

# REPORT ON USE OF FORCE



## Legal Analysis Surrounding the Death of Francis Spivey on February 25, 2015

### INTRODUCTION

On February 25, 2015, at approximately 0020 hours, Francis Spivey (hereinafter referred to as "Decedent") called 911 and advised he was going to commit suicide. Decedent then hung up the phone. Several Las Vegas Metropolitan Police Department (hereinafter referred to as "LVMPD") officers were assigned to the call and drove to the Eagle Trace apartments located at 5370 East Craig Road where the call originated. While en route, officers learned Decedent had a .45 caliber handgun registered to him and had prior military service.

Once officers arrived on scene, they located Decedent's apartment, 2335, in Building 31 and set up a perimeter. Sergeant Weaver and Officers Vance and Hearrell arrived and positioned themselves at the bottom of the stairs which led to Decedent's apartment. Sergeant Weaver attempted to contact Decedent several times, and each time Decedent hung up on Sergeant Weaver.

A short time after the last attempted call, Decedent exited his apartment holding a rifle. Officers on scene were ordered to seek cover and told not to approach Decedent's apartment. Several officers retrieved their rifles, and evacuations of the occupants near Decedent's apartment were ordered by Sergeant Weaver and Lieutenant Gordon.

While officers were evacuating apartments near Decedent's apartment, Officer Vance attempted to speak to Decedent. Officer Vance asked Decedent to put down his rifle and come down the stairs. Decedent disregarded Officer Vance's instructions and

continued to walk in and out of his apartment. Officer Weaver noticed Decedent became more agitated.

At one point, Decedent entered his apartment then came out of his apartment and fired several shots. Officers retreated to safer locations and SWAT was contacted. Officer Vance continued to talk to Decedent, but all Decedent wanted was for his former girlfriend, Witness 1, to be contacted. Decedent then fired more shots while he spoke to Officer Vance.

SWAT Officers Wiggins, Moser, and Cupp arrived and took up positions in Building 19 which was directly south of Building 31. Officers Cupp and Moser were together on a patio in Building 19 and could hear Officer Vance communicate with Decedent. After approximately 30 minutes, Officer Cupp became the primary sniper. Decedent continued to yell at Officer Vance and then fired his rifle again. Officer Cupp could see Decedent's right arm and the rifle he had fired. Officer Cupp saw Decedent step away from his doorway, shoot his rifle towards the officers on scene and towards adjacent apartments. Officer Cupp fired one shot at Decedent. Decedent instantly moved from Officer Cupp's view. Officer Moser saw the round strike Decedent at center mass. After being shot, Officer Moser saw Decedent turn around and go back into his apartment.

Officers Cupp and Moser continued to watch Decedent's apartment and saw no movement. ARMOR was called and they used a robot to enter Decedent's apartment with the use of an explosive. The robot was able to broadcast images from inside the apartment. Decedent was seen unresponsive on the floor of the living room, near the door, with his rifle next to him. SWAT officers entered his apartment and cleared it. After Decedent's apartment was cleared, SWAT officers saw Decedent had been struck and killed.

LVMPD Detectives Jex and Kowalski, of the Force Investigation Team, were assigned to conduct the investigation of the incident with the assistance of other members of the detective bureau and LVMPD personnel.

The District Attorney's Office has completed its review of the February 25, 2015, death of Decedent. It was determined that, based on the evidence currently available and subject to the discovery of any new or additional evidence, the actions of Officer Cupp were not criminal in nature.

This report explains why criminal charges will not be forthcoming against the officer involved. It is not intended to recount every detail, answer every question or resolve every factual conflict regarding this citizen-law enforcement encounter. The report is meant to be considered in conjunction with the Police Fatality Public Fact-Finding Review conducted on October 12, 2015. This report is intended solely for the purpose of explaining why, based upon the facts known at this time, the conduct of Officer Cupp was not criminal.

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

## **THE EVENTS AT 5370 E. CRAIG ROAD, APT. 2335, FEBRUARY 25, 2015**



In the early morning hours of February 25, 2015, Decedent called 911 and reported he was going to commit suicide because he was distraught over his ex-girlfriend. After giving this information to dispatch, he hung up the phone. Dispatch routed officers to the Eagle Trace apartments, located at 5370 East Craig Road, where the call originated.

Several officers were assigned to the incident and went en route to the Eagle Trace Apartments. Further information broadcast notified officers that Decedent was formerly in the military. Officers were also told Decedent thought he had dishonored himself, his family, and his country and no longer wanted to live. Officers began to arrive and set up a perimeter around Building 31 where Decedent lived. A records check of Decedent showed he had a .45

caliber handgun registered to him. Concerned for their safety, officers decided not to approach Decedent's front door.

Sergeant Weaver and Officers Vance and Hearrell arrived and were positioned at the bottom of the stairs that led to Decedent's apartment. Sergeant Weaver attempted to call Decedent three times. Each time Decedent hung up when Sergeant Weaver attempted to talk to him. On the fourth attempt by Sergeant Weaver, Decedent answered, was very distraught and adamant on ending his life. Sergeant Weaver broadcast Decedent's demeanor and officers were advised to keep a safe distance.

A short time later, Decedent exited his apartment holding a rifle with the muzzle under his chin. After seeing Decedent's actions, officers were ordered to seek cover and not approach the apartment. Several officers retrieved their rifles and took positions on the perimeter. Evacuations were ordered by Sergeant Weaver and the watch commander, Lieutenant Gordon. While officers evacuated occupants, Officer Vance began to communicate with Decedent. Sergeant Weaver attempted to get Decedent to put down his rifle and come down the stairs. Decedent walked in and out of his apartment but refused to put his rifle down. Sergeant Weaver noticed each time Decedent did this, he became more and more agitated. The officers could see Decedent was dressed in his Air Force uniform.

Decedent then exited his apartment again and fired several shots. The officers believed the shots were directed at them and moved to different cover locations. SWAT was contacted and the officers on scene were told SWAT was en route. Officer Vance continued to talk to Decedent and attempted to de-escalate the situation. Decedent yelled to Officer Vance to get his former girlfriend, Witness 1, on the phone. Decedent fired his weapon several times during the exchange with Officer Vance. Officer Vance, however, continued to try and communicate with Decedent.

SWAT officers Wiggins, Moser, and Cupp arrived and took positions directly south of building 31 in building 19. Officers Cupp and Moser were together on the patio of building 19, apartment 1398. As they watched Decedent, they listened to him communicate with Officer Vance. At first, Officer Cupp was Officer Moser's spotter and Officer Moser was the primary sniper. After approximately 30 minutes, Officer Cupp became the primary sniper and Officer Moser became Officer Cupp's spotter. Decedent continued to yell at Officer Vance and again fired his rifle. Officer Cupp saw Decedent's right arm and the rifle he had fired. Decedent stepped away from the doorway. Office Cupp saw Decedent fire his rifle toward the officers and the adjacent apartment. Officer Cupp fired one shot at Decedent. Decedent instantly moved from view. Officers Cupp and Moser could not see where he went because of a short wall in the landing area outside Decedent's door. Officers Moser and Wiggins did not fire their rifles.

Officers Cupp, Moser, and Wiggins continued to watch the area for Decedent. ARMOR was contacted and responded to the scene. ARMOR deployed a small robot to go up the stairs and onto the landing area near Decedent's door. However, the small robot was unable to

open the locked door. A second larger robot was deployed and an explosive charge was used on the door to open it. The robot then sent images from inside Decedent's apartment back to the command post. Decedent was seen on the floor in the front living area with his rifle on the floor near the door. A SWAT entry team entered and cleared his apartment. Tactical medic Officer Ruberio entered and determined Decedent was deceased.

Member of the Force Investigation Team (FIT) responded to the scene. Detective Jex was assigned the responsibility of the scene and the other detectives would canvass the area and obtain statements from witnesses and officers. Once the FIT team arrived, Lieutenant Pelletier and Sergeant Calhoun conducted a briefing.

## **OFFICER STATEMENTS**

### **Officer Charles Hearrell**

Officer Hearrell responded to 5370 East Craig Road due to a possible suicide call made to 911. He parked on the southwest side of building 31 and set up on the east corridor of the stairwell leading to Decedent's apartment. While there, Officer Hearrell was joined by Officer Vance. Due to their location, they had a clear view of Decedent's apartment doorway.

Within minutes of Officer Hearrell's arrival on scene, Decedent opened the door to his apartment and stood in the doorway with an AR-15 rifle. The barrel of the rifle was pointed at his chin. Officer Hearrell yelled, "He's got a gun, he's got a gun," and retreated to a safer position. Decedent yelled at the officers, "I don't want to hurt anybody. I love Metro. I love you guys, the only person that's going to get hurt here today is myself. All I want to do is talk to that whore. You need to call that whore. She's not answering her phone. I need to get her on the line."

Officer Hearrell was a member of the Crisis Intervention Team (CIT) and tried to calm Decedent down. He asked Decedent to put down his rifle. Decedent yelled at officers and told them he was a veteran then went back inside his apartment. Officers Hearrell and Vance recognized their positions were not safe and moved east using parked vehicles as cover and concealment.

Decedent again opened his door and yelled to the officers to "get that whore on the phone." Officer Vance learned, and communicated to Officer Hearrell, that Decedent was upset with his former girlfriend, Witness 1. Decedent yelled her phone number to police and Officer Vance contacted her. Witness 1 provided Officer Vance with the name of Decedent's children, the layout of the house and information related to firearms in the house.

Officer Hearrell attempted to develop a rapport with Decedent, but Decedent continued to demand that officers “get that whore on the phone.” Officer Hearrell asked Decedent how he thought his children would feel about him being in this situation. Decedent responded by firing five to six shots. Officers Hearrell and Vance took cover and advised dispatch that Decedent had fired shots. Both officers moved a couple of cars to the east to take cover.

Decedent went back into his apartment and then returned outside and demanded that officers get Witness 1 on the phone. He yelled at officers, “Why are we going to waste and lose lives for that whore?” He also yelled that this is going to be a “blood bath.” He told them he was going to come down there if the officers did not get her on the phone. He said he would shoot every one of them that he saw and every moving person that he saw. Decedent kept saying this over and over again and continued to shoot five to six times after these statement were made. Officer Hearrell remembered that Decedent shot at least four different times.

Officer Hearrell observed SWAT officers in the area. Officer Hearrell retreated, but he quickly realized he was the only officer who had communication with Decedent, so he returned to his area. Decedent continued to yell about Witness 1 and fire shots. At one point, Decedent fired a series of shots and then it got quiet.

## **Officer Jeremy Vance**

On February 25, 2015, at approximately 0020 hours, Officer Vance responded to 5370 East Craig Road regarding a possible suicide. Once at 5370 East Craig Road, Officer Vance met with Officer Hearrell and Sergeant Weaver. All three moved to the base of the staircase leading to Decedent’s apartment. Sergeant Weaver attempted to contact Decedent but Decedent hung up on him multiple times.

Decedent then exited his apartment and Officer Vance saw him holding an AR-15 type rifle. Officers Vance and Hearrell took cover behind a nearby parked car. Decedent communicated to police by yelling at the officers on scene. Officer Vance started to communicate with Decedent by yelling toward him. Decedent told Officer Vance about Witness 1 and told him he wanted the police to call her and get her on the phone. Officer Vance believed if Witness 1 got on the phone with Decedent he would kill himself once that conversation ended. Decedent told Officer Vance he respected the police and he only wanted to hurt himself.

Officer Vance called Witness 1 and spoke to her. She provided him with information including the names of Decedent’s children and information related to firearms Decedent owned. Officer Vance used the information to continue his dialogue with Decedent, but he noticed Decedent appeared agitated and angry. Decedent’s statements to Officer Vance became more aggressive and he became angry at police.

Officer Vance also attempted to get Decedent to put down his rifle but Decedent refused. This made Officers Vance and Hearrell nervous, so they moved further away from Decedent's apartment but continued to talk to him.

Decedent continued to yell at Officer Vance and told him to get "that whore" on the phone. Officer Vance mentioned Decedent's children to him, and Decedent paused and then fired seven to eight rounds into the roof of his breezeway and retreated to his apartment.

Decedent came back out from his apartment, but this time his anger was directed toward officers on scene. He yelled to Officer Vance that he would come down and shoot police. Decedent continued to demand that Officer Vance get Witness 1 on the phone. Decedent then fired a second round of shots. However, this time Officer Vance was informed the last set of shots was directed toward officers on scene. After shooting, Decedent stated, "You better get it done soon," and then went back into his apartment.

While Decedent was in his apartment, Officer Vance called Witness 1 again to get more information on Decedent. Officer Vance attempted to engage Decedent in conversation but Decedent refused to talk to him. Decedent then came back out and announced to police he was going to come down and shoot them. He believed the officers were incompetent because they had not gotten Witness 1 on the phone. Decedent yelled for Officer Vance by name.

Officer Vance got off the phone with Witness 1 and noticed Decedent was more agitated. Decedent continued to demand officers get Witness 1 on the phone and yelled out her personal information, including her cell phone number. Decedent then fired off another round of shots from his rifle. Officer Vance believed he heard a different caliber shot during the last round of shots. After the last round of shots went off, Officer Vance never heard Decedent speak again.

Shortly thereafter, SWAT arrived in an armored car and Officers Vance and Hearrell moved away from Decedent's apartment. SWAT assumed control of the scene and Officer Vance walked around the parking lot for evidence. He noticed a bullet hole in the roof of the parking structure where he stood talking to Decedent. Officer Vance also located a bullet impact in the roof of a vehicle where he and Officer Hearrell had taken cover.

## **Sergeant Weaver**

Sergeant Weaver heard the broadcast regarding the possible suicide of Decedent and drove to 5370 East Craig Road. He parked near building 31 and apartment 2335. He called Decedent and, when he addressed Decedent by his first name, Decedent told him there was no one by the name of Francis and disconnected the call.

Sergeant Weaver exited his vehicle and moved to the stairway below Decedent's apartment where Officers Vance and Hearrell were located. Once there, Sergeant Weaver attempted three more times to call Decedent but to no avail. On the fourth call, Sergeant Weaver identified himself and asked Decedent to come from his apartment to talk to him. Decedent started to rant and yell about his former girlfriend, Witness 1. Decedent wanted Sergeant Weaver to call Witness 1 and get her on the phone.

As Sergeant Weaver talked to Decedent, he was informed by other officers on scene that someone came out of Decedent's apartment and was at the top of the stairs. Decedent subsequently hung up the phone. Sergeant Weaver was updated that the person who had come out of the apartment was Decedent and he was holding a rifle. Sergeant Weaver and Officers Vance and Hearrell moved away from the stairs.

Sergeant Weaver went to his patrol vehicle and retrieved his rifle. He, along with Officer Ramirez, moved to the playground area and took a position across from Decedent's apartment. However, Sergeant Weaver realized this position was not safe so he and Officer Ramirez moved behind their vehicles and took cover.

At this point, Sergeant Weaver ordered evacuations of the surrounding apartments and had other officers retrieve their rifles. Sergeant Weaver and Officer Ramirez moved back to building 31 and started to evacuate residents from the apartments on the ground floor below Decedent's apartment. After the two rear apartments were evacuated, Decedent came out of his apartment and fired several shots from his rifle. Sergeant Weaver and his officers then began to evacuate building 32, which was directly behind building 31. Most of the apartments in building 32 were vacant.

Sergeant Weaver kicked open the door to apartment 2350 in building 32 because it allowed him to have a clear view of the breezeway into Decedent's apartment. He advised officers on scene of this. Decedent yelled at officers to get Witness 1 on the phone or there was going to be bloodshed. Sergeant Weaver then heard several more rounds fired from Decedent. He could see the muzzle flash but could not see Decedent.

Sergeant Weaver felt his position in apartment 2350 was not safe due to possible crossfire issues. He exited the apartment and went to building 31. He requested information on SWAT's location and was advised they had taken over the inner perimeter. Although Sergeant Weaver could not see SWAT he knew they could be possibly hiding in balconies in the area. He could also hear the armored car moving toward building 31.

Decedent continued to yell at officers as Officer Vance continued to try and communicate with Decedent. Sergeant Weaver heard Decedent threaten to shoot all the officers and believed that Decedent had shot in the direction of the officers.

## **Officer Ramirez**

Officer Ramirez responded to 5370 E. Craig Road regarding a possible suicidal male. After officers were advised of the correct location, a perimeter was established around building 31 and evacuations began.

Decedent exited his apartment wearing an Air Force dress blue uniform. He was holding a rifle which was pointed at his chin. Officers retreated to better cover after observing the high powered weapon. Officer Ramirez activated his body camera at that time.

Officer Ramirez joined Sergeant Weaver in the sandbox area of the courtyard. He later moved to assist with evacuations. During evacuations, Officer Ramirez heard Decedent fire approximately five to six shots.

## **Officer Moser**

SWAT Officer Moser received information of a barricaded subject, whom he later learned was Decedent. While en route, Officer Moser heard Decedent had fired shots at officers. After arriving at the apartment complex, Officer Moser went to building 19 with his sniper rifle and set up on the balcony area. Building 19 is directly across from Decedent's apartment.

Officer Moser heard Decedent communicating with Officer Vance and also heard Decedent say he would kill every cop he saw. Officer Moser saw Decedent moving around in his apartment and saw him holding the AR-15 rifle. Officer Cupp arrived and both of them evacuated the apartment they were using. Officer Cupp retrieved two chairs from inside the apartment and waited. Officer Moser was the primary sniper for approximately 30 minutes and then Officer Cupp became the primary sniper while Officer Moser was his spotter. Officer Moser heard Decedent say he would shoot to kill as he exited his apartment. Decedent exited his apartment with the rifle and started to shoot at an adjacent apartment. Officer Moser could also see that officers on scene were within striking distance of the shots being fired. Officer Cupp then fired one round at Decedent. Officer Moser saw the round strike Decedent at center mass. After Decedent was shot, Officer Moser saw Decedent turn around and go back into his apartment.

Officer Moser and Cupp remained in their positions and watched a robot go to Decedent's door and deploy an explosive device on the door. Once the door was open, SWAT officers entered Decedent's apartment and saw his deceased body on the floor.

Officers Moser and Cupp were relieved of their positions and returned to their command posts.

## Officer Cupp

Initially SWAT Officer Cupp gave a public safety statement which consisted of the following:

- 1) Did you discharge your firearm?  
Yes.
  - a) If so, in what direction?  
*From east to west at the target apartment.*
  - b) Approximately where were you located when you fired?  
*Patio, seventy yards from suspect.*
  - c) How many shots do you think you fired?  
*One.*
  
- 2) Is anyone injured?  
*Just suspect.*
  - a) If so, where are they located?  
*Unknown where located.*
  
- 3) Are there any outstanding suspects?  
*No.*
  - a) If so, what is their description?  
*Not applicable.*
  - b) What direction and mode of travel?  
*Not applicable.*
  - c) How long have they been gone?  
*Not applicable.*
  - d) What crime(s) have they committed?  
*Not applicable.*
  - e) What type of weapon do they have?  
*Not applicable.*
  
- 4) Is it possible the suspect fired rounds at you?  
Yes.
  - a) If so, what direction were the rounds fired from?  
*From west to east.*
  - b) How many shots do you think the suspect fired?  
*Between four to six.*
  - c) Approximately where was the suspect located when they fired?  
*On the balcony, outside apartment door.*
  
- 5) Do you know if any other officer(s) discharged their firearms?  
*No.*
  - a) If so, who are they?  
*Not applicable.*
  - b) Approximately where was the officer(s) located when they fired?

*Not applicable.*

6) Are there any weapons or evidence that needs to be secured/protected?

Yes.

a) If so, where are they located?

*Suspect was armed with an AR-15 type rifle. Assume it is somewhere in the apartment. My rifle is on the patio where I took the shot from.*

7) Are you aware of witnesses?

Yes.

a) If so, what is their location?

*Officer Charles Moser, P 6953, was my spotter.*



Additionally, later in the day, Officer Cupp spoke to FIT investigators and provided the following information:

Officer Cupp heard there was a suicidal male and went en route to the Eagle Trace Apartments. Once he arrived he was briefed by SWAT Officer Stephen. He was also shown a map where Decedent's apartment was located. He grabbed his gear which included his .308 sniper rifle and moved up to building 19. Officer Cupp knew SWAT snipers, Officers Moser and Wiggins had already deployed near building 19, but he did not know exactly where they were positioned.

Officer Cupp went through the east breezeway of building 19 and observed several officers behind vehicles that were parked in front of building 31, Decedent's building. He moved across the grass toward the officers to gain intelligence from them. While en route to them, Officer Moser contacted Officer Cupp and advised him of his location at building 19 in the patio area of apartment 1396. Officer Cupp returned to building 19 and jumped the short wall into the patio next to Officer Moser. Officer Moser was watching Decedent through his scope mounted on his rifle. Officer Cupp heard Decedent yell at the officers.

Officer Cupp knew Officer Moser had a good and comfortable shooting location and decided to evacuate apartment 1396 to get the occupants out of the line of fire. He jumped the wall again, went around to the door of the apartment and evacuated the occupants. Officer Cupp got into position and prepared his rifle. He began to watch Decedent through his scope. At first, Officer Moser watched Decedent for approximately 30 minutes through his scope while Officer Cupp was his spotter. Then Officer Cupp took over watching Decedent through his scope and Officer Moser became his spotter.

Officer Cupp heard Decedent yell at officers he was going to spill their blood and shoot every officer he saw. Decedent began to shoot his rifle. Officer Cupp saw the muzzle flash of Decedent's rifle, but could not see Decedent. Decedent continued to fire his rifle and moved out away from the front door. Officer Cupp saw Decedent's right shoulder and elbow. Decedent stopped firing, lowered the muzzle of his rifle, and turned in Officer Cupp's direction. Decedent raised the rifle in the direction of the officers. Officer Cupp believed Decedent was going to shoot at the officers. Officer Cupp fired one round at Decedent; Decedent spun and disappeared from view.

Officer Moser broadcast over the SWAT channel, "Shot out. Shot out. Shot out," signifying a SWAT officer had fired a shot. Officer Cupp continued to scan the area for Decedent but could not see him. He continued to watch the area for approximately 20 minutes until relieved by Officer Moser. Other SWAT officers arrived and Officer Cupp was escorted back to the command post.

## **Sergeant Calhoun**

At approximately 0127 hours, Sergeant Calhoun received a call from SWAT Commander, Lieutenant Pelletier, regarding an incident which involved Decedent. Lieutenant Pelletier informed Sergeant Calhoun that Decedent was at his apartment, dressed in a military uniform, had an assault rifle and wanted to commit suicide by cop. While en route to 5370 East Craig Road, Sergeant Calhoun received updated information: Decedent was going in and out of his apartment and had fired shots at police officers.

Once on scene, Sergeant Calhoun met with Lieutenant Pelletier, who confirmed Decedent had shot at police officers. Sergeant Calhoun learned Decedent possibly had a handgun in addition to the assault rifle he pointed at police. At that point, both Sergeant

Calhoun and Lieutenant Pelletier made the decision evacuations were a top priority since Decedent was shooting an assault rifle.

Sergeant Calhoun believed an armored vehicle would be best to approach Decedent's apartment, especially due to Decedent's prior military experience. Sergeant Calhoun and his team loaded into the armored vehicle and drove toward Decedent's apartment. When they got within 50 yards of the apartment, he was informed a sniper fired one shot into Decedent's apartment and that the sniper fired because Decedent had fired into an adjoining apartment.

Sergeant Calhoun and his team in the armored vehicle continued to Decedent's apartment because they could not verify if he was still a danger to the community. Officers continued evacuations due to the danger in the apartment complex. Sergeant Calhoun and his team used a ladder to access the balcony area of Decedent's apartment and only saw cartridge cases on the balcony. They did not see blood or the body of Decedent.

The robot was requested and sent to Decedent's apartment. Once the robot was able to breach the door, and the images of Decedent's unresponsive body were seen, Sergeant Calhoun and his team cleared Decedent's apartment. Sergeant Calhoun saw the body of Decedent and observed an AR-15 rifle next to his body. Alongside the body of Decedent were several magazines and several cartridge cases on the landing area.

## **Officer Downing**

Officer Downing responded to 5370 East Craig Road, on February 25, 2015, to assist SWAT with the incidents involving Decedent. He was assigned to the ARMOR section and operated the robot which entered Decedent's apartment. Initially when the robot went to Decedent's apartment, it could not gain entry because the door was locked. A larger robot was deployed and with the use of an explosive was able to breach the apartment door to Decedent's apartment. This larger robot broadcast images, which showed Decedent on the floor of his apartment, unresponsive and his rifle near him.

## **CIVILIANS**

As part of the investigation, officers interviewed several other witnesses who provided additional information. The following section details a summary of those witness statements.

## **Witness 1**

Witness 1 met Decedent in December of 2013, and dated him for approximately one year. Witness 1 believed Decedent was divorced and had two biological children. He also had two step children and all of his children lived in Texas. He was a master sergeant in the Air Force, was stationed at Nellis Air Force Base and planned on retiring in June of 2014.

Witness 1 later found out Decedent was still married and his wife lived in Texas. Witness 1 was upset because Decedent lied to her. Decedent told Witness 1 that he planned to divorce his wife after he retired so his child support payments would be based on his retirement income.

Witness 1 noticed Decedent often drank Southern Comfort until he threw up and then he passed out. Witness 1 made him stop drinking because she said it made him "nasty." Witness 1 also observed that Decedent took numerous prescription medications, including Effexor, Tramadol, Zoloft and Ambien.

After Decedent retired in June of 2014, he sold time shares out of the Rio Casino and worked security at Boulder Station. Decedent made approximately \$2,600 per month and sent money back to his wife in Texas.

In October of 2014, Decedent's step children learned of his relationship with Witness 1 and posted derogatory comments about her on Facebook. After learning Witness 1 was still friends with her former boyfriend, Decedent threatened to kill himself.

Sometime between October and December of 2014, Decedent pawned his handgun and purchased an assault rifle.

In December of 2014, Witness 1 learned Decedent was dating another woman. Witness 1 confronted him but he denied it. Witness 1 grew concerned over Decedent's highs and lows: one day he would say "I love you," and the next day he would call her a "fucking whore." Due to his erratic behavior, Witness 1 broke up with Decedent in January of 2015.

In February of 2015, Decedent called Witness 1 a total of 122 times in one day and begged her to speak to him. He also threatened suicide again. On February 8, 2015, Decedent admitted himself into Mike O'Callaghan Federal Medical Center at Nellis Air Force Base. Witness 1 believed it was a Legal 2000, a procedure to involuntarily commit a mentally unstable individual, because Decedent indicated his depression medication was adversely affecting him. Decedent told Witness 1 he became frustrated with a cocktail waitress at work and wanted to punch her in the face. He transferred to

Montevista Hospital and called Witness 1 repeatedly. Witness 1 refused to forgive Decedent for cheating on her, which made him angry.

On February 19, 2015, Montevista Hospital released Decedent. He called Witness 1 and apologized. He said he would not kill himself because of his children and invited Witness 1 to a concert at Nellis Air Force Base. Witness 1 declined but Decedent hoped they could get back together.

On February 23, 2015, Decedent got angry at Witness 1 because her boyfriend answered her phone. Witness 1 became fearful Decedent might go to her house, so she turned her phone off that night. When Witness 1 checked her phone Decedent had called "more than 58 times that night."

On the morning of February 24, 2015, Decedent sent numerous emails to Witness 1. The emails consisted of made-up stories about Witness 1 being pregnant with his child. Witness 1 last had sex with Decedent in early February and she was not pregnant. Decedent threatened Witness 1, "You will pay."

On the night of February 24, 2015, at approximately 2300 hours, Decedent called Witness 1 and said, "I'm going to kill myself because of you. You fucking whore."

On February 25, 2015, at 0030 hours, a Henderson Police Department dispatcher called Witness 1 and told her a male was going to kill himself because of her. Witness 1 advised them he was not healthy. Henderson dispatched an officer to her residence. Decedent called her that morning and told her, "I'm going to kill myself because of you. I'm in my dress blues. You fucking whore." At 0108 hours, an LVMPD officer called Witness 1 from Decedent's apartment complex. Witness 1 advised him Decedent had an AR-15 rifle and he was mentally unstable. Witness 1 drove to Decedent's apartment to meet with officers. Witness 1 left before the incident was over. Witness 1 was told about the officer-involved shooting involving Decedent.

Following the incident, Witness 1 received threats from Decedent's friends and was fearful for her safety.

## **Witness 2**

Witness 2 had been married to Decedent for approximately 18 years, but they were separated for approximately one year due to Decedent's assignment at Nellis Air Force Base. Together, the couple had two children and Witness 2 also had two children from a previous marriage. Decedent had filed for divorce, but never followed through with the paperwork to make the divorce final.

Decedent had retired from the Air Force in June of 2014 after 23 years of service. Decedent communicated with Witness 2 and the children regularly for some time, but his contact with them had lessened over the last few weeks. Decedent sold time-shares and worked security at one of the hotels but had recently been terminated. Because of his termination, he was not able to send much money home. Witness 2 did not know the reason he was terminated.

Witness 2 knew Decedent had a girlfriend, Witness 1, but had never met her. Her children found information on Witness 1 on Facebook and shared it with her. After she learned about Witness 1, her relationship with Decedent changed and their communication became less frequent. Witness 2 described Decedent's relationship with the children as being good, but they had not seen him for some time.

Witness 2 said Decedent did not drink much alcohol; when he did so, it was casually. Witness 2 stated she did not know if he was doing any kind of drugs. Witness 2 was unaware of any mental issues or if Decedent was seeing any doctors. Witness 2 last spoke to Decedent a week prior to the incident.

## **THE INCIDENT SCENE**

The scene was located at the Eagle Trace Apartment complex at 5370 East Craig Road. The complex contained sixty-five (65) buildings with the community areas situated near the center. Building 31 was located near the northwest corner of the complex with building 32 situated on the north side of building 31. A parking lot was located along the south side of building 31 with parking stalls along the north and south sides that ran the entire distance of the lot and numerous vehicles parked throughout. A metal awning covered the parking stalls at the north end of the parking lot. A sandbox playground and large open grass area were situated on the south side of the parking lot and building 19 was located at the southernmost portion of the grass area. Building 18 was located on the southwest side of building 19 with building 17 situated directly south of building 18.

### **BUILDING 31**

Building 31 was a two-story building. Staircases leading to the second floor were located on both the north and south sides of the building. Apartment 2335 was located on the second floor. Apartment 2336 was located on the east side of apartment 2335. Both apartment front entryways shared the same breezeway and were situated directly across from one another. The balconies for the apartments located on the south side of the building faced south, towards the parking lot and open grass area.

**Apartment 2335:**

Inside Decedent's apartment were several pieces of evidence in addition to his body.

**Hallway:** Two (2) cartridge cases head stamped "MKE 14" were on the floor in the center of the hallway. Five (5) magazines containing cartridges were on the floor adjacent to the north wall. A black semi-automatic rifle, 5.56 caliber, with optics attached was on the floor near the northwest corner of the hallway. The rifle was found to contain a cartridge in the chamber and had a magazine attached with six (6) cartridges inside.



**Southeast Bedroom:** Numerous boxes of ammunition were stacked on the shelving unit inside the closet. A holster to a handgun was on the top shelf inside the closet and a rifle box was propped up against the wall.

**Living Room:** A prescription bag, containing prescription related paperwork, and a partially full bottle of "Southern Comfort" was on the floor adjacent to the computer chair legs. An empty green fabric rifle bag was on the floor just west of the television stand and a laptop computer was on the floor just north of the sectional couch. Decedent, was laying on the floor, in the entranceway from the hallway into the living room.

**Kitchen:** A brown wooden box and several alcohol bottles were on the counter in the southeast corner. The wooden box contained a LVMPD gun registration blue card, dated 04/10/12, in the name of 'Decedent' for a "Taurus PT 1911" semi-automatic handgun (S/N NBV39617).

**Master Bedroom:** Three (3) medication bottles, in the name of the Decedent, were on top of the nightstand. A plastic bag containing numerous shotgun cartridges was inside the top drawer of the nightstand. Two (2) medication bottles, in the name of the Decedent, were inside a black zippered bag on the bathroom counter.



**Apartment 2336:**

Two (2) perforating bullet holes were located in the west wall above the bed. Two (2) bullet holes were located in the upper portion of the curtain covering the window. Two (2) bullet holes were located in the upper portion of the vertical blinds covering the window. Two (2) bullet holes were located in the upper portion of the window. Both framed photographs that were hung from the south wall on the east side of the window had perforating bullet holes: the upper right photograph had one (1) bullet hole and the upper left photograph had two (2) bullet holes. There were four (4) bullet defects / holes located behind and adjacent to these upper two (2) photographs. Two (2) bullet ricochets were located in the ceiling of the room with one (1) positioned above the bed and one (1) positioned near the window. There was a large amount of white powdery debris covering the bedspread on the bed and on the carpeting throughout.



### **Second Floor Breezeway:**

There were numerous cartridge cases scattered on the ground in the south portion of the breezeway and in front of the entry door to apartment 2335. A lead fragment was also located on the ground near the landing area. A large amount of wood debris was scattered on the ground throughout the south portion of the breezeway and south staircase and apparent explosive debris was located on the walls and ceiling. A damaged door was propped up against the north wall of the entryway to apartment 2336.

Two (2) perforating bullet holes were located in the west facing wall of apartment 2336 and were positioned above the staircase area. A third penetrating bullet hole was located adjacent to and south of the above holes. There were nine (9) bullet holes located in the north facing portion of the south header positioned above the staircase. Three (3) perforating bullet holes were located in the south facing portion of the south header and one (1) perforating bullet hole was located in the down facing portion. A penetrating bullet hole with apparent blood stains / tissue was located in the south facing wall of apartment 2335 just outside the front entry door. The ceiling mounted light positioned in between apartments 2335 and 2336 was damaged, and had a possible bullet impact. A penetrating bullet hole was located in the south facing side of the center header positioned at the center of the hallway. A penetrating bullet hole was located in the west facing wall of the hallway in between apartments 2336 and 2345. A bullet ricochet was located into the ceiling outside of

apartment 2345 and a penetrating bullet hole was located into the ceiling just north of the front entryway to apartment 2345.



**First Floor Breezeway:**

The south portion of the first floor breezeway was located directly below the upper breezeway and the south staircase. A small planter area was located underneath the staircase with a sidewalk leading to the first floor apartments on the west side. Apartment 1335 was located directly underneath apartment 2335 and apartment 1336 was located directly underneath apartment 2336. A lead fragment was located on the sidewalk and a cartridge case was located in the planter area.

**South Side of Building 31:**

The parking lot on the south side of building 31 ran the entire distance of the building. There were parking spaces along the north and south sides of the lot with metal awnings covering the spaces along the north side. Covered parking space 682 was located directly south of the breezeway outside of apartment 2335. There was a bullet hole in the metal awning covering space 682.

## BODY CAMERAS

Officers Vance and Ramirez both had body cameras on during the February 25, 2015, incident. The incident between Decedent and officers lasted approximately 59 minutes and showed Decedent fired a total of 23 rounds from his rifle on five separate occasions.

Time / Body Camera	Description of View / What was Heard
00:55:52 Officer Ramirez	Decedent was seen in the landing area outside his apartment door. Decedent is heard saying, <i>"I'm done. I'm done, Sergeant. Please go away and leave me alone. I'm done. I'm done. You didn't even know what my first name is. I'm done. Leave me alone."</i> Decedent re-entered his apartment.
00:57:34 Officer Ramirez	Decedent exited his apartment and walked around the landing yelling to Officer Vance reference getting his ex-girlfriend, Witness 1, on the phone.
01:11:51 – 01:12:18 Officer Vance	Officer Vance continued to talk to Decedent and brought up his children in Texas. <b>Officer Vance:</b> <i>"Frank, I talked to Witness 1 for a second."</i> <b>Decedent:</b> <i>"That's a lie. That's bullshit. Get that goddamn whore on the phone or I'm going to start shooting."</i> <b>Officer Vance:</b> <i>"Frank, she told me about _____ and _____."</i> <b>Decedent:</b> <i>"That's bullshit!"</i> <b>Officer Vance:</b> <i>"That's not bullshit. Frank, she told me about and ___ and _____ in Texas with their mother right now."</i> <b>Decedent discharged five to seven rounds from his rifle.</b> <b>Decedent:</b> <i>"Don't ever talk about my kids! Get that fucking whore on the phone."</i>
01:11:40 – 01:12:18 Officer Ramirez	Officer Ramirez and Sergeant Weaver were attempting to evacuate the apartments directly below Decedent's apartment when Decedent exited his apartment and fired the first round of shots. <b>Decedent:</b> <i>"Sarge! Do I need to start firing rounds to let that goddam whore know I'm serious? Do I need to start shooting? Get that goddamn whore on the phone."</i> <b>Decedent:</b> <i>"If you don't get that goddamn whore on the phone I'm gonna start shooting. That's bullshit."</i> <b>Decedent discharged five to seven rounds from his rifle.</b> <b>Decedent:</b> <i>"I don't want to hear a goddamn any more about my kids."</i>
01:19:42 – 01:20:36 Officer Vance	Decedent fired his rifle the second time. Decedent yelled several times to get Witness 1 on the phone. Decedent stated the officers were all stupid bastards. <b>Officer Vance:</b> <i>"Hey bud, you have my promise. Frank you have my absolute promise. Frank, you put the gun down, Frank, Frank. There is no way. Frank, with you so angry there's no way I can bring a phone to you. Frank. I think she's scared Frank. No, Frank, she's scared too, bud."</i> <b>Decedent fired three to five more rounds.</b>

	<p><b>Decedent:</b> <i>"I'm going to suicide by cop."</i> Decedent returned back inside his apartment.</p>
<p>01:32:21 – 01:34:40 Officer Vance</p>	<p>Officer Vance was talking to Witness 1 on the phone. Officer Vance told Decedent he was on the phone with Witness 1 and he did not believe him.  <b>Officer Vance:</b> <i>"Frank, I'm sorry. I was on the phone."</i>  <b>Decedent:</b> <i>"I don't believe that."</i>  <b>Officer Vance:</b> <i>"It's in my hand. If you want to put down the gun and come down and speak, then we can talk."</i>  <b>Decedent:</b> <i>"Can you hear me?"</i>  <b>Officer Vance:</b> <i>"I can hear you sir."</i>  <b>Decedent:</b> <i>"Do you guys want me to suicide by cop? Is that something you want your officers to live with? Do you have a death wish?"</i>  <b>Officer Vance:</b> <i>"Absolutely not, sir."</i>  <b>Decedent:</b> <i>"If you don't want that, if you don't want to live with that, get that goddamn whore on the fucking phone."</i>  <b>Officer Vance:</b> <i>"I'm calling her Frank."</i>  <b>Decedent:</b> <i>"If you want officer safety, if you don't want me to come down and start shooting every cop I see, then get that goddamn fucking whore on the fucking phone! You're giving me no choice. You're leaving me no choice."</i>  <b>Officer Vance:</b> <i>"Absolutely you have a choice Frank."</i>  <b>Decedent:</b> <i>"I don't hear anything you're saying Jake [Officer Vance]. I'm going to shoot it out with these guys."</i>  <b>Decedent:</b> <i>"If you don't want me to shoot it out with you guys, if you don't want murdered cops, then get that fucking whore on the phone."</i>  <b>Officer Vance:</b> <i>"Frank, Frank, when you're this upset I can't talk to you, bud."</i>  Decedent returned back inside his apartment.</p>
<p>01:39:27 – 01:46:36 Officer Vance</p>	<p>Decedent was very upset Officer Vance had not gotten Witness 1 on the phone and he talked about how Metro did not care about him.  <b>Officer Vance:</b> <i>"Frank, I work for Metro. We are calling Henderson Dispatch."</i>  <b>Decedent:</b> <i>"You are the all-powerful. You make Henderson and North Las Vegas submit to your will. Get that goddamn whore on the fucking phone."</i>  <b>Officer Vance:</b> <i>"Frank, you gave me her P, that's how we are finding her."</i>  <b>Decedent:</b> <i>"I'm going to be forced to walk out from behind this door and start firing shots. I doubt Las Vegas Metro don't care."</i>  <b>Officer Vance:</b> <i>"We do care, Frank."</i>  <b>Decedent:</b> <i>"But you are going to murder me."</i>  <b>Officer Vance:</b> <i>"Frank, we do care. Do you have another phone number for her?"</i>  <b>Decedent:</b> <i>"I'm going to start shooting everything I see and you're going to have to murder me. Get that goddamn whore on the phone now! I'm done talking to you Jake [Officer Vance]."</i>  <b>Officer Vance:</b> <i>"I'm listening to you, Frank."</i></p>

	<p>Decedent returned back inside his apartment. A few minutes later Decedent exits his apartment and continued the rant about contact with Witness 1.</p> <p><b>Decedent:</b> <i>“Get that goddamn whore on the fucking phone or you guys are going to pay with blood and your lives.”</i></p>
<p>01:47:21 – 01:48:50 Officer Vance</p>	<p>Decedent again fired his rifle.</p> <p><b>Officer Hearrell:</b> <i>“Hey Frank, Jake’s [Officer Vance] on the phone with Dispatch. Jake’s on the phone right now.”</i></p> <p><b>Decedent:</b> <i>“I don’t give a shit. I’m going to start shooting at every fucking officer I see and I don’t care.”</i></p> <p><b>Officer Hearrell:</b> <i>“Frank, Jake’s [Officer Vance] on the phone right now.”</i></p> <p><b>Decedent:</b> <i>“Get that goddamn whore on the phone.”</i></p> <p><b>Officer Hearrell:</b> <i>“Okay buddy, we’re going to do that.”</i></p> <p><b>Decedent stepped out and fired 6-8 rounds and went back into the apartment.</b></p> <p>Sergeant Weaver broadcasted he saw the muzzle flash from Decedent’s weapon and he believed Decedent was firing in the direction of officers.</p>
<p>02:37:40 – 02:37:50 Officer Ramirez</p>	<p>The final shots are fired by Decedent.</p> <p><b>Officer Vance:</b> <i>“I can hear ya, bud.”</i></p> <p><b>Decedent stepped out and fired three (3) rounds, paused, and fired three (3) more rounds.</b></p> <p>SWAT sniper Officer Cupp fired one (1) round from his rifle, striking Decedent in the chest ending the threat.</p>

## REVIEW OF THE WEAPON

### THE COUNTDOWN OF OFFICER CUPP’S WEAPON

Officer Cupp carried one (1) magazine in his rifle and two (2) magazines in his chest rig. His load out was three (3) six (6) round magazines. The first round in each magazine was a bonded round followed by five (5) match rounds. At the completion of the countdown, it was determined Officer Cupp discharged his firearm one time during this incident.

## AUTOPSY OF DECEDENT

On February 26, 2015, at approximately 0720 hours, Dr. Lisa Gavin performed an autopsy on the body of Decedent. The autopsy was completed at the Clark County Coroner’s Office. During the examination, Dr. Gavin noted Decedent had a perforating gunshot wound to the right side of his left chest and a gunshot exit wound to the left back below the shoulder blade.

After a completed autopsy, Dr. Gavin determined Decedent's cause of death was a single gunshot wound. A postmortem toxicological analysis was completed and revealed a Blood Alcohol Concentration of .195 g/100mL and Sertraline- 440ng/mL. Sertraline is the generic drug for Zoloft, which is an anti-depressant. The amount of Sertraline in the Decedent's system would be considered a high therapeutic amount.

## 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 this officer will be analyzed under the State's jurisprudence pertaining to homicides.

In Nevada, there are a variety of statutes that define the various types of justifiable homicide (NRS §200.120 – Justifiable homicide defined; NRS §200.140 – Justifiable homicide by a public officer; NRS §200.160 – Additional cases of justifiable homicide). The shooting of Decedent was justifiable under two theories: (1) The killing of a human being in self-defense/defense of others; and (2) justifiable homicide by a public officer. Both of these theories will be discussed below.

### A. The Use of Deadly Force in Defense of Another

The authority to kill another in defense of others is contained in NRS §§200.120 and 200.160. "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of ... person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony ..." against the other person. NRS §200.120(1). Homicide is also lawful when committed:

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

NRS §200.160(1).

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

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

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

A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in [defense of another], the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.

....

Actual danger is not necessary to justify a killing in [defense of another]. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:

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

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

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

*Id.* at 1051-52.

In this case, Decedent posed an imminent danger to the officers on scene as well as the occupants of the Eagle Terrace Apartments. First, officers attempted to establish contact with Decedent, but he refused to communicate with them. Officers continued to attempt to communicate with Decedent and were met with aggression and threats. Decedent then escalated the situation when he fired five sets of shots from an AR-15, toward officers on scene, endangering their lives and those of the occupants at the Eagle Terrace Apartments. Officers asked Decedent numerous times to put down his rifle, but he refused.

Officer Cupp was confronted by an actual imminent danger to the officers on scene and occupants in the building. He believed they may have been killed or suffered great bodily harm. In his mind, that danger created an honest belief and fear that the Decedent was going to kill those on scene or those on scene might suffer great bodily injury. Based upon those appearances, fears and actual beliefs, Officer Cupp shot Decedent ending the threat. As such, Officer Cupp's actions were justified.

## **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, Officer Cupp had probable cause to believe Decedent posed a threat of serious physical harm either to himself or other persons. Decedent fired 23 rounds on five separate occasions during this 59 minute incident. Decedent refused to comply with orders to surrender his rifle and instead continued to shoot at officers. These circumstances created probable cause to believe in the officer's mind that the Decedent posed a threat of serious physical harm to everyone at 5370 East Craig Road. In light of all the evidence reviewed to date, the State would be unable to prove that the actions of the officer were in fact *unjustified* "in the discharge of a legal duty."

## CONCLUSION

Based upon the review of the available materials and application of Nevada law to the known facts and circumstances, it has been determined that the actions of law enforcement in response to being fired upon by the Decedent were reasonable and legally justified. The law in Nevada clearly states that homicides which are justifiable or excusable are not punishable. (NRS §200.190). A homicide which is determined to be justifiable *shall* be “fully acquitted and discharged.” (NRS §200.190).

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

Submitted October \_\_\_\_\_, 2015

STEVEN B. WOLFSON  
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By

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