

# REPORT ON USE OF FORCE



## Legal Analysis Surrounding the Death of Alex Underdown on May 14, 2019

### INTRODUCTION

On May 14, 2019, 54-year-old Alex Underdown (“Decedent”) was shot and killed by Las Vegas Metropolitan Police Department (“LVMPD”) Officer Brendan Burbrink following a prolonged armed standoff with police. The incident took place at approximately 8:01 p.m. at 3141 Bel Air Drive, Las Vegas, Nevada, 89109.

### SYNOPSIS

On May 14, 2019, at approximately 5:29 p.m., LVMPD Dispatch received a 9-1-1 telephone call from D.U., Decedent’s wife, reporting a domestic disturbance with Decedent occurring at 3141 Bel Air Drive. D.U. informed Dispatch that there were firearms inside the home and Decedent had been drinking, but that no battery had occurred. D.U. stated that she and Decedent would remain near the residence and await police.

At approximately 6:17 p.m., LVMPD Dispatch received a call from Decedent. Decedent also stated he was involved in a domestic dispute with his wife and informed Dispatch that he would be standing by at a neighbor’s residence. Decedent refused to provide the neighbor’s address and ended the call.

At approximately 7:16 p.m., LVMPD Officer Christina Nicholas arrived at 3141 Bel Air Drive. Upon arrival, Officer Nicholas advised over the radio that she could hear a female (D.U.) screaming, but could not get past the home’s courtyard gate, which was locked. Shortly thereafter, Officer Nicholas made contact with D.U. and reported over the radio that D.U. had injuries to her face. Officer Nicholas further requested that medical personnel respond to the scene.

Patrol officers on scene determined that probable cause had been established to arrest Decedent for battery constituting domestic violence. Officers contacted Decedent on his cellular phone in an attempt to have him exit the residence. Decedent told officers they would have to come and get him and disconnected the phone call. Due to officers knowing that Decedent had firearms inside the residence, officers on scene established containment around the house and additional officers responded to the scene.

At approximately 7:46 p.m., Decedent exited his residence into the courtyard area and stood by the courtyard gate. As officers spoke to Decedent, Decedent displayed a firearm and made statements that he wanted to shoot. Decedent was verbally aggressive with the officers. He also made statements indicative of an intent to commit "suicide-by-cop" for several minutes before walking away from the courtyard gate. Several minutes later, Decedent returned to the courtyard gate and again yelled at officers before walking back towards the house.

At approximately 7:56 p.m., Decedent returned again to the courtyard gate. The LVMPD Air Unit, now assisting in the matter, reported over radio that Decedent was holding a firearm in his right hand. As part of the police containment effort, Officers Brendan Burbrink, Jeffrey Firestine, and Michael Polion had taken position behind a wall in the courtyard area of a house directly to the west of 3141 Bel Air Drive. From their position, these officers also visually confirmed that Decedent was holding a firearm. After several minutes, Decedent told officers he was going inside and walked away from the courtyard gate, back towards the residence.

As Decedent walked toward his front door, he passed by Officers Burbrink, Firestine and Polion. All three officers ducked behind the dividing wall to conceal their location. Once the officers believed Decedent had passed their location, they raised their heads back above the wall to regain a visual on Decedent. As they did, they observed Decedent walking back toward them with his firearm raised. Officer Burbrink discharged his rifle towards Decedent, who was struck and fell to the ground.

Officers advised over the radio that shots had been fired and that the Decedent was down and unresponsive. Thereafter, a team of officers moved into the area to take Decedent into custody. Upon approaching Decedent, a firearm was observed lying next to him. Decedent was placed into handcuffs and medical personnel checked his vital signs. Decedent was declared dead on scene. Officers then secured the scene and the area surrounding the residence. Due to the fact that a fatal officer-involved shooting had occurred, LVMPD Force Investigation Team ("FIT") detectives responded to the scene and assumed responsibility of the investigation.

The Clark County District Attorney's Office has completed its review of the May 14, 2019, death of Decedent. It has been determined that, based on the evidence currently available and subject to the discovery of any new or additional evidence, the actions of Officer Burbrink were not criminal in nature. This review is based upon all the evidence currently available.

This report explains why criminal charges will not be forthcoming against Officer Burbrink. It is not intended to recount every detail, answer every question, or resolve every factual conflict regarding this police encounter. It is meant to be considered in conjunction with the Police Fatality Public Fact-Finding Review, which was held on January 31, 2020.

This report is intended solely for the purpose of explaining why, based upon the facts known at this time, the conduct of the officer 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.

### **BODY WORN CAMERAS**

Several officers activated their body-worn cameras (“BWC”) at different times during this incident. The following BWC summaries provide the most accurate and relevant description of what occurred from the arrival of Officer Nicholas and her contact with D.U., through the officer-involved shooting incident, which was recorded by BWCs worn by Officers Burbrink, Firestine and Polion.

#### **Officer Christina Nicholas**

Officer Nicholas’ BWC footage depicted her arrival at 3141 Bel Air Drive for the domestic disturbance call. As Officer Nicholas was walking towards the residence, a verbal argument could be heard between a male (Decedent) and a female (D.U.). When Officer Nicholas reached the closed gate leading to the residence courtyard, D.U. could be heard yelling, “[D.E], help me!” (The investigation revealed D.U. had her landlord and neighbor, D.E., on speakerphone on her cellular phone). Officer Nicholas could not open the gate due to it being locked. Officer Nicholas knocked on the gate, and D.U. can be heard screaming and yelling several times to call 9-1-1. Officer Nicholas announced, “Police department!” as she continued to knock on the gate and call for back up. Officer Nicholas was able to open the gate using a knife. D.U. then ran towards her yelling, “Help me, please!” D.U. was seen bleeding from her mouth, and had a mark around her right eye. D.U. told Officer Nicholas that Decedent was “out of control” and to “arrest him.”

D.U. was yelling into a cellular phone, stating that Decedent “beat” her out of the house, that she was going to press charges, and that officers were going to arrest him. Officer Nicholas had D.U. exit the courtyard area after D.U. stated Decedent had guns. D.U. told Officer Nicholas several times to arrest Decedent and put him in jail.

Officer Nicholas’ BWC next captured that arrival of Officers Baron Bybee and Jason Manasan who attempted to make contact with Decedent. Officer Manasan called Decedent on his cellular phone. Decedent could be heard yelling from his residence, and said to officers, “Fuck you! Come get me, bitch!” Officer Nicholas moved away from the residence as officers set up containment and waited for additional officers to respond.

Officer Nicholas later contacted D.U. in the back of an ambulance and asked her questions about her injuries. D.U. stated Decedent must have slammed the door into her face, but he did not use any weapons against her. D.U. also said Decedent was responsible for a cut to her right arm. When Officer Nicholas heard radio traffic that Decedent had gone outside, Officer Nicholas exited the ambulance and ran back toward the scene. Officer Nicholas stood in the driveway and carport area of 3145 Bel Air Drive with other officers.

Officer Nicholas' BWC also captured audio of Decedent yelling obscenities towards officers. Decedent was heard yelling at Officer Bybee, "You ready to die, bitch?" The yelling continued for several minutes as additional officers and an Air Unit arrived on scene. At the time of the OIS, Officer Nicholas was in the carport area and neither the officer nor her BWC had a visual on Decedent, though gunshots could be heard.

Officer Nicholas stood by with medical personnel outside of the courtyard until the scene was secured. Medical personnel then entered the courtyard, checked on Decedent, and then exited the area. Officer Nicholas briefly spoke to medical personnel, and then turned off her BWC.

#### **Officer Baron Bybee**

Officer Bybee's BWC begins coverage when he was assigned to the domestic disturbance call at 3141 Bel Air Drive. Officer Bybee's BWC next records his arrival at 3141 Bel Air Drive. He exited his patrol vehicle and stood by the passenger door as his partner, Officer Manasan, approached Officer Nicholas and D.U. D.U. could be heard yelling, "Arrest him! Put him in jail!"

As Officer Bybee was standing near the driveway of Decedent's residence, Officers Manasan and Nicholas were seen standing near the garage door. Officer Bybee instructed Officer Manasan to call Decedent to speak to him. As Officer Manasan was speaking to Decedent on the phone, Decedent could be heard yelling, "Fuck you!"

Officer Bybee walked away from the residence and advised Dispatch via radio that there was probable cause to arrest Decedent for misdemeanor battery. Officer Bybee also notified Dispatch that there were cameras on the house, firearms inside the residence, and that Decedent had challenged the officers to "come get him."

Shortly thereafter, Officer Bybee was standing behind a palm tree next to Decedent's driveway. Officer Bybee was having a conversation with Decedent, who was not in camera view. During the conversation Decedent said officers were waiting to shoot him, at which point Officer Bybee showed Decedent that his (Officer Bybee's) hands were empty. Decedent responded by saying, "You see this?" to Officer Bybee. Officer Bybee immediately told Decedent to "put it down," and then radioed that Decedent had a firearm in his hand. Decedent then yelled, "Shoot me, man! I don't give a fuck!" Decedent then threatened Officer Bybee, stating that he (Decedent) had a better shot.

As the conversation continued, Officer Bybee asked Decedent about what had happened that day, and Decedent replied, "I die. I don't give a fuck. What about you, man? You ready to die,

bitch?” Decedent continued to threaten Officer Bybee as Officer Bybee continued to speak calmly to Decedent. As Officer Bybee and Decedent continued talking, Decedent stated he had more than one gun. Decedent walked away from the gate, which was next to his driveway. Officer Bybee updated Dispatch that Decedent was possibly “suicide-by-cop” and aggressive.

Several seconds later, Decedent went back to the gate and continued to yell at Officer Bybee, and stated he had a Glock. Additional officers and sergeants arrived on scene and Officer Bybee provided them with information about the situation. Officer Bybee stated Decedent showed him the pistol. Officer Bybee had an additional conversation with sergeants and officers on scene about what had occurred.

Several minutes later, Decedent returned to the gate and started yelling at officers. Officer Bybee tried to convince Decedent to put down the gun and talk to officers, but he refused. Officer Bybee tried to have Decedent go back inside his house, so they could call him, but he refused. Officer Bybee asked Decedent several times to put the gun down, but Decedent would not comply. A short time later, four gunshots were heard.

Officer Bybee joined a group of officers as they moved toward the courtyard. After making entry into the courtyard, Officer Bybee put on latex gloves and approached Decedent. A handgun was visible on the ground next to Decedent. Officers placed Decedent in handcuffs.

Officer Bybee and additional officers made entry into the residence to clear it. After making sure there was no one else inside of the home, officers checked the exterior storage areas and backyard.

After the event, Officer Bybee’s BWC recorded interactions with D.U. There was no discussion about the OIS.

### **Officer Brendan Burbrink**

Officer Burbrink’s BWC footage depicted Officer Burbrink responding to the scene as a passenger in the patrol vehicle. Upon arrival to the neighborhood and parking, an unknown Clark County Fire Department member directed Officer Burbrink to the scene. Officer Burbrink met up with additional officers who were in a carport area of 3145 Bel Air Drive, one house west of Decedent’s residence. Officer Burbrink was told that Decedent had a Glock, a .38 special and an AR (assault rifle), and that Decedent had told officers to come get him.

Officer Burbrink went back to his vehicle to deploy his rifle from the trunk. He put on a tactical vest, and picked up his rifle before returning to the other officers’ location. Officer Burbrink walked to the backyard of 3415 Bel Air Drive and looked over the rear fence before returning to the courtyard area. The courtyard area overlooked Decedent’s courtyard. Upon looking over the wall, Decedent could be heard yelling in the background. Officer Burbrink aimed his rifle in Decedent’s direction.

The BWC view was obstructed by Officer Burbrink's uniform, rifle, and the wall. Decedent was heard yelling, "I'm going back inside!" Officer Burbrink slowly ducked below the wall then looked over the wall, at which point Decedent could be seen walking by Officer Burbrink's location. As Decedent left the camera view, Officer Burbrink lowered his rifle and looked over the wall.

Officer Burbrink then appeared to get startled as the camera suddenly jerked and he raised his rifle, and aimed it over the wall. Officer Burbrink discharged his rifle four times, but his BWC did not capture his target. After the shots were fired, Officer Burbrink looked farther over the wall and stated that Decedent was down. Officer Burbrink stated, "He pointed that shit right at my face!"

Officer Burbrink remained looking over the wall, but Decedent's location was not visible. Officers could be heard stating that Decedent was down, a gun was laying next to him, and he was bleeding. Officer Burbrink held his position until another team of officers entered the courtyard where Decedent was located.

Officer Burbrink then left his location and again stated, "He pointed that thing right in my fucking face, man." After unloading his rifle, Officer Burbrink stated, "Definitely a Glock, that's for sure."

Officer Burbrink started to walk toward a patrol vehicle before deactivating his BWC.

### **Officer Jeffrey Firestine**

Officer Firestine's BWC footage depicted Officer Firestine driving to 3141 Bel Air Drive for a domestic disturbance call. Officer Firestine arrived at the incident, and while walking toward the scene he made contact with a firefighter. The firefighter advised Officer Firestine the exact location of the target residence. Officer Firestine walked toward the residence and joined additional officers who were set up for containment at 3145 Bel Air Drive, which was next door to the target residence at 3141 Bel Air Drive.

Officer Firestine was directed to the backyard where additional officers were already set up for containment. A male (Decedent) was heard continuously yelling, "I got a gun! Fuck you! Get that fuckin' helicopter out of here! Fuck you!" Officer Firestine was standing next to Officers Polion and Burbrink. Officer Burbrink had his rifle deployed. Officer Firestine told radio traffic that he could see Decedent, and advised he had a firearm in his right hand. Decedent then yelled, "You bitches got guns; I got a gun!"

Officer Firestine then discussed retrieving either a specialty impact weapon or a low lethality shotgun. An officer standing behind Officer Firestine could be heard saying that he had a low lethality shotgun. Officer Firestine told radio traffic that a low lethality shotgun was deployed.

Officers Firestine, Burbrink, and Polion were seen looking over a wall towards Decedent. Officer Firestine advised the other officers that Decedent was walking in their direction and told radio traffic that Decedent was walking to the rear of the complex. Several moments later, four gunshots were heard. Officer Burbrink yelled to the other officers, "Shots fired! Shots fired!"

Officer Firestine told radio traffic that shots were fired and Decedent was down. Officer Burbrink was heard yelling at Decedent to drop the firearm. Officer Firestine told radio traffic that Decedent's arms were up toward his head, the firearm was down by his waistline, and that he was bleeding.

Several moments later, Officer Firestine had a discussion with Officer Polion reference Decedent firing a round at officers. Another officer on the other side of the wall advised Officer Firestine to have the paramedics go to Decedent's location after the house was cleared. Officer Firestine told Officer Polion to tell the paramedics to come in to the courtyard. Officer Firestine then walked to the front of the house to the driveway and turned off his BWC.

### **Officer Michael Polion**

Officer Polion's BWC footage depicted him responding to the domestic disturbance at 3141 Bel Air Drive on his department motorcycle. Upon arrival, he was directed to the target address by an unknown Clark County Fire Department member. As Officer Polion met with other officers, he moved into the courtyard of 3145 Bel Air Drive, directly west of Decedent's residence. Decedent could be heard yelling in the background.

Officer Polion looked over the wall into Decedent's courtyard, and Decedent was seen standing at the gate looking towards the driveway. Officer Polion moved away from the wall when Officer Burbrink arrived with a rifle. Officer Polion asked another officer to retrieve a 40mm specialty impact weapon or a low lethality shotgun. Officer Polion was handed a low lethality shotgun, and looked over the wall again. Officer Polion ducked below the wall as Decedent walked by, but then appeared to get startled as the camera suddenly moved. Four gunshots were heard, and Officer Polion broadcast over the radio, "Shots fired."

Officer Polion looked over the wall, and Decedent was seen lying on the ground with a handgun by his waist. Officer Polion remained on top of the wall, aiming his handgun at Decedent until other officers entered Decedent's courtyard. As officers made contact with Decedent, Officer Polion moved off the wall.

Officer Polion had a conversation with other officers where it was mentioned that Decedent fired a shot at officers. Officer Polion stated that he came up and Decedent was right there. Officer Polion stated that Decedent pointed the gun directly at his face.

Officer Polion looked around the area where he was standing for any bullet impacts due to officers believing Decedent fired a shot at them. Officer Polion then exited the courtyard at 3145 Bel Air Drive and walked into Decedent's courtyard with medical personnel. Medical personnel checked Decedent and pronounced him deceased.

On the BWC, Officer Polion can be heard responding to a supervising officer that Decedent aimed the gun, possibly fired a round, and subsequently he was shot. Officer Polion then helped clear the garage, and the side and back yards of the neighboring residence to the east. As Officer Polion walked away from the residence, he turned off his BWC.

## SCENE DESCRIPTION

The scene consisted of the residence located at 3141 Bel Air Drive and the front courtyard area of the residence immediately to the west. The residence abutted a golf course, which was immediately to the north.



Figure 1 - Satellite Image of 3141 Bel Air Drive and Surrounding Area

The residence at 3141 Bel Air Drive is a south-facing unit on the north side of the street. The front yard consists of a driveway southeast of the residence, which borders a grass area with a tree on the southwest. The west courtyard is accessed through an east-facing gate near the northwest corner of the driveway. A doorbell camera was on a block wall adjacent to the gate. To the west of 3141 Bel Air Drive was a neighboring residence (3145 Bel Air Drive) that also faced south.

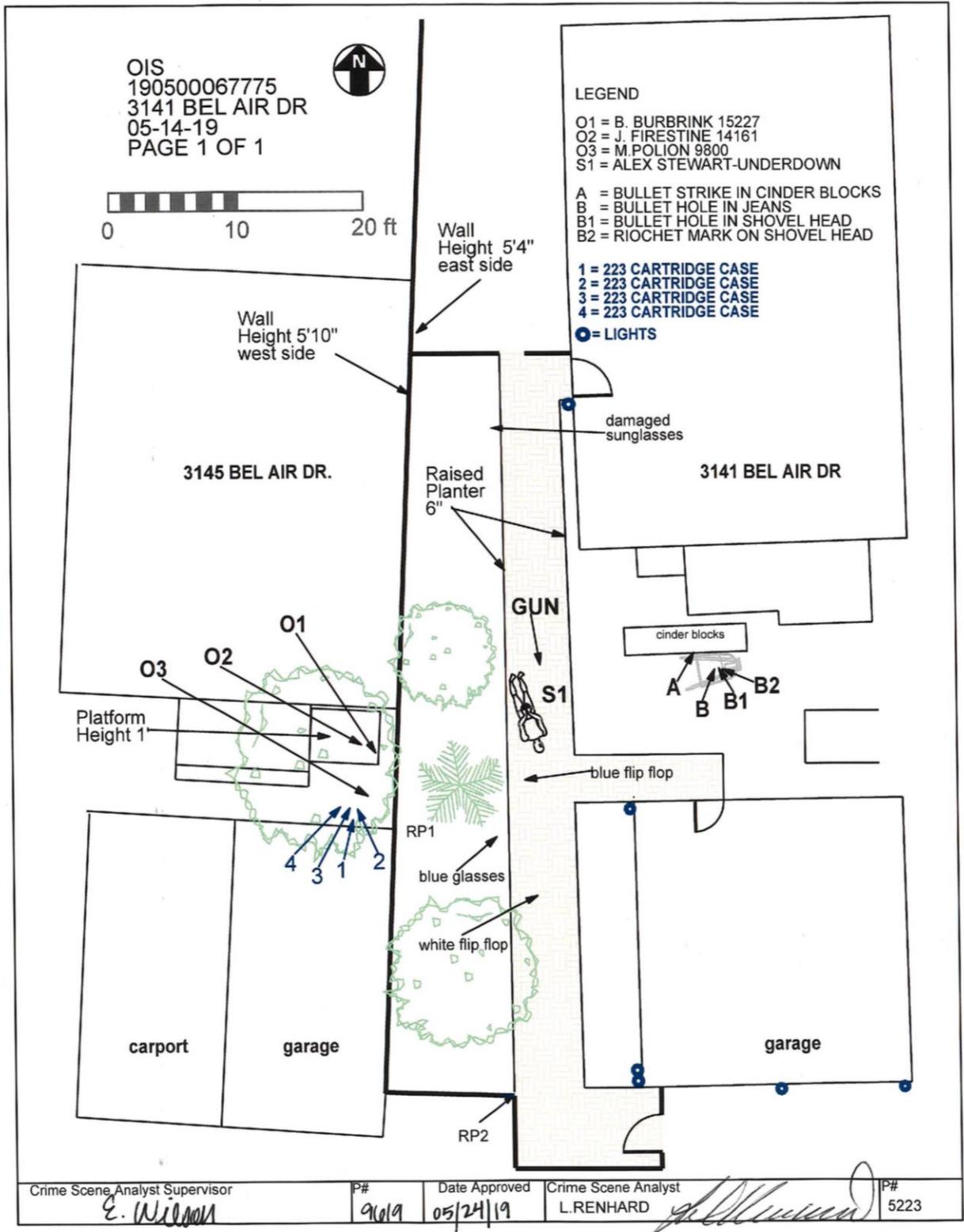


Figure 2 - Diagram of OIS Scene, Including Courtyard Area of 3141 Bel Air Drive and Neighboring Residence

## VISIBLE EVIDENCE

### **3145 Bel Air Drive – Courtyard**

A south-facing gate off of the south carport at 3145 Bel Air Drive led to an east central courtyard. The north portion of the courtyard contained a raised porch that lead to the residence. East of the porch is a planter area with a tree and a wooden platform approximately one foot high. The east shared-wall of the courtyard at 3145 Bel Air Drive was the west shared-wall of the courtyard at 3141 Bel Air Drive. Four cartridge cases bearing headstamp “SPEER 18 223 REM” were located on the ground to the south of the planter.

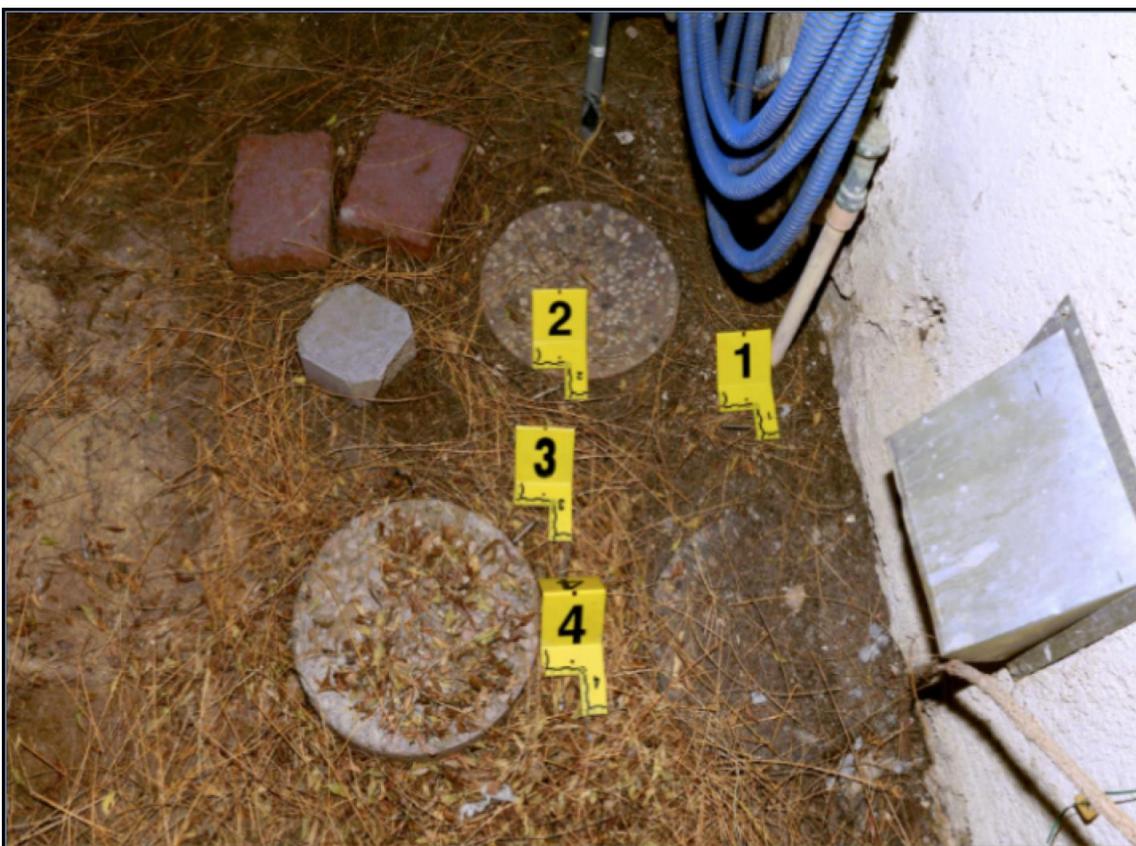


Figure 3 - Location of Cartridge Cases at 3145 Bel Air Drive

### **3141 Bel Air Drive – Courtyard**

The courtyard at 3141 Bel Air Drive had north/south paver walkway that ran along the west side of the property. There were raised planters on the east and west sides of the walkway. The garage to the residence was a separate building to the south of the property, while the residence was to the north. Separating the residence from the garage was a planter area, which contained a standalone cinder block wall. A wheelbarrow with a pair of denim jeans and multiple tools stood just south of the cinder block wall.

Decedent was on the paver walkway on the west side of the courtyard, just north of the central walkway that led to the garage. Decedent had an apparent gunshot wound to the head, but

otherwise exhibited no other signs of trauma. Directly north of decedent was a black “Glock” Model 43 9-millimeter semi-automatic firearm. There was a magazine in the magazine well. A cartridge bearing headstamp “WIN 9MM LUGER” was in the chamber and four cartridges bearing the same headstamp were in the magazine.



**Figure 4 - Decedent's Impounded Firearm & Magazine**

An apparent bullet hole was located in the south side of the cinder block wall, approximately one-foot, ten-inches above the ground. There was another apparent bullet hole in a pair of blue denim jeans with corresponding damage to tools inside the wheelbarrow



**Figure 5 - Bullet Strike in Cinder Block Wall**



**Figure 6 - Bullet Strike in Wheelbarrow**

### 3141 Bel Air Drive – Interior of the Residence

The residence has two stories. The downstairs was organized with a south living room, east central bathroom, west-central stairwell, northeast kitchen and northwest dining room. The upstairs was situated with southwest and southeast bedrooms, an east-central bathroom and a northwest master bedroom.

A handwritten note, signed by Decedent, was located on the dining room table. The note included an apology from Decedent to the owner of the house at 3141 Bel Air Drive, amongst other statements. In the master bedroom, the north nightstand contained a box and plastic bag with ammunition. A holster was on top of the south nightstand and a revolver and a knife were located inside the south nightstand. A cellphone was located on the couch in the living room.

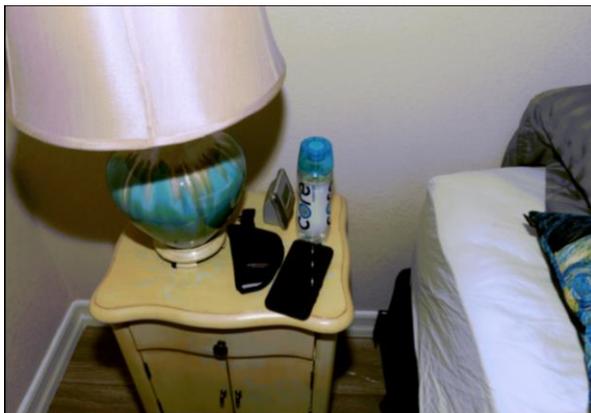


Figure 7 - Holster Located on Nightstand

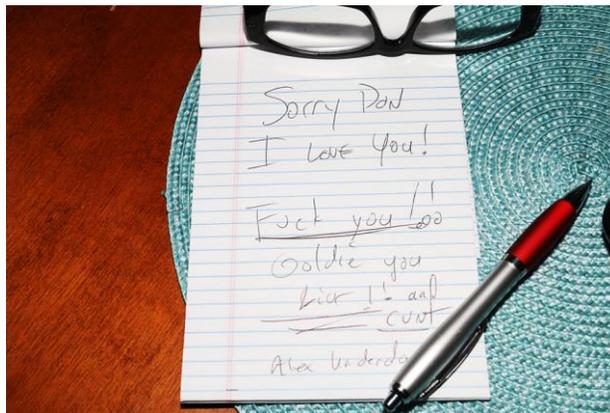


Figure 8 - Note Located on Kitchen Table

### SCENE WALKTHROUGH

On May 15, 2019, at approximately 12:54 a.m., Officer Burbrink provided a walk-through of the scene. Officer Burbrink placed an orange traffic cone to indicate where he was standing at the time of the shooting. Officer Burbrink indicated he fired in an easterly direction over the wall at a downward angle. He stated he fired approximately three shots and that he fired because the Decedent pointed a gun at him and his partner. Officer Burbrink stated he was absolutely in fear for his life.

### PUBLIC SAFETY STATEMENT

Officer Burbrink provided a Public Safety Statement to LVMPD Sergeant Michele Iacullo. On May 14, 2019, at approximately 10:42 p.m., FIT Detective Scott Mendoza interviewed Sergeant Iacullo in reference to the Public Safety Statement (PSS) she obtained from Officer Burbrink. Below is the transcript of the interview. [Detective Mendoza is designated by (SM) and Sergeant Iacullo is designated by (MI).]

*SM: All right. Operator, this is Detec... Detective S. Mendoza, M-E-N-D-O-Z-A, P# 6878, with the Force Investigation Team, conducting a recorded Public Safety Statement interview*

with Sergeant Michele Iacullo, and that's I-A-C-U-L-L-O, uh, P# 7857, call sign of 773NoraSam. Uh, date of hire is January 2003. Uh, she works out of Southser...South Central Area Command, uh, with the Nora Safe Street squad. Uh, rr...uh, RDOs are Saturday, Sunday, Monday and hours of 1700 to 0300. Uh, this Public Safety Statement is in reference to an officer-involved shooting that occurred on May 14, 2019, at approximately 2001 hours, in the area of 3141 Bel Air Drive, Las Vegas, Nevada 89119, uh, reference Event# 190500067775. Uh, today's date is May 14 and the time is 2242 hours. Uh, statement is being conducted at, uh...in front of 3111 Bel Air Drive in LVMPD vehicle...unmarked vehicle 4363. All right. Uh, Sergeant Iacullo, um, you did the Public Sa...Safety Statement with the involved officer...

MI: Yes, I did.

SM: ...is that correct? And, um, can...and what officer was that?

MI: Officer Burbink [sic], P#...

SM: Br...Brendan Burbank...

MI: Correct.

SM: ...P# 15227?

MI: Correct.

SM: Okay. Um, you asked him a series of questions. Can you go through the questions that you asked him, please?

MI: I did. And his answers you want?

SM: Yes.

MI: Okay. The first question is, "Did you discharge your firearm?" He answered, "Yes." "If so, in what direction?" His answer was, "East."

Uh, "Approximately where were you located when you fired?" He said, "Behind a white SUV," which he pointed to me.

"How many shots do you think you fired?" He said, "Three shots."

Uh, next question: "Is anyone injured?" Uh, he said, "Yes, the suspect."

"If so, where are they located?" and he replied, "The courtyard."

Uh, third question: "Are there any outstanding suspects?" "There are not any outstanding suspects."

So, the other questions did not apply to him; um, A through C did not apply. Did you want me to read those?

SM: No, that's fine.

MI: Okay. Uh, D was, um, "What crimes have they committed?" and his reply was, "He pointed a firearm at me."

"What type of weapon do they have?" He said, "It was a bla...a black handgun." He believes it was a Glock.

The fourth question: "Is it possible the suspect fired rounds at you?" He said, "No."

Um, the next several questions are not applicable because the suspect did not fire any rounds.

Uh, #5: "Do you know if any other officers discharged their firearms?" He didn't know.

Um, again, the other ones are not applicable because he was unsure if any other officers fired their weapons.

*#6: "Are there any weapons or evidence that need to be secured or protected?" He said yes, his rifle, and that his rifle was in the back of his patrol car.*

*Um, "Are you aware of any other witnesses?" He said the officer that was riding with him, but he did not know his name, was a witness to it.*

*And that's the end of the statement.*

*SM: Okay. And that concluded your questions that you asked Officer...*

*MI: Yes.*

*SM: Burbank [sic]?*

*MI: Correct.*

*SM: Okay. And, um, also, did you, um, request any LVPMSA representation during this interview?*

*MI: No, I did not. I waived my rep.*

*SM: Okay. Perfect. All right. That'll be end of the interview, same persons present, time of 2244 hours.*

### **SUMMARY OF RELEVANT WITNESS STATEMENTS**

#### **Victim Officers**

##### **Officer Michael Polion**

Officer Polion stated that he was finishing a car stop when he heard the radio broadcast of a domestic disturbance. Officer Polion observed other marked patrol vehicles operating with lights and sirens activated and followed them to the address of the call, 3141 Bel Air Drive. Officer Polion dismounted his marked police motorcycle, and coordinated his approach with other patrol officers.

Officer Polion and the other officers gained entry into a courtyard one residence to the west of 3141 Bel Air. Officer Polion stepped on top of a gas meter, so he could see into the courtyard of 3141 Bel Air. Officer Polion observed Decedent standing near a gate leading from the courtyard of the residence to the front yard area. Decedent was yelling and cursing at officers, and holding a small frame semiautomatic firearm.

Officer Polion stepped off the gas meter and asked another officer to retrieve a specialty impact weapon or low lethality shotgun. The officer stated he had a low lethality shotgun and handed it to Officer Polion. Officer Polion again stepped onto the gas meter and looked towards the gate, however, Decedent was no longer standing in the area. Officer Polion scanned the area from right to left and observed Decedent standing in front of him, still holding the firearm. Decedent raised the firearms and pointed it directly at Officer Polion. Officer Polion feared he was going to be shot, and ducked. Officer Polion heard approximately three gunshots and knew they were fired from the officer on his left who was armed with a rifle (Officer Burbrink). Officer Polion provided cover while other officers took Decedent into custody.

### **Officer Jeffrey Firestine**

Officer Firestine state that he and his trainee-partner, Officer Espino, responded to 3141 Bel Air Drive where other patrol units had requested backup reference a domestic disturbance. Officers broadcasted the male half (Decedent) of the domestic disturbance had a firearm.

Officers Firestine and Espino parked their patrol car so it blocked traffic on Bel Air drive. Officer Firestine observed a group of officers standing at the residence to the west of 3141 Bel Air Drive.

An officer advised Officer Firestine there was a courtyard behind the residence that needed coverage. Officer Firestine took a position in the backyard where he had a clear view of Decedent and blocked Decedent's access to the group of officers standing near the neighboring residence. Officer Firestine was behind a block wall that concealed him from Decedent.

Officer Burbrink deployed his rifle and took Officer Firestine's position, utilizing Officer Firestine as his spotter. Officer Firestine requested an officer to respond to his location with a low lethality shotgun, and Officer Polion deployed a low lethality shotgun at Officer Firestine's position.

Officer Firestine broadcasted they had both lethal and non-lethal coverage, and had a clear view of Decedent's back. Decedent turned around and walked in the direction of Officer Firestine. Officers Firestine, Burbrink, and Polion ducked behind the wall as Decedent approached. The officers believed Decedent had walked away from their area. Officer Firestine peaked over the wall and observed Decedent walking toward them with his gun raised.

Officer Firestine heard a single pop followed by two more pops. Officer Firestine did not know if Decedent had fired. Officer Firestine observed Decedent go down, and an immediate action team was formed to approach Decedent, as well as clear the residence.

### **Officer Witnesses**

#### **Sergeant Michele Iacullo**

Sergeant Iacullo was at South Central Area Command (SCAC) when she heard Officer Bybee broadcast on the radio details about a domestic disturbance call he was assigned. Officer Bybee stated a subject, later identified as Decedent, had firearms inside his residence and had refused to exit. Due to the details, Sergeant Iacullo assigned herself to the call and proceeded to the scene. Sergeant Iacullo received information that a female, D.U., was out of the residence and was safe. As officers made contact with Decedent via telephone, he stated officers would have to come inside and get him.

Officer Bybee updated details of the call via the radio, and stated Decedent was coming out of the residence and had a gun. Sergeant Iacullo activated her emergency lights and siren (Code 3) and continued to drive to the scene. Sergeant Iacullo arrived in the area, and saw a security officer for the community. The security officer showed Sergeant Iacullo where the residence was located. Sergeant Iacullo exited her patrol vehicle and met with Officer Bybee near the residence. As they decided to back away from the Decedent residence, Decedent exited the house with a

firearm. Sergeant Iacullo wanted to form an immediate action team, and requested assisting officers meet her at 3133 Bel Air Drive. Sergeants Robert Johnson and Abraham Aguirre arrived with Sergeant Iacullo.

Officer Bybee attempted to talk with Decedent, but Decedent was very angry and began cursing at the officers. As Sergeant Iacullo formulated a plan of action with fellow officers, she heard three gunshots. Sergeant Iacullo and the other officers believed they were being shot at, so everyone ducked down. Another officer broadcasted over the radio that shots were fired. It was then clarified over the radio that an officer had fired the shots. Most members of the team cleared the residence, and Sergeant Iacullo located the shooting officer, Officer Burbrink. Sergeant Iacullo then conducted a Public Safety Statement interview with Officer Burbrink.

### **Officer Jason Manasan**

Officer Manasan and his field-training officer (FTO), Officer Bybee, responded to 3141 Bel Air Drive in reference to a domestic disturbance. Upon their arrival, Officer Manasan made contact with a female (D.U.) in the driveway. She had injuries on her face, and stated to Officer Manasan that her husband, Decedent, had hit her with a closed fist, and slammed a door on her. She was upset and told Officer Manasan that Decedent needed to be arrested. She told Officer Manasan that Decedent was a Marine, had a Glock, .38 special, and a large rifle inside of the residence.

Officer Manasan met with other officers in front of the residence and relayed the information about the weapons. Officer Manasan placed a phone call to Decedent, who informed him that D.U. was “full of shit” and that if they, i.e., the police, wanted to speak with him they would need to come in and get him. Officer Manasan told Decedent they didn't want to do that, at which point Decedent began cursing at them and disconnected the call.

Officer Manasan did not ever physically see Decedent, nor did he witness the OIS.

### **Officer Baron Bybee**

Officer Bybee, a field training officer (FTO), and his trainee, Officer Manasan, were dispatched to a domestic disturbance call at 3141 Bel Air Drive. They drove from the area of Maryland Parkway and Tropicana Avenue towards Bel Air Drive. Officer Manasan drove as Officer Bybee read incident details off the Mobile Computer Terminal. According to the details of the call, LVMPD officers were dispatched to a verbal only domestic dispute. Details provided also stated that the parties involved owned a firearm and that it was stored in the master bedroom.

Upon arrival Officer Bybee observed the primary unit, Officer Nicholas, had arrived and had already made contact with the female half involved in the domestic dispute (D.U.) at the driveway of the residence. D.U. appeared upset and was crying. Officer Nicholas informed Officer Bybee the male half of the dispute (Decedent) was still inside the residence. Officer Bybee approached the courtyard area, but could not see inside the residence. Officer Bybee realized the residence had a Ring video doorbell system, and placed a latex glove over the camera lens.

Officer Bybee learned from Officer Nicholas that D.U. had visible injuries to her face and lip area from being hit. Officer Bybee also learned that Decedent was D.U.'s husband. Officer Bybee stated that during the preliminary investigation sufficient probable cause existed for the crime of misdemeanor domestic battery.

Officers called Decedent via his cellular phone to talk to him about exiting the residence, but Decedent refused to exit and made verbal threats towards officers, taunting them to enter the residence. Officer Bybee then contacted Sergeant Aguirre to advise him of the incident and to provide him with the details. Sergeant Aguirre advised Officer Bybee that he would respond to the scene. Officer Bybee then called for the Air Unit since the rear of the residence abutted a large golf course. During the interview Officer Bybee stated Decedent stated that he was a Marine and a better shot than him. Decedent also told Officer Bybee that he better "take cover."

While Officer Bybee was requesting additional resources, he observed Decedent exit the residence and enter a courtyard area. Officer Bybee immediately established verbal communication with Decedent. Shortly thereafter, Officer Bybee determined Decedent was holding a handgun in his right hand. Officer Bybee took cover and continued to engage Decedent in conversation. Decedent appeared upset and hostile towards Officer Bybee, and walked away out of view into the courtyard. Decedent returned and stood out front by the gate of the courtyard and continued to engage Officer Bybee in conversation.

Sergeant Iacullo arrived and instructed Officer Bybee to move back. A plan for an arrest team was discussed as Decedent continued to yell at officers. Decedent walked away from the gate, and shortly thereafter Officer Bybee heard gunshots. Officer Bybee believed Decedent was shooting. Shortly after, Officer Bybee heard over the radio the Air Unit advise that Decedent was down and bleeding from his head. Officer Bybee and an arrest team used a shield to approach Decedent. Officer Bybee provided cover as Officer Michael Ross placed Decedent in handcuffs. Officer Bybee observed a Glock handgun on the ground next to Decedent. The arrest team then cleared the interior of the residence.

### **Civilian Witnesses**

#### **Witness S.P.**

Witness S.P. lived nearby the scene. S.P. stated he and his wife were having dinner outside on the balcony of their apartment when he first saw a police vehicle arrive on Bel Air Drive. He did not pay much attention to it, but then saw a second police vehicle arrive and noticed the residence where the police vehicles parked. S.P. retrieved his pair of binoculars with 20x80 magnification power and continued to watch the incident unfold. S.P. said it was still daylight when the incident began, and with his binoculars, he could see all the movement within the courtyard and on the street.

Through his binoculars, S.P. said he noticed an older gentleman with a long, white ponytail (Decedent). S.P. said he recognized the male as someone he had met before and stated he knew Decedent's first name. S.P. did not see anyone else in the courtyard at that time.

S.P. said Decedent then began pacing inside of the courtyard of his residence, and appeared to be attempting to hide from someone. Decedent continued to pace, and at one point S.P. said he saw Decedent hold a firearm in his left hand down at his side and walk very carefully toward the front gate. S.P. said he began to think maybe Decedent was trying to protect himself or shoot someone. S.P. said he didn't understand why Decedent would go outside with a gun knowing there were police in the immediate area.

S.P. said he then saw additional officers in formation and with their guns drawn getting closer to Decedent's residence. S.P. described the handgun Decedent had as a black semiautomatic handgun. S.P. stated he heard officers yell something at Decedent, but could not understand what was said. He was unsure if Decedent yelled anything back towards the officers. According to S.P., he did not see Decedent at any time during the incident put down or drop the firearm. S.P. said Decedent turned and walked slowly toward his residence, and approximately ten seconds later heard four gunshots. S.P. stated he could not see Decedent's movements and/or actions prior to hearing the gunshots.

**Witness D.E.**

D.E. stated he owned the house where the Decedent and D.U. lived, and had known them for years. Earlier that day, he received a cellular phone call from Decedent stating he was humiliated and angry. Decedent stated, "If it ends up in smoke and fire, or bullets and fire, that's the way it'll be." Decedent then hung up on D.E.

D.E. did note that Decedent had a temper, drank every day, and never thought he was wrong. D.E. did not witness the officer involved shooting.

**Witness B.B.**

Neighbor B.B. stated he heard yelling from across the street and saw several officers outside. B.B. left his house prior to the officer involved shooting and was not a witness. The cameras on the exterior of B.B.'s home were not operational.

**THIRD-PARTY AUDIO/VIDEO EVIDENCE**

**LVMPD Air Unit Video – AIR2**

The LVMPD Air Unit (AIR2) was on scene and recorded 11 minutes and 39 seconds of video while orbiting above 3141 Bel Air Drive. The camera recorded in both forward-looking infrared (FLIR) and color modes during the event.

At the start of the video, Decedent was seen standing at the gate next to his driveway and appeared to be yelling. As AIR2 continued to circle, Decedent was seen holding a handgun in his right hand next to his thigh. As the video continued, Decedent placed the barrel of the handgun under his chin with his right hand and moved his left hand behind his back.



Figure 9 - AIR2 Video Still of Decedent with Firearm Under His Chin

Decedent then walked away from the gate. His movements were obstructed by trees as AIR2 orbited. As Decedent went out of view, the FLIR camera captured gunshots. AIR2 advised over the radio it appeared Decedent was shooting. Officers on the ground then radioed, “Shots fired,” and “suspect’s down.”

AIR2 flew closer to the scene and Decedent was seen lying on the walkway. AIR2 officers radioed that Decedent was not moving, but still holding the firearm. AIR2 continued to orbit as officers on the ground moved into the courtyard. The video captured officers taking Decedent into custody. Medical personnel entered the courtyard and checked on Decedent as officers cleared the residence.

After the officers exited the residence, AIR2 stopped recording.

#### **Cellular Phone Voicemail – Decedent’s Mother**

On May 16, 2019, Sergeant Ericsson made telephone contact A.U., Decedent’s mother, who lived out of state at the time of the incident. FIT detectives received information that prior to the OIS Decedent left a voicemail message on A.U.’s phone stating an intent to commit suicide. Sergeant Ericsson obtained verbal permission from A.U. to record the message.

A male’s voice on recording stated the following:

*“Mom, I’m going to kill myself. Goldie’s called the police. I’m surrounded in my house. She’s made accusations that I’ve beaten her. They’re not true. I love you. Goodbye.”*

A.U. confirmed the voicemail was from her son, Decedent.

### **DECEDENT'S AUTOPSY**

On May 16, 2019, at approximately 6:55 a.m., Medical Examiner Doctor Lisa Gavin conducted an autopsy on Decedent. A bullet fragment was recovered from Decedent and impounded during the autopsy procedure. Dr. Gavin concluded Decedent's cause of death was a single gunshot wound to the head.

The toxicology results indicated Decedent had alcohol in his system. Decedent's Blood Alcohol Concentration ("BAC") was .172.

### **OFFICER WEAPON COUNTDOWN**

On May 15, 2019, Officer Burbrink had his duty weapon counted down inside of the LVMPD mobile command vehicle located in the 3100 block of Bel Air Drive. The countdown was witnessed by multiple members of LVMPD and photographed by CSI personnel for documentation and identification purposes.



**Figure 10 - Officer Burbrink's Firearm**

At the completion of the countdown, it was determined Officer Burbrink discharged his rifle four times during this incident. This figure was further corroborated by evidence at the scene.

### **FIREARMS EXAMINATION**

On May 23, 2019, LVMPD Forensic Laboratory Requests were submitted on the firearms of Officer Burbrink and Decedent for function testing and ballistic comparisons to the evidence cartridge cases.

On July 10, 2019, Forensic Scientist Roy Wilcox submitted the Report of Examination: Firearms.

Decedent's Glock model 43, 9mm Luger caliber semiautomatic pistol was examined, test fired and found to be operational with no noted malfunctions. The pistol's magazine has a capacity of six cartridges.

Officer Burbrink's Smith & Wesson model M&P-15, 223 Remington caliber semiautomatic rifle was examined, test fired and found to be operational with no noted malfunction. The rifle's magazine has a capacity of thirty-one cartridges.

The evidence cartridge cases and bullet were examined and compared to test fired cartridge cases and bullets from both weapons. Both the cartridge case and bullet were identified as having been fired in the Smith & Wesson rifle.

### **LEGAL ANALYSIS**

The District Attorney's Office is tasked with assessing the conduct of officers involved in any lethal use of force that occurred during the course of their duties. This assessment includes determining whether any criminality on the part of the officers existed at the time of the incident.

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 could be justifiable under one or both of two theories related to the concept of self-defense: (1) the killing of a human being in self-defense or defense of others; and (2) justifiable homicide by a public officer. Both theories will be discussed below.

#### **A. The Use of Deadly Force in Defense of Self or Defense of Another**

The authority to kill another in self-defense or 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 ... another person, against one who manifestly intends or endeavors to commit a crime of violence ..." against the person or other person.<sup>1</sup> 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).

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<sup>1</sup> NRS 200.120(3)(a) defines a crime of violence:

"Crime of violence" means any felony for which there is a substantial risk that force or violence may be used against the person or property of another in the commission of the felony.

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 self-defense [or 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 himself [or the other person] or cause himself [or the other person] great bodily injury; and
2. That it is absolutely necessary under the circumstances for him to use in [self-defense or 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 [himself or the person(s) 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 self-defense [or 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 self-defense [or 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 he [or 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 himself [or 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 exists that a killing was in defense of self [or defense of another], the State must prove beyond a reasonable doubt that Decedent did not act in self-defense [or defense of another].

Id. at 1051-52.

The known facts and circumstances surrounding this incident indicate that Decedent posed an actual imminent danger to Officers Burbrink, Polion and Firestine. Officers initially responded to the scene for a domestic disturbance and found Decedent's wife, D.U., with clear signs of recent injuries to her face. D.U. informed officers that Decedent had battered her, was intoxicated, and had multiple firearms inside the residence. Officers contacted Decedent by phone in an effort to get him outside to discuss the incident, at which point he became verbally abusive and threatening towards officers and disconnected the call. When Decedent did exit the house, he brought a firearm with him to confront police, initiating an armed standoff. Despite officer attempts to speak calmly to Decedent and deescalate the situation, Decedent displayed his firearm and continued to make multiple threats toward officers. Decedent also made a number of statements to officers that evinced his intent to commit "suicide-by-cop," wherein a suicidal individual provokes an officer into killing him by putting the officer in a situation in which the officer is forced to shoot. Decedent's intent to commit suicide-by-cop was further corroborated by the handwritten note that he left inside the house and the voicemail that he left on his mother's cellular phone. Moreover, Decedent's intent to violently engage officers was corroborated by D.E., Decedent's friend and landlord, who received a call from Decedent prior to the OIS event stating, "[i]f it ends up in smoke and fire, or bullets and fire, that's the way it'll be."

During Decedent's armed standoff, Officers Burbrink, Polion and Firestine had taken position behind a wall neighboring Decedent's courtyard. Prior to the shooting, all three officers observed Decedent by the courtyard gate holding a firearm and making threats to other officers. Decedent also placed the firearm under his chin at one point. As Decedent turned to walk back towards his house, Officers Burbrink, Polion and Firestine ducked behind the wall to conceal their position. After Decedent passed, all three officers raised their heads back above the wall to regain a visual on Decedent. At that point, all three officers observed Decedent walking back towards them at a close distance with his firearm raised in their direction. Officers Polion and Firestine, in fear for their lives and the lives and safety of their fellow officers, again ducked behind the wall for protection. Officer Burbrink, who had lowered his rifle to look back over the wall, jerked away then quickly raised his rifle and aimed over the wall, firing four times at Decedent and neutralizing the immediate threat. After the scene was static, officers observed what would later be confirmed to be a fully loaded semiautomatic Glock pistol next to Decedent's body.

Thus, the totality of the evidence, including civilian and officer witness statements, BWC footage, and Air Unit coverage, illustrates that Officer Burbrink was reasonable in believing that Decedent would cause him and/or his fellow officers great bodily harm or death. Officer Burbrink was confronted with the appearance of imminent danger to himself and his fellow officers and had

an honest and reasonable belief and fear that either he himself and/or his fellow officers were about to be killed or suffer great bodily injury at the hands of Decedent. The evidence further illustrates that Officer Burbrink acted reasonably in reaction to the danger posed by Decedent, who was at close-range with his firearm raised. Here, Officer Burbrink reasonably acted in defense of self and others. Consequently, the shooting of Decedent is justifiable under this legal theory.

#### **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 known evidence illustrates that officers on scene had probable cause to arrest Decedent for battery constituting domestic violence. From the beginning of the incident, Decedent resisted the discharge of the officers’ legal duty to arrest him, and he did so with use of a deadly weapon. Decedent told officers that they would have to “come get him” and made repeated references to his desire to shoot and his intent to commit suicide-by-cop. Moreover, at the time of the officer-involved shooting, officers had additional probable cause to arrest Decedent for resisting lawful arrest with use of a deadly weapon. As part of the effort to contain Decedent until he peaceably turned himself in, Officers Burbrink, Firestine and Polion took position behind a wall neighboring Decedent’s courtyard. The officers were there for containment purposes and to maintain a visual on Decedent and did not engage Decedent in any form or fashion. Decedent approached the officers with his pistol raised in their direction as they were at their most vulnerable, raising their heads above the wall to regain visual contact. As already illustrated, Officer Burbrink had probable cause to believe at that moment that Decedent posed a threat of serious physical harm to both himself and his fellow officers. Accordingly, the use of deadly force by Officer Burbrink was legally justified and appropriate under NRS 200.140(2).

#### **CONCLUSION**

Based on the review of the available materials and application of Nevada law to the known facts and circumstances, we conclude that the actions of Officer Burbrink were reasonable and/or legally justified. The law in Nevada clearly states that homicides which are justifiable or excusable are not punishable and shall be “fully acquitted and discharged.” See NRS 200.190.

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