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December 11, 2020

Sheriff John Mina
Orange County Sheriff's Office
2500 West Colonial Drive
Orlando, Florida 32804

RE: FDLE OR-27-0363

Dear Sheriff Mina:

This letter details my review of the January 12, 2020 incident wherein Deputy Eric Lopez engaged in a use of force that included the discharge of his agency firearm. This review is limited to determining whether criminal charges should be filed against the deputy involved in the use of force. The standard of proof for filing a criminal case is whether there is sufficient evidence to prove any violations of the criminal laws beyond a reasonable doubt to a jury. The prosecution also bears the burden of proving beyond a reasonable doubt that the use of force was **not** justified pursuant to Florida law. This review does not evaluate the appropriateness of the actions of the involved officers, whether sheriff department policies were followed, or whether the policies, practices, or training of the agency involved were sufficient. That evaluation is left to the administrative review mechanism of the agency.

Generally speaking, criminal liability is established when the evidence is sufficient to prove all the elements of a crime beyond a reasonable doubt. In addition to proving the elements of a crime, the prosecution must disprove any statutorily recognized justification or defense beyond a reasonable doubt.

The use of physical force by law enforcement officers is governed by Florida Statute § 776.05 and provides an affirmative defense to criminal liability as follows:

A law enforcement officer...need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. The officer is justified in the use of any force:

- (1) Which he or she reasonably believes to be necessary to defend himself or herself or another from bodily harm while making the arrest;
- (2) When necessarily committed in retaking felons who have escaped; or
- (3) When necessarily committed in arresting felons fleeing from justice.

However, this subsection shall not constitute a defense in any civil action for damages brought for the wrongful use of deadly force unless the use of deadly force was necessary to prevent the arrest from being defeated by such flight and, when feasible, some warning had been given, and:

- (a) The officer reasonably believes that the fleeing felon poses a threat of death or serious physical harm to the officer or others; or
- (b) The officer reasonably believes that the fleeing felon has committed a crime involving the infliction or threatened infliction of serious physical harm to another person.

The United States Supreme Court provides the following instruction in assessing the reasonableness of an officer's belief when using physical force:

The "reasonableness" of a particular use of force must be made from the perspective of the law enforcement 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. *Graham v. Conner*, 490 U.S. 386 (1989).

In addition to the affirmative defense provided by F.S. 776.05, law enforcement officers, like any other person, can invoke the protections of Florida Statute 776.012 and 776.032, commonly referred to as Florida's *Stand Your Ground* law. See *State v. Perez*, 259 So.3d 728 (Fla. 2018).

In charging any individual with a crime, it is important to remember that the defendant does not have to present evidence or prove anything. Instead, at a pre-trial Stand Your Ground hearing, the State of Florida is required to prove by clear and convincing evidence that the person is not entitled to self-defense immunity. If the prosecution is successful at the hearing, the State still must prove, beyond a reasonable doubt to a unanimous jury, that the force was **not** justified.

A comprehensive look at the facts of this incident results in the conclusion that Deputy Lopez' use of force was justified in this instance.

On January 12, 2020, at approximately 9:00pm, an employee of the East Gourmet Chinese Restaurant on West Colonial Drive called 911 to report that an individual had shattered the glass on the restaurant's front door. Deputy Eric Lopez picked up the call. While he was responding, another person called 911 to report the glass was shot out. After he arrived and began to investigate, an employee advised that the culprit was a homeless person known to them who lived behind the restaurant that the landlord had recently tried to remove. As Deputy Lopez checked the scene, the employees pointed out the suspect in the parking lot. When Deputy Lopez approached the suspect, who was wearing a full body animal costume with a hood and a backpack, he began to walk away. When Lopez reached out to engage the suspect, he turned toward Lopez and produced what Lopez believed to be a firearm and fired a shot. In response, Deputy Lopez fired three rounds at the suspect striking him in his upper chest, pelvis and foot. The suspect, later identified as Philip George Nomikos, survived his injuries.

Deputy Lopez' body worn camera was engaged just before contact with Nomikos and, although the images are dark and chaotic, it appears that Nomikos threatens Lopez with a brick, visible in his left hand. His right hand is not visible on the BWC. As shots are fired and Nomikos falls, a

gun drops to the ground near him. He appears to reach for the gun when it is kicked away by Deputy Lopez. Crime Scene investigators and FDLE lab analysts later determined it was an air revolver with a punctured CO2 cartridge. It cannot be determined conclusively from the audio on the BWC if the cartridge was fired during the encounter with Deputy Lopez.

It is instructive here 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. *State v. Kadet*, 455 So.2d 389 (Fla. 5th DCA 1984)

There is no evidence in this instance that Deputy Lopez exercised poor judgment, committed intentional misconduct or acted with any degree of malice or prejudice. To the contrary, the evidence suggested he acted in self defense with force he believed reasonably necessary to prevent imminent death or great bodily harm to himself. Therefore, a complete review of the investigation leads me to conclude that criminal charges against Deputy Eric Lopez are not warranted, and the Office of the State Attorney's review of this incident is complete.

Sincerely,



Linda Drane Burdick
Assistant State Attorney

Cc: Lee Massey, Special Agent in Charge,
Florida Department of Law Enforcement,
Orlando Regional Operations Bureau