



State of North Carolina
General Court of Justice
Twenty-Sixth Prosecutorial District
MECKLENBURG COUNTY

SPENCER B. MERRIWEATHER III
DISTRICT ATTORNEY

700 EAST TRADE STREET
CHARLOTTE, NC 28202
TELEPHONE: 704-686-0700
FAX: 704-686-0716

July 7, 2022

Special Agent in Charge Kevin Canty
North Carolina State Bureau of Investigation
5994 Caldwell Park Dr.
Harrisburg, North Carolina 28075

Re: David Samuel Herbert Death Investigation

Dear SAC Canty:

Pursuant to N.C.G.S. 7A-61, my office has reviewed the investigation surrounding the shooting death of David Samuel Herbert on December 18, 2021. The case was investigated under case number 2021-03543. The documentation considered for the purposes of this review was provided by the North Carolina State Bureau of Investigation on April 13, 2022.¹ The purpose of this review was to examine whether the actions of Charlotte-Mecklenburg Police Department Officer Edward Mark were unlawful in the incident leading to the death of David Samuel Herbert.

These events occurred at the residence of the decedent, his wife ("M.C."), and her 13-year-old daughter ("C.K."), located at 10329 Blairbeth Street in Charlotte. At approximately 6:51 p.m., M.C. called 911 and reported that her husband broke into her residence and stuck a knife to her daughter, and M.C. had fled the residence. Multiple CMPD officers responded to the residence, made entry to the first floor, and witnessed the decedent, who was clearly agitated, restraining C.K. at knifepoint on the second-floor catwalk. As depicted on body-worn camera video, Sgt. Joseph Pendergrast attempted to talk the decedent into releasing C.K. while other officers, including Officers Ryan Wood, Megan Pirkel, and Nickolas Smith were also present in the home. Sgt. Pendergrast's service weapon remained holstered while he attempted to de-escalate the situation. In light of the situation and the decedent's actions, most of the remaining officers had their service weapons drawn. Approximately 20 minutes later, SWAT Officer Edward Mark arrived, carrying his Daniel Defense rifle.

¹ The North Carolina State Bureau of Investigation does not routinely provide transcripts of interviews as part of the investigative file; therefore, transcripts are not included as attachments to this review. For purposes of these reviews, however, this office reviews the actual underlying recorded video or audio interviews provided by the SBI.

Per body-worn camera footage, upon his entry into the residence, Officer Mark was informed that officers had not yet observed any signs of injury on C.K. but that the decedent was currently at the top of the stairs with a knife to C.K.'s throat. Officer Mark then took a position where he could see the decedent and pointed his rifle in the decedent's direction, which immediately resulted in crying and sounds of distress from C.K., including a cry of "it hurts." Officer Mark told the decedent to "put the knife down, sir" and "put the knife down and let her go." Sgt. Pendergrast then told Officer Mark, "he has that knife to her throat, he is going to kill her. He is going to kill her." The decedent then announced, "you have to the count of three to get out of here," after which Officer Mark began to ascend the steps. When Officer Mark reached the second floor, C.K. began to shriek as the decedent pulled her to a back bedroom. Officer Mark followed the decedent and C.K. to the back bedroom where the decedent was restraining C.K. in front of him. Officer Mark pushed the decedent and C.K. to create separation, after which the decedent began stabbing C.K. multiple times with a large hunting knife. [1] After approximately four stabbing motions, Officer Mark fired his rifle twice, striking the decedent in the head and killing him. C.K. was then removed from the room for emergency medical treatment for her multiple stab wounds and lacerations.

An autopsy performed on the decedent determined he suffered two gunshot wounds to the head. C.K. suffered 13 to 15 stab wounds, including two that penetrated the left upper chest, as well as injuries to the right flank, both arms, right abdomen, and left middle finger.

As you know, this letter specifically does not address issues relating to tactics, or whether officers followed correct police procedures or CMPD Directives.

I personally responded to the scene of this incident and monitored the investigation along with another senior Assistant District Attorney (ADA). I reviewed the investigative file as provided by the SBI. Finally, consistent with the District Attorney's Office Officer-Involved Shooting Protocol, this case was presented to the District Attorney's Officer-Involved Shooting Review Team, which is comprised of the office's most experienced prosecutors.

A. The role of the District Attorney under North Carolina law

The District Attorney (DA) for the 26th Prosecutorial District is a state official and, as such, does not answer to city or county governments within the prosecutorial district. The District Attorney is the chief law enforcement official of the 26th Judicial District, the boundaries of which are the same as the County of Mecklenburg. The District Attorney has no administrative authority or control over the personnel of CMPD or other police agencies within the jurisdiction. That authority and control resides with each city or county government.

Pursuant to North Carolina statute, one of the District Attorney's obligations is to advise law enforcement agencies within the prosecutorial district. The DA does not arrest people or charge people with crimes. When the police charge a person with a crime, the DA decides whether or not to prosecute the charged crime. Generally, the DA does not review police decisions not to charge an individual with a crime. However, in officer-involved shooting cases, the DA reviews the complete investigative file of the investigating agency. The DA then decides whether he agrees or disagrees with the charging decision made by the police. If the DA concludes that uncharged conduct should be prosecuted, the case will be submitted to a Grand Jury.

If no criminal charges are filed, that does not mean the District Attorney's Office believes the matter was in all respects handled appropriately from an administrative or tactical viewpoint. It is simply a determination that there is not a reasonable likelihood of proving criminal charges beyond a reasonable doubt unanimously to a jury. This is the limit of the DA's statutory authority in these matters. The fact that a shooting may be controversial does not mean that criminal prosecution is warranted. Even if the District Attorney believes a shooting was avoidable or an officer did not follow expected procedures or norms, this does not necessarily amount to a violation of criminal law. In these circumstances, remedies (if any are appropriate) may be pursued by administrative or civil means. The District Attorney has no administrative or civil authority in these matters. Those remedies are primarily in the purview of city and county governments, police departments, and private civil attorneys.

B. Legal standards

The law recognizes an inherent right to use deadly force to protect oneself or others from death or great bodily harm. This core legal principle is referred to as the right to "self-defense." A police officer does not lose the right to self-defense by virtue of becoming a police officer. Officers are entitled to the same protections of the law as every other individual. An imminent threat to the life of a police officer or others entitles the officer to respond in such a way as to stop that threat.

Under North Carolina law, the burden of proof is on the State to prove beyond a reasonable doubt that a defendant did not act in self-defense of himself or others. The Supreme Court of North Carolina defined the law of self-defense in State v. Norris, 303 N.C. 526 (1981). A killing is justified under North Carolina law if it appeared to a person that it was necessary to kill in order to save himself or another from death or great bodily harm. The law requires that the belief in the necessity to kill must be reasonable under the circumstances. Id. at 530.

C. Use of deadly force by a law enforcement officer

The same legal standards apply to law enforcement officers and private citizens alike. However, officers fulfilling their sworn duty to enforce the laws of this State are often placed in situations in which they are required to confront rather than avoid potentially dangerous people and situations.

The United States Supreme Court stated, "[t]he '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." Graham v. Connor, 490 U.S. 386, 396 (1989). The Court further explained that "[t]he 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." Id. at 396–97. A situation in which an officer is confronting an armed person with uncertain motives is by definition dangerous, and such a circumstance will almost always be tense, uncertain, and rapidly evolving. In these circumstances, we are not deciding whether the officer's belief in the need to use deadly force was correct but only whether his belief in the necessity of such force was reasonable.

In conducting a legal analysis, this office must take its guidance from the law, and a decision must not be based upon public sentiment or outcry. The obligation of a District Attorney is clear; he must simply apply the law to the known facts.

What the law demands is an evaluation of the reasonableness of the officer's decision at the moment he fired the shot. The Supreme Court of the United States has provided guidance on what is objectively reasonable and how such an analysis should be conducted. That guidance indicates that it is inappropriate to employ "the 20/20 vision of hindsight," and an analysis must make "allowance for the fact that police officers are often forced to make split-second judgments." See Graham v. Connor, 490 U.S. at 396. The Court suggests that when reviewing use of force cases, caution should be used to avoid analysis "more reflective of the 'peace of a judge's chambers' than of a dangerous and threatening situation on the street." Elliot v. Leavitt, 99 F.3d. 640, 643 (4th Cir. 1996).

D. The officer-involved shooting of David Samuel Herbert

Officer Edward Mark

Officer Edward Mark was interviewed by SBI agents on January 7, 2022, at the SBI District Office in Harrisburg, North Carolina. In that interview, Officer Mark indicated he has been a police officer with CMPD since September 2007. He has been a member of the SWAT team for approximately nine years and trains with SWAT three times per week. Prior to joining CMPD, Officer Mark served in the U.S. Army and received extensive training, including Airborne School, Light Infantry Unit Patrol Tactics, Stress Shooting, Close Quarters Combat, Clearing Buildings, and Sniper training.

Officer Mark recalled that he received the initial call for service from the Westover Division Headquarters channel as officers were looking for anyone who was on duty from the SWAT team. Officer Mark read over the details of the call on his monitor in his patrol vehicle. Officer Mark stated that the South Division supervisor informed him over the radio that a male went into a house, and the daughter was still inside, being held at knifepoint. The girl's mother had been able to get out of the house. In addition to this briefing, Officer Mark said he monitored the radio traffic and was briefed by Sgt. Eric Tran-Thompson in the garage of the residence upon Officer Mark's arrival on the scene. Officer Mark recalled that Sgt. Tran-Thompson told him the suspect had a knife on the daughter's neck and was holding her against her will. The daughter was 13 years old or younger.

Officer Mark recounted that he went back to his patrol vehicle and got his rifle and helmet. While at his patrol vehicle, he briefed Sgt. Lauren Stubblefield, who was also a SWAT team member, and told her he needed to take charge of the arrest team based on what he was told.

Officer Mark was dressed in his patrol, Class B, duty uniform that included patches, a badge, and a nametag. Officer Mark stated he chose his rifle because it would give him better accuracy, and it is more lethal to effectively stop the threat. Officer Mark stated that the rifle he used was a Daniel Defense rifle with 77 grain ammunition, a suppressor, red dot, aim point, night vision laser, flashlight, and angled grip. The weapon is carried with a 30-round magazine. He loaded a round into the magazine when he arrived on the scene, so there was one round in the

chamber and 29 rounds in the magazine. Officer Mark stated he also carried a Glock 21 handgun, .45 caliber, semiauto pistol, with 13 rounds, but he did not unholster his handgun during this incident.

Officer Mark recalled that the arrest team was at the base of the stairwell when he entered the home. Sgt. Pendergrast was dealing with the “hostage taker.” There were two officers with Sgt. Pendergrast and another officer across the room. He recalled that some of the other officers had their guns out. Officer Mark believed the other officers had been on scene approximately 20 minutes. When Officer Mark entered the home, Sgt. Pendergrast pointed up because the hostage taker was up the stairs. Officer Mark wanted to know where the hostage taker was located. Officer Mark saw the hostage taker and the female up the stairs and could only see part of their faces. The hostage taker was behind the female. Officer Mark recalled that he told the hostage taker, “Hey man, let her go.” He saw the hostage taker was agitated, saw the stress of the police officers, and heard the female moaning. Officer Mark stated he could not see a knife at this point. Officer Mark recounted that the hostage taker was trying to hide behind the female.

Officer Mark stated he made the decision to enter and proceed as a SWAT team member. Officer Mark recalled that the hostage taker was very agitated, and Officer Mark believed he needed to take some kind of action or the decedent was going to kill the girl. He said the girl was in clear distress, and as the hostage taker started counting down from three, Officer Mark believed he needed to act immediately. Officer Mark stated there was no time to consider alternative actions as action had to be taken immediately. Officer Mark recalled that he tried to get a better angle on the hostage taker, but the decedent started counting down, and the girl began screaming. He made his decision to go up the stairs once the hostage taker started counting down.

Officer Mark recalled that he went up the stairs, and the hostage taker pulled the girl into a room upstairs, with the hostage taker holding the girl in front of him. Officer Mark estimated the two were 3 yards away from him. Officer Mark recounted that he tried to create an angle to take a shot and that he tried to pull the girl away from him but could not. Officer Mark explained he has been trained to get the hostage away in a close situation.

Officer Mark stated the hostage taker had a big hunting-type knife in his right hand when Officer Mark entered the room and was swinging the knife toward Officer Mark. Officer Mark stated that he thought the hostage taker stabbed the female two or three times.

Officer Mark stated that, due to the decedent’s aggressive, violent actions, Officer Mark had to shoot him to stop the decedent from killing the girl or hurting Officer Mark with the knife. He recounted that he put the red dot on the hostage taker’s forehead and shot him in the eye and looked for a change in body shape. Officer Mark stated that after the first shot, the hostage taker “still had life to him,” so Officer Mark adjusted and fired a second shot aimed at the top of the decedent’s nose. The hostage taker then dropped the knife, slumped to the floor, and appeared dead. Officer Mark estimated he was 5 to 6 feet away from the decedent when he fired his rifle. He estimated there was about a half second between his first and second shots. Officer Mark stated there was no time for verbal commands or verbal warnings because the decedent was actively trying to kill the 13-year-old. He recalled firing twice. He did not sustain any injuries. He recalled there being less than a minute from the time he saw the hostage taker until he had shot the decedent.

Officer Mark stated that the female had blood on her, and he told officers to take her downstairs to get her treatment from paramedics who had entered the house to provide aid. He recalled that a male sergeant with gray hair took him outside. Sgt. Stubblefield took his rifle on the scene. He was checked by paramedics, and his blood pressure was extremely high, so Sgt. Andrew Riddle took him to the hospital.

Officer Mark stated that his body-worn camera recorded the incident, but he had not reviewed the footage prior to this interview.

C.K.²

C.K. was interviewed on January 18, 2022, at Pat's Place Child Advocacy Center by a trained forensic interviewer. The interview was monitored by SBI agents.

C.K. stated that she was stabbed by her stepfather on the evening of December 18, 2021. On that day, she woke up and did her normal routine. Her mother, M.C., ran errands that evening. C.K. stated that her mom went to run errands that were important for "ditching" her stepfather. C.K. explained she did not know what errands her mom left to do. C.K.'s mother called her multiple times that day to make sure she was safe. M.C. told C.K. to change the passcode on her phone and laptop.

C.K. explained that her mother had been strangled by the decedent the week before C.K. was stabbed. C.K. did not see her mother get strangled, but she saw the bruises on her neck. C.K. stated that she and her mother realized they were in danger, but they did not call the police because her mother was being "blackmailed" by the decedent. C.K. said the decedent told them that if they called the police, the police would separate C.K. and her mother.

C.K. recounted that once her mother got home from running errands, she, her mother, and the decedent went to a restaurant. C.K. explained that when they left the restaurant, her mother locked the decedent out of the car. The decedent was trying to get inside the car and pulled the passenger's side door handle off. Her mother started to drive away, and the decedent jumped onto the car while it was moving. Her mother sped up and stopped abruptly multiple times to try to get the decedent off her car. He eventually fell off their car, and C.K. and her mother went home.

C.K. recalled that once she and her mother got home, she changed from her dress into her pajamas. They thought about calling the police but did not. They also considered getting a hotel room. While C.K. was in the living room on the first floor, she heard their garage door open. C.K. and her mom ran to the laundry room that was connected to the garage. C.K. saw the decedent kick in the laundry room door that led into the garage, and the decedent came in through the laundry room. At this point, C.K. did not see where her mother went, but her mother later told her that she ran outside and called the police.

Once inside the home, the decedent asked C.K. where her mother was, and C.K. told him she did not know. The decedent then went to the coffee table in the living room and grabbed her

² Witnesses who did not identify themselves publicly in media interviews or otherwise are not identified by name in this document. To name those who did not publicly identify themselves could have a chilling effect on witness cooperation in other cases.

phone and a big knife with a brown and black “tattered” leather sheath out of the drawer. C.K. advised the knife was big like a kitchen knife, but it was not a butcher knife. She explained this is the knife the decedent eventually used to stab her.

C.K. said the decedent grabbed her by the arm and drug her around looking for her mother. He held C.K.’s arm with one hand and held the knife with his other hand. The decedent told C.K. that if she was lying to him, there would be consequences. He dragged her around the whole house looking for her mother, but he could not find her. C.K. recounted that the decedent took her to the office upstairs adjacent to the bedroom.

C.K. stated that the decedent told her to unlock her phone, which she did. The decedent used her phone to call his sister. C.K. could not remember the full conversation the decedent had with his sister. C.K. said that when the police arrived, the decedent told his sister, “I’m surrounded and I’m not going to jail.” When the police came into the house, the decedent hung up on his sister.

C.K. advised they were standing in the corner office. When the police came into the house, the decedent held her hostage with the knife. She said they were on the second floor looking down on the first floor, but the police could not see C.K. and the decedent where they were initially standing. C.K. stated that, at first, the decedent would not come out where the police could see him, but he eventually moved to where they could see him. The decedent was behind C.K., holding the knife to her stomach, chest, and neck. She and the decedent were both facing the same way, looking toward the police.

The decedent told the police that if they did anything, he would stab her. C.K. stated that the decedent talked to the officers for a bit, but she did not know how long. She recalled that an officer with a big gun began walking up the steps and, because of that, the decedent pulled her into the office. She believed the decedent pulled her into the office so he would not be shot.

C.K. recounted that after the decedent pulled her into the office, he began stabbing her. She said the decedent tried to stab her in the chest, but she fought back, and the decedent stabbed her in the right upper arm instead. C.K. remembered she got stabbed, and then she closed her eyes. C.K. stated that she then heard a gunshot and when she opened her eyes, officers were dragging her away from the decedent and taking her downstairs.

C.K. recalled that someone put something on her arm to stop the bleeding and they cut off her clothes and were holding her chest. She was then moved to a medical bed and put in an ambulance. C.K. recalled being given a blood transfusion and remembered that once she got to the hospital, people started working on her and gave her an X-ray. During this time, she did not see her mother and did not know where her mother was.

M.C.

M.C. was interviewed by SBI agents on Saturday, December 18, 2021, and December 21, 2021. M.C. stated that she had been married to the decedent since 2017. She recalled that the decedent constantly made statements about hurting and killing her, and she believed he would kill her.

M.C. explained that on December 18, 2021, she, C.K., and the decedent went to a restaurant for dinner. After dinner, she tried to get rid of the defendant by locking the car and driving away. She and C.K. returned to their home and locked the doors but forgot that the decedent knew the code to the keypad on the garage. At approximately 6:30 p.m., she was downstairs with her daughter, C.K., playing games and watching television when she heard the garage door open. M.C. walked to the laundry room to make sure the door was locked. While reaching for the door handle, the decedent kicked the locked door open, knocking M.C. to the floor. M.C. recounted that she did not see his face but recognized his voice. She screamed and ran out of the garage. She could not remember what the decedent said when he entered the home, but her recollection was that he had a large knife in his hand.

M.C. stated she was able to run out of the garage and knocked on several doors in the neighborhood until an unknown elderly couple allowed her to use their phone to call 911. She did not go back inside the home after calling 911. When police arrived on scene, a CMPD officer placed her into a patrol car and transported her to Atrium Health.

S.H.

S.H. was interviewed by SBI agents on December 19, 2021, via telephone. S.H. is the decedent's sister. S.H. informed SBI agents that she was aware that her brother had been shot and killed by a CMPD officer, and she had already spoken with the Mecklenburg County Medical Examiner's Office.

S.H. provided SBI agents with a recording of her video call and screenshots of her phone conversations with the decedent on the day of the incident. S.H. informed agents that the video recording was from approximately 10 minutes before the police came through the door. While she was on that call with the decedent, S.H. believed she heard the decedent cock a gun. The gun sounded like a revolver, but she did not see it over the video call. S.H. did not see a knife or hear C.K. or the decedent talk about a knife. S.H. stated that the decedent kept saying he was not going back to prison, and he was going to die tonight.

S.H. told the decedent to let C.K. go, and the decedent responded, "She didn't ask to leave." S.H. informed SBI agents that she believed the decedent committed "suicide by officer."

S.H. recalled that the decedent had called her on December 18, 2021, at approximately 3:26 p.m., in Colorado's time zone. The call lasted 17 minutes. At that time, the decedent told her that M.C. had hit him with a car on Tryon Street, and he was badly hurt. S.H. talked to a female witness at that scene. S.H. stated that the decedent had used the witness' phone to call S.H., who then paid for an Uber to drive the decedent home. S.H. explained that M.C. had taken the decedent's keys, and the decedent forced his way in the house.

S.H. provided SBI agents with two photographs from her call with the decedent. She explained the photographs of the decedent were taken on Saturday, December 18, 2021, while she was on a video call with the decedent and while he was holding C.K. against her will. The decedent was inside the house, and C.K. was standing against a bedroom wall. S.H. described C.K. as being really scared, and S.H. repeatedly asked the decedent to let C.K. go.

S.H. said she talked to the decedent on the phone three times, including twice while he was at the house with C.K. The decedent called from C.K.'s phone. One phone call was

approximately eight minutes, and the second phone call was approximately two minutes in duration before the phone went dead. She provided SBI agents with two videos of these calls. S.H. stated that the last time she spoke with the decedent, “the cops barged in, and he grabbed (C.K.), and the phone went dead, and I called a million times after.”

Sgt. Joseph Pendergrast

Sgt. Joseph Pendergrast was interviewed by SBI agents on December 22, 2021, in his office at the South Division substation. Sgt. Pendergrast stated that he responded to the call at 10329 Blairbeth Street. Sgt. Pendergrast recalled that upon his arrival at the scene, he met with the 911 caller (M.C.), who reported her ex-husband was in the house with her daughter and he had threatened to kill her and her daughter before M.C. ran out of the house. M.C. stated that the decedent had a knife.

Sgt. Pendergrast reported that he and several other officers went inside and identified the decedent, who was holding a knife in one hand and had his other arm wrapped around a young female. The decedent was upstairs on the balcony and Sgt. Pendergrast was downstairs.

Sgt. Pendergrast recalled that he talked with the decedent and that the decedent stated, “this ends by me killing her, you all killing me, or me killing myself.”

Sgt. Pendergrast reported that a SWAT team member (Officer Mark) arrived and entered the house. The decedent saw Officer Mark, and Officer Mark began giving the decedent commands to drop the knife. Sgt. Pendergrast recalled that within seconds of Officer Mark’s arrival, the decedent yelled commands at Officer Mark, and Officer Mark yelled commands at the decedent, at which point the decedent began walking backward.

Sgt. Pendergrast stated that he did not see the girl being stabbed, but he heard screaming and knew she was being stabbed. He recalled that Officer Mark, armed with a rifle, ran upstairs and other officers followed. Sgt. Pendergrast recalled that he immediately heard two gunshots, and the screaming continued. Officers called for paramedics, and Sgt. Pendergrast called over the radio for key units to respond. Then, he left the house and sat in his car.

Officer Ryan Wood

Officer Ryan Wood was interviewed by SBI agents on December 18, 2021. On that evening, Officer Wood was wearing his CMPD Class B uniform, which consisted of tactical pants, a long-sleeved shirt with CMPD patches on the sleeves, and a department-issued body vest with a nametag and badge. Officer Wood recalled that he was behind the Blakeney Shopping Center, assisting with an accident, when he heard the incident call come over the radio. He was approximately 2 miles away from the address of the call. Officer Wood recounted that he headed toward the call location without his lights and siren activated. When dispatchers relayed information that a male had kicked open the door while holding a knife and a girl had been stabbed, Officer Wood activated his lights and siren.

Officer Wood was the first officer on the scene. The fire department was also present when Officer Wood arrived. Officer Wood stated that a female, later identified as M.C, told him that the decedent came in yielding a large knife and that she left the house and could hear her

daughter yelling and screaming while she retreated. M.C. provided Officer Wood with her garage code to access the residence.

Officer Wood recounted that he requested the fire department to move to the rear of the house in case anyone tried to exit through the back door. Officer Wood held the perimeter until other units arrived. Approximately five to seven minutes later, two sergeants, Sgt. Pendergrast and Sgt. Jeremy Vredevel, arrived in a CMPD vehicle, and he provided them with information regarding the incident.

Officer Wood recalled that Officer Matthew Mayes and another officer arrived at the scene and went around to the back of the house to keep an eye on the back doors. Officer Wood's job was to keep an eye on the front of the house for any movement.

Sgt. Pendergrast gave the command to Officer Wood to use the garage code to open the door and enter the residence. During that time, the two officers who were watching the back of the house came around to the front to assist. Once the garage door was opened, Officer Wood stayed to the left and Sgt. Pendergrast went to the right. Officer Wood noticed the garage door that opens into the residence was not secured shut. He stated he could see the metal latch had been opened. Officer Wood stated he provided commands, including, "CMPD. Come out with your hands up!" Officers then made their way into the home. Following the entry into the house, Officer Wood could hear rumbling coming from upstairs. Officer Wood recalled that he provided more commands which included, "I know who you are," and "Send your daughter outside," but there was no compliance or reaction from the decedent. Officer Wood stated that the decedent showed no interest in talking to him. Officer Wood also stated he used the suspect's first name, David, while providing commands.

Officer Wood recalled that he gave the officers commands to advance into the house. As Officer Wood moved further into the residence, he entered through a narrow corridor, which he believed was possibly a laundry room that opened into a "T" intersection. While Officer Wood was coming around a corner, he noticed movement over his right shoulder coming from the catwalk on the second floor overlooking the dining room. Officer Wood recounted that he raised his weapon and moved to the right and placed himself in between the staircase at the top right corner of the residence from the entry point. Officer Wood stated that the lighting in the residence was good because the house lights were already turned on when officers made entry into the residence.

Officer Wood stated that he heard a girl, later identified as C.K., crying and yelling. The officers fanned themselves out within the living room. Officer Wood engaged with the decedent and asked him to show C.K. to the officers, to which he responded, "See? Here she is." Officer Wood continued verbal commands until Sgt. Pendergrast took over.

The decedent later appeared through an opening with C.K. Officer Wood stated that they asked the suspect what his name was, and the decedent told the officers he did not like the flashlights aimed toward his face. At this time, Officer Wood had a line of sight on the decedent's neck but no visual of the girl or any weapons.

Officer Wood recalled that Sgt. Pendergrast continued to utilize de-escalation techniques and informed the suspect the officers were not going to lower their weapons. While Sgt.

Pendergrast was engaging with the suspect, Officer Wood went through and cleared the downstairs bedroom and small bathroom. Once the rooms were cleared, Officer Wood returned to his position.

Officer Wood explained that the decedent stated he wanted his story told and requested to tell his story before anything happened. After the suspect made the request, he made a “head slicing” sound. Sgt. Pendergrast asked the suspect what the officers could do for the decedent to let C.K. go. He recalled that the decedent told Sgt. Pendergrast, “Nothing until I tell my story.”

Officer Wood recalled that the decedent stated he was a fugitive with felony warrants and M.C. was harboring him and had attempted to run him over with her vehicle. The suspect stated he was bleeding all over the place. Officers informed the suspect the ambulance could not come on the scene until the scene was safe. Officer Wood further recalled the decedent telling officers that he had severe medical conditions, and he was going to be dead in a couple of years anyway.

Officer Wood recalled that at one point, the decedent told the officers it sounded like people were on the roof, but the officers confirmed no one was on the roof. The decedent then asked how many people were in the residence and counted five officers he could see. Officer Wood said there were two officers out of the suspect’s line of sight in the hallway and, including the decedent and C.K., there were nine people total in the residence. Officer Wood recalled that Sgt. Pendergrast told the suspect no one else was coming in.

Officer Wood explained that following this interaction with the suspect, Sgt. Pendergrast moved, and a SWAT officer took his place and aimed his rifle at the suspect. Officer Wood recalled that the SWAT officer informed the decedent, “As long as you have a knife to her throat, we will not be lowering our weapons.” The decedent responded saying he was not holding the weapon to C.K.’s throat, just near her. Officer Wood said the SWAT officer continued to look through the open space where the suspect was located, trying to make visual contact and engaging in commands with the suspect.

Officer Wood stated the decedent started cussing and yelling, and C.K. became more emotional. The decedent ended up moving out of the line of vision, and the SWAT officer advanced up the stairs. Officer Wood recalled that he followed the SWAT officer. Officer Wood could hear C.K. screaming and followed the screams to a room where the suspect and C.K. were located.

Officer Wood stated that when he entered the room, he witnessed the suspect plunging a knife approximately two times into C.K. with less than a second between each plunge. Officer Wood recounted that the SWAT officer commanded the suspect to drop the knife multiple times, then took one step forward and fired two shots toward the decedent. Officer Wood estimated that approximately five seconds passed from the time the officers entered the room to the time the second shot was fired. Officer estimated the distance between himself and the decedent while in the incident room to be approximately 7 feet. He estimated the distance between the SWAT officer and the suspect to be approximately 3 to 4 feet. Officer Wood described the room as a 12-foot by 12-foot room with small cutouts and a shallow corner. A desk took up a third of the space, which pushed the decedent into a corner.

Officer Wood described the suspect's knife as a silver blade with one edge, approximately six inches long with a white ivory handle and a dark brown leather sheath. He recalled that the suspect held the knife in his right hand and held C.K. with his left arm across her neckline, pinning her to his chest.

Officer Wood recalled that an officer came and removed C.K. from the incident room and took her to Officer Mayes, who provided medical aid. Officer Wood saw the decedent's knife on the floor and secured it by placing his right foot over the knife.

Officer Wood stated that he remained in the incident room for approximately 15 minutes, during which the fire department came in and pronounced David Herbert as deceased. After he was released from the scene, he was requested to go to the Law Enforcement Center to be interviewed.

Additional CMPD officers

CMPD Officers Megan Pirkel, Nicholas Smith, Benjamin Wilson, Jonathan Chester, and Matthew Mayes were also inside the home at the time of the incident. Each of these officers were interviewed by SBI agents and gave accounts consistent with that of Officer Wood and the body-worn camera video captured from numerous sources.

E. 911 call

M.C. called 911 at approximately 6:51 p.m. on December 18, 2021. She informed the 911 operator that her husband stuck a knife to her daughter, and she said she believed her daughter was dead. She did not see the decedent actually stab her daughter, but he had a knife, and she heard her daughter scream.

F. Physical evidence

SBI agents performed a round count on the Daniel Defense rifle belonging to Officer Mark. SBI agents counted 27 live LC 17 rounds in the magazine and one in the chamber of the rifle, which corresponds to the two spent LC 17 shell casings found on the scene. SBI agents also located the Break-Up Country knife wielded by the decedent, and it was captured on body-worn camera video next to the decedent's body. The sheath for the knife was also located on the floor next to the decedent.

G. Video evidence

Body-worn cameras from the multiple officers responding to this scene captured the events from different vantage points. The videos corroborate that when officers attempted to speak with the decedent from the garage door leading into the laundry room, the decedent told them, "Don't come in. I know who you are and I'm not coming down." After officers made entrance, C.K. confirmed she was not yet hurt. Multiple officers entered the home and took varying positions on the first floor while Sgt. Pendergrast talked to the decedent, who was located on the catwalk area of the second floor, for 20 minutes. During this conversation, the decedent told officers that he was not going to show his hands and come downstairs. The decedent stated, "I already know I'm spending the rest of my life in prison if I come down." During this exchange, the decedent complained that officers were pointing their guns at him, so

some of the officers lowered their weapons. Also, during this exchange, the decedent made statements such as:

- “I’m not in a hurry. I already know what happens from here.”
- “This is not going to go well.”
- “I guess we’re at a bypass [sic] and everybody up here gets hurt.”
- “This is going to turn south real fast.”
- “I know that I’m not getting out of this situation tonight.”
- “I don’t want this to go bad, but I’m not scared.”
- “I’m never going to get out of this. I either die here or in prison.”
- “If you point a gun at me again, I’m just going to [cutting sounds] and we’re done and it’s over, and you guys will never make it up the stairs.”
- “If SWAT shows up, this is over.”

When Officer Mark entered the laundry room, he asked Sgt. Pendergrast if the arrest team was set up. Sgt. Pendergrast replied, “yes, I have enough.” Officer Mark was informed that officers had not yet observed signs of injury on C.K., but the decedent was currently at the top of the stairs with a knife to her throat. Officer Mark asked this information again to confirm, and officers confirmed that the decedent currently had a knife to C.K.’s throat. Officer Mark was also told there was an entryway into the attic area upstairs, and it was possible the decedent could retreat into it.

Officer Mark then entered the residence from the laundry room, pointed his rifle at the decedent and stated, “let me see your hands.” The decedent stated, “he’s pointing a gun at me,” and C.K. began to shriek. The decedent told Officer Mark to “put it down now” while C.K. could be heard crying and saying “it hurts” in the background. Officer Mark then told the decedent to “get back out here for a second.” The decedent said something inaudible followed by “...down or everyone goes.” Officer Mark replied by telling the decedent to “put the knife down right now, sir.” The decedent told Officer Mark, “now you’re escalating it,” and then stated, “all I wanted to do was talk to a detective.” Next, Sgt. Pendergrast could be heard informing Officer Mark, “he has that knife to her throat, he’s going to kill her. He is going to kill her.” The decedent then stated that “you’ve got on the count of three to get out of here” while C.K. can be heard saying, “please don’t hurt me.”

Officer Mark began moving up the stairs. As Officer Mark ascended the stairs, the cries from C.K. became more urgent. Once reaching the top of the stairs, Officer Mark twice told the decedent to put the knife down. Officer Mark followed the decedent and C.K. to the back bedroom, where the decedent was restraining C.K. in front of him. Officer Mark told the decedent twice more to put the knife down. Officer Mark then pushed the decedent and C.K. to create separation after which the decedent began stabbing C.K. multiple times with a large hunting knife. After approximately four stabbing motions, Officer Mark fired his rifle twice, striking the decedent in the head and killing him. C.K. was then removed from the room for emergency medical treatment for her multiple stab wounds and lacerations.

H. Autopsy report

The Mecklenburg County Medical Examiner’s Office performed an autopsy on David Herbert on December 20, 2021. The autopsy determined that the decedent suffered two gunshot

wounds to the head. The decedent also had an incised wound of the left hand, a superficial incised wound of the anterior left upper leg, and incised wounds of the anterior right upper leg. The cause of death was determined to be gunshot wounds to the head. A blood toxicology screening for ethanol did not reveal any alcohol in the decedent's system. A copy of the autopsy report is included as an exhibit to this report.

I. Conclusion

It is undisputed that Officer Mark fired his rifle two times at close range at the decedent, killing him. The central issue in this review is whether Officer Mark was justified under North Carolina law in using deadly force in the protection of himself or another. A police officer – or any other person – is justified in using deadly force if he in fact believed that he or another person was in imminent danger of great bodily harm or death from the actions of the person who was shot and if his belief was reasonable. The body-worn camera video, statement of C.K., and statements of the other officers present corroborate the account of Officer Mark.

The evidence in this case is clear that the decedent had C.K. restrained against her will at knifepoint. Upon Officer Mark's arrival, officers who had been at the scene for some time informed Officer Mark with urgency that the decedent was going to kill C.K. When Officer Mark ascended the stairs, the decedent retreated into a back bedroom while holding C.K. in front of him. As Officer Mark followed, the decedent began stabbing C.K. with a large hunting knife multiple times before Officer Mark could fire twice, killing the decedent and preserving the life of C.K.

The evidence in this case clearly shows that Officer Mark acted in defense of C.K.'s life. Consequently, the evidence would certainly be insufficient to prove to a jury beyond a reasonable doubt that Officer Mark did not act in defense of another. Similarly, the evidence clearly demonstrates that Officer Mark was indeed reasonable in his belief that the decedent posed an imminent threat of great bodily harm or death to C.K. In fact, it is unmistakably clear that Officer Mark's use of lethal force saved C.K.'s life from a person who left little doubt of his intention to kill her. Accordingly, I will not be seeking charges related to the death of David Samuel Herbert.

If you have any questions, please contact me directly.

Sincerely,



Spencer B. Merriweather III
District Attorney

CC: Chief Johnny Jennings, Charlotte-Mecklenburg Police Department

Exhibits:

The knife wielded by the decedent.

[Return](#)



Exhibit 1

Mecklenburg County M E Office

3440 Reno Avenue, Charlotte, NC 28216
Telephone 7043362005
Fax 7043368353



REPORT OF AUTOPSY EXAMINATION

DECEDENT

Document Identifier B202107681
Autopsy Type ME Autopsy
Name David Samuel Herbert
Age 44 yrs
Race White
Sex M

AUTHORIZATION

Authorized By James R. Lozano MD **Received From** Mecklenburg

ENVIRONMENT

Date of Exam 12/20/2021 **Time of Exam** 10:00
Autopsy Facility Mecklenburg County M E Office **Persons Present** Mr. Jacob May

CERTIFICATION

Cause of Death
Gunshot wounds of head

The facts stated herein are correct to the best of my knowledge and belief.

Digitally signed by
James R. Lozano MD 13 June 2022 16:30

DIAGNOSES

1. Penetrating gunshot wound (A) of right forehead/frontal scalp
 - Lacerations of right frontal, left frontal, and left temporal cerebral lobes
 - Subdural, subarachnoid, and subgaleal hemorrhages
 - Fractures of frontal bone, left temporal and sphenoid bones, and maxilla
 - Radiating skull fractures
2. Perforating gunshot wound (B) of left eye, exiting posterior left occipital scalp
 - Lacerations of left cerebral hemisphere, brainstem, and left cerebellum
 - Subdural, subarachnoid, and subgaleal hemorrhages
 - Fractures of frontal bone and left sphenoid, temporal, and parietal bones
 - Radiating skull fractures
3. Sharp force injuries
 - Incised wound of left hand
 - Superficial incised wound of anterior left upper leg
 - Incised wounds of anterior right upper leg
4. Blunt force injuries of lower extremities
 - Contusion of lateral right knee
 - Abrasions of right knee and bilateral lower legs
5. Hypertensive and atherosclerotic cardiovascular disease
 - Cardiomegaly (410 grams) with four-chamber cardiac dilation and left ventricular hypertrophy
 - Moderate coronary artery atherosclerosis
6. Pulmonary edema
7. Hepatosplenomegaly
8. Testicular atrophy

IDENTIFICATION

Body Identified By
Papers/ID Tag

EXTERNAL DESCRIPTION

Length 71 inches
Weight 229 pounds
Body Condition Intact
Rigor 3+
Livor Posterior
Hair Brown, with short brown-grey beard
Eyes Hazel, with gunshot injury of left eye globe
Teeth Natural upper and lower, in good repair



Received is the body of a well-developed, muscular white man appearing compatible with the reported age of 44 years. The body is received wearing a shirt, pants, underwear, socks, shoes, and a mask. No personal effects accompany the body. Identifying marks and scars consist of tattoos on the left lower chest, left upper arm, and right forearm. Evidence of medical intervention consists of electrocardiograph leads on the abdomen and forearms.

INJURIES

GUNSHOT WOUNDS:

There are two (2) gunshot wounds on the body. The wounds are lettered for convenience of description only; the lettering is not intended to convey the order in which the injuries occurred. All wound directions are given relative to the body in the standard anatomic position.

PENETRATING GUNSHOT WOUND "A" OF RIGHT FOREHEAD/FRONTAL SCALP:

There is a 1/4" entrance gunshot wound on the right forehead/frontal scalp located 1" below the top of the head and 1-3/4" right of the anterior midline. There is gunpowder stippling noted on the skin inferior/anterior to this wound. The wound track proceeds through the skin of the forehead/frontal scalp; perforates and fractures the frontal bone; lacerates the right frontal lobe, left frontal lobe, and left temporal lobe; fractures the left sphenoid and temporal bones; perforates and fractures facial bones; and fractures the left side of the maxilla, where it terminates. Deformed bullet and jacket fragments are recovered from the wound path, which is associated with subdural, subarachnoid, intraparenchymal, subgaleal, and soft tissue hemorrhages, as well as radiating skull fractures and prominent visible and palpable deformation of the skull. The wound direction is front-to-back, right-to-left, and downward.

PERFORATING GUNSHOT WOUND "B" OF LEFT EYE/ORBIT:

There is a 3/8" atypical entrance gunshot wound with up to 1/2" surrounding ecchymosis of the left eye and orbit located 4" below the top of the head and 2-1/2" left of the anterior midline. There is no soot or gunpowder stippling noted on the skin surrounding the wound. The wound track proceeds through the periorbital skin and left eyelids; perforates the globe of the left eye; fractures the left sphenoid and frontal bones; lacerates the left cerebral hemisphere, brainstem, and cerebellum; perforates and fractures the left side of the occipital bone; and ends at a 3/8" irregular exit wound on the posterior occipital scalp located 3-1/2" below the top of the head and 2-1/2" left of the posterior midline. Deformed bullet and jacket fragments are recovered from the wound path, which is associated with subdural, subarachnoid, intraparenchymal, subgaleal, and soft tissue hemorrhages, as well as radiating skull fractures and prominent visible and palpable deformation of the skull. The wound direction is front-to-back and upward.

ADDITIONAL INJURIES:

Sharp Force Injuries:

There is a 1" by 1/8" incised wound with a depth of 1/8" on the palmar surface of the left thumb and hand located 23" below the top of the left shoulder and 2" lateral to the anterior midline of the left arm.

There is a 1/4" superficial incised wound on the anterior left upper leg.

There are two incised wounds of the anterior right upper leg. The first injury is a 1-3/4" by 1/8" (after

reapproximation) incised wound with a depth of 7/8" located 24-1/2" above the right heel and 1" medial to the anterior midline of the right leg. The wound exhibits a blunt edge at the 6 o'clock position and a sharp edge at the 12 o'clock position. The second injury is a 1-1/2" by 1/8" (after reapproximation) incised wound with a depth of 7/8" and a 5/8" leading superficial incision located 23-3/4" above the right heel and 3/4" lateral to the anterior midline of the right leg. The wound exhibits a blunt edge at the 6 o'clock position and a sharp edge at the 12 o'clock position.

Blunt Force Injuries:

There is a contusion on the lateral right knee and abrasions of the right knee and bilateral lower legs.

DISPOSITION OF PERSONAL EFFECTS AND EVIDENCE

The following items are released with the body

None

The following items are preserved as evidence

- Bloodstain card
- Clothing: Socks, shoes
- Blood-soaked clothing: Shirt, jeans, underwear, mask
- Bullet fragments recovered from skull cavity

These items are released by Dr. Lozano to Agent White of the North Carolina State Bureau of Investigation on December 29, 2021 at 12:00 p.m.

PROCEDURES

Radiographs

Anterior/posterior and lateral full-body radiographs reveal numerous radio-opaque projectile fragments in the skull cavity and left facial soft tissue. Prominent skull deformation and fractures are readily identifiable.

INTERNAL EXAMINATION

Body Cavities

The pleural and peritoneal cavities are free of significant fluid and adhesions. The organs are in their normal anatomic positions.

Cardiovascular System

Heart Weight 410 grams

The pericardial sac is free of significant fluid and adhesions. The coronary arteries arise normally, follow the usual distribution, and are patent, exhibiting moderate (up to 50%) atherosclerotic narrowing without evidence of thrombosis. There is dilation of all four cardiac chambers and the left ventricular free wall measures 1.7 cm in thickness at a point located 1 cm below the mitral valve annulus. The chambers and valves otherwise bear the usual position relationships. The myocardium shows no evidence of acute infarction, scarring or focal lesions. The aorta and its major branches are intact without significant atherosclerosis.

Respiratory System

Right Lung Weight 625 grams

Left Lung Weight 775 grams

Examination of the soft tissues of the neck including the strap muscles and large vessels reveals no abnormalities. The hyoid bone and laryngeal cartilages are intact. The larynx is clear. The upper and lower airways are free of debris and foreign material. The lungs are normally formed. The parenchyma of both lungs shows congestion and edema without obvious consolidation or focal lesions. The pulmonary arteries are free of thrombi or emboli.

Gastrointestinal System

The gastrointestinal tract is intact throughout its length and is unremarkable.

Liver

Liver Weight 2500 grams

The capsule is intact and the parenchyma is unremarkable. The gallbladder is present, contains bile, and is grossly unremarkable.



Spleen

Spleen Weight 250 grams

The spleen is normally formed; no focal lesions are present.

Pancreas

The pancreas is of normal size, shape, and consistency without focal lesions or masses.

Urinary

Right Kidney Weight 250 grams

Left Kidney Weight 250 grams

The kidneys are normally formed. The capsules strip with ease from the underlying smooth cortical surfaces. The renal architecture is intact without focal lesions. The bladder contains urine.

Reproductive

The testicles appear atrophic and smaller-than-expected. The genitalia are otherwise grossly unremarkable.

Endocrine

The thyroid gland and bilateral adrenal glands are grossly unremarkable.

Neurologic

Brain Weight 1400 grams

Gunshot injuries as previously described.

Skin

Gunshot, sharp force, and blunt force injuries as previously described. Otherwise, grossly unremarkable.

Immunologic System

Grossly unremarkable.

Musculoskeletal System

Gunshot, sharp force, and blunt force injuries as previously described.

MICROSCOPIC EXAMINATION

Microscopic Comment

Histologic examination is not performed.

SUMMARY AND INTERPRETATION

The decedent is a 44-year-old white man who was shot.

Autopsy examination reveals two (2) gunshot wounds of the head, resulting in fatal injuries to the brain. There are incised wounds present on the left hand, left upper leg, and right upper leg. There are minor abrasions and contusions of the right knee and bilateral lower legs.

Postmortem toxicology is negative for ethanol in the decedent's blood. Please see separate report (T201-14986) for further toxicology details.

Based on the history, autopsy findings, and results of postmortem toxicology, it is my opinion that the cause of death in this case is Gunshot wounds of head.

DIAGRAMS

1. Body Diagram: Adult (Front/Back)
2. Body Diagram-Injuries: Adult (Front/Back)

State of North Carolina

Name of Decedent: Herbert, David Samuel

Office of the Chief Medical Examiner

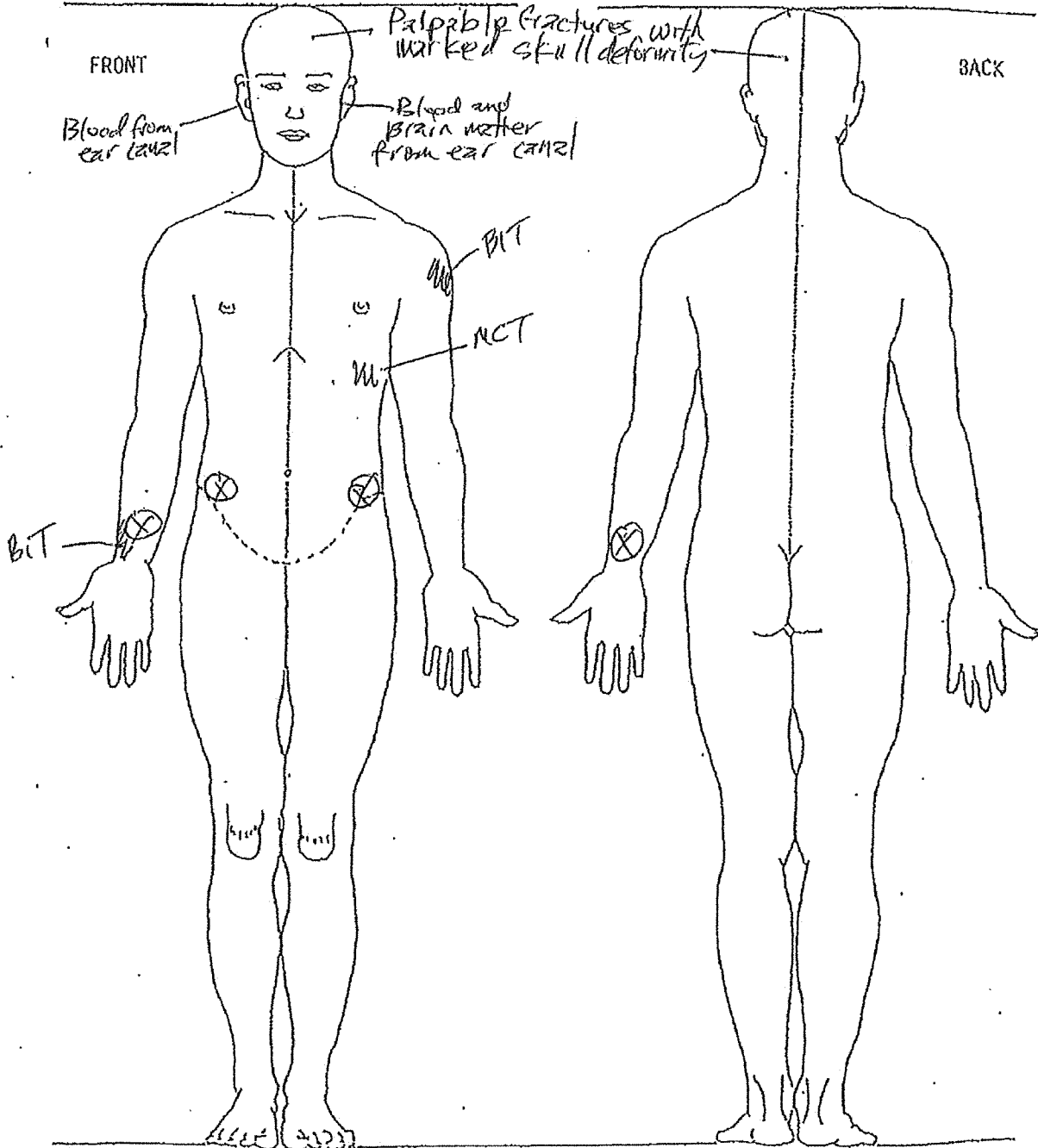
Autopsy # B21-7681

Chapel Hill, North Carolina 27599-7580

Examined By: JR

Date: 12/20/2021

BODY DIAGRAM: ADULT (Front/Back)

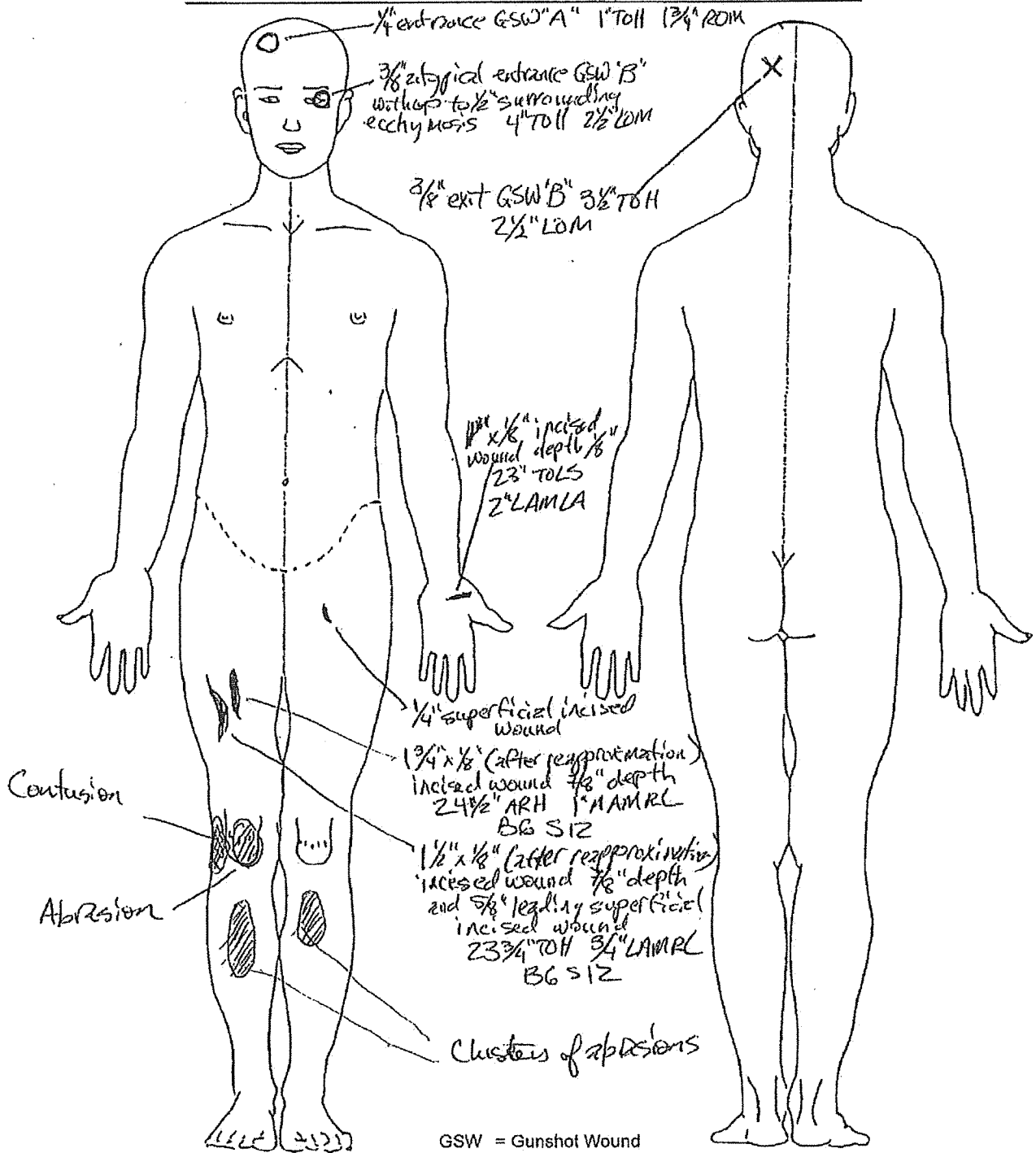


DEMR 1917 (4/97)
Medical Examiner

This form may be photocopied.

PAGE 1 OF 2

BODY DIAGRAM: ADULT (Front/Back)



S210046584:
SOURCE: Liver

Liver

CONDITION: Postmortem
OBTAINED: 20-dec-2021

T O X I C O L O G Y R E P O R T

Office of the Chief Medical Examiner
Raleigh, NC 27699-3025

Toxicology Folder: T202114986
Case Folder: F202113490
Date of Report: 04-jan-2022
DOD: 18-dec-2021
Page: 2

Decedent: David Samuel Herbert

* * *

Accredited by the American Board of Forensic Toxicology, Inc.

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