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NEWS RELEASE

May 12, 2015

Subject: February 17, 2015 shooting death of Matthew Lundy

FACTS

On February 17, 2015, the Eaton County Sheriff's Department had an officer-involved shooting during an incident that arose when deputies were dispatched to a vehicle stuck in snow on a roadside where the driver might have been intoxicated. The shooting resulted in the death of the driver, Matthew Lundy.

The Michigan State Police immediately began a thorough, independent investigation of the shooting. The investigation was led by D/Sgt. Jeffery Yonker. Their report and evidentiary materials were submitted to this office on 04/22/2015. Prosecutor Doug Lloyd and Chief Assistant Prosecutor Neil O'Brien have individually and jointly reviewed these documents and materials, which included among other records: fourteen MSP narrative reports, an original ECSD narrative report, an original Eaton Rapids Police Department assist report, written statements by the three ECSD deputies present at the scene of the shootings, in-dash cameras, body cameras from several ECSD personnel, audio recordings at the time of the incident, interviews with friends and family of Mr. Lundy, a cell phone video from a neighbor to the shooting scene, MSP technical services reports and enhanced videos, MSP crime lab reports, text messages and call records from Mr. Lundy's cell phone, an autopsy report and toxicology report, and scene photos.

The following is a summary of what the MSP investigation revealed:

On 02/17/2015 at 7:11 am, a 911 call was received by Eaton County Central Dispatch from a citizen, who reported a vehicle in a ditch that had no visible registration plate, and the driver appeared intoxicated. The citizen was also concerned that the car might be connected to recent local break-ins.

Eaton County Sheriff's Deputies Tad Schwartz and Chris Cunningham met the citizen at Five Point Hwy. and Canfield Rd., and were apprised of the citizen's information. Dep. Schwartz handled the citizens' breaking and entering complaint a few weeks earlier. Dep. Schwartz and Dep. Cunningham were the first officers to find the car at 7:28 am. It was occupied alone by Matthew Lundy. Dep. Cunningham was the primary deputy handling the initial encounter; Dep. Schwartz was acting as Dep. Cunningham's field training officer. Dep. Schwartz' body cam video recorded the encounter as they approached Mr. Lundy's car.

Weather conditions were very cold: single digit temperature with wind chill below zero. There were light flurries. The road was snow covered. The Chrysler Pacifica was stopped in snow off the east side of the road facing south toward oncoming traffic. The car was running.

At 7:32 am¹, the deputies approached the passenger side of the car because deep snow blocked easy access to the driver's door. Mr. Lundy said that he was okay (not hurt). The deputies described him as being lethargic, intoxicated, and having slow speech. Dep. Cunningham told Mr. Lundy to get out of his car, after which he repositioned himself at the left rear of the Pacifica. Dep. Schwartz remained adjacent to the right rear.

Dep. Cunningham again asked Mr. Lundy to get out of the car, but Mr. Lundy had difficulty due to snow depth blocking his door. Dep. Cunningham told Mr. Lundy to push his door open farther. At 7:33 am, Mr. Lundy labored to get out of the driver's door. According to his written statement, Dep. Cunningham began to approach Mr. Lundy to help open the door without success.

Dep. Schwartz's vantage point was directly across from the passenger side windows. He could see Mr. Lundy trying to get out through the driver's door. According to his written statement, he saw Mr. Lundy digging in a right side pants pocket and pull out a silver object as he was getting out of the driver's door, as Dep. Cunningham approached the driver's door. Mr. Lundy raised a hand toward Dep. Cunningham.

According to his written statement, Dep. Cunningham saw Mr. Lundy raise and point a handgun at his chest, and Mr. Lundy told Dep. Cunningham, "**Don't fucking move.**" Dep. Cunningham slapped at the gun, and Mr. Lundy stumbled backward. Dep. Schwartz's body cam picked up brief dialogue by both Dep. Cunningham and Mr. Lundy at this moment, but the words were garbled and not decipherable.

Dep. Cunningham backpedaled to his right, telling Dep. Schwartz, "**He's got a fucking gun!**" At 7:33:10 am, seconds before this statement, Dep. Schwartz had un-holstered and raised his Glock handgun after seeing the silver object coming from a right side pocket and the driver's arm being raised at his partner. When he heard Dep. Cunningham announce "gun", Dep. Schwartz shot nine rounds through the passenger side rear windows in the direction of where Mr. Lundy had been standing. According to the autopsy report, several of these shots likely hit Mr. Lundy's left torso, arm, forearm and shoulder. Dep. Cunningham did not fire his weapon.

At 7:33:24 am, Dep. Schwartz asked if the driver was 'down'; Dep. Cunningham confirmed that he was. At 7:33:30 am, Dep. Schwartz radioed for EMS and a supervisor. At 7:33:42 am, Dep. Schwartz reported that the driver still had a gun, and the deputies began backing up to a point of safety behind their ECSD patrol car. At 7:33:49 am, Dep. Schwartz advised Central Dispatch that deputies had fired shots and the driver was down. By 7:34:09 am, the deputies had maneuvered behind their squad car as Dep. Schwartz reloaded his gun. Dep. Schwartz announced to Central Dispatch that shots had been fired. He requested that a supervisor be dispatched to the scene.

At 7:34:31 am, Dep. Schwartz noted, and Dep. Cunningham confirmed that the driver was still moving and his arm had come up. Mr. Lundy was on the ground adjacent to the driver's side of his car. Dep. Cunningham's body cam began recording now, and Mr. Lundy is seen lying in snow next to the car. Dep. Cunningham saw a silver handgun next to the driver at 7:35:07 am, but it is not visible on the videos. One or both of the deputies saw him moving several times between 7:38:03 am and 7:41:21 am.

¹ Times noted are from Dep. Tad Schwartz's body cam recording's display.

During these few minutes time, the deputies gave Mr. Lundy repeated safety commands:

"Stay down! Don't move!" (7:34:35 am – Dep. Schwartz)
"Drop the gun!" (7:34:40 am – Dep. Schwartz)
"Stay down!" (7:43:50 am – Dep. Schwartz)
"Get your hand on your head!" (7:35:21 am – Dep. Schwartz)
"Do not reach for that gun!" (7:35:26 am – Dep. Cunningham)
"Don't you move! Stay where you're at!" (7:35:37 am – Dep. Schwartz)
"Put your hand on your head!" (7:35:58 – Dep. Schwartz)
"Put your hand behind your back NOW!" (7:36:35 am - Dep. Cunningham)
"Stop moving around! Stay where you're at!" (7:36:38 am – Dep. Schwartz)
"Put the hand next to the gun behind your back!" (7:37:25 am – Dep. Schwartz)
"Put your hand behind your back!" (7:38:35 am – Dep. Schwartz)
"Put your hand behind your back!" (7:38:58 am – Dep. Schwartz)
"Let's see your hands!" (7:41:25 am – Dep. VanDorpe)
"Put the hand behind your back!" (7:41:30 am – Dep. Schwartz)
"Put the hand behind your back!" (7:41:39 am – Dep. Schwartz)

When Theresa Dep. VanDorpe arrived at 7:38 am, she saw the first two deputies positioned behind the cover of their car with guns drawn and pointed toward a Chrysler Pacifica. She saw that the Pacifica's passenger side windows were broken, and the driver's side door was open. She was alerted by Dep. Schwartz that the driver had a gun by his hand, and that she needed to get her long gun (7:38:21 am).

Dep. VanDorpe positioned herself at the rear of the first ECSD cruiser. From her position, Dep. VanDorpe saw Mr. Lundy lying on his right side facing the deputies. Dep. Schwartz advised her there was a small gun in front of the driver by his hand, and his hand had been moving (7:38:46 am). Dep. Schwartz advised her that no one else was in the car (7:38:19 am), and that he and Dep. Cunningham were unharmed (7:40:14 am). Dep. Schwartz inquired about a body shield (used to protect police when approaching a suspect), which might be with road Sgt. Tom Campbell.

Eaton Rapids Police Officer Richard Dover arrived at 7:41 am and remained with his vehicle, several car lengths further north of the ECSD cars. ECSD deputies did not appear to update Officer Dover on events.

During a lull in dialogue and radio traffic, a metallic **"click"** sound is clearly heard (7:41:46 am) on both Dep. Schwartz's and Dep. Cunningham's body cams. Dep. Schwartz immediately announces **"He just clicked something!"** (7:41:48). Dep. VanDorpe then fired one shot with her rifle at Mr. Lundy (7:41:49). Dep. VanDorpe explained in her written statement that she believed the driver was trying to fire his gun at them. She saw continued movement, and did not think the first round had an effect on the driver.

Seconds later, a school bus crested a hill on Canfield Rd., approaching from the south. Dep. VanDorpe yelled to Mr. Lundy, **"Don't move!"** (7:42:04 am) and Dep. Schwartz yelled to him **"Don't you move!"** (7:42:05 am). Dep. VanDorpe fired her rifle once more (7:42:10 am). She explained in her report that she believed the driver was again trying to get into a position to fire his gun at the deputies. Dep. Schwartz radioed a 'priority' call to Central Dispatch, and to advise the school bus to stop approaching because shots had been fired.

Mr. Lundy was seen still moving for several minutes. At 7:42:32 am, he moved and Dep. Schwartz heard a gargling sound. Another metallic "click" sound was heard (7:42:45 am), and Dep. Schwartz announced, "**Another click!**" (7:42:42 am), but no further shots occurred. Mr. Lundy was still seen moving at 7:44:30 am and commanded by Dep. Schwartz to "**Stay down!**" (7:44:34 am). He was still seen moving by Dep. Cunningham at 7:44:58 am, and Dep. Schwartz ordered him to "**Put your hands behind your back!**" (7:45:21). The school bus began backing away at 7:46:01 am.

At least one of Dep. VanDorpe's rifle shots impacted Mr. Lundy. Notably, one shot impacted the right side of his face, and fractured his jaw, thyroid cartilage and a rib, lacerated his trachea, perforated an artery and lung, and was recovered from the right side of his back. This caused extensive bleeding.

Sgt. Tom Campbell arrived, and Dep. Schwartz advised him (7:49:58 am) that when Mr. Lundy fell, the gun landed 'here' [pointing off camera] and he was doing 'this the whole time' [gesturing], but that he was not moving any more. Dep. Schwartz reported that the gun was underneath Mr. Lundy, with his hand nearby.

By 8:30 am, an Eaton County Sheriff Department arrest team was assembled on site and approached Mr. Lundy behind protective shields. He was secured. Mr. Lundy was pronounced dead at the scene at 8:35 am. A silver Derringer handgun was found adjacent to his body.

The Derringer was examined by the State Police Crime Lab. Notably, two cartridges were found inside the gun, each with damage to the firing pins signifying a previous attempt to fire them. The Derringer operated poorly. Its top barrel would not fire. Pin strikes on the cartridge primer lacked sufficient force to discharge, but did leave marks consistent with an attempt to fire the gun.

Mr. Lundy was also found with loose cartridges in his pockets and center console, as well as a box of .22 cartridges in the car.

Autopsy:

The cause of Mr. Lundy's death was multiple gunshot wounds, according to an autopsy report through Sparrow Hospital. The manner of his death was homicide.²

Mr. Lundy had a variety of entrance wounds on his left shoulder, arm and chest. One entering his chest fractured some ribs, lacerated his lung and exited through his back. The bullet paths entering his arm did not appear to hit vital organs. A significant wound occurred to the right side of Mr. Lundy's face that fractured his jaw, perforated an artery and his lung, and resulted in a lot of blood in his trachea (throat) and bronchi (lungs).

² This is a medical term of art used by medical examiners, not a legal term used by prosecutors, judges and our criminal jury instructions. Autopsy reports announce a manner of death that falls into one of several limited categories: accident, suicide, homicide, natural or indeterminate. Deaths are reported in the medical profession as having been caused by "homicide" when they result from a voluntary act by one person against another that causes physical harm. The medical term does not address the actors' intent to kill, or issues of legal justification or mitigation, all of which are critical in determining criminal culpability.

Toxicology testing reported low levels of alcohol and THC, plus prescription medicines. The alcohol level was consistent with the small number of beers Mr. Lundy reportedly drank at his friend's home between midnight and 2:30 am.

Recent Life Events

We will never know with certainty why Mr. Lundy possessed, displayed or attempted to fire a handgun. As a convicted felon, his mere possession of the Derringer violated the law. Further, it was likely a prohibited condition of his felony probation. Mr. Lundy's friend had seen him with the handgun earlier that same night. Text messages and information from witnesses advised us that he had the handgun due to threats by his girlfriend's "ex-", as well as it being an instrument for recently threatened self-harm. However, the manner of Mr. Lundy's unannounced display of the handgun toward a deputy was the most critical link in the chain of events that led to the two deputies' decisions to shoot back at him.

A review of the facts – most of which were unknown to the responding deputies on 02/17/2015 – establishes that in the previous few days Mr. Lundy was experiencing upheaval and stressors in his personal life, employment, and probation status, and threatened suicide or creating a confrontation with police that would result in his death. Mr. Lundy's personal life was in turmoil leading up to 02/17/2015. According to interviews with family and friends, as well as phone call and text message records, a variety of crises were merging together:

Relationship with Girlfriend: His tumultuous relationship with his girlfriend was in jeopardy. Recent text messages suggested that they had broken up or were about to break up. Communication was strained. In the morning hours before the shooting, Mr. Lundy ignored dozens of phone calls from his girlfriend.

Felony probation violation looming: He was being supervised by both circuit court and district court probation officers for an on-going felony probation term and pre-trial release on a new retail fraud charge. A probation violation hearing was looming on 02/26/2015, in part because of his recent retail fraud arrest. Mr. Lundy also owed a \$3,500 balloon payment toward a \$9,093.65 restitution debt by late February 2016. Text messages suggested that he did not have the money to pay this on time.

Fear of a return to prison: Mr. Lundy told a district court probation officer/pre-trial services officer, as late as 02/10/2015 that he was stressed about owning the restitution balloon payment, and feared being sent back to prison. Mr. Lundy's mother reported that Matthew had suffered from Post-Traumatic Stress Disorder after being assaulted during a previous prison term. Mr. Lundy's text messages in the days before the shooting reiterated that he would fight a potential return to prison.

Vehicle repossession: Mr. Lundy was losing his transportation. The Chrysler Pacifica was being repossessed. Financing fell through because of inaccurate financial information given to obtain the loan. On 02/16/2015, a car sales manager told Mr. Lundy to return his Chrysler Pacifica by the evening of 02/17/2015.

Housing: His housing with his girlfriend was tenuous at best. He was also not living at the residence his probation officer knew about (his mother), which could have resulted in another violation.

Suicide Threats / Police Confrontation Threats: MSP examined Mr. Lundy's cell phone, which contained text message threads giving insight to his state of mind in the days before the shooting. As of 02/13/2015, Mr. Lundy had texted about the likelihood of him being returned to prison. He saw his options as either fleeing the state, or getting into a shootout with police. Among other comments, Mr. Lundy said:

- *If the cops look for him he's got his banger [gun], and he'll shoot.*
- *He'll die before going back to a cell life.*
- *His life was done.*
- *He'd said his goodbyes and was ready to go.*
- *He's going to see the real judge.*
- *If he got flicked [traffic stop], it would be a good shootout. He would let the police do the job.*

Videos:

The Eaton County Sheriff's Department had deployed body cams for deputies a few weeks before this incident. The variety of video evidence compiled in this case was helpful, but it did not record every detail of the encounter as the public may hope for. The videos passively capture the scene. But capturing the 'perfect angle' at the perfect moment is happenstance because the camera lens is usually clipped to clothing which may point or move away from where the deputy is looking or acting, may be covered by other clothing or external items, etc. Deputies in the field – especially in the midst of a shooting event – are not expected to be video directors.

We also learned that Dep. Cunningham's body cam was not functioning during his initial encounter with Mr. Lundy at the passenger window or on the driver's side of the Chrysler Pacifica. There is no video from his viewpoint of Mr. Lundy getting out of his car, pointing a gun or making a statement. His video began after Dep. Schwartz fired his weapon and the deputies had retreated to a position of cover. The camera was sent to the manufacturer in the hope that images could be recovered. According to the camera manufacturer, Dep. Cunningham's unit was an older model that had known connection problems in the linkage between the camera and recording pieces.

In-car dash cam videos were not directly helpful because they did not show clear views of Mr. Lundy. This was due to how the patrol cars were parked. Audio from the dash cams was tied to dispatch radio traffic, not external events.

A neighbor couple to the shooting event was alerted by the first volley of gun fire, and began to record the encounter through a bedroom window on a cell phone. This video corroborates some of the details in the police body cam videos, including the deputies' repeated commands to Lundy to stop hiding his hands. At 2:33 of this cell phone video the first "click" sound is heard, and Deputy Schwartz's voice is heard acknowledging the sounds, followed by Deputy VanDorpe's first shot.

LAW

Self-Defense

Michigan law gives a person the right to use force or even take a life to defend him/herself or another person under certain circumstances. If a person uses force within our state's definition of self defense, their actions are justified under the law, and they are not guilty of a crime.

Shooting a gun in self defense requires an honest and reasonable belief that he or she was in danger of being killed or seriously injured. If that person's belief was honest and reasonable, he or she could act immediately to defend him or herself, even if it turned out later that he or she was wrong about how much danger they were in. CJ12d 7.15; *People v Riddle*, 467 Mich 116, 119 (2002).

The use of deadly force in self-defense is justified where the actor (1) is not the aggressor, (2) acts under an honest and reasonable belief that he is in danger of death or great bodily harm, (3) retreats from the scene if possible, and (4) the only recourse lay in repelling the attack by the use of deadly force. *People v Heflin*, 434 Mich 482, 502-503, 509 (1990).

The Supreme Court clarified that "a person is never required to retreat from a sudden, fierce and violent attack; nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon." *Riddle*, supra, at 119. A **police officer**, because of his duty and responsibility to protect the public, is not required to retreat in the face of a display of force. *People v Doss*, 406 Mich 90, 102 (1979).

Heflin, *Riddle* and *Doss* notwithstanding, the *Self-Defense Act of 2006* abrogated the duty to retreat under most circumstances:

"an individual who is not engaged in the commission of a crime at the time he uses deadly force may use deadly force against another individual anywhere he has the legal right to be with no duty to retreat if.....the individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or another individual..." MCL 780.972.

Even under the Self-Defense Act, however, self-defense is not justified simply on a belief that deadly force is needed to repel an attack. Rather, the actor's belief must be both honest and reasonable. *Heflin*, supra. The belief does not, however, have to be correct. Self-defense justifies the use of deadly force in response to an honest and reasonable belief that such force is required to prevent death or great bodily harm, even if that belief is in error. *People v Shelton*, 64 Mich App 154, 156 (1975).

Lastly, a person does not have to prove their claim of self-defense – instead, the prosecuting attorney must prove beyond a reasonable doubt that the person did *not* act in lawful self-defense. CJ12d 7.20.

Defense of Others

The law of self-defense applies with equal force to the defense of others. *People v Kurr*, 253 Mich App 317, 321 (2002). Traditionally a person could invoke a claim of the defense of others only where the person had a special relationship to the person they were defending (such as a parent and child). That distinction is no longer important; see *People v Kurr*, supra. More significantly, a police officer has a

duty and responsibility to protect the citizens of his/her community and therefore has the right to use appropriate force in defense of the general public.

CONCLUSION

As is the case in any fatal shooting, it is important to emphasize the purpose of this review. It is not to determine whether the deputy could have or might have done something differently. It is not whether, with the full benefit of hindsight, this tragic death could have been avoided. Rather, the sole question to be answered is whether the death of Matthew Lundy was the result of a criminal act by one or more of the Eaton County Sheriff's deputies involved?

Based upon a review of the facts and the law, it is clear that Mr. Lundy presented an immediate danger of death or great bodily harm to Dep. Cunningham. As such, **Dep. Tad Schwartz** acted properly in defense of his patrol partner and/or in self-defense when he shot at Mr. Lundy through the passenger side of the vehicle. Dep. Schwartz had seen movement of a silver object coming from a pants pocket and an arm being raised toward Dep. Cunningham. At this moment, he un-holstered and raised his handgun. Dep. Schwartz saw Dep. Cunningham suddenly retreat and heard his partner say, "He's got a fucking gun!" His decision to shoot at Mr. Lundy was justifiable because he had an honest and reasonable belief that such force was required to prevent death or great bodily harm – either Dep. Cunningham's or his own, or both.

Based on a review of the facts and the law, it is abundantly clear that Mr. Lundy's actions placed Deputies Schwartz and Cunningham in imminent danger of death or great bodily harm. It is equally evident that from the perspective of the officers that they honestly and reasonably believed that Mr. Lundy posed a threat to not only each of them but also to their fellow officers. As such, both deputies would have been legally justified in shooting at Mr. Lundy under either the doctrine of self-defense or defense of others.

A review of the facts and the law also leads to the inescapable conclusion that **Dep. Theresa VanDorpe** honestly and reasonably believed that Mr. Lundy posed an imminent threat to not only herself but also the other three officers at the scene. She could see evidence of the previous shots fired when she arrived, she saw Mr. Lundy on the ground on his right side facing toward them approximately 42 feet away, she was told that a handgun lay at his side, she heard repeated unheeded commands for him to stop moving, and she saw movement in opposition to those police commands. In that context, when the metallic "click" sound was heard and announced by Dep. Schwartz, it was evidence to that experienced deputy that Mr. Lundy had pulled a gun trigger. At this moment, Dep. VanDorpe fired her rifle for the first time because she and three other officers were in the potential line of Mr. Lundy's attempt to fire his handgun.

For reasons similar to Dep. Schwartz's, Dep. VanDorpe honestly and reasonably feared an imminent danger of death or great bodily harm from Mr. Lundy's actions. Even after her first shot was fired, the deputies noted further movement by Mr. Lundy. The presence of the school bus created another layer of exigency and need for public protection, especially after Mr. Lundy continued to fail to obey police commands after the first rifle shot.

The fact that the gun Mr. Lundy possessed was not fully operational does not change the fact that the deputies honestly and reasonably believed that he posed an immediate threat; they could not possibly have known the gun's top barrel did not work because its firing mechanism was too weak. However, the

firing pin marks on the two bullets remaining in the gun is compelling evidence that the deputies were correct about the origin of the metallic "click" sounds: Mr. Lundy was trying to shoot his gun.

Likewise, the deputies could not have known that Mr. Lundy had recently contemplated suicide – directly or indirectly – or that he threatened to provoke a police shoot-out (a so-called suicide by proxy). That evidence is found in his recent text messages. Coupled with his aggression toward Dep. Cunningham, refusal to comply with reasonable safety commands, and apparent efforts to fire his handgun toward the deputies, it is reasonable to conclude that he was intentionally provoking the deputies to shoot him.

Under these circumstances, the deputies were justified in using deadly force against what would be perceived by any reasonable person as an imminent danger of death or great bodily harm under either the doctrine of self-defense or defense of others.

Douglas R. Lloyd
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