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STATE ATTORNEY
NINTH JUDICIAL CIRCUIT
ORANGE AND OSCEOLA COUNTY, FLORIDA

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January 7, 2016

Sheriff Jerry Demings
Orange County Sheriff's Office
2500 West Colonial Drive
Orlando, FL 32804

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Professional Standards Division

Dear Sheriff Demings:

This letter details my review of the February 8, 2015, incident wherein Deputies Matthew Futch, Kristopher Lott, and Stephen Sherry engaged in a use of force that included the discharge of their agency firearms. This review is undertaken to determine whether or not criminal charges are an appropriate response to the use of force in this instance. This state's highest court has—in at least one instance—affirmed the criminal conviction of a law enforcement officer for what was deemed an unlawful use of force. *See State v. Cobb*, 376 So.2d 230, 232 (Fla. 1979). However, the appellate court directly governing the Ninth Judicial Circuit has questioned whether criminal charges are ever appropriate against a law enforcement officer who exercises his or her judgment in difficult and dangerous circumstances. *See State v. Kadet*, 455 So.2d 389, 390–91 (Fla. 5th DCA 1984). The issue in these instances is whether the law enforcement officer's use of deadly force was justified because he or she reasonably believed that force was necessary to prevent imminent death or great bodily harm to themselves or another. Fla. Stat. § 776.012(1)(2012). A comprehensive look at the facts of this incident results in the conclusion that Deputies Matthew Futch, Kristopher Lott, and Stephen Sherry's use of force was justified and appropriate in this instance.

On September 17, 2015, the State Attorney's Office received a Use of Force case investigation report authored by Special Agent (S/A) Stephen Brenton of the Florida Department of Law Enforcement (FDLE). State Attorney's Office Investigator Nelson Espinosa conducted a thorough review of all applicable reports and attachments provided by FDLE. Chief Investigator Wm. Eric Edwards conducted a secondary review and the following observations were noted. The following excerpts are taken from the FDLE report authored by Agent Brenton:

The investigation revealed that on February 8, 2015 at approximately 15:32 hours, OCSO Deputy Scott Bearns was dispatched to 4521 Leslyn Court, Orlando, FL regarding a violation of an injunction. Deputy Bearns met with Charlene Garrett, who reported that Joseph Paffen had violated an injunction which was in effect protecting Garrett from Paffen. Deputy Bearns established probable cause to arrest Paffen and established a plan to take him into custody at the Publix Supermarket located at 4501 Hoffner Ave. [Emphasis added]

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Office of the Sheriff

Deputy Bearns, along with Sergeant Randal Zeller, Deputy David Mittiga, Deputy Robert Kelly, Deputy Matthew Futch, Deputy Kristopher Lott, and Deputy Stephen Sherry responded to the Publix Supermarket to arrest Paffen. Deputy Futch was the first to arrive and located Paffen walking through the parking lot and summoned the assistance of the other deputies.

When the deputies arrived and started to exit their vehicles, Paffen, armed with a Smith and Wesson 9mm semi-automatic handgun, fired several shots in the direction of Sergeant Zeller's vehicle. [Emphasis added] Deputy Futch, Deputy Lott, and Deputy Sherry shot at Paffen in response to Paffen pointing his firearm at Deputy Sherry, firing at the deputies, and wounding Sergeant Zeller. Paffen was struck several times and died from the injuries sustained during the shooting.

On February 8, 2015, members of the Orange County Sheriff's Office established *probable cause* sufficient for the arrest of Mr. Joseph Andrew Paffen for violating an injunction. Based on information collected during the course of the aforementioned law enforcement call for service, deputies were advised Mr. Paffen was purportedly a *Sovereign Citizen*, was known to possess firearms and would most likely resist efforts by law enforcement to take him into custody. Based on the information gleaned during their contact with the victim, Mrs. Charlene Garrett, Deputies Scott Bearns and Matthew Futch called upon the assistance of Sergeant Randal Zeller, Deputy David Mittiga, Deputy Robert Kelly, Deputy Stephen Sherry and Deputy Kristopher Lott for the purpose of affecting the arrest of Mr. Paffen.

Note: The aforementioned law enforcement officers were in their issued Orange County Sheriff's Office uniforms and utilized fully marked Orange County Sheriff's Office patrol vehicles as they attempted to take Mr. Paffen into custody at the Publix parking lot. Though these law enforcement officers were clearly identifiable, Mr. Paffen brandished a firearm and discharged rounds directly towards several of the deputies. Three deputies utilized deadly force by discharging their issued weapons in response.

On February 17, 2015, Deputy Futch provided investigators a sworn recorded statement. During the interview, Deputy Futch was asked questions regarding why he fired his issued weapon at Mr. Paffen and he explained, "*I was worried that he [Mr. Paffen] had the drop on Deputy Sherry and Deputy Kelly. ... because he [Mr. Paffen] was still up and firing.*"

On February 17, 2015, Deputy Lott provided investigators a sworn recorded statement. During the interview, Deputy Lott was asked questions regarding why he fired his issued weapon at Mr. Paffen and he explained, "*...to protect myself and the other deputies in the vehicle.*"

On February 17, 2015, Deputy Sherry provided investigators a sworn recorded statement. During the interview, Deputy Sherry was asked questions regarding why he fired his issued weapon at Mr. Paffen and he explained, "*Because he was sending rounds downrange towards my deputies.*"

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Based on the information provided during sworn statements, coupled with the physical evidence collected, it appears each use of deadly force by the deputies was due to a well-founded fear of death and/or great bodily harm. A fear caused by Mr. Joseph Andrew Paffen actively shooting a firearm directly towards several deputies at the scene.

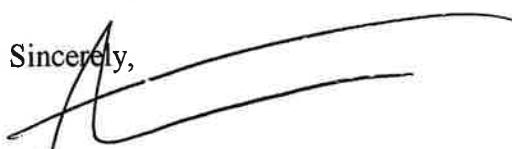
Although there is no evidence in this instance indicating the use of poor judgment by these deputies, it is instructive here and in all instances to note the words of our appellate court when reviewing law enforcement uses of force:

As an observation, we question whether a law enforcement officer should ever be, in the absence of intentional misconduct or some degree of malice, criminally responsible for using poor judgment. A police officer, under the circumstances here, is ordered into a life threatening situation. The call usually comes without warning. He does not ask for the assignment, but he is bound to protect society against the violent acts of the unlawful or mentally deranged. Now that same society seeks to punish him for using poor judgment. An officer, in such circumstances, should not be burdened with the knowledge that if he overreacts to the real or imagined dangers he may be committing a crime, especially when those who judge his actions do so with the benefit of perfect hindsight and from a position of safety.

Kadet, 455 So.2d at 390-91 (emphasis in original).

There is no evidence in this instance that any of the deputies committed intentional misconduct or acted with any degree of malice. To the contrary, the evidence suggested they acted in self-defense with force they believed reasonably necessary to prevent imminent death or great bodily harm to themselves or fellow deputies. Therefore, a complete review of the investigation leads me to conclude that criminal charges against Deputies Matthew Futch, Kristopher Lott, and Stephen Sherry are not warranted, and the Office of the State Attorney's review of this incident is complete.

Sincerely,



Jeffrey L. Ashton
State Attorney

Cc: Danny Banks, Special Agent in Charge,
Florida Department of Law Enforcement, Orlando

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