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MEMORANDUM

DATE: March 6, 2017

TO: Ramsey County Attorney John Choi

FROM: John Kelly, First Assistant Ramsey County Attorney *JK*
Richard Dusterhoft, Criminal Division Director *RD*
Jill Gerber, Assistant Criminal Division Director *JG*

SUBJECT: In the Matter of the Investigation and Review of the Death of Eugene F. Smith
CA File No. 0374560

I. Summary

Eugene F. Smith, age 29, was shot and killed by Officer Joshua Raichert of the Saint Paul Police Department (“SPPD”) at approximately 2:15 PM on May 26, 2016. Officer Raichert was assigned to the FBI Safe Streets Task Force, a federally funded, FBI-led task force comprised of agents and officers from federal and local law enforcement agencies focused on investigating violent crime and illegal drug activities (the “Task Force”).

The shooting occurred during an encounter between Officer Raichert and Mr. Smith in the first floor, rear bedroom of the two-story house located at 2163 East Minnehaha Ave., Saint Paul (the “Property”). Officer Raichert and numerous other SPPD colleagues were conducting a protective sweep of the house that was preceded by multiple, loudly expressed statements announcing their identities as police officers. When Officer Raichert entered the bedroom occupied by Mr. Smith and his female friend J.M., Mr. Smith fired a shot from a 20-gauge shotgun (Stevens by Savage Arms Model 94) that hit the wall above Officer Raichert’s right shoulder. Officer Raichert fired six shots at Mr. Smith from his A-15 automatic rifle, fatally wounding him.

This Memorandum contains a summary description of the relevant evidence gathered by the Minnesota Bureau of Criminal Apprehension (“BCA”) during its investigation of Mr. Smith’s death. As set forth below, this evidence includes statements given by officers and other witnesses; physical, DNA and ballistics evidence; and audio and video recordings taken from police vehicles. None of the officers at the scene had been issued body worn cameras.

Based on our review of the presented evidence, it is our opinion that the use of deadly force by Officer Raichert in this incident was justified by Minn. Stat. §609.066, subd. 2(1). Accordingly, we recommend that no criminal charges be brought against Officer Raichert related to this incident.

II. May 26, 2016 Shooting and the Subsequent BCA Investigation

A. SPPD contacts with 2163 Minnehaha Ave. E. before May 26, 2016

SPPD officers including those assigned to the Task Force had been made aware by multiple sources that illegal drugs and firearms were present on the Property. The house appeared to be transiently occupied by numerous persons. In May 2016, SPPD received information that M.O. was staying at the Property and that there was a felony warrant for his arrest. On May 17, 2016, a felony arrest warrant for M.O. was executed by SPPD officers at the Property. During the unsuccessful search of the Property for M.O., methamphetamine, a firearm and ammunition were observed in plain view in the house.

B. The Events of May 26, 2016

1. Response to Call for Assistance and Establishing a Perimeter

On May 26th at approximately 1:50 PM, Officer Raichert and fellow SPPD officers and Task Force members, Sgt. A. and Officers B. and C¹., responded to a call for assistance made by SPPD Patrol Officer Trygve Sand who had arrested two individuals exiting the house located on the Property. Numerous other SPPD officers who were not assigned to the Task Force, including a canine officer, also responded to Officer Sand's request for assistance.

One of the men arrested by Officer Sand was M.O., the subject of the May 17th arrest warrant. The other person detained was R.N. Both men were placed in separate police vehicles.

M.O. informed Officer Sand that he had marijuana in his backpack. M.O. also told Officer Sand that there was a pit bull in the house that could pose a problem for officers who entered it. M.O. further told Officer Sand that although he did not think there were any other persons inside the house, if anyone was there, they would most likely be in the first floor, rear bedroom.

Knowing that a fugitive felon, drugs, firearms and many other unidentified persons had been observed at the Property, Officer Sand directed several of the responding officers to establish a perimeter around the Property. The perimeter was active and visible. In addition to numerous uniformed officers located in plain view in the front and rear yards of the house, there were SPPD squad cars parked on both the Property's side driveway and rear parking area. The purpose of establishing the perimeter was to

¹ We have been informed by the BCA that some of the law enforcement officers referenced in this Memorandum are presently assigned as undercover law enforcement officers as provided in Section 13.43, subdivision 5 of the Minnesota Governmental Data Practices Act (the "MGDPA"). Section 13.82, subdivision 17(a) of the MGDPA requires that a law enforcement agency shall withhold public access to private data identifying such undercover officers. Section 13.03, subdivision 4(c) of the MGDPA requires this office to recognize the original classification of this data as private. For these reasons, the officers identified by the BCA to this office as undercover officers will be referenced in this Memorandum as Sergeant A and Officers B, C and D.

secure the house, to preserve evidence and protect the responding officers from anyone else in the house until a search warrant could be procured and executed.

2. Police Conduct a Protective Sweep of House

i. The decision why and how to conduct the sweep.

Officer B. estimated that it would take 2-3 hours to draft and obtain the search warrant. The Property is located on a heavily travelled street in a residential neighborhood where the houses are in close proximity to one another. Because firearms and illegal drugs were recently observed in the house, officers were concerned for the safety of neighbors and officers on the scene during the time it would take to obtain the search warrant. These concerns were shared by Sergeant A. and other officers on the scene.

Sergeant A. decided that it was necessary for officers to enter the house before obtaining the search warrant to conduct a protective sweep of the interior of the house. This sweep was only to determine if there were persons inside the house and not to search for illegal contraband. A pre-entry briefing was held during which Sergeant A. also reminded the entering officers of the need to repeatedly announce their presence.

The initial entry team was comprised of Officers Raichert, B., C. and Sgt. A. of the Task Force and SPPD Officers Sand, Mike Dollerschell and D. The Task Force officers and Officer D. were dressed in plain-clothes but all wore black, armored raid vests prominently marked "POLICE" in 4"-6" white, all-capitalized lettering on both the front and back sides. Officers Sand and Dollerschell wore their regular duty, blue SPPD uniforms.

Because of their SWAT training and experience in entering and clearing buildings, it was decided that Officers Raichert and B. would be the first two entrants into the house. Their entry was made through the rear door located on the north side of the house. Following them into the house in a "stacked" or single -file manner was Sergeant A. and Officers C., D., Dollerschell and Sand.

ii. Police enter and begin to clear the house.

Prior to entering the rear door of the house, Officers Raichert and B. each said that they respectively announced their identities by loudly exclaiming "Saint Paul Police" at least 2-3 times. According to Officer B., he intentionally used a tone of voice when making his announcements that were loud enough to be "heard by neighbors." Each of the officers who entered the house behind Officers Raichert and B. have confirmed having heard these announcements.

Upon entry into the house, Officers Raichert, B., Sand and Dollerschell first cleared the basement where they observed a rifle, several rounds of ammunition and drug paraphernalia in plain view. Officer D. was assigned to guard or "hold" the basement from the top of the basement stairs where he remained until hearing shots fired.

Prior to entry into the kitchen, Officer Raichert stated that he again announced "Saint Paul Police" multiple times. Sergeant A and Officers B., C., Dollerschell and Sand specifically recalled hearing these announcements prior to entry into the kitchen. After the kitchen was cleared, SPPD K-9 Officer Colleen Rooney along with her leashed canine partner Gilly entered the house from the rear door and stationed herself in the kitchen where they both remained until hearing shots fired.

Officers Raichert and B. again said that they announced their presence as police officers at least three times prior to entering the adjacent living room. Officers Raichert and B. were the first officers to enter the living room. Except for a sofa, the living room was largely empty. Officer Raichert cleared the west side of the living room which connected to the front door entryway and a small bathroom. They were soon followed into the living room by Sergeant A., Officers C., Dollerschell and Sand all of whom remained there until hearing shots fired.

As Officer B. cleared the east side of the living room he observed a staircase leading upstairs and a closed wooden door at the base of the staircase. The staircase and door are located in the northerly part of the living room. Officers Raichert and B. said they heard a dog growling at the top of the staircase. Officer C. also reported hearing aggressive "grunting" coming from "a larger dog".

Officer B. was positioned at the base of the staircase immediately next to the closed door. He observed an unleashed pit bull at the top of the stairs growling, barking and looking "not happy." The pit bull ran down the stairs toward Officer B. who fired three shots from his AR-15 automatic, short-barreled rifle, instantly killing the dog.

iii. Raichert encounters Mr. Smith and J.M.

The last room on the first floor to be cleared was behind the closed door next to the base of the staircase. Officer Raichert presumed this room to be the bedroom described by Officer Sand during the pre-entry briefing. It was decided that Officer Raichert would enter the bedroom while Officer B. remained at the base of the staircase facing upward so as to secure the second floor. Officers C. and Dollerschell remained just outside of the bedroom. Before entering the room, Officers Raichert and C. announced themselves as police officers. Officer Raichert assumed the door was locked and kicked it open.

When entering the bedroom, Officer Raichert observed a bed immediately to his left that was positioned with the headboard resting against the west wall of the room. He found himself standing in the southeasterly corner of the bedroom immediately next to the corner of the foot of the bed. He described the bedroom as well illuminated by both artificial and natural light.

As he panned the room, Officer Raichert also observed J.M. standing next to the middle of the side of the bed that was parallel to the north side of the bedroom wall. Mr. Smith was standing immediately behind J.M. Officer Raichert said he twice ordered them both to "show your hands" and identified himself as a police officer. He described both Mr. Smith and J.M. as "staggering back and forth" as if exhibiting thoughts of "fight or flight" decision-making. J.M. did not show her hands but instead dropped to the floor next to the bed with her head and hands under it.

Mr. Smith remained standing with his body slightly "bladed" with his right-hand side away from Officer Raichert. Officer Raichert said he again twice gave commands to "show hands." Mr. Smith then "spun back" and Officer Raichert observed him holding and raising an object. Officer Raichert quickly identified the object as resembling "a rifle without a stock." Officer Raichert said Mr. Smith continued to raise the firearm and point it toward him. Officer Raichert disengaged the safety on his A-15 automatic rifle and fired six shots at Mr. Smith. Officer Raichert ceased shooting after Mr. Smith fell backwards and the firearm was no longer in his hands.

Officer Raichert estimated the time between his entry into the bedroom and the exchange of gunfire was "under ten (10) seconds." During this period, Officer Raichert was the only officer in the bedroom. Officers B., C., Dollerschell, Sand and Sergeant A. were positioned outside of the bedroom and did not have a view of Mr. Smith or J.M. during the incident.

iv. Actions taken immediately after the incident.

Officer Raichert quickly moved to the side of the bed nearest where Mr. Smith had fallen and where J.M. had dropped. He ordered J.M. to show her hands and she complied. As Officer Raichert covered Mr. Smith and J.M. he yelled for assistance from the officers outside of the bedroom to call medics for Mr. Smith and to remove J.M. from the room.

Sergeant A. entered the bedroom in response to the gunfire and Officer Raichert's request for assistance. He inquired both as to Officer Raichert's well-being and a very brief description of what had occurred. He then directed Officer Raichert to not "dust off any of your clothes." Unbeknownst to Officer Raichert, he was also

covered by plaster dust and particles caused by a shot fired by Mr. Smith that hit the plaster wall above his right shoulder. Officer Raichert was unaware that a shot had been fired by Mr. Smith.

Following standard SPPD policy for police involved shootings, Sergeant A. then directed Officer Raichert to leave the house and he was led out by Officer B. SPPD Commander Steve Anderson soon arrived and asked Officer B. to continue assisting in clearing the second floor of the house. Commander Anderson then assigned SPPD Officer Craig Campbell to act as Officer Raichert's temporary monitoring officer until the arrival of his scheduled monitoring officer, SPPD Officer Brian Wanschura.

v. *Locations and reactions of other officers in the house during the incident.*

Officer B. was positioned outside of the bedroom door at the base of the staircase. He heard Officer Raichert enter the bedroom and then immediately afterwards a rapid succession of gunfire. Because his hearing was slightly and temporarily impaired from the loud noise caused when he earlier discharged his own A-15 rifle, Officer B. could not distinguish the type of gunfire. He felt "dust or particles" hitting him and said he knew there was "a gun fight going on in the room." He then moved up 5-6 stairs from the base of the staircase to avoid being hit by the gunfire.

Officer C. was positioned just outside of the bedroom door behind Officer Raichert. He said he heard "gunshots" within a few seconds after Officer Raichert entered the bedroom and then felt plaster debris from the shot fired by Mr. Smith fall on his hair. He then heard "5, 6 or 7 shots" he knew to have been fired by Officer Raichert. Because his hearing was slightly and temporarily impaired from the loud noise caused when Officer B. earlier discharged his AR-15 rifle, Officer C. was not able to distinguish the sounds of the gunfire.

Officer C. then entered the bedroom following Officer Raichert. He observed Mr. Smith on the ground with a gunshot wound and a gun resembling a shotgun, laying on the bed with the barrel pointed towards the door. Officer C. removed J.M. from the bedroom.

Officer Dollerschell was positioned outside the bedroom a few feet behind Officer C when Officer Raichert entered the bedroom. He heard a "loud bang" and felt plaster debris "splattering on my face and body." He also then heard more shots being fired. Officer Dollerschell's hearing was also slightly and temporarily impaired from the loud noise caused when Officer B. earlier discharged his AR-15 rifle. He described the first shot as sounding like "a muffled loud blast." He said the next shots sounded "different" from the first shot but was not able to determine the sources of the gunfire.

Sergeant A. was positioned in the living room behind Officers Raichert, B., C., Dollerschell and Sand. He heard an "extremely loud boom" and "saw lots of [plaster] dust" very soon after Officer Raichert entered the bedroom. When Sergeant A. first entered the bedroom, he observed a shotgun laying on the bed and a man with a gunshot wound laying on the nearby floor.

Officer Sand was positioned the furthest back in the living room, behind Sergeant A. He observed Officer Raichert enter the bedroom but could not see any of its occupants. When Officer Raichert entered into the bedroom, Officer Sand said he "instantaneously" heard gunshots. He noticed the hole on the outside wall of the bedroom where the round fired by Mr. Smith exited. He was also able to distinguish some of the gunfire as coming from Officer Raichert's A-15 rifle.

Officer Rooney and her K-9 Partner Gilly were positioned in the threshold area separating the kitchen from the living room. Because of the location of her position, she did not observe Officer Raichert enter the bedroom. She reported hearing "about 4-5 shots with a couple more after that."

Officer D. was positioned in the basement to secure that recently cleared area. Because of the location of his position, he also did not observe Officer Raichert enter the bedroom. He reported that while in the basement he heard two gunshots followed by "maybe four or five others."

vi. *BCA interview of J.M. on the evening of May 26th*

J.M. described Mr. Smith as a methamphetamine dealer and herself as a methamphetamine user who had last used meth on the previous day. She had known Mr. Smith for approximately 18 months and described their relationship as being "good friends, good, good friends... I loved him."

J.M. arrived at the house at approximately 1:00 PM on May 26th. She and Mr. Smith met in the bedroom where the shooting occurred. According to J.M., Mr. Smith preferred to isolate himself and typically did not like to leave the bedroom. Sometime between her arrival at the house and the shooting, J.M. witnessed Mr. Smith sell methamphetamine to an unknown man in the bedroom. She said that when police came to the house looking for M.O. "a couple of weeks ago", Mr. Smith and another occupant of the house flushed all of their drugs down the toilet.

While in the bedroom, J.M. also told Mr. Smith that she wanted to end their relationship because of his continued illegal drug activity. Mr. Smith then told J.M. that he had been contemplating committing suicide because he had no family in Minnesota and that everyone only "uses him for drugs." He also told her that he was considering moving back to Chicago to be near his mother.

During their conversation, J.M. noticed one of Mr. Smith's guns laying on the bed. She described it as a long barreled gun with the stock "sawed off." In addition to this gun, J.M. also previously observed two handguns in the house. J.M. thought

the reason Mr. Smith and another occupant of the house kept firearms was because they were "just paranoid." J.M. found the gun on the bed to be unusual because Mr. Smith knew she did not like guns and for that reason he would not display them when she was present.

J.M. said she and Mr. Smith were talking when Officer Raichert entered the bedroom. She could not recall how he opened the door. She said she was sitting on the bed near the door when she heard a gunshot outside the bedroom. She quickly moved across the bed towards Mr. Smith who then "grabbed me and ... pushed me down like get the hell down like ... you're gonna get shot or whatever [sic]." But when asked during that same interview how she ended on the floor, J.M. said that while she was standing next to Mr. Smith "that was when I was going to the floor regardless cuz I was scared as hell, like all I could think about was my kid. Like please God don't let me got shot at [sic]."

J.M. said that she did not recall what happened prior to her ending up on the floor or what Mr. Smith was doing with his gun. Though she also said that Mr. Smith might have grabbed the gun from the bed. When asked if Mr. Smith fired his gun, J.M. expressed some uncertainty saying "I don't think that he did? It all happened so fast."

J.M. told BCA investigators that prior to Officer Raichert entering the bedroom she did not hear any noise other than "six or seven" gunshots outside of the bedroom. J.M. said she did not know Officer Raichert's identity. She "just remember[ed] them shooting and saying get down, get down and they said after they already shot him, they said (inaudible), they shot him and then again [sic]." She said there was a loud fan on in the bedroom window and that may have masked noise from the officers.

vii. May 30th recorded jail telephone call between J.M. and an unknown female

After the incident, J.M. was arrested and detained in the Ramsey County Law Enforcement Center jail on an outstanding warrant. In a telephone conversation between J.M. and an unknown female recorded on May 30, 2016, J.M. provided details of the encounter between herself, Mr. Smith and Officer Raichert that are in conflict with the statement she provided to the BCA during her May 26th interview.

According to that call, J.M. said that prior to Officer Raichert's entry into the bedroom, she was "sitting up against the wall right by the door when I started hearing them." Mr. Smith then ordered J.M. to "get over here. J.M. then said she "flung over the bed, I don't know how. Don't ask me how, I was high... [Mr. Smith] said get down, get down. I remembered him getting down with me and then getting back up and loudly exclaiming "What the fuck!! And then I looked back over and he was down."

C. Autopsy of Mr. Smith

On May 27, 2016, Assistant Ramsey County Medical Examiner Dr. Victor Froloff performed the autopsy on Mr. Smith's body. Dr. Froloff concluded that Mr. Smith bled to death as a consequence of his having been shot six times.

Toxicology tests conducted on Mr. Smith were positive for methamphetamine and amphetamine.

D. Evidence Gathered by the BCA at the Scene of the Shooting

The BCA processed the shooting scene and recovered a Stevens by Savage Arms Model 94 20-gauge shotgun with its stock removed. The shotgun did not have a serial number. The shotgun is a break action, single shot shotgun. Typically, these firearms need the hammer to be cocked and the trigger pulled for it to fire.

DNA taken from the hammer and knob of the shotgun matches solely to Mr. Smith. DNA taken from the fore-end of the shotgun contains a mixture of two or more individuals with the major male profile matching Mr. Smith. This major profile would not be expected to occur more than once among unrelated individuals in the world population.

DNA taken from a spent 20-gauge shotgun shell found in the shotgun contains a partial source male profile matching Mr. Smith. The probability of selecting an unrelated individual at random from the general population having a DNA profile that would match this partial single source profile is approximately 1 in 1.9 million.

Ballistics testing showed that the spent shell was fired by the shotgun. Four apparent shot pellets were found in the living room area. There is a large hole in the plaster bedroom wall approximately 12"-18" above the bedroom door consistent with the entry point of discharged shotgun pellets. There is also a large hole on the plaster wall and ceiling on the other side of the bedroom wall in the living room area that is consistent with the exit point of those same discharged shotgun pellets.

A DPMS Model A-15 223 Remington/5.56 NATO caliber rifle was collected from Officer Raichert. Six 223 Remington caliber shell casings were found in the entryway to the first floor bedroom and slightly under the bed in that room. Four bullet fragments were found in the bedroom and in Mr. Smith's body. Ballistics testing showed that the shell casings and recovered bullet fragments were fired from Officer Raichert's rifle.

Plaster dust and debris was found on the floor in both the bedroom and the living room below and slightly scattered away from the holes created by the blast from the shotgun. Plaster dust and debris was also found on the hat worn by Officer Raichert when the incident occurred.

E. Audio and Video Taken from Marked Police Vehicles

Officer Dollerschell's marked SUV was parked in the parking area behind the house facing north. Video taken from his in-vehicle camera/audio system show numerous officers standing immediately behind and along the eastern side of the house for a lengthy period of time before entry inside was first made. Video taken from Officer Dollerschell's vehicle camera also shows the initial entry made by officers into the rear door of the house.

Officer Sand's marked squad car was parked in the driveway facing south, less than five feet away from the rear of the house. Video taken from his in-squad/audio camera also shows police activity occurring outside and close by the house.

Gunshots can be heard on audio taken from both Officer Dollerschell's and Sand's in-vehicle camera/audio systems. Three gunshots are heard between 2:14:40 PM and 2:14:42 PM. These shots are consistent with officer statements describing Officer B.'s shooting of the pit bull.

Seven additional gunshots are then heard in rapid succession beginning at 2:14:52 PM. There is a perceptible difference in the sound of the first shot from the next six shots. That is to say, unlike the first shot, the similarity in the sound of the final six shots are consistent with having been fired from one rifle.

Both audio recordings are consistent with some officer statements describing a loud bang or boom followed by what sounded like gunfire from Officer Raichert's A-15 rifle. The ten second gap between the last of the first three gunshots and the first of the last seven gunshots are also consistent with Officer Raichert's estimation that approximately ten seconds elapsed between the time he entered the bedroom and the firing of that first shot.

III. Recommendation

Based on our review of the evidence presented in this investigation, we believe that the use of deadly force by Saint Paul Police Officer Raichert against Mr. Smith was justified pursuant to Minnesota Statutes, §609.066, subd. 2(1). That statute provides that the use of deadly force by a police officer is justified only when necessary to protect the peace officer or another from apparent death or great bodily harm.

There is significant physical, DNA and ballistics evidence described in Section II.D. that Mr. Smith both pointed and fired a shotgun at Officer Raichert shortly after he entered the bedroom. Additionally, the audio evidence described in Section II.E. presents the very likely scenario that Mr. Smith fired his shotgun before Officer Raichert fired his rifle.

As described in Section II.B., the officers who entered the house have given consistent statements that their entry and Officer Raichert's entry into the bedroom were preceded by multiple, loudly expressed announcements identifying themselves as police officers. In contrast, J.M.'s statement that she neither saw or heard the police or knew of their identity is

somewhat belied by both her recorded jail telephone call described in Section II.B.2.v. and the video evidence showing a lengthy and very visibly, active pre-entry police presence outside of the house.

In contrast to her statement to the BCA, J.M. acknowledges for the first time during her recorded jail call, that she was "high" during the incident and that she was near the door when she "started hearing them (emphasis added)." She then reveals that Mr. Smith commanded her to come near him. They both fell to the ground, with Mr. Smith then returning to his feet followed by his screaming an obscenity. Whether her omission of these details was intentional or not, this new narrative creates a significant credibility issue concerning her initial statement that neither she nor Mr. Smith heard or knew of the police presence in or near the house.

After considering both the evidence presented in this case and the objective standard of review recognized by the U.S. Supreme Court in the seminal cases of Tennessee v. Garner, 471 U.S. 1, 11 (1985) and Graham v. Connor, 490 U.S. 386 (1989), we believe that Officer Raichert's use of deadly force against Mr. Smith was objectively reasonable under these circumstances to prevent death or serious bodily harm to himself and others in the house. Accordingly, we recommend that no criminal charges be brought against Officer Raichert related to this incident due to the absence of sufficient, admissible evidence that could be proven beyond a reasonable doubt.

3/8/17

I agree with the recommendation. This shooting incident was a justified use of deadly force by a peace officer. Please communicate this decision to the officers involved, chief Axtell, the family of the deceased (Eugene Smith) and the public.

JJC