

OFFICE OF THE DISTRICT ATTORNEY BROWN COUNTY

300 E. WALNUT STREET, P.O. BOX 23600
GREEN BAY, WI 54305-3600
PHONE (920) 448-4190, FAX (920) 448-4189



DAVID L. LASEE
DISTRICT ATTORNEY

DEPUTY DISTRICT ATTORNEYS
Dana J. Johnson
Mary M. Kerrigan-Mares
Wendy W. Lemkuil

VICTIM WITNESS COORDINATOR
Kim Pansier
(920) 448-4194

SPECIAL PROSECUTOR
Jessica R. Petras

ASSISTANT DISTRICT ATTORNEYS
John Luetscher
Amy R.G. Pautzke
Kevin G. Greene
Eric R. Enli
Kari A. Hoffman
Hannah N. Schuchart
Kimberly A. Hardtke
Caleb J. Saunders
Meranda J. Hillmann
Jill L. Vendetti
J. Foss Davis
Jonathan J. Gigot
Aaron Linssen

July 17, 2020

Special Agent Jay Yerges
Wisconsin Department of Justice
Division of Criminal Investigation

Chief Andrew Smith
Commander Paul Ebel
Green Bay Police Department
307 S. Adams Street
Green Bay, WI 54301

RE: Officer Involved Death of Elder Melgar
DCI Case No: 20-3571

Dear Special Agent Yerges:

Please accept this letter as my review and analysis of the May 9, 2020, incident involving the death of Elder Melgar who died after he was shot by officers of the Green Bay Police Department. Based on Wisconsin Law, and upon the request of the Green Bay Police Department, your agency was asked to direct the investigation of Mr. Melgar's death and you have forwarded the results of that investigation to my office for a review to determine if there was any criminal wrongdoing on the part of the Green Bay Police officers. Based upon my review of the materials provided by the State of Wisconsin Department of Justice Division of Criminal Investigation, I find no evidence to suggest criminal conduct on the part of any Green Bay Police officers, as the facts and circumstances of the incident created a situation where the involved officers were privileged to utilize deadly force against Mr. Melgar. Therefore, there is no basis to issue criminal charges against the officers related to the tragic death of Mr. Melgar.

Materials Reviewed

The Division of Criminal Investigation prepared a thumb drive that included a complete copy of all of their investigative materials. That thumb drive includes the investigative reports of the Division of Criminal Investigation agents, reports from Green Bay Police Department officers, audio recordings of the radio traffic between law enforcement officers and dispatch, audio recordings of witness interviews, surveillance videos from the apartment complex where the incident occurred as well as the gas station where the initial complainant called law enforcement, Green Bay Police Department squad videos, scene photographs and diagrams, images from citizen witnesses, the autopsy report for Mr. Melgar, as well as a ballistics report from the Wisconsin State Crime Laboratory.

Significant portions of this incident were captured on Green Bay Police Department squad cameras and audio equipment. It appears that most if not all aspects of the incident, as reported by the officers involved, are corroborated either by witness officers, citizen witnesses and audio/video recordings.

Summary of Facts

In the early morning hours of May 9, 2020, Green Bay Police Officers were dispatched to the Royal Oak Apartments located at 2817 University Avenue in the City of Green Bay, Brown County, WI. The call originated from a complaining witness, who was the female resident of the apartment at that address. The complaining witness indicated that she had been in the bedroom of her apartment talking with a male friend, who turned out to be the decedent, Elder Melgar. The complainant reported that her ex-boyfriend, Manuel Hernandez-Martinez, had entered her apartment without her permission and had armed himself with a knife. Hernandez-Martinez forced his way into the bedroom and a violent confrontation began between him and Melgar.

The complaining witness noted that as Hernandez-Martinez moved toward Melgar, she saw that Melgar was holding a handgun. Hernandez-Martinez continued to move toward Melgar and Melgar pointed the gun at Hernandez-Martinez. Hernandez-Martinez said, "What the hell?" and Melgar said, "Chill, Bro". Hernandez-Martinez yelled, "You going to shoot me?" then, "Shoot me!" The complaining witness ran into the kitchen and heard one or two shots in the bedroom and could hear both men yelling or arguing. The complaining witness indicated that she fled the apartment and drove Hernandez-Martinez's truck to a nearby convenience store where she contacted the police. Her five year-old son remained in the apartment where the conflict occurred.

A later investigation of the scene confirmed that a violent struggle had taken place inside of the complaining witness' apartment. A significant amount of blood was located inside the apartment. Officers also located a spent 9mm casing consistent with Melgar's gun, as well as two apparent bullet impact marks, one in the ceiling and another in the wall of the bedroom.

Manuel Hernandez-Martinez provided a statement to DCI agents where he said that when he entered the complaining witness' apartment, he saw the doors to her bedroom were locked so he grabbed a knife from the kitchen, and was trying to use it on one of the doors that led to the bedroom, when the complaining witness opened the door. Hernandez-Martinez told DCI that there was a guy (Melgar) in the bedroom with the complaining witness, who came up from the bedroom floor with a gun in his hand. Melgar pointed the gun at him, but then pointed the gun away from him and fired two shots, which Hernandez-Martinez thought might have been an attempt to scare him. Hernandez-Martinez stated he then lunged at Melgar and told DCI agents that he may have stabbed Melgar in the side when he had lunged at him. He stated that Melgar tried to grab the knife away and may have been cut on the hand.

Hernandez-Martinez stated that he tried to grab the gun away from Melgar, but Melgar kept his grip on it and wouldn't let go. He stated that both of them had a grip on the gun. Hernandez-Martinez stated Melgar told him that he was bleeding and that he needed to go to the hospital after he had stabbed him in the side.

Hernandez-Martinez stated that he forced Melgar out of the apartment, with both of them having a grip on the gun, and into the parking lot. He stated at that time, Melgar pushed him away and had control of the gun and started to shoot at him. He stated that he made a movement, like he was going to throw his knife at Melgar, but didn't actually throw it. He stated that as he ran, he saw 3 or 4 more guys starting to shoot at him, and he ran into the woods to get away.

Initially, Officer Chris Vaubel and Officer Alex Wanish were the first to arrive on scene. They received information from Officer Paul Linsmeier that he may have heard shots fired in that area approximately 10 minutes earlier. Officer Vaubel was aware that the building where the incident occurred was the farthest building in the parking lot located on the northeast side. Officer Vaubel and Officer Wanish took cover at the first building in the parking lot on the west side, waiting for additional officers to arrive on scene, due to the high-risk nature of the call.

Officer Vaubel observed two males exit the apartment building, one male was chasing the other male. One male (Hernandez-Martinez) was near a garage door on the east side of parking lot with his hands up. Officer Vaubel did not see anything in the Hernandez-Martinez's hand. The second male (Melgar) was in the center of the parking lot wearing a zip-up hooded sweatshirt and jeans. Officer Vaubel could see a black handgun in his right hand that was pointing in the direction of Hernandez-Martinez. Melgar fired two (2) shots at Hernandez-Martinez. After the first shot went off Hernandez-Martinez turned and started to run away, the second shot was fired while he was running away.

Officer Vaubel took aim at Melgar. Officer Vaubel believed that Melgar was attempting to kill Hernandez-Martinez and Officer Vaubel had to stop the threat. Officer Vaubel started to pull the trigger back on his handgun when Officer Vaubel heard a rifle fire and Melgar fell to the ground. Officer Vaubel released the trigger on his handgun and turned his attention to the other male who had ran from the scene. Officer Vaubel did not fire his handgun.

Officer Wanish provided similar information. He indicated that when he arrived he took up a position next to the apartment building closest to his squad car. Officer Wanish said other officers arrived and they stacked against the building. A stack was a line of officers utilized in a tactical situation to gain a tactical advantage for movement and response to a threat situation. Officer Wanish said he wasn't exactly sure of the order, but he remembered Officer Vaubel was in front of him, and behind him was Officer Colton Wernecke, Officer Michael Stuedemann, Officer Nicholas Walvort and Officer Roman Trimberger. Officer Wanish said he deployed with a handgun, and Officer Walvort, and Officer Trimberger had tactical rifles. Officer Wanish said Officer Trimberger was on his right/back slightly over his shoulder.

Officer Wanish observed that initially there was nobody outside and no appearance of a disturbance. He said the parking lot was fairly lighted with parking lot lights, and it was a clear night. However, very quickly a male came outside of the area of the apartment followed by another male. One of the males (Melgar) had a firearm and he chased the other male around a pickup truck in the parking lot. Melgar came into an open part of the parking lot while the other male was behind the truck. Officer Wanish estimated the males were about seventy-five (75) yards away from law enforcement's location. Officer Wanish said it was clear that one of the males had a handgun.

Because Officer Vaubel was taller than Officer Wanish, Officer Wanish had to move slightly out from the stack they were in and repositioned to get a better view of the two males. As Officer Wanish did

that he observed Melgar point the firearm at the other male and fire shots. Officer Vaubel told dispatch there were shots fired. As Officer Wanish peeked around the corner, Officer Wanish heard Officer Trimberger and Officer Walvort shoot. Both of those officers had tactical rifles. When the officers shot, the male with the gun immediately fell to the ground and the other male ran away to a wooded area.

Officer Walvort stated that he was at the GBPD Headquarters working on a report when he heard dispatch announce "attention all units" then report the complainant said her ex-boyfriend arrived at her apartment with gun. Dispatch further advised the complainant was calling from a gas station and heard a pop when she left the apartment.

Officer Walvort drove to the location of the incident and parked his squad in the lot of the apartments on 2809 University Avenue which had a U-shaped driveway. Officer Walvort entered the west end of the lot and moved to the east end. Officer Walvort removed the rifle from between the two front seats and exited his squad.

Officer Walvort observed two other officers standing by the southwest apartment building of the complex, on the southeast corner of that building, looking north. Officer Walvort approached these officers and heard GBPD Officer Vaubel say he observed a subject with a gun in his hand. Officer Walvort continued to approach then heard a gunshot from the direction where the officers were looking. Officer Walvort arrived at the officers' location, then looked north and saw a male (later identified as Melgar) in middle of parking lot, walking toward Apartment Building 2817.

Officer Walvort watched the subject walk toward a parked vehicle in front of 2817 then do "a weird jump" and disappear behind the parked vehicle. At this time, Officer Walvort couldn't see anybody and held his rifle at tactical ready, looking over the top of the rifle's optics, to assess the scene. While the first subject was hidden from his view, Officer Walvort heard a gunshot then saw a different male (later identified as Hernandez-Martinez) run south between the parked vehicles and garage doors of 2817 University Avenue. Officer Walvort described this individual as "running for his life". Officer Walvort heard a gunshot from the last location he observed the first subject as Officer Walvort was still watching the man who was running. Officer Walvort referred to the second subject as the "runner."

Officer Walvort then saw the first subject, whom he referred to as the "shooter", emerge from behind a parked vehicle near 2817. He described the shooter as, "hunting" the runner, looking in the runner's direction. Officer Walvort heard the second shot when he was focused on the man who was running, and it appeared the runner had been hit because the runner stumbled and fell. Officer Walvort believed the second shot came from the location where had previously seen the first subject standing. Officer Walvort heard another officer yell, "He shot him!" He refocused on the shooter through his rifle's optic as he believed the runner was in imminent danger and fired what he remembered were two shots from his rifle. Officer Walvort believed the only way to stop the threat to the runner was to use his rifle. After Officer Walvort fired, the shooter fell to the ground.

Officer Trimberger provided a similar recall of the events. He indicated that the officers who were on scene prior to his arrival were GBPD Officer Vaubel and Officer Wanish. Officer Trimberger stated he instructed Officer Vaubel and Officer Wanish to momentarily delay on approaching anyone at the scene because himself and Officer Walvort were so close in proximity to arriving at the incident location. Officer Trimberger explained he followed Officer Walvort into a parking area adjacent to the address of the call and parked his patrol vehicle behind Officer Walvort's assigned patrol vehicle. Upon arrival, Officer Trimberger stated he initially observed Officer Vaubel and Officer Wanish standing near south side of the building immediately on his left upon entering. Officer Trimberger explained he armed himself with the aforementioned duty rifle from inside his patrol

vehicle, charged it and slung it as he began approaching the scene where Officer Vaubel and Officer Wanish were located.

Officer Trimberger identified that at some point, Officer Wernecke was on scene with Officer Walvort and himself. Just prior to approaching Officer Vaubel and Officer Wanish, Officer Trimberger heard Officer Vaubel state, "They're shooting!" Officer Trimberger stated he was present with Officer Vaubel and Officer Wanish (as he had just arrived at the corner of the identified building). Officer Trimberger then heard "two (2) gunshots" that sounded like they came from somewhere near buildings "two and three" which were to the north and east of their location.

At such time, Officer Trimberger observed two male subjects. Officer Trimberger described observing both subjects maneuvering and trying to maintain their distance from each other. Officer Trimberger stated he observed the subject who wore the darker sweatshirt possessed a gun. For the remainder of the interview, Officer Trimberger described the subject who wore the darker sweatshirt and possessed a gun as the "shooter." Officer Trimberger stated he observed the shooter raise his arm, at which time Officer Trimberger observed a handgun in the subject's hands. Officer Trimberger stated the shooter proceeded to fire one (1) gunshot at the other male.

Officer Trimberger stated he focused on the shooter at such time because he perceived the shooter as an immediate life-safety threat to the runner. Officer Trimberger explained he was at first watching both men over the optics affixed to his duty rifle. Officer Trimberger stated he then observed the shooter "meter" toward the direction of officers and out into the middle area of the parking lot. Officer Trimberger heard Officer Vaubel state, "Drop the gun" or "Drop the weapon." Officer Trimberger described the shooter momentarily glanced in the direction of officers and then the shooter proceeded to train his observations back at the runner. Officer Trimberger stated he observed the runner somewhere between the vehicles and the garages of the building. Officer Trimberger stated he then observed the shooter raise the handgun with one (1) hand and proceeded to discharge it two (2) or three (3) times. Officer Trimberger stated he simultaneously heard the sound of gunshots and observed one (1) muzzle flash.

At the time gunshots rang out, Officer Trimberger stated he proceeded to continue to observe the subjects and he lowered himself to a knee so that he could look around Officer Vaubel and farther out from the right side of Officer Vaubel. Officer Trimberger stated he had a clear visual line of sight of the shooter and he observed a "safe backdrop." Officer Trimberger explained he was more than aware that rifle rounds travel "far and fast" in the distance. Officer Trimberger stated, as he witnessed the shooter shooting at the runner, he knew that it was his duty to have to stop the threat of the shooter and he feared that the shooter was going to kill the runner. Officer Trimberger stated he observed the shooter raise the firearm with his right hand when he turned himself toward the runner. Officer Trimberger stated he then focused his optic on the upper center mass of the shooting subject and discharged his duty rifle one (1) time. As Officer Trimberger discharged his duty rifle, Officer Trimberger recalled simultaneously hearing another officer to his right fire a duty rifle. Officer Trimberger identified such officer as Officer Walvort. Immediately after discharging his duty rifle, Officer Trimberger stated the shooter fell to the ground and immediately stopped moving.

DCI Agent Jay Yerges subsequently conducted a review of the audio/video recording from the Green Bay Police Department squads, which are very consistent with the information provided by the various officers involved. Officer Trimberger's squad had functioning audio recordings but the camera was pointed in a direction away from the primary scene. Officer Wanish's squad video directly captures the incident, but there is no audio recording. DCI Digital Records Analyst Gustafson was able to synchronize the audio from Officer Trimberger's squad car with the video from Officer Wanish's squad car in order to create a more accurate and complete depiction of the incident. Special

Agent Yerges was able to view and summarize the synchronized recording. The times he provides for the video depictions are times he knows to be very close to being accurate.

The recordings confirm that Officer Wanish's patrol vehicle turned into the driveway of the apartment complex around 2:55:30 AM on May 9, 2020. It appeared he was the first squad to enter the scene. Just prior to that a male officer's voice came over the broadcast indicating that he had heard a gunshot approximately 10 minutes earlier. Over the course of the next two minutes, the first two Green Bay Police officers began lining up at the southeast corner of the apartment building in the left foreground of the recording.

At 2:58:31, an officer with a flashlight illuminated the parking lot area of 2817 University Avenue and a faint depiction of an unidentifiable subject was observed moving around behind a light-colored motor vehicle which was parked in front of 2817 University Avenue. The motor vehicle was parked between the two (2) illuminated entrances to the apartment complex. The subject was closer to the northernmost entrance area. Both officers located at the southeast corner of the apartment building in the left foreground of the recording immediately began to maneuver and came out from the corner of the building. The officers' attention and views were trained on the subject in front of 2817 University Avenue.

At 2:58:33 verbalizations of, "Shots fired. Shots fired" were heard. At 2:58:34, another unidentified uniformed male GBPD officer who wore a ball cap and carried a duty rifle entered the recording from the left side and joined the other two (2) officers at the corner of the building. The referenced officer was immediately followed by a fourth unidentified officer who possessed a duty rifle. The fourth officer was immediately followed by a fifth unidentified officer. All of the officers "stacked" at the previously referenced and described corner of the building.

At 2:58:40, a subject in the parking lot in front of 2817 University Avenue clearly rounded the back right corner of the light-colored motor vehicle parked between the two (2) referenced apartment entrances. A subject moving toward the south between the parked motor vehicles in front of 2817 University Avenue and the garages of the apartment building followed. The subject was momentarily illuminated by the light which emanated from the southern (nearest) apartment complex entrance at 2817 University Avenue. As the subject who was moving south (toward officers) was depicted, a gunshot sounded at 2:58:42. An unidentified officer immediately replied, "Oh, he shot him! He shot him!" The subject who ran south then turned and ducked behind a brown-colored pick-up truck which was parked nearest the second (southern) apartment complex doorway. The shooting subject then came to near the front of the brown-colored pick-up truck while the running subject ducked down and ran back toward the apartment building. An unidentified officer simultaneously stated in a loud voice, "Drop the gun! Get down on the ground!"

The officers maneuvered and at least two (2) officers lowered to their knees. At 2:58:48AM, a sixth unidentified uniformed male GBPD officer who possessed a duty rifle joined the other officers at the previously referenced and described location. Three (3) additional gunshots sounded. As the sounds of gunshots sounded, four (4) muzzle blasts from officers' firearms were depicted which indicated that law enforcement officers fired in very close proximity and/or simultaneously to when the shooting subject shot at the running subject. The law enforcement gunshots occurred from approximately 2:58:48 to 2:58:50. As the gunshots sounded, the running subject ran around the southeast corner of the apartment building at 2817 University Avenue. The running subject went out of view on the right side of the recorded frame. As gunshots sounded, the shooting subject dropped to the asphalt. An unidentified officer yelled out toward the shooting subject, "Don't shoot! Don't shoot! Don't move!" An officer broadcasted via portable radio, "Shots fired. Suspect is down. Gun is next to him. There was a male he was shooting at. We don't have eyes on, yet."

The evidence located on scene by DCI investigators is also consistent with the information provided by officers and the activity depicted in the squad video. DCI agents recovered four (4) fired .223 shell casings near the area where Green Bay Police Officers discharged their rifles. Two (2) of the casings were determined to have come from Officer Trimmerger's rifle and two (2) of the casings came from Officer Walvort's rifle. DCI agents likewise located 3 fired 9mm casings in the parking lot of 2817 University Avenue consistent with the area where Melgar had been observed shooting at Hernandez-Martinez, in addition to unfired 9mm casing, and in addition to the evidence of two shots having been fired in the bedroom of the complaining witness' apartment.

The Autopsy Results

An autopsy was conducted on the body of Elder Y. Melgar on May 10, 2020 at the Dane County Mortuary by Eli Goodman, Deputy Medical Examiner for Brown County. The Summary Comment of Dr. Goodman indicates that Melgar died as a result of multiple gunshot wounds of the head, neck and torso and sharp force injuries of the torso and left upper extremity. The manner of death was listed as homicide.

Dr. Goodman's autopsy report is thorough, and provided a detailed listing of all of the findings of the physical examination. In the autopsy, Dr. Goodman observed and documented a total of three (3) gunshot wounds. One of the gunshot wounds was an indeterminate ranged penetrating wound of the head, neck and torso that resulted in lethal injuries. A second gunshot wound was an indeterminate range wound of the torso that entered the right lower chest/right upper abdomen. A third gunshot wound was an indeterminate range wound of the torso that entered the left lower chest/upper abdomen. Dr. Goodman notes that all of these gunshot wounds were potentially lethal.

In addition to the gunshot wounds, the autopsy revealed that Melgar suffered from six (6) sharp force injuries of the torso and left upper extremity including a stab wound of the left lower abdomen that perforated the small bowel, a large incised wound of the left posterior elbow/arm and incised wound of the left forearm and additional incised wounds of the second and fourth fingers of the left hand. According to Dr. Goodman, the stab wound of the lower left abdomen and incised wound of the left elbow/arm could potentially have resulted in death without appropriate medical therapeutic intervention. The incised wounds of the left upper extremity are consistent with so-called "defensive wounds."

Legal Analysis

The purpose of my review, and the legal analysis involved in this decision is limited to determining whether there are any facts or evidence that would support a conclusion that the Green Bay Police Department officers involved in this incident engaged in any criminal conduct which caused the death of Mr. Melgar. Based on my review of the materials provided, I find no evidence that suggests any criminal wrongdoing on the part of the officers involved.

There is no question that Officers Trimmerger and Walvort did in fact intend to utilize deadly force when they shot and killed Elder Melgar on May 9, 2020. However the officers' use of force in this instance was justified and permitted by both the privilege of defense of others outlined in §939.48(1), Wis. Stats., and the public officer privilege outlined in § 939.45, Wis. Stats. Each of these privileges will be addressed separately.

I. Self Defense and Defense of Others

Under Wisconsin law, a law enforcement officer has a legal privilege to use deadly force to protect himself or others where the officer reasonably believes that there is an actual or imminent unlawful interference directed at himself or another person, and reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, pursuant to Wis. Stat. §939.48(4); and Wisconsin Jury Instructions-Criminal 830.

Wis. Stats. § 939.48(1) describes the privilege of self-defense:

A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

A person is furthermore privileged to use force to defend others under the same conditions and by the same means as they would use to defend themselves, assuming there is a reasonable belief that the other person or persons would be privileged to act in self-defense. See Wis. Stat. § 939.48(4).

There are essentially two components to analyze whether Officers Trimberger and Wavort engaged in actions on May 9, 2020, that were legally permissible as defense of other, both of which involve subjective and objective elements. First, the officers must have "reasonably believed that he...was facing a threat of 'imminent death or great bodily harm.'" *State v. Jackson*, 2014 WI 4, ¶ 59, 352 Wis. 2d 249, 841 N.W.2d 791 (quoting Wis. Stat. § 939.48(1); Wis. JI—Criminal 805). Second, officers must have "reasonably believed that the amount of force used was 'necessary to prevent' the threat." *Id.* In an instance like this case where Officers Trimberger and Walvort used force likely to cause death or great bodily harm, they can only use that force if they reasonably believed the force used "was necessary to prevent imminent death or great bodily harm" to themselves or others. Wis. JI—Criminal 805.

The evidence in this case is clear that both Officer Trimberger and Officer Walvort appropriately exercised their privilege to defend others by use of deadly force. The first inquiry, whether they reasonably believe that there was an imminent threat of death or great bodily harm, is clearly satisfied where officers arrive on scene and observe first hand that Melgar was discharging his 9mm handgun in the direction of Manuel Hernandez-Martinez. The officers' subjective belief that Melgar posed an imminent risk of death or great bodily harm to Hernandez-Martinez was confirmed by the audio/video recordings, fired shell casings found on scene and the statement of Hernandez-Martinez himself. The fact that Hernandez-Martinez was the initial primary aggressor and had entered the apartment of his ex-girlfriend without consent, does not alter the reasonableness of the officers' belief in light of the observations they made upon arrival.

Likewise, officers' belief that deadly force was the reasonable amount of force necessary to prevent the threat is equally supported. Melgar had discharged his weapon at Hernandez-Martinez shortly after the officers arrived on scene, and was actively firing his pistol at Hernandez-Martinez when he was shot by officers. Had they not intervened, it's certainly likely that Melgar would have been successful in shooting and killing Hernandez-Martinez.

II. Public Officer Privilege

Similarly, §§ 939.45(3) and (4) provide a legal defense for a law enforcement officer who is acting in good faith and in an apparently authorized and reasonable fulfillment of the duties of a public officer, or when the conduct is a reasonable accomplishment of a lawful arrest. Again, the reasonableness of the amount of force used to effectuate an arrest will be based on the facts and circumstances as they presented themselves to Officers Trimberger and Walvort, including the consideration of the risk that Elder Melgar posed to Manuel Hernandez-Martinez as well as the officers present in the early morning hours of May 9, 2020.

The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:

(3) When the actor's conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office

This "public officer" privilege is available when one acts in accord with his duties as a public officer. The privilege has two elements. The first is that the actor acted in "good faith," meaning that the actor believed "his conduct was an authorized and reasonable fulfillment of his duties" as a police officer. Wis. JI—Criminal 870. Second, the actor's conduct was "an apparently authorized and reasonable fulfillment of the duties of a public office." *Id.* "Apparently authorized" means that a "reasonable person would believe that the defendant had the authority to act in the manner he did" and "reasonable fulfillment" means the actor's conduct was "necessary and proportional in responding to the interests at stake." *Id.* Our Supreme Court has explained the purpose of this privilege thusly:

The statutory privilege defense was intended to protect a public officer who, but for the defense provided in sec. 939.45, would be guilty of a crime if he or she were acting as a private citizen, and whose unlawful conduct has "sufficient value to society so that it ought not subject the actor to criminal liability." The statutory privilege defense is designed to provide a justification for conduct which "must be in accord with the actor's function as a public servant, and must be necessary and proportional to the protection and furtherance of the interests at stake."

State v. Stoehr, 134 Wis. 2d 66, 85–86, 396 N.W.2d 1787 (1986) (citations omitted). The Court of Appeals also addressed this privilege in *State v. Schoenheide*, 104 Wis. 2d 114, 310 N.W.2d 650 (Ct. App. 1981). The court in *Schoenheide* concluded that a firefighter could not use this privilege as a defense in a prosecution for drunk driving as *Schoenheide* responded to a fire because firefighters are not "apparently authorized" as part of their duties to drive while intoxicated. *Id.* at 116.

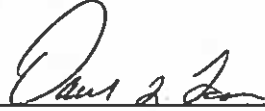
I conclude that the Green Bay Police officers were acting in good faith in this instance. As both Officer Trimberger and Officer Walvort noted, they believe it was their duty to stop the threat that Melgar posed to Hernandez-Martinez, and they were apparently authorized to utilize deadly force in order to stop the threat they observed. In light of the actions Melgar had taken to shoot multiple times at Hernandez-Martinez, the use of deadly force to stop the threat he posed was a necessary and proportional response in reasonable fulfillment of their duties as law enforcement officers.

Conclusion

Police Officers are called upon to make difficult, split-second decisions regarding the use of force necessary to defend others and to fulfill their sworn duties as law enforcement officers. In the early morning hours of May 9, 2020, Officer Roman Trimberger and Officer Nicholas Walvort arrived on

scene to personally observe Elder Melgar discharging a firearm toward another individual. Once officers observed that Melgar's conduct posed an imminent risk of death or great bodily harm to another individual, they knew that they were privileged and apparently authorized to utilize deadly force in protection of others, and as a reasonable fulfillment of their lawful authority. Deadly force should no doubt be used only in those very limited instances when it is legally justified, however, the circumstances of this particular case, no doubt permitted the use of deadly force. While Mr. Melgar's death is tragic, because Officers Trimberger and Walvort were justified in utilizing deadly force, it is not the result of any criminal wrongdoing on the part of the officers involved.

Thank you for your work investigating the matter. Should you have any question or concerns regarding my analysis or conclusions, please contact me at your earliest convenience.

A handwritten signature in dark ink, appearing to read "David L. Lasee", written over a horizontal line.

David L. Lasee
District Attorney

DLL