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Vickie M. Eggum, Office Administrator

October 9, 2012

Chief Roger Nasset
Det. Scott Warnell
Det. Zeb Dobis
Kalispell Police Department

Re: Dan Fredenberg Homicide
Case Number 2012-00021457

Gentlemen:

Having completed my review of your investigative reports, and having had the opportunity to brief this case with your agency at length, my decision in this matter is dictated by the following evidence and statutes:

1. In August, 2012, Brice Harper and Dan Fredenberg became involved in a confrontation at Fatt Boys over the attention Brice was showing Dan's wife, Heather. It was apparently necessary for a bouncer to intervene and separate the two.
2. On September 22, 2012, at approximately 8:30 p.m., Brice shot and killed Dan at Brice's residence, 244 Empire Loop, Kalispell. Brice's residence is a duplex with an attached garage; access into the residence from the garage is through a door opening into the laundry room. The shooting occurred in the garage. Brice was standing in the laundry room doorway at the time of the shooting. Dan collapsed on the floor of the garage at the foot of the stairs leading into the laundry room, approximately 2 to 3 feet from Brice.
3. Dan was shot 3 times. The first shot struck Dan in the abdomen which ultimately proved to be the fatal wound. The second and third shots struck Dan in the left shoulder and grazed the right side of his face. Dan was standing and facing in Brice's direction at the time the three shots were fired.
4. While being escorted from the scene of the shooting by KPD Officer Jason Parce, Brice stated: "I told him I had a gun, but he just kept coming at me." Heather stated to Officer Parce: "Brice shot him...he (Brice) told him he had a gun, but he just kept coming at him." A neighbor also reported to Det. Scott Warnell that she overheard Brice repeatedly state "he was coming at me."

5. When interviewed at the police station by Sgt. Doug Overman, Heather reported the following:

- a. Heather and Dan had a difficult marriage. They were mutually abusive with each other, both verbally and physically. Heather claimed Dan had pushed and kicked her a week prior to the shooting. Heather also complained that Dan "drinks quite a bit," would frequently go to the bars and "come back drunker than hell."
- b. Approximately 3 months ago, they got into a fight after Dan returned home intoxicated. Heather claimed she was "done with the relationship at that time." She further stated that she began "hanging out" with Brice at this time and admitted she "pretty much had an affair." At some point prior to the shooting she told Dan about Brice. She told Dan "she was going to look for someone else because she was done with their relationship." She told Sgt. Overman "it's all my fault." She described Brice as being a "very responsible person" and further stated Brice "treated me so good, his values are so good, he would never put his hands on a woman."
- c. It is apparent from text messages recovered from Dan's phone that their marriage was troubled and that he believed Heather was having, or had, an affair. And while he does not refer to Brice by name, he accused her of continuing to associate with the man with whom she had that affair.
- d. On the day of the shooting, Heather was at Brice's residence helping him clean and prepare for his move out of state. At some point, Dan called her to ask where she was; he also asked if she was with Brice and stated that he had been driving around looking for her. According to Heather, she did not answer Dan's inquiries.
- e. At approximately 8:00 p.m., Heather and Brice took a drive in her car so that he could try and determine what was wrong with it. As they drove through the neighborhood, Heather noticed that they were being followed by Dan. They returned to Brice's residence where she let Brice out of the car. At that time, she advised Brice to close the garage door and not answer the front door if Dan came to the house. As she prepared to drive off, Heather observed Dan enter the garage and approach Brice as he was standing in the doorway to his residence, "walking up to him fast, cussing at him." Heather could not hear what Dan was specifically saying, but she could hear yelling and knew it was "angry." Heather also stated she was in her car on the street when the shots were fired.

f. When asked by Det. Zeb Dobis if Dan ever got violent, Heather stated yes. When asked what she thought would have happened had Dan been able to get a hold of Brice, Heather stated she thought "he would have tried to kill him." Heather also reported that Brice stated he shot Dan because he was coming at him.

6. When interviewed at the police station by Det. Dobis, Brice reported the following:

- a. Brice and Heather had known each other for a few months. He denied having an affair with Heather, but acknowledged they had feelings for each other. He believed Heather and Dan were in the process of going through a divorce. Heather told him that Dan drank alcohol a lot and was abusive towards her. On the day of the shooting, Heather and Dan had an argument over the phone while Heather was at Brice's residence.

b. While driving and attempting to determine what was wrong with her car, Heather saw Dan driving behind them. She advised Brice that Dan was driving "crazy" and had probably been drinking (Dan had a BAC of .08 at time of his death). At this point, Heather dropped Brice off in front of his house, stating she would see him later.

c. As Brice approached his residence he realized Dan had stopped and suspected that something was wrong. He retrieved his pistol from his bedroom and stood in the laundry room doorway, looking out through the garage door. As Dan entered the garage and approached Brice, he raised his hand, pointed a finger at Brice, and stated "you better not point that gun at me." Brice pointed the gun at Dan and told him to stop. Dan nevertheless continued towards Brice at which time Brice shot Dan in the abdomen. Dan bent over, stated you shot me, and, according to Brice, continued to move towards him. Brice then shot him two more times and he collapsed at the foot of the stairs leading into the laundry room, approximately 2 feet from Brice.

d. Brice stated that Dan was "charging at him, like he was on a mission." He said he believed having a gun pointing towards the floor would "be enough for someone to go away." However, Dan kept coming at him so he shot him. Dan continued to come towards him, so he shot him again.

e. Brice stated he did not know what Dan was capable of or what he was going to do. However, when asked what he thought would have happened had Dan been able to get to him, he stated Dan would have tried to hit him. He also stated he did not know if Dan had a weapon and stated that he was scared of Dan. He had heard that Dan was mad at him and wanted to "kick his ass." At the end of the interview, Brice stated that he "was scared for his life" and that he did not want to shoot Dan.

7. In 2009, the legislature amended the statutes governing justifiable use of force (self-defense) in a number of respects:

a. Section 45-3-103, MCA (2009), Use of Force in Defense of Occupied Structure (commonly referred to as the "Castle Doctrine"), states the following:

(1) A person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that the use of force is necessary to prevent or terminate the other person's unlawful entry into...an occupied structure (residence).

(2) A person...is justified in the use of force likely to cause death or serious bodily harm only if: (a) the entry is made or attempted and the person reasonably believes that the force is necessary to prevent an assault upon the person....

b. Under the provisions of Section 45-3-103(2)(a), MCA (2009), a homeowner is authorized to use deadly force against an unlawful/uninvited intruder if he reasonably believes he may be assaulted by that intruder. 45-3-103(2)(a) does not require a homeowner to fear that he may be killed or seriously injured by the intruder before resorting to the use of deadly force. 45-3-103(2)(a) allows the use of deadly force against an intruder if the homeowner reasonably fears an assault of any sort.

c. Section 45-3-110, MCA (2009), No Duty to Summon Help or Flee (commonly referred to as the "stand your ground" law), states: A person who is lawfully in a place or location and who is threatened with bodily injury...has no duty to retreat from a threat or summon law enforcement

assistance prior to using force. The provisions of this section apply to a person offering evidence of justifiable use of force under...45-3-103.

d. Under the provisions of Section 45-3-110, MCA (2009), a homeowner confronted by an uninvited intruder at his residence is not required to retreat or call the police before resorting to the use of force, including deadly force, if he reasonably believes he is about to be assaulted by that intruder.

e. Section 45-3-111(2), MCA (2009), Openly Carrying Weapon—Display, states: If a person reasonably believes that the person...is threatened with bodily harm, the person may warn or threaten the use of force, including deadly force, against the aggressor, including drawing or presenting a weapon.

f. Section 46-16-131, MCA (2009), Justifiable Use of Force—Burden of Proof, states: In a criminal trial, when the defendant has offered evidence of justifiable use of force, the state has the burden of proving beyond a reasonable doubt that the defendant's actions were not justified.

8. On the basis of the foregoing evidence and statutes, I have reached the following conclusions:

a. At the time Brice realized that Dan had stopped and may try to confront him at his residence, he had the right to retrieve his pistol from his bedroom and arm himself.

b. Dan's entry into Brice's garage was uninvited.

c. Given the relationship between Heather and Brice which was known to Dan, the prior confrontation at Fatt Boys, the manner in which Dan entered the garage, Dan's obvious anger, Brice's belief that Dan wanted to "kick his ass," and Dan's refusal to stop when ordered to do so, Brice's belief that Dan intended to assault him was a reasonable one. Heather herself was of the opinion that Dan would have assaulted Brice had he been allowed the opportunity to do so.

d. Even though Brice obviously had the opportunity to retreat into his house, close the door, and call the police, he was under no legal obligation to do so. Under the provisions of 45-3-110 and 45-3-111(2), Brice had the legal right to arm himself and remain in his laundry room doorway, his fear of Dan notwithstanding.

e. Given his reasonable belief that he was about to be assaulted, Brice's use of deadly force against Dan was justified under the provisions of 45-3-103(2)(a).

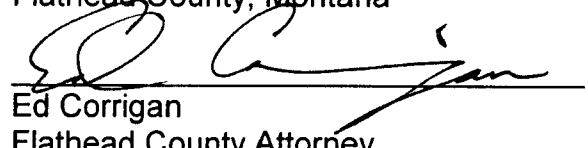
f. Were we to charge Brice with homicide and proceed to trial, I am convinced the judge and/or jurors would conclude that Brice reasonably believed he was about to be assaulted and that his use of force was therefore justified under Montana law. We lack the evidence necessary to prove otherwise beyond a reasonable doubt.

g. I am acutely aware that the Fredenberg family and others believe this matter should be presented to a jury and strongly disagree with the position I am taking. I am, however, ethically precluded from charging an individual with an offense, particularly Deliberate Homicide, when I do not believe the evidence and the law will support a conviction.

For these reasons, I am declining to charge Brice Harper with Deliberate Homicide or Mitigated Deliberate Homicide.

Sincerely,

OFFICE OF THE COUNTY ATTORNEY
Flathead County, Montana



Ed Corrigan
Flathead County Attorney