

INVESTIGATION OF USE OF FORCE INCIDENT

KENOSHA POLICE DEPARTMENT

DATE OF INCIDENT: 07/07/2012

SUBMITTED TO: CHIEF JOHN W. MORRISSEY

KENOSHA POLICE DEPARTMENT

1000 - 55<sup>TH</sup> STREET

KENOSHA, WISCONSIN 53140-3794

PERTAINING TO: KENOSHA P.D. CASE #2012-102556

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**DOCUMENTS REVIEWED:**

At the request of Chief John Morrissey, I reviewed all of the material sent to me. I have reviewed the following documents:

1. One DVD labeled Squad Video, case # 12-102556.
2. One DVD labeled Radio Traffic, case #12-102556.
3. One DVD labeled 911, case #12-102556.
4. Letter from Denise Hertz-McGrath, Attorney at Law, to the City of Kenosha Police and Fire Commission, dated 10/12/2012, 1 page.
5. Kenosha P.D. (KPD), Calls for Service by Event Number, Event # 002012102556, Date reported 07/07/2012, 3 pages.
6. KPD Investigation Report, Case #2012-102556, prepared by Officer Ruha, Badge #543, dated 07/07/2012, 3 pages.
7. KPD Supplementary Report, Case #12-102556, prepared by Officer Niebuhr, Badge #534, dated 07/07/2012, 2 pages.
8. Kenosha County Circuit Court, Case #12-102556, Probable Cause Statement and Judicial Determination, dated 07/07/2012, 1 page.
9. KPD Warrant-Summons Checklist for Tamirius D. Gaston, with attachment of request for Criminal Complaint, both stamped as received by Kenosha County D.A. on 07/09/2012, 2 pages.
10. KPD Warrant-Summons Checklist for Keenan L. Smith, with attachment of Request for Criminal Complaint, both stamped as received by Kenosha County D.A. on 07/09/2012, and Defendant information for Keenan L. Smith and Kenosha County Arrest - Take Custody report, case #12-102556 for Tamirius Gaston and Keenan Smith, 4 pages.
11. Kenosha City and County Cancellation Notice, case #12-102556, for Tamirius Gaston, served on 07/26/2012, 1 page.
12. Additional Information Sheet, case #12-102556, dated 09/25/2012, 1 page.
13. KPD Digital Recording Request Form, #12-102556, with date returned noted as 09/25/2012, 1 page.
14. County of Kenosha D.A. Fax Memo, to Denise Hertz-McGrath, dated 09/17/2012, 1 page.
15. State Public Defender - Order Appointing Counsel, #12-102556, for Tamirius Gaston, stamped as received on 09/26/2012, 1 page.

16. KPD Supplementary Report, #12-102556, prepared by Det. Gene P. Hafke, Badge #300, dated 09/25/2012, 1 page.
17. Kenosha City/County Evidence/Property Inventory Card, #12-102556, Property Card log #157590, dated as received by on 09/25/2012, 1 page.
18. Kenosha City/County Evidence/Property Inventory Card, #12-102556, Property Card log #157528, dated as received by on 09/22/2012, 1 page.
19. KPD cancellation Notice, Case #002012102556-000, for Tamirius Gaston, dated 10/18/2012, 1 page.
20. Kenosha County Circuit Court Arrest-Bench Warrant, case #2012CM001064, KPD #12102556, for Tamirius Gaston, dated 10/15/2012, 1 page.
21. Warrant/Civil Process, KPD, Warrant #002012102556-000-00, Docket #000000000012CM1064 indicating warrant recalled for Tamirius Gaston run on 10/18/2012, 1 page.
22. Order to Cancel Warrant for Case No. 2012CM001064, #2012-102556, dated 10/18/2012, 1 page.
23. Additional Information Sheet, Special Attention D.A.'s Office, case #12-102556, stamped as received on 10/22/2012 with attachments of letter from Attorney Hertz-McGrath, TASER report, and KPD use of force report, 4 pages.
24. Request Form, Evidence/ID Bureau, #12-102556, RE: State vs. Tamirius Gaston, Case No: 12CM1064, requesting all 911 calls and related calls request, squad car cam video request, radio communication and CAD log request, date stamped as received by the Kenosha County D.A. on 09/26/2012, 4 pages.
25. KPD booking photo of Keenan Lesha Smith, 1 page.
26. KPD booking photo of Tamirius Dewayne Gaston, 1 page.
27. KPD Policy and Procedural Manual, Subject: Use of Force, 8 pages.
28. KPD Policy and Procedure Manual, Subject: Firearms Discharge and Other Use of Force Investigation, 5 pages.

## **PURPOSE OF REPORT**

Based on a telephone conversation with Chief John Morrissey and a letter from Attorney Denise Hertz-McGrath, the purpose of this report is to determine if the force used by Kenosha P.D. Police Officer Ruha on Mr. Smith was reasonable and within Kenosha P.D. policies, and if the investigation reports prepared by Officers Ruha and Niebuhr conflict with the patrol car video. Chief Morrissey did not provide me his opinion of this incident.

## **FACTS OF THE CASE**

At approximately 4:34 a.m. on 07/07/2012, Frank Alia placed a call to a 911 operator. Per Mr. Alia, six to seven men were screaming and pushing each other near 2227 54<sup>th</sup> Street. Mr. Alia described one African-American male wearing white boxers and no shirt and a second African-American male "squaring off."

At approximately 4:35 a.m., a dispatcher announced a disturbance call and Officer #543 (identified as Police Officer B. Ruha), Officer #534 (identified as Police Officer Justin Niebuhr), and other officers from the Kenosha P.D. responded to the scene. Dash camera video shows Officer Ruha arriving at the scene of the disturbance at approximately 4:40 a.m.

Initially, as Officer Ruha drives his patrol car toward the location of the altercation, three individuals can be seen toward the right of the screen:

1. An individual wearing light-color long pants and no shirt.
2. An individual wearing white, knee-length shorts and no shirt.
3. A third individual wearing white, knee-length shorts and an orange shirt.

The patrol car makes a right turn and comes to a stop. Individual #1, a taller, African-American male (identified as Keenan L. Smith) can be seen advancing toward individual #2, a shorter, African-American male (identified as Tamirius D. Gaston). The third individual no longer appears on screen. Mr. Gaston is seen walking backward away from Mr. Smith as Mr. Smith

continues to walk forward toward Mr. Gaston. Officer Ruha appears on camera approaching both males at approximately 4:40:57. A second patrol car arrives at approximately 4:41:00 as Officer Ruha points his TASER at Mr. Smith. A red dot from Officer Ruha's TASER laser sight can be seen on Mr. Smith's chest. At this point, Mr. Smith turns toward Officer Ruha. Initially, Mr. Smith's right foot is forward. Mr. Smith then shifts his weight and steps back with his right foot, so that his left foot is now forward and his body is slightly bladed to Officer Ruha. At approximately 4:41:05, Mr. Gaston begins dropping to his knees. At about the same time, Mr. Smith's body visually stiffens and Mr. Smith falls backward. At approximately 4:41:12, Officer Niebuhr approaches Mr. Smith and rolls Mr. Smith over onto his stomach. At the same time, Mr. Gaston is seen crawling in the direction of Mr. Smith and Officers Ruha and Niebuhr. As Officer Niebuhr is approaching Mr. Smith, Officer Ruha is heard calling into the dispatcher. At approximately 4:41:18, Officer Ruha advises the dispatcher that the suspect has been "tased." At approximately 4:41:19, Officer Niebuhr kneels and begins to handcuff Mr. Smith. Officer Niebuhr then moves toward Mr. Gaston and places handcuffs on Mr. Gaston at approximately 4:41:49. At approximately 4:42:56, Officer Ruha and a third officer assist Mr. Smith to his feet.

At approximately 4:44:43, as he is being placed in the rear of a patrol car, Mr. Smith says, "Can you all let me go?" Beginning at approximately 4:45:06, Mr. Smith can be heard yelling, "You all still some fags," "Hey, bitches, Niggas," and "Shut the fuck up you lying bitch." At approximately 4:45:50, Mr. Smith says, "Get me on out. I'll fuck your ass up, you fucking fag." At approximately 4:47:02, Mr. Smith is still swearing angrily and can be heard calling someone "fucking pussies." The dispatcher is heard on radio traffic confirming the officers are en route at 4:48 a.m. The officers arrive at the booking location and Mr. Smith is escorted out of the patrol car at approximately 4:50:46.

## DISCUSSION OF USE OF FORCE

Allegations of excessive force are examined by the courts under the Fourth Amendment prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394 (1989) is the landmark case frequently referred to when assessing use of force incidents. Per *Graham v. Connor*, an officer is not to be judged with 20-20 hindsight, but rather by a reasonable officer on the scene during events which are often tense, uncertain, and rapidly evolving. It should be noted that in a number of federal court cases (e.g., *Plakas v. Drinski*, *Carswell v. Borough of Homestead*, and *Scott v. Edinburg*), the courts have determined the Fourth Amendment does not require officers to use the least intrusive alternative, or even less intrusive alternatives, when determining use of force. The only test is whether the officer's actions were reasonable. Therefore, it is only necessary to determine if Officer Ruha's use of a TASER was reasonable.

In *Graham v. Connor*, the U.S. Supreme Court established a three-prong test to determine the "reasonableness" of an officer's actions. Generally, these three are:

1. What is the nature of the offense? What brought the officer and the suspect together in this incident?
2. Does the suspect pose an immediate threat to the officer or someone else?
3. Is the suspect trying to flee or evade arrest?

Of these three, the greatest weight is given to the second item listed, or the determination if the suspect poses an immediate threat. As mentioned in the Ninth Circuit's decision in *Lundberg v. County of Humboldt*, the "most important element in the *Graham* analysis is whether the suspect posed an immediate threat to the safety of the officers or others." Per *Graham v. Connor*, it is the officer's perception of a threat which dictates the appropriate response.

In examining Officer Ruha's possible perception of a threat, I first looked at the nature of the call. In this case it was in response to a possible fight in progress involving several adult males. This call in itself would be expected to involve a threat of violence. Any disturbance call of this

nature consists of angry people who have already demonstrated a propensity for violence. According to the International Chiefs of Police (IACP) study, "Police Use of Force in America 2001," disturbance calls are the second most common situation in which officers are required to use force. The most common situation is during an arrest. This incident involved both a disturbance call and an arrest.

A second indicator of a greater potential for assaults on police officers is if the suspect is under the influence of alcohol or other substances. Again referring to the IACP report, 53% of the males involved in a use of force incident were under the influence. Per Officer Ruha's report, Mr. Smith had slurred speech, glossy eyes, and a "strong odor of intoxicants." Later, Mr. Gaston stated Mr. Smith was intoxicated. Disturbance calls involving individuals under the influence increase the likelihood of the suspects behaving irrationally - to include fighting with police. It would be tactically sound for an officer to approach this situation with caution in preparation for a potential attack.

Both Officer Ruha and Officer Niebuhr reported seeing two "male blacks" in the street, and stated they believed the suspects would continue to fight. In Officer Ruha's report, he wrote that the two suspects were "actively fighting." In his report, Officer Ruha stated he activated the patrol car lights, which can be seen flashing in the video. In the video, Mr. Smith is seen advancing toward Mr. Gaston, as Mr. Gaston backs away from Mr. Smith. In spite of the flashing lights and police presence, Mr. Smith continued to advance upon Mr. Smith. This indicates Mr. Smith was undeterred by the presence of Officers Ruha and Niebuhr, and his focus continued to be on pursuing Mr. Gaston. Mr. Smith's actions indicate an aggressive, threatening attitude which will not be dissuaded by police presence alone. This is not rational behavior. Most people who are in command of their faculties do not commit crimes or aggressive acts in the presence of the police. The fact that Mr. Smith continued to walk toward Mr. Gaston in a threatening manner indicates he was behaving in an angry, irrational manner. People who are under the influence and cannot be reasoned with are dangerous to police officers. In response to this threatening behavior,



Officer Ruha responded in a tactically sound manner by removing his TASER from its holster as he approached the two suspects.

Officer Ruha appeared to have focused the majority of his attention on Mr. Smith. This also is tactically sound as Mr. Smith is the larger of the two suspects and had exhibited aggressive, stalking behavior. Per the reports of Officers Ruha and Niebuhr, Officer Ruha gave loud commands for the suspect to get on the ground. Mr. Smith stopped advancing on Mr. Gaston, and then turned to face Officer Ruha. Even though it cannot be heard on the video, there is no reason to believe Officer Ruha did not do exactly as he and Officer Niebuhr reported - giving commands to Mr. Smith to get down on the ground and providing a warning that if Mr. Smith did not comply, he would be "tased." Such actions and commands are taught in basic TASER (as well as police academy) training and most officers do so habitually. At this point, Mr. Smith is seen on the video turning to face Officer Ruha. Mr. Smith can be seen shifting his body weight and stepping back slightly with his right foot so that his body is bladed in what could be described as a fighting stance. Although any verbal exchange between Officer Ruha and Mr. Smith cannot be heard, Mr. Smith does not show any signs of compliance. Mr. Smith fails to show the palms of his hands or raise his hands in a surrender position, and he fails to take any action indicating he is going to the ground as ordered.

Both Officers Ruha and Niebuhr reported they thought Mr. Smith was going to fight Officer Ruha. Even if one were to ignore both officers' statements that they saw the two suspects fighting, it is not unreasonable for the officers to believe Mr. Smith would resist arrest based upon the nature of the call, Mr. Smith's aggressive action toward Mr. Gaston observed on video, and Mr. Smith's failure to obey Officer Ruha's commands or show other signs of compliance. Based on these events, it was reasonable for Officer Ruha to feel threatened and it was reasonable for Officer Ruha to deploy his TASER.

Some may advocate officers going "hands-on" in such a situation. However, research conducted by Sgt. Chris Butler of the Calgary Police Service and Dr. Christine Hall of the Canadian Police Research Center ("New Study Ranks Risks of Injury from 5 Major Force Options" and also discussed by the

Force Science Institute in its Force Science News report #102, [www.forcescience.org](http://www.forcescience.org)) has shown that the possibility of injury, for both the suspect and the officer, increases when officers attempt to use personal weapons or control holds. When responding to a resisting, threatening suspect, research determined the TASER was a safer option for both officers and suspects than the use of empty-hand techniques.

After the TASER probes impact Mr. Smith, he fell backward onto the lawn. Officer Niebuhr then moved forward, placed handcuffs on Mr. Smith, and controlled him. Per the TASER download report, only one cycle (5 seconds) of the TASER was applied. Officers Ruha and Niebuhr acted appropriately by immediately moving forward to secure Mr. Smith once the TASER had eliminated any resistance. At no point does Officer Ruha or Officer Niebuhr exhibit behavior that would be described as angry or out of control. Throughout the incident, both appear to be calm and professional. They perform their duties in a routine manner with no outward display of emotion.

It is important to note that it is the perception of the officers on scene which is critical to the determination of whether the force used was appropriate. Although not clearly spelled out in the reports, both officers did write they thought Mr. Smith was behaving in such a manner that the officers thought Mr. Smith would fight. As mentioned earlier, this is a reasonable assumption based upon the nature of the call and Mr. Smith's actions. Additional potential threats include the suspect not yet secured (Mr. Gaston) and other individuals on the porch. Officers Ruha and Niebuhr's belief that Mr. Smith posed a threat is also supported by Mr. Smith's actions after he was handcuffed. Mr. Smith is seen on video angrily shouting and making threats. Per Officer Ruha's report, Mr. Smith is verbally assaultive and wanted to fight the police. This, too, indicated Officer Ruha was correct in his perception that Mr. Smith posed an immediate threat.

## **KENOSHA P.D. POLICY REVIEW**

Per the Kenosha Police Department Policy and Procedure Manual, Section VII titled "Use of Less-Lethal Force, paragraph A:

*The use of a Conducted Energy Weapon has been authorized by the Kenosha Police Department and may be used by trained personnel when a subject is threatening to actively resist, or is actively resisting an officer and the subject poses an articulable threat of harm to an officer or another person.*

The manual then states under the same section, paragraph B:

*An officer shall not brandish, display or threaten the use of a conducted energy weapon unless he or she can reasonably conclude its use may become justified and is anticipated.*

Based on the above, Officer Ruha was justified in brandishing the TASER as its use was anticipated. It would have been inadvisable for Officer Ruha to approach Mr. Smith, who was aggressively advancing on Mr. Gaston, and not draw his TASER. Due to Mr. Smith's actions and non-verbal behavior, Officer Ruha accurately perceived Mr. Smith to be a threat - both to officers on scene as well as to Mr. Gaston. After his arrest and being placed in a patrol car, Mr. Smith continued to act in a threatening manner, making threats to the officers and possibly others on the scene.

## **ALLEGED DISCREPANCY - POLICE REPORTS AND VIDEO**

There are a number of potential pitfalls when comparing video to reports. As outlined in Force Science News report #114 ([www.forcescience.org](http://www.forcescience.org)), Dr. Bill Lewinski, director of the Force Science Institute, cautioned against ignoring realities of human memory; particularly after a stressful experience such as when force is used. Per Dr. Lewinski, "After a high-stress experience... an officer's memory is likely to be fragmentary at best." "It would be extremely rare, if not impossible, for an officer involved in a fluid, complex, dynamic, and life-threatening encounter to remember peripheral details beyond that which he or she focused." "The average person will actually

miss a large amount of what happened in a stressful event and, of course, will be completely unaware of what they did not pay attention to and commit to memory."

It's also common for officers and witnesses to unintentionally report information that didn't occur. Individuals don't do this to be deceptive, but as an instinctive reaction in an effort to fill in memory gaps. It is normal for officers, suspects, and witnesses to not remember parts of what happened. After a stressful situation, difficulty may occur in transferring information to memory. Immediately after a critical incident, it is not unusual for post-incident amnesia to occur.

Humans see clearly, with full acuity, over only 2-3 degrees of visual angle. Particularly when dealing with multiple objects (such as when there is more than one suspect), officers' visual focus typically rapidly shifts from one object to another. As gaze and attention are rapidly shifted among the threats, gaps in vision occur.

Per Force Science research, "multiple perceptual changes occur during high stress encounters. This is problematic as perception and memory are intimately related." It is also common for officers to lose peripheral vision in high stress situations resulting in "tunnel vision." An officer's focus would be on the perceived threat and would ignore superfluous information.

One should never assume an officer sees everything a camera sees, nor should one assume an officer does not see what a camera failed to pick up. The dash camera is oriented in one direction, while the officer's head is constantly moving and, per training, scanning for additional threats. Also, once the officer leaves the car, the visual angles and field of view will be completely different than that offered by the dash camera. Even in a case with a head-mounted camera, in which the camera and head are oriented in the same direction, an officer's specific focus may be elsewhere.

In spite of what I've presented above and even though there are multiple scientific, physiological reasons for a written report not to directly coincide with a video, I see nothing in

the police reports that contradicted what was seen on the video. I did not see any "grave discrepancy" or "unconscionable disparity." I believe the discrepancy mentioned in Attorney Hertz-McGrath's letter focuses on two statements found in the police reports. The first is Officer Ruha's statement that "two subjects were in boxer stances and were hitting each other with fists." The second is Officer Niebuhr's statement that Mr. Smith continued to approach Mr. Gaston "with his arms up looking ready to fist fight with him."

We know, in fact, that Mr. Smith and Mr. Gaston were involved in a fight. Mr. Gaston admitted to it. It doesn't appear in any of the materials I reviewed that Mr. Smith ever denied being in a fight with Mr. Gaston. There is the physical evidence of the scrapes on Mr. Smith's face. We also have the 911 call and Mr. Smith's behavior as indicators a fight did occur. I don't believe there is any question that there was a fight involving Mr. Smith and Mr. Gaston. It is logical to believe the officers witnessed this fight, but the camera view failed to capture the incident; most likely because the majority of the fighting took place when the suspects were not clearly in camera view, but not necessarily out of the officers' view. Obviously, events occurred prior to the arrival of the police which were not captured by the camera, events occurred off-camera after the arrival of the police but prior to the TASER deployment, and events occurred after the TASER was deployed which were also out of the camera's view. It is an unrealistic expectation that all events related to a call would occur on camera. If Officer Ruha had parked his patrol car at a different angle, the dash camera could have been oriented differently so that the dash camera was pointing straight down the street and none of the activity would have been recorded. If all of the activity took place to the side of the vehicle out of the camera's view, I don't think the veracity of the police reports would have been questioned. Similarly, because some of the activity took place out of the limited view of the dash camera, I see no reason why the police reports should be in doubt.

Particularly at the beginning of the video, much of the camera view is obstructed by trees, houses, poles, etc. It is early morning and the lighting is poor. The video quality is

less than ideal. A brief glimpse of three individuals standing in the street is viewed at approximately 4:40:45. The dash camera's view is then obstructed as Officer Ruha continued to drive down the street and then made a right turn onto the street where the suspects were standing. As the patrol car pulled to a stop, the suspects again disappeared from the camera's view. We also have no idea of Officer Niebuhr's field of view as he approached as he was in a different vehicle. Officer Ruha's visual field is most likely much greater and clearer than that of a dash camera. It is not possible to know what happened during the incident, out of the camera's view, unless you were there. Therefore, there is no reason not to believe the statements of those who were present (i.e., the officers and Mr. Gaston). Mr. Gaston admitted he and Mr. Smith were fighting and Mr. Gaston even gave a reason as to why they were fighting. It would be unreasonable to deny officers' and a suspect's first-hand accounts simply because it can't be seen on video.

In the second possibility for a discrepancy alluded to in the Attorney Hertz-McGrath letter, Officer Niebuhr reported that Mr. Smith continued to approach Mr. Gaston with "his arms up looking ready to fist fight with him." First, we must realize that both Officers Ruha and Niebuhr have a different field of view than the dash camera located in Officer Ruha's patrol car. As Officer Ruha's patrol car approached Mr. Smith at approximately 4:40:50, Mr. Smith's hands appeared to be at waist level. Both Mr. Gaston and Mr. Smith are temporarily out of view of the camera, but both later appear as Mr. Gaston continues to back away from the advancing Mr. Smith. We have no idea of the actions or postures of either of the suspects when out of the camera view. We also don't know Officer Niebuhr's field of view, but it was obviously different than that of the dash camera in Officer Ruha's vehicle. Although Mr. Smith's hand/arm position is not always seen in the video, Mr. Smith's actions indicated he was aggressively stalking Mr. Gaston and was attempting to re-engage Mr. Gaston in a physical confrontation.

Per Officer Ruha's report, "The male black with only the pants on was still trying to fight the other male even in our presence." I agree with this statement and it is verified by the video. Mr. Smith is seen advancing towards Mr. Gaston,

undeterred by the flashing lights and police presence. This is an excellent indicator of Mr. Smith's state of mind in that he is likely to be violent and possibly resist arrest. Officer Ruha reported that he gave orders to Mr. Smith to get on the ground or he would be "tased," and Mr. Smith's response was to "square up" to Officer Ruha. Again, this is verified in the video as Mr. Smith is obviously not going to the ground and he takes a bladed stance to Officer Ruha. It can't be heard when Officer Ruha first issued the commands, but it is clear that Officer Ruha is pointing the TASER at Mr. Smith at approximately 04:41:00 and the TASER probes were deployed at approximately 04:41:05. At a minimum, Mr. Smith had five seconds to respond to Officer Ruha's commands. If Officer Ruha had given commands as he approached Mr. Smith (which is the more likely scenario), Mr. Smith would have had even more time to respond. Five seconds is sufficient time for a suspect to exhibit some type of compliance. Mr. Smith failed to demonstrate any compliance. Five seconds is a long time to face a threat that is standing only a few feet away. At that distance, Mr. Smith could have completed an attack on Officer Ruha in less than a second. Officer Ruha wrote, "I believed this subject was going to fight me as well." Based upon the nature of the call and Mr. Smith's aggressive actions, it is reasonable for Officer Ruha to believe an immediate threat existed.

Under stress (when facing a threat), officers may give little thought to behavior and instinctively do what they have been trained to do. This is the fastest response and a life-saving one. Officer Ruha perceived a threat and instinctively drew his TASER. When Mr. Smith failed to respond to Officer Ruha's commands, Officer Ruha performed appropriately.

Therefore, I agree with Officer Ruha's and Officer Niebuhr's assessment that Mr. Smith was a threat. It is unfair to assume an "unconscionable disparity" exists simply because Mr. Smith and Mr. Gaston cannot be seen fighting on a poor quality video in low-light conditions, on a one-directional camera located in a different position than the officers. It would be unnecessarily burdensome, misleading, and ineffective to assume only what can clearly be viewed on a video is factual. The courts have never imposed such a standard.

## **CONCLUSION**

### **Was the use of force reasonable?**

The use of a TASER by Officer Ruha was not only reasonable as defined by *Graham v. Connor*, but it was also tactically advisable based on Mr. Smith's aggressive, threatening behavior.

There are several pre-incident (TASER deployment) indicators that Mr. Smith posed an immediate threat. These include:

1. The nature of the call (disturbance call).
2. The 911 call stating several people were about to fight.
3. Mr. Smith and Mr. Gaston were in the street as described by the 911 caller.
4. Officer Ruha believed Mr. Smith to be intoxicated (and Mr. Gaston later said Mr. Smith was intoxicated).
5. Mr. Smith continued to advance toward Mr. Gaston without regard to the presence of the police officers.
6. Mr. Smith failed to show signs of compliance or obey the commands of the police officer.
7. Mr. Smith turned toward Officer Ruha in what could be described as a fighting stance.

Post incident events which would indicate Officer Ruha's perception that Mr. Smith posed an immediate threat was accurate include:

1. Mr. Smith struggled with officers after being handcuffed.
2. Mr. Smith made threats to others and was verbally abusive.
3. Mr. Smith stated he wanted to fight the officers.

### **Was the use of force within Kenosha P.D. policy?**

Per Kenosha P.D. policy, an officer is not to "brandish, display, or threaten the use a Conducted Energy Weapon unless he or she can reasonably conclude its use may become justified and is anticipated." Officer Ruha was responding to a disturbance call to a possible fight in progress involving several adult males. As Officer Ruha arrived on scene, Mr. Smith continued to move aggressively toward Mr. Gaston in spite of police presence. It was tactically sound for Officer Ruha to believe the use of a



TASER may be necessary and to have the TASER in his hand in preparation of its use.

Per Kenosha P.D. policy, officers may use a Conducted Energy Weapon "when a subject is threatening to actively resist, or is actively resisting and the subject poses an articulable threat to an officer or another person." As mentioned above, Mr. Smith failed to comply with Officer Ruha's commands and demonstrated he was a threat to officers and Mr. Gaston. Officer Ruha was within Kenosha P.D. policy when he drew and fired his TASER in probe mode. It would have been tactically inadvisable for Officer Ruha to have done otherwise.

**Does a malicious discrepancy exist between the video and the reports?**

There are no discernible discrepancies between what is viewable on the dash camera video and the reports of Officer Ruha and Officer Niebuhr. All evidence indicates a fight did occur between suspects Mr. Smith and Mr. Gaston, and officers from the Kenosha Police Department properly responded, resolved, and reported the incident.

When making an arrest, the best possible outcome is for the officer to obtain compliance or control without any injuries to the suspect or the officer. That's what happened in this situation - Officer Ruha successfully arrested Mr. Smith, who indicated he was an immediate threat, without either officers or Mr. Smith suffering any injuries.

## QUALIFICATIONS

Chuck Joyner  
President, Survival Sciences, LLC  
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(310) 962-9122

Chuck Joyner served in the CIA from 1983-1987, and was a FBI Special Agent from 1987 until his retirement in 2011. He has extensive experience in use of force training and consultations. Chuck has lectured internationally and throughout the U.S. on myriad law enforcement topics.

## PUBLICATIONS

*Advanced Concepts in Defensive Tactics; A Survival Guide for Law Enforcement*, published in 2010 by CRC Press, Taylor & Francis.

Contributor to law enforcement periodicals to include the *FBI Law Enforcement Bulletin*, *PoliceOne.com*, and *The Tactical Edge*.

## CERTIFICATIONS

Certified by the Force Science Institute, Ltd. in force science analysis.

Certified by the FBI as a Master Police Instructor, General Police Instructor, Firearms Instructor, Defensive Tactics Instructor, Chemical Agents Instructor, Fitness Instructor, and Tactical Instructor.

Certified by TASER International as a TASER instructor.

Certified by California POST as a SWAT and sniper instructor.

Inducted into the martial arts Masters' Hall of Fame as Instructor of the Year in 2006.

## MEMBERSHIPS

National Tactical Officers Association (NTOA)  
International Association of Chiefs of Police (IACP)  
FBI National Academy  
FBI Retired Agents Association

## EXPERIENCE

Testified in federal and state courts.

Creator of the Dynamic Resistance-Response Model (DRM); a modern use of force model first presented in the *FBI Law Enforcement Bulletin*, September 2007.

Career focus on training and criminal investigations.

Provided instruction on several law enforcement topics to thousands of agents, law enforcement officers, and military personnel.

Principal Firearms Instructor, Principal Defensive Tactics Instructor, and Principal Tactical Instructor for one of the largest FBI field offices.

Lead/certifying instructor in providing firearms, defensive tactics, and chemical agents instruction to certify officers from other agencies as instructors for their respective agencies.

Created training curricula, authored lesson plans, and prepared written and practical examinations of proficiency.

FBI Regional SWAT Team operator (entry team, sniper, and grenadier) and SWAT Team Commander.

Managed FBI critical incident programs to include SWAT, Evidence Response Teams (Crime Scene Investigations), Special Agent Bomb Technicians, Weapons of Mass Destruction, Crisis Management, Hazardous Materials Response Teams, and Special Events.

Managed multi-agency critical incidents, planned and coordinated protection details of U.S. government officials, led high-risk tactical operations, and coordinated the FBI response to special events.

Created and managed two unique programs for the FBI. Met with executive level foreign government officials, researched applicable U.S. and foreign laws, and established program policies and training guidelines.

Key note speaker for law enforcement conferences and training seminars.

## EDUCATION

M.A., Organizational-Industrial Psychology, University of West Florida, 1982

B.A., Psychology, University of West Florida, 1981

B.A., Biology/Pre-professional, University of West Florida, 1981