



**For Immediate Release  
October 5, 2020**

District Attorney Marc Bennett has completed the review of the use of deadly force that resulted in the death of Fred L. Burton. The incident occurred on May 23, 2019 at 727 West MacArthur, in Wichita, Sedgwick County, Kansas.

**SCOPE OF REPORT**

This report details the findings and conclusions limited specifically to criminal liability of the two officers employed by the Wichita Police Department who shot Mr. Burton at 727 West MacArthur on May 23, 2019 .

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 Wichita Police Department, 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 law enforcement officer(s) or citizen(s) had behaved differently in the moments leading up to the fatal use-of- force may not be 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.

## SUMMARY

At 1:55 a.m. on May 23, 2019, 911 received calls from residents of the apartment adjoining Mr. Burton's apartment at 727 W. MacArthur Road. The calling parties (Witness 1 and Witness 2), reported an "explosion." The first responding officer made contact with the calling parties and observed what the officer recognized to be multiple bullet holes in the sheetrock of their apartment through an interior wall they shared with apartment #613. The officer removed the calling parties from their residence. Other officers arrived and heard more gunshots coming from within #613. They began to wake occupants of other apartments within the complex to remove them to safety. While escorting residents to the north of the complex, officers continued to hear additional gunshots.

The WPD SWAT team was deployed to the location to attempt to contact the occupant of apartment #613, later identified as Fred Burton. A negotiator used a public address system to ask Mr. Burton to answer his cell phone. Mr. Burton came to the sliding glass door of his apartment, extended his middle finger and exposed himself to officers. The apartment manager shared Mr. Burton's phone number with law enforcement who attempted multiple times to call and text Mr. Burton. After multiple unsuccessful attempts to reach Mr. Burton by phone, smoke rounds were fired inside apartment #613 in an attempt to remove Mr. Burton. He was seen by officers with a long gun inside his apartment, shooting at the SWAT team members. They returned fire, striking Mr. Burton. The SWAT team made entry into the apartment and located Mr. Burton, deceased.

## INVESTIGATION

The two Wichita Police Department officers involved in the incident were removed from the area. The firearms issued to Sergeant 1 and Detective 1 were secured. Law enforcement officers at the scene gave voluntary statements to investigators with the Wichita Police Department and the Kansas Bureau of Investigations. The statements of nine officers and one medic with the Wichita Fire Department are included herein.

Civilian witnesses were interviewed by detectives with the Wichita Police Department and agents with the Kansas Bureau of Investigation. The statements of four eyewitnesses are included herein.

Crime Scene Investigators from the Wichita Police Department processed the scene. Evidence was submitted to the Kansas Bureau of Investigation for examination.

## CIVILIAN WITNESS STATEMENTS

Investigators interviewed several witnesses on scene and later at the Wichita Police Department.

**Witness 1** was interviewed by a detective with the Wichita Police Department. The interview was recorded and transcribed.

Witness 1 resided in a ground-level apartment within the larger complex at 727 W. MacArthur Road. He had lived at that residence for approximately 1 & 1/2 years, and shares that apartment with his partner, Witness 2.

Witness 1 said he was in his residence and was awakened shortly before 2:00 am on May 23, 2019 to a noise. He confirmed by looking at his phone during the interview that he called 911 at 1:54 a.m.

Witness 1 said he first believed the noise had come from the outside of his apartment, so he grabbed a flashlight and went outside, but saw nothing. Witness 1 said he returned to his apartment and noticed a hole in the wall of his dining room/kitchen area that adjoins his apartment with what he described as Apartment #613.

Witness 1 told the detective that after seeing the hole in the wall, he went and woke up Witness 2. As Witness 2 was getting up, Witness 1 heard what he first described as an "explosion." He later clarified that he had heard a gunshot. He determined it was a gunshot due to the sound and the holes he observed in his wall. Witness 1 said he immediately called the police.

Witness 1 told the detective that when he first looked at the wall, he saw two small holes near the baseboard and when he and Witness 2 heard the next shot, he observed a hole in the same wall near the ceiling above his head. Witness 1 said he was concerned for his

safety, so he and Witness 2 got dressed and left the apartment. Witness 1 was asked if he believed that the shots could have come from the apartment above him. Witness 1 said he believed the shots came from the ground level apartment adjoining his, which would be #613. Witness 1 clarified that he did not know the person who rented that apartment.

Witness 1 waited outside until police arrived. He heard additional shots while outside, both before the police arrived and after. Witness 1 said that when an officer arrived, he took the officer to his apartment, and the officer identified the holes in his wall as being from gunshots. He said he and the officer backed out of the apartment to a place of safety. Witness 1 said that, besides the sound of gunshots, he did not hear any sounds associated with any type of disturbance such as screaming or yelling. Witness 1 went on to say that after the officers arrived, there were more gunshots he described as sporadic “bursts.” Witness 1 stated that at approximately 4:00 am, he was encouraged to leave the area after SWAT arrived, so he called a friend who came and picked him up.

**Witness 2** was interviewed by a detective with the Wichita police Department. The interview was recorded and transcribed.

Witness 2 resides at 727 W. MacArthur Road Apartment #607. He had lived at this residence for approximately one and a half months. He shares the apartment with his partner, Witness 1.

Witness 2 told the detective he was asleep in his apartment when he was partially awakened by a noise at around 2:00 am on that morning, May 23, 2019. He was not sure what the noise was, at first thinking something had fallen over.

Witness 2 said his partner (Witness 1) then woke him up after Witness 1 had gotten up to check out the noise. Witness 2 said Witness 1 found a hole in the wall and got him up to look at it. Witness 2 said that while looking at the hole in the wall a shot was heard, and he saw a second hole in the same wall and plaster debris fell on their table. Witness 2 said the wall with the holes is their kitchen wall that adjoins to the ground floor apartment next to theirs.

Witness 2 said that after hearing the second shot and seeing the holes in the wall, he and Witness 1 went to the bedroom and called 911, gathered some clothes and left the apartment. Witness 2 believed he heard a couple of more shots after leaving the apartment and before the police arrived. Witness 2 also heard several shots after the police arrived. Witness 2 said that after the first officer arrived, he and witness 1 went back to their apartment with the officer. He said they gave the officer permission to go into the apartment to examine the holes. Witness 2 stated that he waited outside while the officer was in their apartment. He and Witness 1 were then moved to safety.

Witness 2 stated that he never saw anyone shooting. He also did not hear any type of audible disturbance. He did not believe he and Witness 1 were being specifically targeted, but that the person was shooting randomly. He said he does not know the person in the apartment adjacent to his, nor does he know any other resident in the complex.

**Witness 3** was interviewed by a detective with the Wichita Police Department. The interview conducted by phone was recorded and transcribed. Witness 3 was a family member of Mr. Burton, and was called by the WPD detective to obtain information regarding Mr. Burton as this incident was unfolding.

Witness 3 informed the detective that Mr. Burton had been diagnosed with paranoia and depression. Witness 3 said he had previously been hospitalized for these issues. She added that he was under a doctor's care and had recently undergone changes to his medication.

Witness 3 said that Mr. Burton was often paranoid about someone trying to break into his apartment, so he would barricade his door with a carpet stretcher. She told the detective that when Mr. Burton has a mental breakdown, he cannot be reasoned with and these breakdowns can last for several days. Witness 3 said Mr. Burton had been the victim of a violent offense as a child, committed by a perpetrator who held Mr. Burton at gunpoint. She said that even though the perpetrator had been dead for several years, Mr. Burton believed that man would return and re-victimize him.

A lieutenant with police department later spoke with Witness 3 at 727 W. MacArthur.

That conversation was memorialized in the lieutenant's report. Witness 3 told him she thought she and her family had removed all the guns from Mr. Burton's apartment prior to this incident. She said he had recently had his medication changed, and when that occurs, he sometimes sees things and believes the police are following him and are in his walls.

Witness 3 told the lieutenant Mr. Burton had also suffered from recent health issues that caused him pain management issues.

**Witness 4** was interviewed by an officer with the Wichita police Department. The following was taken from that officer's report.

At the time of this incident, Witness 4 was the apartment manager at 727 W. MacArthur Road. She was contacted on scene by an officer after he responded to the 911 call to that complex.

According to the officer's report, Witness 4 said the occupant of apartment #613 (Mr. Burton) believed the police were in his walls and would try and kill him. She stated this occurred when he would have psychotic episodes and his medications needed attention. She told the officer that she also knew about the occupant of apartment #613 had been the victim of a violent crime as a child. She told the officer that Mr. Burton had a "safe word" which she had used in the past to contact him in order to get him "back to reality."

Witness 4 told the officer she was aware that Mr. Burton had been diagnosed with schizophrenia, Bipolar disorder, PTSD, and Crohn's disease. She stated that she was not aware that he had firearms in his residence.

The officer passed the information provided by Witness 4 to the primary negotiator in the command post.

## LAW ENFORCEMENT WITNESSES

The law enforcement officers involved in the incident gave voluntary statements to investigators:

**Sergeant 1**, a sergeant with the Wichita Police Department with 13 years of experience at the time, was interviewed by a detective with the Wichita Police Department and a Special Agent with the Kansas Bureau of Investigations. At the time of this incident, Sgt. 1 was assigned as a Patrol supervisor and was also a member of the WPD SWAT team. Sgt. 1 had been a member of the SWAT team in excess of nine years.

At approximately 2:30 am, he was notified that he was to respond 727 W. MacArthur Road because the SWAT team had been requested to that location. Upon arrival, Sgt. 1 contacted with the SWAT commander and was told an individual had been firing a weapon from inside apartment #613 and that bullets had gone through the wall of an adjacent apartment and bullets had possibly been shot through the sliding glass door on the front of the suspect's residence. Sgt. 1 was told that the person in the apartment was believed to be alone. Sgt. 1 began assisting other SWAT members who were using an armored vehicle to remove patrol officers who had initially secured a perimeter around the apartment. The officers were replaced by SWAT team members.

Sgt. 1 was in an armored vehicle at the front of apartment #613. Sgt. 1 said there was an entry door to the apartment and a sliding glass door south of the entry door. As neighboring residents continued to be evacuated, he could hear shots being fired from the apartment.

Sgt. 1 was concerned for a resident that lived in an apartment above the target apartment, who could not get out. An armored vehicle was positioned west of the sliding glass door of apartment #613, and he provided cover while other SWAT team personnel removed the woman from the upstairs apartment using ballistic blankets. The armored vehicle he was in was then re-positioned at an angle to the front (west) of apartment #613 so the lights from the vehicle could shine on the windows and doors of the front of the residence to enhance officer's ability to see in the room and to limit the vision of the person inside that apartment.

One of the SWAT team hostage negotiators then used a public address system to call out to the individual in the apartment, announcing "Police Department" and called the

individual by name, telling him to turn on his cellphone. The negotiator used the “safe word” provided by the apartment manager, Witness 4. This was a word she explained that had been used in the past to calm Mr. Burton when he had experienced a mental issue.

Sgt. 1 said Mr. Burton then came to the sliding glass door and showed both of his hands through the blinds on the door and began shouting something. Sgt. 1 could see he was shirtless and wearing shorts.

The negotiator gave commands over the P.A. for Mr. Burton to come out of the apartment. Mr. Burton responded by extending his middle finger and exposing himself to the officers before he walked away from the sliding glass door. The negotiator continued to ask Mr. Burton to turn on his cell phone so they could communicate.

The SWAT commander determined that smoke canisters would be deployed, since the individual would not communicate with them or leave the residence. Sgt. 1 and other SWAT team members approached the apartment from between the two armored vehicles, using ballistic shields (bunkers) as cover. Sgt. 1 provided cover with his rifle as the team moved forward. Sgt. 1 ordered a smoke round be fired through the sliding glass door in order to shatter the glass and fill the living room with smoke. He said that several rounds were fired at the sliding glass door, which caused a spider-web pattern but did not initially penetrate the door.

Sgt. 1 said that from inside the apartment, a “barrage” of gunfire was then directed toward him and the other SWAT team members who were deploying the smoke canisters. Sgt. 1 counted six bullet holes in the sliding glass door of apartment #613. He and the SWAT team members “fell back” from the apartment in reaction. Some of the rounds fired by Mr. Burton struck the armored vehicle the officers utilized for cover. Sgt. 1 did not return fire because he could not see the individual, due to blinds on the sliding glass door, and was uncertain as to the exact location of other officers.

Sgt. 1 said that after a short period of time, during which no additional shots were fired from within the apartment, the officers successfully fired a smoke canister through the



sliding glass door, which shattered more of the glass. Sgt. 1 could then see the male armed with a rifle in what he described as a “port arms” position (two hands on the rifle with the barrel pointing up) inside the living room. Officer 1 directed that lights from the armored vehicles be turned off because they were restricting his vision to see the subject. Sgt. 1 then saw the male kneeling in the living room with the rifle still in the “port arms” position, then move to sit on a couch.

Sgt. 1 saw Mr. Burton hold up his right hand and shake it, while “bobbing” his head and yelling something the Sgt. could not hear. Mr. Burton then stood up with the rifle and pointed it at the sliding glass door in the direction of the officers. Sgt. 1 responded by taking his rifle off of safety and firing one to two rounds. Sgt. 1 could not tell if Mr. Burton was struck, but he (Mr. Burton) reacted by turning and pointing the rifle directly at the officers.

Sgt. 1 could see Mr. Burton, “squared up 100% with me. I can see him with the rifle, and he’s – he’s looking right at me.” Because Mr. Burton was pointing the rifle directly at him, Sgt. 1 fired additional times at Mr. Burton which caused him to stumble back. Sgt. 1 fired two more rounds and saw Mr. Burton immediately drop behind the couch. Sgt. 1 believed he fired a total of five to six shots. He believed that Detective 1 had also shot.

A ram located on the front of one of the armored vehicles was used to breach the front door of the apartment. Once that was done, Sgt. 1 could see Mr. Burton’s legs from behind the couch. Sgt. 1 and other SWAT team members entered the residence and found Mr. Burton on the floor by the couch with a rifle by his side. A medic assigned to the SWAT team pronounced Mr. Burton deceased. Mr. Burton was the only person in the apartment.

**Detective 1** had been employed by the Wichita Police Department for 13 years. At the time of this incident, Det. 1 had been assigned to the WPD SWAT team over 4 ½ years. His role on the team was “Primary Ballistic Shield Operator.”

Det. 1 received a page from 911 dispatch at 2:34 a.m. on May 23, 2019 while he was off duty. He was instructed to respond to 727 W. MacArthur Road #607. No details as to the

nature of the call were initially provided.

Det. 1 arrived at the location and was initially briefed that there had been an “explosion,” but later learned shots had been fired from inside Apartment #613 into the adjacent ground floor apartment. He was provided with the name of a suspect. A perimeter had already been set up around the subject’s apartment and evacuations were in progress from other apartments. Det. 1 heard radio traffic that one of the armored vehicles positioned west of the apartment had been struck by a bullet and other officers had taken fire while evacuating people. Det. 1 could not hear the shots due to the noise of the engine of the armored vehicle behind which he had taken cover.

Det. 1 said a woman in the apartment directly above apartment #613 needed evacuation. SWAT team members used ballistic blankets, and Det. 1 utilized his ballistic shield to safely extract the woman from the apartment. He assisted with other evacuations by going door to door and providing cover with his ballistic shield to remove residents to the armored vehicles. Det. 1 said the subject, later identified as Mr. Burton, fired more rounds to the east from apartment #613, which Det. 1 thought was a reaction to officers banging on doors to evacuate other residents.

After the evacuations, a negotiator tried to communicate to Mr. Burton that they were the police and were not there to hurt him. Det. 1 heard the negotiator say they were not the voices in his head, that they wanted to resolve this peacefully and asked him to come out without any weapons. Det. 1 heard the negotiator use a “safe word,” which he assumed meant something to the suspect.

From his vantage point behind the armored vehicle, Det. 1 saw the male in apartment #613 come to the sliding glass door and put both his hands through the blinds showing his hands. He could see that the male was wearing shorts but not a shirt. The male looked like the person in a photograph he had seen of the suspect during the initial briefing. The male went back into the apartment out of view, then came back to the sliding glass door, and again showed his hands. He seemed more agitated this time and exposed his genitalia and gave officers “the bird.”

Plans were made to shoot smoke canisters into the apartment. Det. 1, Sgt. 1 and other SWAT team members moved up to apartment #613 using an armored vehicle and his ballistic shield as cover. The first two smoke canisters fired at the apartment did not penetrate. Subsequent canisters did penetrate the sliding glass door into the apartment.

Det. 1 estimated that three to four seconds later, gunfire came from the sliding glass door. Det. 1 ducked behind his ballistic shield, then looked back and saw six to seven bullet holes in the sliding glass door. He believed the shots were directed at the officers and felt he and/or other officers were in genuine danger of being shot. He did not fire his handgun at that time, and did not believe anyone else fired back at the suspect at that time. Instead, the team of officers were able to “pull back” and get behind the armored vehicle.

Later, Sgt 1 moved forward, using the armored vehicle as cover, after other officers reported seeing Mr. Burton inside the apartment. Det. 1 went with him to provide additional cover with the ballistic shield. Sgt. 1 said he saw someone, but Det. 1 could not initially see anyone due to glare and his vantage point. He did finally see a male figure moving inside the apartment. Det.1 said another officer reported seeing the suspect holding a rifle and then heard Sgt. 1 confirm that he also saw the man with a rifle.

Det. 1 could then see the upper torso of the male holding what he believed to be a lever action rifle and pointing it at the sliding glass door, in their direction. Det. 1 then heard a shot and then a second shot, though he did not know if Officer 1 fired or the suspect. When he looked from around the ballistic shield, he saw Sgt. 1 firing his rifle, and he could see the muzzle flashes in his face. Det. 1 saw Mr. Burton walking back and forth in the apartment with the rifle up. Det. 1 was concerned they were exposed and likely to “take a round at any time.” Det. 1 fired one round at the suspect utilizing his handgun equipped with a laser sight. Det. 1 said Mr. Burton was shooting back and reloading. Det. 1 again saw the rifle and fired his handgun a second time with two rapid shots at the suspect. He believed other officers were also firing. He saw Mr. Burton fall.

Det. 1 said that after the suspect fell, officers breached the door with one of the armored vehicles. Det. 1 then entered the residence with Sgt. 1 and other team members. He saw a rifle on the floor near Mr. Burton, who suffered what appeared to be five or six gunshot wounds. After clearing the residence, as he was exiting Det. 1 saw a letter on a dresser by the front door with a box of ammunition on it. The letter appeared to be dated May 21. He recalled a certain line which indicated Mr. Burton was apologizing to a family member, "I'm sorry for this and that and I'm sorry I'm your [stating his relationship to the intended recipient]. . ." Det. 1 did not read the entire letter.

**Officer 1** was interviewed by a detective with the Wichita Police Department. The interview was recorded and transcribed. At the time of this incident, Officer 1 had been employed with the Wichita Police Department for approximately nine years. She was assigned to the Violent Crimes Community Response Team and had been a member of the WPD SWAT team and had been on the SWAT team for approximately 15 months.

Officer 1 received a SWAT callout at approximately 2:30 am on May 23, 2019 to respond to 727 W. MacArthur. She got one of the SWAT armored vehicles and responded to that location. A second armored vehicle was also on scene. Officer 1 used the armored vehicle to provide cover for officers evacuating residents from nearby apartments. Officer 1 heard reports over the radio that there had been some shots fired during this, but she could not hear them from inside the vehicle.

Officer 1 said after residents had been evacuated, commands were given over a P.A to the occupant to come out of apartment #613. Shortly thereafter, Officer 1 saw a male inside #613 show his hands through the blinds of the sliding glass door. She could see the man was bare-chested and wearing a colostomy bag. She saw the male pulling on the front of his pants as if to expose himself. Officer 1 did not see the man with a weapon. He then went back into the apartment and later returned to the glass door and "flips us off."

Officer 1 said the decision was made to shoot smoke canisters into the apartment. She used her armored vehicle to provide cover for the officers who were going to be deploying the canisters. Officer 1 watched as multiple rounds of smoke canisters were fired at the

sliding glass doors. After several attempts, they were able to penetrate the door. At that point, she said there was a “burst of gunfire” coming from out of apartment #613. She could see holes in the glass as bullets came through the sliding glass door. Officer 1 counted six rapid shots and heard one round strike the armored vehicle she was in.

Officer 1 stated after the shooting stopped the team decided to put more smoke into the apartment. After approximately 30 seconds, more smoke was fired into the apartment, and she heard shooting. From inside the armored vehicle, she could not tell if it was the officers shooting or the suspect. Officer 1 could tell that more than one gun was being fired at the same time.

After the scene had been secured, she examined the armored vehicle that she had been driving and found what she believed to be a bullet strike on the front of the vehicle. She said the bullet had not penetrated the armor but had chipped paint.

**Officer 2** was interviewed by a detective with the Wichita Police Department. The interview was recorded and transcribed. At the time of this incident, Officer 2 had been employed by the Wichita Police Department for over eight years. Prior to that, he worked for the Sedgwick County Sheriff's Office. At the time of this incident, he had been a member of the SWAT team for approximately two years and three months.

Officer 2 received a SWAT callout at approximately 2:34 am on May 23, 2019 to respond to 727 W. MacArthur Road. He drove an armored SWAT vehicle to that location. Once there, he was told that a person had been shooting from an apartment.

Officer 2 helped officers by using his armored vehicle as cover while evacuations of other residents took place. Officer 2 heard a negotiator using a P.A. to try to get the person to come out of the apartment, but no contact was made with the occupant of the apartment.

Officer 2 said the first time he saw the suspect was when the man came to the sliding glass door and moved between the sliding door and the “linear curtains.” Officer 2 saw the man was shirtless. The man was “messaging with himself” in his waist area, and then pounded

on his chest. The man then came to the glass door and “flipped us off.”

Officer 2 said smoke canisters were fired into the apartment. After several unsuccessful attempts, the smoke penetrated the sliding glass door. Officer 2 then heard gunshots coming from the apartment. He stated he heard “boom, boom, boom, boom” and saw glass breaking and “spurting out” from the apartment. Officer 2 said he could “recognize that’s bullets coming this way.” His vehicle and Officer 1’s armored vehicles formed a “V” facing the sliding glass door. Officer 2 heard the distinct sound of metal being hit, and he believed that either his armored vehicle or Officer 1’s vehicle had been struck by gunfire.

Officer 2 said the officers who had fired the smoke were between the two armored vehicles, and he saw one SWAT officer react as if he’d been shot. Officer 2 then saw the officers get behind cover. Officer 2 saw the male return to the glass door and make another obscene gesture toward the officers and then went back into the apartment where he got behind a piece of furniture. Officer 2 could see the barrel of a gun in the man’s possession, pointing up. Both armored vehicles had spotlights shining into the apartment to limit what the suspect could see. Officer 2 said this limited his vision into the apartment as well.

Officer 2 heard Sgt. 1 fire rounds from his service rifle. He also heard a handgun fired from Det. 1. Officer 2 said when Sgt. 1 fired, he saw the suspect fall behind a piece of furniture.

A ram was placed on an armored vehicle and the door to the apartment was breached. Officer 2 observed officers enter the apartment, and saw medics enter to check the male.

**Officer 3** was interviewed by a detective with the Wichita Police Department. At the time, Officer 3 was a member of the WPD SWAT team. On May 23, 2019 at 2:34 am, he received a SWAT callout page to respond to 727 W. MacArthur Road. Officer 3 retrieved an armored vehicle and proceeded to that location. Officer 3 was briefed upon his arrival.

Officer 3 initially worked the perimeter, picking up patrol officers and dropping off SWAT officers. He parked his vehicle toward the rear of the suspect's apartment. He described at one point approximately 10 to 12 shots came from the rear of the apartment, through the wall.

Officer 3 heard louder gunshots and believed that SWAT officers had fired their weapons. Officer 3 heard Sgt. 1 say over the radio that officers had been involved in a shooting and that the suspect was down behind a couch. Officer 3 said his vehicle was then used with a boom attached to the front, to make entry into the apartment. After the door came down, he could see legs from the knees down on the ground with a black long gun by the man's knee.

**Officer 4** was interviewed by a detective with the Wichita police Department. At the time, Officer 4 was a member of the Wichita Police Department SWAT team.

Officer 4 received a SWAT team page while off duty to respond to the apartment complex at 727 W. MacArthur Road. Upon his arrival, he was briefed that a person in apartment #613 had been firing a gun from that apartment. He positioned himself where he could observe the front of apartment #613.

Through the use of the magnified optics on his rifle, Officer 4 observed what appeared to be a bullet hole in the red front door of apartment #613. This hole appeared to be the result of a bullet exiting through the door from the inside of that apartment.

Officer 4 then moved to the inside of one of the armored vehicles that arrived. He took a position in the turret of the vehicle in order to observe the apartment. Officer 4 said that at one point, while the negotiator was trying to communicate with the male inside apartment #613, he observed a male in that apartment come to the sliding glass door shirtless. He described that the male had facial hair. He observed the male putting his hands down the front of his pants. Officer 4 said the man made an obscene hand gesture and then went out of his view. Officer 4 stated that was the only time he could see the suspect.

Officer 4 watched as fellow SWAT team members fired smoke canisters into the apartment, some penetrating the glass and others not. At that point, several gunshots were fired from inside apartment #613 in the direction of him and the other SWAT team members. He estimated that six to eight shots were fired at them from inside the apartment. He estimated he was 30 feet away from the front of apartment #613 when these shots were fired by the occupant.

From his vantage point, he could not see the person firing at them, but he could feel he was being struck with debris, he believed to be glass, from the volley of shots that came from the apartment. Officer 4 said a second round of smoke was shot into the apartment, after which he heard several more shots being fired. He believed some of the shots were being fired by SWAT team members.

The door to apartment #613 was then struck with a ram from an armored vehicle. He saw the victim on the ground at that point with a “long gun” lying between the door and the suspect.

**Officer 5** was interviewed by a detective with the Wichita Police Department. At the time, he had been employed by the Wichita Police Department for approximately 18 years, and was assigned to the Violent Crimes Community Response Team. He was also assigned to the WPD SWAT team for approximately four years and eight months

Officer 5 said that while off duty he received a SWAT callout page to respond to 727 W. MacArthur Road. Upon his arrival, he indicated that he received a briefing that an individual inside apartment #613 had been firing a gun from that apartment.

Officer 5 was assigned to be part of the QRF (Quick Reaction Force) team. His assignment was to use “less lethal” force. He described that after his arrival he heard at least one shot being fired from apartment #613.

Officer 5 said after neighboring apartments had been evacuated, the negotiator tried to



make contact with the individual inside apartment #613. Officer 7 and other SWAT team members were watching the front of apartment #613 with the use of lights from the armored vehicles. He was 20 to 25 feet away from the front of the apartment when he observed a male come to the sliding glass door of apartment #613 and move the blinds. He could see a male, who was shirtless, and wearing only underwear. Officer 5 saw the man expose himself to the officers and then go back into the apartment out of view.

Officer 5 was directed to fire smoke into the apartment. He and other SWAT members proceeded toward the front of apartment #613 using one of the armored vehicles for cover. It had been raining, and the armored vehicles were sinking in the ground. He and the other QRF team members left the cover of the armored vehicle and used the ballistic shield of one of the officers to get closer.

His purpose was to introduce chemical munitions into the apartment but also to shatter the glass to allow officers to see into the apartment. The canisters were aimed high in order to avoid hitting the person inside the structure and also to shatter the glass at the top to have it fall down.

After several attempts, a canister struck the glass hard enough to cause the glass to shatter. He fired a total of five canisters at that time.

Officer 5 said he was in the process of loading another canister into weapon, when he looked at the window to determine where he was going to aim. He heard and saw approximately six shots being fired from inside apartment #613. He could see muzzle flashes from inside the apartment and bullets coming through the glass door in their direction. Officer 5 said "I was being fired at . . . I just saw the flashes and then you're hearing it and seeing it so slow . . ."

He and Sgt. 1 and Det. 1 "fell back" to cover. Officer 5 did not believe anyone from the SWAT team returned fire. Officer 5 did get a brief look at the individual who had just shot at them from apartment #613. He saw the male moving, possibly pacing and saw a "long gun" in his hand that he believed to be a rifle.

Officer 5 went to the armored vehicles looking for more smoke canisters. He heard a loud shot and knew it was a SWAT officer who fired. He saw Sgt. 1 firing his rifle and Det. 1 firing his handgun.

More of the glass door to the apartment had been shattered after the officers fired. This allowed them to see better into the apartment. Officer 5 could see the door to the apartment had been barricaded by a couch, so entry using a robot or K-9 could not happen. He heard the officers say they could see legs. Officer 5 could not see this from his vantage point.

After the ram was used to breach the door, he and other SWAT team members entered the apartment behind Det. 1's ballistic shield for cover. Officer 5 saw the man, later identified as Mr. Burton, in a hallway by the kitchen in the living room area with a "long rifle" by his side. He could see Mr. Burton had sustained gunshot wounds and appeared to him to be deceased. Officer 5 continued to clear the residence to make sure no one else was in the apartment. He then protected the scene so that evidence would not be disturbed.

**Detective 2** was interviewed by an agent with the Kansas Bureau of Investigation. At the time of this incident, Det. 2 was assigned to the Gang Unit and was also assigned as a hostage negotiator with the WPD SWAT team. Det. 2 had been employed with the WPD over 16 years and had been a hostage negotiator for 2 ½ years.

Det. 2 received a SWAT page to respond to 727 W. MacArthur Road. Another negotiator was on scene and that negotiator would be designated the primary negotiator, and he (Det. 2) would be the secondary negotiator.

Det. 2 learned the name of the suspect was Fred Burton and that Mr. Burton had been diagnosed with PTSD and schizophrenia. Det. 2 learned Mr. Burton had established a "safe word" with the apartment manager so that if he began having a psychotic episode this safe word could be used so that he would know that it was a real person talking to him and not the voices in his head. Det. 2 learned Mr. Burton had a surgery scheduled in the

next few days, and the doctor had ostensibly warned him the surgery carried risk. He was also told that this person had attempted suicide in the past.

Det. 2 contacted COMCARE mental health services to see if they had information on this subject in question. Det. 2 was told by COMCARE that this person was known to have weapons in his house and on his person, and that COMCARE employees were not allowed to visit the man alone. Det. 2 was told Mr. Burton suffered from PTSD, Major Depression and Psychotic features and episodes.

Det. 2 got into one of the armored vehicles in the front of apartment #613. The primary negotiator had been trying unsuccessfully to contact Mr. Burton by phone. Det. 2 tried to contact Mr. Burton using the PA system in the armored vehicle. He told Mr. Burton his own first name and that he was with the Wichita Police Department and that they were there to help him and to come out of the apartment with his hands up and without any weapons. Det. 2 used the safe word given by the apartment manager so that Mr. Burton would know it was a real person talking to him.

Det. 2 said the man then came to the sliding glass door. He could see Mr. Burton was shirtless and that there was nothing in his hands. Det. 2 said that because a bush obstructed his view, he could not see the male below the waist. He said Mr. Burton went back into the apartment away from the door.

Det. 2 thanked the male and again said he was with the Wichita Police Department. He told him over the PA that "I know that you're scared and you probably don't understand what's going on." Det. 2 tried to reassure Mr. Burton they were there to help him. He continued to give direction for him to go to the front door.

When smoke canisters were going to be introduced into the apartment, Det. 2 saw the round ultimately enter the apartment. He then heard six shots coming through the sliding glass door of the apartment. He could hear other officers saying that the male had a long rifle. He heard Sgt. 1 fire his rifle four or five times and saw Det. 1 fire his handgun into the apartment though he did not know how many times. He heard Sgt. 1 say the subject

was down. He then saw another armored vehicle break down the door to the apartment with a ram.

**WFD Medic 1** is a tactical medic assigned to the Wichita Police SWAT team. He was interviewed by a detective with the Wichita Police Department.

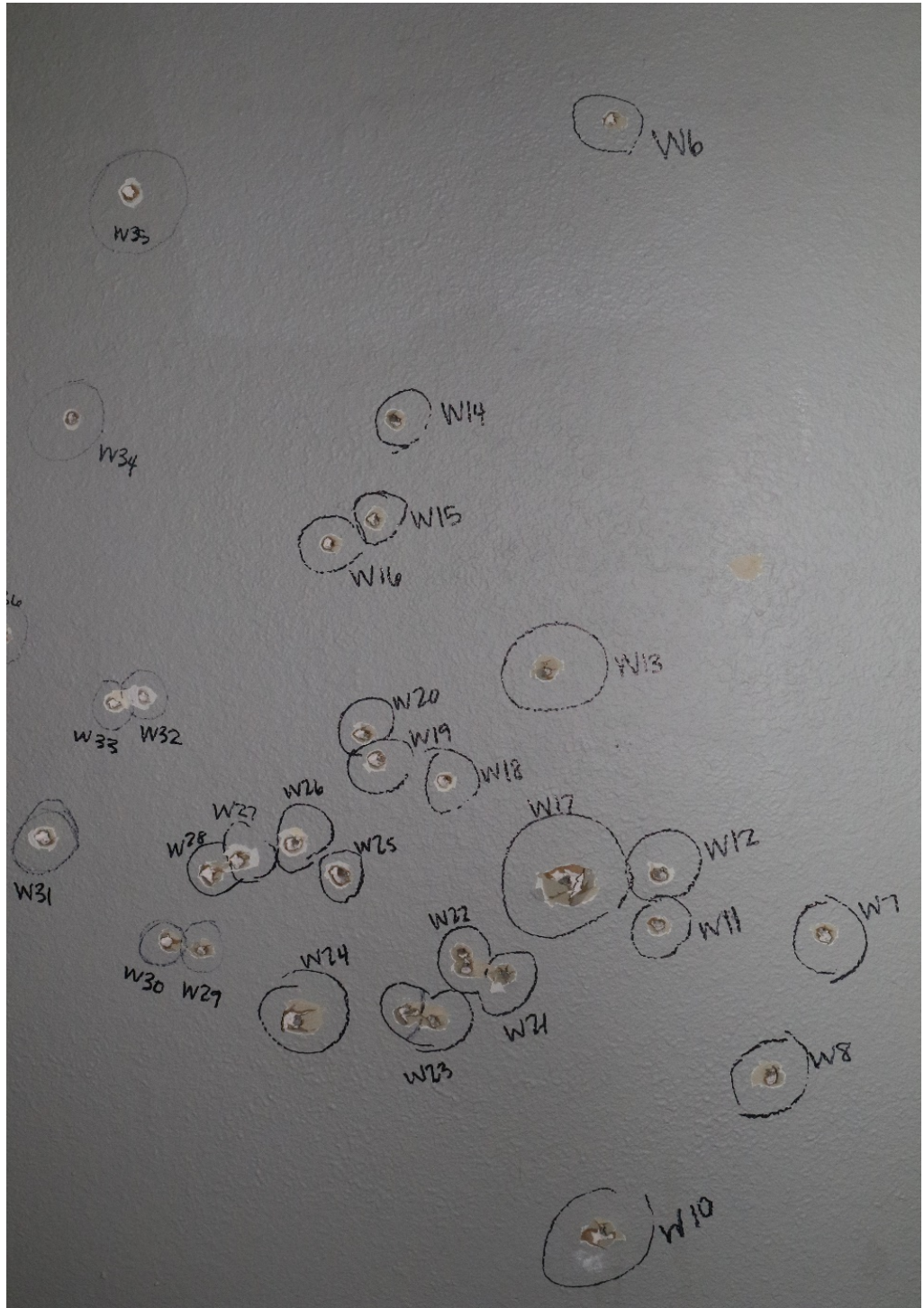
On May 23, 2019, Medic 1 received a page to respond to 727 W. MacArthur Road. He received his page after the other SWAT team members received their page. Medic 1 said when he arrived, he got in the back of one of the armored vehicles. He had limited vision from this vantage point. He did see the suspect, Mr. Burton, briefly through the windshield of the armored vehicle one time and saw that the subject had no shirt on.

He heard shots being fired and could see Mr. Burton fall or dive down. Medic 1 later accompanied the SWAT team into the apartment where he observed a male lying on his back on the floor. He said the man was wearing shorts, a colostomy bag and was bare chested and had a red shirt on that was pulled back behind his neck.

Medic 1 assessed the male and observed a gunshot wound to his jaw, and to the left side of his chest. Medic 1 determined that Mr. Burton was dead.

## CRIME SCENE INVESTIGATION

Wichita Police Department 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 a Remington "Speedmaster" .22 rifle and 83 fired .22 cartridge casings inside apartment #613.



Interior wall of calling party's apartment showing over 30 bullet holes from Mr. Burton's apartment into their apartment.



**Armored vehicles utilized outside the apartment.**



Remington .22 "Speedmaster" Rifle located in Apartment of Mr. Burton.

## FORENSIC EVIDENCE & AUTOPSY RESULTS

The firearm evidence collected from Apartment #613 including a Remington "Speedmaster" .22 rifle; 83 .22 (fired) cartridge casings; two 9 mm casings from Det. 1's department-issued handgun, and ten .223 casings from Sgt. 1's department issued rifle, all of which were subsequently examined by the Kansas Bureau of Investigation.

An autopsy was performed on the body of Fred Burton on May 24, 2019, at the Sedgwick County Regional Forensic Science Center. The final autopsy report, dated May 25, 2019, determined that Mr. Burton died as a result of "multiple gunshot wounds." According to the autopsy, Mr. Burton sustained six "penetrating" gunshot wounds and four "perforating" injuries causing soft tissue damage. The toxicology report determined Mr. Burton had .15

mg/L methamphetamine in his blood and was positive for amphetamine.

## KANSAS LAW

In Kansas all persons, including law enforcement officers, are entitled to defend themselves and others against the use of unlawful force. K.S.A. 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. (2018 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. Barlow*, 303 Kan. 804 (2016); *State v. Younger*, unpublished opinion, No. 116, 441 (Feb. 16, 2018).

K.S.A. 21-5231 (2018 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.

K.S.A. (2018 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.

K.S.A. (2016~~8~~ 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.

K.S.A. 21-5230, addresses the **duty to retreat**,

“A person who is not engaged in an unlawful activity and who is attacked in a place where such person has a right to be has *no duty to retreat* and has the right to stand such person's ground and use any force which such person would be justified in using under article 32 of chapter 21 of the *Kansas Statutes Annotated*, . . . K.S.A. 2018 Supp. 21-5202 through 21-5208, 21-5210 through 21-5212, and 21-5220 through 21-5231, and amendments thereto.”

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**

K.S.A. 21-5227, 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 May 23, 2019, Sergeant 1 and Detective 1 utilized deadly force resulting in the death of Fred Burton.

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 himself or another.

Since 2011, under the Kansas stand your ground 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 Fred Burton fired dozens of rounds (over 30) through the interior walls of his apartment. When officers arrived and evacuated as many residents from the immediate area as possible, they attempted to contact Mr. Burton to convince him to leave his apartment unarmed. He responded with obscene gestures and refused to communicate further. After their efforts to convince Mr. Burton to surrender himself were unsuccessful, they introduced smoke into the apartment in order to force him to come out. He responded by firing his rifle multiple times at the officers. The officers returned fire, killing Mr. Burton.

Under these circumstances, the officers are immune from prosecution under Kansas law.

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

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*