the General Counsel; SSA [redacted] Evidence Response Team (ERT), Laboratory Division (LD); SSA [redacted] Firearms Training Unit, TD; UC [redacted] Special Weapons and Tactics Operations Unit,

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Critical Incident Response Group (CIRG); and SSA [redacted] Defensive Systems Unit, TD. The following non-voting members were also in attendance: [redacted] Office of Inspector General, USDOJ; Inspectors David Paul Gelios, R. Justin Tolomeo, Howard Marshall, Paul Delacourt, Trent R. Teyema and Shawn W. Stroud, OI, INSD; Team Leaders [redacted] [redacted], OI, INSD; SSA [redacted], ERT, LD; Unit Chief (UC) [redacted] PAU, TD; DAD Joshua Skule, Counterterrorism Division; SSA [redacted] Office of Public Affairs; SC Jay Tabb, CIRG; Assistant Director Michael Prout and DAD Blair Deem, OI, United States Marshal Service; [redacted] [redacted] Special Assistant, OI, INSD; SC Tracy A. Paige, OI, INSD; UC [redacted] and Management Program Analysts [redacted] [redacted] Inspection Management Unit, INSD.

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Procedures for Responding to the Instruction

SAC, Chicago Field Office, is responsible for ensuring each Inspection Instruction/Recommendation is satisfactorily resolved. The inspection process is not complete until the Instruction/Recommendation is addressed by the field office. The Inspector-in-Charge (IIC) will review the field office's response to determine if the Instruction/Recommendation has been resolved or requires further action. Resolution is based upon specific actions taken and not a recitation of the actions the division has under consideration or plans to implement.

SAC, Chicago Field Office, is required to provide a written response, via EC, detailing the actions taken by the field office to resolve each Instruction/Recommendation. Follow-up EC responses must be directed to Unit Chief [redacted] Inspection Management Unit (IMU), INSD. Once the EC is serialized, please e-mail the Sentinel link to MPA [redacted]

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[1] I applied the following standards:

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- (1) at the outset, the conduct of an agent should be presumed to be within policy;
- (2) the burden of establishing that the conduct is not within policy should be the SIRG's burden,
- (3) the proper standard of proof should be a preponderance of the evidence, as there is no rational basis to employ a lower standard or a higher one, such as clear and convincing;
- (4) the agent's proffer of his own state mind (as recorded in a sworn statement) is significant evidence to establish this critical factor, but it should not be dispositive of the agent's state of mind;
- (5) all surrounding circumstance and facts, including statements of others, factual and forensic information, and video documentation should be considered to adjudge the agent's state of mind;
- (6) the ultimate issue is whether all the available evidence supports a conclusion that the use of deadly force was within the Department's policy as articulate by the plain language of the policy. What an objectively reasonable law enforcement officer would have done is a factor, but not the ultimate issue as it would be in determining civil liability in a constitutional torts case.

[2] It is noted that DOJ Attorney #1 applies a preponderance of the evidence standard and establishes certain presumptions that DOJ Attorney #1 states the SIRG should apply to the incident, but admits that these standards and presumptions are not set forth anywhere in DOJ policy. The DOJ Deadly Force Policy, however, is based upon a Fourth Amendment reasonableness standard, which looks to all the facts and circumstances to determine whether an agent had a reasonable belief that the subject posed an imminent danger of death or serious bodily injury to the agent or another person such that the use of deadly force was necessary.

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