

**FINAL REPORT ON CHARGING DECISION In RE: §968.02(3) COMPLAINT  
Court Case No.: 20JD15**

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**Conclusions About Pursuing Criminal Charges Against P.O. Joseph Mensah For  
the Shooting Death Of Jay Anderson Jr.**

**Introduction**

This case involves the tragic shooting death of Jay Anderson Jr. in the early morning hours of June 23, 2016 by then-Wauwatosa police officer Joseph Mensah. State and federal prosecutors declined to prosecute Mensah. In 2020 the Anderson family petitioned the Milwaukee County Circuit Court to hear evidence and decide whether there was probable cause to believe Mensah committed a felony when he shot Anderson.

Throughout the first half of 2021 the Court listened to the testimony of ten witnesses and in July 2021 the Court concluded that the evidence supported a finding of probable cause to charge a felony. Because Courts do not issue or prosecute criminal complaints, the Court appointed two special prosecutors to examine all of the evidence, not just the evidence presented to the Court, and decide whether to prosecute Mensah for shooting Anderson.

Our appointment is narrow in the sense that we are authorized only to investigate whether Mensah committed a felony when he shot Anderson. Our focus is on whether Mensah (1) violated one of Wisconsin's homicide statutes or (2) was acting in self-defense when he shot Anderson.

We understand the ethical duties that bar prosecutors from charging crimes that probably cannot be proven beyond a reasonable doubt. In a case that involved an appointed special prosecutor, the Wisconsin Supreme Court cautioned that a prosecutor, "generally should not charge unless he or she believes the evidence can sustain a finding of guilt beyond a reasonable doubt."

*State ex rel. Kalal v Circuit Court for Dane County*, 271 Wis. 2d 633, 655, 681 N.W2d 110 (2004).

A criminal prosecution is different than a civil lawsuit to collect damages for an unconstitutional use of force. Anderson's family has filed a civil action in Milwaukee federal court, but it is separate and distinct from this proceeding.

A criminal investigation also is different than an administrative investigation. Administrative investigations typically ask whether an officer violated office policy or rules, not whether doing so was criminal.

### **Summary of Conclusions**

We believe the evidence will prove that Mensah intentionally shot Anderson, and Anderson died as a result of that shooting. But to convict Mensah of a crime, we also must prove that Mensah was not acting within the privilege conferred on all persons to defend themselves against imminent threats of death or great bodily harm. To overcome this privilege, we must prove beyond reasonable doubt that either Mensah's assessment of the risk he faced, or the action he took to avoid that risk, was unreasonable. If the evidence is insufficient to meet that burden of proof, the shooting was not a crime, though still a tragedy.

We believe a jury would rely heavily on Mensah's dash camera video to answer the key questions in this case. The video captures the actions of Anderson and Mensah shortly before and during the shooting. The video confirms that Anderson disregarded Mensah's commands to keep his hands up and instead reached toward the passenger seat where his gun was laying. These actions would have caused a reasonable person to fear an imminent threat of death or great bodily harm and to use deadly force to protect themselves.

To help understand the impact of that video, beyond our own impression and the impressions of many colleagues who viewed it as well, we convened a panel of Milwaukee County adults eligible for jury duty, showed them the video and still images from it, instructed them according to the Wisconsin Criminal Jury Instructions, and listened to their conclusions.

That exercise confirmed our own conclusions and those of the others who viewed the video. We cannot prove beyond reasonable doubt that Mensah's fear that Anderson was about to shoot him was unreasonable. Nor can we prove

beyond a reasonable doubt that Mensah's use of deadly force to save himself from death or great bodily harm was unreasonable. Our conclusion is that we cannot prove beyond a reasonable doubt Mensah committed a crime when he shot Anderson. This report explains how and why we reached this conclusion.

At the conclusion of our report, we identify issues that should concern the public about certain routines the police follow in investigating police shootings. And we offer a constructive suggestion about how police shootings might be investigated like we investigate other societal tragedies that happen all too frequently, with an eye toward learning from these tragedies and developing better, safer police practices and tactics.

## **Process**

We examined the Milwaukee County District Attorney's files, the testimony and exhibits that the Anderson family's attorney presented to the Court, and all available physical evidence in the case. This included video from squad dash cameras, video from Madison Elementary School, audio between the WPD dispatcher and Mensah, and with WPD squads that responded to the scene, evidence of blood spatter, autopsy evidence, and a forensic download of the Blu brand cell phone found on the front passenger seat next to Anderson. We spoke to the witnesses identified in the police reports, including the Wauwatosa officers who arrived at the scene within 2 or 3 minutes after the shooting, as well as the Milwaukee police investigators assigned to the case. We obtained and studied still frames of Mensah's dash camera video to further examine the movements of Mensah and Anderson during the incident. Finally, we spoke to a number of experts to educate ourselves about the legal and technical issues involved.

We spoke to law Professors Ben Kempinen (ret.) of UW-Madison and Michael O'Hear of Marquette, and conducted our own legal research, to make sure we understood the controlling legal principles. We spoke to Assistant Attorney General Don Latorraca about key cases governing homicides based on criminal negligence and recklessness, and the law of self-defense, many of which he briefed and argued to the Court of Appeals and Supreme Court. We spoke to Gerald Katchka, a certified trainer in Firearms, Defense and Arrest Tactics, and Tactical Response. We spoke about the investigation of police shootings with Prof. Michael Scott of Arizona State University, formerly of UW-Madison Law School, who had a hand in writing the Wisconsin legislation that requires outside

agencies to investigate police shootings. We spoke to Nick Stahlke of the Wisconsin State Crime Lab about blood spatter principles. We spoke to several other people who did not want their name shared given the public and sensitive nature of the topic but had experience investigating police shootings, homicide investigations, or police use of force. The DA Investigator for La Crosse County Brian Puent assisted as a certified trainer in Firearms, Tactical Response and Vehicle Contacts Instructor. We spoke to numerous colleagues informally for their experience in criminal law, trial strategies, and police issues. And we spoke extensively with the Anderson family's attorney, Kimberly Motley, three times with retired former MPD homicide detective Ricky Burems, who testified during the circuit court hearings, and with Christopher MacGillis, counsel for Mensah, to make sure we received and understood all evidence they had to offer.

We tried to keep as open a mind as possible as we searched for the fullest possible understanding of how this tragedy unfolded. We were impressed with the evidence presented during the hearings in 2021. But we also recognize that the evidence presented in 2021 was the product of a one-sided process required by the statute that governed those hearings, Wis. Stat. § 968.02(3). The statute barred the court from hearing any evidence other than what was presented by the petitioners. Nor could the petitioner's witnesses be cross-examined.

## **Analysis**

### **Overview**

The felonies potentially applicable to Mensah are first- and second-degree intentional homicide, first-and second-degree reckless homicide and homicide by negligent operation or handling of a dangerous weapon. Self-defense is built into the elements each of these crimes. In other words, a person cannot be convicted of any of these crimes unless every element of the crime is proven **and** the State proves beyond a reasonable doubt that the person was not acting in lawful self-defense.

We begin by recounting what the evidence shows happened at the scene. Then, we will discuss the elements of each crime and how they apply here. We will discuss self-defense separately because it applies to each of the possible crimes.

## **The Timeline Leading To Mensah Shooting Anderson**

Anderson had been at a bar with his friend, Hakim Fudge. They left for their homes in separate cars around 1 AM on June 23, 2016. At a gas station Fudge noticed that Anderson had a handgun tucked into his belt that was visible and told him to pull his shirt over it. This is one reason we know Anderson had the weapon with him that evening; his friend said so under oath during the hearings. After leaving the gas station, they went their separate ways.

Video from the Madison Elementary School shows Anderson's car entering Madison Park in Wauwatosa at 1:37 AM. A download from one of his two cell phones shows he placed a call a short time later but there was no answer. The same download shows that someone at the number he called tried to call him back about an hour later, but Anderson did not answer. We believe Anderson would have answered that call had he been awake.

Video from the school shows that Mensah's marked squad car (an SUV) entered the park at 3:01 AM, drove to where Anderson's car was parked, and turned on its flood lights, referred to as "take down lights," but not its emergency flashing red and blue lights. Mensah parked his squad in front of Anderson's car, face-to-face, about two car lengths away. The take down lights allowed him to see inside Anderson's car where he observed Anderson apparently asleep.

The audio tape of communications with the WPD dispatcher shows that Mensah reported an occupied vehicle in the park at 3:02:39, and three seconds later the dispatcher directed squad 318 to the park as support. At 3:03:35 Mensah asked the dispatcher for a license plate check. To do that, he had to walk to the rear of Anderson's car because there was no license plate on its front bumper. (While it is possible he drove around to the back and returned to park in front, close inspection of the school video makes it most likely that Mensah did not move his squad.) At 3:04:06, the audio tape records the dispatcher advising Mensah that the license check was negative (had not been reported as stolen) and the car was registered to Olena DeLaRosa. Anderson was an African American man two weeks shy of his 26<sup>th</sup> birthday, obviously not Olena DeLaRosa. (Ms. DeLaRosa turned out to be the grandmother of Anderson's young daughter, but Mensah could not have known that as he approached the car.)

At 3:06:18, the dispatcher's audio tape records Mensah stating, "Step it up. He has a gun." Five seconds later, the dispatcher ordered all squads to report to

Madison Park. At 3:07:15, Mensah's dash cam video shows he began shooting. At 3:07:22 the dispatcher's audio tape records Mensah reporting, "shots fired."

In total, three minutes and nine seconds passed after Mensah received the results of the license plate check before he began shooting. At some point during that time, Mensah spoke with Anderson. Most of whatever conversation occurred is uncorroborated, summarized in a police report of Mensah's unsworn, unrecorded interview with MPD about 30 hours after he shot Anderson. We provide that information next but caution the reader that we did not rely on Mensah's uncorroborated version of the conversation in reaching our conclusions.

After learning the car was registered to Olena DeLaRosa, according to Mensah's interview with MPD, he rapped on the front passenger side window of the four-door Nissan Altima. He said he believed Mensah was "fake sleeping" because he had noticed some movement and Anderson appeared to be breathing fast. Even if Mensah's speculation were correct, it is likely that Anderson had been asleep 20 minutes earlier when he failed to answer the call from the person he had tried to reach earlier. Again according to Mensah's interview with MPD, he rapped on the passenger side car window until he got Anderson's attention and asked him to roll down the window. Mensah's interview summary states that Anderson put his key into the ignition and complied with Mensah's request. Mensah then asked for a driver's license and, according to Mensah's interview summary, Anderson said he did not have one. Next, the summary states Mensah asked Anderson for a state issued ID, and Anderson reportedly said he did not have one, either. In fact, Anderson did not have a driver's license but did have a state-issued ID card.

During their brief conversation, the summary states Mensah noticed Anderson looking at his badge (photos at the scene show that Mensah was in full police uniform) and down at the front passenger seat and back at Mensah a couple of times. Curious what might be on the front passenger seat, the summary states Mensah stepped closer to the car and looked down into the passenger seat, where he spotted a semi-automatic handgun with its magazine inserted. At this point, the dispatcher's audio tape records Mensah stating, "Step it up. He has a gun."

While he waited for other officers to arrive, Mensah ordered Anderson to keep his hands up and stay away from the gun. This is corroborated by the dash cam video from Mensah's squad, which shows Anderson with his hands raised and Mensah pointing his handgun at him. But the dash cam video only captures the final 18 seconds before Mensah began shooting, leaving uncorroborated about 45 seconds between Mensah's report of the gun and when he began shooting. Mensah's interview summary states that he had to warn Anderson a few times to keep his hands up, which Mensah viewed as non-compliant, and then Anderson told Mensah "it's nothing; there's nothing there." To which Mensah's summary says he responded, "I see the gun. Keep away from it."

The dash camera video captures what happened next, but without audio. The video system operates on a loop, recording video even when not activated. It keeps re-recording over itself, but once activated preserves the prior 28 seconds of video without sound. After the shooting ended, Mensah activated his dash camera system via a remote-control button on his vest, capturing the 28 seconds surrounding the shooting.

The video shows that Anderson dropped his right hand toward the passenger seat, raised it again for an instant and then quickly dropped it again as he leaned toward the seat where his gun was located. Mensah immediately fired six rounds in about 1.5 seconds. The video shows Anderson's body straightening back up as the shots were fired. The autopsy shows that one shot entered just behind the top of Anderson's right shoulder; three other shots hit his head, one his right cheek, one his right ear and one just above and slightly behind his right ear. The latter two shots passed straight through to nearly identical exit wounds on the opposite side of his head. Two other shots missed. Once Mensah activated the dash cam system, the audio began and we can hear Mensah reporting that he was okay but the suspect was down. He did not go near Anderson's car until back up squads arrived a little over 2 minutes later.

Testimony at the 2021 hearings relied on autopsy and blood spatter evidence to argue that Anderson was sitting straight up and fully compliant when Mensah shot him. But the evidence was not presented in full context due to limitations imposed by the statute.

We found both the autopsy evidence and the blood spatter evidence inconclusive. The deputy medical examiner told us she could not determine the

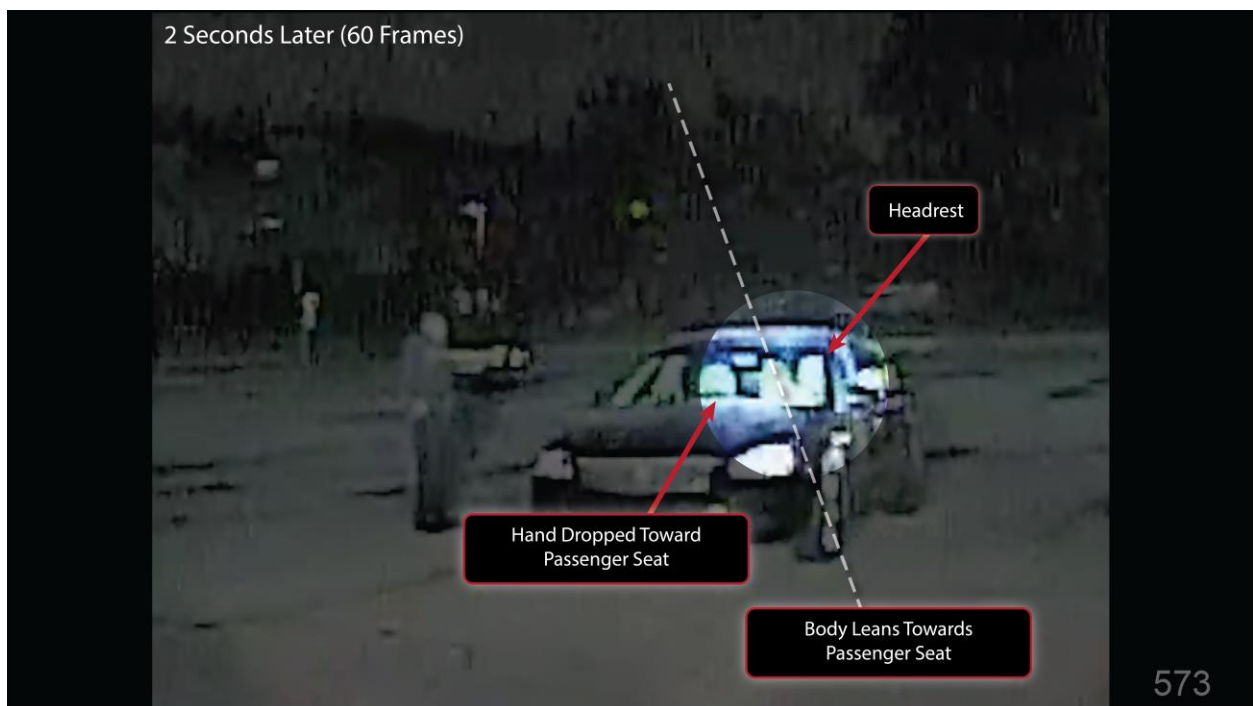
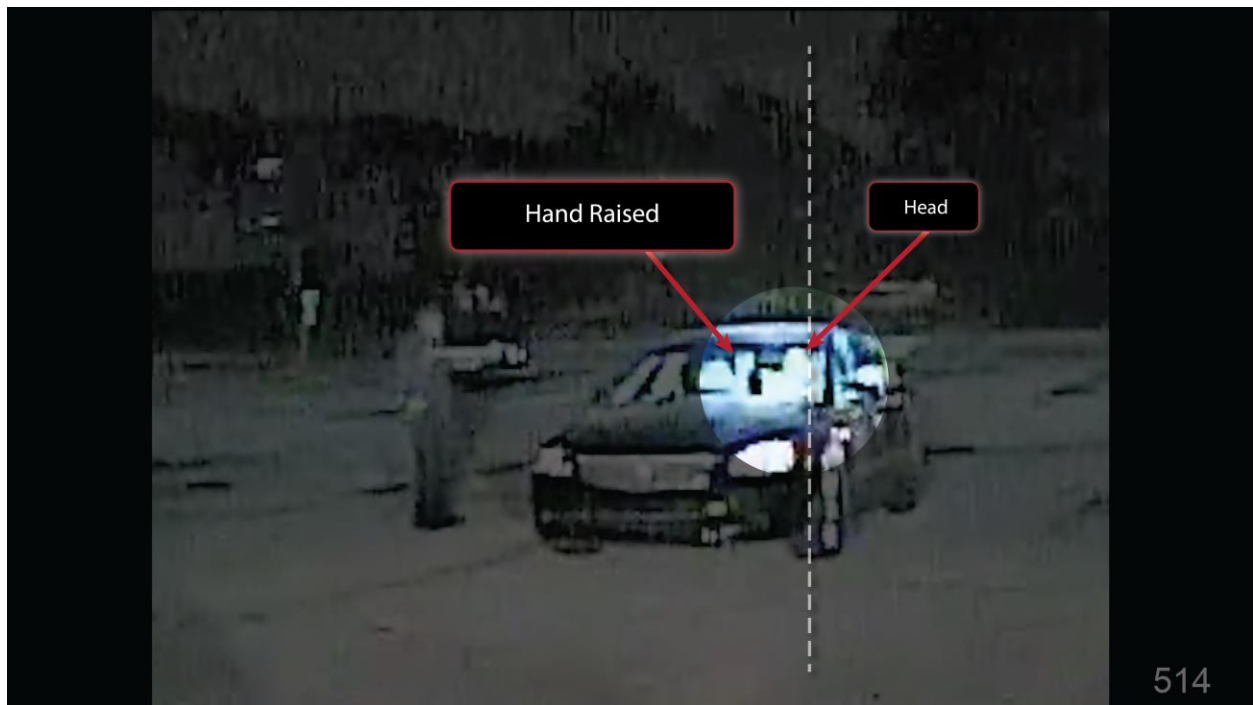
order of the shots or Anderson's position or posture when he was first shot. She told us that a "straight-through shot," as she described the shot to Anderson's ear and the shot above and just behind his right ear, does not necessarily mean he was sitting up facing forward when Mensah first shot him. Without knowing the angle of Anderson's head, neck and body, and the angle of Mensah's gun, it is almost impossible to determine Anderson's exact position when he was first shot based on his wounds.

The evidence of blood spatter also proved inconclusive. Evidence presented at the hearings pointed to the lack of blood spatter on the front passenger seat or on the floor in front of it as proof that Anderson was not moving toward the gun when Mensah shot him. But we found photos of blood spatter on the rear window behind the front passenger seat and on the door beneath it. And blood spatter experts told us that the thick braids Anderson wore likely affected spatter patterns from the shots to his head and the shirt he was wearing likely altered spatter patterns from the shot to the back of his shoulder.

In contrast to the inconclusive autopsy and spatter evidence, we have actual video showing what happened, and we obtained still images of each frame of Mensah's dash camera video (over 10,000 of them) and were able to view still images at each moment before Mensah began shooting. The dash camera video and the collection of still images show Anderson moving from an upright position toward the right passenger seat and his right arm dropping quickly from its raised position toward the front passenger seat where his gun was located immediately before Mensah began firing.

We have included below two still images, nos. 514 and 573, to illustrate Anderson's movement during the two seconds before Mensah shot him. These images are from Mensah's dash cam video, which recorded them at the rate of 30 frames per second, providing an effective timer. Frame 514 shows Anderson sitting upright with his hands raised. Frame 573, which comes sixty frames or two seconds later, shows Anderson's body leaning toward the passenger seat and his right hand disappeared from view. Less than 10 frames later (about 1/3 of a second) Mensah fired his first shot.





The two WPD officers who arrived about two minutes later, officers Mills and Salyers, approached the car to assess whether Anderson remained a threat. As they were doing that, the dash camera system records Mensah telling them the gun “is right there on the seat.” Then it records Salyers telling Mills that Anderson was not breathing, asking Mills to remove Anderson’s weapon and Mills

reaching through the front passenger window and removing the gun before its exact location and position on the seat could be photographed. By then, a third WPD officer helped Salyers move Anderson from the car to the ground as the Wauwatosa medical unit arrived and began administering first aid before transporting him to Froedtert Hospital where he was pronounced dead. Before Anderson was transported, WPD officers searched through his pockets looking for identification. Among other things, they found his State ID card and an iPhone. They found another cell phone (a Blu brand phone) on the front passenger seat. Both belonged to Anderson.

The next section explains, generally and under the facts of this case, the elements of each felony and the ultimately determinative role of self-defense. We must prove each element of each offense beyond a reasonable doubt. We also must prove beyond a reasonable doubt that Mensah was not lawfully defending himself when he shot Anderson.

### **First- and Second- Degree Intentional Homicide**

First degree intentional homicide occurs when an actor intentionally kills another person and (when self-defense is claimed) the actor did not actually believe he needed to use deadly force to save himself from death or great bodily harm. See Wis. Stats. §940.01 and §940.02, and *State v. Head*, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 423. Second-degree intentional homicide is a lesser included offense of first-degree intentional homicide. A person commits a “lesser included” offense if the person’s conduct meets some but not all of the elements of the greater offense. Second-degree intentional homicide occurs when the actor intentionally kills another person, believing at the time that it was necessary to save himself from death or great bodily harm, but the use of deadly force was unreasonable. Wis. Stat. §940.05.

The Wisconsin criminal jury instruction 1017 explains first- and second-degree intentional homicide and the differences between them.

#### ***Elements of First-Degree Intentional Homicide That the State Must Prove***

- 1. The defendant caused the death of Anderson.*
- 2. The defendant acted with the intent to kill Anderson.*

3. *The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.*

### ***Actual Belief That The Force Used Was Necessary***

*The third element of first-degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself. This requires the State to prove either:*

*1) that the defendant did not actually believe he was in imminent danger of death or great bodily harm; or*

*2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to himself.*

*When first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second-degree intentional homicide.*

### ***Jury's Decision***

*If you are satisfied beyond a reasonable doubt that the defendant caused the death of Anderson with the intent to kill and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself you should find the defendant guilty of first-degree intentional homicide.*

*If you are not so satisfied, you must not find the defendant guilty of first-degree intentional homicide, and you must consider whether the defendant is guilty of second-degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first-degree intentional homicide.*

## ***Second Degree Intentional Homicide***

### ***Elements of Second-Degree Intentional Homicide That the State Must Prove***

- 1. The defendant caused the death of Anderson.*
- 2. The defendant acted with the intent to kill Anderson.*
- 3. The defendant did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to himself.*

### ***Reasonable Belief That The Force Used Was Necessary***

*The third element of second-degree intentional homicide requires that the defendant did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to himself. This requires that the State prove any one of the following:*

- 1) that a reasonable person in the circumstances of the defendant would not have believed that he was preventing or terminating an unlawful interference with his person; or*
- 2) that a reasonable person in the circumstances of the defendant would not have believed he was in danger of imminent death or great bodily harm; or*
- 3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to himself*

*The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the*

*defendant under the circumstances existing at the time of the alleged offense.*

### **Application to Mensah.**

Mensah aimed his service weapon at Anderson from close range and pulled the trigger six times. We believe the evidence demonstrates that Mensah intended to shoot Anderson and that doing so was practically certain to cause death or great bodily harm, which satisfies the legal definition of “intent to kill” even if Mensah was merely trying to stop the threat he perceived. This satisfies the causation and intent to kill elements of first- and second-degree intentional homicide.

But to prove first-degree intentional homicide, we also must prove beyond reasonable doubt that Mensah did not actually believe (reasonably or unreasonably) that it was necessary to use deadly force to save himself. We found no such evidence and conclude that we cannot prove a charge of first-degree intentional homicide.

Proving second-degree intentional homicide depends on whether we can prove beyond reasonable doubt that either (a) Mensah unreasonably believed that his life was in danger or (b) Mensah unreasonably believed he needed to use deadly force to save himself from death or great bodily harm. These are the same two questions we face when we assess whether we can disprove self-defense beyond a reasonable doubt, so we will address them as part of that discussion. But for purposes of second-degree intentional homicide, we believe the evidence will prove the first two elements of the offense beyond a reasonable doubt: Mensah caused Anderson’s death by shooting him with intent to kill, as Wisconsin law defines that intent.

### **First- and Second-Degree Reckless Homicide**

First-degree reckless homicide occurs when a defendant recklessly caused the death of another person under circumstances that show utter disregard for human life. Wis. Stats. §940.02. “Recklessly” means the circumstances created an “unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.” Wis. Stats. §939.24(1).

Second-degree reckless homicide is a lesser included offense to first-degree reckless homicide. A person commits a “lesser included” offense if the person’s conduct meets some but not all of the elements of the greater offense. A defendant may be convicted of the lesser included offense of second-degree reckless homicide without evidence that his conduct showed utter disregard for human life. Criminal recklessness means the same thing as it does for first-degree reckless homicide: the actor created an unreasonable and substantial risk of death or great bodily harm.

Whether Mensah’s conduct created an unreasonable risk of death or great bodily harm depends on the threat he faced and the reasonableness of his response to that threat. If Mensah reasonably believed deadly force was necessary to save himself from imminent death or great bodily harm, under Wisconsin law, resorting to self-defense is not unreasonable, and he cannot be guilty of first- or second-degree reckless homicide. Wisconsin Jury Instruction 1017 explains this further.

### ***Elements of the Crime That the State Must Prove***

- 1. The defendant caused the death of Anderson.*
- 2. The defendant caused the death by criminally reckless conduct.*

*"Criminally reckless conduct" means:*

- the conduct created a risk of death or great bodily harm to another person; and*
- the risk of death or great bodily harm was unreasonable and substantial; and*
- the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.*

*You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, his conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-*

*defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.*

*3. The circumstances of the defendant's conduct showed utter disregard for human life.*

### ***Statutory Definition of Second-Degree Reckless Homicide***

*Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.*

### ***Difference Between First- and Second-Degree Reckless Homicide***

*The difference between first- and second-degree reckless homicide is that the first-degree offense requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life.*

## **Application to PO Mensah**

Pointing a handgun at a person and firing six times certainly creates a substantial risk of death, and Mensah must have known this when he shot Anderson, causing his death. These facts satisfy some elements of both reckless homicide crimes. Whether the circumstances made it unreasonable to shoot Anderson depends on whether Mensah reasonably believed he needed to shoot Anderson to save himself from death or great bodily harm. We address this key issue below when we discuss self-defense.

## **Homicide by negligent operation or handling of a dangerous weapon**

Wisconsin statute §940.08 defines the crime of homicide by negligent operation or handling of a vehicle, a dangerous weapon, explosives or fire. The offence has three elements: (1) the defendant operated or handled (in this case) a dangerous weapon; (2) the defendant handled or operated the dangerous weapon in a criminally negligent manner; and (3) the defendant's handling or operation of a dangerous weapon in a criminally negligent manner caused the death of another human being. A gun undoubtedly is a dangerous weapon, and undoubtedly its use caused Anderson's death, so the issue is whether Mensah

caused Anderson's death by operating or handling his gun in a criminally negligent manner. The statute defines "criminal negligence" as "ordinary negligence to a high degree, consisting of conduct the actor should realize creates a substantial and unreasonable risk of death or great bodily harm."

The cases that apply this statute focus on how the defendant handled or operated the dangerous item. For example, in *State v. Langlois*, 2018 WI 73, 382 Wis. 2d 414, 913 N.W.2d 812, the defendant accidentally killed his brother with a knife and the court focused on how the defendant unsheathed, held and positioned the knife between himself and his brother as they came together in a fight. Likewise, in *Hart v. State*, 75 Wis. 2d 371, 249 N.W.2d 810 (1977), the court focused on how Hart was operating his vehicle at the time he hit and killed a bicyclist.

The statute also requires that the risk of death or great harm was unreasonable. In *State v. Langlois*, the court concluded that the privilege of self-defense is a negative element of this crime, meaning a defendant's lawful self-defense prevents conviction.

### **Application to PO Mensah**

There was substantial testimony during the 2021 hearings about the tactics Mensah used after discovering an occupied vehicle in the Madison Park parking lot at approximately 3 AM on June 23, 2016. He parked facing the front of Anderson's vehicle; he turned on his bright "take-down" lights rather than his emergency flashing red and blue lights; he didn't wait for back-up support to arrive; he approached from the passenger side door rather than from the driver's door; and he took a step back, losing sight of Anderson's weapon after first noticing it. All of these tactics, each of varying and debatable prudence, were said to have increased the risk to Mensah, perhaps contributing to his feeling threatened.

But none of those tactics involved his operation or handling of his weapon, which appears from his dash camera video to have been deliberate and practiced. Most of them occurred before Anderson was even awake or there was any interaction between Mensah and Anderson. We found no case that applied this statute under comparable circumstances, and do not believe that Mensah's



actions prior to drawing and handling his weapon could satisfy the elements of this crime.

Additionally, *State v. Langlois* concluded that self-defense is a negative element of this crime, meaning the crime is negated if Mensah was lawfully exercising his privilege of self-defense. So as with the other homicide crimes we have considered, we must prove beyond a reasonable doubt that Mensah was not lawfully defending himself when he shot Anderson. As explained next, this inquiry reduces to two key questions: (1) can prosecutors prove beyond a reasonable doubt that Mensah's fear of imminent death or great bodily harm was unreasonable; or (2) can prosecutors prove beyond a reasonable doubt that Mensah's use of deadly force was unreasonable even if his fear of imminent death or serious injury was reasonable.

## **Self-Defense**

The privilege to use self-defense is codified in Wis. Stat. §939.48(1):

A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself. (Emphasis added.)

The Jury Instruction explains that a defendant's belief may be reasonable even if mistaken, and must be judged from the point of view of what a person of ordinary intelligence and prudence would have believed under the circumstances facing the defendant at the time of the homicide:

*A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined*

*from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.*

It is a normal human reaction (we found ourselves doing it, too) to wonder what Anderson was thinking as he reached toward the front passenger seat. But the jury instruction reminds us that the law requires us to look at the situation from the defendant's perspective: how might a person in Mensah's position have reasonably perceived Anderson's movements?

The self-defense privilege exists even though the defendant acted unreasonably or even unlawfully before it became necessary to resort to self-defense. *State v. Johnson*, 2021 WI 61, 961 N.W.2d 18, is a good example of a case in which a person who set in motion a chain of circumstances fraught with danger nevertheless was entitled to claim self-defense. In *Johnson*, the defendant illegally entered his brother-in-law's home at night seeking computer evidence of child pornography to give to prosecutors. Fearing for his safety if his brother-in-law discovered him, he took a pistol. Eventually, his brother-in-law discovered the intruder and assaulted Johnson, who shot his brother-in-law 5 times causing his death. The Wisconsin Supreme Court held that Johnson was entitled to assert the self-defense privilege if he reasonably believed his brother-in-law was trying to kill him to avoid prosecution for possessing child pornography, even though he had entered his brother-in-law's house illegally.

### **Application to PO Mensah**

Mensah's counsel has confirmed that Mensah will assert the self-defense privilege against any homicide crime we could charge, and it would be our burden to prove beyond a reasonable doubt that he was not entitled to defend himself using deadly force.

Based on our investigation, we believe the evidence is sufficient to prove beyond reasonable doubt that:

1. Mensah discovered a male with a loaded semi-automatic handgun on the front passenger seat just after 3 AM in the parking lot of a closed park.
2. The car was registered to an owner who obviously was not the person in the car.

3. After discovering the weapon, Mensah ordered Anderson to raise his hands and keep them up and away from the gun while he waited for back-ups to arrive.
4. The dash cam video from Mensah's squad is grainy but shows that Anderson moved his right hand from a raised position toward the passenger seat at least once, raised his arm again and then quickly dropped his hand toward the weapon, his head and upper body leaning in that direction as he did.
5. In response, Mensah shot and killed Anderson.

To prove any homicide crime against Mensah, we must prove beyond reasonable doubt that he either (1) did not reasonably believe Anderson was trying to shoot him or (2) did not reasonably believe he needed to shoot Anderson to save himself from death or great bodily harm.

Because we believe a jury will rely on the dash cam video in deciding the reasonableness of Mensah's belief that he needed to shoot Mr. Anderson to save himself, we arranged for a jury-eligible group of Milwaukee County residents to view it in conjunction with the applicable jury instructions and provide their opinions on these critical questions. The panel included two white residents, one male and one female, and six African American residents, three males and three females and one Latina African American.

Six of the nine panel members believed the video showed it was reasonable for Mensah to have believed he had to shoot Anderson to save himself because, from Mensah's point of view, Anderson may have been trying to shoot Mensah first. The conclusions reached by two thirds of our panel matched those expressed by nearly 100% of legally trained colleagues who viewed the same video as well as our own conclusions. With two thirds of our community panelists believing that Mensah had a reasonable basis to believe Anderson was attempting to shoot him, it is highly unlikely that a jury of twelve people would conclude the opposite, and do so unanimously, as is required for a conviction. This is consistent with the views of the legally trained individuals who viewed the video and is why we believe the evidence will not support prosecuting Mensah for either degree of intentional or reckless homicide or homicide by criminally negligent operation or handling of a dangerous weapon.

## Other Acts Discussion

Anderson was the second of three civilians whom Mensah shot during his first five years as a Wauwatosa Police Department officer. This raises important questions and concerns that have led some to advocate that our investigation use those other two shootings, one before and one after Mensah shot and killed Anderson (neither of which were found to have been criminal), to prove Anderson's shooting was a crime. But the Wisconsin Supreme Court has rejected that approach. Mensah's conduct months or years earlier, or later, may not be used to prove that he committed a felony on June 23, 2016.

The Wisconsin Supreme Court in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998) established the three-step analysis for admission of other acts evidence under Wis. Stat. §904.04(2) to be used by trial courts:

1. Is the evidence offered for an acceptable purpose such as motive, intent, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident? §904.04(2), Wis. Stats.
2. Is the evidence relevant? That is, does the evidence relate to a fact or proposition that is of consequence, and does it have probative value? §904.01, Wis. Stats.
3. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? §904.03, Wis. Stats.

As applied to Mensah, we believe the other cases involving Mensah do not meet this standard. The other two shootings Mensah was involved in do not establish any acceptable purpose. We do not see that the evidence of either of the other shootings, especially the one that occurred after the Anderson shooting, are particularly relevant to a fact of consequence in the present case. Finally, the probative value would be outweighed by the prejudicial value.

*Hart v. State*, 75 Wis. 2d 371, 249 N.W.2d 810 (1977), is instructive. The State prosecuted Hart for homicide by negligent operation of a motor vehicle. Prosecutors relied on Wis. Stat. §940.08 (homicide by negligent operation or use of a motor vehicle or dangerous weapon), one of the same homicide statutes we

have considered in this investigation. The jury heard from witnesses who had seen Hart driving carelessly shortly before he hit and killed a bicyclist and who continued to watch him driving in that manner up to the collision. Prosecutors also offered testimony from witnesses who had seen Hart driving carelessly days, weeks and months earlier, but the Wisconsin Supreme Court held that evidence of recklessness at other times could not be used to prove Hart was driving in a criminally negligent manner when he killed the bicyclist.

If we attempted to use evidence of Mensah's first or third shootings to help prove he acted criminally when he killed Anderson, a court would exclude that evidence. Our evaluation must be limited to admissible evidence that proves this particular shooting was a felony.

### **"Officer Induced Jeopardy" As A Theory Of Criminal Liability**

"'Officer-created jeopardy' refers to situations in which police officers unwisely put themselves in danger and then use force to protect themselves." Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 89 GEO. WASH. L. REV. 1362, 1367 (2021). To the extent courts anywhere have recognized it, they have done so in the context of civil actions seeking damages for unconstitutional use of force, not in criminal cases. *Id.*

The argument as relevant here would be that Mensah increased the danger to himself by parking facing Anderson's car; using his spotlights rather than his emergency lights and failing to activate his dash camera earlier; approaching Anderson from the passenger side rather than from the driver's side; not waiting for back up to arrive before checking on Anderson; or not keeping Anderson's weapon in view. As the argument goes, Mensah's use of self-defense may not seem so reasonable if his tactical decisions leading to the confrontation are part of the determination. But as the author of the law review article conceded, no court has accepted this theory in a criminal case, and the only two courts to consider it in the criminal context have ruled that the reasonability of self-defense must be judged by the facts facing the defendants *at the moment they decided to use deadly force*.

After the article was written, the United States Supreme Court reversed a decision of the Court of Appeals for the Tenth Circuit that had relied on this

theory to uphold liability in a civil case. *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9, 211 L.Ed.2d 170 (2021) (per curiam). The Supreme Court wrote that Tenth Circuit precedent “. . . allows an officer to be held liable [in the context of a civil action] for a shooting that is objectively reasonable if the officer’s reckless or deliberate conduct created a situation requiring deadly force.” While the Court did not outright reject the theory under any possible set of facts, it held that the facts of that case – officers cornering an intoxicated man in his ex-wife’s garage and shooting him when he grabbed a hammer as if to strike – “plainly did not violate any clearly established law,” and therefore could not be the basis for civil liability. The Anderson family will have a chance to test this theory in the context of the civil damage action they have filed in federal court.

As special prosecutors, we must follow Wisconsin criminal law. Wisconsin law makes it clear that the lawfulness of self-defense must be judged at the moment when the defendant used deadly force to save himself. *State v. Johnson*, discussed earlier, decided that a defendant was not precluded from using deadly force to save himself despite the tactical stupidity of entering his brother-in-law’s home illegally and armed in the middle of the night to search for evidence of child pornography. Even if one or more of Mensah’s decisions was tactically mistaken or not best practice (and we found experts with varying opinions), they cannot change the requirement that self-defense must be determined by the facts facing Mensah at the moment he resorted to deadly force.

## **Concerns Relevant To Public Policy**

Besides explaining how and why we reached our conclusions, we think it might be useful to share some concerns we developed during our investigation in the hope doing so might lead to improvements that build trust between communities and police sworn to protect them.

## **The Tendency of Police to Protect Their Own**

The public and police officers depend on one another. The public depends on police to keep communities safe. Police need public support to be effective. Public support requires that communities trust the police. Thorough and transparent investigations of officer-involved-shootings promote that trust. Processes that “protect” officers from such investigations undermine it. Two

examples illustrate the problem. The WPD after-action administrative review of Anderson's shooting identified the following "training issue:"

First, all audio and video must be turned off after the incident itself is over (Mensah was asked too many questions while the microphone was still activated).

During our 2022 interview of the WPD officer in charge at the scene until MPD arrived, he identified his "lesson learned" as having asked too many questions of Mensah, creating the risk that he might incriminate himself. This desire to protect fellow officers may be a natural human response, but it harms any thorough, transparent search for the truth. It harms public trust. Ultimately, it harms the police. Ironically, it was Mensah's dash camera video that saved him from criminal prosecution.

Two changes to the current system could help address this issue. Many police departments outside of the Greater-Milwaukee area lack the expertise to investigate officer-involved shooting cases. And even where that local expertise exists, relying on a local District Attorney who works with the same law enforcement officers involved in a shooting can raise questions from the public about the ability of the District Attorney to remain impartial. The Legislature should consider requiring that all officer-involved shootings be investigated by the State Division of Criminal Investigation (DCI) and prosecuted by the Department of Justice (DOJ.) They have the expertise and resources to better investigate these cases. They also are more removed from the immediate officers involved in the incident.

### **The Failure to Record Interviews with Key Police Witnesses**

Similar to the first concern, it has long been MPD's policy not to record interviews with key witnesses to officer-involved-shootings *when those witnesses are police officers*. None of MPD's interviews of WPD officers were recorded. Mensah was the only eyewitness to Anderson's shooting, but his interview was not recorded. Instead, all interviews of WPD officers were summarized in MPD reports, but the officers interviewed were never asked to review the summaries for accuracy.

This policy and these practices are troublesome. Under the protocol the police followed in this case, it is too easy for police witnesses to change their

story. An interviewee might simply say, “The summary got it wrong, and I never had a chance to correct it.”

Also, sometimes the questions asked and the responses *not given* to those questions can be as telling as any other part of the interview. But interview summaries rarely mention the questions actually asked. During our interviews, 5 ½ years later, two officers claimed to recall vividly things they almost certainly were asked about originally but were not mentioned in their summaries. They say they were never asked. The MPD investigators are convinced they asked those questions and the officers had no information to add. Who can say who is correct?

While none of this turned out to be material due to the dash camera video, without the video, it could have been critical and the process of not recording those original interviews would have confounded any prosecution.

### **The Limitations Inherent in Wis. Stat. §968.02(3)**

The statute used to bring this matter to the judge’s attention – §968.02(3) – is easy to exploit and judges need to apply it with care, as the judge has done here. Unlike a district attorney charged with acting in the public interest, private petitioners act in their client’s own, individual interests. And because the proceeding does not allow opposing parties to present evidence or cross examine witnesses, it is likely (and to be expected) that not all important evidence will be presented to the judge. In this case, the judge did not exercise his discretion to authorize a criminal complaint to be filed. Rather, recognizing that the evidence he heard, while powerful, might be incomplete, the judge appointed special prosecutors to thoroughly examine all of the evidence and determine whether they can prove beyond reasonable doubt that Mensah committed a felony when he shot Anderson. Until the Legislature addresses this statute’s built-in weaknesses, other judges should consider this judge’s example.

### **We Should Learn from Tragedies Like This to Improve Policing**

We saved our most important concern for last. If we do not learn from tragedies like this to improve policing, they will recur, and trust will erode. When a criminal investigation finds there was no crime, it is natural for those involved to move on without considering what police might have done to produce a better outcome. Police officers have a dangerous job; they are entitled to defend



themselves, and it is rare for a prosecution to succeed. There are too few successful criminal prosecutions for them to stimulate change. Administrative reviews generally ask only whether the officer followed the department's rules. Civil damage actions usually end in a settlement in which no one admits doing anything wrong. So how can policing evolve to be safer for citizens and police officers alike?

As a possible answer, consider how much safer air travel is today in the U.S. than it was 30 or 40 years ago. In large part, this progress has been due to investigations and recommendations by the National Transportation and Safety Board (NTSB). The NTSB investigates all of the factors that contribute to an airline crash. Human factors, mechanical factors, weather factors, and other natural factors like flocks of birds. Its job is not to litigate criminal or civil liability but to make recommendations designed to improve future outcomes.

A group of bi-partisan legislators introduced a bill in the most recently concluded legislative session to create an NTSB-style investigative entity in Wisconsin to examine shootings by, and of, officers, to identify all of the contributing factors, and to make recommendations that could lead to better outcomes for officers and citizens in the future. In addition to bi-partisan legislative support, AB 112 earned the support of the Wisconsin Bar Association as well as district attorneys and law enforcement. Enacting AB 112 into law would be a wise step in the right direction.

Respectfully Submitted,

/s/

Scott Hansen  
Special Prosecutor

/s/

Tim Gruenke  
Special Prosecutor