



# OFFICE OF THE DISTRICT ATTORNEY

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May 18, 2012

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

**Re:** Officer involved death of Mauricio S. Hernandez which occurred on March 8, 2011, at "The Bar" located at 1987 N. Nellis Blvd., under event #s 110308- 4024 and 110308-3782.

Dear Sheriff Douglas C. Gillespie:

On March 8, 2011, Mauricio S. Hernandez (hereinafter Decedent) shot an individual (hereinafter Victim) at his home at 4313 Stockbridge St., Las Vegas, NV. Approximately 40 minutes later, Decedent entered a drinking establishment known as "The Bar" located approximately one mile east of the Stockbridge location and sat down at the bar. Approximately 30 minutes later, Sergeant David Toney of the Las Vegas Metropolitan Police Department (LVMPD) entered The Bar and walked toward the restrooms in the direction that Decedent was sitting. Sergeant Toney had been invited to the bar for coffee and was not actively pursuing Decedent. When Decedent saw Sergeant Toney, he got up from his chair, pulled out a handgun and rapidly advanced on Sergeant Toney pointing the gun at him. Sergeant Toney immediately drew his service weapon and fired five shots at Decedent who turned and fled into the bar restroom. Decedent subsequently died as a result of a gunshot sustained during the altercation.

The District Attorney's Office has completed its review of the March 8, 2011, death of Decedent which involved Sergeant David Toney. 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 Sergeant Toney 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 Sergeant Toney 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 Sergeant Toney was not criminal. This decision, premised upon criminal-law standards, is not meant to limit any administrative action by the 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 March 8, 2011, at approximately 7:34 p.m., Victim was taking out the garbage at his home located at 4313 Stockbridge St., Las Vegas, NV. A Hispanic male adult, whom Victim later identified from a photo line-up as Decedent Mauricio S. Hernandez, approached Victim. As Decedent moved toward Victim, Decedent pulled out a gun, racked a round into the gun's chamber and fired his weapon multiple times at Victim striking him in the lower back. After he was shot, Victim yelled at Decedent that "the cops are coming" and Decedent fled the scene. Victim was left paralyzed as result of his gun shot wounds. The details of this call were documented under LVMPD event #110308-3782.

### **Contact with Law Enforcement**

At 8:16 p.m., approximately 40 minutes after the Victim shooting, Decedent entered "The Bar" located at 1987 N. Nellis Blvd., which was approximately one mile east of the Victim shooting. Video from The Bar revealed that Decedent initially sat down at the bar near poker machine #4. At 8:19 p.m. and 55 seconds, however, Decedent moved to the north side of the bar near machine #15 which was located near the bar's restrooms.

At 8:34 p.m. and 20 seconds, Decedent left the bar area and entered the restroom. Decedent returned to his seat at the bar at 8:35 p.m. and 4 seconds and continued to drink and engage in limited conversation with bar staff and patrons. During his stay at the bar, Decedent ordered and consumed two tequila and Sprite mixed drinks one of which remained on the bar after the officer involved shooting. Toxicology studies at autopsy revealed that Decedent had a blood alcohol level of 0.090, as well as Amphetamine and Methamphetamine in his system.

At 8:47 p.m. and 23 seconds, Sergeant Toney entered The Bar and walked toward the restrooms in the direction that Decedent was sitting. It is important to note that Sergeant Toney entered The Bar to have a cup of coffee with his friend, Private Citizen (PC) #4, who had invited Sergeant Toney to meet with PC#4 only minutes before. Sergeant Toney was not looking for or pursuing Decedent at the time.

At 8:47 p.m. and 28 seconds, Decedent moved out of his seat, pulled out his gun and moved directly toward Sergeant Toney. At 8:47 p.m. and 29 seconds, as Decedent raised his weapon, he pulled the slide back on his gun ejecting a live round which was later recovered by crime scene investigators.

At 8:47 p.m. and 32 seconds the words "what what" can be heard on the video followed by a rapid succession of gun fire. A total of five shots were fired between 8:47 p.m. and 34 seconds and 8:47 p.m. and 36 seconds. All of these shots were determined to have come from Sergeant Toney's service weapon.

Also, on the video recording, at 8:47 p.m. and 32 seconds, Decedent is seen beginning to back away with his gun aimed in the direction of Sergeant Toney. At 8:47 p.m. and 33 seconds, with his gun still raised, Decedent broke and ran toward and into the restrooms located approximately 8-10 feet away. **See Exhibit 1.** From the video, it appeared as though Sergeant Toney fired his weapon just as Decedent broke to run toward the restroom. No shots were fired after Decedent ran into the restroom and no entry was made into the restroom until backup officers arrived on scene.

Once officers made entry into the restroom, they located Decedent lying face down in the doorway of the restroom's only stall. Decedent's gun was located immediately adjacent to Decedent's left arm on the tile of the restroom floor.

Sergeant Toney elected not to submit to recorded statement to Force Investigation Team (F.I.T.) detectives concerning the facts surrounding the situation. Sergeant Toney did, however, provide a cursory explanation of the scene and events to Detectives R. Rogers, Sergeant S. Naegele and CSI Supervisor J. Smink.

### **Contact with Private Citizens**

There were four persons in the bar at the time of the incident besides Sergeant Toney and Decedent. Each of those individuals was interviewed and each gave statements to police. Private Citizen (PC) #1, the bartender, stated that at approximately 8:00 p.m. to 8:30 p.m., Decedent entered the bar and ordered tequila and Sprite. PC#1 stated that she had minimal contact with Decedent and that he stated his name was Sam. PC#1 said that Decedent stayed in the bar until the officer (Sergeant Toney) arrived approximately 30-40 minutes later.

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According to PC#1, Sergeant Toney walked around the corner of the bar toward the restrooms where Decedent was sitting. PC#1 stated that when Decedent saw Sergeant Toney he got out of his chair, pulled out what she described as a "black" gun and pointed it at Sergeant Toney. PC#1 stated that Sergeant Toney said something to Decedent and she immediately dropped down below the bar. PC#1 said she heard four or five gunshots and when she raised up she saw Sergeant Toney firing his weapon in Decedent's direction and Decedent running into the restroom.

PC#2, a bar patron, stated that he entered the bar at approximately 8:00 p.m.. PC#2 noted that a Hispanic male (Decedent) was seated at the bar near the restrooms. PC#2 stated that sometime later an officer (Sergeant Toney) entered the bar and walked toward the restrooms where Decedent was sitting. PC#2 stated that as Sergeant Toney approached Decedent he suddenly stood up, took an offensive posture as if he was holding a weapon and pointed what PC#2 thought was a gun at Sergeant Toney. PC#2 was not sure if Decedent actually had a weapon, but he was pretty sure that Decedent fired at least one round at Sergeant Toney.

PC#3, another patron, stated that she entered the bar at approximately 7:30 p.m. and that she sat near the end of the bar by the restrooms. PC#3 said that Decedent entered a short time later and sat down near her, but closer to the restrooms. PC#3 stated that she engaged in small talk with Decedent and that her back was toward the entrance as she spoke to Decedent. PC#3 stated that as she was speaking to Decedent, she saw his expression change from calm to one of panic and fear. PC#3 said that Decedent dropped the cigarette he was holding, pulled out a handgun and began shooting at something over her right shoulder. PC#3 stated that she dropped to the ground, could smell gun powder and heard several more gunshots behind her. PC#3 said that she saw the pants of a police officer and also saw Decedent dive for the restroom. PC#3 said that she could hear Decedent moaning from within the restroom, but crawled away as she saw Sergeant Toney cautiously approach the restroom.

PC#4, the bar owner, invited Sergeant Toney to come to the bar and have a cup of coffee. PC#4 stated that when Sergeant Toney entered the bar he walked toward the restrooms. PC#4 said that he heard Sergeant Toney say "what" twice then saw Decedent aiming a silver semi-automatic handgun at Sergeant Toney. PC#4 said that Sergeant Toney drew his weapon and fired several times at Decedent who fled to the restroom. PC#4 stated that he likewise drew his own weapon in order to assist Sergeant Toney. Both PC#4 and Sergeant Toney waited outside the restroom door until other officers responded.

### **Opinions of Private Citizens**

The four private citizens who witnessed all or part of the incident commented that they believed Sergeant Toney had acted appropriately under the circumstances and had no real choice in his actions.

PC#1 stated: "The only thing is that with the gun pointed at the officer the officer really had no choice. It was either him or him." In response to a question about what she thought would have happened if Sergeant Toney had not shot at Decedent PC#1 stated: "He probably would be dead. And the rest of us could have very well been shot too, because from that point he had witnesses."

PC#2 stated: In response to a question about whether in his opinion the officer could have done anything differently PC#2 said "Absolutely not. I mean that was absolutely right on the money. He was, he responded I mean if it'd been me in his shoes, I'd have done exactly the same thing. I mean it was . . . absolutely not. There was, it was a split second decision. You know what I mean, and, and there was, there was no time to be asking questions about that one."

PC#3 stated: In response to a question about what she thought would have happened to the officer if he had not fired PC#3 said "he'd be dead. This dude was shooting. This guy was shooting just, just didn't say anything, just pulled out a gun, looked right past me, and started shooting over my shoulder. He would have killed that cop if he had a chance."

PC#4 stated: "So suspect chose to get out of the bar stool, take a combative stance towards a police officer in uniform, and draw a handgun on him. Sergeant Toney fired on the suspect, because the suspect posed, and the suspect created a imminent threat to the health, and welfare, and safety of Sergeant Toney as well as the other civilians in the bar, which I'm gonna guess beside myself and Sergeant Toney, I'm gonna guess five plus myself. The suspect chose this position. He chose to draw a gun on a police officer in uniform."

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## **FORENSIC REPORTS**

### **Findings from the Scene**

At the point where Sergeant Toney began to fire his weapon the Decedent and Sergeant Toney were approximately 13 feet 7 inches apart. Video images showed Decedent move out of his bar chair, raise his weapon while ejecting a round and move rapidly toward Sergeant Toney while pointing the gun at him. Crime scene analysts documented bullet strikes in the direction of fire from Sergeant Toney and recovered four bullets and two bullet fragments along with five expended cartridge cases at the scene. All expended cartridge cases were forensically matched to Sergeant Toney's service weapon.

Upon examination, Decedent's gun did not contain any live cartridges. Aside from the one live round ejected by Decedent as he was aiming his weapon at Sergeant Toney, crime scene investigators did not find any expended cartridge cases within the bar that came from Decedent's gun. In addition, there was no evidence that Decedent had actually fired his weapon at Sergeant Toney.

Twelve R-P 380 auto cartridges were recovered from Decedent's vehicle located outside the bar and were consistent with the intact R-P 380 auto cartridge recovered from the inside of the bar. Firearms and toolmark analysis of the R-P 380 auto cartridge recovered from inside the bar confirmed that it had been chambered and extracted from the firearm recovered next to Decedent's body. Cartridge cases recovered from the 4313 Stockbridge, crime scene involving Victim were also a forensic matched to the Decedent's recovered weapon.

### **Findings from the Autopsy**

On March 9, 2011, Dr. Gary Telgenhoff, M.S., D.O., of the Clark County Coroner's Office conducted an autopsy on the body of Decedent. Dr. Telgenhoff performed an external and an internal examination of the body of Decedent and ordered a toxicological examination. He identified a perforating gunshot wound to the back of Decedent and determined that this was the cause of death. The toxicological analysis revealed that Decedent had a blood alcohol content of 0.09 and also had, in his system, the presence of Amphetamine, as well as Methamphetamine at a level of 740 ng/mL, which has been associated with violent and irrational behavior.

Doctor Telgenhoff determined the manner of death to be homicide. Dr. Telgenhoff'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.

....

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, Sergeant Toney reasonably believed that both he and the other bar patrons were in imminent danger and that Decedent would kill or cause them great bodily injury. The confrontation from beginning to end lasted only eight seconds and just prior to the confrontation, the bar was calm. Decedent had just shot Victim an hour before and one mile away from the bar. When Sergeant Toney entered the bar Decedent did not know that Sergeant Toney was visiting the bar at the invitation of PC#4 to have some coffee and was simply walking to the restroom. By his actions, Decedent possibly thought that Sergeant Toney was going to try to apprehend Decedent for the crime he had just committed nearby.

When Sergeant Toney entered the bar, he saw bar patrons and briefly spoke with the bartender. Sergeant Toney was aware of the presence and proximity of others when the confrontation occurred. It is undisputed that Decedent was the aggressor in this confrontation. This, coupled with the fact that Decedent produced a gun, appeared to chamber a round and then aim it at Sergeant Toney while Decedent was directly next to other bar patrons clearly projects an imminent threat to the lives of both Sergeant Toney and others.

The fact that Decedent performed these threatening actions while he rapidly advanced on Sergeant Toney, together with the closeness of Decedent to Sergeant Toney further heightened the perceived threat. In addition, because there was no prior incident or altercation which would have alerted Sergeant Toney to the possibility of violence, the rapidly evolving situation and compressed time to react further added to Sergeant Toney's sense of threat.

In short, Sergeant Toney had the right under Nevada law to use deadly force against the Decedent in defense of himself and others in "The Bar" that evening.

## **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, chamber a round and aim that gun at Sergeant Toney there was a clear threat of serious physical harm to both Sergeant Toney and others. Sergeant Toney was, under the circumstances therefore, unequivocally justified in using deadly force to neutralize that threat.

In light of all the evidence reviewed to date, the State would be unable to prove that the actions of Sergeant Toney 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, an 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 States 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, Sergeant Toney was faced with a very dangerous and unique situation. Not only was Sergeant Toney's own life directly put in jeopardy by the defendant confronting him with a gun, but there were also other patrons in the bar that day 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 Sergeant Toney. **See Exhibit 1.** Also, because the entire encounter took place within seconds, it was not feasible, prior to Sergeant Toney using deadly force, to give Decedent a warning. As such, therefore, under both subsections one and two of NRS 171.1455, Sergeant Toney was justified in using deadly force to stop Decedent from escaping.

### 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 Sergeant Toney 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 Sergeant Toney 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.



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Reviewed by



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