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June 20, 2012

Sheriff Douglas C. Gillespie
Las Vegas Metropolitan Police Department
400 Martin Luther King Blvd
Las Vegas, NV 89106

Re: Officer involved death of David Paul Gonzalez which occurred on April 11, 2011, at the intersection of Swenson Street and Flamingo Ave., under event # 110419-3621.

Dear Sheriff Douglas C. Gillespie:

On April 11, 2011, David Paul Gonzalez (hereinafter Decedent) shot at police in the intersection of Flamingo Avenue and Swenson Street following a short high speed chase which began at Cambridge Street and Flamingo Avenue, approximately 0.3 miles due west of the shooting location. Just prior to the shooting, Officers Patrick Burke and Angela Suarez in their marked patrol vehicle had attempted to conduct a routine traffic stop on Decedent's vehicle because his passenger side rear tail light was not functioning. Decedent did not stop, but rather ran the red light at Cambridge and Flamingo and rapidly accelerated in the direction of the Las Vegas Strip driving recklessly. As Decedent's vehicle sped west along Flamingo Road, Officer Burke pursued Decedent and executed a Precision Intervention Technique (PIT) which caused Decedent's vehicle to spin out and come to a stop just east of Swenson Street.

Decedent immediately exited his vehicle from the passenger side door and began shooting at Officers Burke and Suarez. Decedent then began to run while still pointing his gun at the officers. Officer Burke returned fire striking Decedent in the right and left arms, both of which subsequently entered his chest and ultimately caused his death. Toxicology studies of Decedent revealed that he had Amphetamine and Methamphetamine in his system at the time of the shooting.

The District Attorney's Office has completed its review of the April 11, 2011, death of Decedent which involved Officers Burke and Suarez. It was determined that, based on the evidence currently available and subject to the discovery of any new or additional evidence, that the actions of Officers Burke and Suarez were not criminal in nature. It should be noted that this review was made based on all the evidence currently available, but without the benefit of an inquest proceeding.

This letter explains why criminal charges will not be forthcoming against Officer Burke who was responsible for the Decedent's death. This letter is not intended to recount every detail, answer every question or resolve every factual conflict regarding this police encounter. This letter is intended solely for the purpose of explaining why, based upon the facts known at this time, the conduct of Officers Burke and Suarez were not criminal. This decision, premised upon criminal-law standards, is not meant to limit any administrative action by the Las Vegas Metropolitan Police Department (LVMPD) or to suggest the existence or non-existence of civil actions by any person where less-stringent laws and burdens of proof apply.

FACTUAL SUMMARY

Background

On December 1, 2010, Decedent was released on parole from Nevada State Prison for a second degree murder conviction filed on July 23, 1997. Decedent checked in once with the division of parole and probation and thereafter absconded from supervision, approximately one month after his parole grant. The division of parole and probation filed a violation report on March 8, 2011, and was seeking a revocation of Decedent's parole at the time of the officer involved shooting.

On March 29, 2011, 21 days before this officer involved shooting, a victim was walking out of the Money Tree located at 730 East Flamingo Road, 0.3 miles east of the attempted traffic stop in the instant case. As the victim exited the building, a car drove rapidly toward him causing him to jump out of the way. An individual, believed to be Decedent, exited his vehicle, pulled out a handgun and fired at the victim who retreated into the Money Tree business for protection. Police were summoned and they recovered the bullet from the scene which was fired at the victim. This bullet was later determined to have been fired from the same gun Decedent used to shoot at Officers Burke and Suarez on April 11, 2011.

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This information is provided to give some insight into what factors may have contributed to Decedent's actions on the incident day. It is significant in this analysis that the defendant had been released from prison on parole just five months earlier for committing murder and that he had absconded from supervision only a month after his parole grant. In addition, Decedent was in possession of a firearm at the time which was a felony that would have likely sent him back to prison. Furthermore, Decedent may have thought that police were after him that day because he allegedly shot at an individual in exactly the same geographic area just three weeks earlier. All of these factors are potential reasons why Decedent may have acted the way he did that day.

Contact with Law Enforcement

At 8:05 p.m. on April 19, 2005, Officers Burke and Suarez were operating a marked patrol vehicle in the area of Cambridge Street and Flamingo Road. They observed Decedent driving a 2001 Silver Chevy Cavalier south on Cambridge with a non-functioning passenger side rear tail light. Officers Burke and Suarez initiated a traffic stop, however, Decedent failed to stop, running a red light and accelerating west bound on Flamingo Road. Officers Burke and Suarez activated their lights and siren and attempted to stop Decedent. As Decedent accelerated westbound toward the Las Vegas "Strip," he began to drive recklessly, moving back and forth from left to right. Because Decedent was headed in the direction of the highly populated Strip and because he was driving erratically, Officer Burke attempted to "PIT" the vehicle as it approached Swenson Street.

The PIT of Decedent's vehicle was successful and Decedent's vehicle spun out coming to a stop in the west bound travel lanes of Flamingo facing southeast, just east of the intersection. At this point the front bumper of Officers Burke and Suarez's patrol car was in contact with the driver's side of Decedent's Chevy. Decedent then exited the passenger side of his vehicle, pulled out a gun and fired at Officers Burke and Suarez.

Officer Burke immediately tried to return fire, but his safety was on which caused a short delay. During this time, Decedent began to run from the vehicles while still pointing his gun at officers. Officer Burke fired a total of five shots at Decedent as he ran, while simultaneously taking his backdrop into account. Some of Officer Burke's shots struck Decedent and he went down near the east crosswalk in the east bound travel lanes of Flamingo Road. Officer Suarez did not fire her weapon.

Officers Burke and Suarez provided police investigators with required public safety statements, but did not otherwise consent to be interviewed.

Contact with Private Citizens

There were many people and cars at or near the intersection of Flamingo Road and Swenson Street when the incident took place. Fourteen of those persons agreed to give statements to police. Each of those individuals was interviewed.

Private Citizen (PC) #1 was driving south on Cambridge when he noticed a speeding car being followed by police in his rearview mirror. PC#1 stated that the vehicles went around him and headed westbound on Flamingo which was also the direction he was headed. PC#1 said that as he approached the intersection at Swenson, he saw the police car "PIT" the other vehicle. As the PIT occurred a car which had been behind PC#1 pulled in front of him. PC#1 stayed a half a block away and was only able to see what happened by looking through the window of the car in front of him. PC#1 stated that he saw Decedent get out of the driver's side of his car move to the left and then heard gunfire. PC#1 had a better view of the police officer and saw him aiming his gun. PC#1 then heard approximately six or seven shots and then saw Decedent lying on the ground. PC#1 also stated that he did not see Decedent with a gun. PC#1 said he only saw Decedent for a split second because of other vehicles which were blocking his view.

PC#2 was sitting in his vehicle at the intersection facing south on Swenson. PC#2 stated that he saw what looked like a slow speed PIT maneuver in which a black and white patrol car contacted the back end of a Chevy Cavalier and caused it to spin around so that it came to a stop facing the opposite direction of travel. PC#2 estimated the vehicle speeds at the time of the PIT to be approximately ten miles per hour at the intersection. PC#2 stated that Decedent exited the passenger side of the Cavalier almost immediately as his vehicle came to a stop. PC#2 said that Decedent took three strides away from the vehicles, turned, raised his arm with a gun in his hand and fired at least two shots directly at where the officers were located. PC#2 stated that the entire confrontation took place within approximately five seconds and that Decedent dodged wildly as the officer returned fire to avoid being hit.

PC#3 was a passenger in the vehicle being driven by PC#2. PC#3 stated that Decedent's vehicle was speeding at the time the patrol car spun Decedent's vehicle causing it to stop. PC#3 said that after the cars came to a stop, that Decedent exited the passenger side of his car, ducked down moving a short distance from the vehicles, turned and shot at the officers. PC#3 said that Decedent was right next to the vehicles when he turned to shoot at the officers. PC#3 estimated that Decedent was only about three feet away when he began firing his weapon. PC#3 also thought that Decedent fired his gun twice at the officers.

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PC#4 was on a Moped in the left turn lane facing south on Swenson when the incident occurred. After police performed the PIT on Decedent's vehicle, Decedent exited the passenger side of his vehicle and started firing behind him with the gun that he had. PC#4 stated that the officer ordered Decedent to the ground then fired approximately four times at Decedent. PC#3 thought the officer may have hit Decedent twice and saw at least one round ricochet off the ground. PC#4 said that Decedent's vehicle had to slow down as it approached the intersection because of all of the traffic and that this allowed the officer to perform the PIT. PC#4 said the officer performed the PIT perfectly. PC#4 stated that Decedent had the gun in his hand when he exited the vehicle and that he turned and fired at the officers as he exited. PC#4 estimated that Decedent was between 15-20 feet away from the officer when the officer fired at Decedent. PC#4 said that Decedent continued to point his gun at the officers as he ran from the vehicles and PC#4 thought that Decedent may have fired again at officers as he ran. PC#4 estimated that the officer returned fire within two to three seconds after Decedent discharged his weapon at the officers.

PC#5 was a passenger on the Moped driven by PC#4 at the time of the incident. PC#5 described events similarly to PC#4. PC#5 stated that Decedent pulled his gun out as he exited the passenger side of his vehicle, turned toward police and fired at them. PC#5 thought that Decedent may have fired as many as three shots at officers. PC#5 also said that Decedent pointed his gun back at the officers as he ran and thought that Decedent may have fired once again as he ran. PC#5 stated that the officer ordered Decedent to stop running before the officer shot at Decedent. Both PC#4 and PC#5 stated that they saw the officer approach Decedent and order him to "stay on the ground" after Decedent went down.

PC#6 was in his vehicle stopped in the eastbound travel lanes on Flamingo about to turn north on Swenson when the incident occurred. PC#6 remembered the police car hitting another car at the intersection and the cars coming to a stop. PC#6 stated that he heard a shot and ducked down in his car. PC#6 did not see what happened as the shooting occurred. PC#6 left the intersection in his vehicle, but later discovered that his vehicle had been struck by one of the shots fired at the intersection.

PC#7 was a passenger in the front seat of PC#6's vehicle during the incident. PC#7 observed Decedent exit the passenger's side of his vehicle, turn and shoot at police over the top of his car and police return fire. PC#7 believed that Decedent fired his gun more than once. PC#7 was sure that one of the bullets hit their car during the incident. PC#7 was able to locate the bullet strike above the windshield on the driver's side of the vehicle along the roof line.

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PC#8 was a passenger in the back seat of PC#6's vehicle during the incident. PC#8 said that Decedent's vehicle approached the intersection driving really fast and the police car hit Decedent's car. After that PC#8 didn't see anything, but did hear shots fired.

PC#9 was in his vehicle stopped in the eastbound travel lanes on Flamingo about to turn north on Swenson when the incident occurred. PC#9 saw the collision between Decedent's and the police vehicles, but saw little else because he was concerned for his family in his car and was telling them to get down. PC#9 thought that he saw Decedent get out of the driver's side of his vehicle and heard shots, but he wasn't sure. PC#9 also saw Decedent running, but didn't see anything else with the exception of what appeared to be a bullet striking PC#6's vehicle.

PC#10 was the driver of PC#11's vehicle which was stopped on Swenson in the left hand turn lane about to go west on Flamingo when the incident occurred. PC#10 saw the PIT of Decedent's vehicle at the intersection by police and Decedent exit the passenger side of his vehicle and immediately start firing at the police officer. PC#10 thought that Decedent fired more rounds than PC#10 could count and then both PC#10 and PC#11 put their heads down and saw nothing more. PC#10 said they heard a couple of more shots and when they looked up, Decedent was on the ground. PC#10 said that the time between Decedent firing his weapon and the shots fired by the officer was about a second. PC#10 also said that before he ducked down, he saw Decedent running and firing at the officer at the same time. PC#10 also estimated that Decedent's vehicle was traveling at between 30-45 miles per hour at the time the officer PIT Decedent's car.

PC#11 was a passenger in the front seat of his vehicle which was stopped on Swenson in the left hand turn lane about to go west on Flamingo at the time of the incident. PC#11 saw the officer PIT Decedent's vehicle and Decedent exit out of the passenger door. PC#11 did not remember if the patrol vehicle had its lights and siren activated, but he clearly saw that Decedent had a gun in his hand and that he shot in the direction of the officer. PC#11 also remembered hearing the officer shout some commands at Decedent. At this point, PC#11 looked down to unlock his seat belt so he could take cover. PC#11 did not see the officer shoot at Decedent, but he did hear additional gunfire.

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PC#12 was driving his vehicle which was stopped on Swenson heading northbound at the time of the incident. PC#12 noted that police vehicle had its lights and siren activated, before it spun Decedent's vehicle at the intersection. PC#12 said that Decedent exited the passenger side of his vehicle immediately after it stopped. PC#12 said that the driver of the police vehicle also exited his vehicle and ordered Decedent to stop. PC#12 said that Decedent turned and fired what he believed was two shots from a smaller pistol. PC#12 stated that the police officer fired at Decedent after Decedent fired at the officer. PC#12 also saw the officer kick Decedent's gun away from Decedent.

PC#13 was working at the Speedy Mart located at 804 East Flamingo on the northeast corner of Flamingo and Swenson at the time of the incident. PC#13 was outside the Speedy Mart smoking a cigarette when Decedent's vehicle was stopped at the intersection by police. PC#13 noted that the police vehicle had both its lights and siren activated. PC#13 stated that as soon as the police got out of their car, she heard shots and saw muzzle flashes coming from Decedent's vehicle. PC#13 stated that she immediately ran back into the store and did not see the officers return fire. PC#13 also stated that there were numerous persons present in the store and on the street at the time of the shooting.

PC#14 was walking through the parking lot of the Speedy Mart located at 804 East Flamingo on the northeast corner of Flamingo and Swenson at the time of the incident. PC#14 heard the gunshots and saw both Decedent's and police vehicles in the intersection. PC#14 also saw two muzzle flashes coming from Decedent's vehicle and could tell that it was a male who fired the weapon. PC#14 said that Decedent started to fire immediately and that the police didn't have any time. PC#14 said that as soon as he heard the shots he tried to get out of there and did not see officers returning fire.

Opinions of Private Citizens

The private citizens who witnessed all or part of the incident and could comment on police actions believed Officer Burke acted appropriately under the circumstances.

PC#1 did not see enough to offer an assessment.

PC#2 stated: "he (Decedent) was a clear and present danger to those officers and he had just fired and the officers returned fire, and he was down within five seconds. I thought he (Decedent) was a clear and present danger, and I couldn't believe my eyes of how brazen that was. . . in my comment to my passenger was, uh, he just fired on those officers, God knows who else he'll fire on"

PC#3 stated: "I thought he was going to kill the police officers. . . Maybe he, he would have either kept shooting at them or sho, unfortunately may have shot someone else." In response to a question regarding whether PC#3 thought the officer had any other choice, but to shoot Decedent, PC#3 responded "Unfortunately, no."

PC#4 stated: In response to a question about what PC#4 thought Decedent was trying to do, PC#4 responded "shoot the officer." PC#4 also said that everything "happened hella fast" and that the officer gave Decedent a chance even after Decedent shot at the officer. When asked if PC#4 thought that Decedent posed a threat to other people in the area, PC#4 responded "yes" and admitted that he had been afraid at the time.

PC#5 stated: She thought Decedent would have just run away if officers had not returned fire. PC#5 went on to state, however, that "Like the Strip was right up there. If he (Decedent) would have got up there, and it could have been worse that it was. . . So I'm gonna say that the cop did the right thing. He did."

PC#6 did not see enough to offer an assessment.

PC#7 did not see enough to offer an assessment.

PC#8 did not see enough to offer an assessment.

PC#9 did not see enough to offer an assessment.

PC#10 In response to a question about whether the police did anything inappropriately during the incident PC#10 stated: "[n]o, I, I totally think that the, the cop did exactly what we, we pay them to do. You know what I mean? I, I think he's, that's,. . . I mean I don't see any other way that if you gonna—that, that guy jumped out and freakin'. . . he was no more that five foot away form the police officer's car cause he jumped out of the passenger's side and the co—cop's front of the car was right there, and he was just hanging right there. You know what I mean so . . . He (Decedent) was just unloading on him. . . he (the officer) might have been shot himself . . . he (Decedent) might have needed to take another car to get out of there . . it didn't leave him (the officer) with a lot of choices"

PC#11 stated: “. . . it was so clear that that guy popped out of the car and shot at the officer first.”

PC#12 In response to a question about whether the police did anything inappropriately during the incident PC#12 stated: “[n]o. No, I felt he (the officer) was very justified. The guy had already opened fire on him (the officer) first.”

PC#13 In response to a question about what PC#13 thought would have happened if police had not fired, PC#13 stated: “[s]he (the officer) would have been killed . . . [i]f, if she didn’t shoot back at him (Decedent), I’m, ah, I was afraid that she (the officer) did get shot . . . [c]ause I mean he (Decedent) didn’t give her (the officer) any chance. Immediately after her, her car hit his (Decedent), he just started shooting.”

PC#14 In response to a question about what PC#14 thought would have happened if police had not returned fire, PC#14 stated: [h]e probably would have hurt someone else.”

FORENSIC REPORTS

Findings from the Scene

At the point where Officer Burke fired his weapon and shot the Decedent the two were approximately 15 feet apart. The scene photographs and scene diagram showed that the defendant appeared to be moving away from Officer Burke at the time of the shooting in a southerly direction. No video images were recovered which depicted the events as they occurred or any portion of the scene. Statements from private citizens who witnessed the events, however, were for the most part consistent and described Decedent exiting the passenger side of his vehicle, producing a firearm and discharging that firearm at police as he ran southwest from his vehicle. Crime scene analysts documented two bullet strikes in the middle portion of the intersection in the direction of fire from Officer Burke and recovered one bullet along with five expended cartridge cases at the scene. All expended cartridge cases were forensically matched to Officer Burke’s service weapon. The bullet recovered from the scene west of the shooting location, as well as the bullet recovered from Decedent were consistent with having been fired from Officer Burke’s service weapon.

Upon examination, Decedent’s gun, a blue/black .38 caliber six shot revolver, contained five live cartridges and one expended cartridge. Decedent’s gun was capable of being fired, but an unknown residue present within the revolver was found to impair its

normal operation and made it difficult for the gun to lock up correctly when fired. In fact, Investigator Jocelyn Maldonado found that the hammer of Decedent's gun, as it was recovered from the scene, was not located directly over a specific chamber, but rather was positioned between two chambers. Investigator Maldonado further noted that the expended cartridge in Decedent's gun was located at position five with two unexpended cartridges between it and the malpositioned hammer in the direction of the cylinder rotation. It should also be noted that a bullet recovered from the scene of the prior shooting and attempted murder three weeks earlier, under event #110419-3621 in which Decedent was a suspect, was forensically matched to the gun Decedent carried and fired at officers on April 19, 2011.

An inspection of Decedent's vehicle, a 2001 Chevy Cavalier, NV 633-XCG, following the shooting revealed that the vehicle's left rear tail light was not functioning.

Among the items recovered from the body of Decedent were two (2) hearing aids, one (1) pair of eyeglasses, a gun holster and two (2) small bags containing a white crystalline substance with a total weight of 0.7 grams. No testing was performed on the crystalline substance.

Findings from the Autopsy

On April 20, 2011, Dr. Lisa Gavin, M.D., M.P.H., of the Clark County Coroner's Office conducted an autopsy on the body of Decedent. Dr. Gavin performed an external and an internal examination of the body of Decedent and ordered a toxicological examination. She identified a gunshot wound to the right shoulder of Decedent, a gunshot wound to the left shoulder of Decedent, and blunt force injuries to the head, torso and extremities of Decedent. Dr. Gavin described the blunt force injuries as "scattered abrasions." Dr. Gavin determined that these injuries did not contribute to Decedent's cause of death. Dr. Gavin further determined that both of the gunshot wounds sustained by Decedent penetrated into his chest. Dr. Gavin ultimately determined that the gunshot wounds to Decedent were the cause of death. The toxicological analysis revealed that Decedent had the presence of Amphetamine, as well as Methamphetamine at a level of 650 ng/mL in his system at the time of the shooting. Methamphetamine levels in this range have been associated with violent and irrational behavior according to the toxicology report.

Doctor Gavin determined the manner of death to be homicide. Dr. Gavin's opinion and use of the word "homicide" is not a legal opinion but rather a medical opinion that the death was caused at the hand of another. It in no way expresses an opinion as to whether the homicide was intentional, accidental, criminal, justified, or excusable.

LEGAL ANALYSIS

The District Attorney's Office is tasked with assessing the conduct of officers involved in any killing which occurred during the course of their duties. That assessment includes determining whether any criminality on the part of the officers existed at the time of the killing. As this case has been deemed a homicide by the coroner, the actions of these officers will be analyzed under the State's jurisprudence pertaining to homicides.

In Nevada there are a variety of statutes that define the various types of justifiable homicide. (NRS 200.120 – "Justifiable homicide" defined; NRS 200.140 – Justifiable homicide by a public officer; NRS 200.160 – Additional cases of justifiable homicide

The shooting of the Decedent was justifiable under two theories: the killing of a human being in self defense/defense of others and justifiable homicide by a public officer. Both of these theories will be discussed.

A. The Use of Deadly Force in Defense of Another

The authority to kill another in defense of others is contained in NRS 200.120 and NRS 200.160. "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of ... person, against one who manifestly intends or endeavors, by

violence or surprise, to commit a felony ..." against the other person. NRS 200.120(1). Homicide is also lawful when committed:

[i]n the lawful defense of the slayer, ... or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished

NRS 200.160(1).

The Nevada Supreme Court has refined the analysis of self defense and, by implication, defense of others, in *Runion v. State*, 116 Nev. 1041 (2000). The relevant instructions as articulated in *Runion* and modified for defense of others are as follows:

The killing of [a] person in [defense of another] is justified and not unlawful when the person who does the killing actually and reasonably believes:

1. That there is imminent danger that the assailant will either kill [the other person] or cause [the other person] great bodily injury; and
2. That it is absolutely necessary under the circumstances for him to use in [defense of another] force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to [the person being defended].

A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in [defense of another], the circumstances must be

sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.

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Actual danger is not necessary to justify a killing in [defense of another]. A person has a right to defend from

apparent danger to the same extent as he would from actual danger. The person killing is justified if:

1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that [the other person] is about to be killed or suffer great bodily injury; and
2. He acts solely upon these appearances and his fear and actual beliefs; and
3. A reasonable person in a similar situation would believe [the other person] to be in like danger.

The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger.

If evidence [that a killing was in defense of another exists], the State must prove beyond a reasonable doubt that the defendant did not act in [defense of another].

Id. at 1051-52.

In this case, Officer Burke reasonably believed that both he and other persons, including his partner, were in imminent danger and that Decedent would kill or cause them great bodily injury. The confrontation from beginning to end lasted only a few seconds. Decedent had just run from police and they were actively pursuing him at the time of the incident. When Officer Burke initiated the traffic stop on Cambridge prior to the incident neither he nor Officer Suarez knew that Decedent was a suspect in a shooting which had occurred three weeks earlier and only a third of a mile away from the incident scene and involved the very same gun Decedent carried that day. Officers Burke and Suarez also did not know that Decedent had recently been paroled for murder and had absconded from supervision. By his actions, Decedent possibly thought that Officers Burke and Suarez were attempting to try to apprehend Decedent for the earlier shooting and/or to take him back to prison for absconding from parole from his murder conviction.

When Officer Burke decided to initiate the PIT of Decedent's vehicle, he saw that Decedent was racing toward the Strip in an erratic and reckless manner. When Decedent's vehicle came to rest on Flamingo Road after the PIT just east of the intersection at Swenson Street, Officer Burke was well aware of the proximity and number of citizens within the zone of danger when Decedent started to fire his gun at the officers. Aside from the PIT of Decedent's vehicle, it is undisputed that Decedent was the aggressor in this confrontation. This, coupled with the fact that Decedent produced a gun, aimed and fired it at Officers Burke and Suarez while Decedent was in close proximity to others clearly projects an imminent threat to the lives of both Officer Burke and others.

The fact that Decedent initially fired his gun at Officer Burke when they were only a few feet apart, together with the fact that Decedent continued to aim his gun at the officers as he ran in the direction of others further heightened the perceived threat.

In short, Officer Burke had the right under Nevada law to use deadly force against the Decedent in defense of himself and others at the intersection that evening.

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B. Justifiable Homicide by a Public Officer

“Homicide is justifiable when committed by a public officer ... [w]hen necessary to overcome actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty.” NRS 200.140(2). This statutory provision has been interpreted as limiting a police officer’s use of deadly force to situations when the officer has probable cause to believe that the suspect poses a threat of serious physical harm to either the officer or another. *See* 1985 Nev. Op. Att’y Gen. 47 (1985).

Upon seeing Decedent produce a gun, aim and fire his gun at Officers Burke and Suarez there was a clear threat of serious physical harm to both Officer Burke and others. Officer Burke was, under the circumstances therefore, unequivocally justified in using deadly force to neutralize that threat.

It light of all the evidence reviewed to date, the State would be unable to prove that the actions of Officer Burke were in fact unjustified “in the discharge of a legal duty.”

C. Use of Deadly Force by an Officer to Prevent Escape

The law in Nevada with regard to when an officer may use deadly force to effect an arrest and to prevent the escape of a fleeing felon is defined in NRS 171.1455.

NRS 171.1455 states that:

If necessary to prevent escape, and officer may, after giving a warning, if feasible, use deadly force to effect the arrest of a person only if there is probable cause to believe that the person:

1. Has committed a felony which involves the infliction of threat or serious bodily harm or the use of deadly force; or
2. Poses a threat of serious bodily harm to the officer or to others.

The use of deadly force by an officer in such circumstances was also addressed in the case of Weddell v. State, 118 Nev. 206, 43 P.3d 987 (2002). In Weddell, the Court held “that deadly force is, as a matter of law, unreasonable, unless the deadly force is used in defense of self or others against a threat of serious bodily injury.” *Id.* at 209, 43 P.3d at 988. The Court, however, went on to discuss the legislative intent behind NRS

171.1455. The Court stated that after reviewing the legislative history concerning the enactment of NRS 171.1455 the Court recognized that the legislature intended to adopt the United State's Supreme Court's holding in the case of Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Id. at 212, 43 P.3d at 990, in relation to when an officer may lawfully use deadly force to apprehend a felon.

In Garner, the United States Supreme Court in considering this issue held that:

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. Id. at 12, 150 S.Ct. at 1701.

In the instant case, Officer Burke was faced with a very dangerous and unique situation. Not only was Officer Burke's own life directly put in jeopardy by Decedent confronting Officer Burke with a gun and firing at him, but there were also other persons at and near the intersection that evening who were equally threatened. It is important to note that as Decedent turned to run from the scene, he still held the weapon aimed at Officer Burke. Also, despite the fact that the entire encounter took place within seconds, a number of witnesses stated that Officer Burke ordered Decedent to the ground, prior to Officer Burke using deadly force. As such, therefore, under both subsections one and two of NRS 171.1455, Officer Burke was justified in using deadly force to stop Decedent from escaping.

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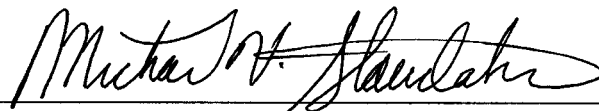
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CONCLUSION

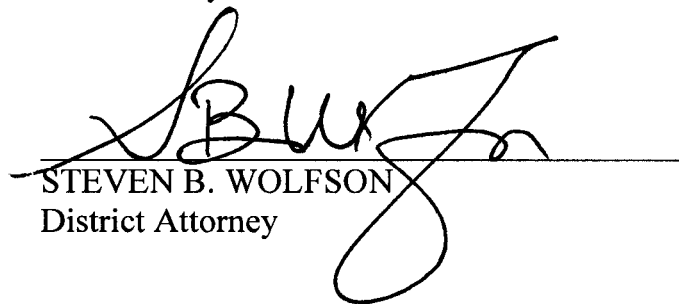
Based on the review of the available materials and the application of Nevada law to the known facts and circumstances surrounding the officer involved shooting death of Decedent, it has been determined that the actions of Officer Burke were reasonable and legally justified. The law in Nevada clearly states that homicides which are justifiable or excusable are not punishable. (NRS 200.190). A homicide, which is determined to be justifiable, *shall* be “fully acquitted and discharged.” (NRS 200.190).

As there is no factual or legal basis upon which to charge Officer Burke based on the totality of the circumstances, unless new circumstances come to light which contradict the factual foundation upon which this decision is made, no charges will be forthcoming.



MICHAEL V. STAUDAHER
Chief Deputy District Attorney

Reviewed by:



STEVEN B. WOLFSON
District Attorney