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August 20, 2008

The Honorable Knoel Owen
Presiding Judge
Sonoma County Superior Court
Sent Via Courier Mail

RE: Response to the 2007-2008 Grand Jury Report

Dear Judge Owen,

Enclosed is the District Attorney's response to the Grand Jury Final Report for 2007-2008.

Sincerely,

Stephan R. Passalacqua
District Attorney

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enclosure

cc: The Board of Supervisors
Denise Gordon, Court Executive Officer
Bob Deis, County Administrator
Janice Atkinson, County Clerk

REC'd 8/22/08

**SONOMA COUNTY DISTRICT ATTORNEY'S OFFICE
RESPONSE TO THE 2007-2008 GRAND JURY REPORT**

REVIEW OF MOSES McDOWALL FATAL INCIDENT

Finding F7, Page 14:

The District attorney's review of the VCU investigation concludes that no criminal acts, unlawful acts, or acts of omission occurred between 3:15 a.m. and 6:00 a.m., which in all probability was when Mr. McDowall died. There is no clear evidence indicating which, if any, CO performed the five required cell checks during this period. Any one of these security checks, if done, may have saved his life. The DA and the VCU investigation failed to look into what occurred during this critical time. The unlikelihood of a successful criminal prosecution was given as a justification for the lack of pursuit of these issues. Justifications aside, the Grand Jury found that the Deputy District Attorney did not identify any of the issues we raised.

Response: The respondent disagrees partially with this finding.

The role of the District Attorney in any Law Enforcement Employee-Involved Fatal Incident is to determine whether there was criminal misconduct on the part of any individual that resulted in the decedent's death. In the case of Moses McDowall, the District Attorney's office determined that no criminal act, specifically criminal negligence, occurred. Nothing raised by the Grand Jury report indicates that there is any additional evidence, which could or should have been obtained, that would change the District Attorney's determination regarding criminal liability.

According to Sonoma County Law Enforcement Chiefs' "Law Enforcement Employee-Involved Fatal Incident Protocol," the "lead" investigative agency in this jail death was the Sonoma County Sheriff's Department. According to the protocol, the District Attorney's office participated in the investigation by responding to the scene, offering investigative assistance, and providing legal guidance and support during the investigation. The District Attorney later reviewed the investigation and made a determination regarding criminal liability.

According to the protocol, the sole purpose of the District Attorney's analysis is "to determine whether or not violations of criminal law are believed to have occurred." As acknowledged by the Grand Jury, it is not the District Attorney's role to review the internal investigations conducted by the Sheriff's Department. Nor is it the District Attorney's role to make recommendations about how internal jail protocols might be improved in the future or analyze legal liability under civil law.

In every fatal incident report the District Attorney's conclusions are based on a legal analysis of the totality of the facts and circumstances surrounding the event. The evidence is carefully evaluated by a senior prosecutor under the supervision of a chief deputy district attorney. When analyzing reports and determining whether additional

investigation is necessary, the District Attorney seeks to separate out those facts that can be established with reasonable certainty from information that is speculative, based on assumptions, or for which there is little or no evidence. When determining criminal liability, the District Attorney does not engage in speculation, nor does its report pose hypothetical questions about whether a death could have been avoided based on assumptions of what might have happened had circumstances been otherwise.

The correct standard that prosecutors should adhere to in filing criminal charges is expressed in a publication of the California District Attorney's Association entitled, *Uniform Crime Charging Standards*.¹ It provides:

The prosecutor should consider the probability of conviction by an objective fact-finder hearing the admissible evidence. The admissible evidence should be of such convincing force that it would warrant conviction of the crime charged by a reasonable and objective fact-finder after hearing all the evidence available to the prosecutor at the time of charging and after hearing the most plausible, reasonably foreseeable defense that could be raised under the evidence presented to the prosecutor.

Therefore, it is appropriate for prosecutors to consider the likelihood of conviction by a criminal jury in evaluating the sufficiency of an investigation to support criminal charges.

In this case, the District Attorney's Office determined with reasonable certainty a number of facts, including but not limited to the following:

- 1) Mr. McDowall was a chronic alcoholic;
- 2) Mr. McDowall had consumed approximately 1.75 liters of whisky prior to his arrest on November 5, 2006;
- 3) Mr. McDowall was found in possession of an open container of alcohol on Johnson's Beach in Guerneville;
- 4) Mr. McDowall was lawfully arrested by on two outstanding warrants on November 5, 2007 at approximately 2:00 p.m.;
- 5) Mr. McDowall was inebriated when he arrived at the MADF at 3:15 p.m. on November 5, 2006;
- 6) Mr. McDowall was housed in a shared detoxification cell at MADF until 12:03 a.m. on November 6, 2006;
- 7) Mr. McDowall was transferred to an "individual" detoxification cell at approximately 12:03 a.m. on November 6, 2006, and appeared to be "clear, alert, lucid, and not rambling."
- 8) While in his detoxification cell Mr. McDowall was checked every fifteen minutes.
- 9) At approximately 3:30 a.m. on November 6, 2006, Mr. McDowall was transferred to general population in the "D" module in cell number 45.
- 10) Shortly after 6:00 a.m. Mr. McDowall was offered a breakfast tray in his cell by

¹Cal. District Attorneys Association, Uniform Crime Charging Committee 1996, *Uniform Crime Charging Standards* (1990), p. 6.

another inmate. Mr. McDowall did not respond. However, the inmate noted that Mr. McDowall was breathing loudly.

- 11) At approximately 8:00 a.m. on November 6, 2006, Mr. McDowall was found by jail staff to be unconscious. Medical personnel were immediately summoned and CPR was initiated. While emergency measures continued, paramedics arrived to provide additional treatment. At 8:26 a.m. on November 6, 2006, paramedics pronounced Mr. McDowall dead.

These facts, and the many other facts cited in the report, in combination with the findings produced by the autopsy report, support the District Attorney's conclusion that there is no evidence of criminal negligence to support filing criminal charges.

The Grand Jury's Report, including finding "F7" emphasizes the time frame between 3:15 a.m. and 6:00 a.m. on November 6, 2006, stating: "The DA and the VCU investigation failed to look into what occurred during this critical time."

Both the District Attorney and VCU did look into what occurred between 3:15 a.m. and 6:00 a.m. As indicated in the investigative reports and as summarized in the District Attorney's report, a time line was created establishing Mr. McDowall's movements, placements, levels of alertness, behaviors, and the occurrence of various safety checks from the time of booking through the time he was pronounced dead the following day. The Grand Jury's report notes this fact when stating: "Documents produced by the VCU investigation indicate that a CO performed the required cell checks in Module D on the morning of Mr. McDowall's death." While conflicts in the evidence as to whether these checks occurred may exist, there is not sufficient evidence to establish with reasonable certainty that the checks did not occur, particularly in the face of some evidence to the contrary. Moreover, the failure to perform such checks, when considered in light of the totality of the circumstances, does not satisfy the legal standard for sufficiency of evidence required to prove criminal negligence beyond a reasonable doubt.

Finding "F7" further states: "There is no clear evidence indicating which, if any, CO performed the five required cell checks during this period (3:15 a.m. to 6:00 a.m.). Any one of these security checks, if done, may have saved his life." (Report, at 14.)

The assumption that any one security check, if done, may have saved the decedent's life assumes not only that the checks reported by the Sheriff's department to have been done did not in fact occur, but also that if they had occurred a CO would have obtained the kind of information from a check of this kind sufficient to alert him or her to invoke life-saving measures, and further, that such measures, if instigated, would have been successful in preventing death.

In most criminal investigations there are some questions of fact that cannot be fully answered with reasonable certainty. And in many criminal investigations, the issue of criminal liability can be determined without fully answering all questions of fact. The absence of affirmative, credible evidence establishing criminally negligent acts or omissions cannot form the basis of the district attorney's conclusion. While the absence

of additional documentary evidence corroborating that these checks occurred is unfortunate, an assumption that they did not occur cannot form the basis of a finding of criminal negligence on the part of an individual. Rather, there must be affirmative evidence amounting to proof beyond a reasonable doubt of an omission that rises to the level of criminal negligence and that caused the decedent's death.

While according to the protocol, the District Attorney may conduct an independent investigation separate from the lead agency, the discretion to do so is based on a determination that additional or separate investigation is deemed appropriate. The additional investigation undertaken by the Grand Jury does not change the District Attorney's conclusion that no criminal charges are warranted in this matter. Nor does it cause the District Attorney's Office to believe that further investigation might lead to criminal charges.

Recommendation R5, Page 16:

The District Attorney should conduct a new investigation into Mr. McDowall's death, either independently or in concert with the outside agency referred to in R1.

Response: The Recommendation will not be implemented because it is not warranted.

There are no facts presented that would warrant the District Attorney conducting a new investigation into Mr. McDowall's death for the reasons explained above.