



## OFFICE OF THE DISTRICT ATTORNEY

P.O. Box 1748, Austin, TX 78767

Telephone 512/854-9400

Telefax 512/854-8994

**MARGARET MOORE**  
DISTRICT ATTORNEY

**MINDY MONTFORD**  
FIRST ASSISTANT

October 17, 2017

Brian Manley, Chief  
Austin Police Department  
P.O. Box 689001  
Austin, Texas 78768-9001

### LETTER DECLINING PROSECUTION AFTER INVESTIGATION

RE: *Officer-Involved Shooting on September 5, 2016, by Austin Police Department Officers Salvatore Reale #2100 and Andrew McRae #6331 causing death to Cesar Garcia (DOB 06/20/1981)*

Dear Chief Manley:

The Office of the Travis County District Attorney has reviewed the Austin Police Department Special Investigation Unit (APD SIU) investigation of the above-referenced matter and concluded our independent review of the officer-involved shooting in which Austin Police Department Officers Salvatore Reale and Andrew McRae fired shots from their rifles that resulted in the death of Cesar Garcia. This letter is to inform you of my decision to decline prosecution of criminal charges against Officers Reale and McRae. My decision does not limit or address administrative action by the Austin Police Department, or other civil actions, where non-criminal issues may be reviewed and where different rules and lower levels of proof apply.

The District Attorney's Office has reviewed the investigation of the Austin Police Department into this incident pursuant to the officer-involved shooting protocol that is attached and posted on the DA official website. A copy of this letter will also be posted on the DA official website.<sup>1</sup>

Based upon the evidence available and the applicable Texas law,<sup>2</sup> I am convinced that a jury following the law would not convict Officers Salvatore Reale and Andrew McRae, because the evidence proves the use of force to be justified under Texas law. The following sets forth the facts determined during our review, identifies the applicable legal rules, and presents the analysis underlying my opinion.

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<sup>1</sup> <https://www.traviscountytexas.gov/district-attorney/cru>

<sup>2</sup> In arriving at this conclusion, I have relied upon the legal guidelines governing the use of force/deadly force in Texas as set forth in sections 9.32, 9.33 and 9.51 of the Texas Penal Code, the case authority construing that provision, and the United States Supreme Court case authority governing law enforcement use of force. (See applicable laws in Appendix)

SUMMARY OF FACTS

On September 5, 2016 at 8:50a.m., officers responded to a 911 call at the San Paloma Apartments, 12501 Tech Ridge Blvd #1013, building 10. Marie Garcia reported that her ex-husband, Cesar Garcia, was outside her apartment wanting to collect his belongings, but she did not want to let him inside. Marie provided the name of Cesar Garcia and a description of his clothing and vehicle to the operator. Marie told dispatch that Cesar did own a gun, but that she did not know if he had the weapon on him. Officer Catherine Hutchins pulled up information on Cesar Garcia from the Austin Police Department database indicating that Cesar was “suicidal,” “possibly suicide by police,” and that during a previous incident the wife said “he would run at police officers with a knife.” The warnings about Cesar, as well as the description of his black Nissan Titan truck, were broadcast over the radio for responding officers.

Comments	Date	Time	User	Type	Conf.	Comments
	9/5/2016	08:44:25	AP6357	Response		caller's ex is at loc. wants his property; caller doesn't want to let him inside
	9/5/2016	08:44:52	Kroger, Christopher	Response		wa 2 man
	9/5/2016	08:45:36	AP6357	Response		ex: Cesar Garcia (dob 062081), hm wmg gry shirt/blk shorts - has told caller in past that he owns a gun; caller hasn't seen it on him today
	9/5/2016	08:46:22	AP6357	Response		gate code=3917 // Cesar poss in plot now - in blk 4d Niss Titan (lp# unk)
	9/5/2016	08:46:25	AP6357	Response		noi
	9/5/2016	08:47:24	Hutchins, Catherine	Response		Remarks: IF WIFE CALLS POLICE HE WOULD RUN AT COPS W/KNIFE
	9/5/2016	08:48:57	AP5442	Response	Y	[Query] E109, Name/DOB Check: TX,GARCIA, CESAR [REDACTED] M,W,1
	9/5/2016	08:50:02	AP5442	Response	Y	[Query] E109, Name/DOB Check: TX,GARCIA, CAESAR, [REDACTED] M,W,1
	9/5/2016	08:50:36	AP5442	Response	Y	[TLETS]: 11866831 - TX,GARCIA,CAESAR [REDACTED] M,W,1 [TLETS]: Results for TTPerson Check Query Performed By Williams, Atara for Unit E109

Transcript of the 911 call

Due to the dangerous nature of the call, multiple patrol units responded to the front gate of the apartment complex. Shortly after driving into the complex, officers spotted a black truck, with the driver’s side door open, matching the description of Cesar’s vehicle. The truck was parked in a fire lane, with its front end facing arriving officers, near the breezeway of building 10. As officers approached, Cesar pulled a long gun out of the front seat of his pickup truck. This was captured on Officer Tim Hamby’s patrol car video.



Screenshot of video from Officer Hamby’s vehicle shortly after Cesar has exited his truck.

Officer Hamby exited his vehicle and announced over the radio, "He's got a rifle, he's got a rifle, everyone back up." Officers took cover behind a patrol vehicle while Cesar walked backwards, facing officers, holding what appeared to be a high-powered rifle with a full stock and a scope. Officer Rocky Reeves, a mental health officer, was the primary voice on scene asking Cesar to drop his gun and telling Cesar that he was not in trouble. Officer Reeves assured Cesar that the officers were there to help him. At one point, multiple officers were giving Cesar verbal commands to drop his gun. Cesar responded by informing officers, "he was not going to drop the gun." Cesar walked away from the officers, through the parking lot, towards the far end of building 10. At this time, Officers McRae and Nathaniel Stallings were in the breezeway at the far end of building 10, not too far from where Cesar was standing in the parking lot. Cesar was still holding the long gun, but was not actively pointing it at anyone. Cesar moved the gun back and forth from one hand to the other. Officers remained in positions of cover while making continuous verbal attempts to connect with Cesar and gain compliance. At one point, Cesar briefly raised the barrel of his long gun up towards officers. Officer Scott Chumbley warned Cesar not to point his weapon at them again, or he would be shot. Cesar's response was, "who's gonna shoot me, all of you?"

The male was holding the rifle at the low ready with the barrel aimed toward the ground.

At one point, the male quickly raised the barrel of the rifle for a period of a couple seconds as if in a defensive gun fighting stance. The male then lowered the barrel back toward the ground.

Officer Chumbley was holding a rifle and told the male that he would be shot if he were to raise the rifle again.

Portion of Officer Reeves' written statement

Officer Stallings retrieved a less-lethal shotgun<sup>3</sup> from another officer's patrol vehicle and returned to his position alongside Officer McRae in the stairwell of building 10 near Cesar's location. Approximately nine minutes after officers first encountered Cesar, Officer Stallings fired two rounds from his less-lethal shotgun at Cesar. These less-lethal rounds did not seem to have an effect on Cesar. After the less-lethal rounds were fired, Cesar began to run or walk quickly away from officers. Several officers described Cesar as walking fast or running when they heard the shots fired and saw Cesar to go down to the ground.

I heard the less lethal shotgun fired twice and saw the suspect flinch both times, but I do not know if he was actually hit. The suspect then ran in a northeast direction with the rifle still in hand. I then left my position of cover in order to keep eyes on the suspect, but lost sight of him as he was running behind multiple obstacles, which included a tree, vehicles and part of the building. I then heard several gunshots and did not know if the suspect was firing or if we were. They sounded controlled and not in a rapid succession. I then was able to see the suspect down on the ground and I saw a rush of officers moving towards him. I saw the suspect's rifle on the ground, to the right of where the suspect fell. The suspect was then detained in handcuffs.

Portion of Officer Chumbley's written statement

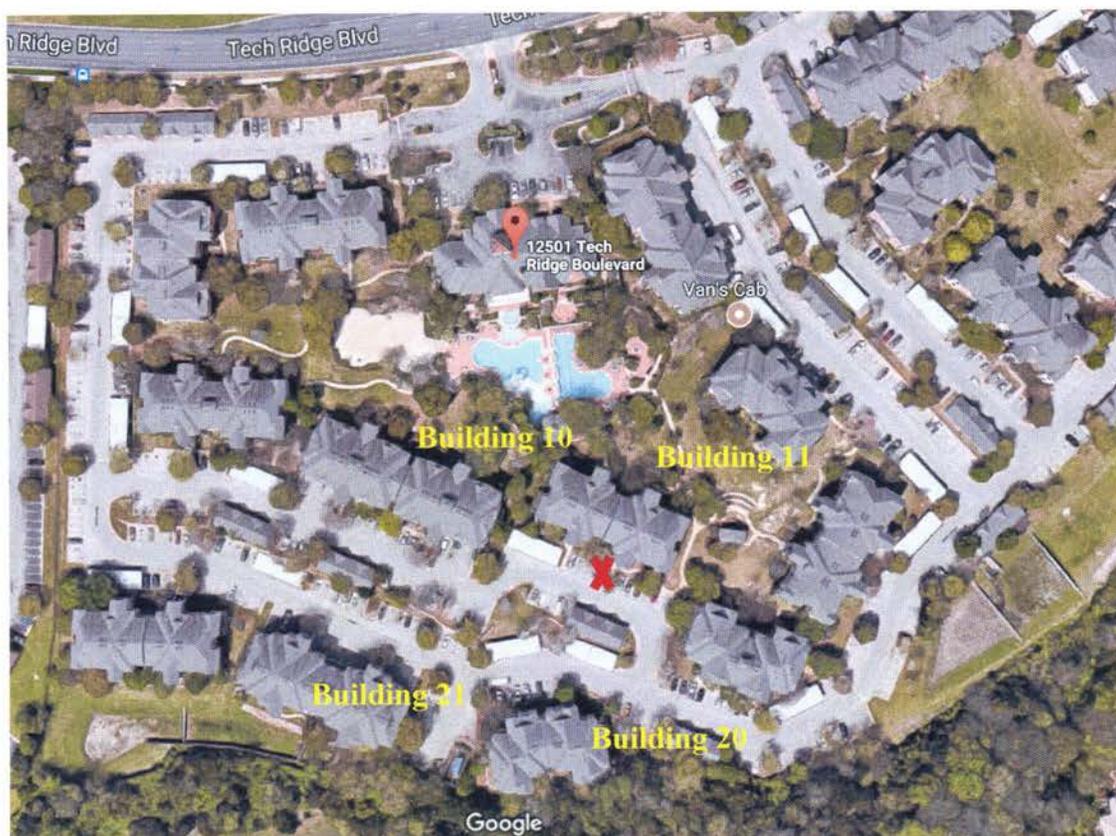
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<sup>3</sup> A bean bag round is loaded into a less-lethal shotgun and its deployment is intended to disable the person without killing him. Shotguns dedicated to being used for bean bag rounds are often visibly modified with either yellow or green markings, or bright orange stocks to reduce the possibility that a user might inadvertently load lethal munitions into the weapon.

At that point I heard the less lethal shotgun deploy and I observed the subject taking a round in the side. It didn't seem like it had any effect on him. I know I heard at least two (2) less lethal rounds go off. There might have been a third (3), but I don't remember. All the less lethal rounds had no effect on him. From this point I moved up a little bit walking east and took cover behind the back right of the red car. There was a brown Ford truck parked facing north blocking my view to where the subject was moving to. After the less lethal rounds were deployed the subject took off at a fast walk behind the brown Ford truck heading east out of my view still in the parking lot. And that's where the shots were fired. I heard at least two (2) shots fired and I observed the subject on the ground. From that point officers moved in. When the subject hit the ground he dropped his rifle.

Portion of Officer Hamby's written statement

After the less-lethal rounds were fired, Officer McRae, as well as other officers, pursued Cesar as he ran or walked quickly through the parking lot heading east away from building 10 towards building 11. Cesar was still holding his rifle, as officers followed him.



Aerial view of the apartment complex. Building 21 was Corporal Reale's location; pictured in more detail below. Building 10 was the location where Officer Stallings fired the less-lethal shotgun. The red X depicts where Cesar fell after he was shot.

The officers who were pursuing Cesar, as well as Corporal Reale, who had taken an elevated position on the third floor stairwell of building 21, described Cesar as turning around with his weapon pointing towards the officers behind him. Corporal Reale stated during his interview with investigators, that after the less-lethal rounds were fired, Cesar moved into his line of sight, and he saw that Cesar was holding the rifle with two hands and turning back toward officers.

1570 Q1: W- when - when you said that you s- when he runs into your view and you s- see him  
 1571 look and I'm lookin' to the left...  
 1572  
 1573 A: Yeah.  
 1574  
 1575 Q1: ...t- towards the officers and you think he's about to shoot at them or get a sight  
 1576 picture on them or a place where he can shoot at them...  
 1577  
 1578 A: Yeah.  
 1579  
 1580 Q1: ...is there anything else that he's doing besides turning his head that makes you  
 1581 believe that.  
 1582  
 1583 A: It - it - it's the position of his body. You know? I- like I said, it's all very fast as he  
 1584 came through, just the way he - he - he looked, just the way he - his bo- body  
 1585 appeared to be positioned towards my officers after not dropping his weapon after  
 1586 being hit...

Transcript of Corporal Reale's Interview

Corporal Reale explained to investigators that Cesar looked as if he were going to fire on officers, so he fired one shot to stop the threat.

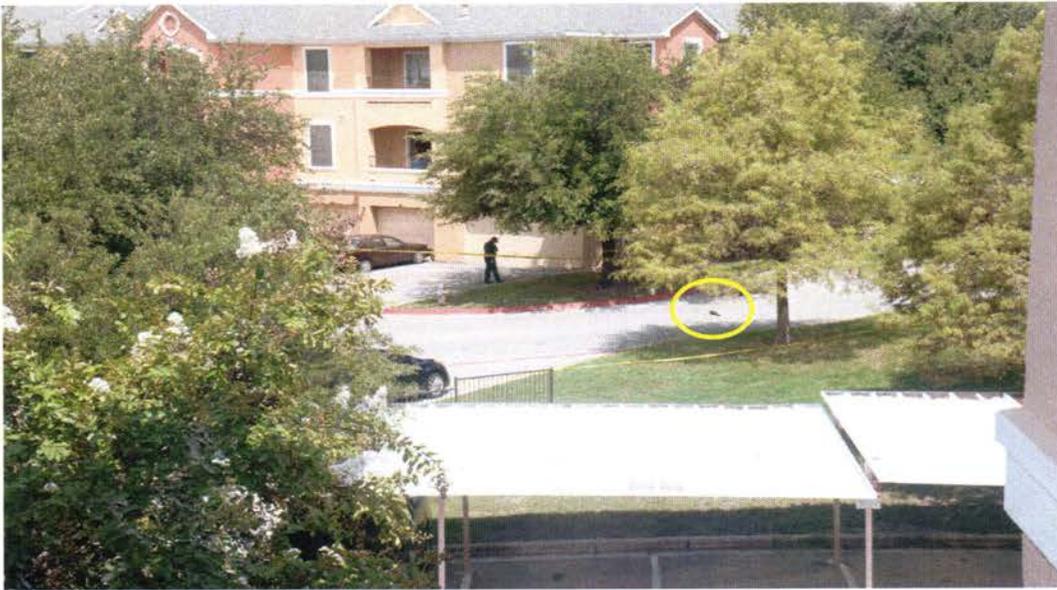
1811 Q: ...and - and whatnot and what were some of the reasonings behind your thought  
 1812 process of - of taking a shot?  
 1813  
 1814 A: Okay. Um, less lethal didn't get him to drop his weapon, uh, he's been given, uh, a  
 1815 number of commands. Less lethal was deployed, he didn't drop his weapon, he  
 1816 started moving to me to find, uh, to start shooting and to find, uh, an advantage point  
 1817 to shoot from. We had civilians out there, uh, that - when I - I s- I don't remember  
 1818 where they were, I saw people on their balconies over here I believe. Um, but my  
 1819 main concern was he was gonna start shootin' the officers that were there. From the  
 1820 way he moved after being bean-bagged, uh, he was gonna start now returning fire  
 1821 and there was no more time and - and the threat needed to be stopped and that's  
 1822 why I fired.

Transcript of Corporal Reale's Interview



Corporal Reale's position on the 3<sup>rd</sup> floor of building 21 when he fired at Cesar.

View from 3<sup>rd</sup> floor of building 22. Cesar's rifle is highlighted with a yellow circle.



A zoomed in view of Cesar's Ruger 10/22, semiautomatic rifle.



## Transcript of Officer McRae's Interview

1510 A: I'm interpreting - I'm seeing that now, again, he's got both hands on the rifle in a  
 1511 position where he can much more easily manipulate it to train it on us, train it on, um,  
 1512 you know, somebody else. He's at that point carrying it in a manner where it would be  
 1513 much easier and quicker for him to bring it up to a firing position whether that be from  
 1514 his hip, from his shoulder pocket, or something along those lines. Um, so at that point  
 1515 the - and now he's turned and faced directly towards me in that manner after  
 1516 everything that we've tried. We've tried spea- we've tried verbal de-escalation, we've  
 1517 tried, you know, talkin' to him at length to no avail, we tried less lethal munitions to no  
 1518 avail and now he's running away from us and then turning. And so in my - I don't  
 1519 know if he's running away giving himself enous di- enough distance to turn and take  
 1520 a firing position on us. So I see him turn, he's facing directly towards us and now he's  
 1521 holding the rifle in po- in a manner that would be much easier for him to mani-  
 1522 manipulate the rifle to fire on us. So I felt at that point it was even more of a - an  
 1523 immediate threat 'cause now he's facing directly towards us with both hands on the  
 1524 rifle, um, in a manner that he could very quickly start firing rounds at us.

Officer McRae stated, during his SIU interview, that he followed Cesar after the less-lethal rounds were deployed. McRae observed Cesar, holding his rifle with two hands, turn back towards the officers who were following him. In McRae's opinion, Cesar was in a position to be able to quickly fire upon pursuing officers. Officer McRae explained that their efforts at verbal de-escalation had failed. He noted that Cesar had become increasingly agitated and that even less-lethal rounds had not been effective at controlling Cesar. Officer McRae told investigators that he was in fear for his safety, as well as others, when he fired five rounds from his patrol rifle at Cesar.

1446 A: I saw the suspect - he was running and then he turned back towards me. He was  
 1447 holding the rifle now with both hands, he had his left hand forward, you know, on the  
 1448 hand guard area, uh, for lack of a better term, and then the right hand was near the  
 1449 trigger. I didn't see exactly where it was. And then he's hol- so he's holding now the  
 1450 rifle with both hands, he turns and faces towards me and towards the other officers  
 1451 that are behind me. So I remember him turning and starting to face towards u- or  
 1452 facing towards us so he was essentially facing directly towards us. The rifle was like  
 1453 this, he had it now with both hands in a much more conventional firing position with  
 1454 both hands on the rifle. I heard a gunshot, based on his actions, his mannerisms, not  
 1455 seeing an immediate recoil from the rifle I believed it to be a gunshot fired by another  
 1456 officer. Seeing the suspect turning towards me, both hands on the rifle I had - I feared  
 1457 immediately for my safety. He's already spoken to me, he knows where I'm coming  
 1458 from, he knows where the other officers are coming from. I'm afraid for my safety, I'm  
 1459 afraid for the other officers, for their safety, I'm afraid - I'm afraid for the safety of the  
 1460 people that are here. It's Labor Day, the k- you know, kids are off school, it's, you  
 1461 know, 9 o'clock in the mornin' so ki- you know, people are up, they're awake, they're  
 1462 movin' around. Um, we could've very easily encountered somebody while he was  
 1463 trying to run away from us and then could've potentially harmed them or it could've  
 1464 turned into a potential hostage scenario where he took them hostage, try to br- or try  
 1465 to break into an apartment. There's a variety of things and based on his actions and  
 1466 his failure to comply with our commands, there was no telling what he was gonna do  
 1467 at that point. But based on all of his actions leading up to this he po- he posed a very  
 1468 real and very serious threat to our safety and to the safety of everybody there. So  
 1469 once I saw him turn - I saw him turn, I heard the gunshot and again based on  
 1470 everything I didn't believe it to be from him. Base- and seeing him turn with the rifle in  
 1471 both hands facing towards me, I began feeling that I was - that I as well as other  
 1472 officers were in immediate danger. I fired approximately five rounds from my rifle at  
 1473 the suspect. Uh, the suspect went down, the rifle - he dropped the rifle and he went  
 1474 down, he landed on hi- he was facing me, he tu- kinda turned away from me standing  
 1475 up and then fell to his stomach. He - so as I continued to move up and as I was  
 1476 moving up to him he rolled from his stomach onto his back. I moved to a position  
 1477 where I could provide less lethal - I was essentially standing directly over his head  
 1478 providing lethal cover so that Office- providing lethal cover on him in case he posed  
 1479 another lethal threat. We hadn't frisked him yet, obviously, I didn't know - if he's  
 1480 already carrying a gun, who's to say, depending on what his intentions were, if he  
 1481 maybe had another gun concealed on his person. I moved up, positioned on his head  
 1482 to provide lethal cover so other officers could detain him. Once they detained him  
 1483 they immediately - I heard officers calling for a tourniquet, calling for supplies to start  
 1484 applying medical aid to the suspect.

Transcript of Officer McRae's Interview

McRae's five fired shell casings marked as tented evidence give a general firing location for McRae.



Aerial view of Building 10. Yellow circle depicts the approximate location of where Cesar fell.

Officer Stallings stated in his interview with investigators that he saw Cesar turn around to face him with the rifle so he began to transition from the less-lethal shotgun to his pistol.

1553 Q: And turned and looked back. You said he looked directly at you.  
 1554  
 1555 A: I was transitioning into my lethal weapon 'cause I've - thought he was  
 1556 gonna kill me. I was gonna pull my weapon out and shoot him. But with  
 1557 reaction time he had a - he would've had a faster reaction coming back  
 1558 towards me then I would've as I was pulling out my gun. I got my gun  
 1559 to about mid-waist when Officer McRae started firing. And he was  
 1560 incapacitated. There was no reason for me to fire. The lethal encounter  
 1561 was taken care of.  
 1562

Transcript of Officer Stallings' Interview

Officer John York, believing Cesar was preparing to fire on himself and other officers, stated he raised his pistol up right before Officer McRae fired.

At which time Officer Stallings deployed an unknown amount of less lethal rounds at the suspect. I did observe the suspect to possibly take one round based off of his bodily reaction of flinching and tensing. I observed the less lethal rounds appeared to be ineffective. The suspect then proceeded to start running east in the parking lot. Officer McRae was in front of me as we had kind of set up a four person react team. We began to pursue the suspect on foot. After an undefined amount of feet I observed the suspect turn and start to raise his rifle in our direction. Given the totality of the circumstances I did believe the suspect was going to start engaging in gun fire with us. I continued to fear for my life and moved my pistol from position #3 to position #4 to use deadly force. Milliseconds as I was punching out my pistol I then observed Officer McRae shoot the suspect.

Transcript of Officer York's Interview

Shots were fired at 9:03 a.m. Cesar sustained multiple gunshot wounds. Cesar went to the ground after a few steps and the rifle he was holding fell underneath him. Cesar was transported to Brackenridge Hospital where he was pronounced deceased at 9:36 a.m. The investigation of the officer-involved shooting began with SIU investigators, crime scene technicians, internal affairs and ballistics experts, as well as representatives from the Police Monitor's Office, City of Austin legal department, and the District Attorney's Office all responding to the scene.

After the shooting during the investigation, several residents of the apartment complex reported hearing officers tell Cesar repeatedly to, "put the gun down" and that Cesar, "was not in trouble." They reported that Cesar did not obey commands to put the weapon down. Several of the apartment residents gave written statements to detectives investigating the shooting that are consistent with officer in-car video and the officers' accounts of how the shooting transpired. Officer Hamby's in-car video captures most of the officers' encounter with Cesar, including the instant where Cesar points his rifle at officers.



Cesar pointing his rifle in direction of the officers.



Officer Reale's in-car video captures Cesar running after the two less-lethal rounds have been fired, including the instant where Cesar turns back toward officers with his rifle in his hand.



Close up of Cesar turning back toward officers with his rifle in his hand.



Further, close up of Cesar turning back toward officers with his rifle in his hand

STATEMENT OF MARIE GARCIA

Marie Garcia and Cesar had been together for 17 years and had 4 children together. Throughout their relationship, Cesar had been mentally and physically abusive. She had attempted to end the relationship a number of times, but each time Cesar would threaten to kill himself. Although they were divorced, Cesar had recently moved back in with the family. Things were not going well between them, so Marie asked Cesar to move out on Saturday, September 3, 2016. Marie told the investigating officers what Cesar told her on Saturday as he was leaving the apartment:

*"He (Cesar) said he was leaving and left his ID, credit cards, and cash. He told me, 'where I'm going, I won't need this.' I took this to mean that he was going to kill himself. In the back of my mind, I knew that he would probably do it, I just didn't know when."*

On Monday morning, September 5, 2016, Cesar arrived at the family apartment. Marie and her friend, Peter Cantu, were inside the apartment when Cesar knocked on the door and then tried to get into the locked apartment. When Marie called Cesar on the phone to ask him why he was there, Cesar told her he wanted to pick up his belongings. Cantu told investigators that he advised Marie to call 911 because he feared things would get out of hand.

*"I was there at the apartment this morning when Marie's ex-husband Cesar Garcia knocked on the door. Cesar began to walk around the outside of the apartment and look in through the windows. Cesar was saying he just wanted his stuff. Marie would not let Cesar in the apartment. Cesar attempted to come inside the apartment by trying to open the locked front door. I told Marie to call the police, not knowing if this situation may get out of hand."*

Marie followed Cantu's advice and called 911. During the call, Marie explained to the operator that her ex-husband was at her apartment and that she did not want to let him inside. Marie requested an officer to stand by why Cesar gathered his belongings. When the operator asked if Cesar had a weapon, Marie replied that she had never seen him with one, but that Cesar always told her he had a gun. Marie relayed her account of the police arriving and their interaction with Cesar to investigators:

*"After I hung up with 911, I looked outside and didn't see Cesar anywhere. I didn't hear him either. Within five minutes, I looked out of my son's bedroom window. I saw the police to the right and Cesar to my left. Cesar was walking backwards as the cops were telling him to put the gun down and that he wasn't in trouble. I saw about five officers to my right. Some were behind a truck and one was behind a tree. They were talking to Cesar. Cesar was talking back, but I couldn't hear what he was saying. The cops were loud but Cesar wasn't talking loud enough. Cesar was holding a gun in his right hand and down by his side. I don't think Cesar was holding the gun by the handle. I think he held it by the stock. I didn't see Cesar ever raise the gun the entire time I looked outside the window, which was about four minutes. I stepped away from the window because I knew what was going to happen. I knew the cops were going to shoot him because he had been saying for so long. He said if he ever died, that it would be suicide by cop."*

STATEMENTS FROM APARTMENT COMPLEX RESIDENTS

**Amanda Ybarra** was inside her parked car near building 20:

*"As I was in my car, I heard the police officers yelling at the guy multiple, multiple times to 'drop the gun', 'drop your weapon', 'get on the ground' and things to that effect. I heard someone say 'You haven't even done anything wrong'. The police officers were trying to talk to the guy and I could see him at some points but then he would move out of my view. He was moving between cars in the parking lot. This was taking place near the covered parking between buildings #11 and #20. From what I saw, now the guy was holding the rifle level and holding it with 2 hands. He was holding it in a fashion that all he had to do was pull the trigger and anyone on the ground in that direction could get hit. It was not pointed down at the ground or up in the air during this time."*

**Ida Soliz** lives in building 10, close to where Cesar's truck was parked during the incident. After Soliz opened the door, she could hear what was going on as she observed events outside her window:

*"I cracked the door and could hear Officers saying 'hey Cesar you're alright' The Officers also was saying 'Cesar you're not in trouble, just put the rifle down' - Then I heard Officers say 'come on Cesar, if you point it that way again, we're going to have to shoot.' Officers then said 'if he does it again, shoot.' A few seconds later I heard the shooting. It sounded like two different weapons went off, then it was at that point I noticed it was further down the complex and not at the truck."*

**Steven Silva** was staying with his girlfriend, Ida Soliz, in building 10, when he woke up to what he thought was someone arguing. Silva looked out the window and saw it was the police yelling:

*"I then realized the Officer was up against the truck taking cover. I then heard several Officers yelling 'Cesar don't do it,' 'stop,' 'do it again and we'll shoot.' I even heard the Officers instruct Cesar to put the gun down. I do know the Officers gave whoever they were talking to many warnings before taking a shot. The Officers were using very clear and loud voice commands while giving Cesar instructions."*

**Yousif Al Dabbagh** lives in building 10. When Al Dabbagh's sister woke him up, he heard yelling coming from the apartment parking lot:

*"I heard yelling coming from outside of people saying, 'Drop your weapon! Drop your weapon!' I looked out the window of my second floor apartment and saw a man holding a rifle down by his side. I heard people that I believed were the police telling the man to not point the rifle at anyone. I heard the man say, 'Why? Are you going to shoot me? Who's going to shoot me, you guys?' I heard the police say, 'You didn't do anything illegal yet, just drop your weapon!' I heard the man say, 'What if I want to be shot?' I think the man may have pointed the rifle at the police and the police started to shoot at him. I saw the man start to run away still in the parking lot. The man with the rifle was speaking perfect English."*

**Janet Zawacki** observed the shooting from her 3<sup>rd</sup> floor bedroom window, building 11, facing the parking lot:

*"My bedroom window faces the parking lot. I then saw two Police officers wearing Green uniforms walking up toward my building. I heard one of the Officers say 'watch your back' I then heard a lot of commotion toward the front of the building. I then heard approximately 3-4 gun shots toward the front of my building. I then saw a large Hispanic man, approximately 35-40 years of age, shaved head, wearing a shirt and shorts running up the parking lot, with a weapon in his hands. The weapon that I saw the man carrying was a black in color rifle. I saw this male looking, as he was pointing his weapon outward as he was walking around the parking lot. I saw the man with the weapon then turn around and start to run back toward where 4 other Officers wearing dark blue in color uniforms were at. I then heard a lot of shouting. I then heard two shots, and saw the man with the gun fall down onto the driveway."*

## MEDICAL EXAMINER'S AUTOPSY REPORT

The death of Cesar Garcia was investigated by the Travis County Medical Examiner's Office under the statutory authority of the Medical Examiner jurisdiction. The postmortem examination was performed by Vickie L. Willoughby, D.O., Deputy Medical Examiner, beginning at 12:00 p.m. on 9/6/2016, at the Travis County Medical Examiner Office, Austin, Texas. An autopsy and toxicology report were completed. The autopsy report noted that the cause of death was gunshot wounds and the manner of death was homicide. According to the toxicology report authored by Chief Forensic Toxicologist, Dr. Brad Hall, Cesar did not have any detectable amount of ethanol or routinely tested drugs in his system when he was shot. During an interview with Dr. Willoughby, she reported to our office that the four gunshot wounds listed in her autopsy report are arbitrarily numbered or listed for descriptive purposes and are not necessarily listed in order of possible chronological sequence or severity.

There were four documented gunshot entrance wounds and three documented gunshot exit wounds. Gunshot wound one entered the back of the left shoulder and its direction of travel was back to front, left-to-right and downward. Gunshot wound two entered the left back and its direction of travel was back-to-front, upward and left-to-right. Gunshot wounds one and two both exited the front of the left shoulder. Gunshot wound three entered the right back and the direction of travel is upward, right-to-left and back-to-front. The projectile from gunshot wound three was recovered from subcutaneous tissue of the right scalp. This projectile was collected, packaged and submitted as evidence for ballistic testing. The fourth gunshot entered the left calf and exited front and front inner lower left leg and its direction of travel was back to front, upward and left-to-right.

## FIREARM AND TOOL MARK EXAMINER'S REPORT

Firearm and Tool Mark Examiner, Dale Justice, arrived at the scene to collect, process, and investigate the ballistic evidence of the officer involved shooting. This ballistic evidence would later be analyzed and tested at the Austin Police Department's firearms laboratory. At the conclusion of his investigation and testing, Justice issued two reports detailing his findings. Officer Stallings fired two bean bag projectiles from his less-lethal shotgun. Corporal Reale fired his (department issued) AR-15 rifle once. Reale collected his own spent casing due to bystanders in the area, and it was given to a crime scene technician by an officer on scene. This fired casing was positively identified as having been fired from Corporal Reale's rifle. Reale's fired projectile was collected at the scene. Justice could not definitively determine whether or not Reale's shot impacted Cesar. Officer McRae fired his (department issued) AR-15 rifle five times. Five fired cartridge casings, recovered from the south side of Building 10, were positively identified as having been fired in McRae's rifle. The area where McRae's fired casings were collected was consistent with the location McRae told investigators he fired from. The projectile recovered by the medical examiner from Cesar Garcia's scalp tissue was positively identified as having been fired in Officer McRae's rifle. The rifle Cesar had was a Ruger 10/22, semiautomatic rifle. When Cesar's rifle was collected by crime scene technicians, it did not have a magazine in place nor did it have ammunition in the rifle. There were, however, two fully loaded 10-round magazines in the butt stock storage spaces of the rifle. Cesar's rifle was examined and test fired and was found to be capable of discharging live rounds and functioned normally during the test. Later, pursuant to a search warrant, one fully loaded 25-round magazine along with a plastic ammo box containing another 70 rounds of Winchester .22 Long Rifle Hollow Point were recovered from Cesar's truck.

## RELEVANT LEGAL PRINCIPLES

A law enforcement officer is authorized to make an investigatory stop of an individual upon a showing of reasonable suspicion.<sup>4</sup> Police interactions with citizens are often dynamic and escalate quickly. It is not uncommon for an initial detention to give rise to probable cause to search or arrest an individual. The right to make this arrest or search carries with it the right to use some degree of physical coercion or threat thereof to effect it.<sup>5</sup> The force used to make that arrest or search must be judged from the perspective of a reasonable officer on the scene and must be “objectively reasonable” under the circumstances.<sup>6</sup>

A person commits the offense of Murder if he: (1) intentionally or knowingly causes the death of an individual; or (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. Murder is punishable as a felony of the first degree.<sup>7</sup> A person commits the offense of misdemeanor Assault if the person intentionally or knowingly threatens another with imminent bodily injury.<sup>8</sup> A person commits the offense of Aggravated Assault if the person commits an Assault and either causes serious bodily injury or uses or exhibits a deadly weapon during the commission of the Assault.<sup>9</sup> An Aggravated Assault is a felony of the first degree if the offense is committed by a public servant acting under color of the servant’s office or employment.<sup>10</sup>

It is a defense to prosecution that the conduct in question is justified.<sup>11</sup> Texas law contains several justifications which can serve as a defense for criminal prosecution when force or deadly force is used.<sup>12</sup> A person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other’s use or attempted use of unlawful force.<sup>13</sup> This is known as Self-Defense. A person is justified in using *deadly* force against another if the actor would be justified in using force in Self-Defense and when and to the degree the actor reasonably believes the deadly force is immediately necessary to protect the actor against the other’s use or attempted use of unlawful deadly force.<sup>14</sup> A person is justified in using force or deadly force against another to protect a third person if, under the circumstances as the actor reasonably believes them to be the actor would be justified in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect and the actor reasonably believes the intervention is immediately necessary to protect the third person.<sup>15</sup> This is known as Defense of a Third Person.

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<sup>4</sup> *Derichsweiler v. State*, 348 S.W.3d 906 (Tex. Crim. App. 2011); *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>5</sup> Tex. Penal Code § 9.51.

<sup>6</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>7</sup> Tex. Penal Code § 19.02(b), (c).

<sup>8</sup> Tex. Penal Code § 22.01(a)(2).

<sup>9</sup> Tex. Penal Code § 22.02(a).

<sup>10</sup> Tex. Penal Code § 22.02(b)(2)(A).

<sup>11</sup> Tex. Penal Code § 9.02.

<sup>12</sup> “Deadly Force” means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury. Tex. Penal Code § 9.01(3).

<sup>13</sup> Tex. Penal Code § 9.31(a).

<sup>14</sup> Tex. Penal Code § 9.32(a)(1), (2)(A).

<sup>15</sup> Tex. Penal Code § 9.33.

Texas Penal Code §9.51 contains a justification for use of force or deadly force that applies to law enforcement officers. A peace officer is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search or assist in preventing escape after arrest, if: (1) the actor reasonably believes the arrest or search is lawful, and (2) before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer or as one acting at a peace officer's direction, unless he reasonably believes his purpose and identity are already known or cannot reasonably be made known to the person to be arrested. A peace officer is justified in using *deadly* force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest, if the use of force would have been justified under Subsection (a) [authorizing the use of non-deadly force] and: (1) the actor reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force; or (2) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed.<sup>16</sup> The applicable provisions of the Texas Penal Code are included in the appendix that is attached to this letter.

Criminal liability is established only if it is proved beyond a reasonable doubt that all the elements of an offense defined by statute have been committed.<sup>17</sup> Further, if a defendant produces some evidence of justification, the State must prove beyond a reasonable doubt that the offense was committed without legal justification.<sup>18</sup>

#### LEGAL ANALYSIS

Law enforcement officers had probable cause to make an investigatory stop of Cesar based upon the 911 call made by Marie Garcia. Marie Garcia told the 911 call taker that she was requesting assistance with her ex-husband retrieving his belonging from the apartment and she gave a general description of Cesar and his truck. When asked if Cesar was armed with a weapon, Marie could not definitively state that Cesar was unarmed. This information, along with notes from a previous call indicating Cesar could pose a threat to law enforcement, was broadcast to responding officers. Before the officers had the chance to detain Cesar for questioning and to check for possible weapons, Cesar exited his truck with a rifle. Cesar's display of a weapon and refusal to comply with the officers' commands to put the weapon down prevented the officers from safely approaching Cesar to conduct their investigation. The actions that ensued arose from their attempts to make this lawful detention and search of Cesar. Later in the encounter, officers had probable cause to arrest Cesar Garcia for Aggravated Assault.

Both Officer Salvatore Reale and Officer Andrew McRae, while on duty with the Austin Police Department, fired their rifles at Cesar Garcia. It is provable, based on the firearms expert's examination, that McRae's shots impacted Cesar. Therefore, Officer McRae potentially committed the offense of Murder<sup>19</sup> when he intentionally shot Cesar. Because it is unknown whether or not Officer Reale's single shot struck or injured Cesar, his use of deadly force is potentially the offense of Aggravated Assault by a Peace Officer,<sup>20</sup> rather than Murder.

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16 Tex. Penal Code § 9.51.

17 Tex. Penal Code § 2.01.

18 *Saxton v. State*, 804 S.W.2d 910 (Tex. Crim. App. 1991); *Jenkins v. State*, 740 S.W.2d 435 (Tex. Crim. App. 1983).

19 Tex. Penal Code § 19.02.

20 Tex. Penal Code § 22.02(b)(2)(A).

Regardless of the offense, if the use of deadly force is justified under the law, the officers are not criminally liable for the shooting death of Cesar Garcia. The evidence supporting justification, as either Self-Defense or Defense of a Third Person, defeats the State's ability to meet its burden of proof. Officers saw Cesar retrieve a firearm from his truck. Officers were on notice that Cesar was possibly suicidal and was considered a threat to responding officers from a previous incident. Cesar raised and pointed his weapon in a manner that indicated immediate threat of deadly force. The reasonableness of the officers' perception of threat and immediate necessity is further supported because the efforts to de-escalate by using less-than-lethal measures were not successful, because Cesar had acknowledged the officers' warning that he would be shot if he continued his threatening conduct, and because Cesar raised his rifle towards officers after being warned not to. The reasonableness of the officers' perception is not defeated by the actual fact that the rifle did not have a round in the chamber. That fact could not have been known to the officers at the time.

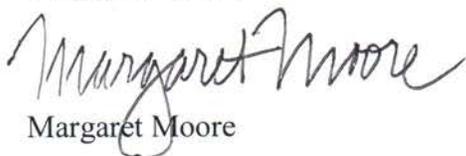
When Cesar Garcia raised his rifle and pointed it in the direction of the officers, he committed the offense of Aggravated Assault on a Peace Officer.<sup>21</sup> This criminal act constituted a felony committed in the presence of the responding officers for which Texas Penal Code § 9.51 authorizes peace officers to use deadly force and serves as an additional justification for both Officer Salvatore Reale and Officer Andrew McRae.

#### CONCLUSION

For these reasons, I have concluded that the filing of criminal charges against Officers Salvatore Reale and Andrew McRae are not supportable under Texas criminal law standards because both officers' use of deadly force in this incident was justified under the circumstances. Consequently, charges will not be filed. We are closing our review and will take no further action in this matter.

I have released a public/press packet that includes videos, witness statements, officer statements, forensic reports, photos and an autopsy report. I have also attached the items and legal citations mentioned in the analysis. This decision will be posted on my Office's website and will be accessible under Cesar Garcia and the date of the incident, September 5, 2016.<sup>22</sup>

Very truly yours,



Margaret Moore

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<sup>21</sup> Tex. Penal Code § 22.02 (a), (b)(2)(B).

<sup>22</sup> <https://www.traviscountytexas.gov/district-attorney/cru>

## **APPENDIX**

## Texas Penal Code Sections (TPC)

### TPC SEC. 2.01. PROOF BEYOND A REASONABLE DOUBT

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

### TPC SEC. 9.01. DEFINITIONS

(3) "Deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

### TPC SEC. 9.02. JUSTIFICATION AS A DEFENSE

It is a defense to prosecution that the conduct in question is justified under this chapter.

### TPC SEC. 9.31. SELF-DEFENSE

(a) Except as provided in Subsection (b), a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. The actor's belief that the force was immediately necessary as described by this subsection is presumed to be reasonable if the actor:

- (1) knew or had reason to believe that the person against whom the force was used:
  - (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;
  - (B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or
  - (C) was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery;
- (2) did not provoke the person against whom the force was used; and
- (3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

(b) The use of force against another is not justified:

- (1) in response to verbal provocation alone;
- (2) to resist an arrest or search that the actor knows is being made by a peace officer, or by a person acting in a peace officer's presence and at his direction, even though the arrest or search is unlawful, unless the resistance is justified under Subsection (c);
  - (3) if the actor consented to the exact force used or attempted by the other;
  - (4) if the actor provoked the other's use or attempted use of unlawful force, unless:
    - (A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and
    - (B) the other nevertheless continues or attempts to use unlawful force against the actor; or
  - (5) if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was:
    - (A) carrying a weapon in violation of Section 46.02; or
    - (B) possessing or transporting a weapon in violation of Section 46.05.

(c) The use of force to resist an arrest or search is justified:

- (1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest or search; and
  - (2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary.
- (d) The use of deadly force is not justified under this subchapter except as provided in Sections 9.32, 9.33, and

9.34.

(e) A person who has a right to be present at the location where the force is used, who has not provoked the person against whom the force is used, and who is not engaged in criminal activity at the time the force is used is not required to retreat before using force as described by this section.

(f) For purposes of Subsection (a), in determining whether an actor described by Subsection (e) reasonably believed that the use of force was necessary, a finder of fact may not consider whether the actor failed to retreat.

#### **TPC SEC. 9.32. DEADLY FORCE IN DEFENSE OF PERSON**

(a) A person is justified in using deadly force against another:

- (1) if the actor would be justified in using force against the other under Section 9.31; and
- (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary:
  - (A) to protect the actor against the other's use or attempted use of unlawful deadly force; or
  - (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

(b) The actor's belief under Subsection (a)(2) that the deadly force was immediately necessary as described by that subdivision is presumed to be reasonable if the actor:

- (1) knew or had reason to believe that the person against whom the deadly force was used:
  - (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;
  - (B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or
  - (C) was committing or attempting to commit an offense described by Subsection (a)(2)(B);
- (2) did not provoke the person against whom the force was used; and

(3) was not otherwise engaged in criminal activity; other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

(c) A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section.

(d) For purposes of Subsection (a)(2), in determining whether an actor described by Subsection (c) reasonably believed that the use of deadly force was necessary, a finder of fact may not consider whether the actor failed to retreat.

#### **TPC SEC. 9.33. DEFENSE OF THIRD PERSON**

A person is justified in using force or deadly force against another to protect a third person if:

- (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
- (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

#### **TPC SEC. 9.51. ARREST AND SEARCH**

(a) A peace officer, or a person acting in a peace officer's presence and at his direction, is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest, if:

- (1) the actor reasonably believes the arrest or search is lawful or, if the arrest or search is made under a warrant, he reasonably believes the warrant is valid; and
- (2) before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer or as one acting at a peace officer's direction, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested.

(b) A person other than a peace officer (or one acting at his direction) is justified in using force against another

when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making a lawful arrest, or to prevent or assist in preventing escape after lawful arrest if, before using force, the actor manifests his purpose to and the reason for the arrest or reasonably believes his purpose and the reason are already known by or cannot reasonably be made known to the person to be arrested.

(c) A peace officer is justified in using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest, if the use of force would have been justified under Subsection (a) and:

(1) the actor reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force; or

(2) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed.

(d) A person other than a peace officer acting in a peace officer's presence and at his direction is justified in using deadly force against another when and to the degree the person reasonably believes the deadly force is immediately necessary to make a lawful arrest, or to prevent escape after a lawful arrest, if the use of force would have been justified under Subsection (b) and:

(1) the actor reasonably believes the felony or offense against the public peace for which arrest is authorized included the use or attempted use of deadly force; or

(2) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to another if the arrest is delayed.

(e) There is no duty to retreat before using deadly force justified by Subsection (c) or (d).

(f) Nothing in this section relating to the actor's manifestation of purpose or identity shall be construed as conflicting with any other law relating to the issuance, service, and execution of an arrest or search warrant either under the laws of this state or the United States.

(g) Deadly force may only be used under the circumstances enumerated in Subsections (c) and (d).

#### **TPC SEC. 19.01. TYPES OF CRIMINAL HOMICIDE**

(a) A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual.

(b) Criminal homicide is murder, capital murder, manslaughter, or criminally negligent homicide.

#### **TPC SEC. 19.02. MURDER**

(a) In this section:

(1) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(2) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(b) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(c) Except as provided by Subsection (d), an offense under this section is a felony of the first degree.

(d) At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

**SEC. 22.02. AGGRAVATED ASSAULT**

- (a) A person commits an offense if the person commits assault as defined in Section 22.01 and the person:
- (1) causes serious bodily injury to another, including the person's spouse; or
  - (2) uses or exhibits a deadly weapon during the commission of the assault.
- (b) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if:
- (1) the actor uses a deadly weapon during the commission of the assault and causes serious bodily injury to a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code;
  - (2) regardless of whether the offense is committed under Subsection (a)(1) or (a)(2), the offense is committed:
    - (A) by a public servant acting under color of the servant's office or employment;
    - (B) against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant;
    - (C) in retaliation against or on account of the service of another as a witness, prospective witness, informant, or person who has reported the occurrence of a crime; or
    - (D) against a person the actor knows is a security officer while the officer is performing a duty as a security officer; or
  - (3) the actor is in a motor vehicle, as defined by Section 501.002, Transportation Code, and:
    - (A) knowingly discharges a firearm at or in the direction of a habitation, building, or vehicle;
    - (B) is reckless as to whether the habitation, building, or vehicle is occupied; and
    - (C) in discharging the firearm, causes serious bodily injury to any person.
- (c) The actor is presumed to have known the person assaulted was a public servant or a security officer if the person was wearing a distinctive uniform or badge indicating the person's employment as a public servant or status as a security officer.
- (d) In this section, "security officer" means a commissioned security officer as defined by Section 1702.002, Occupations Code, or a noncommissioned security officer registered under Section 1702.221, Occupations Code.