

REPORT ON USE OF FORCE



Legal Analysis Surrounding the Death of Joshua Oscar Burchell on August 2, 2012

INTRODUCTION

On August 2, 2012, the FBI task force, known as the Criminal Apprehension Team (CAT), located a murder suspect by the name of Joshua Oscar Burchell. The members of the CAT task force included FBI agents, as well as officers from the Las Vegas Metropolitan Police Department and the Henderson Police Department. The CAT task force requested the assistance of SWAT in arresting and taking into custody the murder suspect.

A plan was created to take the murder suspect into custody who was staying at the Arizona Charlie's Hotel/Casino located at 4575 Boulder Highway in Las Vegas. Three adjacent rooms at the hotel were utilized by SWAT and the CAT task force to set up and effectuate the arrest. Surveillance equipment was placed in the room the suspect was in to allow the police to verify that the suspect was in fact armed, which he was. In fact, the murder suspect was armed with a firearm that had previously been stolen from a corrections officer.

The plan was to arrest the murder suspect in his room. However, the murder suspect left his room and an order was then given to the team to effectuate the arrest. The members of the SWAT and CAT task force exited the adjoining room, announced their presence as FBI agents, and issued commands to the murder suspect to not move. The murder suspect did not comply and ran away from the SWAT and CAT task force to the parking lot of the hotel/casino. Once in the parking lot, the murder suspect pulled a

firearm from his waist area and pointed it at police. Special Agents fired at the murder suspect and he fell to the ground as he was hit by the gunshots. Medical aid was administered quickly at the scene and the murder suspect was taken to the hospital where he was later pronounced dead.

The Decedent was a suspect in a murder that occurred in late July of 2012. The Decedent shot a man he knew in the head and stole a painting from the murder victim. The Decedent later made admissions about killing the victim. Decedent also had an outstanding warrant from Clark County for Robbery with Use of a Deadly Weapon and another warrant out of California for Burglary.

The District Attorney's Office has completed its review of the August 2, 2012, death of Joshua Oscar Burchell, (Decedent). It was determined that, based on the evidence currently available and subject to the discovery of any new or additional evidence, the actions of the Special Agents were not criminal in nature. This review was based on all the evidence currently available.

This letter explains why criminal charges will not be forthcoming against the Special Agents involved. It 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 the Special Agents was not criminal.

This decision, premised upon criminal-law standards, is not meant to limit any administrative action by the FBI, LVMPD, or HPD or to suggest the existence or non-existence of civil actions by any person where less stringent laws and burdens of proof apply.

A Police Fatality Public Fact-finding Review was not conducted in this case. Clark County Code 2.14 mandates such a review when a police-involved death occurs, and the prosecutor preliminarily determines that no criminal prosecution of the officer is appropriate. The definition of "officer" is limited by NRS Chapter 289 to state and local law enforcement personnel. In the instant case, the Special Agents involved were acting in their capacity as federal law enforcement agents; therefore, they were not "officers" for purposes of Clark County Code 2.14.

THE EVENTS AT ARIZONA CHARLIE'S

LAY WITNESSES

Housekeeper

On August 2, 2012, Housekeeper was working at the Arizona Charlie's Hotel/Casino when she was moving from one room to another between cleanings. Housekeeper saw a tall man run past her towards the parking lot. The man was being chased by other men who had guns drawn and who Housekeeper perceived were police officers. As the man in front was running, Housekeeper saw him stop, turn around, and pull a black object from his right side but she could not tell what the object was. Immediately after seeing this motion, Housekeeper heard 2 to 3 shots and she dropped to the ground and got behind her cleaning cart.

Patron # 1

On August 2, 2012, Patron # 1, who lives out of state, was in Las Vegas with her husband of 50 years, as well as their grandson. They were staying at Arizona Charlie's as they were bringing their grandson to Las Vegas so he could catch a flight at McCarran International Airport. Patron # 1, her husband, and her grandson had checked into the hotel and were in the process of going to their room. In fact, Patron # 1 was in the parking lot waiting for her husband and grandson to bring the car around. As she was waiting, a man with a badge ran directly towards her telling her he was with the FBI and that she needed to leave the area. Patron # 1 next saw a man she described as a white male with grey hair wearing shorts come out of a room and run towards her direction. The man was followed by several men who were wearing jackets with the letters FBI on them who were yelling repeatedly at the man with the grey hair telling him to stop. The man with the grey hair, however, did not stop and kept running in her direction. Patron # 1 said she then heard a single shot but she could not tell who had shot. She immediately got on the ground but she could see the FBI men were trying to render aid to the man with the grey hair who was down on the ground.

Patron # 2

On August 2, 2012, Patron # 2, who lives out of state, was in Las Vegas with his wife, Patron # 1, as well as their grandson. Patron # 2 and his grandson were in the process of driving their car around to the back of the hotel/casino when they were met by an officer in plain clothes with a badge who told them they would have to go around a different way. As Patron # 2 drove around the parking lot, he saw a male running and heard someone shouting but he could not tell what they were saying. Patron # 2 then heard more than one gun shot and saw someone on the ground but he did not see who

did the shooting. Patron # 2 then backed his car out of the area and checked on his wife.

Patron # 3

On August 2, 2012, Patron # 3, who lives out of state, was in Las Vegas with his Grandmother (Patron # 1) and Grandfather (Patron # 2) so he could catch a flight back to his home state. Patron # 3 was with his Grandfather as they drove from the front of the hotel to the back after checking in. As they were driving towards the back, a law enforcement officer told them they needed to turn around. Grandfather then drove in a different direction. As they were driving, Patron # 3 saw a man running in the parking lot followed by 4 to 5 men who were following behind dressed in clothes with FBI insignia. The 4 to 5 men chasing the one man were yelling to the man to get down and to put his hands up. Patron # 3 then heard what he thought was 1 or 2 gunshots. Later Patron # 3 saw the man that had been running lying on the ground and the police personnel attempting to render aid.

POLICE WITNESSES

Special Agent # 1¹

On August 2, 2012, Special Agent (SA) # 1 was working as a part of the SWAT team tasked with taking the Decedent into custody. Specifically, SA # 1 was to be the first officer in the stack of SWAT officers that would enter the Decedent's room and take him into custody. The SWAT team rehearsed the plan and subsequently took position in the accompanying room to where the Decedent was located. The SWAT team prepared to take the Decedent into custody in his room. However, the Decedent exited the room before the SWAT team could make entry to the room. As such, the order to effectuate the arrest was given and the SWAT team exited their room and SA # 1 shouted, "FBI, don't move." The Decedent immediately ran away from SA # 1 and his team through the parking lot. SA # 1, however, did not pursue, which was consistent with the standard operating procedures and instructions he had been given previously.

As the Decedent ran away from SA # 1 and the members of the SWAT team, SA # 1 observed the Decedent pull a gun from his waist. SA # 1 yelled out, "Gun" and saw the Decedent then turn slightly to his left. Next, SA # 1 heard gunshots from his left and he saw the Decedent fall to the ground. The Decedent was handcuffed and medics came and rendered aid. SA # 1 also noted an unfamiliar older female on the ground in the area of the shooting, which was Patron # 1.

¹ At the request of the FBI, the names of the FBI Agents have been removed.

Special Agent # 2

On August 2, 2012, SA # 2 was working as a part of the SWAT team tasked with taking the Decedent into custody. Specifically, SA # 2 was to be the second officer in the stack of SWAT officers that would enter the Decedent's room and his responsibility was to cover SA # 1 as they took the Decedent into custody. As they observed the surveillance inside the Decedent's room before he exited, SA # 2 saw that the Decedent had a gun in his hand. As the SWAT team exited their room they encountered the Decedent. SA # 2 and SA # 1 both announced who they were and ordered the Decedent not to move and to put his hands up.

The Decedent, however, took off running through the parking lot. SA # 2, per prior instructions, did not pursue the Decedent. SA # 2 saw the Decedent pull a gun out as he ran through the parking lot. SA # 2 observed the Decedent aim the gun in SA # 2's direction. Based on being confronted with lethal force by the Decedent, SA # 2 fired his handgun one time at the Decedent. The Decedent did not react to the shot so SA # 2 fired another round, but the Decedent continued to run. Consequently, SA # 2 fired a third time, after which the Decedent fell to the ground.

Special Agent # 3

On August 2, 2012, SA # 3 was working as a part of the SWAT team tasked with taking the Decedent into custody. SA # 3's responsibility, along with SA # 6, was to set up to the east of the parking lot against a wall opposite the hotel in the event of a "runner" scenario. SA # 3 received information from his investigation that the Decedent was armed with a gun, which SA # 3 relayed to the other police personnel. SA # 3 then saw the Decedent running in the parking lot towards him and SA # 6. SA # 3 ran towards the Decedent and saw the Decedent pull a gun from his waistband and point it directly at him. At the same time, SA # 3 heard other agents yelling to the Decedent to drop the gun. SA # 3 then retrieved his weapon and pointed it at the Decedent but realized that there were crossfire concerns based on the position of the other agents and officers who were behind the Decedent.

Because of concerns crossfire shots could hurt one of the other officers, and due to concerns for his own safety, SA # 3 found cover in the parking lot behind a car. As he did so, SA # 3 heard gunshots and looked to see the Decedent fall to the ground. After the Decedent fell, SA # 3 observed SWAT team personnel handcuff the Decedent. Medical aid was then rendered to the Decedent.

Special Agent # 4

On August 2, 2012, SA # 4 was working as a part of the SWAT team tasked with taking the Decedent into custody. SA # 4 was the third in the stack and as such his

responsibility was to breach the room with a room key and handcuff the Decedent. When the command to go was given, SA # 4 saw the Decedent just outside his room. Commands were given to the Decedent, but he ran away from the police towards the parking lot. As the Decedent was running, SA # 4 heard two or three shots, which had different sounds. After the shots, SA # 4 saw a dark object fly out from the Decedent's body as the Decedent stumbled and fell to the ground. SA # 4 then approached the Decedent and put him in handcuffs. The medical team then took over and rendered aid. SA # 4 remained with the Decedent as he was transported to the hospital and while he was in the hospital.

Special Agent # 5

On August 2, 2012, SA # 5 was working as a part of the Las Vegas Field Office's Perimeter Support Team (PST) tasked with taking the Decedent into custody. Specifically, SA # 5 monitored the video surveillance. Additionally, SA # 5 was to exit the adjoining room upon implementation of the plan and post there with a shield. When the command to effectuate the arrest was given, SA # 5 exited his room and observed the Decedent running away from the building in the parking lot. SA # 5 yelled that he was with the FBI and told the Decedent not to move. The Decedent, however, did not relent and continued to run. SA # 5 heard someone yell, "Gun, gun, gun" and saw the Decedent drop some sunglasses. Next, SA # 5 heard 4 to 5 gunshots and saw the Decedent fall to the ground. Someone pointed to the Decedent's gun on the ground so SA # 5 stood next to the gun until he was later called away. SA # 5 also observed medical personnel administer aid to the Decedent.

Special Agent # 6

On August 2, 2012, SA # 6 was working as a member of CAT tasked with taking the Decedent into custody. SA # 6 was positioned with SA # 3 in the parking lot. SA # 6 saw an elderly woman in the parking lot as well. SA # 6 went to the woman and identified himself and told her to get back. As he was doing this, SA # 6 heard SWAT members repeatedly yell, "FBI, get down." As SA # 6 turned back he saw the Decedent running towards him and saw the Decedent pull out a handgun and point it at him. SA # 6 yelled "gun" and took cover behind an electric box.

From the vantage point behind the electric box, SA # 6 saw the Decedent turn back towards the SWAT members running behind him and point his gun. Because the Decedent posed a threat to SA # 6, SA # 3, the SWAT team members, and the elderly woman in the parking lot, SA # 6 fired his weapon at the Decedent. The Decedent did not stop running towards SA # 6, SA # 3, and the elderly woman, and his gun was pointed at them again. As such, SA # 6 aimed his weapon again and, as he did, he heard a gunshot. SA # 6 then fired three times at the Decedent who then fell. The Decedent appeared to push himself up with his hands so SA # 6 aimed at him again. However, the

Decedent no longer appeared to be armed so SA # 6 did not fire again. SWAT then handcuffed the Decedent and medical personnel worked on him.

Special Agent # 7

On August 2, 2012, SA # 7 was working as a part of the Las Vegas Field Office's Perimeter Support Team tasked with taking the Decedent into custody. SA # 7 was positioned together with SA # 5 in the room next to where the Decedent was staying the hotel. SA # 7 and SA # 5 were to use their shield and block the Decedent opposite the SWAT team in a pincer movement.

When the order to effectuate the arrest was given, SA # 5 opened the door to their room and SA # 7 observed the members of the SWAT team in the stack running towards the parking lot. SA # 5 then followed after the SWAT team and SA # 7 followed SA # 5. When SA # 7 got to the parking lot he was able to see that the Decedent had a gun. SA # 7 heard people yelling, "Gun, gun, gun" as well as, "Stop running. FBI, stop moving." SA # 7 then heard shots and saw the Decedent drop to the ground. Medical staff attended to the Decedent and the area was searched for the Decedent's gun. When the Decedent's gun was found, agents took turns guarding it until it was collected as evidence.

Special Agent # 8

On August 2, 2012, SA # 8 was working as a part of the SWAT team tasked with taking the Decedent into custody. SA # 8 was the fourth person in the stack behind SA # 4 who had the key to the room and was tasked with opening the door. Information was obtained that the Decedent was exiting the room so the order to go was given. Upon getting out of the room, SA # 8 saw the Decedent and yelled to him, "FBI, get your hands up. Don't move." The Decedent did not listen and instead ran away to the parking lot. SA # 8 observed that the Decedent had a gun in his hand as he ran off. SA # 8 heard someone yell, "gun, gun, gun" and then heard three shots fired from the direction to his left. SA # 8 then saw the Decedent fall to the ground. SA # 8 and SA # 1 then approached the Decedent and put him in handcuffs. Medical staff then rendered aid.

THE REVIEW OF THE WEAPONS

SA # 2 carried a Colt M16A1. The magazine removed from the Colt M16A1 contained 28 rounds. A review of SA # 2's weapon indicated that it was fired 3 times during the incident. SA # 6 carried a Springfield 1911. The magazine removed from the Springfield 1911 contained 5 rounds. There were two additional magazines for the Springfield that contained 8 rounds. A review of SA # 6's weapon indicated that it was fired 4 times during the incident. The stolen weapon the Decedent was in possession of was a Glock

model 19, 9mm, which had a 15 round magazine with 14 rounds in the magazine and there was one round in the firing chamber at the time the weapon was recovered. The Glock was operational.

THE AUTOPSY OF DECEDENT

On August 3, 2012, an autopsy was performed by Deputy Medical Examiner Doctor Gary Telgenhoff on the body of the Decedent at the Clark County Coroner's Office. It was determined Decedent died as a result of multiple gunshot wounds. A total of 6 gunshot wounds were found on the Decedent's body. One of the gunshot wounds was not as visible due to surgical intervention. The five remaining gunshot wounds consisted of one penetrating and four perforating. A graze wound was also noted to the Decedent's left forearm. Additionally, toxicology tests were performed from liver samples which revealed that the Decedent had the presence of Amphetamine, a metabolite of methamphetamine, in his system at a rate of 810 nanograms per gram. He also had Methamphetamine in his system at a rate of 3900 nanograms per gram. Violent and irrational behavior has been associated with high levels of methamphetamine.

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 Decedent was justifiable under two theories: (1) The killing of a human being in self defense/defense of others; and (2) justifiable homicide by a public officer. Both of these theories will be discussed below.

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 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 jury 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.

....

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, the Decedent posed an imminent danger to the SWAT and CAT police personnel involved in the efforts to take the Decedent into custody, as well as the patrons of the Arizona Charlie's Hotel/Casino. The Decedent, while armed with a 9mm handgun, ran from police into the parking lot area of the hotel. The police repeatedly announced themselves and ordered the Decedent to stop. As this happened, the Decedent ignored the police orders and instead pulled out his 9mm handgun and pointed it at the police. In fact, as he ran away from the police following him, he ran directly at other police who had set up a perimeter. The Decedent's actions posed an imminent danger to the officers and others, including Patron # 1. Thus, the police personnel were confronted by the appearance of imminent danger which created in their minds an honest belief and fear that they, or others, were about to be killed or suffer great bodily injury. Accordingly, the officers were justified in acting upon those appearances, fears and actual beliefs.

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).

In this case, the Special Agents who fired at Decedent had probable cause to believe that Decedent posed a threat of serious physical harm either to the themselves or other persons. Decedent, while ignoring commands to stop, pointed his handgun toward police personnel as they tried to take him into custody. These circumstances created

probable cause in the officers' minds that the Decedent posed a threat of serious physical harm either to the officers or others. In light of all the evidence reviewed to date, the State would be unable to prove that the actions of the officers were in fact *unjustified* "in the discharge of a legal duty."

CONCLUSION

Based on the review of the available materials and application of Nevada law to the known facts and circumstances, it has been determined that the actions of law enforcement involved in the efforts to take the Decedent into custody 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 the officers, and unless new circumstances come to light which contradict the factual foundation upon which this decision is made, no charges will be forthcoming.

DATED August 9, 2013

STEVEN B. WOLFSON
District Attorney

By

GIANCARLO PESCI
Chief Deputy District Attorney