Review of Officer Involved Shooting of Dustin Theoharis

Report Prepared for the Office of Law Enforcement Oversight

Police Assessment Resource Center (PARC)

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Police Assessment Resource Center (PARC)

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Executive Summary

This report, *Review of Officer Involved Shooting of Dustin Theoharis*, focuses on the tactics and decisions of KCSO and DOC members who were on involved in this incident, the investigations by KCSO that followed, and the assessment as a result of these investigations. This report also provides PARC's evaluation of this incident through a Decision Point Analysis, and a brief description by the King County Office of Law Enforcement Oversight (OLEO) as described by Director Charles Gaither. In writing this report, PARC examined MCU investigation files and evidence, statements and interviews of the involved officers and witnesses, photographic and video evidence, and evidence collection documentation.

After a thorough analysis of these materials, we conclude that the use of deadly force appears to have been lawful and within KCSO policy. KCSO managers reviewing the incident appropriately examined the conduct of the officers leading up to the shooting incident, reasonably identified errors and missed opportunities, and properly traced them to serious deficiencies in officer training and protocols governing service of DOC warrants.

Nonetheless, we were deeply troubled by serious deficiencies in the underlying investigation and the apparent unwillingness of KCSO to question its own officers about the use of deadly force once it appeared that they have not committed a crime. For example, the involved officers were not immediately interviewed about their actions, but instead were given over a month to provide a written account of the shooting. In addition, physical evidence was overlooked or moved, witness interviews were not thorough, and inconsistencies were not adequately addressed.

Some of the deficiencies may have been unique to this case, but others, such as the failure to promptly interview involved officers, are the product of policies that tilt noticeably in favor or officers and undermine confidence in the ability of KCSO to investigate its own officers and hold them accountable.

Introduction

This report constitutes PARC's review of the King County Sheriff's Office (KCSO) investigation of a February 11, 2012 Auburn, Washington officer-involved shooting (OIS) incident involving KCSO Detective X and Washington Department of Corrections (DOC) officer Y.[1] The memorandum also briefly discusses various KCSO's policies and procedures relating to deadly force investigations.

I. Factual Background.

A. Receipt of Department of Corrections (DOC) Warrant and Preparation.

The officer-involved shooting incident occurred during service of a Department of Corrections (DOC) warrant for the arrest of Probationer Nicholas Harrison, who had failed to report to community supervision. The arrest was carried out by DOC Officer Y with the assistance of three members of KCSO's Gang Unit: Detectives X, A, and B. KCSO has provided similar assistance to DOC many times in the past pursuant to a memorandum of understanding. Detective X later reported to investigators that he himself had provided assistance on at least 500 similar calls prior to the shooting in this case.

Officer Y received information from DOC that Probationer Harrison resided at the house of his father, Cole Harrison. Officer Y put together an arrest packet that included Probationer Harrison's description and a photograph. He later reported that he had had a confidential informant visit the house and confirmed by telephone that Probationer Harrison was home.[2] The informant also reported that the Probationer's father, Cole, was there, as well as his brother, Shane, and Nicholas Harrison's five year-old son.

[1] The identities of all law enforcement members, save for the publically elected Sheriff, will remain anonymous throughout this report.

[2] In his March 2012 compelled written statement, DOC Officer Y did not mention sending a confidential informant to the house, but wrote instead that he had received an "anonymous tip" that probationer Harrison was in the house. (P 744). KCSO Detectives B and A referred to Officer Y sending in an informant, and Officer Y later told KCSO that the "tip" was really information from the informant he sent to the house. (P 759).

B. Arrest of Harrison and Upstairs Search.

Service of the warrant and the arrest were uneventful. The officers arrived at Harrison's house at approximately 3:45 p.m. All officers were in plain clothes, although they wore vests or jackets that clearly identified them as law enforcement. Detective B moved to the backyard to cover any possible escape route, while DOC Officer Y and KCSO Detectives X and A entered the residence after speaking to Harrison's father, Cole Harrison.

Almost immediately upon entering the split-level house, the officers spotted the probationer, Nicholas Harrison, at the top of a short flight of stairs. They summoned him down and handcuffed him without incident. The arrest appears to have been completed within a minute or two after entering the home.

Rather than depart the residence with Nicholas Harrison in custody, DOC Officer Y decided to remain at the house and spend some time "looking around for DOC violations."[3] The conditions of Harrison's release authorized DOC to search his residence. Officer Y and Detective X elected to search the upstairs of the residence together. A brief search of Probationer Harrison's room and a brief conversation with the Probationer's brother, Shane Harrison, did not identify any DOC violations or any evidence suggesting a threat to officers' safety. While speaking to Shane, the officers learned that another individual, Dustin Theoharis, was staying in a lower-level bedroom. The officers claim they found a single sheet of paper that looked like a drug ledger, but they did not pursue the matter further. The officers later reported they did not ask about weapons in the house.

C. The Living Room Conversation and Decision to Search the Downstairs.

After searching Probationer Harrison's bedroom, Officer Y and Detective X returned to the kitchen/living room area where Detective A was waiting with Probationer Harrison and his family. Around the same time, Detective B joined the group.

[3] DOC Officer Y Written Statement (P 744).

The witnesses disagreed about the details of the ensuing discussion, but agreed that DOC Officer Y and Detective X told the group they were going to look downstairs. All witnesses except Detective A reported hearing them say they were going to look for Mr. Theoharis in the downstairs bedroom.

Detectives A and B remained with Nicholas, Cole, and Shane Harrison, and Nicholas' five year-old son in the kitchen/living room area. These individuals (except the child, who was not interviewed) later reported not hearing any sounds from downstairs prior to the shooting. They disagreed about whether they would be able to hear loud officer commands below.

In the downstairs foyer, DOC Officer Y and Detective X noticed a tall, closed gun safe to their left and agreed they would ask Cole Harrison about it later. According to Detective X, he drew his primary firearm, a Glock .40, and used the barrel mounted flashlight to illuminate the room. (It appears there was no KCSO policy regarding weapon-mounted flashlights, and it is unclear whether this flashlight or its use here was authorized.) DOC Officer Y had a handheld flashlight and left his gun holstered.

The two officers proceeded to the room where Dustin Theoharis was reportedly staying. Cole Harrison later described the room as "a little apartment by itself," with its own bathroom and outdoor entry. He added that he would not enter the room without knocking.[4] Both officers had been in this room during an October 2010 DOC visit to Probationer Harrison and had encountered a different lodger who, according to Detective X, had access to firearms.[5] The officers later reported that the glass door to the bedroom was covered in fabric and the room was dark inside. They noted the glass door had an exterior lock and opened to the outside.

[4] Cole Harrison Interview (P 313).
[5] Detective X Written Statement (P 324).

D. Room Entry and Shooting.

According to the officers, DOC Officer Y made first contact with Dustin Theoharis by knocking on the door, announcing, "Police." He drew his sidearm and partially opened the door to look inside. (P 744). He could see the room was dimly lit, with Theoharis lying on a bed, covered by a comforter. The room was quite cluttered, and a night stand next to the bed held drug paraphernalia.

Both officers reported they identified themselves as law enforcement and asked Theoharis to show his hands as they entered the room, illuminating it with their flashlights. Theoharis briefly raised his hands from under the comforter, but only for a moment. The officers now stood at the foot of the bed. Officer Y, holding his gun in his right hand and his flashlight in his left, pulled the comforter off the bed, exposing Theoharis, who was fully dressed. Dustin Theoharis did not make any sudden movements and no weapons were in view.

Remaining at the foot of the bed, DOC Officer Y asked Theoharis if he had any guns. Theoharis reportedly replied that he had three. According to the officers, when DOC Officer Y asked where the guns were, Theoharis called out suddenly, "Right here," and then lunged to the left (nightstand) side of the bed and began reaching under the mattress with his left hand.

The officers reported shouting commands for Theoharis to stop and show his hands. When Theoharis continued his actions, the officers opened fire. It is not clear who fired first. Detective X reported that when he opened fire, Dustin Theoharis's back was exposed to him, as Theoharis was still reaching for something he thought was a gun. DOC Officer Y stated that Dustin Theoharis transitioned to lay flat on the bed.

KCSO investigators never conclusively established how many rounds were fired, because the officers were unsure how many rounds they had loaded in their weapons. Investigators recovered 15 shell casings — eight matching DOC Officer Y's gun and seven matching Detective X's. Only seven spent bullets were recovered. (P 378). The MCU and IIU investigations do not confirm how many rounds struck Theoharis or describe their trajectory.

The officers did strike Theoharis in the torso, jaw, arms and legs.[6] None of the wounds were fatal.

Theoharis fell to the floor and remained largely immobile. Detective B, who had not heard anything from downstairs prior to the shots, ran downstairs and entered the room, pistol drawn. He jumped onto the bed and pointed his weapon at Theoharis, who was on the floor next to the night stand. Detective X holstered his pistol and dragged Theoharis by his leg(s) several feet away from the nightstand. After the shooting was broadcast and medical assistance summoned, Detective B learned the officers had not cleared the room and then proceeded to clear it himself. He found no occupants and no guns. There is no indication whether or when the officers lifted the mattress to look for the objects Dustin Theoharis was allegedly seeking to retrieve.

Investigators found no weapons or any other objects under the mattress. They did report finding a small black flashlight on the floor next to the nightstand. Neither DOC Officer Y nor Detective X claimed to have seen any object in Dustin Theoharis's hands. Because it appears undisputed that Theoharis did not retrieve a weapon, the stated justification for the use of deadly force is that officers reasonably, albeit mistakenly, believed Theoharis was in the process of retrieving a firearm in order to attack them.

E. The KCSO Investigation.

1. MCU Investigation.

Pursuant to KCSO policy, the incident was initially investigated by the Major Crimes Unit (MCU), which conducts criminal investigations. KCSO did not send to the scene any Internal Investigations Unit (IIU) or Training Bureau/Division representatives. DOC sent its own investigations team to the scene, but it did not interview any witnesses or conduct any scene analysis.

[6] The file does not contain any photographs, diagrams, or catalog of the entry wounds.

Both Officer Y and Detective X declined to submit to a voluntary interview, though both answered several "public safety questions," such as whether they were injured or had blood on their clothing. Although KCSO and DOC could have immediately ordered the officers to submit to an interview or provide a written report,[7] both elected to wait a month before asking for any statement. When they did ask for the officers' account, both agencies decided they would allow the officers to provide a written statement in lieu of an interview. (As noted below, DOC Officer Y was never interviewed about the shooting and Detective X was not interviewed about the shooting until September 13, 2012 — seven months after the incident.)

The evening of the shooting MCU conducted recorded interviews of Detectives B and A, who had been in the Harrisons' living room when the shooting occurred.

MCU also unsuccessfully sought to interview Dustin Theoharis about the incident. The investigation indicated that Theoharis did own a rifle that was locked in the gun safe outside his room. The file materials indicate no prior history of violence by Theoharis.

KCSO ordered Detective X to provide a written account of the shooting on March 12, 2012. By this point, it appears that Detective X already had had an opportunity to discuss the incident in detail with his fellow officers at a February 22, 2013 critical incident stress debriefing scheduled by KCSO's Personal Assistance Team (PAT) members. It appears that MCU was not in a position to question Detective X or other officers about what was discussed at the debriefing, as such peer support meetings are confidential under KCSO policy and perhaps under state law.

DOC Officer Y provided his compelled written statement on March 19, 2012. The investigative file does not address whether the officers had conferred with each other while preparing their written statements, or whether DOC Officer Y had seen Detective X's statement prior to completing his own.

[7] Under existing KCSO policy, even if Detective X had been ordered at the scene to provide a compelled statement, he could have taken up to 72 hours to provide it. *See* General Order (G.O.) 6.02.015, subd. (4)(c).

Nonetheless, MCU Investigator C did report seeing two union representatives for Detective X — KCSO Sergeant D and Guild Attorney, Christopher Vick — confer with Detective X and then later confer with DOC Officer Y and his union attorney, Chris Coker. (P 158, P 823). Presumably MCU was not allowed to ask Sergeant D and Attorney Vick whether they had shared any information they obtained from Detective X with DOC Officer Y and his attorney. Nor is it clear whether KCSO policy addresses Sergeant D's role in the conversation with DOC Officer Y.

2. Initial Administrative Review; Prosecutor Declination.

On June 4, 2012, KCSO Sergeants E and F submitted to IIU Captain I a "Supervisor's Use of Force Incident Review" of the Auburn incident. (P 5, P817). Pursuant to KCSO policy, this review should have been completed by Detective X's on-duty supervisor. (General Order 6.01.025). However, the supervisor did not comply with this requirement and the file materials do not indicate why.

Sergeants E and F did address the use of deadly force and found it reasonable and justified. They acknowledged that it was unusual for Dustin Theoharis to have gone for a weapon when there was none to be found. The only explanation they suggested was that Theoharis, a drug user, led a troubled life. They did not discuss whether the officers' written accounts of the shooting were complete or accurate.

On June 19, 2012, the King County Prosecuting Attorney's Office issued a "declination" memo explaining that the officer would not pursue criminal charges against the officers. (P 823).

Major G presented his review by memorandum to Chief H dated August 21, 2012. The review process was assigned to two KCSO Sergeants, E and F (P 2-3. P 824). The review was based upon the MCU investigation and DOC's separate review of DOC Officer Y's actions. (P 3). Major G identified no policy violations, but did express concerns about a lack of guidance and training for KCSO officers providing assistance to DOC. Major G

expressed no views on the use of deadly force or tactics immediately prior to the shooting.

This review included two brief compelled interviews of the officers. Detective X was interviewed on August 16, 2012, and DOC Officer Y was interviewed on August 22, 2012. (P 749 – 771). By order of KCSO Major G,[8] the interviews would address the only the search/privacy issues. (P 750). For reasons not disclosed in the file, neither officer was asked about the shooting.

On August 30, 2012, Major G issued a three-page memorandum to KCSO Chief H describing the conclusion of the administrative review. (P 886). He expressed no concerns about the shooting itself, but instead observed that "[t]he question of tactics, authority of DOC, and Fourth Amendment rules on 'Third Party Privacy' rights raise the most significant issue of this investigation." He also noted the "lack of clear written expectations and policies by the KCSO that may affect the KCSO/DOC authorities." (P 888). At the time, KCSO was nearing the expiration of the mandatory 180-period for completing personnel investigations. According to IIU, the 180-day period was set to expire September 18, 2012. (P 976).

3. Formal IIU Investigation.

IIU opened its investigation on August 30, 2012 at the request of KCSO Chief H, who wanted an examination of whether Detective X's contact with Dustin Theoharis violated any privacy laws or was inconsistent with KCSO policy or tactics. At the time of the request, KCSO was 19 days away from the 180-day deadline for completing administrative investigations. IIU Sgt. P and King County Office of Law Enforcement Oversight (OLEO) Director Gaither interviewed Detective X on September 13, 2012; the deadline for completing the investigation having been extended to September 24. The interview addressed entry into Dustin Theoharis's bedroom and covered the use of deadly force.

[8] It appears that at the time Major G also served as Police Chief for the City of Burien.

IIU also sought an interview with Dustin Theoharis, but he refused. His legal counsel advised that Mr. Theoharis would be testifying in a pending civil case, and would assert entry into his room violated his Fourth Amendment rights. (P 977). IIU interviewed no other witnesses. Its records indicate that it did not review the entire MCU investigative file, which exceeded 1,000 pages.

4. Recommended IIU Findings.

On September 21, 2012, Major G provided IIU Captain I a written memorandum describing his recommendations following the IIU investigation. He found that Detective X had not complied with Department performance standards regarding the entry into of Dustin Theoharis's room. The action recommended was training in performance standards and tactics. (P 987). Chief H concurred with these recommendations by memorandum dated September 23, 2012. (P 983). Neither identified any concerns or questions regarding the use of deadly force.

5. Shooting Review Board.

KCSO policy requires a five-member Shooting Review Board (SRB) to meet within 30 days of the completion of the criminal investigation to review an officer's use of deadly force. (General Order 6.03.010). KCSO did not follow that policy in this case, but instead met on October 5, 2012. (P 832). The file does not contain any Board vote sheets, notes or reports.

6. Ultimate KCSO Disposition.

On November 9, 2012, Chief Deputy J reported to the then-Sheriff Strachan that the Shooting Review Board found Detective X's use of force justified, but split over whether he met performance standards relating to the search of the house. He reported the Board voted 5-1 that there were no violations, but also noted that he and KCSO Legal Advisor agreed with the dissenting vote that there were violations relating to privacy. (P 832).

Sheriff Strachan notified Detective X of the outcome by memorandum dated November 13, 2012. (P 874).

However, by a letter dated January 17, 2013, incoming Sheriff Urquhart notified Detective X's Guild representative that he was rescinding the proposed findings of policy violations in response to a grievance filed on the Detective's behalf. In explaining his decision, Sheriff Urquhart observed:

> "I believe Detective [X] was singled out when other detectives and supervisors had at least some culpability as well. But make no mistake. I am extremely concerned with how this operation was conducted, the supervision of the units and certainly the ultimate outcome."

He concluded the letter by noting his agreement that more training was necessary and was forthcoming.

F. The DOC Investigation and Evaluation.

DOC convened its own review board on April 4, 2012, and issued a report of the board's findings on April 13, 2012. (P 14). DOC likewise credited the officers' written account of the shooting and found DOC Officer Y's use of deadly force justified. Its April 13 report expresses some concerns regarding the interaction between DOC and KCSO regarding coordination, communication, and authority to conduct searches. However, DOC found the use of deadly force was justified, and no legal or policy violations regarding the entry into Dustin Theoharis's room.

II. Scope of Work and Summary of Conclusions.

A. Scope of Review.

As requested, the principal focus of PARC's review has been the Auburn shooting and KCSO's investigation thereof. Our review consisted of review of the MCU investigation files and attachments as well as the following: (1) KCSO's General Orders (G.O.) Manual and KCSO forms; (2) photographs and the radio broadcasts relating to the Theoharis shooting; (3) security camera video from the residence; (4) MCU video from the investigation; (5) evaluations of the shooting from the Prosecuting Attorney's Office, DOC, and KCSO's

Shooting Review Board; and (6) IIU's compelled interview of Detective X regarding search of the residence. These materials were provided in hard copy and in electronic form.

The MCU investigative packet included 7 DVDs of material. Altogether, more than 1,000 pages of investigative materials were reviewed.[9]

B. Summary of Conclusions.

The Auburn case calls for a broad, searching examination of the officers' conduct. KCSO policy appropriately recognizes that public confidence is essential to its mission, and its members must conduct themselves in a manner that does not undermine that trust.

House Entry/Privacy Issues. In the aftermath of the shooting, KCSO carefully examined its own policies and practices regarding its officers' entry into the house and subsequent contact with Dustin Theoharis. It examined its existing policies and training regarding coordination with DOC officers and found them wanting in numerous respects. To its credit, it has undertaken to fill in the gaps in policy and guidance and provide supplemental training to its officers.

The file materials provided did not address, however, how those gaps had arisen and why they had not been identified years earlier. It is true that Detective X is accountable for knowing applicable procedures and the scope of his authority. However, it is also true that his supervisors are also accountable for ensuring he knows them.

Deadly Force. KCSO did not devote nearly as much time and effort to examining the officers' use of deadly force. The investigative work is not likely to inspire public confidence. The officers were allowed to write out their own accounts a month after the shooting, physical evidence was overlooked or moved, witness interviews were not thorough, and inconsistencies were not adequately addressed. Some of the concerns identified below may be unique to this case. However others, such those relating to KCSO's investigative policies

[9] The materials provided for review included an additional 1,300 pages of medical records obtained by MCU in March 2012. However, most these records related only to treatment of Dustin Theoharis and thus did not pertain directly to the shooting.

and practices, reflect policing styles inconsistent with best practices and at odds with the Department's commitment to the public trust.

III. Assessment of KCSO Policies and Procedures Relating to OIS Investigations.

PARC's August 2012 report to OLEO ("PARC Report") identified a number of concerns regarding KCSO policies relating to use of force, personnel investigations, and risk management and suggested sweeping changes to those policies. Perhaps most relevant to this review was PARC's recommendation that KCSO supplement the criminal investigation of an OIS incident with a simultaneous administrative investigation, which addresses compliance with policy, tactics, training, as well as adequacy and use of department resources and risk management. (PARC Report 46-49). Adding this second layer of investigation and review is essential to reducing risk and to increasing public confidence in the Department.

This section identifies additional areas of concern.[10]

A. General Orders Manual.

- General Order 6.02.005 states that in deadly force investigations, "Particular attention shall be given to: 1. The deputy(s) involved in the shooting to help reduce the trauma suffered by the deputy(s)." It is not clear what this duty requires of investigators. Moreover, the omission of any reference to trauma that may be suffered by crime victims or other civilian witnesses leaves KCSO open to claim that it extends preferential treatment to its officers.

- General Order 6.02.015 subd. (3)(a) leaves KCSO equally vulnerable to claims of preferential treatment. It states that the on-scene supervisor's first obligation, "Immediately take the necessary steps to calm and reassure the deputy involved."

[10] Provided for our review were: (1) the KCSO General Orders (G.O.) Manual and associated forms; and (2) excerpts from the collective bargaining agreement pertaining to officer interviews.

This is appropriate, but there is no similar obligation to take steps to calm and reassure civilian victims or witnesses to the shooting.

- General Order 6.02.015, subd. (4),which details how MCU is to investigate OIS incidents, also opens KCSO to charges of preferential treatment:
    - "Involved deputies shall be given special consideration regarding the timing of giving either a signed officer witness statement or a taped statement." Investigators are not required to give any "special consideration" to civilian witnesses, who are typically interviewed shortly after OIS incidents. KCSO also does not suggest that investigators seek written accounts, rather than interviews, from civilians.
    - "The [MCU] investigator shall be responsible for obtaining the statement within seventy two (72) hours of the time it was compelled by the deputy's commanding officer." Again, KCSO does not offer this delay to involved civilians.
    - "An un-taped oral statement [of the involved officer] for the purposes of clarification may be necessary." Going off-tape with involved officers introduces the risk, and certainly the perception, that investigators may coach officers or neglect to report any self-incriminating statements made by the officer.
- General Orders 2.09 and 6.02.015, subd. (2) provide for a roll-out of Personal Assistance Team (PAT) officers to the scene of the shooting in order to provide support for involved officers. PAT officers also reach out to officers' family members. However, we could not identify any KCSO policies that require officers to refer

crime victims (or relatives of those killed or wounded by KCSO officers to community counselors or mental health services).[11]

- KCSO currently lacks a policy requiring involved officers or witnesses (civilian or sworn) to be separated to reduce the risk of witness contamination or even outright collusion. Many major departments, including the Washington State Police (WSP), impose some form of sequestration. *See, e.g.,* WSP Manual, § 2.00.110 (I)(A)(7):

  > "The involved officer(s) shall not discuss the incident with anyone other than the following people until the officer has provided an official statement to the investigators or the employer; or, if none was provided, the conclusion of the investigation . . . ."

  - The KCSO does provide supervisors with various "reminders" for responding to an OIS scene, including the following: "Keep involved deputy(s) separated. This procedure is requested both by Major Crimes and the Guild."[12] This reminder, however, is clearly inadequate. First, it does not provide for any form of sequestration prior to the arrival of a supervisor.[13] Second, it does not provide that involved officers are precluded from talking about the shooting with witness officers.[14]

  - A related problem is that KCSO policy does not prohibit officers from reviewing other officers' reports prior to submitting their own reports. Indeed, policy currently does not preclude them from writing their reports in concert with

[11] The King County Prosecutor's Office provides such referrals both by telephone and on its web page, http://www.kingcounty.gov/Prosecutor/victimassistance.aspx. However, KCSO evidently does not mandate referral to any of these resources.

[12] KCSO, *Supervisor Checklist Instructions for Deputy Involved Shootings* at 2 (Rev. 2012). (P 877).

[13] It appears that after the shooting Detectives B and A were together for some period of time before Sergeant N arrived at the scene and separated them. *See* N Report (P 127).

[14] Detective X stated in a September 13, 2013 IIU interview that he did not discuss the shooting with DOC Officer Y. (P 952). However, the investigator did not ask any follow-up questions, such as whether Detective X had discussed the incident with other officers, or had heard from any officer what DOC Officer Y had said about the incident. Thus, one cannot be confident that there was no witness contamination in this case.

each other. The lack of any such prohibition again introduces additional risks of witness of contamination or collusion and may erode public confidence.[15]

- KCSO policy also does not appear to address whether KCSO officers may confer with those from other agencies that may be involved in a deadly force incident. As noted above, KCSO Sergeant D, who was serving as Detective X's Guild representative, was seen by an MCU investigator speaking with DOC Officer Y and his union lawyer. At best, Sgt. D's speaking to DOC Officer Y after conferring with Detective X presents the appearance of impropriety.

- KCSO policy does not address whether investigators can compel any officers to participate in a scene walkthrough. A walkthrough enables the investigators (and later, crime scene technicians) to develop a plan for collecting and preserving evidence, and also sets the framework for officer interviews.

- As noted above, KCSO does not *require* interviews of officers using deadly force. It appears such a requirement would be consistent with the existing collective bargaining agreement.

- Although KCSO policy permits interviews of involved officers, it appears that its historical practice has been to rely instead upon compelled written statements. (G.O. 6.02.015, subd. (4)(c)). This policy and practice is contrary to sound investigative practice and erodes public confidence in the integrity of KCSO internal investigations.

- KCSO's particular implementation of a report-driven system presents additional concerns:

  - **KCSO does not impose any particular deadline for ordering a compelled written statement.** The order could come weeks or even months after the incident. (G.O.

[15] Chapter 15 of the General Orders Manual is devoted in large part to articulating detailed requirements for officer reports. The level of detail goes down to the color of ink required. (G.O. 15.01.025, subd. (2)(b) (blue or black ink only)). However, these requirements do not proscribe joint report-writing or reviewing other officers' reports prior to writing one's own report. Nor do they require officers to disclose whether they had reviewed others' reports prior to finalizing their own.

6.02.015, subd. (4)(c)). Such delays not only provide opportunities for collusion or inadvertent witness contamination, but increase the risk that the officer will have forgotten (or plausibly claim to have forgotten) salient details about the incident. Until KCSO revises its policies to require contemporaneous interviews, it should issue the order for a compelled statement shortly after investigators arrive at the scene.

- **KCSO currently grants officers 72 hours to submit the written statement upon receipt of an order they do so**. This time period introduces substantial risk of witness contamination and opportunities for collusion. Pending a change to an interview-based system, the Department should require the officer to submit his or her written report prior to being released from duty following the incident. This reduces at least some of the risks of contamination or collusion.

- **KCSO policy does not specify any essential elements of the OIS written report.** For purposes of consistency and fairness, deadly force investigations should cover common ground, including pertinent training and tactics governing the officers' actions. Current policy appears to the leave the agenda to the officer, whose personal interests may not always coincide with the Department's.

- General Order 6.02.015, subd. (3)(d) requires the on-scene supervisor to "[d]irect the involved deputy to leave the scene, accompanied by a deputy, PAT member, or other person requested by the involved deputy(s)." It is not clear if "scene" is limited to the immediate crime scene, or the general vicinity of the shooting.[16] If the latter, there is a concern of potential witness contamination, particularly if the deputy is allowed to pick who will accompany him, as the quoted language suggests. The better practice is to leave control of the involved officers to the criminal investigators, not the on-scene supervisor.

[16] One would expect "scene" to be limited to the crime scene. However, the issue remains unclear, as the same General Order uses the more specific term, "crime scene," in a different context. *See* G.O. 6.02.015, subd. (3) (f)-(g).

- General Order 6.02.015, subd. (4)(c), which governs MCU investigations, contains this mandate: "Individual deputies shall be special consideration regarding the timing of giving either a signed officer witness statement or a taped statement." The policy does not identify what counts as "special consideration" for officers, but appearance of preferential treatment remains. It appears KCSO routinely asks civilians for interviews, not written statements, and conducts field interviews hours, if not minutes, after critical incidents.

- The same provision also provides: "An un-taped oral statement for the purposes of clarification may be necessary." The concern here an investigator may conduct (i) unrecorded, pre-interviews of officers that may amount to a "rehearsal" for taped statement or (ii) unrecorded interviews of civilians that might be leading, intimidating, or otherwise leave the Department open to claims of impropriety.

    - Best practice calls for recording witnesses interviews whenever possible. Where a witness refuses to submit to a recorded interview, that fact should be noted in the investigative file. Some departments provide a form for a witness to sign that he or she refused to submit to a recorded interview.

- KCSO policy does not provide sufficient detail regarding the duties of Major Crimes Unit (MCU) investigators regarding deadly force incidents.

    - General Order 6.02.015, subd. (4)(e) provides that MCU investigators, in addition to securing crime scene evidence and obtaining evidence, shall "[c]omplete an incident report and conduct all the usual follow-up duties and responsibilities." However, this policy does not say what the "usual" duties are.

    - In contrast, General Order 6.09 provides detailed investigative steps to be taken when investigating other types of firearms incidents. The policy discusses in detail physical evidence collection, witness interviews, and key issues to address in such investigations. It seems anomalous that KCSO policy

would not offer at least as much detail when addressing officer-involved shootings, in-custody deaths, or high-risk uses of force.

- General Order 2.09.015, subd. (4) appears to grant Personal Assistance Team (PAT) members the authority to disseminate information regarding deadly force incidents to uninvolved offices. This merits closer study, as PAT members may inadvertently spread inaccurate information regarding the incident under investigation.

- KCSO policies appear to be in conflict over whether Critical Incident Stress Debriefings (CISDs) may occur prior to the involved officers' providing a compelled statement to investigators. General Order 2.08.020, sub (4) states that debriefings "*will* be conducted" after compelled statements are provided, but General Order 2.08.025, subd. (6)(b) states debriefings "should take place" after officers provide their statements. To reduce the risk of witness contamination and avoid the appearance of impropriety, the debriefings should occur only after the involved officers have been thoroughly questioned by investigators.

B. Supervisor Checklist for Officer-Involved Shootings.

To its credit, KCSO has developed a four-page OIS checklist for responding supervisors. (P 876- 879). The need for a detailed checklist is important, because deadly force incidents often draw large numbers of personnel to the scene and present numerous logistical challenges.

1. Scene Coordination Not Adequately Addressed.

Surprisingly, the checklist does not address immediate and often urgent scene coordination responsibilities, including broadcasting suspect lookouts, requesting backup and support services, establishing an appropriate perimeter, and identifying witnesses and requesting their cooperation. Contact with the family of deceased or injured persons is also not addressed.

2. Comments on Specific Provisions.

A number of the stated "scene reminders" deserve special mention:

- **"Assign a deputy(s) to accompany the involved deputy(s) to the precinct, command post, or other designated location."** (P 877). MCU should make the determination about movement of the involved officers, not the officers' supervisor.

- **"Keep involved deputy(s) separated. This procedure is requested both by Major Crimes and the Guild."** (P 877). If there are indeed no Guild objections to sequestration, KCSO should immediately require sequestration as a policy requirement so that involved and witness officers are required to separate at the very outset, prior to receiving an order from a supervisor."

- **"Count all rounds of all witness deputies who were present when shots were fired."** (P 877). This should be within MCU's role, not a supervisor's. It would be more appropriate for the supervisor to order the witness officers to keep their side-arms holstered, or long guns secured, until MCU's arrival.

3. Information Sheet.

The final two pages of the checklist include a list of 14 questions the supervisor "shall" answer and provide to responding MCU sergeant at the scene. (P 878 – 879). The list is useful, particularly in that it requires the supervisor to provide the information in writing.

Nonetheless, the list could be improved in a number of areas. For example, it would be appropriate to require the supervisor to document what civilian and officer witnesses had spoken to the supervisor or others who responded to the scene. In addition, the final item on the sheet is puzzling. It asks, "Was [sic] the incident report and all officer witness statements completed?" It does not seem likely that such reports would, or should be completed by the time MCU arrives at the scene. KCSO may benefit by reviewing other agencies' protocols for supervisors and revise its checklist accordingly.

IV. KCSO Investigation.

A. Initial Response.

The initial handling of the scene raised two concerns.

1. Apparent Conflict of Interest - Initial On-Scene Supervisor.

Under KCSO policy, the first supervisor to arrive at the scene is obliged to assume control of the crime scene, direct involved personnel, and take on preliminary investigation responsibilities. (G.O. 6.02.015, subd. (3)). Clearly, given the sensitive issues that often accompany deadly force incidents, the neutrality of the supervisor needs to remain unquestioned.

In this case, however, the first responding supervisor, KCSO Sergeant D, did not maintain the position of neutrality. Shortly after arriving on the scene, he switched roles from supervisor and neutral party to officer advocate. KCSO was aware of this apparent conflict at the outset, as noted by the June 4, 2012 internal review of the incident:

> "Though this is not covered in the GOM [General Orders Manual], there appears to be a conflict with Sergeant D's role in this incident. He was the first Sergeant on scene, spoke with the involved personnel, looked inside, but did not enter [the crime scene], directed resources, but upon arrival at the Lake Dolloff substation took on the role of Guild Representative."
>
> Another area of concern is that based on Detective C's follow-up entries:
>
> 02/11/12 @ 18:50, By this time Guild Attorney Chris Vick arrived and he and Sgt. D spoke with Detective X in private.
>
> 02/11/12 @ 20:25, Officer Y had been conferring with Sergeant D, Attorney Vick and Attorney Chris Coker, who represents DOC Officers. This would appear to contradict the King County Sheriff's Office Neighborhood Corrections Initiative Memorandum of Understanding . . . that reads:
>
> 'Each agency shall be responsible for their respective team members in the event of emergency responses, use of force events, or injuries or accidents.'
>
> 'Neither DOC members nor KCSO deputies are agents of the other agency nor shall act as the agent of the other.'" (P 823).

KCSO appropriately identified the conflict, but evidently did nothing to address it. The Sergeant was not asked to explain his conduct and was not held accountable for failure to comply with applicable policy. In September 2012, the same Sergeant served as one of Detective X's two Guild representatives in an IIU interview and was vocal advocate for the officer during the proceeding. (P 960 – 961).

To date, it appears that KCSO has not taken any measure to prevent similar occurrences in the future.

2. Potential Conflict - KCSO PAT Officer.

The actions of a different KCSO officer the evening of the shooting raise similar concerns. An MCU investigator's report that noted that one KCSO Personal Assistance Team (PAT) member was stationed with Detective X, while a second KCSO PAT member was stationed with DOC Officer Y. (P 157). If this officer was indeed providing PAT assistance, his actions were not only contrary to the MOU provisions quoted above, but also beyond the scope of PAT's authority — General Order 2.09.015 authorizes PAT members to respond to critical incidents in order to provide support for KCSO employees; it does not authorize them to provide support to other agencies.

It does not appear that KCSO responded to this potential conflict or questioned the PAT member about his interactions with DOC Officer Y.

B. MCU Investigation.

1. Investigation Strengths.

Overall, the Major Crimes Unit approached the investigation in an organized fashion and clearly devoted substantial time to collecting physical, documentary, and testimonial evidence regarding the entire incident, not merely the officer-involved shooting.

Other investigation strengths included:

- MCU's rollout to the scene was organized and well-staffed. MCU quickly determined that it might need additional resources and appropriately coordinated officer assistance from the Bellevue Police Department.

- The lead MCU Investigator, Detective K, exhibited good rapport-building skills in his recorded interviews of Shane, Nicholas, and Cole Harrison on the evening of the shooting.

    - For example, after notifying Nicholas Harrison of his Miranda rights, Investigator K stated: "So first of all, I know Dustin is your friend, and so I, this is probably not the easiest thing in the world, so I'm sorry about that. . . . [H]ow long have you known Dustin for?" (P 331).

    - Later, upon learning that the child who had been in the house at the time of the shooting was Harrison's son, Investigator K promptly notified Harrison that the child's mother had arranged to take him home and checked to make sure that was "cool" with Harrison. (P 332).

- MCU Investigator K was careful to avoid any problems in opening the gun safe located outside Dustin Theoharis's bedroom. The homeowner, Cole Harrison, had indicated in his recorded interview that he owned the safe and offered to open it for investigators. However, when Mr. Harrison later stated that Dustin Theoharis also had access to the safe, Investigator K appropriately informed Mr. Harrison that KCSO would obtain a search warrant before looking inside. (P 323).

2. Investigation Concerns/Areas for Improvement.

a. Involved Officer Interviews.

The most serious area of concern was KCSO's (and DOC's) failure to compel interviews of the involved officers as soon as possible. Best practice calls for a thorough, recorded interview of all involved officers as soon as possible—certainly before they are relieved from duty the day of the incident.

Under existing KCSO policy, Detective X could have requested a delay of up to 72 hours before submitting to a compelled interview or providing a compelled written report. Although that delay itself is problematic, KCSO nonetheless should have issued the order the evening of the shooting so as to obtain the evidence as soon as possible.

To avoid tainting a possible criminal prosecution, compelled interviews would have to be "firewalled" from the criminal investigation. It appears, however, that KCSO does not utilize any such technique. The report of MCU Sergeant L indicates that he repeatedly urged numerous officials—including then-Sheriff Rahr, the assigned prosecutor, and KCSO's legal advisor, to interview Detective X as soon as possible. Each request was rejected.[17] Ultimately, KCSO delayed questioning Detective X until September 13, 2012—seven months after the shooting.

The file materials raise a question about the role of the King County deputy prosecutor in persuading KCSO to delay interviewing Detective X. According to MCU Sgt. L's investigation report, on February 16, 2012, he wrote the following:

> "[the assigned prosecutor] told me his legal opinion is to hold off on compelling until after we interview Theoharis. He understands from the employer standpoint the reasons for wanting to compel now. I told him our MCU opinions are based on our experience in conducting investigations and the strategies we think would work well for gathering accurate/more comprehensive information in this OIS. I told him I also appreciate and respect his opinion and position he is in making a filing decision." (P 108).

The next day, Sgt. L shared this recommendation with then-Sheriff Sue Rahr and the KCSO legal advisor. Both agreed to follow the prosecutor's recommendation, apparently notwithstanding Sgt. L's objections. (P 108).

The file does not present other accounts of these conversations, and thus the underlying motivations remain unclear. To be sure, a prosecutor's office can and should insist that it not be given access to any involuntary statements. And it can and should recommend that the law enforcement agency's criminal investigators likewise be denied access, so as to

[17] *See, e.g.,* Sgt. L Report at 4-6 (P 108-110) (MCU interview requests on February 14, 16-17 and 27 and March 9 denied).

avoid the risk of tainting the criminal investigation. But it is not a prosecutor's role to recommend whether or when compelled statements should be taken.

For its part, KCSO could have and should have rejected the deputy prosecutor's recommendation and proceeded with a compelled interview of Detective X that would be firewalled from MCU or the prosecutor's office. Instead, according to Sgt. L's report, then-Sheriff Rahr decided KCSO would not seek a compelled interview "until provided written direction by the Prosecutor's Office when they decide it's appropriate for us to compel." (P 108).

On March 12, 2012, KCSO ordered Detective X to provide a compelled written statement. The statement was not provided to MCU or the prosecutor's office. KCSO could have and should have issued the order the afternoon of the shooting.

b. Crime Scene Processing.

The MCU file indicates that KCSO provided a sufficient number of personnel to process the scene of the shooting. Though Dustin Theoharis's bedroom was quite cluttered, the crime scene itself was not extraordinarily complex compared to those presented in other cases. Here, the shooting occurred in a single, closed room with no opportunities for physical evidence, such as bullet fragments, to escape through floor vents or open windows. Notwithstanding sufficient staff and a closed environment, a number of problems surfaced:

Evidence Overlooked. Investigators left the crime scene the morning of February 12 without recovering all of the evidence. For example, they left the crime scene without taking into evidence a small metal flashlight located at the side of Dustin Theoharis's bed; it was not collected into evidence until February 14. (P 107). In addition, investigators failed to locate a shell casing in their initial processing and instead found it on February 14. (P 96). In addition, investigators accidentally discovered a bullet located inside of Dustin Theoharis's nightstand

on February 21, 2012, when conducting a trajectory analysis offsite.[18] Finally, although investigators recovered a total of fifteen shell casings, they recovered only seven rounds.[19]

It is not clear whether investigators used widely-available metal detectors designed specifically for collection of forensic evidence. The utility of such devices has long been recognized.[20]

Moved Shell Casings. Several of the crime scene photographs document two shell casings on a pile of clothes and a third shell casing located on the tile floor nearby. Standard practice is to place an evidence marker next to each shell casing, photograph the casings and markers, and then measure the locations of each. Here, however, an investigator instead moved the two shell casings found on the clothing next to the shell casing located on the floor and used a single evidence marker (#13) for all three of them.[21] This action was captured on video (Scene Recording at 24:13). It was clear the investigator needed to move the clothing to continue searching for evidence. Nevertheless, the casings should have been marked in place and measured.

As a result, the crime scene diagram (P 514 – 515) is inaccurate. The diagram describes Evidence Marker 13 as denoting a single "casing" when it fact, it refers to three shell casings. The diagram does not reflect the original location of the two moved casings.

No Evidence Markers on Comforter or Bed. Other scene photographs show a shell casing and bullet fragments on Dustin Theoharis's comforter and bed.[22] Nonetheless, it appears that investigators did not document these items with evidence markers or provide any measurements regarding their location. As a result, the crime scene diagram is incomplete.

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[18] Crime scene photos taken inside the room clearly show where the bullet struck the nightstand. *See* Detective M Photo Nos. 2992-2993. The discovery of the bullet on February 21 is depicted in Photo Nos. IMG_7517 and IMG_7518. In his reports, MCU Investigator K indicated the bullet was accidentally discovered while the nightstand was being packaged for storage. (P 74).

[19] *See* May 1, 2012 crime lab report. (P 378). *See also* Investigator K Report at 50. (P 97).

[20] *See, e.g.,* R. Graham, *Metal Detection, The Crime Scene's Best Kept Secret*, The FBI Law Enforcement Bulletin (Feb 1995), available online at: http://www.thefreelibrary.com/Metal%20detection:%20the%20crime%20scene%27s%20best%20kept%20secret.-a016677480

[21] *See* Detective M Photo Nos. 2953 - 2959.

[22] *See* Detective M Photo Nos. 2960 – 2968, 2981, 2986, 3007.

The diagram does not identify the location of any of these materials on the bed or on the comforter. (P 515).The crime scene video depicts these actions. (25:26 – 25:08)

Scene Measurements; Diagrams. Scene measurements are critical in enabling investigators to recreate the scene of a shooting and to form solid judgments about the location of involved individuals and the trajectory of the rounds fired. The crime scene diagram presented in the MCU file (P 514 – 515) contains no measurements for any of the evidence marked. A report from a member of KCSO's Major Accident Response and Reconstruction (MARR) Unit indicates measurements were taken, but none appear in the diagrams presented. (P 103, P 154).

The diagrams do contain a distance scale, but it is of little value in assessing the distance of marked evidence items. Finally, it was unusual not to find any rough sketches in the investigative file. Rough sketching the scene with notes and measurements is a fairly standard practice and the sketches are relevant and typically admissible evidence.

Trajectory Analysis. MCU appropriately sought to conduct a trajectory analysis of two holes in Dustin Theoharis's mattress and a bullet strike to an adjacent nightstand. However, the analysis was not particularly sound, or at least was not well-documented. First, the analysis was not conducted at the actual crime scene, which introduced the risk of error regarding the precise locations of the bed and nightstand. Second, there is no indication that investigators used any measurements when the sought to recreate the scene in the evidence room.

Third, the trajectory analysis does not account for the possibility (or even likelihood) that Detective X was on the mattress when the shot in question was fired. Photos of the analysis show only a trajectory rod inserted into an *empty* mattress; one that would not be compressed by the weight of Theoharis. An additional test, using a dummy or weights, should have been conducted.

Fourth, the analysis does not include any documentation of the mattress's interior. Was it a foam mattress with a discernible bullet channel? Did the mattress have springs or coils that

might deflect the bullet's exit path? The file does not say. There does not appear to be a second analysis performed with a dummy or other weight to simulate the effect on the mattress if the shot had been fired when Dustin Theoharis was on the bed, which seems likely.

Crime Scene Video. The scene processing video was brief (just over 29 minutes) but contained sufficiently detail to show the layout of the residence and provide a sense of the size and orientation of Dustin Theoharis's bedroom. The video technique was sound, with wide establishing shots, slow panning, and zooming shots of key evidence, such as shell casings.

Nonetheless, the video presents a number of concerns. First, the video lacked a time and date stamp, and thus it is impossible to tell when various scenes were shot. Second, the video was not shot continuously, which not only compounds the difficulty in establishing time, but also introduces subjectivity into the video. (Questions may arise why a videographer stopped recording at one point, or decided not resume recording at another.) Third, there does not appear to be any audio recorded, so that the viewer misses discussions among the investigators and a brief recorded discussion with Cole Harrison as he opens the gun safe in the downstairs foyer.

Fourth, some portions of the video are difficult to decipher. At one point (23:23,) video footage of taken inside Dustin Theoharis's bedroom shows the legs of two KCSO investigators who are wearing appropriate foot coverings to avoid scene contamination. However, the video also shows the legs of an unidentified third person, who is wearing sneakers, in the crime scene. The videographer did not zoom back so that the viewer can see who this person was. At another point (23:49), the video captures what looks like a small black plastic bag being tossed onto the floor between evidence markers 7 and 8. Without audio and a panning shot, it is impossible to determine who threw the plastic down and why. Later in the video (27:15), the black plastic is gone. It may be that the item has no relationship to the underlying events, but the disappearance is a puzzle.

Finally, the video does not continuously record the evidence collection. A crime scene video does not necessarily need to record evidence collection; it may be limited to providing a walkthrough of the scene so as to allow reviewers a better perspective of the location, fields of view, and so on. Yet if the decision is made to document evidence collection, then the video should be shot continuously, so as to avoid questions about subjectivity.

Ambient Light Video. To its credit, MCU recorded a second brief video of Dustin Theoharis's room on the afternoon of February 14.[23] The room was indeed dark, and the bed area difficult to see.

The video could have been more useful, however, if the investigators had also recorded the same room as illuminated by the two flashlight models used by DOC Officer Y and Detective X. Also, the video should have had a date and time stamp.

c. Medical Evidence.

Although MCU investigators obtained copies of Dustin Theoharis's medical records on March 15, 2012 (P 79), their reports do not reflect any analysis of the records and do not discuss the location of any of the gunshot wounds. Instead, the discussion is limited to stating that the medical records "do not provide a conclusive number for how many times Theoharis was struck by bullets or what the trajectories of the bullets were." (P 98). Rather than state this bare conclusion, MCU should have outlined what the evidence was, so that others could form their own opinions.

Detailed analysis of the medical records was beyond the scope of this review. Yet a number of the records provided to MCU investigators present at least a question about whether Dustin Theoharis sustained some of his wounds while leaning to his right in an effort to pull something from beneath the mattress. For example, the records indicate that Theoharis sustained one gunshot wound to the right front jaw and another wound to his upper right shoulder.

[23] (Digital Recording File, MVI_7459.mov).

It is not obvious how Dustin Theoharis could have sustained these two gunshot wounds from Detective X if he was leaning on his right side, facing away from the officers. DOC Officer Y did not submit to questioning, and his written statement is ambiguous about whether he fired when Theoharis was facing him.[24]

The medical evidence may well turn out to be inconclusive, but MCU investigators should have gone through the evidence in detail so that prosecutors and KCSO officials could have more made their own judgments.

d. Witness Interviews.

Numerous Unrecorded Interviews. KCSO policy vests MCU with the discretion to conduct unrecorded interviews. (G.O. 6.02.015, subd. (4)). Best practice requires investigators to obtain recorded statements whenever possible. Although it is not always possible to obtain a witness' consent to a recorded interview, investigators should at least make the effort and document when a witness refuses consent to a recording.

In this case, MCU investigators conducted numerous unrecorded interviews and did not provide detailed summaries or contemporaneous notes of those interviews:

- On the evening of the shooting, MCU Investigator K conducted two unrecorded interviews of civilian witness Shane Cole. (P 60 – 61).
- On Monday, February 13, Investigator K conducted his third unrecorded interview of Shane Harrison and conducted an unrecorded interview of Cole Harrison. (P 68)
- On Tuesday, February 14, Investigator K returned to the Harrison house and had additional unrecorded discussions with Shane and Cole Harrison. (P 69 - 70).

[24] *See* Y Written Statement (P 30) ("While he was being shot, he turned his body over from being on his stomach to transitioning to his back. He was now lying on his back on the bed. I did not stop firing until I felt there was no longer a threat.").

- On February 27, Investigator K questioned Shane Harrison over the telephone regarding Dustin Theoharis, whom Shane had been visiting. The questioning was not recorded. (P 73).

- On March 26, Investigators K and Q returned to the Harrison residence and conducted another unrecorded interview of Shane Harrison about his conversations with Dustin Theoharis at the hospital. (P 80).

- On March 27, Investigator K had another unrecorded discussion with to Shane Harrison about Dustin Theoharis and the KCSO investigation. (P 81).

Pre-Interview. The file contains one indication of an unrecorded "pre-interview" of a witness, an emergency medical responder. At the outset of the recorded interview, the investigating detective stated, "So tell me about, we went over a little bit about what you did that day, but just for the tape, if you can go over it again." (P 359).

Although this witness' statement was not critical to the overall investigation, KCSO should expressly prohibit pre-interviews.

Interview Tone / Neutrality. As noted above, MCU investigators generally avoided leading questions in their recorded interviews. One notable exception arose in the MCU interview of Detective B, who had remained in the Harrison's living room while DOC Officer Y and Shane Harrison went downstairs to look for Dustin Theoharis. The investigator's question is unnecessarily leading:

> "Correct me if I'm wrong, but it sounds like, ah, [Y] and [X] had gone downstairs to check and see if this individual had weapons, which would have been a violation because the person you had arrested was on active DOC, so having weapons in that house would have been a DOC violation. Is that correct?" (P 296).

Thoroughness of Recorded Interviews. MCU's recorded interviews the night of the shooting were extremely brief. MCU spent a total of only 57 minutes interviewing the three civilian witnesses (Cole, Shane, and Nicholas Harrison) and only 47 minutes interviewing the two officer witnesses, (Detectives B and A). As a result, many details were omitted,

inconsistencies not pursued, and opportunities for follow-up questions missed. For example:

- Investigators did not pin down the location of the five witnesses at the time of the shooting. The witnesses stated they were in the living room area, but most did not provide any greater detail.[25] The investigators could have addressed the issue easily by asking each witness to sketch out where everyone was located.

- Investigators did not ask any of the five witnesses in the recorded interviews whether the radio or television was on while they were in the living room/kitchen area prior to the shooting.[26] Such information was relevant to the issue of why none of the five witnesses reported hearing any commands from DOC Officer Y and Detective X prior to the shooting. MCU Investigator C reported that the day after the shooting, he asked Detectives A and B about the television volume. They characterized it as "normal" or "loud enough to hear." (P 160). However, this follow-up questioning was not recorded, and MCU evidently never asked the three civilian witnesses.

    - Shane Harrison told MCU said he did not hear any voices and said he would have. (P 349). He said he had no problem hearing Dustin moan and swear after the shots. (P 349, 355)

    - Cole Harrison said he heard voices after the shots were fired, but not before. (P 327).

    - Nicholas Harrison said he heard the officers knock on Dustin Theoharis's door, but isn't sure he heard any voices before the shots. (P 337-338). He said one

[25] Shane Harrison disclosed his location to the MCU investigator (P 353), but the investigator did not follow up by asking Harrison where everyone else was located.

[26] One of the first officers to enter the house prior to MCU's arrival did not mention in his report whether the television was on. (P 100), However, MCU Investigator K wrote in his report that when he entered the living room at 10:10 p.m. — over 5 hours after the shooting — the television was on and "and the volume was on medium to high." (P 61)). He also noted the remote control was nearby and he turned the television off. Scene video recorded by Detective O shows the television on (video at 6:30), but the video is not time stamped and there is no audio on the video recording.

would have to shout to be heard upstairs where he was and said he did not hear any loud voices. (P 339-340).

- Investigators did not adequately explore whether Cole Harrison, the homeowner, had consented to officers' entering Dustin Theoharis's room. Mr. Harrison told MCU at one point that he told officers they could "go down to the back" of the house to find Theoharis's room (P 316), but MCU did not follow up on whether Mr. Harrison consented to their entering the room. The investigators did not pursue the issue of consent in their other recorded interviews, either.

- Investigators did not ask Detective B or Detective A whether the officers had discussed a plan of action once Nicholas Harrison was in custody.

- Investigators did not ask the officers to describe their understanding of Detective X's authority to search the remainder of the house or enter Dustin Theoharis's bedroom. Nor did they ask the officers to explain their understanding of their authority to conduct a protective sweep when serving DOC warrants for individuals like Nicholas Harrison.

- Investigators did not lay a basic foundation regarding any of the five witnesses' ability to provide accurate and reliable testimony. For example, they did not ask the witnesses when they had last slept or whether they had taken any medications that might affect their recall or ability to communicate.

- Investigators did not carefully and consistently question the five witnesses about whether there had been any mention of guns in the house prior to the officers' effort to contact Dustin Theoharis.

    - MCU Investigator K, who interviewed civilian witnesses Shane, Cole, and Nicholas Harrison, did not ask if anyone discussed the presence of firearms prior to the shooting.

- In Shane Harrison's interview, the subject does not come up at all.[27]

- In Nicholas Harrison's interview, MCU Investigator K never asked if anyone had discussed the subject of guns with officers. Investigator K did ask whether Nicholas knew Dustin Theoharis owned any guns (he said he did not (P 339)), but did not ask if he heard any mention of guns prior to the shooting.

    - Likewise, in Cole Harrison's interview, Investigator K never asked if there was a discussion with officers about a weapon in the house. Instead, Mr. Harrison was merely asked if Dustin Theoharis had a gun. In responding this question Harrison volunteered that he had told the officers about Theoharis's gun. (P 319). He did not say, however, whether he mentioned this before or after the shooting, and the investigator did not ask. The investigator also neglected to ask Mr. Harrison to recount fully what he had told the officers and what, if anything, they said in reply.

    - MCU Investigator C interviewed Detectives B and A and similarly did not pursue the topic of whether there was discussion of a gun in the house, but rather relied upon the few details volunteered by the officers.

Interview Coordination. MCU took its only recorded interviews of the house occupants on the evening of the shooting. As noted above, MCU Investigator K interviewed the three civilian witnesses (Shane, Cole, and Nicholas Harrison) and MCU Investigator C interviewed the two officer witnesses (Detectives B and A). MCU did not take any steps to coordinate the interviews, so that Investigators K and C would know what each witness said that evening and would be able to pursue topics raised prior interviews. For example:

- Cole Harrison told Investigator K that DOC Officer Y and Detective X had "rushed" downstairs to look for Dustin Theoharis. (P 316-317). MCU Investigator C did not

[27] According to MCU's investigative report, the subject was later raised with Shane Harrison on February 13, when investigators returned to the house. The report states that Shane Harrison stated that he did not mention guns to the officers who had entered the house (P 68). This statement was not recorded, and the investigative file contains no contemporaneous interview notes from the investigators. As discussed elsewhere, KCSO should consistently record witness interviews.

hear this allegation, and thus did not know to ask the officer witnesses if anyone was in a rush.

- Detective B told MCU Investigator C that he heard Shane Harrison talking with DOC Officer Y and Detective X about whether there were guns in the house. (P288-289)). However, MCU Investigator K, who interviewed Shane Harrison that evening, did not know of B's allegation and thus was not in a position to test that allegation with Harrison.

e. Failure to Initiate IIU Investigation at the Outset.

KCSO General Order 3.03 indicates that members are required to promptly report all complaints of misconduct. When IIU learns of a complaint of misconduct, the IIU Commander determines whether the open an IIU investigation or leave the investigation to the chain of command. (G.O. 3.03.030). The General Orders do not offer any definition of "complaint," but it is assumed that would include any allegation of officer misconduct.

Here, KCSO did not open an IIU investigation until August 30, 2012, long after it was aware the officers were accused of misconduct.

- The evening of the shooting, MCU Investigator C was informed by Detective B and Sergeant R that, prior to being removed from the scene by paramedics, Dustin Theoharis had stated, "I can't believe you guys shot me." (P 292). The clear import of the statement was that Theoharis was claiming the shooting was unjustified.

- In his March 26, 2012 interview with a civilian witness who was not at the scene of the shooting, MCU Investigator K acknowledged that he was aware of Dustin Theoharis's intention to sue the Department. (P 371).

- On March 29, 2012, MCU Investigator K found Shane Harrison had been posting extensively on Facebook about the shooting, claiming the shooting was unlawful. *See, e.g.,* K Report (P 87) ("[Theoharis] was wrongfully shot by the police at my house today . . . .").

These allegations alone should have sufficed to open a parallel IIU investigation.

f. File Contents and Presentation.

Contents Not Numbered. The contents of the MCU investigation book were well-organized, but the documents were not sequentially numbered. Numbering the investigative report is a best practice in that ensures document control and facilitates citations to the record.

Handwritten notes missing. The file does not contain any handwritten notes made by the officers on the scene and does not contain any of the investigators' notes. Such notes are clearly relevant to the investigation and should have been included. During his MCU interview, Detective A repeatedly referred to his field notes during the course of his interview by MCU. (P 257, P 264). The investigator did not ask to see or copy the notes, and it is not known whether the notes were copied or turned over. The investigators' own handwritten notes from their interviews are likewise relevant and should have been available.

Insufficient scene sketches or diagrams. The MCU file did not contain any annotated sketches or diagrams indicating where the civilian witnesses and officers were located in the residence. There is no indication that MCU asked any witness to provide a sketch or annotate a scene diagram to indicate where individuals were located prior to, during, or after the shooting.

Failure to address evidentiary conflicts. Several conflicts emerged during the investigation and neither MCU nor IIU took any effort to pursue them or flag them in any memorandum or report. Such conflicts included:

- Detective A told MCU Investigator C that prior to the shooting he had no idea there was anyone downstairs. (P 262).
    - However, only minutes earlier, Detective B told Investigator C that DOC Officer Y and Detective X had announced in the living room (where he and Detective A was located) that they were going downstairs to check on Dustin Theoharis

and see whether he had guns. (P 291). MCU did not pursue the point with Detective A or highlight the inconsistency.

- Cole Harrison and Shane Harrison each told MCU Investigator K that they told (unspecified) officers that Dustin Theoharis was downstairs. (P 316 and P 346- 347). This again could present a conflict with Detective A's account, but was not pursued or highlighted in any reports.

- Detective A also told MCU Investigator C that he had no reason to have any concerns about DOC Officer Y and Detective X searching the downstairs. (P262-263). This presented at least a potential conflict with Detective B's prior statement to Investigator C that (1) the officers had discussed the potential presence of firearms before entering the house and (2) while in the living room (where Det. A also stood) he heard Y and X speaking to Shane Harrison discussion about whether Theoharis had guns. (P 288, 290).

KCSO investigators may benefit from the use proof charts to lay out witness testimony regarding key issues. One example might look like this (next page)**:**

Issue: Was there any discussion of guns in the house prior to entry into Dustin Theoharis's room?	
Cole Harrison	Mentioned Dustin Theoharis's rifle to unidentified officers, but did not specify when. Not asked if he heard any other discussion of guns.
Shane Harrison	Issue not addressed in recorded interview. Investigator K states that Shane Harrison told him in a subsequent unrecorded interview that he did not discuss guns. He was not asked if he heard any other discussion of guns.
Nicholas Harrison	Issue not addressed in interview.
Detective B	Officers discussed possibility of guns prior to entry. Heard Shane Harrison talking to DOC Officer Y and Detective X about whether guns were in the house. (Conflicts with Shane Harrison statement.) Heard Y and X announce to all they were going to look for guns downstairs in Theoharis' room. Not asked if he heard Cole Harrison or anyone.
Detective A	Not asked about any pre-entry discussion among officers. Stated Cole Harrison mentioned a rifle after they heard shots fired (Possible conflict with Cole Harrison statement). Said he had no reason to believe there was anyone else in the house. (Possible conflict with Detective B statement).

The very act of drawing up a proof chart may prompt investigators to pursue key questions to address any inconsistencies or gaps in the evidence. Where inconsistencies persist, proof charts make it easy for decision makers to understand where the witnesses are in agreement or disagreement.

C. August 2012 Interviews of Involved Officers.

On June 4, 2012, the MCU investigation was presented to KCSO Major G for initial administrative review, with the primary review work performed by KCSO Sergeants E and F. (P 2, P 817). During the course of that review, Major G asked Sergeant E to interview Detective X about entry and search issues; he did request any questioning about the shooting itself. (P 750).

Interview of Detective X. Sergeant E conducted a recorded interview of Detective X on August 16, 2012. The interview is very brief, lasting just 19 minutes. (P 790). The interviewer did not ask Detective X about the shooting, but confined his questions to all events that preceded entry into Dustin Theoharis's bedroom. Nonetheless, the interviewer failed to ask fundamental questions about the officers' actions.

The failure to do so is troubling, particularly given that the materials accompanying the interview transcript included a list of prepared questions (P 798) that were never posed during the interview. The list included many fundamental questions that simply were overlooked, including these examples:

- "When approaching the front door, did anyone request entry to the house from Mr. Cole Harrison? Who? If not, did anyone announce lawful purpose for entering the house? If so, what was said and by whom?"
- "Whose decision was it not to do [a protective sweep upon entry]?"
- "Prior to making contact with Dustin or going downstairs to contact him in the bedroom, did you ask about weapons, prior contact with police, propensity towards violence, if there were more than one person downstairs, etc.? If not, why not?"
- "Isn't getting information about people and their history prior to contacting them a common practice in police work for officer safety reasons?"
- "[Were] any questions asked of the occupants of the house to determine third party status of Dustin and the room he was staying in? If not, why not?"
- "Did anyone consider having one of the Harrisons ask Dustin to come out of his room? Why not?"

Interview of DOC Officer Y. KCSO Captain M conducted a recorded interview of Officer Y on August 22, 2012. The interview ignored the use of deadly force and was cursory in all other respects; the transcript spans only six pages. In addition, one of the officer witnesses, Detective B, sat in on the interview, though his role or authority to do so was never explained.

Finally, the interview is replete with leading questions. At one point, Captain M suggests to DOC Officer Y additional grounds for justifying his search. (P 757- 760). At another, he suggests to DOC Officer Y that his reference to an "anonymous tip" in his March 2012 written statement report was an error, and Officer Y must have intended to refer to a confidential informant. (P 759). The interview was the least neutral and perhaps the most cursory of all presented for review.

D. IIU Investigation of Entry and Tactics.

As discussed in Section I above, KCSO ultimately opened a formal IIU investigation on August 31, 2012. By that time, KCSO had only 19 days to complete an administrative investigation under Department policy.[28] The challenge to ICU was formidable, as the MCU investigative notebook alone held nearly 750 pages. IIU managed to obtain only one six-day extension in the investigation, moving the deadline to September 24, 2012.

Clearly, IIU did not have the ability to conduct a full investigation. Despite overwhelming time constraints, IIU did manage to ask Detective X some hard questions, and often the answers provided were not satisfactory. Key aspects included:

- It was the only interview in which a witness asked to identify mark a diagram to indicate where he and others were located.[29] (P 941).

[28] General Order 3.03.150 requires that all administrative investigations be completed within 180 days of learning of the matter to be investigated. In this case, the 180-day deadline was set to expire on September 18, 2012. (P 976).
[29] Sgt. P could have improved the outcome if he had asked Detective X to mark the locations of each of the civilians and officers in the living room at the time he headed to the downstairs level of the house. The information would inform judgments about whether those individuals would be in a position to hear any commands issued downstairs.

- The IIU investigator appropriately asked Detective X if anyone had asked the occupants if Dustin Theoharis had weapons in the house. (P 942). Upon hearing that Detective X say he was unaware of anyone asking, the investigator pressed X to explain why not. Ultimately, Detective X said he did not know. (P 943).

- When asked for the first time to provide his understanding of applicable DOC policies regarding community supervision, Detective X acknowledged he had not looked at them recently and added that he should be checking for recent updates. (P 942).

- When asked to explain whether his legal authority to conduct a protective sweep ended once Nicholas Harrison was in custody, Detective X initially conceded he did not know what applicable policy required. (P 955).

Nonetheless, the interview was hardly exhaustive. Detective X was not walked through the series of events step by step and asked to recount all he had heard, said, and witnessed. Nor were there questions that might test some of the claims by other officers, such as Detective B's claim that the officers had discussed the possibility of finding guns before entering the house. Nor were basic questions about alternatives explored, such as why officers did not simply ask Shane Harrison to call his friend Dustin to come upstairs, why they did not call a supervisor, or why they did not ask the Harrisons more information about Dustin Theoharis, such as whether he had prior problems with the police.

V. KCSO's Assessment of the Incident.

A. Assessment of Entry/Search Issues.

Overall, KCSO did a good job identifying the gaps in policy, guidance and training regarding coordination with the DOC field supervision officers. It was appropriate for managers to examine existing policies and practices and to recommend more detailed requirements and supplemental training.

As noted above, KCSO initially decided to sustain findings that Detective X did not meet performance standards regarding his search of the lower portion of the Harrison residence.

The recommended consequence, supplemental training, seemed apt, given Detective X's difficulty in his IIU interview to articulate the policies that governed his actions.

It appears, however, that KCSO later rescinded the finding. The file materials did not include any explanation; the reason for doing so it is not obvious from the materials that were provided.

Also unclear is why the gaps in KCSO policies and practices regarding DOC residential entries had not been detected sooner. The materials provided do not suggest there was any follow-up with the supervisors responsible for the program. It would have been appropriate to question those individuals thoroughly about their understanding of officers' authority, their supervision of coordinated efforts, and their expectations for line officers.

Finally, it is also unclear whether KCSO elected to examine any prior searches conducted by the officers in question. Given the concerns with Detective X's actions in this case, it would have been appropriate to review prior incidents that also involved a third-party residing in the offender's dwelling. Such review may turn up additional concerns about tactics and policy.

B. Assessment of Deadly Force and Tactics.

In contrast, the file materials indicate KCSO spent substantially less time considering the shooting itself and had a general unwillingness to test the officers' written account of the shooting.

- The initial administrative review of the incident, conducted by Sergeants E and F, acknowledged difficulty understanding why Dustin Theoharis would tell the officers he had guns in the room and then make a furtive movement, "knowing full and well there was no firearms and having an idea what would come next" (P 11). Rather than recommend questioning the officers about this version of events, the review concluded that Dustin Theoharis must have been acting irrationally, given his drug use and troubled life. (*Id*.).

- KCSO did eventually interview DOC Officer Y, but never asked him about the shooting or any of the events that occurred in Dustin Theoharis's bedroom.

- KCSO first interviewed Detective X in August 2012 and did not ask him any questions about the shooting or events inside the bedroom.

- KCSO did not ask Detective X any questions about the shooting until September 13, 2012—over seven months after the shooting and only 11 days before the deadline for completing its investigation. As noted above, the September IIU interview was not exhaustive.

- KCSO never asked Detective X why the officers did not simply ask Shane Harrison to call Dustin Theoharis upstairs from his bedroom to talk to the officers. It is not obvious that the officers' decision to take a flashlights-out, guns-drawn approach was the only option available to them, and thus there should have been consideration of alternatives and the officers asked to explain the choices they made.

- KCSO policy required the Shooting Review Board to convene within 30 days of the completion of the criminal (MCU) investigation. (G.O. 6.03.010). However, the Board did not comply with that policy. The criminal investigation had concluded by late April 2012, and the prosecutor's office had issued a declination memorandum in June 2012. Yet, for reasons not stated in the materials, the Board did not meet until October 5, 2012.[30] By that time, the deadline for completing an administrative investigation of the incident had expired.

It is true that KCSO's ability to evaluate the shooting incident was constrained by the lack of third party witnesses and Dustin Theoharis's refusal to provide a statement. Yet as noted above, KCSO missed numerous opportunities to obtain much more information from the involved officers, and unreasonably delayed its efforts to obtain that information.

[30] See November 9, 2012 Deputy Chief J memorandum regarding SRB review and determination. (P 832).

These missed opportunities unnecessarily limited the scope and thoroughness of administrative review.

VI. Decision Point Analysis.

A. General Assessment.

During the administrative review of the incident, KCSO managers identified numerous areas of concern regarding officers' entry into the Harrison household and officers' subsequent entry into Dustin Theoharis's bedroom. The decision point analysis below expresses similar concerns. It also identifies basic issues that were never resolved in the investigation, such what KCSO officer was in charge, and what the particular officers said or heard once they were inside the house.

As for the deadly force incident, one can confidently say that the prosecutor lacked sufficient evidence to support a criminal prosecution given the lack of independent witnesses, a statement from Dustin Theoharis, and little admissible information from the involved officers. Beyond that, however, it is difficult to draw firm conclusions; the KCSO investigation left many factual questions unanswered. If the officers' account of the incident is accurate, the use of force was within policy. But their account also raises questions about the officers' training, tactics, and judgment. The decision point analysis raises these questions but, without further information from the officers, cannot resolve many of them.

B. Decision Point Analysis.

1. Decision Points 1-16: Officer Actions Prior to Approaching Dustin Theoharis's Bedroom.

1) On February 11, 2012, DOC Officer Y receives notice of a warrant to arrest Probationer Nicholas Harrison, who violated the terms of his release by failing to report to DOC community custody within 24 hours of his release. The warrant is for

"Escape from Community Custody." Officer Y looks up Nicholas Harrison's listed residence and asks a confidential informant to visit the residence and confirm that Nicholas Harrison is there.

References: DOC Officer Y IIU Interview (P 758-760); Detective A Interview (P 260); Detective B Interview (P 286).

Comment: Actions appropriate. The officers obtain information regarding chances of success and potential risk prior to approaching the location.

2) **DOC Officer Y pulls together an arrest packet for Probationer Harrison that includes a description and photograph. He then discusses the warrant with KCSO Detective A. The two agree Harrison is probably unaware of the warrant and thus they expect an easy arrest. Later, the two discuss the arrest with Detective B. The plan is to attempt the arrest at 3 p.m. It is not clear any KCSO supervisor was advised of the planned operation.**[31]

References: Detective A MCU Interview (P 256-60); DOC Officer Y Written Statement (P 743); Detective B Interview (P 285).

Comment: Except for the apparent failure to notify a supervisor of the planned operation, the officers' actions appear appropriate. At this point DOC Officer Y was aware that Probationer Harrison was on community supervision for a drug conviction and had a prior drug and domestic violence conviction.

The officer statements and interviews lack many details about these early discussions. They do not address, for example, whether or when the officers discussed the layout of the house, which was known to DOC Officer Y and Detective X from a 2010 residential search. Both had reported in their compelled written statements that, during the 2010

[31] It does not appear that KCSO asked Detective X's supervisor, Sergeant N, or any other supervisors whether they were aware of the operation. (Sgt. N's report addresses only his response to the shooting. (P 127). In his September 13, 2012 IIU interview, Detective X stated he did not know if a supervisor had been advised. (P 938-939). He claimed it was up to DOC Officer Y to decide whether to notify a supervisor. (P 939).

search, they had entered the downstairs bedroom (the shooting scene) and had encountered a resident living there. Detective X's report noted (though DOC Officer Y's report did not) that this resident had "access to guns." (P 739 – X Statement); (P 743 – Y Statement).

3) **According to Detective B, the officers talk about a prior visit to the house involving "a roommate previously that had [had] guns, and DOC was having an issue with it saying that the offender (Nicholas Harrison) can't live there if the roommate has guns in the house."**

References: Detective B Interview (P 288).

Comment: This discussion, if it took place as described, is appropriate and significant to the officers' decision-making. A prior history of firearms in the house increased the need for the officers to form a concrete plan with designated roles for each officer.

It is not clear, however, if Detective B's report of this discussion is accurate. None of the other officers mention this discussion and unfortunately, KCSO investigators did not pursue the point in the interviews. As noted above, DOC Officer Y and Detective X did refer to this prior roommate in their reports, and X referred to access to firearms. However, neither reported discussing this prior encounter with anyone the day of the shooting.

4) **DOC Officer Y and Detective A drive to the area and stop a little north of the residence. They briefly await arrival of Detective B and Detective X, who are to arrive in their own cars. At some point, Officer Y receives a call from his informant, who'd just left the Harrison residence. The informant tells Officer Y that Probationer Harrison was inside, as well his father, Cole Harrison, his brother, Shane Harrison, and his five year-old son.**

References**:** DOC Officer Y IIU Interview (P 759); Detective A Interview (P 259-260); Detective B Interview (P 285).

Comment: Actions appropriate. The presence of the child presented additional safety concerns, but there is no indication in the file the officers discussed that concern or changed their planning in any way.

5) **Detective B arrives in his car. The officers briefly discuss driving together in a group, and placing Detective B in the rear of the house to cover any escape route. The three drive closer to the residence and wait for Detective X's arrival.**

References**:** Detective A Interview (P 260); Detective B Interview (P 285 - 287).

Comment: Actions appropriate, however, there is insufficient information regarding the officers' discussion.

Was there any discussion of the layout of the house? Was there a discussion about the resident in the back bedroom Y and X had encountered in 2010? Was there any discussion about firearms or a search plan? MCU Investigator C had asked Detective B about the officers' planning, but did not obtain a complete answer and did not follow up. (P 286- 288).

As noted in Decision Point 3 above, Detective B told MCU that, prior to approaching the house, the officers had discussed whether there were guns in the house, and whether there had previously been an occupant in the house with guns. (P 288). This claim was not corroborated by the other officers, however, and seems contrary to Detective A's statement to MCU that he had no idea there might be anyone in the house other than those identified by the informant. (P 262- 263).

6) **Detectives X arrives and the officers begin their approach to the house. Detective B drives his car into the driveway, exits, and walks to the rear yard. The remaining three officers walk to the front door.**

References**:** Detective A MCU Interview (P 260); Detective B Interview (P 287-288); Detective X Written Statement (P 739).

Comment: Appropriate to begin a group approach and to send Detective B to cover the back.

Nevertheless, as noted above, it is unclear whether the officers discussed what role each would play, or what they would do once they entered the residence. It is also unclear whether the officers discussed anything with Detective X when he arrived. The limited information obtained from the officers suggests they were simply going to react to whatever they found inside the house. Such an ad hoc approach unnecessarily presents risks for the officers and is likely inconsistent with KCSO training.

The investigation does not tell us where Detective B took position in the rear or what he did once he reached his destination. Thus, we cannot assess his actions there. According to Detective B, he remained in the rear for roughly three minutes before Detective A called to say they were Code 4 inside, with Nicholas Harrison in custody. (P 288).

7) **DOC Officer Y sees the front door open briefly and spots Cole Harrison, the owner. As Cole Harrison begins to close the door, Officer Y identifies the officers as law enforcement, instructs him to keep the door open. He enters, asking where Nicholas Harrison is.**

References**:** DOC Officer Y Written Statement (P 744); Cole Harrison Interview (P 314); Detective A Interview (P 260).

Comment: The actions appear lawful and within policy, as DOC's warrant permitted entry. It is not clear, however, whether DOC Officer Y sought consent to enter the house or stated DOC's authority to enter. It would have been appropriate to do both.

8) **As Officers Y, X, and A enter the house, Cole Harrison calls Nicholas Harrison out. Nicholas emerges from the upstairs bathroom, where his brother, Shane Harrison, had been cutting his hair. The officers recognize Nicholas as he stands near the top**

of the stairs. Detective A responds by identifying himself and asking Nicholas to come down.

References**:** Nicholas Harrison Interview (P 333); Shane Harrison Interview (P 346); Detective X Aug. 16 Interview (P 765); Detective X Sept. 13 Interview (P 940) Detective A Interview (P 260- 61).

Comment: Having entered the house, the officers' actions appear appropriate.

9) **The officers explain there is a DOC warrant for Nicholas Harrison's arrest. Nicholas Harrison walks down the stairs and is handcuffed without incident.**

References**:** Nicholas Harrison Interview (P 333-334); Detective A Interview (P 260-261); Detective X Sept. 13 Interview (P 940).

Comment: Actions appropriate.

10) **Detective A notifies Detective B via cell phone (direct connect) that they are Code 4. Detective B leaves the rear yard to enter the front door.**

References**:** Detective B Interview (P 288); Detective A Interview (P 261- 262).

Comment: There is some question as to whether the Code 4 is premature. The officers have not secured the house or even asked the known occupants if anyone else was inside. As noted above, Detective B told MCU that, prior to making the entry, the officers had discussed whether there may guns in the house. (P 288). If that is correct, making a Code 4 call to B was inappropriate. Instead, Detective A could have notified Detective B that Nicholas Harrison was in custody, but the house had not yet been secured.

11) **DOC Officer Y decides to remain at the residence and conduct a search of Harrison's living area; he informs Detective X of his intentions.**

References**:** DOC Officer Y Written Statement (P 744); Officer Y IIU Interview (P 759-760); Detective X Aug. 16 Interview (P 766).

Comment: Actions appropriate. Although the officers could have left with Nicholas Harrison in custody, DOC Officer Y did have the right to examine Harrison's living quarters to ensure he has not violated any other terms of his release.

12) DOC Officer Y and Detective X head upstairs to inspect Nicholas Harrison's bedroom, accompanied by Shane Harrison. Meanwhile, Detectives B and Detective A remain in the living room with Nicholas Harrison (handcuffed), Cole Harrison, and Nicholas Harrison's five year-old son.

References: DOC Officer Y Written Statement (P 744); Officer Y IIU Interview (P 760); Detective X Written Statement (P 740); Detective X Sept. 13 Interview (P 940 - 941); Detective X Aug. 16 Interview (P 766); Detective A Interview (P 261); Nicholas Harrison Interview (P 335); Shane Harrison Interview (P 346).

Comment: Questionable for the officers to separate and look for contraband before at least inquiring whether there is anyone else in the house and if the occupants know of any firearms in the residence.

Detective X stated in his compelled written report that he had previously visited this residence with DOC Officer Y in October 2010 and had found another resident in the downstairs bedroom and this individual had access to firearms. (P 739). DOC Officer Y also mentioned in his report the prior encounter with a resident in the back bedroom, though he did not mention access to firearms (P 743).

In light of that prior experience with the Harrison residence, the officers should have inquired at the outset whether there were other persons or guns on the premises. In retrospect it seems likely that if they had done so, they would have learned that Dustin Theoharis was the only other person in the house, and learned that Dustin Theoharis had a rifle that Cole Harrison had once locked in the gun safe, and that Theoharis had told him earlier in the day he had removed and placed in his truck.

(Cole Harrison Interview, P 319-320).[32] At that point, the officers could have formed a sound tactical plan that would minimize risk to all in the house.

The search of the upstairs bedroom appears lawful, as Shane Harrison had told DOC Officer Y that Nicholas Harrison lived in that room.

13) DOC Officer Y conducted the search of Nicholas Harrison's room, while Detective X stood by and spoke to Shane Harrison.

References: DOC Officer Y Written Statement (P 744); Office Y IIU Interview (P 760-761); Detective X Written Statement (P 740); Detective X Aug. 16 Interview (P 766-67); Shane Harrison Interview (P 346).

Comment: As noted above, it seems imprudent for two of the officers to split off and search before learning about other occupants or the presence of firearms. Yet the search, conducted under DOC authority, appears lawful and consistent with policy.

14) DOC Officer Y and /or Detective X ask Shane Harrison whether there was someone else living in the back bedroom, as in the past. Shane replies that a new friend, Dustin Theoharis, is living back there. Detective X does not follow up with any questions.

References**:** Same as in Decision Point No. 13; Detective X Sept. 13 Interview (P 942 – 943).

Comment: Appropriate inquiry, but one that should have taken place before the officers split off from Detectives A and B.

The officers missed an opportunity to obtain more information about Dustin Theoharis, and did not ask if he had any friends or companions with him. During his

[32] As it turned out, Dustin Theoharis had not placed his rifle in his truck; the weapon was found in Cole Harrison's locked gun safe. Nonetheless, given the level of cooperation exhibited by Cole Harrison, it seems likely that he would have told him about the gun and where he thought it might be.

September 2012 IIU interview, Detective X offered no particular reason for failing to ask about guns in the house, other than to suggest he did not ask because the overall feeling in the house was "low key." (P 943).

15) DOC Officer Y tells Detective X he would like to search the remainder of the house. The two, accompanied by Shane Harrison, return to join Detectives A and B and the rest of the Harrison family.

References: Same as in Decision Point No. 13.

Comment: Actions appropriate. Nonetheless, as discussed above, it remains unclear whether, at this point, DOC Officer Y and Detective X had been speaking to Shane Harrison about the presence of guns in the house. The two officers' March 2012 written reports do not mention any discussion of firearms, and the topic is not pursued in their August 2012 compelled interviews.

Detective A also told MCU that he was unaware of any conversation about guns or anyone else being in the house. [33] (P 262 – 263). However, in his MCU interview, Detective B said he heard DOC Officer Y and Detective X talking with Shane Harrison about whether there were guns in the house. (P 288).[34] He added that the two officers told Shane they were going to check to see if Dustin Theoharis had guns. (P 290).

MCU did not ask Shane Harrison in his recorded whether he discussed guns with the officers, and Harrison did not mention the subject in the interview. However, MCU Investigator K noted in his investigative report that, during a February 13, 2012 (unrecorded) interview with Shane Harrison, Harrison "said he didn't say anything about guns." (P 68).

[33] Detective A told MCU Cole Harrison informed him *after* shots were fired that Dustin Theoharis had had a gun in the house days earlier. (P 264).

[34] Specifically, Detective B told MCU: "[Officers Y and X] finished whatever they were doing upstairs, and then I heard them talking about, um, whether the roommate had guns in the house because that was an issue before." (P 288).

Cole Harrison told MCU in his recorded interview that he told officers Dustin Theoharis had a gun. (P 319). Yet MCU did not clear up when this discussion occurred, or who the officers were. It is thus not clear whether Cole Harrison was telling MCU about a conversation he had with Detective A which, according to A, occurred after they heard gunshots downstairs. (P 264).

Nicholas Harrison told MCU he did not hear any mention of guns in the house. (P 339).

16) DOC Officer Y and Detective X briefly rejoin Detectives A and B and the Harrison family in the living room, then announce they are going to check Dustin Theoharis in the downstairs bedroom. They then head down the stairs.

References: Detective X Written Statement (P 740); Detective X Aug. 16 Interview (P 767); Cole Harrison Interview (P 315-317); Nicholas Harrison Interview (P 331); Detective A Interview (P 262).

Comment: The announcement is appropriate, though the scope of officers' right to go downstairs and check is unclear. The compelled statements of DOC Officer Y and Detective X indicate that, at this point, they did not have reasonable suspicion of a safety risk that would justify a protective sweep of the area. Neither officer mentioned having any information about a weapon downstairs or any threat posed by Dustin Theoharis.

Thus, any legal justification for going downstairs appears to be limited to DOC authority to check living areas to which Nicholas Harrison had access. From prior experience, the officers would likely know that Nicholas had access at least to open foyer area at the foot of the stairs. Nevertheless, they did not know whether Dustin Theoharis's bedroom constituted a third party residence.

The appropriate course would have been to question the homeowner, Cole Harrison, about Dustin Theoharis's room, so as to determine whether it was an area within DOC's search authority. The officers also could have asked Cole Harrison's consent to

enter the bedroom. His answer may have provided useful information for determining whether there was DOC search authority. Cole Harrison told MCU that the bedroom used by Theoharis room was "a little apartment by itself" with its own bathroom and outdoor entry. He added that he would not enter the room without knocking. (P 324).

The officers also missed an opportunity to contact a supervisor to discuss their search authority. In addition, as discussed earlier, it is not obvious why, given what the officers knew and said they perceived at the time, they did not simply ask Shane Harrison to call his friend Dustin upstairs so they could talk to him.

The officers also did not discuss any tactics. (Detective X Sept. 13 Interview, P 944).

Detective X had one less lethal option, a Taser, but did not draw the weapon or discuss whether to do so. (*Id*.)

Finally, there is also some question about how quickly DOC Officer Y and Detective X headed down the stairs to check on Dustin Theoharis. Cole Harrison repeatedly told MCU that the officers "rushed" down stairs as if they were in a great hurry. (P 316-317). However, Nicholas Harrison told MCU that the officers walked down in no hurry. (P 337). KCSO did not explore the point with other witnesses.

2. Decision Points 17-29: Analysis of Actions After Officers Began Approaching Dustin Theoharis's Bedroom.

The decision points set forth below are based solely upon officer accounts; Dustin Theoharis declined repeated requests to speak to KCSO investigators. Furthermore, DOC Officer Y was never interviewed about the actual shooting, and Detective X was not questioned about the shooting incident until September 13, 2012. The lack of early, thorough interviews of the involved officers makes it difficult to assess the reliability of the officers' accounts. For purposes of the analysis that follows, the officers' accounts are assumed to be reliable.

Finally, it should be emphasized that although the events described below are broken into numerous decision points, the events occurred in a very brief time period, perhaps less than

a minute overall. Detective B told MCU that he heard shots roughly 10 seconds after the officers had reached the downstairs and turned the corner. (P 291, 294). Detective X did not offer an estimate of the time spent downstairs prior to opening Dustin Theoharis's door, but did estimate that he and DOC Officer Y had been in Dustin Theoharis's room only about 10-15 seconds before opening fire. (P 963).

17) Detective X and DOC Officer Y enter a darkened foyer. Detective X turns on the flashlight mounted on his Glock to clear the room. In doing so, he observes a large, closed safe which he thinks might be a gun safe. DOC Officer Y tells Detective X they will have to talk to "Dad" (*i.e.*, Cole Harrison) about the contents. The two proceeded toward Dustin Theoharis's bedroom.

References: Detective X Statement (P 740); DOC Officer Y Written Statement (P 744); Detective X September 13 Interview (P 946).

Comment: Observing and communicating about the safe is appropriate. Yet the officers missed an opportunity to stop their progress and check with Cole Harrison upstairs about the safe and about firearms in the house. Detective X told IIU the safe meant to him, "there are probably guns in the house," (P 946), and yet the officers did not change their plans or communicate this new information to the officers upstairs.

The officers were not asked why they did not turn on any lights in the foyer or ask the Harrisons to do so. The officers' statements do not reflect a need for stealth. Turning the lights on would have provided better visibility and freed both officers' hands from using flashlights.

A related concern, not at all addressed by KCSO, was Detective X's use of a gun-mounted flashlight to illuminate the foyer. It is not clear whether the device was Department approved, or whether its use is appropriate absent articulable grounds to draw and point a firearm. Did Detective X use the gun-mounted light because he perceived a threat or was it simply a matter of convenience? KCSO never asked him to

explain, and the file materials do not reflect any discussion of the issue during administrative review. The question is important, because the very act of drawing a sidearm may increase risks of a deadly force encounter and limit less lethal force options.

18) The two officers approach Dustin Theoharis's bedroom, the entrance to which comprises two closed glass doors at the end of the foyer. The glass was covered with dark cloth, blocking view into the next room. DOC Officer Y notes the door opens outward and/has an exterior lock and decides to open the door.

References: DOC Officer Y Written Statement (P 744) Detective X Statement (P 740).

Comment: DOC Officer Y later justified entry into the room by noting that the door opened outward and had an exterior lock. This, he stated, indicated that Nicholas Harrison had access to the room, and thus it was within his DOC search authority. (P 744).

KCSO's legal advisor and various managers reasonably questioned whether the mere fact that there was an exterior lock and the location of the door hinges was enough for officers to conclude Dustin Theoharis had no privacy interest in his bedroom.[35] For all DOC Officer Y knew at this point, Dustin Theoharis was the only person given a key to the room. Or it may have been that the area was considered, as DOC Officer Y later told IIU, "clearly off limits" to Probationer Harrison. (P 762). As noted by KCSO, the officers should have slowed down and addressed the issue of access/privacy by speaking to Cole Harrison before making the approach.

[35] *See, e.g.,* Chief H September 23, 2012 Memorandum at 3 (P 871) (Officers should have "slowed down" and discussed with others whether the bedroom was a third-party residence.); Major G August 30, 2012 Memorandum at 2 (P 830) (information disclosed in officers' reports not sufficient to establish that entry into the bedroom was permissible); Legal Advisor Shelledy August 2, 2012 E-mail Message to Major G (P 750) (officers should have known whether the homeowner gave permission for others to enter the bedroom so it could be deemed an area to which Probationer Harrison had access). The file also contained excerpts from court decisions addressing third-party privacy within a residence. (P 751- 754).

19) DOC Officer Y knocks on the door and draws his sidearm. He then announced "Police," as he opens the door and looks in. Detective X looked in over DOC Officer Y's shoulder. The room is dark, though Officer Y recalled dim lights over to the left by a bar area.

References: DOC Officer Y Written Statement (P 744); Detective X Statement (P 740); Detective X Sept. 13 Interview (P 944 - 945).

Comment: Knocking and identifying appears lawful and within applicable policy. As noted above, entry into the room presented the third party privacy issues noted by KCSO. Chief H's observation that the offices should have "slowed down" (P 36) seems apt.

As discussed above, it remains unclear why the officers opted for this stealthy, guns-drawn approach, which may have unnecessarily limited their choices and presented deadly force as the most immediate force option.

Seeing that the room was dark, the officers might have taken a moment to look for a light switch. (Crime scene photos and video show a standing lamp directly to the left of the door.) DOC Officer Y stated in his compelled interview he did not think to do so. (P 763). IIU did not ask Detective X about this.

There is some evidentiary conflict regarding the ambient lighting in the room. DOC Officer Y indicated in his written report that there were some dim lights over by the bar. (P 744), but Detective B stated in his MCU interview that no lights were on. (P 293). Detective A told MCU that when he arrived in the room after backup arrived, the room was well-lit—though this is probably after the exterior window coverings had been removed. (P 265). As noted above, MCU took a video of the room without the lights on, but should have recorded what the room looked like as illuminated by the two flashlight models used by DOC Officer Y and Detective X.

20) Dustin Theoharis, covered in a comforter/blanket, stirs in the bed. Detective X calls out, "Sheriff's Office," and DOC Officer Y adds, "Police, put your hands above the blanket where I can see them."

References: Same as in Decision Point No.19.

Comment: The commands are lawful and consistent with policy. Nonetheless, the question not addressed by the investigation or KCSO's internal review is whether this sudden, "command" approach contributed officers' own perceptions of risk. Neither officer was asked, for example, why they had not knocked on the door and said something like, "Dustin, this is DOC and the Sheriff's Department. Your friend Shane said you were down here. Mind if we come in a talk for a few minutes?"

21) According to Detective X, Dustin Theoharis responds (to the question in the above comment) by stating, "No." DOC Officer Y enters the room and Detective X follows him into the room with his handgun at the low ready position. He moves to the right of DOC Officer Y, and points his handgun at Dustin Theoharis. At some point, DOC Officer Y has his flashlight in his left hand and his gun in his right.

References: DOC Officer Y Written Statement (P 744); Detective X Written Statement (P 740- 741).

Comment: See comments about entry into the bedroom. Once in the darkened room, the officers' use of flashlights and reliance on the handguns seems appropriate with the threat they reported perceiving.

A few additional issues remain unclear, however. First, the officers were never asked if they scanned the entire room to ensure others were not in there with Theoharis. Second, the investigation did not clearly establish the officers' locations for the entire time period leading up to the shooting other that they remained at the foot of the bed. According to Detective X's statement, DOC Officer Y stood at the left corner of the bed (the corner nearer the nightstand) and X stood roughly at the center of the foot of the bed. (P 741, P 947). However, DOC Officer Y's report states initially he had

moved to the "right corner of the bed," and later, after pulling a comforter/blanket off Dustin Theoharis, moved to Detective X's left (P 745). These matters should have been cleared up so KCSO could form judgments about the officers' tactics.

22) DOC Officer Y observes drug paraphernalia on the night stand and tells Detective X, "rigs," to denote their presence.

References: DOC Officer Y Written Statement (P 744); Detective X Written Statement (P 741); Detective X Sept. 13 Interview (P 962).

Comment: Actions appropriate. The officers' written statements conflict as to *when* Officer Y made this "rigs" comment to Detective X. Detective X's statement indicates the "rigs" comment was made after Officer Y removed the comforter/blanket from Dustin Theoharis. (P 741). However, Officer Y's written statement indicates he made the "rigs" comment before he pulled off the comforter/blanket. (P 744). Although this inconsistency may not affect the overall analysis, it does highlight the need for detailed, contemporaneous interviews.

23) With gun and flashlight in hand, DOC Officer Y rips the blanket off Dustin Theoharis, while Detective X covers Theoharis with his weapon.

References: DOC Officer Y Written Statement (P 745); Detective X Written Statement (P 741); Detective X Sept. 13 Interview (P 947).

Comment: Appropriate goal, but questionable in its execution. It is not clear which hand Office Y used to remove the comforter/blanket, but either way, it seems unlikely he could have kept an accurate target while he did so. Furthermore, without an interview, we do not know whether pulling the comforter/blanket off temporarily impeded Detective X's view of Theoharis.

24) According to DOC Officer Y, he moved to the left of Detective X and asked Dustin Theoharis if he had any identification. Theoharis replied, "Ya."

Reference: DOC Officer Y Written Statement (P 745).

Comment: The questioning is appropriate, and moving closer to the nightstand is appropriate. We do not know, however, whether the movement crossed any lines of fire.

Another key issue not addressed in the investigation is why officers elected to remain at the foot of the bed at this point. From their descriptions, they appear to have remained fixed in a shooting position. By remaining in this position, rather than closing in toward Theoharis on the left (nightstand) side, the officers may have limited their force options. At this point, the comforter had been removed and the officers could see Theoharis with no weapons in view. The question becomes whether one officer could have provided lethal cover while the other moved to the left (nightstand) side of the bed, thus cutting off access to any weapons that may be in the vicinity. Because the officers were never asked to discuss force options, it is difficult to assess the feasibility of alternatives.

25) DOC Officer Y asks Dustin Theoharis, "Do you have any weapons?"

References: DOC Officer Y Written Statement (P 745); Detective X Written Statement (P 741); Detective X Sept. 13 Interview (P 947 – 948).

Comment: Actions appropriate, though as mentioned earlier, it would have been better to explain why the officers were there, and to ask Dustin Theoharis whether there were any weapons *in the room*.

Possible evidentiary conflict: In his September 13, 2012 IIU interview, Detective X stated that DOC Officer Y had also cautioned Dustin Theoharis not to reach for a weapon when he asked this question. (P 948, 957). Yet the two officers' compelled written statements do not reflect this caution being given. If the caution was indeed given, it was appropriate.

26) When Dustin Theoharis responds, "I have 3 guns," DOC Officer Y asks where the guns were. Theoharis responds loudly, "Here!" and "dove his left hand" over the left (nightstand) side of the bed "as if grabbing for something."

References: DOC Officer Y Written Statement (P 745); X Written Statement (P 741); Detective X Sept. 13 Interview (P 948).

Comment: Actions appropriate. The critical point is to learn where any weapons are.

There is another evidentiary conflict here. Detective B told MCU that, moments after the shooting, Detective X told him that Theoharis said he had four, not three guns. (P 291). This again highlights the need for contemporaneous interviews of the involved officers.

27) The officers shout commands for Dustin Theoharis to put his hands up or show his hands, but Theoharis continues digging away with his left hand. Theoharis pauses briefly to look at the officers, then resumes digging with his left hand.

References: DOC Officer Y Written Statement (P 745); Detective X Written Statement (P 741); Detective X Sept. 13 Interview (P 948).

Comment: The commands are appropriate. As noted above, it is not known whether Officer Y had a realistic opportunity to close in on Theoharis so that other force options were available. At this point, the officers are essentially locked into a situation where deadly force is the only practical force option.

28) DOC Officer Y fires at least eight times and Detective X at least 7 times. Both Officers reported firing at Theoharis's back as he was reaching over the side of the bed.

References: DOC Officer Y Written Statement (P 745); Detective X Statement (P 741); Detective X Sept. 13 Interview (P 950).

Comment: As noted above, MCU recovered only 15 shell casings and 7 spent bullets. (P 378). It is possible the officers fired additional rounds because they were unsure how they had loaded their weapons.

Assuming the officers' statements are accurate, deadly force would be reasonable. But there is insufficient information to determine whether total number of rounds fired was excessive. One question that the investigation and internal review did not resolve, or apparently raise, was whether the incident involved fire contagion. It was incumbent for investigators to consider other explanations for the officers' conduct, such as whether one officer prematurely opened fire and the second began firing only because his partner had started firing. If KCSO did consider the possibility, it did not reflect the assessment in the file materials provided.

Another question is whether KCSO trains its officers to fire in short bursts (*e.g.*, controlled pairs) so as to allow the officers an opportunity to assess the suspect's actions between bursts. Here, Detective X stated in his September 13, 2012 interview that he fired continuously, until Dustin Theoharis rolled back onto the bed and his hands were in plain view. (P 950). Again, the file materials do not reflect any consideration of fire control.

29) Dustin Theoharis briefly rolls back onto the bed and the officers stop firing. He then falls to the floor next to the nightstand. He appears immobile on the floor, with visible arm and leg fractures. DOC Officer Y and Detective X continue covering Dustin Theoharis with their firearms. Officer Y attempts to radio shots fired and request for medical assistance. Detective X thinks he tried to radio as well.

References: DOC Officer Y Written Statement (P 745); Detective X Statement (P 741); Detective X Sept. 13 Interview (P 950).

Comment: Actions appropriate.

30) Upstairs, Detectives A and B look at each other after hearing the rapid gunfire. Detective A draws his sidearm to cover the family in the living room, and Detective B draws his sidearm and runs downstairs.

References: Detective A Interview (P 263- 264); Detective B Interview (P 291).

Comment: Actions appropriate; it is not clear whether Detective B announced his entry as he entered the foyer. He should have, because he did not know where DOC Officer Y and Detective X were at the time.

31) Reaching the bedroom, Detective B calls, "Coming in," before entering the room with gun drawn. He noted Y and X are standing still with their weapons pointed, as if in shock.

References: Detective X Written Statement (P 741); Detective B Interview (P 291); Detective X Sept. 13 Interview (P 951).

Comment: Actions appropriate. Detective B communicates to the officers in order to avoid surprising them.

32) Detective B notes DOC Officer Y to his left and Detective X to his right. He asks the officers what happened and whether there was a weapon. Unable to see Dustin Theoharis clearly, Detective B stands on top of the bed points his firearm at Theoharis.

References: Detective B Interview (P 291- 292); DOC Officer Y Written Statement (P 745); Detective X Written Statement (P 741).

Comment: Appropriate for B to seek information and to take charge once he saw that DOC Officer Y and Detective X seemed to be shock. Deciding to stand on the bed was not ideal, as it is not a stable platform and there appears to have been sufficient space for him to move instead to the left side of the bed near the nightstand. Finally, it is not known if Detective B crossed either officer's line of fire.

33) Detective X holsters his sidearm and drags Dustin Theoharis toward the foot of the bed, so as to remove access to a weapon. He decided not to handcuff Dustin Theoharis in light of his visible injuries, including a visibly broken arm.

References: DOC Officer Y Written Statement (P 745); Detective X Written Statement (P 741); Detective B Interview (P 292, 295).

Comment: Actions appropriate, though it would have been better for Detective X to ensure the rest of the room was clear first. DOC Officer Y and Detective B were covering Theoharis, which gave X the chance to ensure no one else was in the room.

There is an evidentiary conflict here. Detective B told MCU that DOC Officer Y, and not Detective X, dragged Dustin Theoharis away from the night stand. (P 292, 295).

34) Detective B asks the officers if they had cleared the rest of the room. DOC Officer Y said no, so B cleared the closet area.

References: Detective B Interview (P 292); Y Written Statement (P 745).

Comment: Actions appropriate.

35) At some point, Detective B radios shots fired.

References: Detective B Interview (P 294).

Comment: Actions appropriate, though the investigation does not pin down where in the sequence of events B made the radio call. He told MCU Investigator C he made the radio call, but does not say when. (P 294).

VII. OLEO Involvement.

After submitting this report to Director Gaither, he had the following to add to illustrate OLEO's involvement in the investigative process of this shooting incident:

"Something not noted in the report was the pressure OLEO exerted on the KCSO to initiate an Administrative Investigation in February 2012. This pressure did not stop and continued until the administrative Investigation was commenced in August 2012."

- Director Gaither attended what he believed was a Major Incident Debriefing on February 14, 2012. At this meeting, Major Crimes provided a briefing of the shooting incident. During the course of Major Crime's presentation, Director Gaither noted the following: the involved officers had not been interviewed and their rationale for using

deadly force was not known, KCSO was reluctant to compel the involved officers to provide their account of the shooting incident, and, although a representative from IIU was present at the briefing, he lacked the authority to initiate an administrative investigation. Director Gaither also noted Major Crimes could not account for all of the rounds fired, that KCSO does not have a policy that assured each deputy loaded each magazine to capacity to enable it to determine the total number of rounds fired following a shooting incident, and that the weapon mounted flashlight affixed to Det. X's flashlight constituted a policy violation. Director Gaither alerted [the] KCSO Legal Advisor of his concerns and advised her [that] this would be an appropriate basis to launch an administrative investigation. Director Gaither further noted that Major Crimes failed to collect important pieces of evidence, which included a flashlight Major Crimes opined was "the gun" the victim allegedly reached for and drug paraphernalia in the room. When he asked a Major Crimes detective why these items had not been collected, the detective replied "it did not have evidentiary value." When Mr. Gaither advised [the KCSO Legal Advisor] that the KCSO should collect these items, she directed Major Crimes to return to the scene and to collect them. The King County Police Officer's Guild ("Guild") later filed a grievance against the KCSO and Director Gaither that alleged his attendance at this meeting violated the Collective Bargaining Agreement. As a consequence, Director Gaither is no longer allowed to participate in any meetings involving the review of an Deputy Involved Shooting.

- OLEO met with Sheriff Strachan and IIU Captain I on many occasions and requested that an administrative investigation be commenced. Both Sheriff Strachan and Captain I advised Director Gaither that IIU could not self-initiate an administrative investigation and they were waiting for a complaint or lawsuit to be filed.

- On December 13, 2011, Director Gaither met with Sheriff Rahr and advised her of concerns relative to tolling, concurrent criminal/administrative investigations, force investigative teams, supervisor's failure to report misconduct, and walkthroughs of crime scenes and critical incidents. Neither Sheriff Rahr nor Sheriff Strachan implemented policies to address these issues before the Auburn shooting incident.

- OLEO sent e-mails periodically asking when the KCSO anticipated commencement of an administrative review. One email was sent after the Seattle Times reported on the Shooting on June 20th.

- OLEO also raised concerns with the Weapon Mounted Flashlights. Not only was the use a deputy safety because the additional weight of the flashlight could cause Glock pistols to malfunction, but also because it increased the possibility of a deputy involved shooting since the deputy pointed the flashlight and handgun at the subject he illuminated.

- Due to the Auburn case, OLEO helped coordinated a trip to Los Angeles for KCSO command staff to observe the LAPD's Officer Involved Shooting process. KCSO changed many of its policies following this trip.

- OLEO did not certify the administrative portion of the Auburn shooting incident as thorough and objective due to the limited scope and amount of time IIU had to complete the investigation.

"OLEO actively engaged the KCSO to amend [relevant] polices before and after the Auburn shooting incident. Despite OLEO's efforts, KCSO did not implement appropriate polices to address these concerns and did not commence an administrative investigation until August 30th."

Conclusion

The Auburn shooting incident brought to light significant lapses in KCSO's administration of its Neighborhood Corrections Initiative with the Department of Corrections. Although KCSO should be credited for responding to those lapses in the wake of the incident, larger questions, such as how such lapses had come to arise, remain unanswered.

The incident also highlights significant weaknesses in existing policies and practices regarding deadly force investigations and review. KCSO has made numerous compromises to the integrity of the investigation process, such as relying upon written statements from involved officers.

To better serve its dual commitments to officer safety and preserving the public trust, KCSO should revamp its investigation and review model to ensure deadly force and other high risk incidents are subject to immediate, searching examination of policy, tactics, and training. Many departments have successfully adopted such models and drawn lessons from high risk incidents that better prepare officers to meet challenges they face in the field.

OFFICE OF LAW ENFORCEMENT OVERSIGHT

Summary of Recommendations and Major Finding of the Auburn Shooting Investigation

These recommendations and major findings are listed as they are addressed in the report.

1. The Auburn case calls for a broad, searching examination of the officers' conduct. KCSO policy appropriately recognizes that public confidence is essential to its mission, and its members must conduct themselves in a manner that does not undermine that trust. (Pg. 12)

2. In the General Orders Manual, there are many deadly force policies that call special attention to the trauma suffered by deputies. This consideration should be extended to civilian witnesses and victims who are involved as well. (Pg.15)

3. KCSO currently lacks a policy requiring involved officers or witnesses (civilian or sworn) to be separated. This would reduce the risk of witness contamination or even outright collusion. Many major departments, including the Washington State Police (WSP), impose some form of sequestration. (Pg. 15)

4. KCSO policy should compel officers to participate in a scene walkthrough. A walkthrough enables the investigators (and later, crime scene technicians) to develop a plan for collecting and preserving evidence, and also sets the framework for officer interviews. (Pg. 16)

5. For purposes of consistency and fairness, deadly force investigations should cover common ground, including pertinent training and tactics governing the officers' actions. (17)

6. KCSO should compel involved officers to complete a recorded interview under a deadline, and compel a written statement the same day of the incident. (18)

7. Best practice calls for recording all interviews whenever possible. Where a witness refuses to submit to a recorded interview, that fact should be noted in the investigative file. (Pg. 18)

8. A Supervisor Checklist for Officer-Involved Shootings should include: Urgent scene coordination responsibilities, comments on specific provisions, and an information sheet that includes 14 questions that the supervisor "shall" answer and provide to the responding MCU. (Pg. 19, 20)

9. Investigators should use metal detectors at crime scenes to locate shell casings. (Pg. 26)

10. Investigators should not move shell cases and mark all shell casings with individual evidence markers. (Pg. 26)

11. Trajectory Analysis should be performed at the crime scene and should take into account all relevant factors that might affect the bullet's trajectory. (Pg. 27)

12. Crime-scene video should be time-stamped. Additionally, crime-scene video should be continuous in high-profile cases where public scrutiny can be an issue. Also, panning and zooming techniques should be utilized to identify all those at the crime scene, and a camera with audio-recording functionality should be used as well. Evidence collection video recording should also be recorded continuously. (Pg. 28, 29)

13. A completed MCU report should contain a description of the location of bullet wounds of everyone involved in the incident. This description can be a portion of the medical record that describes this. (Pg. 29)

14. Pre-interviews should be strictly prohibited. Interviews should be thorough and conducted in a neutral tone. Also, interviews should be coordinated to raise topics with each witness interview conducted subsequently. (Pg. 31, 34)

15. IIU should be allowed to initiate a parallel investigation when there is sufficient scrutiny of an OIS. By the end of March 2012, there were many implications that such an investigation was in order for this incident. (Pg. 35)

16. Case file contents should be numbered and retain hand-written notes by detectives. (Pg. 36)

17. Scene sketches and diagrams indicating where the civilian witnesses and officers were located in the residence should be created by MCU detectives and included in the case file. (Pg. 36)

18. All evidentiary conflicts should be thoroughly examined; the use of a proof chart is recommended to aid MCU in doing this. (Pg. 36)

19. KCSO should reexamine questionable deadly force tactics identified in this report. Some of these tactics include: not having a "plan" once the officers decided to enter Mr. Theoharis's room, not contacting a supervisor after it was suspected that guns were present, and using gun-mounted flashlights to illuminate the area in and around Mr. Theoharis's room. We recommend closely examining our Decision Point Analysis of the shooting at the end of our report. (Pg. 42 – 66)

SHERIFF
KING COUNTY

Memorandum

Date: April 18, 2013

To: Sheriff John Urquhart **Via:** Chain

From: Sgt. Jesse Anderson- Major Crimes Unit

Re: MCU REVIEW & RESPONSE TO PARC OIS REVIEW

CAPT 4/19/13

On April 10, 2013 the Major Crimes Unit (MCU) received the Merrick Bobb Police Assessment Resource Center (PARC) review of the officer involved shooting of Dustin Theoharis. MCU has completed a thoughtful and comprehensive response to the PARC review- see attachment.

During the MCU review I noted the Major Crimes points of concern and met with Sgt. Tony McNabb and Major Crimes detectives to discuss the issues. A significant amount of constructive discussion took place for each Major Crimes investigative concern identified. Members contributed by providing productive feedback on areas for improvement. We identified those areas where we can improve with an explanation for changes. If we didn't see a need to change we gave an explanation why the task was not completed or could not be carried out. Most of those noted deficiencies were either not applicable to this investigation or are contrary to what we have been advised are best practice standards.

Specifically, I documented the review into three categories for each Investigative Critique and Review Concern as follows:

1. Recommendations for change
2. Changes already implemented
3. Reason(s) for not following recommendations during this OIS investigation.

It's important to note that the Major Crimes Unit is always open for suggestions on continuous improvement. Major Crimes personnel are continuously critical of their investigative work, and we appreciate feedback from other law enforcement professionals to help improve our investigative procedures and practices. As you know, Major Crimes has an excellent reputation with the King County Prosecutor's Office and we intend on keeping it that way!

Attachment: Merrick Bobb Critique of Major Crimes Unit Investigation

Merrick Bobb Critique of Major Crimes Unit Investigation

Investigative Critique	Review Concerns	Recommendations for Change	Changes already Implemented	Reason(s) for not following recommendations during this OIS inv.
Pg 23: Investigation Concerns/Areas for Improvement. **Involved Officer Interviews**	Failure to compel interviews at scene ASAP.	Compelling deputy statements on serious use of force ASAP after incident.	In-process	Department Major Crimes procedures require a meeting with Command & Legal prior to ordering statements.
Pg 25: Crime Scene Processing **Evidence Overlooked**	Failure to collect metal flashlight (mini mag light).	None. This was identified at the Major Crimes investigative meeting when brought to our attention by the newest member of MCU. Major Crimes realized the oversight and made immediate plans to return to the scene to collect it.	Emphasized the importance of communication at the scene when unsure about the status of an item.	The relevance of the evidence didn't become apparent until the investigators' meeting.
Pg 25: Evidence Overlooked	Bullet from nightstand.	None- See above. Not discovered until we lined up the trajectory at the Property Management Unit. The nightstand was checked at the scene by detectives who did not locate the bullet. The nightstand and bed were placed by MARR detectives at the scene so the exact position was known for a reconstruction for trajectory analysis at PMU.	Every effort will be made to conduct the trajectory reconstruction at the scene.	The bed and nightstand were prematurely moved prior to giving clear direction to do the trajectory work up. Not all evidence is found during initial searching. It's dependent on the condition of the scene, including movement at scene after the incident.
Pg 26: Evidence Overlooked	Why was a metal detector not used.	None.	Major Crimes recently acquired a new metal detector primarily for outdoor scenes.	The use of metal detectors indoors is usually not successful due to a variety of metal objects it detects; including nails, staples, plumbing, and rebar.
Pg 26: Moved Shell Casings	Moved three casings and used one evidence marker.	Use evidence marker on each shell casing, unless circumstances dictate otherwise. Occasionally there are reasons for using one evidence marker, such as when the casings are grouped closely together in a pile.	Continue standard operating procedures.	It was already documented. The casings were found in layers of bedding and not readily obvious to set up placards for the individual locations. The layers had to be carefully examined to find the casings, which required

Merrick Bobb Critique of Major Crimes Unit Investigation

Investigative Critique	Review Concerns	Recommendations for Change	Changes already Implemented	Reason(s) for not following recommendations during this OIS inv.
				movement preventing exact location for marking. Evidence placards are not always used to mark each individual evidence item. One placard can mark more than one item in a location or can be used to mark locations of items not collected (i.e., stains, fixtures, etc.) The placards don't necessarily show the original location of the item. The detective taking the role of the scene manager decides what format the placards are to be used and will later testify to that in court. Courtroom testimony provides for an explanation of the procedures used.
Pg 26: Crime scene diagram accuracy.	Due to the movement of casings the diagram is not accurate.	None. See above. The MARR Unit Total Station diagram is accurate whenever possible and practical.		It was impossible to place casings in exact location due to the above conditions.
Pg 26: No Evidence Markers on Comforter or Bed.	No markers used to ID item or measurements included in report. In complete diagram.	None. MCU uses placards for each item when necessary.	MCU followed crime scene processing procedures.	There was no need for a marker on the bed. The bed is included in the Total Station diagram that shows the furniture in the room. Items were piled & moved on the bed from their original location.
Pg 27: Scene Measurements; Diagram	Diagram in MCU file contains no measurements for any of the evidence marked.	None. MCU has access to the evidence measurement diagram when/if needed for court. The diagram is prepared showing exact measurements. Standard paper is too small to include all the measurement, it would be too cluttered. They have to use the plotter to produce the image	Standard practice.	The MARR Unit didn't provide it, but it is available. Merrick Bobb must not have been provided with a copy.

Merrick Bobb Critique of Major Crimes Unit Investigation

Investigative Critique	Review Concerns	Recommendations for Change	Changes already Implemented	Reason(s) for not following recommendations during this OIS inv.
		Merrick Bobb is looking for.		
Pg 27: Rough Sketching	That it's a fairly standard practice, why don't we (KCSO) do it.	None.	Standard practice when necessary. These are handled as notes for use by the detective only for interviewing and briefing.	On occasion we complete rough sketches/diagrams; however, these sketches are not accurate. We rely on the Total Station diagram for accuracy, in addition to photos and video.
Pg 27: Trajectory Analysis	Not sound or at least not well documented.	Conduct trajectory work at the scene unless circumstances prohibit or do not necessitate this investigative step at the scene. The items were placed by MARR so that we could reconstruct the scene at PMU. A 3D scanner would help facilitate this process, but at a cost of about $135K.	Detectives have been given direction.	Bed and nightstand were moved prior to giving clear direction on completing trajectory. Environment was not ideal for doing trajectory at scene.
Pg 27: Trajectory Analysis	No indication investigators used any measurements to reconstruct scene in evidence room.	None. Accurate information and measurements were taken and documented in detective follow up reports.		It was completed and documented in detective follow up reports.
Pg 27: Trajectory Analysis	Does not account for the possibility or likelihood that Detective X was on the mattress when shots were fired.	None. There is no reasonable or accurate method of showing weight distribution for a detective standing on the bed. In addition, MCU didn't have access to this location/placement information from officer statements.		The officer and detective statements were not provided to MCU until long after the scene investigation was completed. MCU didn't know where they were positioned. There is no method to accurately recreate on a mattress exact movement, placement, position, weight, and weight distribution.
Pg 27: Trajectory Analysis	No dummy or weights were used to compress mattress to account for the weight of Theoharis.	None. See above.		There is no accurate method for measuring body position and exact distribution of weight based on movement. See above.

Merrick Bobb Critique of Major Crimes Unit Investigation

Investigative Critique	Review Concerns	Recommendations for Change	Changes already Implemented	Reason(s) for not following recommendations during this OIS inv.
Pg 27: Trajectory Analysis	Type of mattress to determine bullet channel. Foam type or springs & coils.	Document mattress composition in reports, including any trajectory deflection as a result of the material in the mattress.		There was no indication the bullet hit any hard material in the mattress that would alter the bullet path. Trajectory rod went straight through mattress without striking any hard material.
Pg 28: Crime Scene Video	Lack of time & date stamp.	None		Best industry practice for forensic videographers is to not use date & time stamp. It obstructs images and is not always accurate.
Pg 28: Crime Scene Video	Video was not recorded continuously.	None. Video should not be taken while in movement unless it's to show a path/direction taken by an individual.		Again, industry best practice standards apply. Continuous video recording would produce hours of unnecessary footage of the same views over and over. Expensive (tape usage) & time consuming for the videographer and viewer. Videographer occasionally has additional assigned tasks that don't involved video recording.
Pg 28: Crime Scene Video	No audio recording.	None.		Again, this is not best practice. It's not recommended. Discussions include many theories/ideas that are ultimately not an accurate account of the incident. Two party consent. We would have to continually stop recording to get consent.
Pg 28: Crime Scene Video	Portions of video are difficult to decipher.	Continue to take both wide angle and close up footage for full identification, along with placement and orientation.	Direction provided to videographer detective.	MCU is not aware of what is being referred to for this concern. My guess is that it's a small oversight that wasn't recognized at the time.

Merrick Bobb Critique of Major Crimes Unit Investigation

Investigative Critique	Review Concerns	Recommendations for Change	Changes already Implemented	Reason(s) for not following recommendations during this OIS inv.
Pg 28: Crime Scene Video	Inconsistencies in wearing of boot/shoe coverings.	Occasionally boot/shoe coverings are not necessary. Booties are primarily for trace evidence preservation. When those conditions are present all MCU personnel will wear the coverings. Trace preservation is usually not an issue for OIS investigations because of the known individuals involved. Booties are often worn for protection while working in biohazard conditions.	Direction given to detectives.	Detective was likely working in the non-biohazard (blood stained) area and didn't feel the need for coverings.
Pg 29: Crime Scene Video	Doesn't continuously record the evidence collection.	Stop recording collection of most evidence. Some evidence, such as removal of pieces of walls or other structures, will be recorded to show the dismantling process.	The videographer probably took too much video at this scene. We will instruct them to only take the initial video and then maybe one with all placards in place. Then no further video unless specifically asked to by a detective.	Logistically, our sole videographer is unable to be at multiple locations simultaneously to record all evidence gathered.
Pg 29: Crime Scene Video	Video should have been taken using the same two flashlight models used by DOC officer and detective.	Good suggestion. We have taken video under various conditions such as this, so MCU will continue this practice when we have this type of information available to us.	MCU routinely shoots video in various lighting conditions to recreate the scene as it was during the incident.	MCU was unaware of the DOC officer and detective's exact positions or how/if the flashlights were used until much later in the investigation. Its' a Garrity/compelling issue.
Pg 29: Medical Evidence	Detectives' reports do not reflect any analysis of the records or location of gunshot wounds. MCU should have outlined the evidence so that others could form their own opinions.	None. Detectives routinely provide their non-expert initial observations of gunshot wounds; however, MCU relies on the Medical Examiner or medical staff reports to provide expertise and specifics.	No changes necessary, already in practice.	Unable to determine a conclusive number for how many times Theoharis was struck by bullets or the trajectories. The expert opinion of the ME is what MCU relies on. Multiple uneducated opinions create confusion.
Pg 30: Witness Interviews	Numerous unrecorded interviews.	Interviews that are not recorded should include a detailed summary in follow up	Direction given to re-affirm the importance of this	Detectives used their judgment on what documentation to include

Merrick Bobb Critique of Major Crimes Unit Investigation

Investigative Critique	Review Concerns	Recommendations for Change	Changes already Implemented	Reason(s) for not following recommendations during this OIS inv.
		reports. Often, as evidence or facts are gathered, witnesses need to be re-interviewed.	documentation.	based on the value of the info obtained. Those who had little relevant info were not recorded or summarized in detail. As a witness is recorded again & again they become more apprehensive in making statements. Using our limited clerical resources for unnecessary transcriptions is not an efficient or cost effective use of resources and creates a significant backlog. Detectives determine which interviews merit recording.
Pg 31: Pre-Interview	Pre-interviews should be recorded.	None. With all respect this is unrealistic. It's MCU's opinion that detectives will not and should not record pre-interviews.		Starting a recording without building a rapport and trust, or finding out what info the person can provide, is not practical and can negatively impact the interview. They are less likely to provide complete information and maybe uncooperative. In addition, we don't have the admin resources to transcribe unnecessary lengthy interviews.
Pg 31: Interview Tone/Neutrality	Avoid leading questions.	None. Only one example is mentioned in the report.		Detectives are well trained/experienced interviewers and know when it's appropriate to ask leading questions.
Pg 31: Thoroughness of Recorded Interviews	Brief interviews by MCU the night of the incident.	None. We continue to insure thoroughness of interviews with detailed questions and answers.	Detectives understand the importance of detailed interviews, so they were	It's the detectives' opinions the interviews were thorough given the information that they had at

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			reminded of this concern. MCU detectives are well trained in interview techniques.	that time. Follow up interviews are often necessary.
Pg 32: Interview sketches	Should have asked each witness to sketch out where everyone was located.	Good recommendation, especially for eye witnesses. MCU does this on occasion when they believe it's important. Perspective photos are also taken.	Standard practice	MCU detectives didn't take this step because all of the witnesses were relatively close together in the living room to hear the noises downstairs. No one was able to visually witness the shooting. Locations were documented in detective follow up.
Pg 32: Witness Interviews	Detectives didn't ask whether the radio or TV were on.	Incorrect. Witnesses were asked about the volume of the TV and it was answered. There is documentation in the detective follow up report.	This part of a detailed interview.	N/A
Pg 33: Specific questions not asked by detectives.	See bulleted list on pg 33. These questions are mixed between IIU/Admin and MCU related questions.	Ensure detailed interviews.	Discussed conducting detailed interviews.	Follow up interviews are often necessary as new information is discovered. MCU typically doesn't ask IIU/Admin policy questions during interviews.
Pg 34: Interview Coordination	MCU only took recorded interviews of the house occupants the night of the incident, and didn't coordinate the info obtained during the interviews.	Good recommendation. MCU will strive to improve in this area. Limited staffing and workload are an obstacle.	Discussed with detectives and will begin immediately.	Time constraints and limited personnel resources to conduct all the different scene tasks.
Pg 36: Contents not numbered	Documents not sequentially numbered.	None		MCU uses an index for case files/binders. MCU doesn't use a Bates number stamp. Continuously adding reports makes this system inefficient.
Pg 36: Handwritten notes missing	No deputy or detective handwritten notes in the	None		KCSO detective practice is to transfer notes to follow up report

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	case file.			and then destroy. The notes only help the author to recall facts for his/her report. The notes are not understandable to others.
Pg 36: Insufficient scene sketches or diagrams	No annotated sketches or diagrams from witnesses to show where they were positioned.	None. When appropriate MCU will ask witnesses to sketch the scene and their location.	Current practice.	See above under interview sketches. None of the witnesses in this case were eyewitnesses, so there was no scene to sketch.
Pg 36: Failure to address evidentiary conflicts.	Several conflicts emerged during the investigation and MCU didn't take any effort to pursue them or flag them.	MCU will carefully compare notes and witness information to sort out the facts and address discrepancies. This was done in meetings & follow up.	MCU detectives routinely follow this investigative step.	Attention was focused on listening to the family. There were discrepancies between witnesses. Those are documented and sorted out later by MCU detectives. Both examples involve Detective A stating that he did not have any knowledge that the two officers were going downstairs to contact another subject and that investigators never questioned him on this. In his statement, Detective A said that he was involved in a conversation with another family member when the officers went downstairs. The two witnesses were also unsure of when or whom they told about Theoharris being downstairs.
Pg 37: Proof charts		Bobb recommends investigators use proof charts to lay out witness testimony regarding key issues. MCU recognizes the importance of this organizational documentation. At times actual charting or listing is done for the use of the specific detective organizing the information.	MCU has historically documented this information in reports. Used when appropriate.	