

DO YOUR JOB, EVEN IF IT KILLS YOU?

THE PROFESSIONAL LIABILITY IMPLICATIONS FOLLOWING THE ARREST OF
MARJORY STONEMAN DOUGLAS' SCHOOL RESOURCE OFFICER SCOT PETERSON

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Valentine's Day 2018 changed the world forever in Parkland, Florida. Minutes before the bell rang, a former student armed with an AR-15-style rifle killed 17 people and injured another 17 at Marjory Stoneman Douglas High School. Among the dead were 14 students (ranging in ages from 14-18) and three staff members. Many immediate questions followed: Who did this? How could this happen in Parkland? Who is responsible? Who (else) deserves jail time?

WHO IS RESPONSIBLE?

Of course, the shooter is the direct cause of the killings and injuries. He has already confessed and is awaiting trial. But should others bear at least some responsibility for what they knew, did, or did not do? Should anyone else face criminal charges? Since the tragedy, a search for accountability of all those involved has been exhaustive.

Media reports revealed that the gunman was certainly known to law enforcement long before that fateful Wednesday afternoon. Records show that the police had been called out to his home on numerous occasions in response to a wide range of incidents (18 calls from 2008 to 2017), including callers who worried that he might even carry out a school shooting. Before the shooting, school officials, the Florida Department of Children and Families (FDCF), and a counselor at Henderson Behavioral Health were all also aware of his multiple behavior problems and threats of violence.

The FBI was even made aware of a September 2017 YouTube post by a user with the same name as the gunman, but apparently could not identify that user. In January 2018, the FBI apparently received a tip raising concerns that the gunman was showing a desire to kill people and may carry out a school shooting.

However, a recent development has simultaneously provided relief for some and sparked outrage for others. On June 5, 2019, retired Broward Sheriff's Office Deputy Scot Peterson was arrested and charged with child neglect, culpable negligence, and perjury. Such criminal charges against a member of law enforcement are unprecedented and have sparked a national debate.

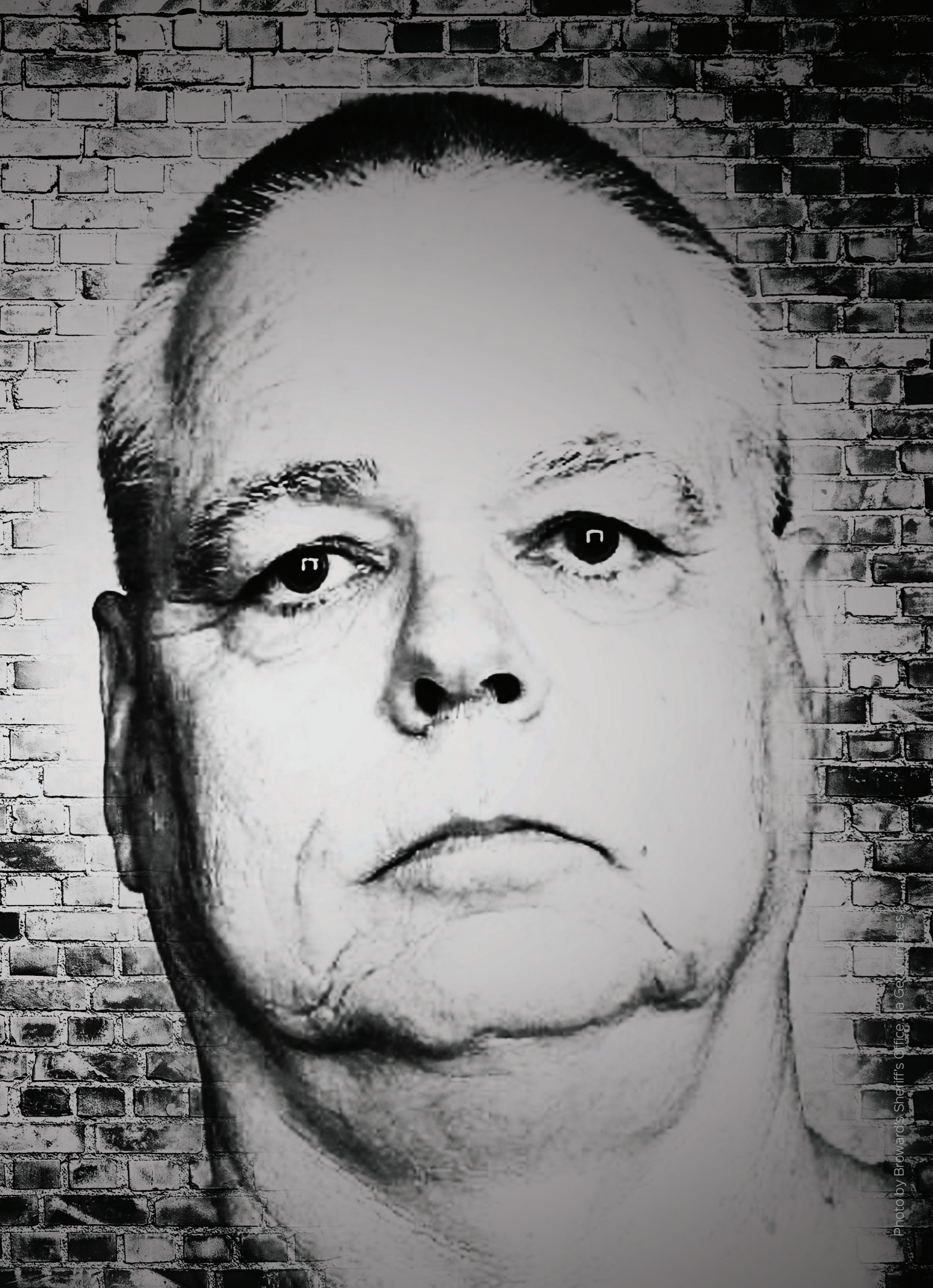


Photo by Broward's Sheriff's Office, via Getty Images

BRINGING CRIMINAL CHARGES

Criminally charging Peterson is uncharted territory. In 2018, then-Florida Governor Rick Scott called for an investigation into law enforcement's response to the shooting. The results of that investigation led to the June 5, 2019, arrest.

For 27 years, Peterson served as the school resource officer (SRO) at Douglas. But he was more than just that. Peterson had substantial training in dealing with an active shooter situation, including numerous trainings on school safety and how to respond to an active shooter incident. Peterson was even an instructor for the Broward Public Schools' "active killer" course, as well as other trainings specifically geared toward responding to and handling active shooter situations.

Despite his specific training and experience, Peterson failed to follow well-established protocols to engage the shooter. According to the charges, Peterson failed to do anything to engage the shooter and prevent further loss of life. Since the shooting, Peterson has been nationally vilified as a result of his failure to act. The parents and families of those killed and injured, the entire Parkland community, state and national politicians, members of law enforcement, and many across the nation have all expressed outrage directed at Peterson. He lost his job, his reputation is destroyed, and now he is facing criminal charges.

Peterson's behavior certainly appears indefensible. Nearly all agree that he should have done something to engage the shooter by entering the building, locating the shooter, and stopping the threat. But he did nothing. But is that a crime, or just the highest level of incompetence?

THE CHARGES BROUGHT AGAINST PETERSON

According to the charges, the shooter fired approximately 140 shots at the school that day. Approximately 75 of them were fired after Peterson arrived on the scene, moved into position, and took cover. While Peterson waited outside the building, the charges assert that one teacher and five students (four of which were under

THE PERSONAL SIDE OF TRAGEDY

THE PARKLAND SHOOTING, SCOT PETERSON, AND HIS RECENT ARREST HIT CLOSE TO HOME FOR ONE OF THE AUTHORS (WAY TOO CLOSE). SIMEON BRIER AND HIS WIFE HAVE LIVED IN THE PARKLAND AREA FOR MOST OF THEIR LIVES, BOTH HAVING GRADUATED FROM STONEMAN DOUGLAS HIGH, WHERE THEY MET AND, AFTER GRADUATION, STARTED DATING.

ON THE DAY OF THE SHOOTING, THEIR OLDEST DAUGHTER, WHO WAS THEN A SOPHOMORE AT THE SCHOOL, WAS IN THE BAND ROOM ADJACENT TO THE BUILDING WHERE THE SHOOTING TOOK PLACE, WHERE SHE HID IN A LOCKER FOR HOURS WHILE THE SCHOOL WAS ON LOCKDOWN AND POLICE SEARCHED FOR THE SUSPECT. THEIR YOUNGEST DAUGHTER, AN EIGHTH GRADER AT THE ADJACENT MIDDLE SCHOOL, WAS ALSO ON LOCKDOWN, AS THE SHOOTER APPARENTLY FLED ACROSS THE MIDDLE SCHOOL'S CAMPUS.

ALL THE WHILE, BRIER'S WIFE STOOD OUTSIDE THE SCHOOL FOR PICK-UP, PRAYING AND WAITING IN ANGUISH FOR ANSWERS. BRIER AND HIS WIFE WERE BLESSED TO BRING THEIR KIDS HOME ON FEBRUARY 14, 2018.

AS THEY ATTENDED FAR TOO MANY FUNERALS, MEMORIALS, PUBLIC MEETINGS AND OTHER COMMUNITY EVENTS ABOUT THE TRAGEDY, SRO SCOT PETERSON BECAME (AND REMAINS) A CONSTANT TOPIC OF DISCUSSION. HOWEVER, EVEN FOR MANY CLOSEST TO THE SHOOTING, PETERSON'S ARREST POSES MORAL AND LEGAL QUANDARIES AND LEAVES MORE QUESTIONS THAN ANSWERS.



the age of 18) were killed because of Peterson. Furthermore, it asserts that one teacher and three students under the age of 18 were shot and injured because of Peterson's inaction.

As a result, the arrest warrant charges that Peterson failed, declined, or refused to attempt to investigate the source of the gunshots fired; fled approximately 75 feet from the building where the shots were being fired and remained there for the entire incident; failed, declined, or refused to move toward the sound of gunfire; and failed, declined, or refused to seek out, confront, or engage the shooter. These findings led to seven felony charges for child neglect, three misdemeanor counts of culpable negligence, and one misdemeanor count of perjury.

While issues of professional liability are nothing new, the Peterson case may be just the latest example of

the expanding scope of responsibility. As previously discussed in *CLM Magazine's* May 2018 issue, "Start Sweating the Small Stuff," considering the impact of the *Keodalah v. Allstate* decision, failing to do your job well may have increasingly harsher impacts. In *Keodalah*, the court held that insurance claims professionals could be personally liable for bad faith and Consumer Protection Act violations for essentially doing their jobs poorly. Peterson's case of 11 criminal charges takes this apparent trend of expanding professional liability to yet another level, also based on Peterson essentially doing his job poorly. Certainly, Peterson deserved to be fired, but is he a criminal?

Putting aside the more mundane perjury charge, the child neglect and culpable negligence charges raise interesting legal issues, both in terms of liability and potential insurance coverage

issues. Although both types of charges appear to sound in negligence, plenty of questions arise concerning whether any civil claims based on the same facts would be covered under a general liability insurance policy, including whether Peterson's inaction would constitute an occurrence or accident; whether Peterson's inaction would fall under an expected or intended exclusion; or whether Peterson's inaction would fall under a physical abuse exclusion. A closer analysis of the charges reveals even more questions about liability.

THE CHILD NEGLECT CHARGES

For the child neglect charges, Florida law provides that "a caregiver's failure to make a reasonable effort to protect a child from abuse, neglect, or exploitation by another person," constitutes a crime. Additionally, "caregiver" is defined as "a parent, adult household member, or other person responsible for a child's welfare."

As an SRO, was Peterson a "caregiver" able to be charged with child neglect? While Peterson had specialized training and certainly seemed more than qualified to at least do something, was he required to act in order to avoid facing criminal charges? Many within the law enforcement and legal communities questioned such charges and raised concerns about their impacts. Having SROs fear the possible criminal ramifications of their actions or inactions could lead to the unintended consequence of having fewer SROs.

Additionally, if Peterson can be criminally charged for his inaction, what about the myriad others who came before him who equally (and perhaps more egregiously) failed to act? The Broward Sheriff's Office personnel who fielded the calls expressing growing concern over the shooter's behavior, specifically those made closest in time to the shooting? The FBI, which failed to properly investigate the YouTube post and tip about the gunman showing signs of wanting to be a school shooter? What about the FDCF and counselor at Henderson Behavioral Health, who seems to fit more squarely into the definition of a "caregiver"? Of

course, there were also other officers who arrived at the scene who equally did nothing to engage the shooter. Did they not also become caregivers who were required to act?

Criminally charging an employee with child neglect is nothing new in Florida. In December 2018, a foster home director (who also happened to be a former police detective) was criminally charged with child neglect and other charges stemming from his failure to prevent and report child molestation by others. In May 2019, a day care owner was arrested on child neglect charges after a girl in the facility's care died in a hot van outside the facility. Also in May 2019, a swimming instructor was criminally charged with child neglect after a toddler almost drowned in a swim class that the instructor was teaching.

However, these cases all appear to be different from the Peterson matter. First, these individuals are traditional caregivers, tasked with ensuring the well-being of children. Is an SRO the same as a foster home director, day care owner, or swimming instructor? Second, none of the other professions appear to have job responsibilities that would require them to put their lives on the line by running into a building and facing a deranged person with an assault weapon.

But if not now, when? Peterson's behavior was so egregious and contrary to his training, and the results of his inaction so catastrophic, that if he is not held criminally responsible, would an SRO ever be? Or would they essentially be immune from criminal prosecution?

THE CULPABLE NEGLIGENCE CHARGES

The culpable negligence charges also present novel legal issues. According to the Florida Supreme Court, culpable negligence is defined as conduct "evinced by reckless disregard of human life or of the safety of persons exposed to its dangerous effects; or that entire want of care which would raise the presumption of indifference to consequences; or such wantonness or recklessness or grossly careless disregard of the safety and

welfare of the public, or that reckless indifference to the rights of others, which is equivalent to an intentional violation of them." In the arrest warrant, Peterson is not being charged with doing something that recklessly endangered others, but instead failing to do something that might have prevented death or injury to others, which is what Peterson was trained and paid to do.

The arrest warrant may conflate moral causation/obligation with legal causation/obligation. Morally speaking, it seems that Peterson could have and should have done more. But legally, it seems quite the stretch to assert that his inaction caused multiple deaths and injuries the same way that the shooter himself did. It's likely an impossible task to prove that if Peterson acted a certain way, then he would have definitively prevented the shooter from inflicting his mass carnage. Then again, if not now, when?

BROADER IMPACTS

Regardless of your position on Peterson, the sweeping implications of his case cannot be ignored from a legal perspective. Skepticism remains as to whether Peterson will ever be convicted of the charges filed. Many close to the case see his arrest as a welcome sign of accountability, while others see it as a PR stunt. There are fears that some will be discouraged from remaining in law enforcement or taking on the role of an SRO (or similar jobs). Of course, failing to hold Peterson criminally responsible for his inactions could set a dangerous precedent that SROs are essentially immunized from criminal prosecution, regardless of their ineptitude in protecting children under their watch. Either way, the Peterson case raises fascinating legal issues as apparently the first case in the United States where a law enforcement official is being criminally charged for failing to stop an active shooter. As active shooter cases remain part of our society, are more arrests of law enforcement coming? ■

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