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LETTER DECLINING PROSECUTION AFTER INVESTIGATION

RE: *Officer-Involved Shooting on January 14, 2017, by Austin Police Department Officer, Jesse Lane #7705, causing death to Scott Gilpin*

Dear Chief Manley:

The Office of the Travis County District Attorney (“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 Officer Jesse Lane fired shots from his rifle that resulted in the death of Scott Gilpin. This letter is to inform you of my decision to decline prosecution of criminal charges against Officer Lane. 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 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 District Attorney official website. A copy of this letter will also be posted on the District Attorney official website.¹

Based upon the evidence available and the applicable Texas law,² I am convinced that a jury following the law would not convict Officer Jesse Lane, because the evidence proves the use of force was 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.

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

² 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 January 14, 2017, at approximately 1:08 a.m., officers responded to a panic alarm and a subsequent 911 call from an employee at the Anderson Mill Pub located at 10401 Anderson Mill Road. At 1:10 a.m., pub employee, Rachel Burnett, told 911 operators that a male subject armed with a handgun was involved in a fight. She said the handgun was taken from the male and secured in the pub office. At 1:15 a.m., Officer Edward Soltys, Officer Michael Villarreal, Officer Gregory Fox, and Corporal Taber White responded to pub's call for assistance. Officer Fox went inside the pub and took custody of the handgun that had been seized from the suspect. The suspect, Scott Gilpin, (identified by pub employee as "Scotty") was no longer on scene. Approximately thirty minutes later pub employee, Alanna Escueta, called 911 to report that Gilpin had returned to the pub. Dispatch advised that officers were on their way and that Alanna should call back if she discovered Gilpin was armed. Almost immediately, Alanna called 911 back to report that Gilpin was now shooting a firearm in the pub parking lot.

Corporal White was the first officer to arrive back at the pub after employees reported Gilpin had returned. As Corporal White parked and exited his patrol car, he heard shots being fired in the pub parking lot. Corporal White announced "shots fired" over his police radio. The sound of shots being fired in the pub parking lot can be heard on Corporal White's patrol car video at 1:36 a.m. Corporal White told detectives during his interview:

"I drove up to the business beside the Pub and parked my vehicle behind some bushes. This was approximately 100-150 feet east of the entrance to the pub. As I was exiting my vehicle I heard a single shot. The shot sounded like it was outside. I called out over the radio that a shot had been fired. I then grabbed the shotgun out of my patrol vehicle and took a position of cover behind one of the concrete columns that line the sidewalk in front of the shopping center. I then heard several more shots in rapid succession. There were approximately 5-7 shots fired. I was afraid that the suspect was possibly shooting at someone. At this point I could not see the shooter. I moved up and took a position of cover behind the engine block of a vehicle that was parked in front of the Pub. At this point I was approximately 30 feet from the front door of the Pub and there were 4 or 5 cars between me and the suspect. I heard a car engine start and observed the top of a black jeep start to pull out. I advised over the radio that the suspect may be leaving the scene in the jeep. A moment later I observed a police car enter the Wells Fargo Bank parking lot. The jeep had stopped moving and remained in the parking space that it had been in. Officers Villarreal and Soltys pulled up along the east side of the building facing the pub. As they pulled up the headlights or spotlight of their patrol car was pointed at the suspect. I looked at the wall behind him. The light cast a shadow on the wall and I could make out the shape of a barrel of a rifle with a flash hider. One of the officers that was on scene yelled out that the suspect had a rifle. I was afraid. I was 30' from an intoxicated suspect that had already fired several shots and was armed with a rifle that was capable of penetrating my body armor. I did not know if it was the suspect's intentions to shoot and kill someone at the bar or what he could possibly be there for."



Gilpin's Jeep parked in front of the Anderson Mill Pub with crime scene tape and cones securing fired cartridge casings.

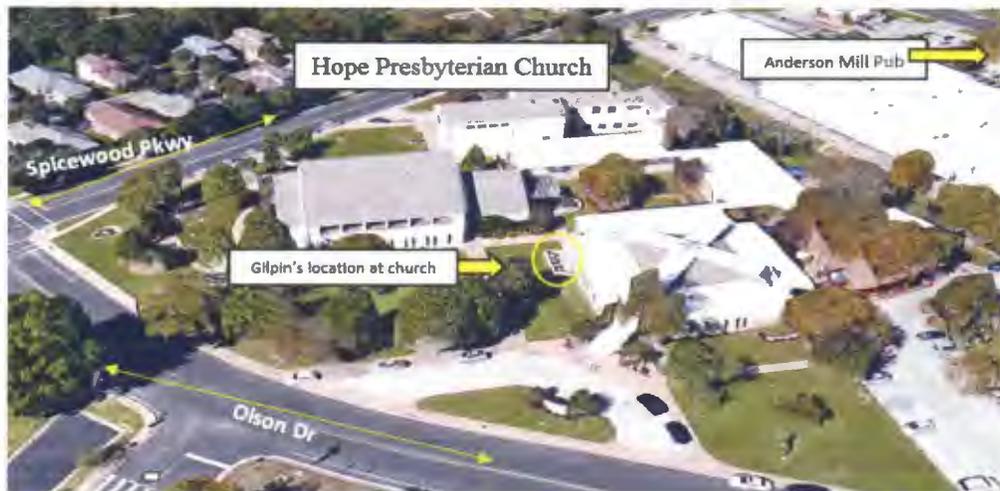


Fired cartridge casings collected by crime scene from behind Gilpin's Jeep in pub parking lot.

Shortly after Gilpin fired shots in the pub parking lot, Officers Villarreal and Soltys arrived on scene and observed Gilpin armed with an assault rifle. They saw Gilpin reach into the passenger side of his Jeep to retrieve a second weapon, a shotgun. Gilpin ignored the officers' commands to drop his weapons, and instead he told officers they would, "have to kill him." Officers followed Gilpin as he walked away from the pub, still giving him commands to drop his weapons. Gilpin walked down Spicewood Parkway towards Hope Presbyterian Church holding both weapons with officers following him at a safe distance. Officer Soltys wrote in his offense report supplement:

"Upon arrival I observed a male in his vehicle which was a jeep. I then observed that the male subject had an AR-15 in his vehicle and that he was manipulating it. The male then exited his jeep and had the AR-15 in his hands. Subject then refused to listen officers' commands to drop the firearm. He stated your gonna have to kill me. Subject then went to the passenger side of the jeep and retrieved a shotgun. The subject did not point his weapons at any officer or person while in the bar parking lot. The subject then started walking towards Spicewood PKWY and continued to ignore officers' commands to stop and drop there weapons. Subject then continued to walk south

on Spicewood pkwy. I followed at a safe distance and attempted to remain near a cover and concealed possession when possible. Subject then entered the property of Hope Presbyterian Church 11512 Olson Dr. Austin TX 78750.”



Scene overview at intersection of Spicewood Parkway and Olson Road.

At Hope Presbyterian Church, Gilpin took a defensive position behind a concrete walled off area that housed A/C units. Officers could see Gilpin behind the enclosure holding a rifle. Officer Stevenson documented in his offense report supplement that Gilpin fired off several rounds from this position. According to the radio transmission captured on Officer Stevenson’s patrol car video, Gilpin fired these shots at 1:43a.m. Officer Stevenson wrote in his offense report supplement:

“I saw the subject go into a small walled off area next to the church and then fire off several rounds in the air. I announced over the air ‘shots fired’ and lit the walled off area the best I could with my spot light. I then got my AR out of the car and went to the corner of the church and covered the area where the subject was until Ofc. Soltys came up to the position with me. Ofc. Soltys and myself covered the subject and were talking to him trying to get him to drop the weapons but he refused. The subject kept saying to shot him in the head since he could see over the wall and saw where we were located. The subject would talk to us then turn around and talk to the other officers located on the other side of the wall. The subject did this for a while.”

In Officer Fox’s written statement, he described Gilpin’s demeanor during the negotiation:

“The subject said things such as ‘I love Jesus’ and ‘I’m not going to WILCO, You’ll have to kill me,’ ‘tell them not to pursue,’ and ‘Shoot me.’ CPL White told the subject that we all had kids and families and we just wanted to talk. The subject fired approximately three to five rounds and we fell back behind the corner. I was unable to see what direction and do not know what direction the subject fired the rounds.”



Gilpin's location with crime scene tent marking fired cartridge casings in the enclosure.

Officer Lane and Officer McDonald responded to the pub at 1:41 a.m. after the other officers had left the parking lot to pursue Gilpin. The officers following Gilpin announced over the radio that they were behind the pub at a church. Corporal White requested that an officer with a rifle respond to his location. Upon hearing this updated information, Officer Lane and Officer McDonald each drove their patrol cars towards the residential area behind the pub to look for a church. While en route, Officer Lane heard over the radio that the suspect had just fired shots. Officer Lane stated during his interview with detectives:

505 A: And, uh, the reason I stopped there is I could see officer's cars here
 506 and then we could see several officers, like, from this straight shot from
 507 the street view I could see several officers right in this area. And, um, so
 508 Officer (McDonald) and I got out of the car. We were trying to radio -
 509 he - he was doing the radio speaking but I heard him and we were
 510 discussing trying to get in contact with them to find out the best way to
 511 approach because we didn't - we still hadn't laid eyes on the subject,
 512 um, and I - I skipped something important. Um, when I - er- like almost
 513 immediately after jumping back in my car to g- drive down there they
 514 radioed out that shots had been fired. And, um, they did kind of a roll
 515 call, like, real quick, "Hey has anybody been hit?" And, uh, you know,
 516 at that point nobody came up on the radio but I - I mean, it was - the
 517 situation was i- like in- indeed more real at that point to me.

Transcript of Officer Lane's SIU Interview

Officer Lane and Officer McDonald parked and exited their patrol cars when they were close to where they believed the incident was unfolding. Officer Lane deployed with his rifle and he and Officer McDonald attempted to locate the other officers. During this time, Officer Fox announced over the radio that the suspect had pointed a gun at him at 1:48 a.m. At 1:51 a.m., Officer McDonald radioed that he (and Lane) were moving up to join Corporal White and Officer Fox in the church courtyard. Corporal White, who had a shotgun, and Officer Fox, who had a handgun, had taken a position of cover next to a church building wall around the corner from Gilpin's location in the enclosure. Corporal White took over as the voice on scene and continued his efforts to de-escalate the situation by talking with Gilpin and asking Gilpin to put his guns down. Corporal White, along with other officers on scene, made continuous attempts to convince Gilpin to surrender.



A separate team of officers, including patrol supervisor Sgt. Courtney Daniel, were stationed at the front of the church. These officers were also interacting with Gilpin and trying to convince him to surrender. Upon arrival, Sgt. Daniel began requesting additional law enforcement resources. These resources included CAST³, SWAT, Hostage Negotiator, Air One, and that a reverse 911 call be made to the surrounding neighborhood instructing residents to shelter in place. Sgt. Daniels attempted to establish direct contact with Gilpin by calling a cellphone number provided to her by APD, but there was no answer.

Corporal White's team of officers decided to send Officer Lane and Officer McDonald to a location that provided a better view of Gilpin. Other officers provided cover for Lane as he moved across the courtyard. Once in this new position, Officer Lane discovered that he was now illuminated by an overhead light and he feared Gilpin would spot him. As Lane was attempting to move back to his previous location, Gilpin spotted Lane and became agitated. Realizing that it would be too dangerous for him to move back to his previous position, Lane attempted conceal himself in place. In a subsequent interview with detectives, Officer Lane described Gilpin's reaction to his attempt to move back to Corporal White's team:

676	like. "Oh, he saw me." And he perceived what I was doing; my posture
677	as gettin' ready to rush him, or something to that - to that effect. And
678	that's what's got him all hyped up. And, um, he started saying he really
679	didn't wanna hurt us. And - but to not pursue him because he had an
680	arsenal. And, um - um, so basic- I mean, I really felt like he was
681	threatening us. Like i- if you guys come towards me I'm - I'll - you
682	know, I don't wanna do this but I'm - I'm ready to, um, is what I'm
683	gathering from what he's saying. Um, so at that point I - I tucked back

Transcript of Officer Lane's SIU Interview

³ "CAST" Counter Assault Strike Team, is a specialized unit within the APD created to provide a rapid and comprehensive law enforcement response to incidents involving mass and/or large scale violence such as active shooters, acts of terrorism, large scale hostage sieges and ongoing violence occurring in multiple geographical locations simultaneously.



Officer McDonald decided it would be safer to remain with Corporal White and Officer Fox on the side of the church building rather than join Officer Lane in his new position. During this time, McDonald observed Gilpin point a weapon from the enclosure towards them. Officer McDonald explained in his written statement:

"I then told Officer Lane to move and that we would provide him cover. At that point, however, the suspect raised his left hand over the concrete barrier wall and aimed what appeared to be a shotgun at us. We were approximately 15 yards away from the suspect and his action clearly constituted a deadly intention/threat towards us. I then put out over the radio that he had aimed the gun at us. Due to the movement of the gun and its direction toward us I almost fired my shotgun in defense but didn't as I was not 100% sure of what and who was on the other side of the concrete barrier and where officers were located."

A few minutes later, Gilpin left the enclosure and began to walk towards the courtyard holding a shotgun and rifle. Officers gave Gilpin commands to drop the weapons and asked Gilpin to not make them do this as he advanced forward. Although Gilpin was not pointing his weapons at the officers, officers later told detectives they feared that at any moment Gilpin could fire upon them. Officer Lane realized at this point, Gilpin's path would soon put the officers in a cross-fire situation.



Diagram of cross-fire situation

Officer Lane fired his rifle five times, striking and fatally injuring Gilpin. According to radio transmission records, shots were fired at 2:03a.m. Officer McDonald approached Gilpin and moved Gilpin's weapons away from his reach. Sgt. Courtney cleared EMS to enter the scene and officers began providing medical aid to Gilpin. Patrol cars were moved into the area to light up the dark courtyard. Gilpin was pronounced deceased at 2:22a.m. The investigation of the officer-involved shooting began with APD SIU detectives, 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.

At the request of detectives, Officer Jesse Lane agreed to participate in a walk-through of the shooting to explain to how this critical incident unfolded. Lane pointed out the positions of officers on scene in relation to Gilpin's location in the A/C unit area of the church. Lane said he could see Gilpin holding a long gun behind the enclosure and that he believed the firearm to be real based on the reports from other officers that Gilpin had fired off rounds. During the recorded walk-through, Officer Lane explained the lack of cover available to himself and other officers in the courtyard as well as the cross-fire situation that Gilpin's advancement towards the middle of the courtyard presented. Lane said that he felt that, "he had no cover, he had no option, he was scared, everyone's life was in peril and that if he didn't act when he acted more people could have been hurt or injured."

After the shooting, detectives from APD SIU interviewed Officer Lane and some of the witness officers. These officers gave written statements describing what they were thinking and doing right before Officer Lane fired his rifle.

Officer Fox described the moment Gilpin started advancing towards:

"The subject left his cover and began to walk along the path between the two buildings, right between where Officers McDonald, myself, CPL White and Officer Lane's positions. I could see the subject was holding what looked like an automatic rifle with the barrel in an upward fashion at roughly a 45 degree angle in his right hand as he continued to walk in front of us. At that point Officer McDonald, myself, and CPL White attempted to backup. The subject was roughly ten meters or less from our location and even less from where Officer Lane was. At this point I said a prayer in my mind for everything to be ok. CPL White again asked the subject to please drop the gun. The subject did not comply and turned slightly towards our location. At this point we did not have any cover between ourselves and the subject. Officer Lane said something to the effect of that he was going to take the shot and fired on the subject."

Officer McDonald stated that he made the decision to use deadly force right before Lane fired:

"Officer White and I then began to move backwards about two feet but were now in the middle of the breezeway with no cover. While standing approximately 7-8 yards away from us, the suspect was still holding the guns and moving the shotgun around using his left hand. The suspect then said 'I am just going to walk' and he began to move in a direction that was directly between Officer Lane and us. While walking he was still moving the shotgun around with his left hand and I made the mental decision to use deadly force based on all of the events leading up to that point. I began to squeeze the trigger on my shotgun when I heard Officer Lane say 'I am going to take the shot.' I heard Officer Lane fire 4-5 shots and the suspect fell to the ground."

Corporal White felt his life was in danger and that deadly force was warranted:

"Scotty was holding the AR-15 in his left hand and the shotgun in his right hand. I was on his right side and he was facing west, Officers McDonald and Fox were behind me. I felt a sensation that I can only describe as if gravity had been turned down and my body had become 50 pounds lighter. I also felt a knot in my chest and the

sensation as if I was having a hard time taking a full breath. I felt completely exposed to Scotty. I actively trained my patrol shotgun at him and shouted at him to drop the guns. Scotty began to rotate his body and the barrel of his shotgun began to elevate. I felt like I was in mortal danger. I placed my finger on the trigger and began to squeeze. In this same moment I heard Officer Lane say something like 'I'm going to shoot' and I hear approximately 3, 4 or 5 shots."

The SIU investigation contains a transcript of Officer Lane's interview with detectives. Detectives asked Officer Lane what he knew prior to coming in contact with Gilpin:

798 A: Um, that he had a weapon and a long arm, multiple long arms. And
799 that he had - he had already shot off the weapon and was disobeying
800 commands from law enforcement. Um, I knew there was houses in the
801 area immediately surrounding all around where that pub is. There's -
802 there's houses in the area. I knew, um, they followed him to another
803 property giving him commands.
946 A: I didn't witness it. I heard one of my colleagues say it on the radio that
947 he pointed the gun at them.

Transcript of Officer Lane's SIU Interview

Detectives interviewing Officer Lane asked him what was going through his mind as Gilpin exited the enclosure:

1805 Q1: When he came out from behind the wall and when you say he
1806 advanced upon your position and - what do you believe his intentions
1807 were?
1808
1809 A: I don't know. I really don't know. I mean, it - I - I was afraid he was
1810 going to shoot me. And I was afraid that he was going to shoot my
1811 colleagues or I was afraid he was also going to go out into the
1812 community and shoot somebody else. Um, I - I - the - the one thing I
1813 know that wasn't his intention was - I don't think he intended on putting
1814 down his weapons and going with us to go get help. I mean, because it
1815 was so easy, it was so easy for him to do. I mean, th- everybody there
1816 was telling him that no one would harm him if he put down his
1817 weapons and came out to us and talk, you know, just talk to us about
1818 it. I - I - my corporal even offered to talk to him for hours and to be his
1819 friend. Seriously if he had no other friend in the world he would be his
1820 friend and talk to him for hours. And he said it in a sincere manner. I
1821 mean, it - that's why, I mean, I really had a - I don't know - I have a lot
1822 of, um, faith in - in what he was saying to the guy that it was gonna
1823 work out. That he would put - put down his weapons. And he didn't.
1824 But, um, I don't know what his intention was at that point. I know he - I
1825 guess he's trying to evoke the reaction he got out of the police. He's
1826 carrying the weapons closer to the police. Holding 'em in a - in a
1827 manner where they're quickly enabled or able to be quickly deployed
1828 and - and shot. And he's approaching us. Um, specifically he's - he
1829 was coming at an angle that's taking up all my cover. He knew my
1830 position. He knew I had nowhere to go.

Transcript of Officer Lane's SIU Interview

Officer Lane explained to detectives how Gilpin's advancement created a cross-fire situation forcing him to use deadly force:

752 And, sure enough, he comes advancing up kind of diagonally.
 753 Um, in my perception it was like somewhat up the middle but maybe a
 754 little bit more towards - towards my direction. And, um, because, I
 755 mean, if he wanted to advance up on them they were along this - this
 756 area here. But he's coming up this direction which, as he comes up
 757 this direction, ever - every inch he gets forward now slices the pie
 758 conversely against me. It takes away my cover. And I'm just sitting
 759 there in a cubby with nothing. Um, a- and I - I can't - I wouldn't be able
 760 to return fire because now he's between me and my colleagues. So I,
 761 um, when I saw him come into view and when it got to the point where
 762 it was starting to become a crossfire issue, I stayed on target. I
 763 announced to my colleagues, "I'm takin' the shot." And I stepped out as
 764 far as I could to combat that potential crossfire and to make sure my
 765 rounds went only where I wanted them to go.

Transcript of Officer Lane's SIU Interview

STATEMENTS FROM ANDERSON MILL PUB PATRONS

Detectives interviewed customers who were at the pub on the night of the shooting. Detectives learned that Gilpin was known as "Scotty" and that he was a regular at the Anderson Mill Pub. On this night, Gilpin had gotten into an altercation with a man named Chris. During the disturbance, Gilpin pulled out a gun and put a magazine in it. Other pub patrons, who were not involved in the disturbance, were able to take the gun away from Gilpin and unload the weapon. A bartender put Gilpin's the gun in the office. Gilpin left the pub, but later returned. Patrons inside the bar reported hearing popping sounds coming from the parking lot. After the popping sounds people came running in the bar saying, "He's got a gun." According to bar patron, Camilla Muniz, Gilpin returned to the bar and was kicked out for a second time. Andres Martinez, a witness inside the pub, told investigators that when Gilpin returned to the bar he locked the bar door to keep him from getting back in, and the patrons inside took cover in the back of the pub. Martinez witnessed Gilpin pull a rifle out of the back of his Jeep in the parking lot and fire it four to five time into the air. Two of the pub patrons were transported to APD to give formal written statements.

MEDICAL EXAMINER'S AUTOPSY REPORT

The death of Scott Gilpin 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 Leisha E. Wood, M.D., Deputy Medical Examiner, beginning at 10:45 a.m. on 1/15/2017, 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, the blood ethanol concentration in Gilpin's blood was approximately three times the legal limit of blood ethanol in Texas.⁴ During an interview with Dr. Wood she reported that the five 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 six documented gunshot entrance wounds as one wound was from the re-entry of the same projectile. Dr. Wood documented five gunshot exit wounds.

Gunshot wound one entered the left upper back, exited the left chest, re-entered left medial upper arm and exited again out the front of the left upper arm shoulder and its direction of travel was back to

⁴ In a subsequent interview with Dr. Hall, he explained that that there were only low concentrations of cocaine and marijuana in Gilpin's blood and that he was not experiencing the acute effects of either substance at the time of his death. Dr. Hall did, however say, that Gilpin was experiencing the acute effects of ethanol intoxication at the time of his death.

front, right to left and downward. Gunshot wound two entered the left mid chest exited back side of the right chest and its direction of travel was front to back, left to right and downward. Gunshot wound three entered the right mid back, exited upper right side of abdomen and the direction of travel is back to front, left to right and downward. The fourth gunshot entered the front side of the left thigh, exited the middle left thigh and it's direction of travel was slight back to front, left to right, slightly downward. The fifth gunshot entered the back side of the left lower leg, exited the middle left lower leg and it's direction of travel was back to front, left to right, no upward or downward direction. Dr. Wood noted that the "major injuries included lacerations of the lungs, the heart, the liver, the right kidney, the mesentery, fractured ribs, and a fractured left fibula with blood in both chest cavities and within the abdominal cavity."

Two projectiles were found in Gilpin's clothing during Dr. Wood's preliminary external examination of Gilpin's clothed body. These two projectiles were packaged and sealed in evidence envelopes. These two projectiles were sent to APD Firearms Laboratory for forensic examination. There were no other projectiles collected during the autopsy in this case.

FIREARM AND TOOL MARK EXAMINER'S REPORT

Firearm and Tool Mark Examiner, Steven Aston, arrived at the scene at 5:30 a.m. to collect, process, and investigate the ballistic evidence of the officer involved shooting. This ballistic evidence would later be analyzed and tested by Aston at the Austin Police Department's Firearms Laboratory. Aston issued two reports detailing his findings, one dated January 17, 2017 and, another dated March 28, 2017. Officer Lane's department issued Colt rifle was found to be functioning normally and capable of discharging live rounds. Aston interviewed Lane and based on his interview and evidence gathered from the scene it was determined that Officer Lane fired his rifle six times. All six of Lane's fired .223 cartridge case were recovered from the scene and positively identified as having been fired from Lane's rifle. Cartridge cases were recovered in the church sanctuary courtyard entry way in the area where Officer Lane told investigators he had been standing when he shot Gilpin. Crime scene technicians recovered three fired projectiles and one fired projectile fragment from the courtyard area of the church where Gilpin was shot. Aston was able to positively identify 3 of 4 projectiles collected at the scene as having been fired in Lane's rifle. At my request, Aston examined and analyzed the two projectiles collected by crime scene technicians during Gilpin's autopsy and they were also positively identified as having been fired from Officer Lane's rifle.

Three of Gilpin's weapons were collected, examined, and test-fired. Aston found all three of Gilpin's weapons to be functioning normally and capable of discharging live rounds. The .45 caliber Glock that Gilpin had in the pub contained a total of 7 live rounds, one in the chamber and 6 in the magazine. The Maverick 12 gauge shotgun and the Smith & Wesson AR-15 that Gilpin possessed during the lethal encounter were both located in the grass near Gilpin's body. An additional magazine with 26 rounds for Gilpin's rifle was also located near his body.



Gilpin's shotgun was found to be loaded with four unfired shot shells. There was no evidence to suggest that Gilpin fired his shotgun during this encounter. The rifle that Gilpin fired during the incident was a Smith & Wesson AR-15 that contained 8 live rounds, one in the chamber and 7 live rounds in its magazine. Six fired Hornady .223 cartridge cases were collected from the pub parking lot at the back end of Gilpin's parked Jeep. These six cartridge cases were positively identified as having been fired in Gilpin's rifle by firearm's examiner Aston. A second set of fired Hornady .223 cartridge cases were collected by crime scene technicians in the enclosed A/C unit area of the church where Gilpin had taken cover. Aston was able to positively identify 6 of 7 Hornady fired .223 cartridge casings located between the A/C units as having been fired Gilpin's rifle. One of the Hornady fired .223 cartridge case could not be positively identified as having been fired out of Gilpin's rifle, however, it was able to be eliminated as having been fired from Officer Lane's rifle.

RELEVANT LEGAL PRINCIPLES

A law enforcement officer is authorized to make a warrantless arrest of individual when the officer has probable cause to believe the individual has committed or is committing an offense in his or her presence.⁵ Warrantless arrests of individuals who have committed a felony and are about to escape are authorized when there is not time to obtain a warrant.⁶ The right to make this arrest carries with it the right to use some degree of physical coercion or threat thereof to effect it.⁷ The force used to make that arrest must be judged from the perspective of a reasonable officer on the scene and must be "objectively reasonable" under the circumstances.⁸

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.⁹

It is a defense to prosecution that the conduct in question is justified.¹⁰ Texas law contains several justifications which can serve as a defense for criminal prosecution when force or deadly force is used.¹¹ A person is justified in using force against another when and to the degree the actor reasonably believes

⁵ Tex. Code Crim. Proc. §14.01. Beck v. Ohio, 379 U.S. 89 (1964); Beverly v. State, 792 S.W.2d 103 (Tex. Crim. App. 1990); Lunde v. State, 736 S.W.2d 665 (Tex. Crim. App. 1987) [warrantless arrests can be based on prior knowledge of the officer combined with the officers observations]

⁶ Tex. Code Crim. Proc. § 14.04

⁷ Tex. Penal Code § 9.51

⁸ Graham v. Connor, 490 U.S. 386 (1989).

⁹ Tex. Penal Code § 19.02(b), (c).

¹⁰ Tex. Penal Code § 9.02.

¹¹ "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).

the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force.¹² 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.¹³ 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.¹⁴ This is known as Defense of a Third Person.

Texas Penal Code §9.51 contains a justification for use of force or deadly force that applies to law enforcement officers attempting to arrest or search an individual. 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.¹⁵ 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.¹⁶ 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.¹⁷

LEGAL ANALYSIS

Officers who responded to the initial 911 calls reporting two males fighting had reasonable suspicion to detain the subjects involved in the disturbance at the pub. Because Gilpin left the area before law enforcement arrived, officers were not able to fully investigate what had occurred prior to their arrival. When Corporal White responded back to the pub parking lot for the report that Gilpin was back with a gun, he heard shots being fired as he exited his patrol car. Next, Corporal White saw a Jeep backing out of a parking spot and other officers' patrol cars arriving to light up the Jeep with Gilpin and his rifle inside. At this point, Corporal White had probable cause to arrest Gilpin for an offense committed in his view.¹⁸ Gilpin refused to obey multiple officers' commands to put his weapons down,

¹² Tex. Penal Code § 9.31(a).

¹³ Tex. Penal Code § 9.32(a (1), (2) (A)).

¹⁴ Tex. Penal Code § 9.33.

¹⁵ Tex. Penal Code § 9.51.

¹⁶ Tex. Penal Code § 2.01.

¹⁷ *Saxton v. State*, 804 S.W.2d 910 (Tex. Crim. App. 1991); *Jenkins v. State*, 740 S.W.2d 435 (Tex. Crim. App. 1983).

¹⁸ *Discharging a Firearm in Certain Municipalities*, "a person commits an offense if the person recklessly discharges a firearm inside the corporate limits of a municipality having a population of 100,000 or more. An offense under this section is a Class A misdemeanor" Tex. Penal Code § 42.12.

and instead began walking away from the area armed with two long guns. All officers pursuing Gilpin on foot could have detained Gilpin for discharging his weapon in front of the pub and could have arrested him for evading detention.¹⁹ When Gilpin positioned himself behind the enclosure, he gained a tactical advantage over pursuing officers. From behind the enclosure, Gilpin committed the first degree felony offense of Aggravated Assault on a Peace officer, when he pointed one of his guns in the direction of officers.²⁰

The actions that ensued arose from their attempts to make this lawful detention and arrest of Gilpin. When Gilpin left the enclosure and advanced towards officers on both sides of the courtyard, Officer Lane made the decision to use deadly force against Gilpin. It is provable, based on the firearms expert's examination, that only Lane discharged his firearm at Gilpin. Therefore, Officer Lane potentially committed the offense of Murder²¹ when he intentionally shot Gilpin. Projectiles collected at Gilpin's autopsy and at the scene were examined and determined to have been fired from Lane's rifle.

If the use of deadly force is justified under the law, Officer Lane is not criminally liable for the shooting death of Gilpin. 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. Officer Lane listened to the incident unfold on his patrol car radio as he drove towards the church. By the time Officer Lane joined Corporal White and other officers on the side wall of the courtyard around the corner from Gilpin, Lane was aware that Gilpin had been involved in the initial disturbance at the bar, that Gilpin had fired off rounds, and threatened his fellow officers with a firearm. Lane was also aware that Gilpin was not complying with officers repeated commands to put down his weapons and surrender.

Based on Gilpin's demeanor, Officer Lane believed that Gilpin knew his location. Because the layout of the courtyard presented few options for concealment, officers decided to remain in place and wait for additional law enforcement resources to arrive. Once Gilpin left the enclosure, his advancement posed an immediate threat of deadly force to officers on both sides of the courtyard. Although Officer Lane said that Gilpin was not pointing his weapons at anyone, Lane felt that Gilpin's weapons could be manipulated into a firing position quickly. It was reasonable for Officer Lane to fear for his own safety and to be concerned for the safety of his fellow officers, as well as for the patrons in the pub and residents of the nearby neighborhood. The reasonableness of the officer's perception of threat and immediate necessity is further supported because the officers had little cover inside the courtyard and Gilpin's advancement created a dangerous cross-fire situation. The reasonableness of the officers' perception is not defeated by the fact that Gilpin had said he did not wish to harm them or that he was repeatedly asking officers to shoot him. Gilpin did not drop his weapons before leaving the enclosure. The layout of the courtyard was such that a reasonable officer would not have waited to see what Gilpin was going to do before using deadly force.

When Gilpin raised his long gun and pointed it in the direction of the officers, he committed the offense of Aggravated Assault on Peace Officer.²² When Gilpin fired off his long gun at the pub and the church, he committed the offense of Discharging Weapon in Municipality.²³ These criminal acts constitute offenses committed in the presence of the responding officers for which Texas Penal Code §

¹⁹ Tex. Penal Code §38.04. Evading Arrest, a person commits an offense if he intentionally flees from a person he knows is a peace officer or federal investigator attempting lawfully to arrest or detain him. An offense under this section is a Class A misdemeanor"

²⁰ Tex. Penal Code § 22.02.

²¹ Tex. Penal Code § 19.02.

²² Tex. Penal Code § 22.02 (a), (b) (2) (B).

²³ Tex. Penal Code § 22.02 (a), (b) (2) (B).

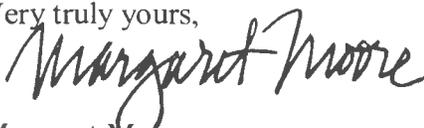
9.51 authorizes peace officers to use deadly force and serves as an additional justification for Officer Lane's use of force.

CONCLUSION

For these reasons, I have concluded that the filing of criminal charges against Officer Jesse Lane are not supportable under Texas criminal law standards because the officer's 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 Scott Gilpin and the date of the incident, January 14, 2017.²⁴

Very truly yours,

A handwritten signature in black ink that reads "Margaret Moore". The signature is written in a cursive, flowing style.

Margaret Moore

²⁴ <https://www.traviscountytx.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.

TPCSEC. 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.