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April 19, 2012

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Re: Officer involved death of Eduardo Lopez-Hernandez (hereinafter Decedent) which occurred on August 25, 2010, and is referenced as 100825-3520.

Dear Sirs:

The Clark County District Attorney's Office has completed its review of the August 25, 2010 officer involved death of Eduardo Lopez-Hernandez involving NHP Trooper Sergeant Scott Simon, NHP Trooper Heather Neely, NHP Trooper Jorge Hernandez and HPD Officer Michael Corad. We have concluded that based on the evidence currently available, and subject to the discovery of any new or additional evidence, that the actions of these officers were not criminal. It should be noted this

review was made based on all the evidence currently available but without the benefit of an inquest proceeding.

This review does not comment on the legitimacy or efficacy of the policies or procedures of your organizations or on any issues relating to civil liability. As such, this review should not be interpreted as expressing an opinion on these matters.

FACTUAL SUMMARY

Background

Mr. Lopez-Hernandez's (Decedent) behavior and actions prior to his contact with the police were reported by his juvenile brother (hereinafter **Brother**) and the private citizen motorists (hereafter **PC#**) that observed Decedent to be acting strangely and combatively.

According to **Brother**, while at a soccer practice shortly before the altercation, Decedent was walking around the field acting strangely and saying, "It's not me." When a coach asked Decedent if he was alright, Decedent attempted to start a fight with the coach.

Brother explained that Decedent had experienced this type of behavior before and that approximately six months earlier Decedent was taken to the hospital. **Brother** is unaware if Decedent had been diagnosed with any mental illness or whether Decedent was taking any medications. When speaking with **PC4**, **Brother** indicated that Decedent had acted this way before and that Decedent had had hallucinations.

Brother further indicated that when they got into the car Decedent got into the driver's seat and continued to say, "It's not me." Then, while approaching slowing traffic on US-95, Decedent did not slow down, but crashed into multiple cars and attempted to drive through the stalled traffic until he crashed into a barrier. (**PC3, PC4, PC5, PC6, PC7, PC8, PC10, PC13 & PC14**).

Contact with Private Citizens

Motorists reported that Decedent exited his vehicle by climbing out of the vehicle's window (**PC3, PC6, PC7 & PC10**). **PC3** also got out of his car and confronted Decedent and said, "What in the [expletive] is a matter with you?" [sic] **PC3** reported that Decedent turned around and attacked **PC3** biting **PC3** on the left forearm. (**PC1 & PC3**). Decedent ran eastbound crossing northbound traffic. (**PC1, PC2, PC3, PC4, PC6, PC7, PC9, PC10, PC11 & PC12**). **PC3** indicated that he chased after Decedent. (**PC2, PC3, PC5, PC6, PC7, PC10, PC11 & PC12**).

PC1 indicated that he noticed that Decedent had a bloody face as he was running. (**PC1 & PC13**). **PC3** attempted to hold or detain Decedent. (**PC1, PC2, PC3, PC9 & PC10**). Other motorists described what occurred as a fight between the decedent and one or more persons. (**PC5, PC6, PC7, PC8, PC11 & PC12**). The reports of what occurred during the detention/fight are varied.

- **PC1** indicated that Decedent bit **PC3**.
- **PC2** indicated that while **PC3** was attempting to detain Decedent that Decedent was biting **PC3**. That **PC2** and **PC1** went to assist **PC3** and Decedent bit **PC1** and tried to bite **PC2**. In response **PC2** “smacked” Decedent. Decedent ran away but came back and **PC1** tried to calm Decedent down but Decedent responded by attempting to bite them again. **PC2** struck Decedent again. **PC5** also attempted to calm Decedent down by speaking to him in Spanish with no success. Decedent bit **PC3** approximately seven times and **PC1** twice during the confrontation.
- **PC3** indicated that he caught Decedent and that several other people attempted to assist **PC3** in detaining Decedent. That Decedent bit and hit **PC3** and others who attempted to restrain him.
- **PC5** indicated that **PC3** caught Decedent and was trying to hold him down when another person got involved and it became a fight. As Decedent was being punched **PC5** got out of his car and asked what was going on. **PC5** attempted to speak to Decedent in Spanish because he believed that the problem may have been due to a language barrier. Decedent started to clam down and then said, “This is not me.” **PC5** offered to let Decedent sit in his truck and Decedent got all crazy again.
- **PC6 & PC7** indicated that Decedent got into a fight with several other people.
- **PC8** indicated that Decedent was fighting with the man who drove a red van.
- **PC9** indicated that two or three males were restraining Decedent and that all those males struck Decedent in the head multiple times. The last thing **PC9** saw as traffic had begun to move was the three people punching and kicking Decedent.
- **PC10** indicated that seven or eight people were attempting to restrain Decedent.
- **PC11 & PC12** indicated that Decedent and **PC3** engaged in a struggle and that **PC3** was assisted by four other males. The fight continued even after Decedent

went to the ground. One man grabbed a broom from a truck but **PC11 & PC12** never saw Decedent being struck with the broom.

Motorists reported that Decedent was bleeding during and after the fight. (**PC8 & PC10**). Decedent was able to get away and ran west across the northbound and southbound lanes of traffic to the far west side of the roadway. (**PC1, PC3, PC5, PC7, PC8, PC10, PC11 & PC12**). It was about this time that law enforcement arrived on the scene.

Contact with Law Enforcement

On the date in question there had been a chemical spill on US-95 shutting both the southbound and northbound lanes. Multiple Troopers responded to investigate and conduct traffic control. As the troopers were beginning to open up the traffic lanes, dispatch and a passing motorist advised them of a fight on northbound US-95 near Boulder Highway.

Nevada Highway Patrol Sergeant Scott Simon and Trooper Heather Neely responded to the fight. When they arrived they observed Decedent on the far west shoulder of southbound US-95. (**Simon & Neely**). Decedent then started to walk into oncoming traffic which was now at near or regular speed. (**Simon, Neely, PC4 & PC7**). Decedent was bleeding from his head/face. (**Neely**). Troopers told Decedent to stop and return to the shoulder but Decedent never made eye contact with the troopers nor did he follow their directions. (**Simon, Neely & PC8**).

Simon and Neely, on foot, crossed over the median and barrier from the northbound lanes to the southbound lanes where they stopped traffic and approached Decedent. (**Simon, Neely & PC8**). Neely grabbed Decedent and attempted to place handcuffs on him. (**Neely, PC4 & PC7**). Simon went to assist Neely and Decedent bit Simon on the forearm. (**Neely, PC1, PC7 & PC8**). Decedent was also kicking at officers. (**PC1 & PC8**) Decedent struck Neely. (**PC8**). In response, Simon struck Decedent in the head and radioed that they were in a fight. (**Neely & PC4**). **PC4** indicated that Decedent was fighting and swinging at officers. (**PC4 & PC10**).

The troopers were giving commands which Decedent did not follow. (**PC1, PC3 & PC8**). **PC1** heard troopers saying, "Stop biting." (**PC1**).

Troopers were able to move Decedent to the side of the road and out of traffic by the center median and Neely swept Decedent's legs bring him to the ground where Neely and Simon struggled to place Decedent in handcuffs. (**Simon, Neely, PC3, PC4 & PC7**). Troopers got the handcuffs on Decedent but he managed to slip his right hand out of the handcuffs and continued to struggle with the troopers. (**Simon, Neely, PC1 & PC3**)

In an attempt to gain control over Decedent, Simon and Neely activated and deployed a taser. (**Simon & Neely**). Simon indicated that he used the taser on Decedent in the upper back area and Neely stated she used the taser on Decedent in the lower leg area. (**Simon & Neely**). **PC1** indicated that he heard a female yell, “Tase him.” (**PC1**). **PC8** indicated that the troopers told Decedent to cooperate or he would be tased. (**PC8**). Decedent was tased but it had no effect on him. (**PC8**). **PC3** indicated that when Decedent was tased he just dropped “like a switch.” (**PC3**).

Henderson Police Officer Michael Corad was traveling back from North Las Vegas to Henderson when he saw the altercation. (**Corad**). He got out of his vehicle and approached to assist the troopers. (**Corad**). As he approached he was warned by Simon that Decedent had bitten a trooper and was continuing to attempt to bite the troopers. (**Corad**). He noticed that the two troopers and Decedent had blood on them and that Decedent’s face/head was bleeding. (**Corad**). When Decedent lashed out in an attempt to bite the troopers, Corad placed his foot on the right side to Decedent’s head to prevent Decedent from biting the troopers. (**Corad, Pollard & Hernandez**).

Henderson Police Officer Brian Pollard indicated that as he approached the struggle he saw two NHP officers fighting with Decedent near the center median. (**Pollard**). He heard Simon say “Hey, he just bit me, watch yourself.” (**Pollard**). At that point Corad secured Decedent’s head with his foot. (**Pollard**). The troopers were struggling to control Decedent and attempting to handcuff him. (**Pollard**). He saw the troopers use “distract strikes” in order to get Decedent’s left arm out from under his body. (**Pollard**). Neely asked for the taser and deployed it on Decedent’s lower legs twice. (**Pollard**).

Trooper Jorge Hernandez arrived and saw that Decedent was not cooperating with the commands to calm down and submit so he reissued those commands in English and in Spanish. (**Hernandez**). Decedent did not comply with any commands. Simon was holding Decedent’s right arm, Neely was holding Decedent’s leg and Corad had his foot on Decedent’s head. (**Hernandez**). Seeing that Decedent’s left arm was under his body Hernandez attempted to reach under the chest of Decedent and pull the arm out so it could be cuffed. (**Hernandez**). He was unable to pull the arm out so he tried to lever the arm out with a baton. (**Hernandez, Corad & Pollard**). Hernandez was able to use an extendable baton to lever the arm out and noticed the left hand was already in a handcuff. (**Hernandez & Corad**). At that point officers were able to get Decedent into handcuffs and gain control of him. (**Hernandez**).

Troopers noticed that Decedent was not breathing and Trooper Kevin McNeal started CPR with Simon giving directions. (**Simon, Neely, McNeal, Burtner, Hernandez, Corad, Pollard & PC8**) CPR was continued until medical arrived a few moments later. Decedent was transported to the hospital and expired.

Opinions of Private Citizens and Officers

Various officers and private citizens commented that Decedent seemed (1) to possess abnormally high strength, (**Simon, McNeal, Burtner, Pollard, PC1, PC3 & PC8**); (2) to be under the influence of some unknown drug, (**PC2 & PC8**); or, (3) to be suffering a mental health episode (**PC5, PC6 & PC8**). **PC3** thought Decedent wanted to die.

Some private citizens thought Decedent would have been hit by a car if not for the intervention of the officers. (**PC7 & PC8**). No private citizens indicated they thought the force used by the officers was excessive. In fact, two specifically commented that the amount of force was appropriate. (**PC1, PC7**).

FORENSIC REPORTS

Findings from Autopsy

Dr. Lisa Gavin conducted an autopsy on the decedent on August 26, 2010, at the Clark County Coroner's Office. The pathological examination revealed that Decedent had suffered cardiopulmonary arrest and blunt force trauma to the head, neck, torso and lower extremities as evidenced by numerous abrasions, contusions and lacerations on Decedent's body. Dr. Gavin's report gave the following opinion as to the cause and manner of death:

OPINION

CAUSE OF DEATH: This 21-year-old man, Eduardo Lopez-Hernandez, died of cardiopulmonary arrest during varied restraining procedures.

MANNER OF DEATH: HOMICIDE.

Dr Gavin's opinion and use of the word "homicide" is not a legal opinion. It is a medical opinion meaning that Decedent's death was brought to pass at the hand of another. It in no way expresses an opinion as to whether the homicide was intentional, accidental, criminal, justified, or excusable.

Dr. Gavin also indicated that radiographs confirm no skeletal injuries. The toxicology of Decedent revealed delta- 9 tetrahydrocannabinol (THC), delta- 9 carboxy THC (THC metabolite) and atropine at nontoxic/therapeutic levels in the decedent's system. Caffeine, nicotine and cotinine (nicotine metabolite) were positive but not quantified.

Taser Report

The “Taser Download” showed that the taser was activated 19 times during the confrontation and was active for a total time 110 second from 19:08:17 hours until 19:11:34 hour, a period of 3 minutes and 17 seconds. (**Taser Report, Dr. Vilke**). It is uncertain whether each activation of the taser was deployed upon the person of Decedent. (**Dr. Vilke**). However, the autopsy report (**Dr. Gavin**) indicates the following:

- Paired abrasions or paired abrasion and contusion extending from nape of the neck to center aspect of mid back (taser marks).¹
- Paired abrasions extending from the upper aspect of the right posterior lower leg to the right posterior ankle (taser marks).²

Those marks amount to 10 to 11 locations on the body that the taser was activated and deployed.

Opinion of Dr. Vilke

Dr. Vilke was provided; (1) all the investigative reports; (2) the autopsy reports; and, (3) the deposition of Dr. Gavin concerning this case. He purports to have extensively reviewed the literature in the area of tasers and excited delirium.³ After reviewing the file and the literature, he proffered the following opinions:

¹ The autopsy report further describes these as follows:

At the nape of the neck is a 1/8 inch red-brown abrasion. At the mid upper aspect of the back are two paired 1/8 inch red-brown abrasions. At the mid aspect of the back is a 1/8 inch red-brown abrasion paired with a 1/8 inch light purple contusion. At the mid center aspect of the back is a 1/4 inch red-brown abrasion with a paired 1/8 inch light purple contusion. At the mid center back are two 1/8 inch paired red-brown abrasions.

² The autopsy report further describes these as follows:

Extending from the upper aspect of the right posterior lower leg towards the right posterior ankle are four paired 1/8 inch red-brown abrasions.

³ Excited Delirium Syndrome (ExDS) is a syndrome most commonly caused by use of stimulant drugs like cocaine, methamphetamine or PCP and presents typically with aggressive and often paranoid behavior, but can also be caused by uncontrolled and untreated psychiatric illnesses, particularly schizophrenia. In fact, the original description of ExDS symptoms was in psychiatric patients. And in the days before there were medications to treat these patients, the mortality rate was reported at 75%. Currently, the majority of cases occurs in subjects using illicit drugs and is a significant cause of sudden cardiac arrest.

Classically, people suffering from ExDS are delusional, are hyperactive, may be violent despite threats or overwhelming force, inappropriately dressed for the conditions or take off their clothes, are sweaty, have elevated body temperatures, and are often breathing fast. They are also often destructive and described as having superhuman strength. The subjects who tend to suffer sudden death are commonly noted to have elevated body temperatures.

ExDS places the individual at increased risk for sudden death syndrome, felt by most experts to be caused by an irregular or stoppage of the heartbeat, caused by the increased stress and work on the

1. There is no published medical or scientific literature that demonstrates that a TASER X26 ECD in drive stun mode can cause cardiac arrest or sudden death in a human.
2. The restraining process did not cause the sudden cardiac arrest and death in Mr. Lopez-Hernandez.
3. Mr. Lopez-Hernandez was exhibiting signs and symptoms of Excited Delirium Syndrome, which is the probable cause of his sudden cardiac arrest and death.

LEGAL ANALYSIS

The District Attorney's Office is tasked with assessing the conduct of the officers involved and determining whether any criminality on the part of the officers exists. 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.

First let us look at what constitutes excusable homicide in the State of Nevada. "Excusable homicide by misadventure occurs when a person is doing a lawful act, without any intention of killing, yet unfortunately kills another" (NRS 200.180). Setting aside the two contradictory opinions of the medical experts and assuming that the actions of the officers caused the death of Decedent, there is insufficient evidence of an intent to kill to overcome a defense of excusable homicide. The officers appear to have been acting lawfully in an attempt to apprehend/arrest Decedent. As such, the facts of the instant case seem to indicate that the death of Decedent was not unlawful, rather that it could, and most likely would be characterized as an excusable homicide by misadventure.

Next let us look at justifiable homicide. 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). In reviewing the various species of justifiable homicide within the framework of the facts of this case, it is clear that the relevant statute for our consideration is NRS 200.140, which states:

heart by the excited, over-stimulated, agitated physical state. There are data that this state is caused by a central brain effect and changes in neurotransmitter receptors. Once the heart goes into an irregular beat or stops, blood flow through the body ceases and shortly thereafter, the subject will lose consciousness due to lack of blood flow to the brain and stops breathing. Often, law enforcement officers will notice that the subject has quieted down, thinking that he has finally calmed down and given up the fight. Then a short time later is when someone will identify that the subject is suddenly in cardiac arrest. (Dr. Vilke).

Homicide is justifiable when committed by a public officer, or person acting under the command and in the aid of the public officer, in the following cases:

1. In obedience to the judgment of a competent court.
2. When 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.
3. When necessary:
 - (a) In retaking an escaped or rescued prisoner who has been committed, arrested for, or convicted of a felony;
 - (b) In attempting, by lawful ways or means, to apprehend or arrest a person; or
 - (c) In lawfully suppressing a riot or preserving the peace.

(NRS 200.140).

Police officers are public officers under the statutes of the State of Nevada (NRS 169.164; AGO NO. 1985-11) and they are given authority to make arrests and where a person “either flees or forcibly resists, the officer may . . . use all necessary means to effect the arrest.” (NRS 171.122). According to the facts of this case, the officers encountered a person who appeared to be: (1) under the influence of some unknown controlled substance; and/or (2) undergoing an episode of mental illness. Decedent’s actions posed a threat to not only himself but also motorists in oncoming traffic. As such, the officers stopped traffic and attempted to move Decedent to safety. Decedent became combative and bit, struck and/or kicked one or more of the officers. These actions constituted one or more batteries on an officer, crimes for which Decedent was subject to immediate arrest. The officers attempted to apprehend/arrest Decedent. Officer and onlookers alike indicated that Decedent seemed to be possessed with extraordinary strength.

A review of the instant case does not indicate that the officers engaged in the gratuitous use of force in effectuating the arrest of Decedent. Dr. Gavin does detail multiple injuries present on Decedent’s body consistent with Decedent having been in a car accident, fight with the motorists, and a confrontation with officers attempting to take him into custody. In layman’s parlance, these injuries would be called scrapes, cuts, bumps and bruises. Dr. Gavin also indicated that Decedent suffered no broken bones. The United States Supreme Court has given some guidance in the area of what constitutes the reasonable use of force:

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. [Citation omitted]. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong

person is arrested, [Citation omitted], nor by the mistaken execution of a valid search warrant on the wrong premises. [Citation omitted]. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: “not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” [Citation omitted], violates the Fourth Amendment. The calculus of reasonableness must embody allowances for the fact that police officers are often forced to make split second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the “reasonableness” inquiry in an excessive force case is an objective standard: the question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. [Citation omitted].

Graham v. Connor, 490 U.S. 386, 396-397, 109 S. Ct. 1865, 1872 (1989). Under the reported circumstances of the instant case—a noncompliant subject with abnormal strength who is kicking, biting and running into traffic—it appears that the officers’ actions were objectively reasonable.

The evidence does not clearly show how many times the taser was deployed upon the body of Decedent. Moreover, in light of the noncompliance and violent actions of Decedent and Dr. Vilke’s opinion that the taser is not the cause of the cardiac arrest or the death of Decedent, the use of the taser appears to have been objectively reasonable.

It light of all the evidence reviewed to date, the State would be unable to prove that the force used was in fact unjustified “in attempting to, by lawful means, apprehend or arrest a person.”

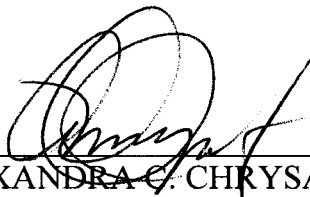
CONCLUSION

Based on our review of all the available materials and the application of Nevada law to the known facts surrounding the officer involved death of Eduardo Lopez-Hernandez, the District Attorney’s Office has concluded that the actions of NHP Trooper Sergeant Scott Simon, NHP Trooper Heather Neely, NHP Trooper Jorge Hernandez and/or HPD Officer Michael Corad were not criminal. There is no evidence that the officers acted unlawfully, with malice aforethought, or with the intent to kill or even the intent to injure Decedent. On the contrary, it appears that the actions of the officers’ were objectively reasonable and lawful. Therefore, an honest application of the facts to the law concerning justifiable and excusable homicide leads to the conclusion that the death of Decedent was either justified or excusable.

April 19, 2012

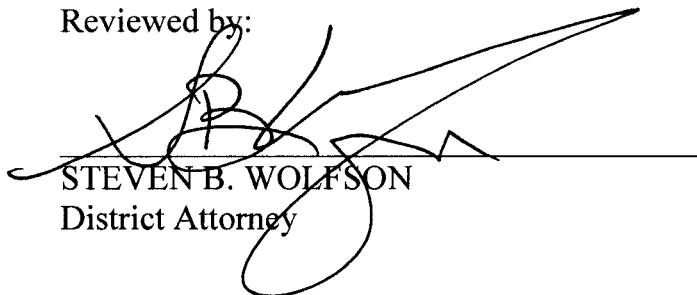
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The law in Nevada is very clear: homicides that are justifiable or excusable are not punishable. (NRS 200.190). “The homicide appearing to be justifiable or excusable, the person indicted shall, upon trial, be fully acquitted and discharged.” (NRS 200.190). As there is no factual or legal basis upon which to charge NHP Trooper Sergeant Scott Simon, NHP Trooper Heather Neely, NHP Trooper Jorge Hernandez and/or HPD Officer Michael Corad, based on the totality of the circumstances, and unless new facts come to light which contradict these findings, no charges will be forthcoming.



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