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March 19, 2019

Mitchell Roth
Prosecuting Attorney
Office of the Prosecuting Attorney
655 Kilauea Avenue
Hilo, Hawaii 96720

CONFIDENTIAL

Re: Shooting Death of Justin Waiki
Recommendation of the Law Enforcement Officer Independent Review Board
Decline Prosecution – Officers Involved Shooting Justified

Dear Mr. Roth:

The Incident

Hawaii County police set up a vehicle checkpoint on South Point Road to screen vehicles for fugitive Justin Waiki (“Waiki”), who was sought for the murder of police officer Bronson Kaliloa. An armored vehicle named a BearCat was used as a roadblock. Outside the BearCat searching vehicles leaving the South Point area were Sergeant Bryan Tina, and officers Patrick Aurello, Kevin Brodie and Wayne Kennison.

A silver Toyota 4Runner approached the checkpoint on July 20, 2018, at about 2:45 p.m., with a male driver and female front seat passenger.¹ Sergeant Tina approached the driver, informed him that they were searching for a fugitive and asked him to unlock the vehicle and roll down the windows. The driver complied. Looking through the driver’s window, Sergeant Tina didn’t see anything suspicious and began to walk to the back. A female sat in the backseat with nothing suspicious on the floor.²

At the rear of the vehicle, Sergeant Tina began to lift the tailgate whereupon clothing and other items began to fall out. He stopped the tailgate from rising to prevent more things from falling out and pushed them back into the cargo area. Sergeant Tina collected what had fallen out

¹ Jorge Pagan-Torres was the driver and Krystle Ferreira the passenger. Both claim they didn't know Waiki, who got into Ferreira's 4Runner that morning when they picked up Jamie Jason, a friend of Waiki.

² That female was Malia Lajala, a friend of both Waiki and Jamie Jason.

and began to return them to the cargo area. As he did so, he touched and squeezed a blanket that concealed something, and did so again because what he felt was soft like body tissue.

Suddenly, two shots rang out from under the blanket. One struck Sergeant Tina in the upper right chest, and he stumbled back and fell. Officer Brodie, who was at the rear of the vehicle with Sergeant Tina, immediately returned gunfire, shooting into the blanket. Officer Aurello heard the gunshots coming from the rear of the vehicle and the return fire from officers. He fired shots into the rear driver's side quarter panel into the cargo area. Shots were fired into the rear quarter panel on the passenger side where officer Kennison was positioned.

Waiki's blanket covered body rolled out of the rear of the vehicle. Photos show him lying on the road with his head towards the passenger side of the 4Runner. An autopsy revealed that the fatal shot was to mid chin that exited from the right fronto-temporal scalp. It would appear that the fatal shot was fired from the driver's side of the vehicle. There were 21 other gunshot wounds. Toxicology testing was positive for methamphetamine and morphine.

A stolen .38 caliber Taurus Brasil silver/black special revolver was recovered from under the blanket with Waiki's body. Occupants of the 4Runner reported that Waiki was armed. Deoxyribonucleic acid (DNA) testing of blood on the barrel and grip of the Taurus Brasil revolver matched Waiki, as did tissue/flesh on the grip.

A Danish couple in a vehicle behind the 4Runner confirm that the first shots fired were from someone under a blanket in the trunk.

Jamie Jason was under the blanket with Waiki and she suffered a gunshot wound to her leg. She told police that Waiki admitted to shooting officer Bronson Kaliloa. Waiki also told her that he did not want to go back to prison and was going to shoot it out with police.

Law of Use of Deadly Force in Self-Defense and Defense of Others

The use of deadly force in self-defense **IS** permitted if:

The use of deadly force is justifiable under this section if the actor believes that deadly force is necessary to protect himself against death, serious bodily injury, kidnapping, rape, or forcible sodomy. Hawaii Revised Statutes §703-304(2).

The use of deadly force in self-defense **IS NOT** permitted if:

The actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

.....

(ii) A public officer justified in using force in the performance of his duties, or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape, is not obliged to desist from efforts to perform his duty, effect the arrest, or prevent the escape because of resistance

or threatened resistance by or on behalf of the person against whom the action is directed.

Hawaii Revised Statutes §703-304(5)(a) and (b)

The use of deadly force in defense of others **IS** permitted if:

The use of deadly force upon or toward another person is justifiable to protect a third person if, under the circumstances as the [person] reasonably believes them to be, the third person would be justified in using deadly force to protect himself on the present occasion against death or serious bodily injury and the [person] reasonably believes that his intervention is immediately necessary to protect the third person. The reasonableness of the [person's] belief that the use of deadly force was immediately necessary shall be determined from the viewpoint of a reasonable person in [that person's] position under the circumstances of which the [person] was aware or as the [person] reasonably believed them to be when the deadly force was used.

Hawai'i Pattern Jury Instructions-Criminal 7.02

The use of deadly force in defense of other **IS NOT** permitted if:

The use of deadly force to protect a third person is not justifiable if the [person] knows that, by retreating, he can: (1) avoid the necessity of using such force with complete safety; and (2) secure the complete safety of the third person.

Hawai'i Pattern Jury Instructions-Criminal 7.02³

Analysis, Conclusion and Recommendation

Justin Waiki fired two (2) shots while concealed under a blanket, striking Sergeant Bryan Tina in the chest. There was no indication that Waiki was in the vehicle, i.e., this was an unprovoked surprise attack. Officers Kevin Brodie, Patrick Aurello and Wayne Kennison were justified in shooting Waiki because they reasonably believed deadly force⁴ was immediately necessary to protect Sergeant Bryan Tina and themselves from death or "serious bodily injury."⁵ Retreat was not a viable option because Waiki was armed with a firearm, had fired two (2) shots, and was in close proximity to all police officers. Prior statements that he did not want to go back to prison and was going to shoot it out with police corroborate Waiki's intent to kill or seriously injure police.

³ These jury instructions combine the principles found in the Hawaii Penal Code of: (1) use of deadly force in self-defense, and (2) use of force for the protection of other persons. The jury instructions are referenced rather than the Hawaii Penal Code because the Hawaii Penal Code does not have a specific provision addressing the use of deadly force to protect others.

⁴ "Deadly force" means force which the actor uses with the intent of causing or which the actor knows to create a substantial risk of causing death or serious bodily harm. Intentionally firing a firearm in the direction of another person or in the direction which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's intent is limited to creating an apprehension that the actor will use deadly force if necessary, does not constitute deadly force. Hawaii Revised Statutes §703-300.

⁵ 'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. §707-700, Hawaii Revised Statutes.

It is the unanimous recommendation of the Law Enforcement Officer Independent Review Board ("Board") that the Hawaii County Office of the Prosecuting Attorney **decline prosecution** of officers Kevin Brodie, Patrick Aurello and Wayne Kennison in the shooting death of Justin Waiki on July 20, 2018. This recommendation is based solely upon review of the investigative report provided by the Hawaii County Police Department to the Board.

This recommendation is confidential until "... any criminal prosecution or proceedings in the State related to the officer-involved death have been *adjudicated*, the board shall release the board's recommendations and any accompanying reports, documents, and information, unless otherwise prohibited by law." Hawaii Revised Statutes §28-153(h).

Please inform the Board of your decision of whether to prosecute the officers involved in the death of Waiki so the Board can comply with its statutory obligation to disclose its recommendation and the accompanying reports, documents and information.

Communications with the Board should be made through the Attorney General's Criminal Justice Division at the address and phone number listed in the letterhead.

Respectfully,



Iwalani D. White

Chairperson

Law Enforcement Officer Independent Review Board