



For Immediate Release
October 19, 2018

District Attorney Marc Bennett has completed the review of the use of deadly force that resulted in the death of Jose Ortiz. The incident occurred on August 7, 2017, at 1320 N. Wellington Place, in Wichita, Sedgwick County, Kansas.

SCOPE OF REPORT

This report details the findings and conclusions limited specifically to criminal liability of the WPD officer, Officer 2, who fatally shot Mr. Ortiz at 1320 N. Wellington Place.

The Office of the District Attorney has no administrative or civil authority regarding use of force investigations. Therefore, this report does not address any administrative review that may be conducted by the WPD, provide any assessment of policy considerations, or address questions of possible civil actions where a lesser burden of proof would apply.

Questions as to whether the use of force in any particular case could have been avoided or de-escalated if the officer(s) or citizen(s) had behaved differently in the moments leading up to the fatal use-of- force are not properly addressed in a criminal investigation.

The sole question addressed by the District Attorney is whether sufficient evidence exists to establish beyond a reasonable doubt that a violation of the criminal laws of the state of Kansas occurred in this instance.

On Monday, August 7, 2017 at approximately 7:15 a.m., 911 received a call from 1320 N. Wellington Place in reference to a disturbance with a knife. The caller (listed below as Witness 1) advised dispatch that her brother, Jose "Pepe" Ortiz, was inside the residence with a knife trying to kill the caller's sister-in-law (listed as Witness 5 below). The caller also advised the dispatcher that there were two other adults and four children inside the residence. The caller told the dispatcher that Jose Ortiz had been using the drug "ice" this morning and that he had choked her sister-in-law with a cord earlier that day.

WPD officers were dispatched to 1320 N. Wellington Place at approximately 7:16 a.m. The calling party called 911 again at 07:21 a.m. and said her brother was armed with a pocket knife and that she could hear her sister-in-law screaming. She advised that everyone else in the house had exited the residence, leaving Jose Ortiz and her sister-in-law alone in the residence.

WPD officers arrived on scene at approximately 7:31 a.m. Officers on scene learned that Jose Ortiz had tied up his girlfriend inside the residence and that he was holding a knife to her back and neck. Officers learned that Jose Ortiz was smoking "ice" inside the residence.

Officers moved to the front porch of the residence and attempted to make contact with Jose Ortiz through the front door. Officers also attempted to call Jose Ortiz inside the residence. Neither effort was successful.

At approximately 7:48 a.m., Officers requested SWAT respond to their location. Officers continued several times to make contact with Jose Ortiz. Mr. Ortiz did not respond.

At approximately 8:14 a.m., Officers heard a female screaming inside the residence. In response, at approximately 8:15 a.m., a Sergeant and four officers from the WPD made entry through the front door of the residence into a living room area. The five officers made contact with Jose Ortiz who was standing in the adjacent dining room

of the residence holding a female in front of him by her hair and holding a knife to her right side and back. The female victim's arms were behind her back as if bound. The officers spoke to Ortiz in an attempt to convince him to release the female. Ortiz did not comply with the officer's request to release the female. Ortiz backed into a corner of the room with the female still held in front of him. He continued to hold her by her hair while holding a knife to her side and back. The female victim screamed and winced in pain several times.

Finally, the female victim screamed and bent at the waist, moving her waist and hips to her left, in what appeared to be an effort to move away from the knife Ortiz had held to her right side. Officer 2 was armed with a department-issued .556 rifle. When the female victim screamed and bent to her left, Officer 2 fired one shot striking Ortiz who fell to the floor at approximately 8:16 a.m. The female victim was escorted out of the house by other officers. Outside the residence, officers had to cut off an electrical cord which was wrapped around her wrists behind her back. Jose Ortiz was transported by EMS to Via Christi St. Francis Hospital where he was pronounced deceased at approximately 9:36 a.m.

INVESTIGATION

The five officers involved in the incident were removed from the area. The weapon issued to Officer 2 was secured. Crime Scene Investigators from the WPD processed the scene. Evidence was submitted to the Sedgwick County Forensic Science Center for examination.

The five officers directly involved in the incident gave voluntary, recorded statements to investigators.

CIVILIAN WITNESS STATEMENTS

Investigators interviewed several witnesses on scene and later at police headquarters.

Witness 1: Witness 1 was asleep in the residence at 1320 N. Wellington Place and, in response to noises and screaming, went into the living room where Witness 1 saw her

brother, Jose Ortiz, holding Witness 5 by the hair. Witness 1 asked Jose what he was doing and he told Witness 1 to mind her own business and get out of the house. Witness 1 saw Witness 5's hands tied behind her back with an electrical cord. Witness 1 called their mother, Witness 2, and asked Witness 2 to return home to help. Witness 1 then contacted Witness 3, another sibling, who was upstairs inside the residence at 1320 N. Wellington Place, and explained the ongoing situation involving Jose and Witness 5.

Witness 1 and Witness 3 helped to get four children out of the house. Witness 1 saw Jose punching Witness 5, and pick her up by the hair and slam her to the couch. As Witness 1 was helping get the children out of the residence, Witness 1 observed Jose pull a knife out of his pocket. Jose threatened to kill Witness 5 and everyone else if they came any closer. Witness 1 said Jose had Witness 5 on her knees as he (Jose) was holding the knife.

Witness 1 left the residence and notified 911. Witness 2 had contact with officers and repeated what had occurred.

Witness 2: Witness 2 is a family member of Jose Ortiz. Witness 2 awoke around 5:00 a.m. to get ready for work. Witness 2 told Jose to get ready for work and that she would give him a ride. Jose said he didn't feel good and that he wasn't going to work.

Witness 2 received a phone call later at work from Witness 1. Witness 1 said Jose was inside the residence smoking a drug pipe. Witness 2 tried to speak to Jose on the phone but Jose refused to take the phone. Witness 1 put the cell phone on speaker and Witness 2 told Jose to go outside to smoke. A short time later, Witness 2 received a phone call again from Witness 1. Witness 1 said Jose was out of control and beating Witness 5. Witness 1 asked Witness 2 to come home immediately.

Witness 2 returned home and entered the residence through the back door. Jose was holding Witness 5 at knife point on the floor of the living room. Witness 2 pled with Jose to stop but he told Witness 2 to not come any closer. Witness 2 picked up a seat cushion with the intent to use it if necessary to stop Jose from stabbing Witness 5.

Witness 2 approached Jose who then held the knife extended in front of him directed at Witness 2. Witness 2 backed away and then exited the residence and reported to officers outside as they arrived what had occurred.

Witness 2 was aware that Jose smoked methamphetamine and that he'd been doing so for quite some time. Witness 2 believed it was making Jose crazy. Witness 2 said Witness 5 had told Witness 2 about an incident on Friday with Jose, where Witness 5 received an injury to her leg.

Witness 3: Witness 3, a sibling of Jose Ortiz, was asleep inside 1320 N. Wellington Place when he received a phone call from Jose who wanted a lighter. Witness 3 got up and gave Jose a lighter. Witness 3 was contacted a couple of hours later by Witness 1, who asked him to move two children from downstairs to the upstairs. Witness 3 said Jose had Witness 5 tied up downstairs and was hitting Witness 5. Witness 3 could hear Witness 5 yelling.

Witness 3 went downstairs and saw that Witness 5 was tied with her hands behind her back. Witness 3 saw Jose grab Witness 5 by the hair and throw Witness 5 to the floor. Jose was also slapping Witness 5. Jose continued to hit Witness 5 who was yelling for help. Witness 3 said Witness 5 looked scared. Witness 3 tried to calm Jose down. Jose was accusing Witness 5 of sleeping with other men and said he was going to kill Witness 5. Witness 3 observed Jose smoking out of a glass pipe. Witness 3 said Jose is known to smoke "ice" (methamphetamine).

Witness 3 said Jose pulled a knife out at one point and unfolded the blade. During the incident, Witness 3 helped in getting the children out of the residence. Witness 5 said Witness 2 arrived at the residence and tried to calm Jose down. Witness 3 left the residence and reported to the officers outside what had occurred.

Witness 4: Witness 4 is a neighbor and was awoken by his wife who told him that Witness 1 was bringing children over to their house to watch because Jose was acting crazy and threatening Witness 5 with a knife. Witness 4, who has known Jose his whole

life, walked to 1320 N. Wellington Place. Witness 4 said he went inside the residence with Witness 3 through the rear door. Witness 4 observed Jose with a knife waving it around. Witness 4 saw Witness 5's hands tied together and Jose said he was going to kill Witness 5. Witness 4 exited the residence and then heard a scream and sounds consistent with someone being hit. Witness 4 went back inside the residence and saw Witness 5 on the couch covering away from Jose. Witness 4 went back outside and heard more screams.

Witness 4 said Witness 2 came home. Witness 4 and Witness 2 then went back inside the residence. Jose told Witness 2 to back up while pointing the knife. Witness 4 said that Jose told Witness 5 that he was going to kill Witness 5.

Witness 4 went outside and heard officers try to negotiate with Jose from the front of the house. Witness 4 said it appeared as if someone was looking out of the blinds but Witness 4 never heard Jose respond to the officers.

Witness 5: Witness 5 said she has been in a relationship with Jose Ortiz for about 8 months and lived with him at 1320 N. Wellington Place. Witness 5 said on Friday, August 4, 2017, Jose arrived home from work and was acting weird and paranoid. He accused her of cheating on him. Witness 5 said she started to go upstairs to the bedroom to get away from him and Jose grabbed her by the hair causing her to fall down the stairs. Witness 5 said she injured her leg which caused a bruise to her shin. Witness 5 didn't report this incident to law enforcement. Witness 5 said Jose was unable to sleep and kept telling her that he knew she was hiding men in their bedroom. Witness 5 later told Witness 2 what had happened. Witness 2 made the comment that Jose was probably using drugs again. According to Witness 5, nothing significant occurred on Saturday, August 5th.

On Sunday, August 6, 2017, Witness 5 said she and Jose went to the liquor store to get some beer. Later that afternoon, Jose said he was waiting on someone. A vehicle pulled into the driveway and Jose contacted the person. Jose then came inside the residence and locked himself in the bathroom for about 40 minutes. Once Jose exited

the bathroom, Witness 5 described his eyes as wide open and he kept picking at his face. Jose told her not to ask him anything and mind her own business. Witness 5 said they watched TV and Jose couldn't sit still and kept going outside to smoke cigarettes and drink beer. Witness 5 said this lasted the entire night and she eventually fell asleep on the couch.

Witness 5 awoke at around 5:00 a.m. on Monday, August 7, 2017. Witness 2 left for work and Jose said he wasn't going to work. Witness 5 said Jose began yelling at Witness 1 about getting a guy out of the room. Witness 5 said there wasn't anyone in the room. Jose then began to accuse Witness 5 of having men upstairs in their bedroom. Jose then grabbed Witness 5 and dragged her by the hair and began to hit her. Witness 5 yelled for help and tried to escape but Jose stopped her from escaping. Jose then pulled a knife out of his pocket and held it to her face and right side. Jose told Witness 5 that he was going to kill her. Jose tore an electrical cord off of a table lamp and used it to tie her hands behind her back. Witness 5 said Jose forced her to get on her knees and kept demanding that she put her nose on the floor.

Witness 5 said that Witness 2 came inside the residence and tried to convince Jose to stop. Jose threatened to kill Witness 2 and made a stabbing motion with his hand directed at Witness 2. Witness 5 said Jose held her (Witness 5) in front of him like a human shield and pulled her into a corner of the living room. According to Witness 5, Jose pulled out a glass pipe and used it to smoke more drugs. Jose made the comment to her that if the police came inside she would die.

Witness 5 said she heard the officers outside asking for Jose to come out and give up. Witness 5 said she felt faint but then felt the knife poking her right side which caused her to scream. Witness 5 said the police entered the residence at that point. Witness 5 said the officers tried to get Jose to release her and offered to help him. Witness 5 heard a gunshot and Jose fell to the ground. Witness 5 said she ran and an officer took her outside and cut the cord off her wrists. Witness 5 said her wrists had turned blue from being tied up.

LAW ENFORCEMENT OFFICER STATEMENTS

The five officers involved in the shooting incident gave recorded voluntary statements afterwards:

Officer 1 (Sergeant): The WPD Sergeant involved in the incident was a 16-year veteran of the department. Officer 1 was assigned to first shift and was dressed in an authorized WPD uniform. Officer 1 heard a domestic violence call involving a knife over the police radio at 1320 N. Wellington Place. Officer 1 advised that this was during shift change and Officer 1 instructed officers that were in a squad meeting to respond to the call. Officer 1 heard one of the officers request a supervisor respond to the scene over the police radio. One of the officers on scene advised someone was being held inside the residence and the suspect was armed with a knife. Officer 1 responded in a fully marked WPD vehicle.

Officer 1 contacted two officers on scene who had already learned from family members that a male had tied up his girlfriend or wife and was holding her at knife point. Officers had set up a perimeter around the house. Another female family member exited the residence and talked to officers. The female family member said the male had tied up the female victim with a cord and was holding a knife to her. The suspect male (Mr. Ortiz) told the female family member that exited the residence that if officers came in the residence he was going to stab her. Officer 1 learned that the male had reportedly been using meth.

Officer 1 attempted to make phone contact with Mr. Ortiz and was unsuccessful. Officer 1 went up to the front porch area and yelled inside in an attempt to make contact with Mr. Ortiz. Officer 1 announced his rank and name and said he was there to help. Officer 1 tried to convince the male to respond and to end this peacefully. Officer 1 then moved up to the front door and again tried to make verbal contact with the male and said he was there to help. Officer 1 put his ear to the door and could hear a female crying and whimpering. Mr. Ortiz never verbally acknowledged any of Officer 1's attempts to make contact. Officer 1 tried again several times to make contact verbally with Mr. Ortiz with no success.

Officer 1 requested the dispatcher make SWAT notifications to have them respond to the scene. Officer 1 heard a notification over the police radio by another officer also on the scene that they could hear the female screaming from inside of the residence. Officer 1 feared for the safety of the female inside the residence. Officer 1 grabbed a bunker for protection and entered through the unlocked front door of the residence followed by other officers. Once inside, Officer 1 could hear a female screaming.

Officer 1 entered into the living room at the front of the residence and saw a female standing, with a male standing directly behind her in the dining room area of the residence. The female's hands appeared to be restrained behind her back and the male was holding her by the hair. Officer 1 observed the male holding a silver edged weapon in his hand that appeared to be a knife or scissors.

Officer 1 told Mr. Ortiz that officers were there to help. Officer 1 tried to convince Mr. Ortiz to release the female. Mr. Ortiz moved backwards and to his right into the far corner of the dining room, holding the female by the hair in front of him (Mr. Ortiz). Mr. Ortiz continued to hold the silver edged weapon behind the female. Mr. Ortiz only responded with profanity to Officer 1's requests to release the female. Mr. Ortiz appeared very agitated.

Officer 1 said the female kept wincing in pain and moving. He believed the male had moved the knife and was at that point holding the knife behind the female victim. Officer 1 believed Mr. Ortiz was either stabbing or gouging the female with the knife. Officer 1 then heard a shot. Mr. Ortiz immediately fell to the floor and Officer 1 observed bleeding from the top of Mr. Ortiz's head. The female victim ran towards the kitchen area. Officer 1 instructed another officer to take her outside. EMS was already standing by and came inside the residence to attend to Mr. Ortiz.

Officer Involved 2: The second WPD officer involved in the incident was an 18- year veteran of the department. The officer was assigned to first shift and was driving a fully marked WPD vehicle dressed in an authorized WPD uniform.

Officer 2 responded to a call at 1320 N. Wellington Place of a male holding a female hostage with a knife. The information received by Officer 2 was that the female was tied and the male was threatening to kill her. Officer 2 learned that the male had reportedly been using methamphetamine.

Once on scene, Officer 2 learned that the male suspect's mother was still inside the residence. Officer 2 said that the mother then exited the residence and informed officers that her son was inside and threatened that if the police entered the residence he was going to stab his girlfriend, Witness 5.

Officer 2 followed Officer 1 to the front area of the residence while Officer 1 yelled and attempted to make contact with the male. Officer 2 could hear the female crying inside of the residence. Officer 1 was unsuccessful in his attempt to make contact with the male. Officer 2 said that there was a discussion with Officer 1 about contacting SWAT and waiting to see if the effects of the drug wore off and the male would surrender peacefully. Officer 2 said the female began intensified screaming and yelling inside the residence. Officer 2 said they believed the female was in jeopardy at that point and they decided they could not wait to enter the residence. Officer 2 followed Officer 1 inside the residence.

Officer 2 said they entered the front door into the living room area of the residence. Officer 2 observed the male and female in the dining room area of the residence. The male had his left arm wrapped around the female with a knife in his right hand. Officer 2 said he could see the silver blade of a knife. The male was holding the knife towards the back of the female. Officer 2 said that Officer 1 tried to talk to the male and convince him to drop the knife. The male responded by using profanity towards the officers. The female was wincing as the male held the knife to her back and side.

Officer 2 said the female had fear and terror in her eyes and appeared extremely scared. Officer 2 described the male as very agitated and he feared the male was going to stab the female. The female screamed and bent slightly at the waist. The officer was armed with a .556 rifle and shot once striking the male who fell to the floor.

Officer Involved 3: The third WPD officer involved in the incident was a 14-year veteran of the department. The officer was assigned to first shift and was driving a fully marked WPD vehicle, and was dressed in an authorized WPD uniform.

Officer 3 responded to the call of a disturbance with a knife at 1320 N. Wellington Place. Officer 3 advised a female family member contacted the officers outside of the residence and advised a male family member was holding his girlfriend inside of the residence. The family member reported the male had the female tied up and was holding a knife to her. Officer 3 also learned that another family member was inside the residence. Officer 3 also learned from other officers that the male said he would stab the female victim if the officers entered the residence. Officer 3 said another officer attempted to make phone contact with the male with no success. Officer 3 said that Officer 1 then attempted to make contact with the male inside the residence. At one point Officer 3 also approached the front of the residence and attempted to make verbal contact with the male.

Officer 3 heard the female screaming from inside of the residence. The officers decided to enter the residence as a result. Officer 3 was behind Officer 2 as they entered the residence. Officer 3 saw a male and female with her hands behind her back. The male was holding a double-bladed knife in his right hand. Officer 3 said the male grabbed the female by her hair with his left hand and then moved his right hand with the knife behind her. Officer 1 attempted to talk to the male. The male responded with profanity. Officer 3 said the male looked very angry. The officer said the female screamed and he believed the female had been stabbed or cut with the knife. Officer 3 heard Officer 2 fire one shot and saw the male drop to the floor.

Officer 3 took the female out the back door of the residence. The officer saw a black cord wrapped around her wrists and saw that her wrists had turned purple. The officer was able to remove the cord from around the female's wrists which were bound behind her back. Officer 3 then took the female out to the street to be examined by EMS personnel.

Officer Involved 4: The fourth WPD officer involved in the incident was a 24-year veteran of the department. The officer was assigned to first shift and was driving a fully

marked WPD vehicle, and was dressed in an authorized WPD uniform.

Officer 4 responded to 1320 N. Wellington Place to a disturbance with a weapon call. Upon arrival the officer learned that a male was holding a female with a knife inside the residence. Officer 4 said officers set up a perimeter around the residence.

Officer 4 said a female family member then exited the residence and reported that the male said that if officers entered the residence he would stab the female. Officer 4 said officers approached the front of the residence and yelled at the male attempting to make contact several times. Officer 4 said the officers announced themselves by rank/name and said they were there to help. Officer 4 said that SWAT notifications were made.

Officer 4 said other officers said they could hear screaming and yelling from inside the residence. In response, the officers made entry into the residence. Officer 4 followed Officer 3 through the front door. The officers stopped in the living room and Officer 4 observed a male standing behind a female who was screaming. Officer 4 said Officer 1 attempted to talk to the male. Officer 4 said he also attempted to talk to the male. Officer 4 said the male was very angry and screaming at the officers and the female but he couldn't understand what the man said. The female was screaming and he did not know if she had been stabbed at that point. Officer 4 said the female appeared scared. Officer 4 had a partially obstructed view because of his position in the living room behind a short wall. Officer 4 heard Officer 2 fire his rifle and the male fell to the floor. Officer 4 said the female started to run and Officer 4 saw the female's hands had been bound with something behind her back. Officer 4 went forward and handcuffed the male behind his back.

Officer 4 later rolled the male onto his side and observed a brown handled double-bladed knife on the floor underneath the male. EMS and Fire personnel removed the male and Officer 4 observed a glass pipe on the floor. The pipe appeared to have been broken during the incident.

Officer Involved 5: The fifth WPD officer involved in the incident was a 27-year

veteran of the department. The officer was assigned to first shift and was driving a fully marked WPD vehicle, and was dressed in an authorized WPD uniform.

Officer 5 responded to a call of a disturbance involving a male holding a female with a knife at 1320 N. Wellington Place. Officer 5 said as officers arrived they set up a perimeter around the house. Officer 5 said that Officer 1 asked for SWAT to respond to their location. Officer 5 said Officer 1 approached the front of the residence and tried to make contact with the male inside and said they were there to help.

Officer 5 said a female family member exited the residence and contacted officers. An officer on the back of the residence said he could hear screaming from inside the residence. Officer 5 said that officers then entered the residence through the front door. Officer 5 was the last officer to enter.

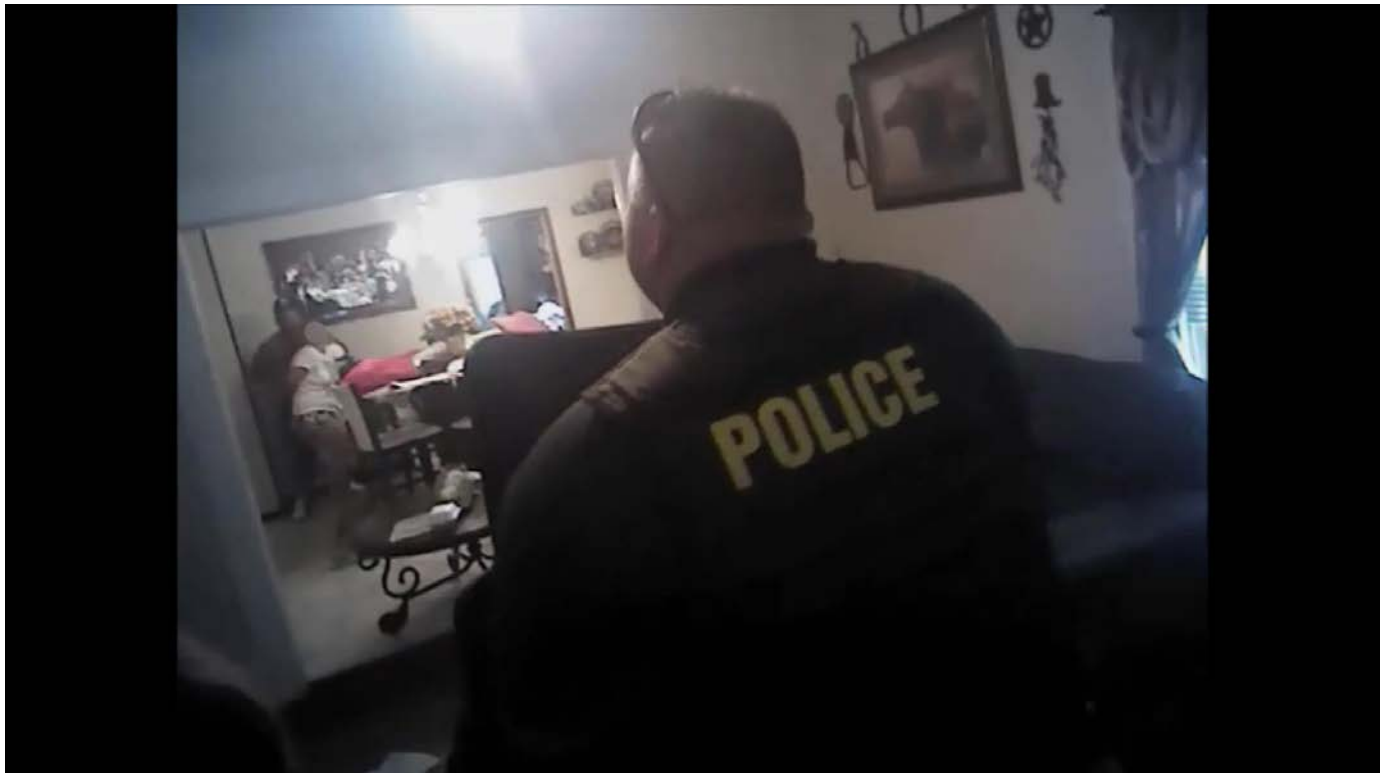
Officer 5 said the officers stood in the living room and the male and female were in the dining room area. The male grabbed the female and pulled her into a back corner. Officer 5 said the male and female moved out of his view which was obstructed by a small wall. Officer 5 said the female was screaming. Officer 1 attempted to talk to the male to try and settle him down. Officer 5 heard a shot by Officer 2. The male fell to the floor. Officer 5 observed a rifle cartridge casing on the floor. Officer 5 observed Officer 4 handcuff the male and then Fire/EMS personnel entered the residence.

CRIME SCENE INVESTIGATION

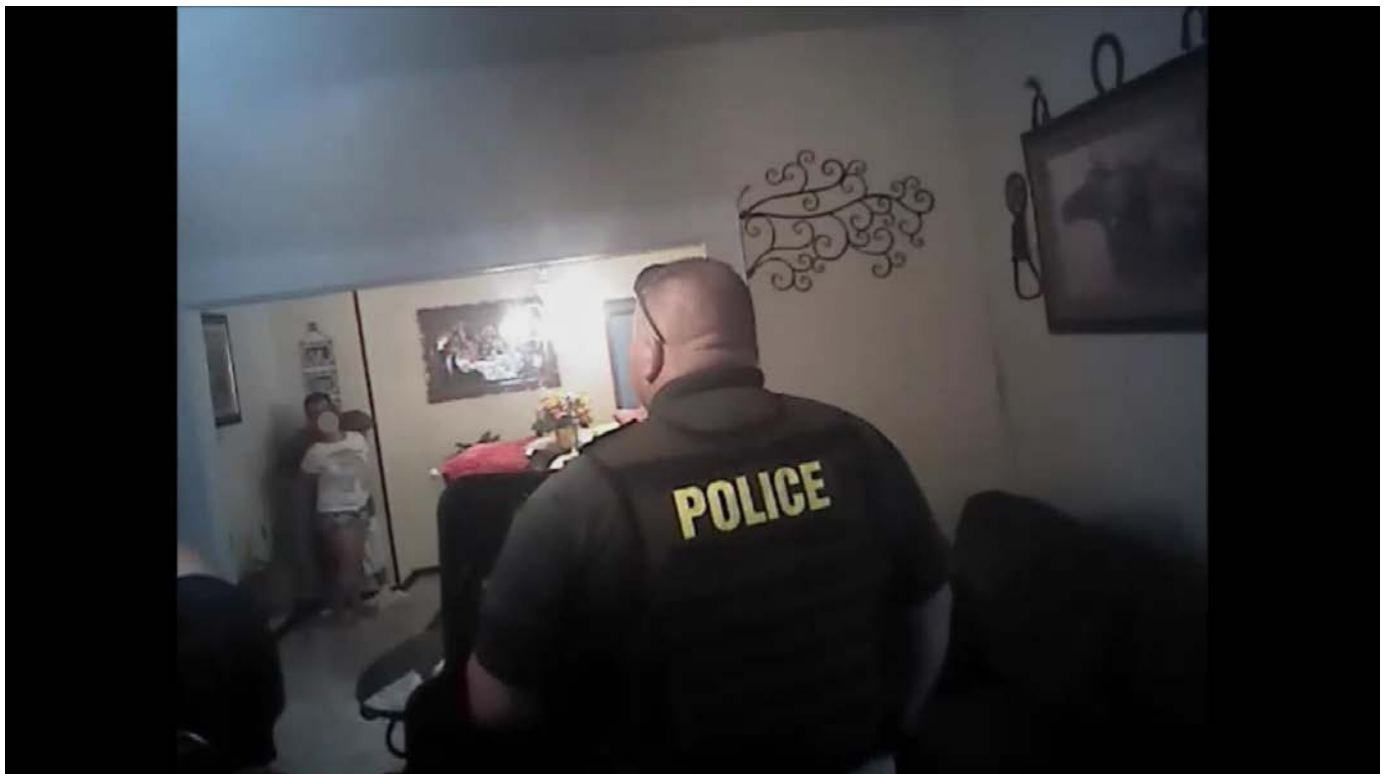
WPD Crime Scene Investigators processed the scene of the shooting which was photographed and diagrammed. Scene Investigators located, photographed, and collected items of physical evidence including: one cartridge casing; cellular phones; electrical cord cut from wrists of victim; knife with 4" blade (overall length 9") on floor in dining room; glass pipe; lighter; small plastic baggies containing an unknown substance; and other evidentiary items. The above-described knife was recovered underneath Jose

Ortiz's body when he was removed and transported by EMS.









FORENSIC EVIDENCE & AUTOPSY RESULTS

The firearm evidence collected from the scene of the shooting including one .223 cartridge casing, the department-issued firearm, as well as the bullet projectile/fragments from the autopsy of Jose Ortiz were examined at the Sedgwick County Regional Forensic Science Center. The weapon was submitted for examination, met the definition of a firearm and was functional.

According to the report from the Sedgwick County Regional Forensic Science Center, dated December 22, 2017, the single cartridge casing collected at the scene was identified as "having been fired in" Officer 2's weapon. The bullet fragment collected during the autopsy was identified as "having been fired from" Officer 2's weapon.

An autopsy was performed on the body of Jose Ortiz on August 7, 2017, at the Sedgwick County Regional Forensic Science Center. The final autopsy report, dated October 11, 2017, determined that Mr. Ortiz died as a result of a gunshot wound to the head and the manner of death was homicide. Bullet projectile/fragments were recovered during the autopsy. Specimens were collected for toxicological examination. A toxicology report was submitted with the autopsy and found Mr. Ortiz to have been positive for Amphetamine, Methamphetamine (0.64 mg/L in the blood sample collected at the hospital), and Benzoylcegonine.

KANSAS LAW

In Kansas all persons, including law enforcement officers, are entitled to defend themselves and others against the use of unlawful force. **Kansas Statutes Annotated** 21-5220 states:

- (a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
- (b) A person is justified in the use of deadly force under circumstances

described in subsection (a) if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.

(c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person.

The term “use of force” includes words or actions directed at or upon another person or thing that reasonably convey the threat of force, the presentation or display of the means of force or the application of physical force, including by a weapon. “Use of deadly force” means the application of any physical force which is likely to cause death or great bodily harm to a person.

The Kansas Supreme Court has made clear that the analysis of a self-defense claim presents a “two prong test”:

“The first is subjective and requires a showing that McCullough sincerely and honestly believed it was necessary to kill to defend herself or others. The second prong is an objective standard and requires a showing that a reasonable person in [the same] circumstances would have perceived the use of deadly force in self-defense as necessary.” State v. McCullough, 293 Kan. 970 (2012).

With respect to a law enforcement officer’s use of force, in Graham v. Connor, 490 U.S. 386, 396 (1989), the United States Supreme Court clarified that any assessment of objective reasonableness must take into account the contextual realities faced by the officer:

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”

“The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”

A. Immunity

In 2010, the Kansas Legislature enacted a series of statutes addressing the use of force, including the use of deadly force, in the defense of a person or property, including a

person's dwelling. See K.S.A. (2016 Supp.) 21-5220 et seq. The new statutes became effective on July 1, 2011, and are commonly known as this state's "stand your ground law." State v. Younger, *unpublished opinion*, No. 116, 441 (Feb. 16, 2018).

Kansas Statutes Annotated 21-5231 (2016 Supp.) **Immunity from Prosecution**, reads,

- (a) A person who uses force which is subject to the provisions of K.S.A. 21-5226, and amendments thereto, is justified pursuant to K.S.A. 21-5222, 21-5223 or 21-5225, and amendments thereto, is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer who was acting in the performance of such officer's official duties and the officer identified the officer's self in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer.

Kansas Statutes Annotated (2016 Supp.) 21-5222, **Defense of A Person, . . . no duty to Retreat**, reads,

- (a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
- (b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes that such use of force is necessary to prevent imminent death or great bodily harm to such person or a third person.

Kansas Statutes Annotated (2016 Supp.) 21-5223, **Defense of Dwelling, . . . no duty to Retreat**, reads,

- (c) A person is justified in the use of deadly force to prevent or terminate unlawful entry into or attack upon any dwelling, place of work or occupied vehicle if such person reasonably believes that such use of force is necessary to prevent imminent death or great bodily harm to such person or another.

Kansas Statutes Annotated (2016 Supp.) 21-5224, **Use of Force; presumptions**, reads,

- (a) . . . a person is presumed to have a reasonable belief that deadly force is necessary to prevent imminent death or great bodily harm to

such person or another person if:

- (1) The person against whom the force is used, at the time the force is used:
 - (A) Is unlawfully or forcefully entering or has unlawfully entered and is present within, the dwelling, place or work or occupied vehicle of the person using the force; or
 - (B) has removed or is attempting to remove another person against such person's will from the dwelling, place of work or occupied vehicle of the person using the force; and
- (2) The person using the force knows or has reason to believe that any of the conditions set forth in paragraph (1) is occurring or has occurred.

No such presumption of reasonableness exists if the person utilizing force does so against a law enforcement officer per K.S.A. 21-5224(b)(4):

- (b) The presumption set forth in subsection (a) does not apply if, at the time the force is used:

. . . (4) the person against whom the force is used is a law enforcement officer who has entered or is attempting to enter a dwelling, place of work or occupied vehicle in the lawful performance of such officer's lawful duties, and the person using force knows or reasonably should know that the person who has entered or is attempting to enter is a law enforcement officer.

On March 10, 2017, in State v. Hardy, 305 Kan. 1001, 390 P.3d30 (2017), the Kansas Supreme Court recognized that immunity granted by K.S.A. 21-5231 is distinct from self-defense, citing with approval the dissent in State v. Evans, 51 Kan.App.2d 1043 (2015):

Self-defense and immunity are clearly distinct concepts. If immunity were the same as self-defense, there would have been no need to adopt a specific immunity statute because K.S.A. 2014 Supp. 21-5222 would have sufficed. Perhaps most importantly, because K.S.A. 2014 Supp. 21-5231 grants immunity from arrest and prosecution rather than a mere defense to liability, it is effectively lost if a case is erroneously permitted to go to trial. [citation omitted] . . . [a] prosecutor must rebut a claim of statutory immunity before the case can go to trial. Hardy, 305 Kan. at 1009-1010.

B. Use of Force During Arrest

Kansas Statutes Annotated 21-5227 (formerly 21-3215), Use of Force; law enforcement officer making an arrest, States:

“A law enforcement officer, or any person whom such law enforcement officer has

summoned or directed to assist in making a lawful arrest need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. Such officer is justified in the use of any force which such officer reasonably believes to be necessary to effect the arrest and the use of any force which such officer reasonably believes to be necessary to defend the officer's self or another from bodily harm while making the arrest. However, such officer is justified in using deadly force only when such officer reasonably believes that such force is necessary to prevent death or great bodily harm to such officer or another person, or when such officer reasonably believes that such force is necessary to prevent the arrest from being defeated by resistance or escape and such officer has probable cause to believe that the person to be arrested has committed or attempted to commit a felony involving death or great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that such person will endanger human life or inflict great bodily harm unless arrested without delay."

CONCLUSION

On August 7, 2017, Officer 2 exercised deadly force resulting in the death of Jose Ortiz.

Under K.S.A. 21-5222(b), a person may employ deadly force when the person reasonably believes that deadly force is necessary to prevent imminent risk of great bodily harm to another. Under K.S.A. 21-5223(b), a person may employ deadly force to "terminate" an attack on any dwelling, when the person reasonably believes deadly force is necessary to prevent death or great bodily harm to another.

Since 2011, under Kansas law, one who acts in defense of himself or to protect a third party is immune from prosecution. See K.S.A. 21-5231. Meaning, a person may not be charged, prosecuted (or subsequently sued) unless the state can establish that they were not acting reasonably under the circumstances. In Graham v. Connor, the United States Supreme Court made clear that assessment as to the reasonableness of an officer's decision to utilize deadly force must be made within the context in which the officer found himself – not from the perspective of "20/20 hindsight."

The investigation established that Jose Ortiz held a female hostage at knife point and failed to respond to officers' repeated requests to let her go. The actions of Jose Ortiz, who was armed with a knife and had bound the female victim, constituted a threat to use force

on another (the female victim) and that force was likely to cause great bodily harm or death to the female victim. The Officer #2 reasonably believed Ortiz posed an imminent lethal threat to the female victim.

Under Kansas law and the facts of the case, I conclude that no criminal charges will be filed against the officer.

A handwritten signature in black ink, appearing to read "Marc Bennett". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

District Attorney Marc Bennett
*18th Judicial District of
Kansas*