

October 8, 2019

Officer Troy Phillips  
Police Officer  
University of Oregon Police Department

RE: IA PS2019-021 Finding

This letter is to inform you that I have sustained four out of five allegations of misconduct against you as outlined in the internal investigation #PS2019-021. By way of background, this Internal Investigation was conducted due to a community member filing a tort claim against the University of Oregon in reference to your actions while on duty as a University of Oregon Police Officer.

I have reviewed the internal affairs investigation ("IA Investigation"), all related video/audio data, and the findings of an independent subject matter expert. My specific findings are as follows:

Allegation #1

It is alleged that you failed to document the existence of audio and/or video recordings related to this arrest in your report in violation of police department policy:

446.6 DOCUMENTING MOBILE AUDIO VIDEO (MAV) USE - If any incident is recorded with either the video or audio system, the existence of that recording shall be documented in the officer's report. If a citation is issued, the officer shall make a notation on the back of the records copy of the citation indicating that the incident was recorded.

In reviewing your police report there is no documentation of your MAV recording as required by department policy. The system for viewing MAV logged the fact that you accessed your MAV recording four times right after the incident clearly demonstrating your awareness of the existence of your MAV recording. When questioned by the investigator if you were aware of the specific policy you responded, "I am now as a result of the service of the documents that you provided."

I noted that you have accepted the University of Oregon Police Department Policy Manual and you have acknowledged review of a Daily Training Bulletin (DTB) titled, "Activation of the Mobile Audio Video System" dated October 12, 2018. This DTB clearly reinforces your requirement to document the existence of your MAV recording. Because you have been expressly provided with the relevant policy twice – once by being provided with the UOPD policy manual and once through the DTB, you were made aware of this policy and, moreover, received training on is recently Accordingly, I do not accept your suggestion that you were not aware of this policy.

At my direction, Captain Wade reviewed past arrest reports authored by yourself. Captain Wade discovered that you did not document, in any of those reports, your MAV recording when it existed. During the personnel investigation interview, when questioned about your documenting the existence of the MAV in your report, you stated, "Here in the report, I note that I activated my overhead red-and-blue emergency lights, which automatically activates our cameras, be clear documentation. Other than that, I don't believe that there is documentation in this report."

Furthermore, to ensure your failure to document your MAV recording was not a systemic issue within our organization, I directed Captain Wade to conduct a review of peer officer arrest reports; of the three officers reviewed, the existence of a MAV recording was documented 100% of the time in the police report when the MAV recording existed.

In reviewing the UOPD Use of Force Report Form I found that the existence of the MAV recording was appropriately documented. As you are aware the UOPD Use of Force Report Form is not an addendum to your police report thus a District Attorney, or in this case, a City Attorney would have no idea that there was a MAV recording. UOPD Policy #446 clearly states an officer's responsibility: "Written reports should state that a recording device was used." Again, this is the policy that you received training on recently and that other officers are complying with regularly.

At the end of your interview with Captain Wade you offered the following statement, "Yeah. So, like the first piece is that I do recall, and specifically recall - it's my, it's my common practice - on a use-of-force report to both encourage and make available video for my sergeant to watch before we complete the report. And in this case, I distinctly remember showing Davis both my dash-cam video, including the reasons for the stop, and my body-cam video, to the degree that it was relevant, and - and encouraging him to review it. That's my common practice because I want things to be well-documented."

Your own statement relating to things being well documented conflicts with the fact that you omitted the existence of your MAV recording in your police report as required by department policy.

I support the finding of SUSTAINED as it relates to this allegation.

## Allegation #2

It is alleged that you made false or misleading statements and that you omitted facts from your police report. These same allegations also hold true for your courtroom testimony and comments you made to your supervisor relating to this incident. Violation of Department Policy 1012.8 HONESTY AND TRUTHFULNESS – Knowingly making false, misleading or malicious statements that harm or destroy the reputation, authority or official standing of the

Department or employees. Falsifying records, making misleading entries or statements, or willful and unauthorized destruction and/or mutilation of any department record, book, paper or document. Work related dishonesty, including attempted or actual theft of department property, services or the property of others. Failure to disclose material facts or the making of any false or misleading statement on any application, examination form or other official document, report or form. False or misleading statements to a supervisor.

I found statements made by you in person, in your report, and in your courtroom testimony to be untrue. Those statements included:

1. “Mr. Rodriguez drew my attention because as he neared the crosswalk he swerved jaggedly as though he was going to cross into my lane.” (Excerpt from your police report)
  - a. The MAV recording clearly demonstrates that at no time did Mr. Rodriguez act or make a movement that would suggest he was crossing into your lane of travel while riding his bicycle.
  - b. You reviewed your MAV recording the same day you authored your police report. You were also given the opportunity to review your MAV recording during your interview with Captain Wade. Even when confronted with the MAV recording evidence you did not admit, nor clarify, that your police report and subsequent courtroom testimony were not accurate. This speaks to the multiple opportunities you were given to tell the truth, state the obvious, and you failed to do so.
2. “I had to brake heavily. Mr. Rodriguez then swerved back.” (Excerpt from your police report)
  - a. The MAV recording clearly demonstrates that you had already started to break prior to nearing the crosswalk and prior to Mr. Rodriguez making any movements on his bicycle other than maintaining a straight direction of travel in the bicycle lane.
  - b. You reviewed your MAV recording the same day you authored your police report. You were also given the opportunity to review your MAV recording during your interview with Captain Wade. Even when confronted with the MAV recording evidence you did not admit, nor clarify, that your police report and subsequent courtroom testimony were not accurate. This speaks to the multiple opportunities you were given to tell the truth, state the obvious, and you failed to do so.
3. “Mr. Rodriguez then cut in front of me into the vehicle lane of travel while dismounting his bicycle.” (Excerpt from your police report)

- a. The MAV recording clearly demonstrates that Mr. Rodriguez did not cut in front of your vehicle while dismounting his bicycle nor did he dismount his bicycle in the vehicle lane of travel.
  - b. You reviewed your MAV recording the same day you authored your police report. You were also given the opportunity to review your MAV recording during your interview with Captain Wade. Even when confronted with the MAV recording evidence you did not admit, nor clarify, that your police report and subsequent courtroom testimony were not accurate. This speaks to the multiple opportunities you were given to tell the truth, state the obvious, and you failed to do so.
4. Further in your written report you contradict yourself by stating, “And made an unsafe change of lane by dismounting or partially dismounting his bicycle as he moved into my lane in violation of Oregon Revised Statute 811.375 Unlawful Change of Lane (Unsafe).”
  - a. The MAV recording clearly demonstrates that Mr. Rodriguez did not dismount or partially dismount his bicycle as he moved into your lane of travel.
  - b. You reviewed your MAV recording the same day you authored your police report. You were also given the opportunity to review your MAV recording during your interview with Captain Wade. Even when confronted with the MAV recording evidence you did not admit, nor clarify, that your police report and subsequent courtroom testimony were not accurate. This speaks to the multiple opportunities you were given to tell the truth, state the obvious, and you failed to do so.
5. “I also had concern that based on the swerving and jerky sharp movements that Mr. Rodriguez who was carrying a large plastic trash bag in his left hand was operating his bicycle in violation of Oregon Revised Statute 814.450 Unlawful Load on Bicycle as he was carrying a bundle or article which prevented Mr. Rodriguez from “having full control [of the bicycle] at all times.” (Excerpt from your police report)
  - a. The MAV recording clearly demonstrates that Mr. Rodriguez had full control of his bicycle and did in fact have at least one hand on the handlebar. The MAV recording also demonstrated that the items Mr. Rodriguez was carrying at no time prevented him from having full control of his bicycle.
  - b. You reviewed your MAV recording the same day you authored your police report. You were also given the opportunity to review your MAV recording during your interview with Captain Wade. Even when confronted with the MAV recording evidence you did not admit, nor clarify, that your police report and subsequent courtroom testimony were not accurate. This speaks to the multiple opportunities you were given to tell the truth, state the obvious, and each time you failed to do so.

6. In your police report you stated, "I tackled Mr. Rodriguez to the ground and he immediately began reaching towards his waistband and knife. I was able to take physical control of his arms and keep my arms and body underneath his shoulders to prevent him from accessing his weapon. I pushed Mr. Rodriguez's arms above his head and Officer Sitts joined. During the struggle I was concerned Mr. Rodriguez would continue attempting to access his weapon and once we had some physical control I upholstered the knife and threw it away from where we were fighting. Mr. Rodriguez actively tried to pull his arms away, refused to roll to his stomach, and initially appeared to be attempting to access his weapon. Mr. Rodriguez claimed he was not resisting and was not refusing to follow orders as he actively resisted our attempt to arrest him. It took approximately a minute to take Mr. Rodriguez into custody and required three to four officers in order to do so. I applied handcuffs to Mr. Rodriguez behind his back. I applied the handcuffs as safely as possible as Mr. Rodriguez actively resisted being arrested and cuffed, and continued to pull away after handcuffs were applied."
  - a. Your body worn camera video and audio clearly demonstrates that at the point you tackled Mr. Rodriguez at no time did he attempt to access his knife nor did he continue to attempt to access his knife as you suggest in your police report. In fact, your body worn camera video and audio clearly demonstrates that Mr. Rodriguez was trying to comply with your directions once you had made physical contact. Your body worn camera video and audio also demonstrates that Mr. Rodriguez's hands were above his waist holding items just prior to your physical contact with him and upon taking him to the ground it took you less than one minute (40 seconds) to successfully place Mr. Rodriguez into handcuffs.
  - b. Your above statement is a mischaracterization of what actually occurred.

You omitted the fact from your report that Mr. Rodriguez had an item in each hand at the time of your detention, neither item being a weapon. You also failed to document the fact that Mr. Rodriguez was holding his arms in the air, well above his waist. This is clearly identified throughout most of your contact as captured on your MAV and body worn camera. This fact is important when determining the reasonableness of many aspects of your contact with Mr. Rodriguez. Your written report is exceptionally detailed as demonstrated from the following excerpts from your police report:

1. "At this point I had ordered Rodriguez to get on the ground approximately 14 times, informed him he was under arrest approximately one minute and twenty seconds"
2. "I ordered Rodriguez over my Public Address System, "Police Department, you're under arrest for Interfering with a Police Officer, if you continue to run you will be committing the crime of Escape."

3. "The weather was cloudy, dark, with a light visible rain, which had been ongoing for approximately two hours resulting in a substantially wet environment."
4. "On October 28th, 2018, I was assigned to the Canine Division of the University of Oregon Police Department. I was working in that capacity wearing a full University of Oregon Police Department Uniform, displaying the badge of the University of Oregon Police Department. I was assigned and operating a marked University of Oregon Police Department Patrol Vehicle."
5. Oregon Uniform Citation and Complaint/
6. UOP114079
7. Evidence Seized/
8. UOP - EPR - 02508
9. Property Seized/
10. UOP - Safe Keep Property - 18-02254
11. Photographs Taken/Yes – Digital

The above details found in your report are merely a snapshot of what you chose to record. I find it completely unreasonable, and in violation of policy, that you provided false information and omitted many relevant facts. Your report contains extensive detail about what violations you believed Mr. Rodriguez to have committed with those facts being clearly inconsistent with the video and audio from this incident. This brings into question your reason for omitting this fact, which again speaks to the reasonableness of your actions as it relates to your tactics and perceived threat posed by Mr. Rodriguez.

The Eugene Municipal Prosecuting Attorney Doug Worley and Eugene Municipal Judge Richard Fredericks, both of whom were in the court during the trial, later reviewed the MAV recording and both independently agreed that the recording did not match your report or their recollection of your testimony. Both recalled that your testimony was consistent with, and based on your police report. I share this same opinion based on the information contained within this personnel investigation. To be clear, that means that I am finding that you provided false or misleading information while providing testimony in this matter.

While on scene you advised Sergeant Davis that Mr. Rodriguez cut right in front of you and that you almost hit him. This statement to your supervisor is not true based on the information contained in this investigation including all video and audio recordings.

In fact you stated the following in your police report, "I sounded my audible siren and Rodriguez physically reacted to my siren and looked at me as though it was clear he understood I was pursuing him. Rodriguez then continued riding away. At this point I had been attempting to stop Rodriguez for over fifteen seconds far longer than most subjects require to stop. Most

traffic, pedestrian, and bicycle stops result in compliance and stopping in less than three seconds in my experience.”

While I find your statement “that most traffic violators stop within three seconds” hard to believe, I understand that this is your experience and not mine. However, since the facts of this incident as reported by you do not match the video evidence, I directed Captain Wade to review your MAV recordings in other traffic stops as it relates to the time it takes a violator to stop for you.

The review revealed that violators on average took approximately 18 seconds to stop for you. I am not questioning your ability to perceive and record time, those are fundamentals of your ability to serve as a police officer. Furthermore, the relevance of your statement here is important to your allegation that Mr. Rodriguez was refusing to stop, was attempting to escape, and related reasons for arrest and use of force. The allegation of failure to comply and escape are very serious if true. You attempt to legitimize your actions based on your own reported experience, which was also found to be untrue.

Based on the information contained in this personnel investigation I concur with the finding of SUSTAINED as it relates to this allegation. You were not truthful in your police report, your statement to your supervisor, your testimony in municipal court, and you omitted facts that would be considered exculpatory in nature.

### Allegation #3

It is alleged that you violated Department Policy 612.3 DISCLOSURE OF INVESTIGATIVE INFORMATION - Officers must include in their investigative reports adequate investigative information and reference to all material evidence and facts that are reasonably believed to be either incriminating or exculpatory to any individual in the case. If an officer learns of potentially incriminating or exculpatory information any time after submission of a case, the officer or the handling investigator must prepare and submit a supplemental report documenting such information as soon as practicable. Supplemental reports shall be promptly processed and transmitted to the prosecutor's office. If information is believed to be privileged or confidential (e.g., confidential informant or protected personnel files); the officer should discuss the matter with a supervisor and/or prosecutor to determine the appropriate manner in which to proceed. Evidence or facts are considered material if there is a reasonable probability that they would affect the outcome of a criminal proceeding or trial. Determining whether evidence or facts are material often requires legal or even judicial review. If an officer is unsure whether evidence or facts are material, the officer should address the issue with a supervisor. Supervisors who are uncertain about whether evidence or facts are material should discuss the issue with the appropriate prosecutor.



During this investigation you provided Captain Wade a copy of an email that you received from the prosecuting attorney which asked the question if MAV was available. This email was sent to you a day prior to the trial. When asked about this email during your interview with Captain Wade you stated, “No, I didn’t talk to him. I received an email from him, and I did not have any conversation with him. I did not reply to the email because I didn’t have an answer for him. It was just a notice, ‘Hey, you’re going to trial.’”

Your response completely disregards that the email from the prosecuting attorney inquires about the existence of your MAV recording. The exculpatory facts that you chose not to disclose are documented within the investigation and include, but are not limited to the following:

1. You failed to document the existence of your MAV recording. Your MAV recording provides a narrative related to the facts of this incident that, when compared to your police report, own statements, and courtroom testimony, provides a completely different picture.
  - a. Eugene Municipal Prosecuting Attorney Doug Worley and Eugene Municipal Judge Richard Fredericks, both of whom were in the court during the trial, later reviewed the MAV recording and both independently agreed that the recording did not match your report or their recollection of your testimony. Both recalled that your testimony was consistent with and based on your police report.
2. Your police report did not accurately and truthfully capture the facts of this incident consistent with your MAV recording.
3. You state in your report, “At this point I had ordered Rodriguez to get on the ground approximately 14 times, informed him he was under arrest multiple times including explaining why I stopped him.” You omit the fact in your report that during the time you are ordering Mr. Rodriguez to get on the ground he is stating in a clear and calm voice the following (excerpt from your body worn camera transcription):
  - a. You state, “The ground now”
  - b. Mr. Rodriguez replied, “Why is that?”**
  - c. You state, “Get on the ground. You’re under arrest.”
  - d. Mr. Rodriguez replied, “Why is that, sir?”**
  - e. You state, “Get on the ground now or you’re gonna get tasered.”
  - f. Mr. Rodriguez replied, “No sir, why is that?”**
  - g. You state, “You’re under arrest for interfering with a police officer.”
  - h. Mr. Rodriguez replied, “No, I didn’t interfere with...”**
  - i. You state, “I’m stopping you for pedestrian violation and you failed to stop. Get down on the ground now.”
  - j. Mr. Rodriguez, “I tried to tell you I couldn’t hear you for the music.”**





- k. You state, "Get down on the ground now."
- l. Mr. Rodriguez replied, "Sir, I'm not going to get down on the..."**
- m. You state, "Get down on the ground now."
- n. Mr. Rodriguez replied, "(Unintelligible) please get your sergeant."**
- o. You state, "You're armed with a knife and you're refusing to follow my orders."
- p. Mr. Rodriguez replied, "No - no - no."**
- q. You state, "Get down on the ground now you're armed with a knife..."
- r. Mr. Rodriguez replied, "Sir..."**
- s. You state, "...and you're refusing to follow my orders."
- t. Mr. Rodriguez, "...it's in the sheath. Sir."**
- u. You state, "Go lethal."
- v. Mr. Rodriguez replied, "No. Please sir. You see my hands. Get your sergeant."**
- w. You state, "Sir, if you do not get down on the ground I'm going to use a Taser on you, you're armed with a knife."
- x. Mr. Rodriguez replied, "Yeah, I know but..."**
- y. You state, "Get down on the ground."
- z. Mr. Rodriguez replied, "...it's in a sheath."**
- aa. You state, "You're armed with a knife and you're refusing my orders. Get down on the ground."
- bb. Mr. Rodriguez replied, "Sir, it's in a sheath."**
- cc. You state, "Get down on the ground now."
- dd. Mr. Rodriguez replied, "Please let me get your sergeant."**
- ee. You state, "Sit."
- ff. Mr. Rodriguez replied, "You can't do that to me. Let me - I couldn't hear to the music. But you know what..."**
- gg. You state, "You're under arrest. Get down on the ground."
- hh. Mr. Rodriguez replied, "Sir, please get your sergeant, sir - sir."**
- ii. You state, "Get on the ground."
- jj. Mr. Rodriguez replied, "Hey - hey..." and then you tackled him.**

The statements of Mr. Rodriguez are clearly exculpatory. These statements coupled with the fact that at no time did Mr. Rodriguez's behavior and demeanor to a reasonable officer ever suggest he was yelling at you. To the contrary, Mr. Rodriguez's response were calm and audible in a fashion that did not require him to yell while his arms are raised in the air, objects in each hand and standing over a bicycle. Had you included these facts along with the fact that a MAV recording existed in your police report it would have clearly changed the outcome of your criminal investigation.

Based on the information contained in this personnel investigation I concur with the finding of SUSTAINED as it relates to this allegation.

#### Allegation #4

It is alleged that you violated Department Policy 300.3 USE OF FORCE, when taking Mr. Rodriguez into custody. Department policy states, "Officers shall use only that amount of force for the duration which reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose."

I have given careful attention to your written report and your statements made during this personnel investigation, as well as the video/audio data. I find your actions in this incident not only unreasonable but also troubling. Those include but are not limited to the following:

1. Upon exiting your patrol vehicle you immediately draw your firearm and point it at Mr. Rodriguez giving him commands which he is refusing to follow. Your decision to exit your vehicle and immediately transition to deadly force was based on the following:
  - a. During your interview with Captain Wade you were asked about drawing your firearm and de-escalation techniques. You responded with the following, "Clear, concise orders. I addressed him as sir. I explained the reason that I was stopping him. I explained my concern. I have in here in quotes, "I explained, 'You are armed with a knife, you're refusing to follow my orders.'" These are all explanations of why I'm - I'm concerned. I maintained distance to the best of my ability and attempted to de-escalate. **I also used force as a de-escalator, the presence of a firearm.** And the goal is to de-escalate the situation and encourage him to comply with commands. I also initially, even though I drew my firearm, I informed him that he may be subject to a taser exposure because in my training and experience, even before we carried tasers, the threat of a taser was often something that would de-escalate, prevent resistance, and - and gain an immediate response. I had one specific instance where I was chasing a guy, no taser on my belt. I told him, "Hey, you're gonna get tased." And he went from a full-out sprint to dropped on the ground, full compliance, did not even - did not even fight me. When I asked him why. He said, "Because I'm scared of the taser, I don't want to get tased." So there's many tools that I use here. I tell him - I - I - I engage him, not only tell him he's under arrest, what he's under arrest for, I even go on to say, "I'm stopping you for a violation." In this case I say a pedestrian violation, that's what I said, but regardless, "And you failed to stop, get down on the ground." I'm providing as much de-escalation as is possible

based on the training that I received about de-escalation, given that the circumstance is still very tense and uncertain.”

I viewed your actions, and your statements regarding your actions, through the lens of Department Policy #300. I concluded that a reasonable officer would not have introduced the potential for use of deadly force in the manner in which you did. You state you used force as a de-escalator, which you know from your training at the police academy, UOPD, and department policy, that your firearm is to be used only when circumstances justify its use. If you have received training outside of the UOPD to suggest otherwise, I am not aware of that training, nor would it have been sanctioned by our department. During this incident you advised Officer Sitts to “Go lethal.” That is it, no further explanation or communication about what your intentions were at the time.

During my review of this investigation I concluded that Officer Sitts understood what you meant at the time you said it, as he did not use lethal force. However, it does not diminish the fact that making such a statement to a fellow officer is reckless and inconsistent with your training and department policy.

When interviewed on the topic of threat, Officer Sitts stated, “I didn’t feel like he was presenting any threat to me at that point as he was verbally engaging with Officer (Phillips) and directing his attention towards him.” Officer Sitts was asked if he felt Mr. Rodriguez was making any threatening motions or actions to which he replied, “At this point right now his actions do not appear to be threatening as he’s raised his hands up around chest-level.”

Officer Sitts does state that Mr. Rodriguez was uncooperative and had easy access to a weapon. Officer Sitts also stated in his interview, “My opinion standing there providing Officer (Phillips) with cover was that at this point in time we had closed off the movements of a highly mobile suspect, i.e. someone on a bike. He was not in a high student population area and it seems very reasonable of me for Officer (Phillips) to attempt to take him into custody at that point using a low level of force rather than risk him fleeing either on bike or on foot to somewhere where he was going to potentially be a danger to more people than just the two officers on scene.”

UOPD Policy #300 states that deadly force is defined as “force reasonably anticipated and intended to create a substantial likelihood of causing death or serious physical injury.”<sup>1</sup> Again, you state that you used your firearm as a “de-escalator.” Nowhere in our department policy, your training, sponsored by the UOPD does it state that by pointing your firearm at an individual will de-escalate a situation. A citizen has the right to possess a knife consistent with Oregon state statute, and in this case Mr. Rodriguez was lawfully in possession of a knife.

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<sup>1</sup> UOPD Policy 300 – Use of Force

As part of your ongoing training related to department policy you have completed well over 40 Daily Training Bulletins here at the UOPD on the topics of use of force and crisis intervention techniques. As a member of the UOPD have also attended courses related to the use of force including but not limited to the following:

1. Basic Police Academy
2. Use of Force
3. Verbal communication
4. Crisis intervention team training
5. Street survival
6. Firearms training
7. Use of deadly physical force
8. Defensive tactics

UOPD policy #300.3.1 identifies the factors used to determine the reasonableness of force. The following factors are taken into consideration when determining if the force used by an officer was reasonable. Those factors include:

1. Immediacy and severity of the threat to officers or others
  - a. At no time did Mr. Rodriguez make any threatening statements to you, other officers, or members of the public prior to your use of force.
  - b. At no time did Mr. Rodriguez make any threatening movements towards you, other officers, or members of the public prior to your use of force.
  - c. Your initial reason for your detaining Mr. Rodriguez was solely based on an alleged traffic violation while riding a bicycle.
    - i. Your reported version of failure to comply and escape on the part of Mr. Rodriguez is not truthful based on the video/audio evidence.
  - d. Mr. Rodriguez was lawfully in a possession of a knife which was contained in a sheath on his belt.
  - e. Mr. Rodriguez was straddling a bicycle, holding an item in each hand with arms raised away from his waist. While Mr. Rodriguez had access to a knife at no time prior to your use of force did he make any movement that would suggest to you he was going to use the knife against you, or anyone else. Again, your assessment of escape, which would lend itself to the severity of the threat posed against you and other officers is not accurate.
  - f. Mr. Rodriguez did make several statements to you prior to your use of force. However, those statements centered on his wanting to talk to your supervisor, declaring his knife is in a sheath, and the fact he stated he could not hear you

due to his music. Mr. Rodriguez demeanor was calm and would not be considered hostile or combative to a reasonable officer.

- g. Mr. Rodriguez failed to follow your commands.
  - h. The allegation of escape is based on the fact Mr. Rodriguez failed to stop within 3 seconds<sup>2</sup> and continued to ride his bicycle on the sidewalk at a leisurely pace for less than a minute before stopping. At no time did Mr. Rodriguez accelerate nor did he vary from his direction of travel. Again, the escape is based on the fact Mr. Rodriguez took less than one minute to stop his bicycle and no other factors.
  - i. Officer Sitts arrived on scene at the same time Mr. Rodriguez stopped his bicycle. EPD officers arrived shortly thereafter.
  - j. You state, "I did not know why Rodriguez had chosen to flee and refuse my orders but I feared that based on his behavior he posed a significant threat to myself and the community."
2. The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
- a. Your perceptions of the Mr. Rodriguez's conduct when you confronted him is as follows (based on your police report and interview):
    - i. Mr. Rodriguez committed an alleged traffic violation while riding a bicycle.
    - ii. Mr. Rodriguez failed to stop in what you considered a timely fashion.
    - iii. Mr. Rodriguez displayed "combat skills."
    - iv. You state, "The significant threat of a - a subject fleeing from me who was armed with a deadly weapon. I think that captures it. There's a significant threat to myself, other officers, the community. The subject has demonstrated that they will not comply with law-enforcement orders and they are armed with a dangerous or deadly weapon, there's a significant threat to myself, other officers and the community."
    - v. Mr. Rodriguez failed to follow your direction as it relates to his detention i.e. getting on the ground.
  - b. You state in your police report, "Rodriguez's past behavior and continued non-compliance created a significant threat to my safety and increased the risk of going hands on with Rodriguez as in a fight he could easily access his knife. I drew my firearm and pointed it at Rodriguez."
    - i. Factually, Mr. Rodriguez's past behavior included your allegation of a traffic violation and it took him less than a minute to stop after you

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<sup>2</sup> Per Officer Phillips own statement it is his experience that most members of the community when directed by the police to stop do so within three seconds.

activated your overhead lights. Again, the allegation of escape is based on the amount of time it took Mr. Rodriguez to stop versus some specific action as altering his direction of travel, speeding up, and dropping the bike and running, all of which did not occur.

3. Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
  - a. Your backup officer arrived on scene prior to your use of force.
  - b. Responding EPD officers were on scene while you were taking Mr. Rodriguez into custody.
  - c. There were no identified officer/subject factors present during this incident
4. The effects of drugs or alcohol.
  - a. Unknown
  - b. Mr. Rodriguez operated his bicycle in a manner that did not suggest he was impaired.
  - c. Mr. Rodriguez did not display slurred speech nor was he unsteady on his feet.
5. Subject's mental state or capacity.
  - a. Unknown
6. Proximity of weapons or dangerous improvised devices.
  - a. Mr. Rodriguez possessed a knife in a sheath in plain view.
    - i. Mr. Rodriguez was holding an item in each hand and his hands were raised above and away from the knife as he straddled his bicycle.
7. The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
  - a. You state Mr. Rodriguez resisted your attempts to be restrained once you had him pinned to the ground.
  - b. You state Mr. Rodriguez attempted to reach for his knife once you tackled him
    - i. Factually, per the video and audio evidence, once tackled you were able to restrain Mr. Rodriguez with the assistance of Officer Sitts.
    - ii. Mr. Rodriguez does not attempt to reach for his knife.
    - iii. Mr. Rodriguez did not pull away.
    - iv. You never alert your cover officers that Mr. Rodriguez is trying to get his knife which would be consistent with good officer safety tactics as well as corroborate your conclusion that Mr. Rodriguez was actually trying to get to his knife.
8. The availability of other options and their possible effectiveness.
  - a. You made no attempt to resolve this incident through any sort of de-escalation techniques consistent with your training and department policy.
9. Seriousness of the suspected offense or reason for contact with the individual.

- a. The seriousness of the initial reason for your stop, if true, is a traffic violation committed by a person riding a bicycle.
  - b. The allegation of escape is exceptionally serious, but must be viewed in context as it relates to the facts of this case, not the manner in which they were reported.
10. Training and experience of the officer.
- a. You have received a wealth of training as evidenced by your training profile, and is supported by your acknowledging department policy and daily training bulletins.
  - b. You have been a law enforcement officer for 4 years and 3 months at the time the incident occurred. You have attended 1688.75 hours of training as documented by Oregon Department of Public Safety Standards and Training, which includes training such as Crisis Intervention Training, Defensive Tactics, and Decision-making.
11. Potential for injury to officers, suspects and others.
- a. A person with a knife poses a greater potential for injury as compared to a person without a knife. Mr. Rodriguez lawfully possessed a knife.
  - b. The seriousness of the initial reason for your stop if true is a traffic violation committed by a person riding a bicycle.
  - c. The allegation of escape is exceptionally serious but must be viewed in context as it relates to the true facts of this case, and not the manner in which they were reported. Your conclusion in this area is not reasonable.
12. Whether the person appears to be resisting, attempting to evade arrest by flight or is attacking the officer.
- a. The allegation of escape is exceptionally serious but must be viewed in context as it relates to the facts of this case and not the manner in which they were reported. Your conclusion in this area is not reasonable.
    - i. At no time did Mr. Rodriguez attack you nor did his behavior suggest he was going to attack you.
    - ii. Mr. Rodriguez does not comply with your order to get on the ground and instead raises his hands in the air both of which are holding non-lethal items, makes continued requests to speak to your sergeant, and states his knife is in a sheath all while straddling a bicycle.
13. The risk and reasonably foreseeable consequences of escape.
- a. Eugene Municipal Code 4.915 Escape From Custody states:
    - i. A person commits the crime of escape if the person escapes from custody.



- ii. "Custody" means the imposition of actual or constructive restraint by a peace officer pursuant to an arrest or court order, but does not include detention in a correctional facility, juvenile facility or a state hospital.
    - iii. "Escape" means the unlawful departure, including failure to return to custody after temporary leave granted for a specific purpose or limited period, of a person from custody or a correctional facility but does not include failure to comply with provisions of a conditional release in ORS 135.245.
    - iv. It is a defense to a prosecution under this section that the person escaping or attempting to escape was in custody pursuant to an illegal arrest.
  - b. Your complaint of escape per your own police report is based on the following:

"I sounded my audible siren and Rodriguez physically reacted to my siren and looked at me as though it was clear he understood I was pursuing him. Rodriguez then continued riding away. At this point I had been attempting to stop Rodriguez for over fifteen seconds far longer than most subjects require to stop. Most traffic, pedestrian, and bicycle stops result in compliance and stopping in less than three seconds in my experience."

    - 1. The facts are:
      - a. Mr. Rodriguez stops in less than one minute and his pace at this time is best described as leisurely.
      - b. Mr. Rodriguez does not accelerate prior to stopping.
      - c. Mr. Rodriguez does not change his direction of travel.
      - d. Mr. Rodriguez does not jump off his bike and run from you
      - e. Mr. Rodriguez when stopped declares he could not hear you based on his music.
    - c. It is unreasonable to suggest that the consequences of Mr. Rodriguez escaping from you posed any threat to the community. At best, he does not comply with your order to get on the ground and instead raises his hands in the air both of which are holding non-lethal items, makes continued requests to speak to your sergeant, and states his knife is in a sheath all while straddling a bicycle.
14. The apparent need for immediate control of the subject or a prompt resolution of the situation.
- a. You based your need for immediate control, per your police report, on the following:
    - i. "Based on the totality of the circumstances including Rodriguez's refusal to stop, refusal to comply with lawful orders, the fact that Rodriguez was

under arrest for Interfering with a Police Officer, Escape from Custody, was armed with a deadly weapon, and only two officers were on scene, I felt it would be safest to order Rodriguez to the ground to eliminate the significant threat posed by Rodriguez fleeing or attempting to use his weapon.”

- ii. “Rodriguez’s past behavior and continued non-compliance created a significant threat to my safety and increased the risk of going hands on with Rodriguez as in a fight he could easily access his knife.”
- iii. Based on the totality of the circumstances including Rodriguez’s refusal to stop, refusal to comply with lawful orders, the fact that Rodriguez was under arrest for Interfering with a Police Officer, Escape from Custody, was armed with a deadly weapon, and only two officers were on scene, I felt it would be safest to order Rodriguez to the ground to eliminate the significant threat posed by Rodriguez fleeing or attempting to use his weapon.

- b. Mr. Rodriguez did in fact refuse your order to get on the ground. His other behavior included the fact that when he stopped for you he raised his hands in the air both of which were holding non-lethal items, made continued requests to speak to your sergeant, and stated his knife is in a sheath all while straddling a bicycle.

15. Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.

- a. Mr. Rodriguez’s behavior did not pose an imminent threat. When stopped after committing an alleged traffic violation while riding a bicycle, he stood with his hands raised in the air both of which were holding non-lethal items, made continued requests to speak to your sergeant, and stated his knife is in a sheath all while straddling a bicycle. Again, this would not suggest to a reasonable officer that Mr. Rodriguez posed an imminent threat.

16. Prior contacts with the subject or awareness of any propensity for violence.

- a. None.

17. Any other exigent circumstances.

- a. None

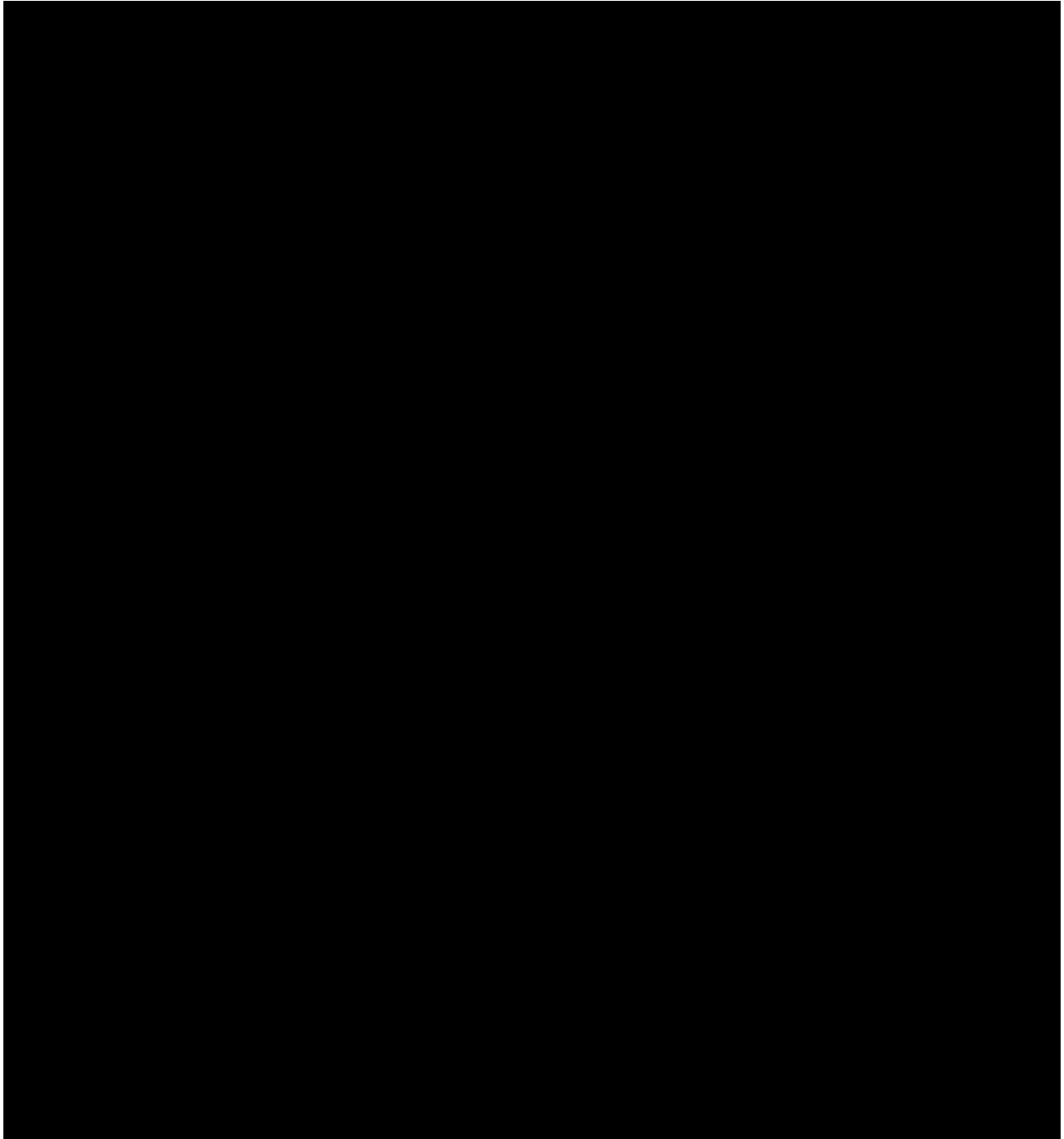
I did review the Use of Force Report Form and noted that at the time of the supervisor review Sergeant Davis found your use of force to be within policy. However, you checked areas on the form that are not supported by the facts in this case, including:

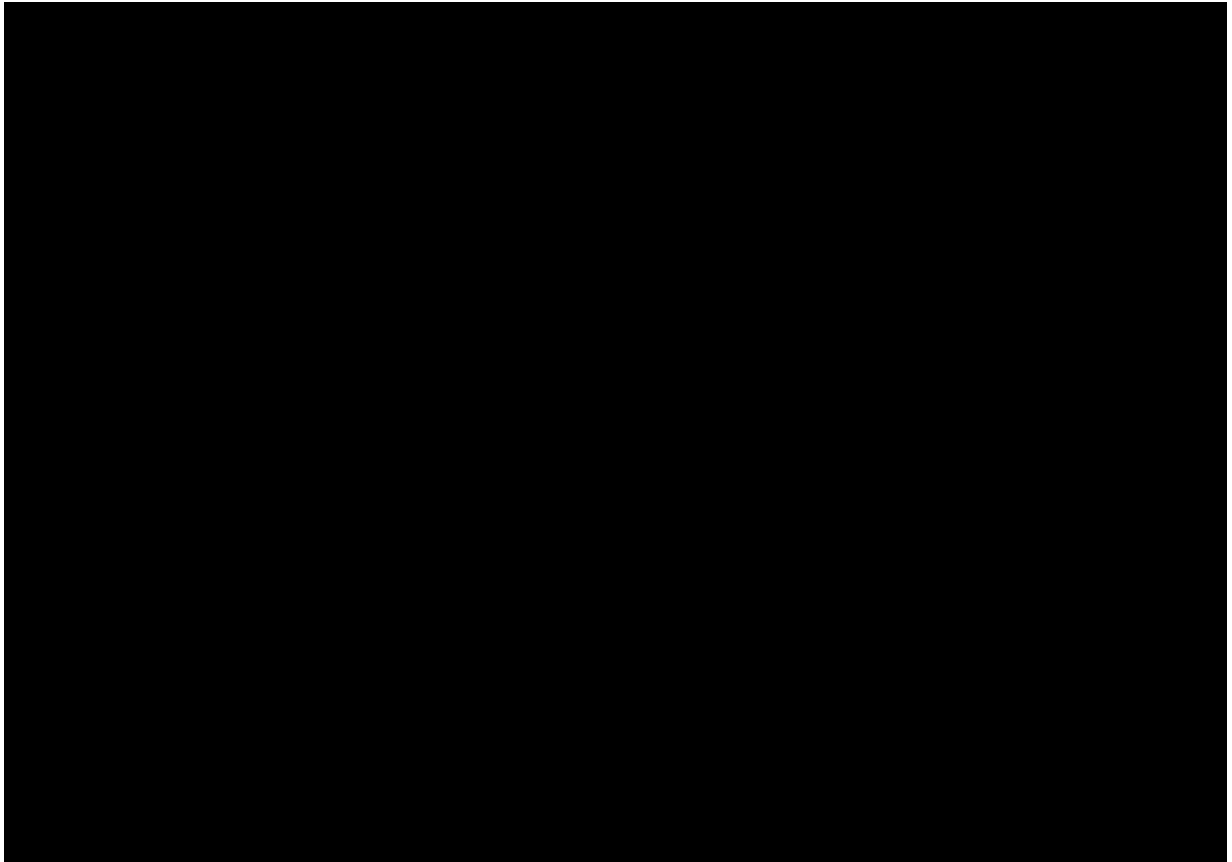
- 1. Threat visibly agitated
- 2. Threat displaying combat skills

3. Threat visibly hostile

Based on the personnel investigation, the findings of Captain Wade, the information contained in the review made by the consultant, Rick Wall, who is a use of force subject matter expert, I find this allegation to be SUSTAINED.

Allegation #5





[REDACTED]  
[REDACTED]  
[REDACTED]

I concur with the finding of Captain  
Wade that this allegation is NOT SUSTAINED.

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*Matthew E. Carmichael*

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# Rick Wall & Associates

Consulting and Investigations



*Helping You Put The Pieces In Place*

August 9, 2019

**TO:** Chief Matthew Carmichael  
University of Oregon Police Department

**FROM:** Rick Wall  
Rick Wall and Associates

**SUBJECT: REVIEW OF USE OF FORCE INCIDENT (Case # 18-02254)**

## Scope of Review

The purpose of this review is to examine the Use of Force incident (UOF) that occurred on October 28, 2018 at approximately 2244 hours (Case # 18-02254), involving Officer Troy Phillips #319 during the detention and arrest of Eliborio Rodriguez. This review is based on an application of University of Oregon Police Department (UOPD) Policy Manual Section 300 regarding appropriate use of force, and is not intended to be a legal opinion or legal advice.

This review consisted of a review of:

- Incident Investigation Report (18-02254)
- Use of Force Report (18-02254)
- Oregon Revised Statutes (ORS):
  - 161.085 – Definitions with Respect to Culpability
  - 811.375 – Unlawful or Unsignaled Change of Lane
  - 801.385 – Pedestrian Defined
  - 801.155 – Bicycle Lane Defined
  - 814.440 – Failure to Signal Turn
  - 814.420 – Failure to Use Bicycle Lane or Path
- University of Oregon Police Department Policies:
  - Policy 300 – Use of Force
  - Policy 446 – Mobile Audio Video
  - Policy 612 – Brady Disclosure Material
  - Policy 1012 – Conduct
- Oregon Criminal Statutes:
  - 4.907 – Interfering with a Police Officer
  - 4.910 – Resisting Arrest
  - 4.915 – Escape From Custody



- Transcription of Interviews:
  - Officer Troy Phillips
  - Judge Richard Fredrick's
  - Assistant City Prosecutor Doug Worley
  - Sandee Morrison
  - Renelle Courtney
- Body Worn Camera Video (BWC)(Phillips)
- Body Worn Camera Video (BWC)(Sitts)
- Mobile Audio Video (MAV) (Phillips Vehicle)
- Video Log for MAV (Phillips Vehicle)
- Internal Affairs Investigation (PS2019-021)

### Overview of Incident

On October 28, 2018 at approximately 2244 hours, Officer Troy Phillips was travelling Northbound on Agate Street from East 15<sup>th</sup> Avenue in a marked University of Oregon Police vehicle when, according to his report and testimony, he observed subject Eliborio Rodriguez, who was riding a bicycle in the bike lane, commit a traffic infraction when he made a lane change in front of him forcing Phillips to stop to avoid a collision in violation of ORS. Rodriguez then crossed the street at the crosswalk, failing to yield to oncoming traffic (Phillips vehicle). Phillips opined that a traffic violation had occurred and negotiated a U-turn to catch up to Rodriguez, who was now travelling southbound on the sidewalk while riding the bicycle.

Phillips activated his emergency lights to stop Rodriguez who continued to ride his bicycle southbound on the sidewalk. Phillips activated his siren for approximately 1 second to get the attention of Rodriguez, who continued to ride his bicycle. Phillips then broadcast on the PA system "Police. Stop" which Phillips opined was being ignored by Rodriguez. According to the report and interview of Phillips, he opined that Rodriguez was intentionally ignoring his commands and was in violation of 4.907 *Interfering with a Police Officer* then utilized the PA system and advised Rodriguez that he was under arrest for interfering with a police officer. Rodriguez continued to ride his bicycle at, what Phillips described as a "slow roll" at which time Phillips opined that Rodriguez was in violation of 4.915 *Escape from Custody* and pulled his vehicle onto the sidewalk behind Rodriguez. At the same time, Officer Sitts had responded to Phillips' request for an additional unit, and stopped his marked police vehicle northbound on the southbound side of the street at the curb, in the roadway. At this time, Rodriguez stopped.

At some point during this event, Phillips observed that Rodriguez was wearing what appeared to be a fixed blade knife in a sheath on his belt on the left hip.<sup>1</sup> Phillips stated that he was concerned for his safety and ordered Rodriguez to the ground. Rodriguez requested a supervisor to respond. Phillips repeatedly directed Rodriguez to get on the ground, each time; Rodriguez requested to speak to a supervisor. Phillips repeatedly stated that because Rodriguez was armed

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<sup>1</sup> Oregon law permits knives to be carried openly in public as it is not a criminal act.



with a knife and was refusing his commands, Rodriguez needed to get on the ground. Each time, Rodriguez replied that the knife was in a sheath and reiterated his request for a supervisor. During this period, Rodriguez was standing on the sidewalk, straddling the bicycle, with both hands raised shoulder height holding a bag in his left hand, and a small speaker in his right. After approximately 40 seconds, Phillips charged and tackled Rodriguez. Sitts and two other responding officers assisted in taking Rodriguez into custody. Phillips briefed Sgt. Davis at the scene, then proceeded to transport Rodriguez to the jail for booking at which time he cited him for the traffic violations before returning to the station to complete his reports of the incident.

While completing the reports Phillips accessed the MAV four times. On January 24, 2019, Phillips appeared in court and testified to the incident and the report that he had prepared. Rodriguez was subsequently acquitted of the charges and filed a tort claim for damages which resulted in an investigation of the incident and subsequently this review.

### **Review of the Incident**

The review of this incident is broken down into several parts. These are:

- Probable Cause for Detention/Arrest
- Pre-Use of Force Tactics and Communication
- Use of Force
- Documentation of the Use of Force Incident
- Determination of "Reasonableness" of the Use of Force

### **Probable Cause for Detention/Arrest**

According to Phillips' report, he observed Rodriguez riding his bicycle in the bike lane and "as he neared the crosswalk, he swerved jaggedly as though he was going to cross into my lane" forcing Phillips to "brake heavily" at which time Rodriguez "swerved back." Rodriguez then "cut in front" of Phillips "into the vehicle lane of travel while dismounting his bicycle" committing a traffic offense.

**Issue #1** – A review of the MAV shows that this did not happen as described by Phillips. Rodriguez is riding in the bike lane carrying a bag in his left hand and an indiscernible item in his right (later determined to be a speaker). As he approached the crosswalk he came to a complete stop and straddled the bike with both feet on the ground. At the same time, Phillips' police vehicle also came to a complete stop in the lane of traffic. Rodriguez then dismounted the bicycle and looked back toward the stopped vehicle before entering the crosswalk, walking the bicycle with both feet on the ground and to the left of the bicycle. Phillips remained stopped and allowed the pedestrian Rodriguez to cross the street. The MAV does not indicate that Phillips had to "brake heavily" and that he came to a slow rolling stop as he approached the crosswalk.

According to his report, Phillips negotiated a u-turn and proceeded southbound on Agate from the traffic lane, following Rodriguez who was riding his bicycle on the sidewalk. Phillips' report



stated that "When I activated my overhead red and blue emergency lights, I was angled towards Rodriguez and no one else was." When Rodriguez failed to stop, Phillips tapped the siren and got on the PA to advise "Stop. Police."

When Rodriguez failed to stop, Phillips opined that Rodriguez was trying to flee and was in violation of 4.907 (Interfering with a Police Officer), a misdemeanor. Phillips again got on the PA and announced "Police department, you're under arrest for interfering with a police officer. If you continue to run, you will be committing the crime of Escape." According to Phillips' report, "Rodriguez then motioned to me with his right hand as if to acknowledge my presence and dismiss my attempt to stop him."

Note: Since Rodriguez was holding a speaker in his right hand at the time, he may have been indicating that he was listening to music and did not recognize the fact that Phillips was trying to stop him. The fact that Rodriguez was holding the speaker in his hand was omitted from the report.

At that point, Phillips reported that he believed that Rodriguez had committed a traffic violation, interfered with a police officer, and may be committing the crime of escape from custody and that he had probable cause to affect an arrest/detention of Rodriguez.

Note: It should be noted that the courts have held that even when an officer commits an error in good faith which is later determined to be inaccurate, that the detention may still be lawful. It is also noted that the initial traffic violations did not occur or if a violation occurred, it did not occur as described by Phillips in his report. The fact that the initial reason stated for the contact and detention was reasonably known to Phillips to be untrue, the cause for the initial detention comes into question. However, this does not negate the other potential traffic violations that Phillips claims to have witnessed Rodriguez commit, nor would it necessarily negate his probable cause to detain Rodriguez, however certainly brings Phillips' veracity into question.

#### **Pre-Use of Force Tactics and Communications.**

Once Rodriguez was stopped, Phillips made contact with him and Rodriguez made the spontaneous statement that he didn't know Phillips was trying to stop him because he was listening to his music, and held his speaker in his right hand to demonstrate what he was listening to. Based on his written report and subsequent interview, Phillips felt that Rodriguez posed a significant risk to the community and to officers, which ultimately guided Phillips' decision to use force to subdue Rodriguez. At the time that Phillips used force, wherein he tackled Rodriguez, Rodriguez was standing on the sidewalk, straddling his bicycle, and holding both hands at shoulder height with a bag in one hand and a speaker in the other. Sirens of responding officers can be heard in the background but Phillips made the decision to tackle Rodriguez approximately 40 seconds into the stop. During this time there was no communication regarding the plan to use force or what tactics to use other than the one comment to Sitts of "Go lethal!"



when Phillips transitioned to the taser. The lack of a plan or any apparent pre-planning, communication, and/or coordination is troubling.

**Issue #2** - In this case, Sitts served as the covering officer while Phillips served as the contact officer. Sitts stated that he heard Phillips repeatedly state to Rodriguez "You are armed with a knife," but didn't see it. Making the comment to "go lethal" could have had serious consequences as it could be interpreted as a direction to use deadly force against Rodriguez. Additionally, when Phillips made the decision to tackle Rodriguez, Sitts did not know that there was a tactical plan and was not prepared to take action, which could have had serious consequences.

In *Hayes v. San Diego County*, the 9<sup>th</sup> Circuit found that in determining the "law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations in determining whether the use of deadly force gives rise to negligent liability. Such liability can arise, for example, if the tactical conduct and decisions show, *as part of the totality of circumstances*, that the use of deadly force was unreasonable." While this incident did not result in deadly force being used, the concept that the tactical conduct and decisions preceding any use of force meet the same standard as those decisions could ultimately result in deadly force being used. The decision to tackle an armed suspect after telling his cover officer to "Go lethal!" could have resulted in an application of deadly force by Sitts or one of the other responding officers. Phillips' decision to act without developing a tactical plan while there was time to do so in this situation should be viewed as part of the totality of circumstances in this situation in determining the appropriateness of the Use of Force.

### **Use of Force**

The review of this incident is based on UOPD Policy 300 "*Use of Force*." However, it should be noted that this policy is based on the Supreme Court decision in *Graham v. Connor* which established the standard that the use of force must meet the standard of being "objectively reasonable" and that the "reasonableness" of a particular use of force must be judged from the perspective of a *reasonable* officer on the scene, rather than with the 20/20 vision of hindsight.<sup>2</sup> Furthermore, the test of reasonableness is not capable of precise definition or mechanical application. Its proper application requires careful attention to the facts and circumstances of each particular case, including:

- The severity of the crime at issue,
- Whether the suspect poses an immediate threat to the safety of the officers or others, and
- Whether he is actively resisting arrest or attempting to evade arrest by flight.

In this case, Phillips made the decision to use force to take Rodriguez into custody by tackling him off the bicycle that he was straddling while refusing to get on the ground and instead asking

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<sup>2</sup> In this review, I will refer to the standard as established by *Graham*, as it is the basis for Policy 300 and the standard being objectively reasonable as established by the United States Supreme Court.



for a supervisor to respond to the scene. If we look at the standards established by *Graham*, the first question is the severity of the crime. In this case, the stated reason for the initial stop was a traffic violation. However, upon review of the MAV, it is clear that the stated traffic violation did not occur and that no *reasonable* officer would have concluded that this was a serious violation. Additionally, the fact that Rodriguez lawfully possessed a knife which he was carrying openly does not in itself escalate the incident to allow a use of force. The decision to escalate the initial offense to *Interfering* and then to *Escape* was not based on a *reasonable* conclusion by Phillips. The fact that his report describes Rodriguez' riding the bicycle away as a "slow roll" and that Rodriguez "did not seem to be fleeing so much as refusing to comply" indicates that Phillips constructed this interpretation to fit his narrative that Rodriguez was *Interfering*.

Next we examine *whether the suspect poses an immediate threat to the safety of the officers or others*. Phillips' conclusion that Rodriguez posed an immediate threat to the safety of officers or others is not *reasonable* based on the facts known to or perceived by a reasonable officer at the scene. In his interview, Phillips poses a myriad of hypotheticals as to how Rodriguez, who lawfully possessed a knife in a sheath in plain view and had made no threatening gestures or actions, "could have" fled into the community and injured or killed people is not a *reasonable* conclusion. This interpretation would be a "green light" to use force on any law abiding person who merely was in lawful possession of a knife in a sheath, while in a public area. He stated that Rodriguez could have had other weapons, while there was no indication that this was true and Phillips had not seen any indication that other weapons existed<sup>3</sup>. The framework by which the determination of the immediacy of the threat must be based on what is happening and not what could possibly happen, otherwise the decision to use force would go from the perceptions of a reasonable officer to "What ifs?" that would only be limited by the imagination of the involved officer.

Lastly, we look at *whether Rodriguez is actively resisting arrest or attempting to evade arrest by flight*. In this case, Rodriguez is not cooperating with Phillips' orders to get on the ground; however the concept of "active resistance" generally requires an act of violence or the threat of violence, neither of which were present in this incident. Rodriguez was standing still, straddling a bicycle, with his hands raised and holding items in each hand, while repeatedly asking for a supervisor while he refused to get on the ground in the rain would not be considered to be actively resisting by a *reasonable* officer.

Phillips' decision to use force and tackle Rodriguez came approximately 40 seconds after the stop. Other than threats to use force or to taser Rodriguez, Phillips made no real effort to deescalate this incident or to talk with Rodriguez. In his interview, Phillips stated that "his [Rodriguez] non-compliance is not gonna be solved, did not seem to be resolved by talking with

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<sup>3</sup> In my experience, I have rarely encountered a subject who was armed with a knife in "open carry" who also possessed other weapons. While I am not discounting the "possibility" that this could happen, I find Phillips' perception to be unsubstantiated. Additionally, even if Rodriguez did possess an additional weapon, the mere lawful possession of a weapon in your pocket or clothing, as Phillips speculated, does not escalate the situation to an imminent threat to the safety of the officer or the public.



him, ‘cause I talked with him extensively. He did not seem like he was going to comply”<sup>4</sup> The reality was that as captured on Phillips’ BWC, he was not talking with Rodriguez but shouting at him. Each time Phillips ordered Rodriguez to get on the ground, Rodriguez replied with either a request for a supervisor or to advise that the knife was in a sheath, or some other comment to explain why he was not going to get on the ground, each of which would have allowed a reasonable officer an opportunity to engage Rodriguez in conversation to try to de-escalate the situation. Phillips seemed to ignore these opportunities.

It should also be noted that in his interview, Phillips stated that Rodriguez was not behaving normally. He stated: “His behavior, based on what I’ve read in the report and what I recall of the incident, does not seem to be that of a normal person.” In the Department’s Use of Force Policy, Section 300.7 states:

“It is important for officers to bear in mind that there are many reasons a suspect may be resisting arrest or may be unresponsive. The person in question may not be capable of understanding the gravity of the situation. The person’s reasoning ability may be dramatically affected by a number of factors, including but not limited to a medical condition, mental impairment, developmental disability, physical limitation, language, drug addiction, or emotional crisis. *Therefore it is possible that a person’s mental state may prevent a proper understanding of an officer’s commands or actions. In such circumstances, the person’s lack of compliance may not be a deliberate attempt to resist the officer. An officer’s awareness of these possibilities, when time and circumstances reasonably permit, should then be balanced against the facts of the incident facing the officer when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.*”[Emphasis added]

While Phillips acknowledges that Rodriguez’ response to his attempt to stop him and failure to obey commands was “not normal” it doesn’t appear that Phillips considered that Rodriguez’ mental state may have prevented him from understanding that he was being detained and Phillips made no attempt to de-escalate the situation even though both time and circumstances reasonably permitted him to do so, but instead chose to escalate the situation by tackling Rodriguez.

According to the BWC video, sirens of other responding officers can be heard approaching so that Phillips was aware that other officers were enroute. The BWC also shows that within 20 seconds of Phillips tackling Rodriguez, other officers were helping to take Rodriguez, who had been knocked to the ground with both Sitts and Phillips on top of him, into custody. The availability of other officers at the scene would have provided an opportunity to safely engage in conversation with Rodriguez while at the same time, allowing officers on the scene to develop a tactical plan to take Rodriguez into custody, should other de-escalation techniques fail.<sup>5</sup>

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<sup>4</sup> Phillips Transcript, Page 47, lines 2107-2110.

<sup>5</sup> It should be noted that the presence of additional officers can also serve to de-escalate a situation with a subject engaged in passive resistance.



According to Phillips, the fact that Rodriguez possessed a knife in a sheath was an indication that Rodriguez “displayed combat skills.” While the mere possession of a knife in a sheath would not cause a reasonable officer to draw that conclusion, if Phillips actually believed that to be true, the decision to tackle Rodriguez without having a plan or advising Sitts was reckless and could have further escalated the situation. Additionally, once Rodriguez was taken to the ground, Rodriguez can be heard on the audio portion of the BWC advising that he was not resisting and at various points, his hands can be seen being held down in front of him by the officers. Yet for some reason, Phillips made the decision to unholster the sheathed knife and take it out to throw it away from the possible reach of Rodriguez. This decision was exceptionally reckless as by introducing a fixed-blade knife into the struggle, Phillips could have injured Rodriguez, Sitts, or any other officer at the scene. In fact it should be noted that during the take-down, Phillips accidentally struck Sitts, possibly as he threw the knife away, endangering his fellow officer. This tactic was inappropriate and reckless.

### **Documentation of the Use of Force Incident**

A review of the reports completed by Phillips revealed several areas of concern. These include:

- The stated reason for the initial stop. Phillips reviewed his MAV on four occasions while he completed the report. In the video, it is clear that Rodriguez did not commit the traffic violation that Phillips articulated in the Incident/Investigation Report. However, in spite of clearly knowing that the initial cause that he articulated for the stop did not occur as he described, Phillips made no effort to correct the report or to notify his supervisor of the discrepancy.
- In his report, Phillips failed to reference the existence of the MAV, as required in Department Policy 446.3(h). Additionally, Policy 446.6 Documenting MAV Use states:

“If any incident is recorded with either the video or audio system, the existence of that recording shall be documented in the officer’s report. If a citation is issued, the officer shall make a notation on the back of the records copy of the citation indicating that the incident was recorded.”

In his interview, Phillips advised that he did not include it in the report because the report indicated that he had activated the emergency lights, which in turn, activate the MAV and that his supervisors should have known that the MAV recording existed. While that may be accurate, police officers are trained to understand that their report is an accurate representation of the events that occurred that is written not just for department supervisors, but for the courts, prosecutors, defense attorneys, and jurors. To assume that these others would know the intricacies of how the MAV works and that a video exists is improper. The fact that it can be argued that this video contained exculpatory evidence and was not shared with the defense, or even the prosecution for that matter, raises credibility issues with the report as well as Phillips’ explanation of the events.



Note: In his interview, Assistant City Prosecutor Doug Worley acknowledged that Phillips' testimony and report did not match the MAV and that had he possessed the MAV prior to the case he most likely would not have filed charges against Rodriguez.

- In the report, Phillips stated that Sitts "with his red and blue lights active and cut Rodriguez off from the south..." This is also inaccurate as it gives the impression that Rodriguez would have continued to ride his bicycle away had Sitts not cut off his avenue of escape. The reality is that as Rodriguez rode his bicycle southbound on the east sidewalk, Sitts drove his vehicle northbound in the southbound lane of traffic and stopped at the curb in the lane of traffic, approximately 4-6 feet west of the sidewalk and did not impede Rodriguez' route of travel. This too was captured on Phillips' MAV.
- On Page 6 of the Incident/Investigation Report, Phillips identifies the "conversation" he had with Rodriguez. In the report, Phillips goes to great length to show all of the times he ordered Rodriguez to comply, in an attempt to demonstrate the "threat" that Rodriguez' resistance presented. However, when listing Rodriguez' responses, if at all, appear one sided and not a true representation of what occurred. For example, in his initial response to Phillips' advisement that he was under arrest, Rodriguez asked "Sir, why is that?" and that Rodriguez also replied "I didn't interfere with anybody." Yet there is no mention of the numerous times that Rodriguez requested to speak with a supervisor or to advise Phillips that the knife was in a sheath. This seems to create a one-sided narrative to bolster the decision by Phillips to justify the use of force and not to accurately capture the event calling Phillips' objectivity into question.
- In the Use of Force Report, under Reason for Initial Contact, Phillips checked the boxes for Suspicious Actions, Menacing Behavior, Criminal Investigation, PC Arrest, and Other Traffic Violation. However, in his written report, the only reason given for the *Initial Contact* was the Other Traffic Violation. There is nothing in the narrative of the report so support that Rodriguez was engaged in Suspicious Actions or Menacing Behavior. The issues of Criminal Investigation and PC Arrest, if accurate, were subsequent to the initial contact. The fact that these issues, especially the claim that the stop was initiated because of "menacing behavior" is important because it would help to establish the "imminence" of threatening behavior as defined in *Graham*. The fact that there is nothing in the narrative of the report that indicates that Rodriguez did anything menacing to justify the initial contact and there is nothing on the MAV that supports this claim again brings Phillips' credibility and veracity into question.

### **Determination of "Reasonableness" of the Use of Force**

When reviewing the Use of Force, it must be viewed through the lens of *Graham*, which is to say, based on the *totality of the facts and circumstances*, could such an officer believe that the force was reasonable? The question is whether the "totality of the circumstances" justifies a particular use of force applied in the situation. The most important factor in this incident is



whether the Rodriguez posed an immediate threat to the safety of the officer or others. It is my opinion that he did not.

The facts of this case that were known to Phillips at the time that he made the decision to use force to take Rodriguez into custody should have shaped his decision. These facts include:

- The stated cause for the initial detention did not occur. Rodriguez was riding his bicycle in the bike lane, stopped and dismounted the bicycle, and walked the bicycle from the left side as he used the crosswalk to cross the street. He did not swerve into Phillips' lane of traffic as he indicated in his report.
  - It should be noted that the inaccurate version of this event was also communicated by Phillips' in his initial description of the cause for the stop to Sgt. Davis, stating that Rodriguez had swerved into his lane and Phillips almost hit him with his vehicle. While the report went on to add other possible violations, these were not communicated to the sergeant at the time of the initial contact and were likely concluded after the fact while writing the report to help justify the initial stop.
- As Rodriguez rode his bicycle on the sidewalk, Phillips was driving his police vehicle in the traffic lane, with the emergency lights on in an attempt to stop Rodriguez. As Rodriguez rode the bicycle, he was clearly holding a bag in his left hand and an object, which turned out to be a speaker which Rodriguez was using to listen to music, in his right hand. When Rodriguez failed to stop, Phillips requested additional units to respond with lights and sirens to assist. Rodriguez stopped when Sitts pulled up to the curb and Phillips pulled his police vehicle onto the sidewalk behind him.
  - In his report, Phillips indicated that Rodriguez stopped when Sitts "with his red and blue lights active and cut Rodriguez off from the south". This was inaccurate as Sitts never cut off Rodriguez' route of travel, but did pull to the curb in the lane of traffic ahead of Rodriguez, who was on the sidewalk and not in the lane of traffic.
- Phillips' assertion that Rodriguez was not acting normally should have at least alerted Phillips to the potential that there may be a mental or medical reason for his refusal to comply, and allow him to adjust his tactics which would have afforded Phillips the opportunity to attempt to de-escalate the situation and resolve it without using force. Instead, Phillips actions and conduct actually escalated the incident into one involving a use of force.
- Once he stopped, Rodriguez stood straddling the bicycle, hands raised and holding the bag in one hand and the speaker in another and advised Phillips that he did not hear him because he was listening to his music. His actions did not form the basis for a reasonable officer to opine that these actions were threatening.



- Rodriguez continued to passively resist Phillips' command to get on the ground while repeatedly asking for a supervisor to respond. Phillips' opinion that Rodriguez, who was refusing to get on the ground and was asking for a supervisor presented a "significant threat" was not reasonable. Similarly, Phillips' opinion that Rodriguez was "displaying combat skills" as he identified in the Use of Force Report was not reasonable and was not reasonably based on any factors that were present at the time.

Based on the totality of the facts that were *reasonably* known to or reasonably perceived by Officer Phillips, it is my opinion that the use of force, albeit a low level, was not objectively reasonable and therefore was not justified in this incident.<sup>6</sup>

These opinions are based on my review of the information that was received from the University of Oregon Police Department in regards to this case. I reserve the right to make changes or modifications to this report should additional information become available.

Respectfully,

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Rick Wall

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<sup>6</sup> In coming to this conclusion it should be noted that Policy 300.3.1 contains additional factors that "should be taken into consideration" when determining the reasonableness of the use of force. These factors were commented on during the Internal Affairs Investigation as well as in Phillips' interview and were considered in rendering my opinion.