



PUBLIC RELEASE M E M O R A N D U M

DATE: March 24, 2020

SUBJECT: Officer Involved Shooting – Non-Fatal

Officers: Office Imran Ahmed
San Bernardino Police Department

Officer Brian Olvera
San Bernardino Police Department

Officer Serbando Saenz
San Bernardino Police Department

Involved Subjects: G.B. (wounded)

John Wayne Phillips
San Bernardino, CA

Date of Incident: April 28, 2016

Incident location: 2500 Block of 5th Street and Meridian in the City of San Bernardino, CA.

DA STAR #: 2017-00-0007339

Investigating Agency: San Bernardino Police Department

DR #: 2016-0044232

PREAMBLE

This was a non-fatal officer involved shooting by San Bernardino Police Department officers. The shooting was investigated by the San Bernardino Police Department. This factual summary is based on a thorough review of all the investigative reports, photographs, and audio recordings submitted by the San Bernardino Police Department, DR# 2016-0044232.

PRINCIPAL INVOLVED PARTIES

G.B. (a juvenile), is believed to have fired a .380 caliber handgun at San Bernardino police officers and was shot in the hip during the incident under review.

John Wayne Phillips, DOB 03/18/1997, of San Bernardino, California fired a 9mm firearm at officers. Phillips was detained by officers and was not shot or wounded by police.

Officer Imran Ahmed of the San Bernardino Police Department was an officer involved in the shooting of G.B.

Officer Brian Olvera of the San Bernardino Police Department was an officer involved in the shooting of G.B.

Officer Serbando Saenz of the San Bernardino Police Department was the officer who shot G.B.

SCENE

This incident occurred on April 28, 2016, at around 2040 hours. Location of occurrence was 2500 block of 5th Street near the intersection of Meridian Avenue in the City of San Bernardino California.

BACKGROUND INFORMATION

G.B. at the time of the incident was a juvenile and did not have a prior criminal history. He associated with the Five-Times criminal street gang based in San Bernardino.

John Wayne Phillips is a documented Five-Times criminal street gang member with a criminal history that includes prior arrests for robbery, burglary, obstructing a peace officer, carrying a loaded firearm, spousal abuse, and being a felon in possession of a firearm.

FACTUAL SUMMARY

On April 28, 2016 members of the San Bernardino Police Department M.E.T (Multiple Enforcement Team) were in their standard issue green uniforms and on patrol in an unmarked police vehicle in the area of Foothill Boulevard and Meridian Avenue. Additional patrol in this neighborhood was due to recent violence and gun violence in the area known to be a Five-Times territory. Officers Ahmed and Olvera wore police uniforms in an unmarked Toyota Camry, and Officers Saenz and Hysen were in full police uniforms driving a marked San Bernardino Police Department patrol vehicle.

While driving in their unmarked vehicle, Officers Ahmed and Olvera observed three African American males near the dead-end of 5th Street. The officers called to Officers Saenz and Hysen, who were in the marked San Bernardino Police Department vehicle to check on subjects loitering in the area.

Olvera and Ahmed turned east onto the alley north of 5th Street and observed the subjects walking toward a cement block wall that is in the rear of the Terrace Motel located on Foothill Boulevard. Their observations were radioed to Officers Saenz and Hysen.

Officer Olvera, who was driving the unmarked vehicle, turned south on a driveway leading back to 5th Street when, within seconds, the subjects jumped the block wall and they heard gunshots and saw muzzle flashes from the direction of the three African American males. The driver side window of the unmarked vehicle shattered, and it was at that moment, both Ahmed and Olvera realized they were under fire.

Officer Olvera attempted to reverse the vehicle, but it was disabled. At that moment, Officer Ahmed exited the passenger door and returned fire at the subjects. Officer Olvera climbed over to the passenger seat to exit the vehicle; as he was exiting the vehicle, he turned on his forward-facing red light and siren on the vehicle. The suspects fired multiple rounds after lights and sirens were activated.

Hearing the gunshots, Officers Saenz and Hysen turned north into the west driveway of the Terrace Motel and proceeded to the rear of the Motel where he observed three subjects standing along the west wall facing the officers in the unmarked vehicle. Officer Saenz believed he observed the subjects holding weapons and both officers observed muzzle flashes.

Officer Saenz pulled his marked patrol vehicle up to the incident location and turned the vehicle to show the subjects the SBPD marking on the vehicle. Both Officer Saenz and Hysen exited the vehicle and observed the three subjects run east away from their location toward a field on the north side of the Terrace Motel. Officer Saenz ran to the west of the location and ended up observing one subject running southeast through the field with a firearm in his hand. Officer Saenz identified himself as a police officer to the fleeing suspect and ordered him to drop the weapon. The suspect turned his shoulders clockwise and raised his right arm with the gun toward Officer Saenz. At that moment,

Officer Saenz opened fire and struck the subject in the right hip. The suspect immediately went down. This suspect was identified as G.B. During a search of G.B.'s person five live .380 caliber rounds were in his pants pocket.

Officer Hysen observed another suspect was also running through the field – south towards Foothill Boulevard and towards San Bernardino Motel parking lot. Officer Saenz ran to that area as well and observed the second suspect banging on doors at the motel. They succeeded into taking that subject into custody. This suspect was identified as John Wayne Phillips.

During the investigation it was learned that G.B. lived at 2504 W. Foothill Boulevard unit 134. Officers responded to that location and observed a white vehicle approaching the unit. Inside that vehicle was the father of G.B. and L.B. who is the brother of G.B. At that time, it was believed that L.B. was the possible third suspect outstanding based on the clothing that he was wearing. L.B. was positively identified by Officer Saenz as the third suspect, while Officers Ahmed and Olvera could only identify that the clothing of L.B. was consistent with the third suspect.

A daytime search of the field and the specific area where G.B. was shot revealed a loaded .380 caliber handgun. Investigation into the shootings also determined that two .380 fired cartridge casings were located on the east side of the wall. Three 9mm fired cartridge casings were located south of the .380 cases in the Terrace Motel parking lot. A full box of 9mm casings were located near a tree near the wall. Six bullet strike marks located on the west side of the wall from the direction the officers were shooting. One bullet strike to the unmarked vehicle driven by the officers Ahmed and Olvera.

G.B. was transported to Arrowhead Regional Medical Center for treatment and John Wayne Phillips and L. B. were arrested and transported to Central Detention Center.

A subsequent interview with G.B. he admitted that he fired a .380 caliber semi-automatic handgun. He admitted being a Five-Times member and fired on the unmarked vehicle believing it was rival gang members. G.B. identified John Wayne Phillips as another shooter wielding a 9mm semi-automatic weapon, and Onoria Mejia as another shooter wielding a .357 revolver. G.B. also identified Abraham Ospina and Tyrone Tolliver as other Five-Times members present that evening.

WITNESSES AND CORROBORATION

1. Witness # 1

On April 29, 2016 Detective Granado interviewed Witness #1. Witness #1 informed the detective that in the evening hours on April 28, 2016 he was in his vehicle driving down Foothill Boulevard. As he was driving, he observed an African American male "hopping" along Foothill Boulevard. Witness #1 described "hopping" as limping or walking as though hurt. Witness #1 observed the person begin crossing Foothill Boulevard and

being followed by police officers. He observed several uniformed officers converge on the person and take him into custody.

2. Officer Martin Hysen

On April 29, 2016 at approximately at 0045 Detective A. Tello was tasked with the interview of witness, Officer Martin Hysen. Officer Hysen is a member of the San Bernardino Police Department, gang detail. Detail of Officer Hysen interview is below.

Video Recorded Interviews¹

Officer Brian Olvera

Interview with Officer Brian Olvera details the circumstances of the event from his perspective. Officer Olvera was interviewed by Detective Marco Granado of the San Bernardino Police Department. The interview was conducted at 1:21 am on May 4, 2016. The interview begins with the introductions between the parties. Officer Olvera begins the interview discussing his current assignment and the investigations he was assigned to that evening. On the night of the incident, Officer Olvera was wearing his Multiple Enforcement Team (MET) uniform. That uniform is a green shirt with police badging over the chest and the arm. He had on his uniform pants and utility belt carrying his firearm.

After notifying his superior officer about their whereabouts and what they intended to investigate next, Officers Olvera and Ahmed proceeded to patrol the area of 5th Street and Meridian Avenue. Investigating shootings that took place near the Terrace Motel in that area, Officers Olvera and Ahmed proceeding down an alley way neighboring 5th street. That alley-way dead ends to a concrete wall that divides the Terrace Motel Parking lot from the street. While proceeding down that alleyway, Officer Olvera and Ahmed observed what appear to be three African American males near the concrete block wall. Coordinating with a marked patrol vehicle occupied by Officers Saenz and Hyson, Officer Ahmed informs the marked patrol team of their location. At this time, the three men jump over the concrete block wall. It appeared to Officer Olvera that the men were straddling the wall and looking over in the direction of their vehicle. At that point, Officer Olvera drives slower to observe the three men. Eventually, all three males make it over the wall. Officer Olvera lost observation of the three men as he drives his vehicle out of the alleyway, he stops the car. Officer Ahmed just now gets off the radio with the marked patrol vehicle having asked them to contact the three men. As Officer Olvera and Ahmed are parked, Officer Olvera notices his driver side window shot out and hears

¹ The video recordings were reviewed in their entirety. The summaries of the recordings will only cover the events from the beginning of the recordings through the point immediately after the incident under review.

rapid gunfire coming towards the two officers. Officer Olvera remains in the driver's seat with his foot on the brake and the vehicle's headlights on. Officer Olvera details that the bullets were directed towards him and his partner because you could hear them striking the area around them and the vehicle.

Officer Olvera attempts to reverse his vehicle out of harm's way but the vehicle does not move. Officer Ahmed exits the vehicle and returns fire in the direction of the shots being fired at them. Officer Olvera thought to identify themselves as police officers and activates the vehicle's forward-facing red light and sirens. Gunfire continues after the lights and sirens are on. Officer Olvera then climbs out the passenger compartment and engages in gunfire with the subjects. Officer Olvera describes muzzle flashes coming from the area of the concrete block wall. Officer Olvera, after he exits the vehicle can discern two silhouettes with two distinct weapons firing at the officers. Officer Olvera recalls firing two rounds at the suspects. After firing two rounds at the suspects, firing ceased and Officer Olvera radios in that shots have been fired. The suspects are then heard running away in the field that borders the concrete wall. After the firing ceases Olvera hears that Officers Saenz and Hysen are in pursuit of the subjects.

Detective Granada asks Officer Olvera to draw his service weapon and requests Officer Olvera to count the number of rounds remaining in his weapon. Officer Olvera informs Detective Granada that he normally loads eighteen rounds into his magazine. Officer Olvera counts that he has sixteen remaining rounds in his weapon.

Officer Imran Ahmed

Interview with Officer Imran Ahmed details the circumstances of the event from his perspective. Officer Ahmed is interviewed by Detective Marco Granada of the San Bernardino Police Department. The interview was conducted on May 4, 2016. The interview begins with the introductions between the parties. Officer Ahmed begins the interview discussing his current assignment and the investigations he was assigned to that evening. On the night of the incident, Officer Olvera was wearing his Multiple Enforcement Team (MET) uniform. That uniform is a green shirt with police badging over the chest and the arm. He had on his uniform pants and utility belt carrying his firearm.

Officer Ahmed and Olvera drove their undercover vehicle to the area of the Terrace Motel. Officer Ahmed and Olvera were investigating recent shootings in the area and know the location to be a Five Times Hometown Crips area. As the officers drove the area, they proceeded down an alleyway and noticed three subjects standing against a wall on the southeast portion of that complex. Officer Ahmed got on the radio and contacted his close cover team in a marked patrol vehicle. That vehicle was occupied by Officer Saenz and Hysen. As Ahmed and Olvera stopped their vehicle Ahmed observed the three subjects jump over the wall into a field that neighbors the Terrace Motel. Officer Ahmed noted fresh tagging near where the subjects were depicting

"NLK" or "Noe Luv Killer." Noe Luv is Five Times rival. According to Officer Ahmed, immediately after noticing the graffiti he observed, what he believed to be a muzzle flash from in the direction of the concrete block wall. Hearing the driver side window break, Officer Ahmed immediately knew they were being shot at and exited the vehicle. He returned fire in the direction of the muzzle flashes. Officer Ahmed notes that he heard two guns firing at him and Officer Olvera. Officer Olvera turned on the red forward-facing light and activated the vehicle's siren. Officer Ahmed indicated he identified himself as a police officer. During the shootout Officer Ahmed was advising via his radio that they were engaged in gunfire and advised of possible crossfire. The gunfire ceased and Officer Ahmed knew he fired multiple rounds and completed a tactical re-load of his weapon.

Sometime later Officer Ahmed notes that he heard a single gunshot in the distance and both he and Officer Olvera moved forward toward the concrete block wall to apprehend any suspects. As they approached the wall and looked over, they did not observe any suspects. Sometime later, over the radio Officer Ahmed noted that he heard they had the suspects detained.

The interview ends with a count of the bullets in Officer Ahmed's service weapon. During a count of his magazine Officer Ahmed notes that he usually carries sixteen rounds in his weapon which is fifteen in the magazine and one in the chamber. His first magazine was dropped at the scene and the count was done on his second magazine which had 15 rounds.

Officer Serbando Saenz

Interview with Officer Saenz was completed on April 29, 2016. At that time Officer Saenz was assigned to X4 in unit 156 and was in his SMASH uniform driving a SMASH patrol vehicle.

On the date of the officer involved shooting, Officer Saenz was working directed patrol in the area of 2500 W. Foothill Boulevard to curb and investigate recent gun violence in the city of San Bernardino. His partner for the shift was Officer Hysen.

Officer Saenz noted that he and Officer Hysen were patrol backup for Officer Ahmed and Olvera who were in an unmarked, undercover vehicle conducting their investigations. During their patrol, Officer Saenz hears Officer Ahmed broadcast that three black male adults were running in an easterly direction away from their location. Officer Saenz decides to drive his patrol vehicle westbound on Foothill to the northbound driveway of the Terrace Motel. When Officer Saenz first pulled into the complex, he put his high beams on to identify any subjects that may be in the area. The high beams were also used to prevent identification of his patrol vehicle. As Officer Saenz and Hysen approached the area he heard several gunshots to the north of their location. As he proceeded north in the complex, he observed an African American male subject wearing what appeared to be silver shorts, a black sweatshirt, and holding a

black, large caliber handgun. Behind that subject, was another African American male with a blue hooded sweatshirt and a backpack positioned up on a platform or shopping cart of some sort. From where the patrol vehicle was positioned, it was the opinion of Officer Saenz, that the subjects could identify that a police vehicle was approaching. Officer Saenz and Hysen, in their patrol vehicle were approximately twenty-five yards away from the subjects.

Officer Saenz proceeded on foot and the subject he previously observed began to run east through the complex and behind the building. As the subjects ran away, Officer Saenz located one subject with a blue hooded sweatshirt running through an open field. As the male was running, Officer Saenz observed the male look and point the gun in the direction of Officer Saenz. Officer Saenz yelled, "Stop. Police." and utilized the chain link fence to fire his service weapon at the subject. He fired one round in the direction of the suspect and observed the suspect go down.

After firing and hitting the subject, Officer Saenz stated that he proceeded south along the fence line and east along Foothill Boulevard toward the San Bernardino Motel. At that point he met up with Officer Hysen and stated he could hear someone banging on motel doors. A second subject was located at the San Bernardino Motel. This subject was an African American male wearing a black hooded sweatshirt and grey sweats. Officer Saenz later heard radio broadcast that a subject wearing a blue hooded sweatshirt was detained.

Officer Saenz detailed for investigators his positions during the incident and specifically mapped out his direction of travel and ultimately where he confronted and fired upon one of the subjects.

An inspection of Officer Saenz service weapon was completed by investigators and fifteen rounds were accounted for. Officer Saenz service weapon is a Model 22 Glock .40 handgun that holds sixteen total rounds of ammunition. The serial number is RYE055.

Officer Martin Hysen

Officer Martin Hysen was interviewed on April 29, 2016 by Homicide Detective A. Tello. During that interview Officer Hysen indicated he was partnered with Officer Saenz on the date in question and was patrolling the 2500 Block of Foothill Boulevard in reference to ongoing gun violence in the neighborhood. His other partners for the evening were Officer Olvera and Officer Ahmed who were in an unmarked undercover vehicle.

Notes, that when they travel northbound into the Terrace Motel driveway where he hears gunshots. They proceed to the northwest corner and Officer Hysen observes one African American subject with a black hooded sweatshirt holding a black handgun in subject's right hand. Officer Hysen exits the vehicle and the subject had disappeared on the north end of the Terrace Motel. Officer Hysen ran to the north side of the building and did not observe the subject at that time. He proceeded east along north side of the

building and still did not see the subject. Officer Hysen approached the eastern fence line of the Terrace Motel and observed two subjects running through the field. One ran northeast and the other straight east. Officer Hysen ran south to Foothill and then proceeded east on Foothill Boulevard and as he passed the San Bernardino Motel, he heard banging and a male voice yelling "I'm from the hood let me in." Officer Hysen recognized the subject as the same person he observed with a firearm earlier running away from him at the Terrace Motel. He was able to handcuff that subject and searched him but did not locate the handgun previously seen on the subject.

Officer Hysen detained that subject and walked him out toward the street. At that moment he observed a subject wearing blue limping across Foothill Boulevard towards the neighboring mobile home complex. That subject was also taken into custody.

Officer Hysen did not observe the actions of the other officers as he was focused on his pursuit.

L.B.

A Mirandized statement of L.B. was taken by Detective Tello with the homicide unit. L.B. denied any involvement in the incident and only came out of his residence to see what happened. He was later taken into custody by the police and positively identified as one of the subjects by Officer Saenz as the person who fit the general clothing description of the subject he observed that evening. Since the initial determination and identification of L.B. additional evidence, including a statement by G.B. that cleared L.B. of any criminal wrongdoing during the incident.

G.B.

Subject G.B. was interviewed by Detective Granado on May 5, 2016. G.B. had previously, since the incident date of April 28, 2016 been at Arrowhead Regional Medical Center receiving treatment for a single gun shot wound to his right hip. G.B. was advised of his Miranda rights and voluntarily agreed to speak with the detective. During the initial questioning, G.B. denied any and all connection with the shooting that day and maintained that he was shot for being at the wrong place at the wrong time.

After further discussions and a conversation with G.B.'s father, G.B. provided an actual account of the evening and informed the Detective that L.B. was not present during the shooting. In fact, those who were with him were "John" (later identified as John Wayne Phillips) and "AB" (later believed to be Abraham Ospino.) He said he was in Five Times territory with John Wayne Phillips, AB, Yayo and Tyrone in the location where he was first observed by Officers Olvera and Ahmed. G.B. believed that the undercover vehicle was a rival gang, "357" and that everyone who was there decided to shoot collectively because they had to stay "on point."

G.B. admitted to firing at the undercover vehicle and continued to squeeze the trigger until the gun stopped firing. Detective Granado showed G.B. a picture of the .380 found in the field near where he was shot, and he positively identified that as the weapon he used. G.B. indicated that he became aware that he was shooting at police officers when the marked patrol vehicle came on scene. G.B. advised he never saw the black undercover car with lights or sirens on.

John Wayne Phillips

Interview with John Wayne Phillips on April 29, 2016. During the interview John Wayne Philip denied any and all involvement in the shooting. He indicated he was at the Terrace Motel and ran when he heard gun shots. Sergeant Kokesh also attempted to interview John Wayne Phillips, but the subject denied involvement in the shooting.

Evidence

A daytime search of the incident location and its surrounding areas was done, and the following pieces contained evidentiary value:

1. Loaded .380 caliber handgun located in the field where G.B. was shot. The handgun was "stovepiped," meaning there was an ejection malfunction of a fired casing.
2. Two .380 caliber fired cartridge casings located on east side of wall where suspects fired from.
3. Three 9mm fired cartridge casings located south of the .380's in the Terrace Motel parking lot.
4. Full box of 9mm ammunition located by tree near the wall where shooting took place.
5. Six bullet strike marks located on west side of wall from direction officers had fired.
6. One bullet strike to Toyota Camera (undercover vehicle).
7. A pair of gloves found in field near .380 caliber handgun.
8. Video Surveillance from Terrace Motel.

APPLICABLE LEGAL STANDARDS

Laws of Arrest

California Penal Code section 834a

If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such a person to refrain from using force or any weapon to resist such arrest.

California Penal Code section 835

An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subject to such restraint as is reasonable for his arrest and detention.

California Penal Code section 835a

Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

Laws of Self-Defense

The legal doctrine of self-defense is codified in Penal Code Sections 197 through 199. Those sections state in pertinent part: "Homicide is justifiable when committed by any person in any of the following cases: (1) When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person...(4) When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed,...or in lawfully keeping and preserving the peace." Lawful resistance to the commission of a public offense may be made by the party about to be injured. (Pen. Code §692.) The resistance may be sufficient to prevent injury to the party about to be injured, or the prevent injury to someone else. (Pen. Code §693.)

Where from the nature of an attack a person, as a reasonable person, is justified in believing that his assailant intends to commit a felony upon him, he has a right in defense of his person to use all force necessary to repel the assault; he is not bound to retreat but may stand his ground; and he has a right in defense of his person to repel the assault upon him even to taking the life of his adversary. (*People v. Collins* (1961) 189 Cal.App. 2d 575, 588.)

Justification does not depend on the existence of actual danger but rather depends upon appearances; it is sufficient that the circumstances be such that a reasonable person would be placed in fear for his safety and the person act out of that fear. (*People v. Clark* (1982) 130 Cal.App.3d 371, 377.) "He may act upon such appearances with safety; and if without fault or carelessness he is misled concerning them, and defends himself correctly according to what he supposes the facts to be, his

act is justifiable, though the facts were in truth otherwise, and though he was mistaken in his judgment as to such actual necessity at such time and really had no occasion for the use of extreme measures." (*People v. Collins, supra*, 189 Cal.App.2d at p. 588.)

CAL CRIM 3470 (REVISED 2012) RIGHT TO SELF-DEFENSE OR DEFENSE OF ANOTHER

Self-defense is a defense to the assault or the unlawful killing of a human being. A person is not guilty of that/those crimes if he/she used force against the other person in lawful self-defense or defense of another. A person acts in lawful self-defense or defense of another if:

1. The person reasonably believed that he/she or someone else was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully;
2. The person reasonably believed that the immediate use of force was necessary to defend against that danger; AND
3. The person used no more force than was reasonably necessary to defend against that danger.

When deciding whether a person's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the person and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the person's beliefs were reasonable, the danger does not need to have existed.

The person's belief that he/she or someone else was threatened may be reasonable even if he/she relied on information that was not true. However, the person must actually and reasonably have believed that the information was true.

A person is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of death/bodily injury has passed. This is so even if safety could have been achieved by retreating.

USE OF DEADLY FORCE BY A PEACE OFFICER

Authorization of the use of deadly force is analyzed under the Fourth Amendment's "*objective reasonableness*" standard. (*Brosseau v. Haugen* (2004) 543 U.S.194, 197.) This question is governed by the principles enunciated in *Tennessee v. Garner* (1985) 471 U.S. 1 and *Graham v. Connor* (1989) 490 U.S. 386.

In these decisions, the US Supreme Court explained "it is unreasonable for an officer to 'seize an unarmed, non-dangerous suspect by shooting him dead.... However, where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force.'" (*Tennessee v. Garner, supra*, 471 U.S. at p. 11.)

Reasonableness is an objective analysis and must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. (*Graham v. Conner, supra*, 490 U.S. at p. 396.) It is also highly deferential to the police officer's need to protect himself and others. The 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. (*Id.* at p. 396-397.) The question is whether the officer's actions are "objectively reasonable" considering the facts and circumstances confronting them, without regard to their underlying intent or motivation. (*Id.* at p. 397.)

The US Supreme Court in *Graham* set forth factors that should be considered in determining reasonableness: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. (*Graham v. Connor, supra*, 490 U.S. at p. 396.) The question is whether the totality of the circumstances justifies a particular sort of ... seizure. (*Tennessee v. Garner* (1985) 471 U.S. at p. 8-9. The most important of these factors is the threat posed by the suspect. (*Smith v. City of Hemet* (2005) 394 F.3d 689,702.)

Thus, under *Graham*, the high court advised we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. "We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." (*Smith v. Freland* (1992) 954 F.2d 343, 347.)

Reasonableness: The Two Prongs

Penal Code section 197, subdivision (3) requires that one who employs lethal force have a "reasonable ground to apprehend" a design to commit a felony or to do some great bodily injury. Further, Penal Code section 198 requires that such fear be "sufficient to excite the fears of a reasonable person." This is clearly an objective standard. In shorthand, perfect self-defense requires both subjective honesty and objective reasonableness. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1093.)

When specific conduct is examined under the analytical standard of reasonableness the concepts of apparent necessity and mistake are invariably, and necessarily, discussed, for they are part of the same equation. "Reasonableness," after all, implies potential human fallibility. The law recognizes, as to self-defense, that what is being put to the test is human reaction to emotionally charged, highly stressful events, not mathematical axioms, scientifically provable and capable of exact duplication.

While the test, as mandated by section 198, is objective, reasonableness is determined from the point of view of a reasonable person in the position of one acting in self-defense. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.) We must take into consideration all the facts and circumstances that might be expected to operate in the persons mind. (*Ibid.*) Reasonableness is judged by how the situation appeared to the *person claiming self-defense*, not the person who was injured or killed as a result.

Imminence of Perceived Danger

"Imminence is a critical component of both prongs of self-defense." (*People v. Humphrey, supra*, 13 Cal.4th at p. 1094.) Response with deadly force must be predicated on a danger that portends imminent death or great bodily injury. Reasonableness and immediacy of threat are intertwined. Self-defense is based on the reasonable appearance of imminent peril of death, or serious bodily injury to the party assailed.

In *People v. Aris* the trial court clarified that imminent peril means that the peril must have existed, or appeared to the person to have existed, at the very time the shot was fired. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1188 disapproved on another ground in *People v. Humphrey* (1996) 13 Cal.4th 1073.) This was later cited with approval by the California Supreme Court: "An imminent peril is one that, from appearances, must be instantly dealt with." (*In re Christian S.* (1994) 7 Cal. 4th 768,783 quoting *People v. Aris, supra*, 215 Cal.App.3d at p. 1187.)

The question is whether action was instantly required to avoid death or great bodily injury. In this regard, there is no duty to wait until an injury has been inflicted to be sure that deadly force is indeed appropriate.

Retreat and Avoidance

Under California law one who is faced with an assault that conveys death or great bodily injury may stand his ground and employ lethal force in self-defense. There is no duty to retreat even if safety could have been achieved by retreating. (CALCRIM No. 3470.) Indeed, in California the retreat rule has been expanded to encompass a reasonably

perceived necessity to pursue an assailant to secure oneself from danger. (See *People v. Holt* (1944) 25 Cal.2d 59, 63; *People v. Collins* (1961) 189 Cal. App.2d 575, 588.)

Nature and Level of Force

The right of self-defense is limited to the use of such force as is reasonable under the circumstances. (See *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 200; *People v. Minifie, supra*, 13 Cal.4th at p. 1065; *People v. Moody* (1943) 62 Cal.App.2d 18,22.)

Case law does not impose a duty to use less lethal options. "Where the peril is swift and imminent and the necessity for action immediate, the law does not weigh into nice scales the conduct of the assailed and say he shall not be justified in killing because he might have resorted to other means to secure his safety." (*People v. Collins, supra*, 189 Cal.App.2d at p. 578.)

The rationale for vesting the police officer with such discretion was explained:

Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

Scott v. Henrich (1994) 39 F.3d 912, 915.

In summary, an honest and objectively reasonable belief that lethal force is necessary to avoid what appears to be an imminent threat of death or great bodily injury will justify the use of deadly force. This is true even if the person acting in self-defense could have safely withdrawn or had available to him a less lethal means of defense.

ANALYSIS

On April 28, 2016 members of the San Bernardino Police Department Multiple Enforcement Team (MET) were working in the area of Foothill Boulevard and Meridian Avenue. The area was of specific import that evening because of the recent violence and shootings in the neighborhood. Officer Ahmed and Olvera were working in an undercover capacity in an undercover police vehicle. Both officers Ahmed and Olvera were wearing their Multiple Enforcement Team (MET) uniform. That uniform is a green shirt with police badging over the chest and the arm. They had on their uniform pants and utility belt carrying their firearms. Officers Saenz and Hysen were in police uniforms in a marked police vehicle serving as additional patrol. As Officers Ahmed and Olvera approached a dead-end area of 5th street they observed three African American males standing near a concrete block wall. Officers Ahmed and Olvera are aware the area is frequented by Five Times Criminal Street Gang as evidenced by recent graffiti on the same concrete block wall where these three men were observed.

The officers turned east onto an alleyway north of 5th street and saw the subjects walk toward the block wall which leads to the back of the Terrace Motel. Officer Ahmed and Olvera advise Officers Saenz and Hysen about the subjects and their direction of travel. Officer Ahmed and Olvera turned south on a driveway leading to 5th Street when they observed the subjects jump the wall and immediately begin firing at their undercover vehicle. The undercover vehicle's driver's side window shattered and both officers realized they were under attack. The muzzle flashes came directly from the area where the three male subjects had scaled the concrete wall.

Officer Ahmed exited the vehicle and returned fire at the subjects. Officer Olvera pushed his way out of the passenger side and on his way out of the vehicle turned on his forward-facing red light and siren. After the lights and siren turned on, both Officers observed that the subjects continued to fire their weapons at the officers.

At this moment, Officers Saenz and Hysen approached the area to assist their fellow officers. As they turned in the west driveway of the Terrace Motel, they accelerated towards the area where the male subjects had jumped the wall. As they approached, Officer Saenz believed he observed three subjects armed with handguns, heard gunfire and observed muzzle flashes.

Officer Saenz, who was driving the marked patrol vehicle, turned his vehicle exposing the patrol car door and the San Bernardino Police Department insignia on the side of the vehicle. Officer Saenz and Hysen observed the subjects run from the location; running east from the north side of the Terrace Motel. Officer Hysen reports that he observed the subjects running through the field that neighbors the Terrace Motel. Officer Saenz ran east through the parking lot to the west side of the Terrace Motel and stopped at a chain link fence where he observed one subject running through the field. That subject was later identified as G.B. G.B. was holding a handgun as he ran. Officer Saenz identified himself as a police officer and ordered him to stop and drop the gun. G.B. rotated his shoulders clockwise and raised his right arm with the gun towards

Officer Saenz. Officer Saenz, seeing this offensive move by G.B., fired one round striking G.B. in the right hip and caused him to go down to the ground in the field. A search of G.B. yielded five rounds of .380 caliber weapon in his pocket. A search of the field yielded a .380 caliber weapon nearby to where G.B. was shot.

Officer Saenz and Hysen observed a second subject, identified as John Wayne Phillips, running south in the field towards Foothill Boulevard and eventually running into the San Bernardino Motel. There, he was heard banging on doors begging to be let in. He was apprehended.

When presented with a fleeing suspect who was just involved in an armed conflict with other officers, who was observed holding a weapon, ignoring commands to stop and drop the weapon, and eventually turning and raising his arm holding the gun, it was reasonable for Officer Saenz to use deadly force to ensure the safety of himself and others. Had Officer Saenz not proceeded with use of deadly force not only would he have put himself in danger of being shot but also other officers could have also been in danger had the suspect gotten away.

In the present case, although in an undercover vehicle, Officers Olvera and Ahmed were wearing their police uniforms and once the shooting commenced, they identified themselves as police officers when Officer Olvera activated the vehicle's lights and siren. The key point in the analysis is that the subjects continued to fire even after that point and when a marked patrol vehicle arrived on scene. The marked patrol vehicle arrived on scene and Officer Saenz specifically maneuvered the vehicle so that the San Bernardino Police Department insignia could be seen by the three male subjects. Officer Saenz, after giving chase to the subjects on foot, announced himself as a police officer and ordered the suspect to stop running and drop his weapon. Those facts support that the shooting of G.B. when he turned to face Officer Saenz and raised his weapon in the direction of the officer.

Therefore, based on the facts presented in the police reports and other evidence provided surrounding the officer involved shooting, and the applicable law, it is the opinion of this analyst that use of deadly force by Officer Saenz was appropriate.

CONCLUSION

Based on the facts presented in the reports and the applicable law, Officer Saenz use of deadly force was a proper exercise of his right of self-defense and defense of others and therefore his actions were legally justified.