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CRITICAL INCIDENT TASK FORCE MEMORANDUM

DATE: November 4, 2021

TO: Josh Tuttle, Idaho State Police District 6 Investigations; Chief Bryce Johnson, Idaho Falls Police Department

FROM: H Alayne Bean, Chief Deputy Prosecuting Attorney

RE: CITF Investigation/Levi Jesse Bautista

The Critical Incident Task Force investigated the use of deadly force by Officer Mitchell Bierma against Levi Jesse Bautista on September 11, 2021. Idaho State Police District 6 Investigation acted as lead agency. This case was presented to the Bonneville County Prosecuting Attorney's Office on October 19, 2021, for review. At this time, we have reviewed all evidence in the case including witness statements, video and audio evidence, and other physical evidence. This attorney also visited the scene shortly after the shooting and was given a walk-through of the evidence to that point. This memorandum details our findings.

The Parameters of this Decision:

This analysis is limited simply to this question: Whether Officer Mitchell Bierma should face criminal liability for the events of September 11, 2021. More particularly, was the deadly force Officer Mitchell Bierma used against Levi Jesse Bautista justified? It is beyond the scope of this review to comment on any civil matters such as compliance with departmental policy or the like, as those matters are entirely within the province of the incident agency.

Several individuals have been charged with crimes in connection to this incident and that investigation is not over. Levi Jesse Bautista will have to address charges that he possessed a firearm as felon and eluded police. Juan Gonzalez has been charged with Aggravated Battery and Aggravated Assault. Jose Nery has been charged with Aggravated Battery, Aggravated Assault, and Unlawful Possession of a Weapon by a Convicted Felon. Cooper Allison has been charged with Accessory to Aggravated Battery and Harboring and Protecting a Felon. It is beyond the scope of this review to comment on the charging decisions in those cases. Any discussion of the facts of those cases is only used for the purpose of evaluating criminal liability for Officer Mitchell Bierma.

Pertinent Facts:¹

On September 11, 2021, at approximately 12:45 a.m., four separate citizens called Dispatch to report multiple shots being fired at the parking lot of Hurricanes Bar (“Hurricanes”). Hurricanes is located at 888 N. Holmes Avenue (“Holmes”), Idaho Falls. While Hurricane’s has a Holmes address, it faces east, onto Freeman Avenue (“Freeman”). Hurricanes is separated from Freeman by a parking lot. Hurricanes is connected to the EconoLodge, also at 888 N. Holmes. The EconoLodge is the part of the building that faces Holmes. Elva Street (“Elva”) borders the EconoLodge/Hurricanes’ property to the north and Whittier Street (“Whittier”) borders the property to the south. Based on numerous police reports, law enforcement responds regularly to Hurricanes with the nature of those incidents often violent and aggressive.

At approximately the same time the citizens were calling in to report multiple gunfire shots, Officer Robert Martin (“Officer Martin”) with the Idaho Falls Police Department (“IFPD”) broadcast over the police radio that he could hear gun shots south of his location. Dispatch confirmed with Officer Martin that they were receiving reports of multiple rounds fired from the area of Hurricanes.

All available officers responded. Based on the reports to Dispatch, officers were on the lookout for a silver Chrysler 200, which reportedly fled west on Elva. After the Chrysler left, Dispatch received a subsequent report of ‘shots fired’ around Yellowstone Avenue (“Yellowstone”), which intersects with Elva, west of Hurricanes. That part of Yellowstone is also called Northgate Mile.

Officer Mitchell Bierma (“Officer Bierma”), had been in the College of Eastern Idaho parking lot with Officer Spencer Wood (“Officer Wood”) discussing a traffic stop they had recently concluded. Officer Bierma has been a peace officer with IFPD since July 2015. He is certified by Idaho P.O.S.T. (Peace Officer Standards and Training) and is currently assigned as a K9 handler.

Officer Bierma, followed by Officer Wood, left the parking lot in his 2011 Ford Explorer, with exterior red and blue light bar on the roof of the vehicle. Officer Bierma intended to provide K9 backup. Officer Bierma was wearing his regular IFPD Class C Uniform and duty belt. His Explorer is marked with IFPD on the sides and several K9 markings on the back. Officer Bierma drove northbound on Hitt Road/25th East. His lights, sirens and dashboard camera were all activated. Officer Bierma turned west on 1st Street and followed that road until it curved right onto Lomax Street (“Lomax”), still going westbound. When Officer Bierma was close to the intersection of Lomax and Wabash Avenue, he saw a silver car run the stop sign at Freeman and Lomax. The driver of the silver car, later identified as 21-year-old Levi Jesse Bautista (“Bautista”), was traveling northbound on Freeman, toward Hurricanes.

Officer Bierma, still followed by Officer Wood, turned from Lomax onto Freeman, and tried to catch up to Bautista. Officer Bierma estimated Bautista’s speed at 55 to 60 miles per hour. The speed limit on Freeman Avenue is 25 miles per hour. Officer Bierma was worried because it appeared to him that the same person who fired multiple shots at Hurricanes and then on Yellowstone was now returning to Hurricanes.

¹ We do not have video of every possible angle of this incident, however all evidence collected supports the pertinent facts.

Once Bautista got to the area of Hurricanes, he stopped in the road and reversed just slightly, before proceeding north again on Freeman. Officer Bierma believed Bautista possibly missed the entrance to the parking lot. Whatever the reason, Officer Bierma was able to gain some ground on Bautista. This allowed him to positively identify the silver car as a Chrysler 200. Matching what callers reported to Dispatch. Officer Bierma called out the license plate over the radio. As Officer Bierma passed Hurricanes, he observed numerous innocent bystanders outside in the parking lot. Taking all estimates into account, somewhere between 30 and 100 people were in the parking lot. Officer Bierma also observed a Hurricanes security guard, who pointed at the Chrysler, leading him to further believe he had located the correct car.

Bautista made a hasty stop where Freeman ends at Elva. He quickly turned east on Elva, then immediately south into the Elks Lodge parking lot, which is on the west side of the Elks Lodge. The east side of the Elks Lodge Parking lot is used as a small RV park. RVs were parked there on this night. The west end of the parking lot abuts Freeman and is used by patrons of Hurricanes as overflow parking. Officer Bierma also observed people in this parking lot.

Officer Brandon Anderson (“Officer Anderson”) also responded to Hurricanes. Officer Anderson traveled eastbound on Elva and could see Bautista, Officer Bierma and Officer Wood turn from Freeman onto Elva and then into the Elks Lodge parking lot. Officer Anderson’s lights, sirens, and dashboard camera were all running.

To the point that Officer Bierma had followed Bautista into the Elks Lodge parking lot, he believed that: Bautista had fired multiple rounds at Hurricanes; Bautista had fired shots at a second location near Yellowstone; Bautista was returning to Hurricanes at a high rate of speed; Bautista would not pull over for law enforcement; and Bautista was disregarding the safety of numerous innocent bystanders by driving unsafely. Based on that information, Officer Bierma requested and was granted permission by Sergeant Darin Moulton (“Sgt. Moulton”) to utilize a Pursuit Intervention Technique (“PIT maneuver”) to stop Bautista.

Bautista exited the parking lot onto Whittier without stopping. He then turned from Whittier onto Freeman without stopping at the stop sign. Officer Bierma executed a PIT maneuver on the car while they were both on Freeman. After the PIT maneuver, Bautista regained control of the Chrysler and began to drive north on Freeman. Officer Anderson had turned from Elva southbound on Freeman to intercept Bautista. Bautista was now in a collision path with Officer Anderson. Officer Anderson believed Bautista was going to strike him in his patrol vehicle. Officer Anderson knew that Bautista had come back to Hurricanes after firing multiple shots in the direction of a bar filled with people, attempted to elude Officer Bierma, failed to yield to police, and was now headed directly in Officer Anderson’s direction. Officer Anderson also heard Sgt. Moulton give Officer Bierma permission to PIT Bautista. Officer Anderson decided to use his police car to ram into Bautista.

Officer Anderson collided with Bautista on the Chrysler’s rear passenger side. Officer Bierma drove his patrol vehicle into the Chrysler’s rear driver’s side. Officer Anderson and Officer Bierma essentially pinned the Chrysler between their patrol vehicles at the northwest corner of Freeman and Whittier, which is also the southeast corner of the EconoLodge/Hurricanes’ property.

Officer Anderson said he kept his eyes on the driver during all of this. After the vehicles stopped and Bautista exited his vehicle, Officer Anderson saw that Bautista had a black handgun in his right hand. Officer Anderson saw the barrel of the gun pointed in his direction. Officer Anderson saw Bautista, still holding the gun, turn toward Officer Bierma. Officer Anderson got out of his own patrol car and ran around the back of the Chrysler and Officer Bierma's patrol car, to reach Officer Bierma. While he was doing this, he heard what he thought were two shots fired.

When the vehicles came to rest, Officer Bierma was perpendicular to the rear of the Chrysler. Officer Bierma also saw Bautista with a gun inside the Chrysler. Officer Bierma described the gun as a black polymer handgun, possibly a Glock, loaded with a magazine made partially of a clear-type material that allowed Officer Bierma to see the rounds inside. Officer Bierma could see that it was a "high-capacity" magazine. A high-capacity magazine is one that carries more than seventeen (17) rounds. Officer Bierma knew that this type of magazine could, with very little effort, cause harm to himself, other officers, and the numerous innocent bystanders in the area. Officer Bierma saw Bautista point the gun at him.

Fearing for his life, Officer Bierma opened his door, ducked down, and drew his duty weapon, a Springfield .45 caliber "Operator" handgun. As Officer Bierma exited his vehicle, he momentarily lost sight of Bautista. Officer Bierma then saw Bautista, now out of the Chrysler, run westbound. Officer Bierma yelled at Bautista to drop the gun. Bautista did not drop the gun. Instead, he looked back over his right shoulder and his right arm and hand came backwards and up. Officer Bierma believe Bautista intended to fire upon him or Officer Anderson, who he knew was nearby. Officer Bierma fired four rounds at Bautista.

Prior to Officer Bierma discharging his weapon, he believed Bautista had committed the following crimes: discharging a firearm within city limits; aggravated assault; felony eluding police; and aggravated assault on officers; among other crimes.

Bryan Kokko ("Kokko"), a security guard at Hurricanes, saw the PIT maneuver and saw Bautista jump out of a car and run west. Kokko said Bautista was fiddling with something in his hands, but he could not see what that item was. Kokko also saw Officer Bierma fire four rounds and saw Bautista drop to the ground.

Shannon Olsen ("Olsen") heard the first volley of shots. She also saw the incident after police stopped Bautista. She said she saw Bautista pull a gun out to the officers. She said he grabbed it out of his left pocket. James Fielding ("Fielding") also said Bautista pulled the gun out of his pocket, but he said Bautista made no movements with the gun. However, Julio Ortiz who observed the first incident from his nearby home, also saw when Bautista returned and saw Bautista grab something from his car after he was stopped by officers. He then saw Bautista running with something in his hand.

Officers Wood, Hendry and Gray Smith also responded to the scene and were present at the time Officer Bierma deployed his weapon. Officer Wood was behind Officer Bierma's patrol vehicle. He did not see Officer Bierma fire any shots, but he heard them. Both Officer Hendry and Gray Smith saw Bautista running with a gun in his right hand. Officer Hendry was still in his patrol vehicle when he heard Officer Bierma's four shots. Officer Gray Smith had been following Officer

Anderson when Officers Bierma and Anderson pinned the Chrysler. She stopped her patrol vehicle. She should see Bautista begin to run and as he cleared the car, she saw a gun in his right hand. She was exiting her patrol vehicle when she heard Officer Bierma fire his gun.

After Officer Bierma fired, Bautista fell to the ground and dropped the gun with the extended magazine. Bautista had a Glock Model 19 9MM handgun with a 40-round magazine. The magazine was loaded with 30 rounds of Belom 9x19 ammunition. Officers secured the scene and administered emergency aid to Bautista, who said he could not feel his legs. It was at this time that officers learned Bautista's identity. None of the responding IFPD officers knew or had any prior interaction with Bautista.

Bautista sustained three gunshot wounds: two to his lower back and one to his left shoulder. He was transported to the hospital to receive medical care, including surgery, for his injuries. The latest information this office has is that Bautista has not regained feeling in one of his legs.

Bautista was interviewed by representatives of the Critical Incident Task Force ("CITF") a few days after the incident. He gave information about what occurred on September 11, 2021, including the events that occurred prior to the reports to Dispatch of shots fired.

Bautista said he had gone to Hurricanes with his friend, Javier Corral ("Corral"). Bautista's girlfriend, Jennifer Echeverria ("Echeverria"), the owner of the silver Chrysler 200, was with them at the bar, as well as some other "associates" who Bautista would not name. Based on Hurricanes security camera footage, Bautista and Corral arrived at Hurricanes at approximately 12:40 a.m. As they approached the entrance, Bautista could be seen putting a handgun in his waistline.

Once inside, Bautista said he got into a confrontation with a local street gang. Bautista said that an unknown male told Bautista, "Fuck BWC!" According to law enforcement, "BWC" is slang for Budweiser Crew, a known gang in Idaho Falls. Bautista said that he used to be a member of BWC but that he was no longer a member. Bautista said he tried not to engage but, he did tell Corral that the unknown male wanted to fight. Bautista said he and the unknown male walked outside.

Jasen Thomas, a Hurricanes security guard, said he escorted Bautista out of the bar after a dispute inside. According to the security camera footage, at approximately 12:41 a.m., Bautista exited the bar. Three males followed Bautista outside and confronted him in the parking lot. Bautista said he tried to tell the male that he does not associate with BWC anymore. The security footage shows that Bautista spoke animatedly with the males, while holding a handgun. Bautista looked to be making sure the males knew he had a gun and was switching it from hand to hand, sometimes grabbing the barrel in what looked to be a 'racking' motion meant to cock the gun. One of the males raised his shirt and turned around, showing Bautista a large "13" tattoo on his back. According to law enforcement, this is a common tattoo for MS-13 gang members. MS-13 and BWC are rival gangs.

At approximately 12:42 a.m., Juan Manuel Gonzalez ("Gonzalez") exited the bar and walked to a nearby car. A fourth male came out of Hurricanes and joined the group of males. Bautista left the area and walked across Freeman to the Elks Lodge parking lot. Bautista said he was walking to his girlfriend's car.

Gonzalez ran towards Freeman, took a shooter's stance, and fired a shot with a handgun towards Bautista. Bautista returned fire. Bautista said he fired in the direction of the male and "emptied the whole thing," clarifying that he fired fifteen (15) shots. Bautista said he got the gun he fired from his friend right before returning fire; however, Hurricanes' surveillance video showed that when Bautista first arrived at the bar, he had a gun in his waistband. Further, he was on his own when he had the encounter with the males in the parking lot, so no one handed him the gun at that time.

Notably, neither Officer Bierma nor any of the other responding officers knew that Gonzalez had fired a gun at Bautista. That information was not relayed to Dispatch. Certainly, Bautista never called Dispatch to report it.

Bautista said he drove away from the bar and phoned Echeverria. He said he put the gun in the driver's side door pocket. According to Bautista she told him they needed to hurry and leave, and they were all going to get into "Jasmine's" car. Bautista said he sped back to Hurricanes to meet them. Bautista said when he got close to Hurricanes, Echeverria told him he needed to leave. He then saw police and turned into the Elks Lodge parking lot to turn around. He said as he pulled out, "one cop hit me on one side and one cop hit me on the other." He said after he was hit, he, "got out of the car, took off running and since I had a gun in my hand, they shot me." Bautista said that is the last thing he remembers until he woke up three days later.

Bautista clarified that he knew police behind him with their emergency lights on. When CITF investigators tried to ask him more specific questions about the incident, like if he was going to continue driving or stop for law enforcement, Bautista requested an attorney, and the interview was terminated.

Echeverria said after Bautista left in her car, she was on the phone with him when Corral was "jumped" by the unknown males. She said that Bautista could hear everything on the phone and was asking what was happening. Echeverria said that she saw Bautista arrive back at Hurricanes and that the police were already behind him. Echeverria said that she told Bautista to stop for the police because they were trying to pull him over. She said that Bautista was not listening to her. She said Bautista came out of the Elks Lodge parking lot and that is when two of the police cars hit Bautista. She said she saw Bautista run away from the cops, she heard gunshots, and then she saw Bautista fall on the ground.

On the early morning of September 11, 2021, members of the CITF collected evidence at the scene. In the area where Bautista returned fire from the Elks Lodge parking lot, CITF members recovered fourteen (14) spent 9 mm casings as well as one (1) unspent cartridge, totaling fifteen (15) rounds.² All the casings were Belom ammunition, which matched the 30-rounds of ammunition found in the extended magazine Bautista dropped. CITF members also located an empty Glock 9mm 15-round capacity magazine on the driver side floor of the Chrysler.

As well as casings, the CITF also located numerous bullet strikes. First, there is what looks to be a bullet strike on the brick wall of Hurricanes. There, investigators located an area of chipped cement and part of a bullet was located underneath that area, on the ground. Additionally, three

² The unspent round could be from cocking the gun.

parked cars were damaged. A blue Hyundai Veloster that was parked in the Hurricanes parking lot facing east had a bullet hole in the front windshield. That bullet traveled to the rear upper hatch above the passenger seat and was recovered. Another bullet hit the Veloster on the front grill near the passenger-side headlight. Both rounds traveled westbound. A gray Dodge Ram 1300 pickup was parked on Freeman facing south. The pickup had a bullet hit on the front driver-door, halfway up and just behind the fender panel. That bullet traveled westbound. Finally, a silver Ford Fusion had 3 strikes. The Fusion was parked in the Elks' parking lot next to Freeman, but the driver had backed into the space, so the Fusion was facing east. A bullet went through the front windshield, then the front passenger seat, and came to rest in the rear passenger seat. Another bullet grazed the driver-side C-post, halfway down the vehicle. The third bullet hit the rear driver-side door above the handle. This bullet did not make it fully through the door but did cause a bulge on the inside of the door. All rounds hitting the Fusion traveled in a westbound direction. All the rounds that hit these cars originated from Bautista.

In connection with the investigation into Gonzalez firing at Bautista, IFPD responded to Ron Sayer Dodge, located at 490 Northgate Mile. IFPD investigated a car that had been shot. Bautista did not say that he had fired anywhere else after he left Hurricanes. However, IFPD recovered six (6) Belom brand shell casings. The Belom brand matches the brand of ammunition fired by Bautista and in the Glock Bautista was carrying. Interestingly, the car that was shot by Ron Sayer Dodge was a silver Chrysler 200.

On March 10, 2021, Bautista was convicted of Aggravated Assault, a Felony under Idaho Code § 18-905. Due to that conviction, Bautista is prohibited by law from possessing a firearm. The gun that Bautista had belonged to Susan Rubio ("Rubio"). Rubio purchased the gun on September 4, 2021. Rubio said she has known Bautista for a while. Rubio loaned Bautista her vehicle on September 10, 2021, the day prior to the shooting incident. When Rubio saw that Bautista had been involved in this incident, she checked her vehicle for her gun, a Glock 19. It was gone. Rubio also noticed that a 15-round magazine and a 40-round magazine were also missing. Rubio contacted law enforcement. Rubio said she had loaded both magazines with Belom ammunition. Law enforcement matched the gun Bautista had to Rubio's documentation, confirming that Rubio was the owner of the gun Bautista used on September 11, 2021.

Analysis Synopsis:

After reading the reports, conferring with CITF investigators, reviewing evidence from the incident, and considering all relevant information, including the facts related above, we have concluded that there is no evidence to support a criminal charge against Officer Mitchell Bierma. The facts in this case reveal that at the time Officer Bierma encountered Bautista, Bautista presented himself as a clear and immediate threat to officers engaged in the lawful performance of their duties and to the innocent public. Officer Bierma's actions were justified under Idaho Code §§ 18-4009 and/or 18-4011, as well as the Fourth Amendment to the United States Constitution. As such, they do not form the basis of a criminal prosecution.

Applicable Law:

Deadly force may be used under the conditions listed in Idaho Code § 18-4009, which discusses when a homicide³ would be justified by any person, not just a peace officer:

- (a) When resisting any attempt to murder any person, or *to commit a felony, or to do some great bodily injury upon any person;*
- (c) *When committed in the lawful defense of such person . . .when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished . . .;* or
- (d) When necessarily committed in attempting, by lawful ways and means, *to apprehend any person for any felony committed. . .*

Idaho Code § 19-610 addresses what force a law enforcement officer may use to arrest an individual. It states, “[w]hen the arrest is being made by an officer . . . without a warrant but is supported by probable cause to believe that the person has committed an offense, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all reasonable and necessary means to effect the arrest and will be justified in using deadly force under conditions set out in section 18-4011, Idaho Code. I.C. § 19-610. The relevant portions of Idaho Code § 18-4011 state, “homicide⁴ is justifiable when committed by public officers and those acting by their command in their aid and assistance...when *reasonably necessary in overcoming actual resistance to the execution of some legal process...*” The use of deadly force in such a case is justified only when “*the officer has probable cause to believe that the resistance poses a threat of death or serious physical injury to the officer or to other persons.*” I.C. § 18-4011(2).

Finally, the “Fourth Amendment of the U.S. Constitution protects individuals from excessive force by police officers during an arrest, which allows inquiries to be made into whether the officers' actions were objectively reasonable considering the circumstances confronting them, without regard to their underlying intent or motivation. The calculus of this inquiry, however, 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.” *Picatti v. Miner*, 449 P.3d 403, 414 (Idaho 2019) (internal quotation marks omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 397, 396—97, 109 S. Ct. 1865, (1989)).

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 ‘reasonableness’ inquiry in an excessive force case is an objective one: The question is whether the officers' actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Kessler v. Barowsky*, 129 Idaho 640, 646, 931 P.2d 634, 640 (Ct. App. 1996) (quoting *Graham*, 490 U.S. at 397).

³ When no death occurs, these factors apply to determine when the use of deadly force is authorized.

⁴ Like I.C. § 18-4009, when no death occurs, these factors would apply to the use of deadly force.

Detailed Analysis:

I. Officer Bierma was justified in using deadly force because Bautista posed a threat of death or serious physical injury to Officer Bierma, another officer and the innocent public at large.

When weighing the facts of this case against the applicable standards, Officer Bierma was justified in using deadly force against Bautista. First under Idaho Code § 18-4009(a), a person would be justified in resisting any attempt to do some great bodily injury upon any person. The evidence shows that Bautista grabbed the gun right before he exited the Chrysler. Both Officer Bierma and Officer Anderson saw Bautista pointing a gun at them when he was in the Chrysler. After Bautista had exited and as he ran west, Officer Bierma saw Bautista turn and raise the gun at him. Bautista's intentions at that moment are unknown. However, it does not change the analysis because the fact that Bautista did not take a firing stance against Officer Bierma is not a distinguishing fact. Officer Bierma is allowed to defend himself against the threat of death or serious physical injury. This is consistent with the Idaho Court of Appeals:

We are not persuaded that it is necessary to make a distinction between the gun being 'pointed in the direction of the officers' and it being 'aimed' at the officers. Once [the suspect] pulled the gun, the officers had reasonable cause to believe that [the suspect's] forceful resistance posed a threat of death or serious physical injury to the officers. As a matter of law, the officers had a right to fire their weapons at [the suspect] after [the suspect] drew his gun on them."

Kessler v. Barowsky, 129 Idaho 640, 645, 931 P.2d 634, 639 (Ct. App. 1996).

Under Idaho Code § 18-4009(c), a person can defend a person or persons against another's design to commit a felony or do some great bodily harm. In this case, Office Bierma accurately believed that Officer Anderson was behind him and at risk for being shot by Bautista. Not only officers were in the line of fire. Bautista was near 30 to 100 innocent bystanders outside of Hurricanes. Officer Bierma believed all those individuals were in danger from Bautista. Idaho Falls police officers are entrusted with the safety of the public at large. Bautista presented himself as a direct threat to public safety. Even as we later learn the facts of what had occurred prior to Officer Bierma being dispatched, Bautista was involved in a dangerous situation. Bautista went to Hurricanes fully armed with a Glock 19 and approximately 50 rounds of ammunition, partly loaded in a high-capacity magazine, even though he is prohibited from lawfully possessing any gun and Rubio said Bautista took the gun from her car. Gonzalez shot a round at Bautista and Bautista returned fire fifteen (15) times.⁵ Bautista returned fire with little or no regard for the safety of anyone who was in the parking lot. He hit several parked cars at a level where an innocent bystander could have easily been hit. Thankfully, no one was injured from his barrage.

As has been said before, officers have a "duty to the general public when arresting a potentially dangerous individual [] to protect innocent bystanders from any harm the arrestee may inflict upon them during the process of being arrested." *Kessler v. Barowsky*, 129 Idaho 640, 644, 931 P.2d 634, 638 (Ct. App. 1996).

⁵ One round was not successfully fired.

Officer Bierma was further authorized to use deadly force under Idaho Code § 18-4009(d). Under that statute, a person may, by lawful ways and means, apprehend any person for a felony committed. Bautista had already committed at least one felony offense: Eluding a Peace Officer, a felony under I.C. § 49-1404(2), by disregarding Officer Bierma's lights and sirens and then driving recklessly and in a manner likely to endanger the public. Bautista never submitted to law enforcement, even after his car was disabled and pinned. Instead, he made an effort to grab his gun out of the driver's side pocket and he continued to try to evade Officers Bierma and Anderson.

The analysis for Idaho Code § 18-4011(2) is much the same as for Idaho Code § 18-4009(d). However, § 18-4011 only applies to public officers⁶: [deadly force] is justifiable when committed by public officers...when *reasonably necessary in overcoming actual resistance to the execution of some legal process...* The use of deadly force in such a case is justified only when "*the officer has probable cause to believe that the resistance poses a threat of death or serious physical injury to the officer or to other persons.*" I.C. § 18-4011(2).

As discussed above, Bautista eluded Officer Bierma until Officer Bierma and Anderson pinned his car with theirs. After he was forcibly stopped, he then armed himself with a dangerous weapon, continuing to make himself a threat of death or serious physical injury to the officers and to the 30 to 100 innocent citizens who were milling about in Hurricanes' parking lot.

Finally, for all the reasons discussed above, Officer Bierma's actions were also reasonable considering the Fourth Amendment. Officer Bierma knew that he was responding to an area where multiple shots had been fired and that the suspect that had previously left the scene was returning to the scene. Officer Bierma knew that the suspect was refusing to submit to law enforcement by eluding him in a manner that was dangerous to the public. Officer Bierma knew that Bautista did not give up, even after Officer Bierma utilized a PIT maneuver. Officer Bierma knew that Bautista exited the car with a Glock with at least seventeen (17) rounds. Officer Bierma knew the parking lot was crowded with innocent bystanders. Finally, Officer Bierma knew that Bautista looked over his shoulder and raised the loaded Glock at Officer Bierma. Bautista gave every indication that he would not submit to law enforcement, instead choosing to run with a gun near a crowd of people. Officer Bierma was reasonable to conclude that he needed to stop Bautista before he could seriously injure or kill him, another responding officer, or innocent members of the public.

Bautista had numerous opportunities to have a peaceful encounter with law enforcement. For one thing, he could have called 911 to report that he had been shot at. He could have stopped his car anywhere along Freeman. He could have stopped in the Elks Lodge parking lot. After Officer Bierma and Officer Anderson pinned his car, he could have stayed in his car put his hands up. Instead, he grabbed a Glock loaded with 30 rounds and exited the Chrysler with both intention and destination unknown. Even though we now know that Juan Gonzalez fired upon Bautista, Bautista's subsequent actions, as reported to Dispatch and observed by law enforcement, looked to be those of the person who had been the aggressor. It reasonably appeared to Officer Bierma that Bautista was returning to finish the job.

⁶ And those acting by their command in their aid and assistance.

After analyzing the relevant standards, Officer Bierma was justified in using deadly force to prevent Bautista from injuring or killing officers or innocent bystanders.

Conclusion:

After reading the reports, reviewing the evidence, and conferring with detectives assigned to the case, we have concluded that there is no evidence to support a criminal charge against Officer Mitchell Bierma for the events of September 11, 2021.

Bautista was involved in a dangerous game with rival gang members. He was prepared with an equally dangerous weapon. Bautista may not have fired the first shot, but he returned fire fifteen times and fled the scene, never enlisting the help of our local peace officers. Officer Bierma reasonably believed that Bautista had fired multiple rounds at both Hurricanes and somewhere on Yellowstone and was now returning to finish the job. It took two peace officers to stop Bautista by pinning the car he was driving. When Bautista exited, he continued to be a threat by making a conscious choice to grab a dangerous weapon that could cause harm to every person in his wake. He also ran from officers with both destination and intention unknown. Finally, he pointed a gun at Officer Bierma. Taking all this information into account, Officer Bierma was justified in deploying his firearm at Bautista.

Bautista could have avoided being shot. He could have never taken a handgun to Hurricanes. He could have called 911. He could have stopped his car when he was pursued by Officer Bierma. After he was stopped, Bautista could have remained with his hands up in the Chrysler until given instructions by law enforcement. Bautista could have left the loaded Glock in the vehicle. Bautista should not have pointed the gun at Officer Bierma. Bautista did none of those things.

Ultimately, the responsibility for Officer Bierma shooting Bautista rests with Bautista. Bautista's own actions on September 11, 2021, constituted sufficient justification for Officer Bierma to use deadly force to prevent the serious injury or death of officers and/or innocent citizens. Officer Bierma has a duty to protect the citizens of Idaho Falls and all who come as guests to its borders. "The existence of a law-defying element in [our] midst; the fear and feeling of insecurity that has existed; the supposed prevalence of bad, desperate and reckless men who have been a terror to the [area]"⁷ are the very things Idaho Falls' peace officers should protect the people from. Officer Bierma had an obligation to stop this dangerous and violent situation and he did.

For the reasons stated above, we find that Officer Mitchell Bierma was justified in the use of deadly force against Levi Jesse Bautista on September 11, 2021, and thus do not form the basis of criminal prosecution.



H. Alayne Bean
Bonneville County Chief Deputy Prosecuting Attorney

⁷ Decision of Judge Wells Spicer, November 30, 1881.