



## **PUBLIC RELEASE MEMORANDUM**

**DATE:** March 22, 2021

**SUBJECT:** Officer Involved Shooting (Fatal)

**Officer:** Deputy Cory McCarthy  
San Bernardino County Sheriff's Department

**Involved Subjects:** Jacob Scott Cato (Deceased)  
Date of Birth 01/03/85  
Morongo Valley, CA

**Date of Incident:** November 19, 2019

**Incident location:** \*\*\*\*\* Cactus Flower Trail  
Yucca Valley, CA

**DA STAR #:** 2020-22575

**Investigating Agency:** San Bernardino County Sheriff's Department

**Case Agent:** Detective Gerardo Moreno

**Report Number#:** DR # 091901758 / H # 2019-117

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## **PREAMBLE**

This was a fatal officer involved shooting by a deputy from the San Bernardino County Sheriff's Department. The shooting was investigated by the San Bernardino County Sheriff's Department. This factual summary is based on a thorough review of all the investigative reports, photographs, and audio recordings submitted by the San Bernardino County Sheriff's Department, DR# 091901758 and H# 2019-117.

## **FACTUAL SUMMARY**

On November 19, 2019, Witness #1 called law enforcement and reported his neighbor, later identified Jacob Cato, was shooting at his property. Witness #1 reported Cato shot approximately eighteen rounds at his trailer. Deputies responded to the scene but maintained a safe distance from the immediate location. Deputies heard approximately twenty-six gunshots from Cato's residence. During the incident, Cato exited his residence wearing a black ski mask and placed a black bag containing unknown items near the main front gate. Cato placed a propane tank near the backyard entry gate to the property. Deputies ordered Cato to surrender but Cato refused to comply.

When Cato failed to comply with deputies' commands to surrender and barricaded himself inside his residence, San Bernardino County Sheriff's Department Specialized Enforcement Division (SED) personnel were requested to respond and assist. The San Bernardino County Sheriff's Department Aviation Unit helicopter, 40 King, was requested to respond to the scene. A crisis negotiation team also responded to the location. The crisis negotiation team spoke to Cato over the telephone in an effort to get Cato to peacefully surrender. The crisis negotiation also spoke to Cato's attorney and requested the attorney help facilitate a peaceful surrender. The crisis negotiation team's efforts were unsuccessful.

On November 19, 2019, Deputy Cory McCarthy and Corporal Greg Gary, both from SED, responded to the command post that was set up at a nearby gun range. Deputy McCarthy and Corporal Gary were partnered up as a team. Deputy McCarthy and Corporal Gary had learned Cato was a possible sovereign citizen and a possible Hells Angels gang member. Deputy McCarthy and Corporal Gary were advised Cato had fired multiple gunshots at Witness #1's residence and Cato was uncooperative with the initial patrol deputies who responded to the scene. Deputy McCarthy and Corporal Gary learned Cato had placed a black bag containing unknown items near the front gate of the property and a propane tank near a back gate to the property. Cato had also repositioned his vehicles in the middle of the roadway leading up to his property. Deputy McCarthy and Corporal Gary gathered their equipment and made their way to a ridgeline.

Once Deputy McCarthy and Corporal Gary positioned themselves on the ridgeline overlooking the rear of Cato's residence, they monitored Cato's movements in and out

of the residence. 40 King hovered above Cato's residence providing additional information to the deputies on the ground regarding any suspicious activity by Cato. At one point during the incident, Cato exited the residence armed with a black semi-automatic handgun. Corporal Gary, through the scope of his rifle, saw Cato take a shooter's stance. Cato took a shoulder width stance, leaned forward, swung the handgun up and pointed it directly at Corporal Gary and Deputy McCarthy. Corporal Gary advised Deputy McCarthy that Cato had a gun.

Corporal Gary feared for his life and the life of Deputy McCarthy. Corporal Gary also feared for the lives of the other deputies at the scene. Corporal Gary moved his rifle upward with the intent of taking a precision shot towards Cato's head. Deputy McCarthy also feared for his life, the life of Corporal Gary, and the lives of the other deputies at the command post. As Corporal Gary was transitioning his weapon, he heard Deputy McCarthy fire his weapon. Corporal Gary believed he saw a muzzle flash from Cato's handgun at the same exact time he heard Deputy McCarthy fire his weapon. Deputy McCarthy fired one round at Cato.

After the shooting, Cato dropped his gun and fell to the ground. While on the ground, Cato continued to move his body around and attempted to pick up his handgun. A plan was initiated for SED personnel to approach Cato and render medical aid. There was concern Cato may have planted improvised explosive devices at different places on the property. The Arson and Bomb detail moved forward and placed an explosive charge on the black bag on the road. Once the black bag was detonated and determined to be safe, the immediate response team was able to move forward and eventually reached Cato who was still down on the ground. Cato was pronounced deceased at the scene.

A Glock 27 .40 caliber handgun was located approximately two feet, five inches north of Cato's body. The handgun was loaded with six cartridges in the magazine, and one in the chamber.

### **STATEMENTS BY POLICE OFFICERS**

On November 26, 2019, at approximately 8:26 in the morning, **Deputy Cory McCarthy** was interviewed by Detective Gerardo Moreno and Detective Nicholas Craig.<sup>1</sup>

On November 19, 2019, Deputy Cory McCarthy, from the San Bernardino County Sheriff's Department, was assigned to the Specialized Enforcement Division (SED). Deputy McCarthy was wearing a long-sleeved green shirt with San Bernardino County Sheriff's Department patches on the arms, green pants, boots, and a helmet. Deputy McCarthy wore a plate carrier vest which had a San Bernardino County Sheriff's

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<sup>1</sup> Deputy McCarthy was equipped with a belt recorder that was recording during the incident under review. Deputy McCarthy reviewed the recording prior to being interviewed by Detective Moreno and Detective Craig.

Department yellow star on the front of the vest and a yellow Sheriff's placard on the front of the vest as well as a yellow Sheriff's placard on the back of the vest.

On November 19, 2019, at approximately 10:30 in the morning, Deputy McCarthy was training at the Sheriff's Academy in Devore when he was notified by his lieutenant that there was a call out in the Morongo area. While Deputy McCarthy was headed out to the scene, he received an email from his lieutenant with additional information. Deputy McCarthy learned the address was near 29 Palms Highway in Morongo Valley; an exact address was not provided because the residence was placed up against the mountains. The suspect was identified as Jacob Cato, a possible Hells Angels gang member<sup>2</sup> and possible Sovereign Citizen. Based on Deputy McCarthy's training and experience, Deputy McCarthy knew the Hells Angels were an outlaw motorcycle gang that were not law enforcement friendly and the gang had been involved in multiple incidents with law enforcement officers that have resulted in either harm or death to law enforcement officers. Deputy McCarthy learned Cato had come out of his residence earlier in the day and shot multiple times at his neighbor's residence with an unknown weapon. Cato then barricaded himself in his residence and disregarded multiple commands from patrol deputies to exit the residence. The lieutenant's email indicated there may be both a search warrant as well as arrest warrant for Cato. As Deputy McCarthy monitored his radio, he heard patrol deputies already at the scene indicate they heard multiple gunshots out the back of Cato's residence.

A command post was set up at a nearby shooting range, east of Cato's residence. Deputy McCarthy continued to monitor the radio as he made his way to the command post. Deputy McCarthy heard deputies making Public Address (PA) announcements for Cato to come out; at one point, Deputy McCarthy heard deputies indicate Cato exited the residence and was walking toward the deputies down a long driveway. The deputies described Cato as shirtless, wearing a mask, and carrying a black bag in his hand. Deputy McCarthy heard the deputies state Cato walked approximately two hundred yards down a dirt road and placed the black bag in the middle of the road. Based on that description, Deputy McCarthy feared Cato could be placing an explosive device or some sort of trap for patrol deputies or members of SED that would be responding to the call.

Cato went back inside his residence. Deputy McCarthy heard 40 King, the San Bernardino County Sheriff's Department Aviation Unit helicopter, put out that Cato again exited the residence. This time, Cato got into a white pickup truck and created some sort of blockade in the road. Cato then went and got another pickup truck and parked it next to the white pickup truck. 40 King also advised over the radio that Cato locked a gate near the vehicles and placed a propane tank near the vehicles. Deputy McCarthy feared Cato was setting up some sort of ambush for law enforcement officers. 40 King advised Cato failed to comply with all PA announcements for him to respond to patrol deputies and went back inside the residence.

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<sup>2</sup> According to Jacob Cato's mother, Witness #2, her son was a Hells Angels drop out and not an actual member of the gang.

As Deputy McCarthy neared the location, he heard 40 King advise Cato had exited the residence and go over to a garage where Cato grabbed a bag and a box full of pipes. Deputy McCarthy feared Cato was making a pipe bomb or some sort of explosive device. Cato went back inside the residence with the items. Patrol deputies on the perimeter put out over the radio that they could hear drilling inside the residence. When Deputy McCarthy arrived at the command post, Sergeant Lucas Gaytan assigned Deputy McCarthy and Corporal Greg Gary as a team and told Deputy McCarthy to take his .308 Select Fire Carbine with him. Sergeant Gaytan did not want Cato to break containment from the residence. While Deputy McCarthy was gathering up his equipment, he heard patrol deputies over the radio indicate Cato had exited the back of the residence, wearing a mask and a plate carrier vest. Deputy McCarthy, based on his training and experience, knew a plate carrier vest was made to hold hard armor plates and the armor plates could potentially stop rifle ammunition if need be.

Deputy McCarthy and Corporal Gary positioned themselves on a ridgeline to watch the "three side" of Cato's residence, which was the back of the residence. Deputy McCarthy and Corporal Gary were approximately two hundred seventy yards from the main residence. While Corporal Gary was clearing an area for his long rifle, Deputy McCarthy saw Cato exit the residence through a screen door and start doing pushups. There were two large trees partially blocking sight of the door, so Deputy McCarthy did not have an unobstructed view of Cato. After doing some pushups, Cato went back inside the residence. Deputy McCarthy used shrub cutters and cleared an area where he would have a clear field of view.

Shortly thereafter, Cato again exited the residence. Deputy McCarthy saw Cato write something on what appeared to be a pizza box and then hold the box up towards 40 King. Cato walked around a couple of times trying to show the box to 40 King and then walked back inside the residence. The next time Cato exited the residence, Deputy McCarthy saw Cato was wearing a balaclava mask. Cato was wearing tan pants, no shirt, and carrying a bottle with some liquid inside in his left hand. Deputy McCarthy saw a phone in Cato's right hand. Cato walked and dumped the liquid out into the dirt and went back inside the residence. Deputy McCarthy continued to watch the residence.

Next, 40 King put out that they see Cato on the "one-side" near the door. Cato was standing at a window next to the front door and had a black device in his hand. Deputy McCarthy believed Cato was rigging his house for law enforcement officers if the incident continued and Cato did not come out peacefully. Deputy McCarthy saw Cato exit the residence through the screen door on the back of the home. Deputy McCarthy used the optic on his .308 Select Fire Carbine to get a better view of Cato. Cato was wearing a hoodie pulled over his head and was wearing the balaclava mask. Cato walked approximately twelve to fifteen feet out of the doorway. Deputy McCarthy could see Cato's body break away from the two trees that partially obstructed Deputy McCarthy's view.

Deputy McCarthy heard Corporal Gary say Cato had a gun in his right hand. Deputy McCarthy was able to clearly identify a handgun in Cato's right hand down near Cato's right hip. It appeared to Deputy McCarthy to be a black semi-automatic handgun. Deputy McCarthy said Cato walked out approximately fifteen feet, stopped, and then got into a shooting stance. Deputy McCarthy said Cato's toes, knees, hips, and shoulders were squared at both Deputy McCarthy and Corporal Gary. Cato's right foot was six to nine inches back behind his left foot. Deputy McCarthy said Cato brought the gun up and punched it out in front of him, up at Cato's eye level, in what Deputy McCarthy believed was an attempt to get a sight picture. Deputy McCarthy said Cato took his left hand and supported the left side of the gun to stabilize the weapon.

Deputy McCarthy heard Corporal Gary state, "he is pointing the gun at us." As Deputy McCarthy heard this, he simultaneously saw Cato pointing the gun at the officers. Deputy McCarthy placed the .308 Select Fire Carbine from safe to fire. At that point, Deputy McCarthy feared Cato was going to try to shoot at Deputy McCarthy and Corporal Gary. Deputy McCarthy also feared Cato could strike the approximately twenty people at the command post which was behind them. Deputy McCarthy began to pull the trigger on his weapon with the intent of stopping the threat. As Deputy McCarthy started to pull the trigger, Deputy McCarthy saw Cato fire one round from his handgun. Deputy McCarthy saw Cato's handgun recoil and smoke disburse from the weapon. Deputy McCarthy squeezed the trigger on his .308 Select Fire Carbine and fired one round at Cato's center chest area. Deputy McCarthy estimated it was approximately ten seconds from the time Cato exited the residence and pointed the handgun at Deputy McCarthy and Corporal Gary to the time Deputy McCarthy saw the slide recoil and smoke come out of Cato's handgun.

After Deputy McCarthy fired the one round, he reassessed and saw Cato dropped the gun as Cato fell directly onto his back. Deputy McCarthy put out over the radio that the suspect had pointed a gun at them, and a shot was away. Deputy McCarthy also advised the suspect was down. The immediate response team wanted to try and move forward and render medical aid to Cato. The command post, however, was concerned the black package Cato placed on the road was an improvised explosive device or some type of booby trap. The command post advised Deputy McCarthy and Corporal Gary that they were going to first send in Arson and Bomb investigators, who were at the scene, to take care of the black package before the immediate response team could move forward.

Deputy McCarthy and Corporal Gary continued to watch Cato from their location on the ridgeline. 40 King also continued to monitor the scene and relay information from the air. Deputy McCarthy saw Cato trying to use his foot to kick his handgun up towards Cato's upper body. At one point, Deputy McCarthy saw Cato was able to place his right hand on the gun, however, Cato never attempted to pick up the gun again. The Arson and Bomb detail moved forward and detonated the black bag with an explosive device. Next, they cleared Cato of being armed with any explosive devices. Those actions took approximately fifty-six minutes. Once that was complete, the immediate response team

was able to move forward and eventually reach Cato who was still down on the ground. At that point, Deputy McCarthy put down his rifle and stopped his audio recording. Corporal Gary did the same. Deputy McCarthy and Corporal Gary were no longer involved in the incident.

On November 25, 2019, at approximately 10:58 in the morning, **Corporal Greg Gary** was interviewed by Detective Eric Ogaz and Detective Nicolas Craig.<sup>3</sup>

On November 19, 2019, Corporal Greg Gary, from the San Bernardino County Sheriff's Department, was assigned to the Specialized Enforcement Division (SED). On that date, Corporal Gary was wearing a long sleeve green shirt with San Bernardino County Sheriff's Department patches on the shoulders, green pants, boots, and a Sheriff's Department ballistic plate carrier with Sheriff's patches on the front and rear. On that date, between 10:30 and 11:00 in the morning, Corporal Gary was attending training at the San Bernardino County Sheriff's Department training center when he received a call out regarding shots fired and a barricaded subject in the area of Twentynine Palms or Yucca Valley.

When Corporal Gary arrived at the command post, he received a quick briefing. Corporal Gary was advised a neighbor reported Cato had shot at the neighbor's residence multiple times. Corporal Gary learned the subject, later identified as Jacob Cato, had exited his residence and placed an unknown bag containing unknown materials in his driveway. Cato had also placed a propane tank by a vehicle located on the property. Corporal Gary was advised that Cato had pistols and possibly a long rifle. Corporal Gary also learned there were possible improvised explosive devices at the location. While he was at the command post, Corporal Gary heard 40 King, the San Bernardino County Sheriff's Department Aviation Unit helicopter, giving Cato commands. 40 King identified itself as the Sheriff's Department and ordered Cato to exit the residence with his hands up. Corporal Gary was partnered with Deputy Cory McCarthy. The two gathered their equipment and made their way to a ridgeline where they would be able to observe Cato's residence.

Once Corporal Gary and Deputy McCarthy reached the ridgeline, they established their positions. Corporal Gary and Deputy McCarthy were watching the "three side" of Cato's residence which was the rear of the house. Deputy McCarthy set up approximately seven to ten feet to the right of Corporal Gary. Corporal Gary saw Cato exit the residence with a black cell phone in his right hand. Cato walked around a little and then started to go back inside the residence. Cato then grabbed a piece of cardboard, held it up to 40 King and then went inside the residence. Corporal Gary was unable to see what was written on the cardboard.

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<sup>3</sup> Corporal Gary was equipped with a belt recorder that was recording during the incident under review. Corporal Gary reviewed the recording prior to being interviewed by Detective Ogaz and Detective Craig.



A short time later, Cato exited the residence again. This time Cato was wearing a ski mask or balaclava. Cato had a black cell phone in his right hand and a measuring cup in his left hand. Corporal Gary could see dogs outside where Cato was walking. Cato dumped whatever liquid substance was inside the measuring cup onto the ground and went back inside the residence. After another short period, Cato came back outside again. This time Cato was wearing a black hoodie up over his mask. Corporal Gary saw a black handgun in Cato's right hand.

Corporal Gary advised Deputy McCarthy that he saw a gun in Cato's hand. The gun appeared to be a black semi-automatic handgun. Cato walked out farther from the house. Corporal Gary's view of Cato's body was obstructed by the Joshua Tree that was in the desert landscape. Corporal Gary then saw Cato take a shooter's stance. Corporal Gary said Cato took a shoulder width stance, leaned forward, swung the handgun up and pointed it directly at Corporal Gary and Deputy McCarthy. Corporal Gary said Cato looked like somebody on the shooting range. Corporal Gary feared for his life and the life of Deputy McCarthy. Corporal Gary also feared for the lives of the officers at the command post. Corporal Gary moved his rifle upward with the intent of taking a precision shot towards Cato's head. As Corporal Gary was transitioning his weapon, he heard Deputy McCarthy fire his weapon. Corporal Gary believed he saw a muzzle flash from Cato's handgun at the same exact time he heard Deputy McCarthy fire his weapon. Corporal Gary estimated the distance between himself and Cato was approximately 325 yards at the time of the shooting.

After the shooting, Cato took two or three steps back. Cato dropped his gun, lowered himself on the ground, and started laying on his side. Once Cato was on the ground, Corporal Gary kept an eye on Cato's gun which was near Cato's right foot. Cato appeared to be using his right foot to pull the gun up towards Cato's butt. It appeared to Corporal Gary that Cato was trying to pick up the gun. Cato was able to place his hand on the gun a few different times but never picked the weapon up off the ground. Deputy McCarthy put out over the radio that he had shot his weapon.

After the shooting, the immediate response team began getting into place so they could approach the residence. Arson and Bomb personnel detonated the black bag Cato had placed in the driveway and deemed it non-dangerous which then allowed the immediate response team to move forward to Cato's body. It took approximately fifty-six minutes for Arson and Bomb personnel to detonate the bag and clear Cato's body of any explosive devices. Corporal Gary and Deputy McCarthy continued to observe Cato from the ridgeline. Corporal Gary and Deputy McCarthy downloaded their rifles and eventually another team of officers made their way to Corporal Gary's location. That team walked Deputy McCarthy back to the command post. Corporal Gary stayed on the ridgeline and took some photographs to document the scene. Later, another deputy arrived and relieved Corporal Gary. Corporal Gary walked back to the command post.

On November 20, 2019, at approximately 1:40 in the morning, **Corporal John Scalise** was interviewed by Detective Nicolas Craig and Detective Eric Ogaz.

On November 19, 2019, Corporal John Scalise, from the San Bernardino County Sheriff's Department, was a Flight Officer assigned to the San Bernardino County Sheriff's Department Aviation Unit. On that date, at around 11:45 in the morning, Corporal Scalise was notified of a Specialized Enforcement Division (SED) call in Morongo Valley. The call was in reference to a subject barricaded inside his residence. The subject, later identified as Jacob Cato, had also been seen exiting his residence and firing a firearm. At approximately 1:00 in the afternoon, Corporal Scalise, along with his partner, Deputy Paul Kowalski, and Deputy Tommy Dickey, who was in training, were assigned call sign 40K1 and flew a marked San Bernardino County Sheriff's Department Aviation Unit helicopter to the Morongo Valley gun range near the incident location. Deputy Kowalski was assigned as the pilot of the helicopter. Corporal Scalise sat in the right front passenger seat and Deputy Dickey sat in the right rear passenger seat.

40 King landed at approximately 12:00 in the afternoon. Corporal Scalise moved to the back seat of the helicopter with his M4 rifle to cover SED personnel. Deputy Dickey moved up to the left front seat of the helicopter and operated the camera system.<sup>4</sup> Once 40 King was in flight, Corporal Scalise could see Cato's residence. Corporal Scalise saw one SED sniper team positioned in the hills north of the location. Corporal Scalise saw two pickup trucks parked together blocking the roadway to Cato's residence. 40 King made continual left-hand orbits around the residence between 500 and 1000 feet.

Approximately fifteen to twenty minutes into the flight, Corporal Scalise saw Cato exit the north side of the residence. Cato walked to the north side of the property, looked around, and went back inside the residence. Deputy Dickey saw Cato place what appeared to be a surveillance device in the interior bay window on the south side of the residence. The surveillance device appeared to have a view of the driveway leading up to Cato's residence.

Approximately forty-five minutes later into the flight, Cato exited the north side of the residence wearing a dark colored sweatshirt with a hoodie covering his face. Deputy Dickey advised Corporal Scalise and Deputy Kowalski that he saw Cato with a gun. Deputy Kowalski made a hard left-hand turn and flew down towards Cato. During the turn, Corporal Scalise was unable to see Cato. Once the turn was complete, Corporal Scalise saw Cato was down on the ground. Corporal Scalise did not hear or see any gunshots. Corporal Scalise saw a black pistol on the ground next to Cato's right hip. Cato lifted his head up and looked north in the direction of the sniper team. Cato moved his body and attempted unsuccessfully to grab the firearm. At one point, Cato was able to lift the firearm up with his left hand, but Cato was unable to hold the weight of the gun and immediately dropped it. Corporal Scalise estimated Cato continued to move and roll his body around for approximately ten to fifteen minutes before Cato completely stopped moving.

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<sup>4</sup> The helicopter video camera system did not record the incident under review.

SED personnel made their way up the dirt driveway towards Cato. SED personnel were forced to stop and detonate a black box Cato had placed in the middle of the driveway. It was unknown if the black box was an improvised explosive device. Once the black box was detonated and rendered safe, SED personnel approached and contacted Cato. Cato was pronounced deceased at the scene.

On November 20, 2019, at approximately 1:02 in the morning, **Deputy Paul Kowalski** was interviewed by Detective Nicolas Craig and Detective Eric Ogaz.

On November 19, 2019, Deputy Paul Kowalski, from the San Bernardino County Sheriff's Department, was a deputy pilot assigned to the San Bernardino County Sheriff's Department Aviation Unit. On that date, Deputy Kowalski was notified of a Specialized Enforcement Division (SED) call in Morongo Valley. Deputy Kowalski read the call history and learned a subject, later identified as Jacob Cato, had shot a gun in the area and was barricaded inside his home. Deputies already at the scene had heard gunshots coming from inside the house. At around 1:00 in the afternoon Deputy Kowalski, Corporal John Scalise, and Deputy Tommy Dickey were assigned the call sign 40K1 and flew a San Bernardino County Sheriff's Department Aviation Unit helicopter to a gun range near the incident location.

Once Deputy Kowalski landed the helicopter, Corporal Scalise moved to the back seat of the helicopter with his M4 rifle. Deputy Dickey sat in the left front seat of the helicopter and operated the camera system, while Deputy Kowalski was in the front right seat. Deputy Kowalski received a briefing where he learned Cato had placed various items around the property which were consistent with possible explosive devices. Deputy Kowalski flew the helicopter in a counterclockwise orbit over Cato's residence. Deputy Kowalski saw multiple San Bernardino County Sheriff's Department patrol vehicles in the area. Deputy Kowalski also saw a SED sniper team on a hill, north of Cato's residence.

While they were in the air, Deputy Kowalski saw Cato walk out of the north side of the residence. Cato had a cell phone in one hand and a coffee cup in the other hand. Cato walked around the fence line of the house and then walked back inside the residence. Deputy Kowalski saw Cato place a black item near the window on the south side of the house. Deputy Kowalski was unsure what the item was but advised the other deputies of Cato's actions over the radio.

Deputy Kowalski continued to conduct orbits over Cato's residence. Deputy Dickey advised Cato walked out of the north side of the house again. Deputy Kowalski looked at the camera screen and saw Cato run out of the north side of the house. Cato was wearing camouflage pants and a black hoodie over his head. Cato crouched as he ran in a two-handed shooting position and held a handgun. Cato aimed the gun at the snipers who were positioned north of the house. Based on how Cato was moving with the gun, Deputy Kowalski believed Cato intended to shoot the snipers who were north of the residence.

Deputy Kowalski made a quick, steep left turn to give Corporal Scalise a better view of Cato. Deputy Kowalski believed Corporal Scalise could engage Cato with his rifle if needed. Deputy Kowalski focused his attention on bringing the helicopter to a lower altitude. Deputy Kowalski did not hear any gunshots but when he looked out the window, he saw Cato on the ground on his back. The handgun was near Cato. Cato tried to grab the gun but was unable to pick it up. As Cato rolled around on the ground, Deputy Kowalski saw a large exit wound on Cato's back. Deputy Kowalski heard deputies announce they would approach Cato to render medical aid once the deputies were able to disable the suspected explosive devices on the road and near the house. Deputy Kowalski estimated Cato continued to move for approximately ten to fifteen minutes and then stopped.

On November 25, 2019, at approximately 2:33 in the afternoon, **Deputy Tommy Dickey** was interviewed by Detective Nicolas Craig and Detective Eric Ogaz.

On November 19, 2019, Deputy Tommy Dickey, from the San Bernardino County Sheriff's Department, was assigned to Emergency Operations was involved in Search and Rescue operations. As part of Deputy Dickey's training, Deputy Dickey accompanied the San Bernardino County Sheriff's Department Aviation Units to learn their capabilities. On that date, Deputy Dickey was notified of a Specialized Enforcement Division (SED) call regarding a subject, later identified as Jacob Cato, who fired his gun at nearby residents and barricaded himself inside his home. Deputy Paul Kowalski and Corporal John Scalise were assigned to Aviation Division Unit 40K1. Deputy Kowalski was the pilot and Corporal Scalise was the Flight Observer. Deputy Dickey responded to the aviation hangar and sat in the backseat of the helicopter. Deputy Dickey, Deputy Kowalski, and Corporal Scalise flew to a gun range near the incident location.

After they landed, Deputy Dickey got into the front left seat of the helicopter. Corporal Scalise moved to the back-left seat of the helicopter with his M4 rifle. Deputy Kowalski sat in the front right seat and flew the helicopter in counterclockwise orbits over Cato's residence. Deputy Dickey saw a two-man SED long rifle team north of Cato's residence on a nearby hillside. There were two trucks blocking the driveway to Cato's residence. Deputy Dickey saw an orange cord that ran from one of the trucks to a nearby metal building. Deputy Dickey was concerned it could be a detonation cord. Deputy Dickey also saw multiple San Bernardino County Sheriff's Department patrol vehicles on dirt roads surrounding Cato's residence.

Deputy Dickey used the camera system on 40 King to observe Cato's residence. Deputy Dickey saw Cato exit the north side of the residence. Cato was wearing a black mask and no shirt. Cato walked around the north side of the residence, looked around the hillsides, and talked on a cell phone before going back inside the residence. Approximately ten minutes later, Cato slowly ran out of the north side of the residence. Cato was wearing a black mask and a thick shirt. Deputy Dickey observed Cato was

holding a sub-compact Glock handgun in two hands, was crouched down in a stable stance, and had his arms thrust out in a shooting position. Deputy Dickey saw Cato aim the handgun at the SED long rifle team to the north. Deputy Dickey believed Cato purposefully moved to shoot at the SED deputies. Cato ran north and pointed the handgun at the deputies until he neared a small fence north of the residence. Deputy Dickey heard one gunshot and saw Cato fall onto his back.

Deputy Kowalski quickly turned 40 King in a sharp left turn. Deputy Dickey lost sight of Cato on the camera. After approximately twenty seconds, Deputy Dickey was able to focus the camera back on Cato. The handgun was near Cato's upper body. Deputy Dickey noticed Cato was wearing a soft body armor vest over his chest. Deputy Dickey observed a red bloodstain on Cato's chest and back. Cato rolled onto his stomach with the handgun still nearby. Deputy Dickey heard SED personnel plan their approach to the house. SED personnel detonated a black box in the driveway leading up to Cato's residence. Once that was cleared, SED personnel methodically approached Cato. Deputy Dickey heard a medic with SED pronounce Cato deceased.

### **STATEMENTS BY CIVILIAN WITNESSES**

On November 19, 2019, at approximately 9:44 in the evening, **Witness #1** was interviewed by Detective Nicolas Craig and Detective Alan Pennington.

Witness #1 lived with his girlfriend Witness #3 at \*\*\*\*\* Twentynine Palms Highway in Morongo Valley. Witness #1's neighbor was a subject by the name of Jacob Cato. Witness #1 never spoke to Cato and only saw Cato coming and going from Cato's property. Witness #1 knew Cato's name as a result of previous conversations with Cato's landlord as well as documents posted on the front gate and mailbox of Cato's property. Witness #1 also learned from paperwork posted on the gate that Cato cultivated marijuana. Witness #1 believed Witness #3's interaction with Cato was only in passing.

Witness #1 indicated Cato frequently fired his guns on his property. Over the last two months, Witness #1 said Cato would shoot his weapons more frequently. Cato would fire different types of guns and varying amounts of shots every night. On November 19, 2019, at around 8:10 in the morning, Witness #1 heard someone shoot a gun six times and yell, "Get the f\*\*k out." Witness #1 heard someone fire an additional six gunshots and yell, "Get the f\*\*k out," a second time. Witness #1 called Sheriff's Dispatch. While on the phone with the dispatcher, Witness #1 heard six more gunshots.

Witness #3 looked out the window towards Cato's property and saw someone dressed in all black on her property. Witness #3 took a photograph of the person with her cell phone and later sent it to Witness #1. Witness #1 believed Cato was the person dressed in all black. Witness #1 was unable to recognize Cato's voice but knew no one else visited Cato's property. Witness #1 estimated the distance between his property

and Cato's property to be approximately thirty yards. Witness #1 was afraid he or Witness #3 would be shot and killed. Witness #1 tried to get Witness #3 to hide in their fifth wheel. Witness #1 heard a subject, who he believed to be Cato, yell, "Get the f\*\*k out," and six more gunshots.

The dispatcher advised Witness #1 that deputies would not approach Witness #1's house. When Witness #1 looked outside, he did not see anyone. Witness #1 spoke to a sheriff's deputy over the phone and confirmed deputies were not near his house. Witness #1 locked his fifth wheel and left in his car with Witness #3. Neither Witness #1 nor Witness #3 witnessed the incident under review.

### **INCIDENT AUDIO AND VIDEO**

**BELT RECORDING.** The San Bernardino County Sheriff's Department does not equip deputies with body worn cameras. Deputies are equipped with belt recorders. All belt recordings submitted were reviewed in their entirety.<sup>5</sup>

#### **Deputy Cory McCarthy**

Deputy McCarthy had a belt recorder activated during part of the incident under review. The belt recorder was activated prior to the incident under review. There were two separate files submitted for review.

#### **Belt Recording Part 1**

The recording was approximately 8 minutes and 43 seconds in length. The recording appeared to start once Deputy McCarthy arrived at the command post. Deputy McCarthy indicated a suspect shot at his neighbor's residence. Deputy McCarthy also stated the suspect came out of the residence wearing a plate carrier and mask and was carrying a gun. Corporal Gary was heard saying they were stepping off as Sierra 2. Deputy McCarthy and Corporal Gary could be heard walking and eventually setting up their positions to observe Cato's residence.

#### **Belt Recording Part 2**

The recording was approximately 1 hour, 51 minutes, and 38 seconds in length. The recording covered the time period when Deputy McCarthy and Corporal Gary were setting up their positions to observe Cato's residence to when Deputy McCarthy went

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<sup>5</sup> Summaries of the belt recordings will only cover the start of the recording and end at the point immediately following the lethal force encounter.

off tape. Corporal Gary and Deputy McCarthy were heard discussing their observations of Cato when he came out of the residence. A helicopter was heard flying in the background throughout the recording. There was a discussion about where other SED personnel teams were located around Cato's property. There were discussions clarifying the numbering of the sides of Cato's residences. At 1 hour, 3 minutes, and 40 seconds, muffled conversation was heard.<sup>6</sup> From 1 hour, 3 minutes, and 43 seconds to 1 hour, 3 minutes, and 48 seconds, "He's got a gun" was heard twice. At 1 hour, 3 minutes, and 49 seconds, a gunshot was heard. At 1 hour, 3 minutes, 53 seconds, Deputy McCarthy was heard saying, "Shots fired." From 1 hour, 3 minutes, 56 seconds to 1 hour, 3 minutes, 58 seconds, Deputy McCarthy was heard saying, "Sierra 2. Shot away."

### **Corporal Greg Gary**

Corporal Gary had a belt recorder activated during part of the incident under review. The belt recorder was activated prior to the incident under review. The belt recording was approximately two hours, 9 minutes, and 13 seconds in length. The recording covered the period from Corporal Gary and Detective McCarthy setting up their positions to the point Corporal Gary goes off tape.

The recording started with Corporal Gary and Detective McCarthy setting up their positions on the ridgeline to observe Cato's residence. A helicopter could be heard flying in the background. Corporal Gary and Deputy McCarthy were heard discussing distances and their observations of Cato when Cato exited the residence. Corporal Gary advised Cato came out, wrote something on a cardboard box and held it up to 40 King. Radio traffic was heard in the background confirming Cato shot at the reporting party. Corporal Gary and Deputy McCarthy discussed their observations of different areas of Cato's property. There was a discussion clarifying the numbering of the sides of Cato's residence. Cato was observed exiting the residence and dumping some sort of liquid outside. There were additional discussions clarifying the numbering of the sides of Cato's residence. Additional radio traffic was heard on the recording.

At 1 hour, 21 minutes 16 seconds, Corporal Gary said, "Door coming out. He's got a hoodie on." At 1 hour, 21 minutes, 20 seconds, Corporal Gary said, "Looks like he has a gun in his hand." There was some radio traffic at the same time. At 1 hour, 21 minutes, 24 seconds, Corporal Gary said, "He's pointing the gun at us." At 1 hour, 21 minutes, 26 seconds, a gunshot was heard. At 1 hour, 21 minutes, 30 seconds, Deputy McCarthy said, "Shots fired." At 1 hour, 21 minutes, 33 seconds, Deputy McCarthy said, "Sierra 2. Shot away. He had the gun pointed at us. He fired one round."

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<sup>6</sup> All times mentioned regarding belt recording summaries are approximations for reference only and not meant to indicate exact times specific events occurred during the lethal force encounter.

### **CRIME SCENE INVESTIGATION**

A Glock 27 .40 caliber handgun, serial number BEFH389, was located approximately two feet, five inches north of Cato's body. The handgun was loaded with six cartridges in the magazine, and one in the chamber. Approximately fifty .40 and .45 caliber fired cartridge casings were found in the enclosed backyard surrounding Cato's body. Two Glock 27 magazines were located in Cato's left front pocket. One magazine was loaded with nine cartridges and the other magazine was loaded with ten cartridges.

During the service of the search warrant at Cato's residence, Detective Nicolas Craig located a black spotting scope. The spotting scope had a small tripod attached to it. The spotting scope's lens cover was off. Detective Craig took the spotting scope outside the front door of the residence and stood on the concrete walkway. Detective Craig held the spotting scope and focused it on the hillside area where Detective McCarthy and Corporal Gary were positioned when the lethal force encounter occurred. Based on Detective Craig's observations, it was Detective Craig's opinion that Detective McCarthy and Corporal Gary would have been visible if Cato used the spotting scope prior to the lethal force encounter.

### **GUNSHOT RESIDUE EXAMINATION**

San Bernardino County Sheriff's Department Deputy Coroner Investigator Witness #4 checked Cato's hands for gunshot residue. Right-hand and left-hand adhesive discs were submitted to the San Bernardino County Sheriff's Department Scientific Investigations Division for examination. Two characteristic gunshot residue particles were identified on Cato's right-hand adhesive disc and six characteristic gunshot residue particles were identified on Cato's left-hand adhesive disc. Characteristic gunshot residue particles can be deposited on the hands by firing a firearm, being in proximity of a discharging firearm, or by coming in contact with a surface that has gunshot residue on it, including handling a firearm or ammunition.

### **DECEDENT**

**AUTOPSY.** Witness #5, Chief Forensic Pathologist for the Office of the Riverside County Sheriff-Coroner-Public Administrator, conducted the autopsy of Jacob Cato on November 22, 2019. Witness #5 determined the cause of death was a perforating, rifle gunshot wound of the torso.

#### **Gunshot Wound of Chest:**

There was an entrance gunshot wound present in the right midline chest region with an exit wound present to the right lateral mid back region. The projectile passed through the skin and subcutaneous soft tissues located between the fourth and fifth ribs on the



right, producing a perforating defect through the lower lobe of the right lung. The projectile then exited through the seventh and eighth ribs on the posterior aspects of the right side of the rib cage and exited the soft tissues where previously described. The trajectory of the projectile was primarily front to back, and minimally left to right.

**TOXICOLOGY.** Right chest blood, vitreous, gastric, liver, bile, urine, and brain samples were collected from Cato during the autopsy.

Toxicology results for the **Blood** sample were listed as follows:

- Ethyl Alcohol – 0.000% (W/V)
- Cocaine &/OR Metabolites – detected
  - Benzoylcegonine, LC/MS/MS – 0.024 mg/L
- Cannabinoids – detected
  - Delta-9-THC, LC/MS/MS – 0.0271 mg/L
  - 11-Hydroxy-Delta-9-THC, LC/MS/MS – 0.0040 mg/L
  - 11-Carboxy-Delta-9-THC, LC/MS/MS – 0.085 mg/L

Toxicology results for the **Urine** sample were listed as follows:

- Ethyl Alcohol – less than 0.010% (W/V)
- Cocaine &/OR Metabolites – detected
  - Benzoylcegonine, LC/MS/MS – 0.387 mg/L
- Cannabinoids – detected
  - Delta-9-THC, LC/MS/MS – 0.460 mg/L

Toxicology results for the **Vitreous** sample were listed as follows:

- Ethyl Alcohol – 0.000% (W/V)
- Cocaine &/OR Metabolites – Detected
  - Cocaine, LC/MS/MS – less than 0.005 mg/L
  - Benzoylcegonine, LC/MS/MS – 0.055 mg/L

**CRIMINAL HISTORY.** 2016, 14601(a) of the Vehicle Code, Driving on a Suspended License. Riverside County Docket number 1607379, a misdemeanor.

### **DE-ESCALATION**

Several different attempts were made by law enforcement to de-escalate the situation. Patrol deputies who initially responded to the scene gave Cato verbal commands to exit the residence. Cato failed to comply with those commands. 40 King gave Cato verbal commands to exit the residence and comply with patrol deputies. Cato failed to comply

with those commands. Crisis negotiators were brought in to speak with Cato over the telephone. Cato hung up on one negotiator. Crisis negotiators also contacted Cato's attorney and requested assistance in getting Cato to come out of the residence. Cato's attorney was unsuccessful in attempting to get Cato to exit the residence and surrender to deputies. At no time did Cato cooperate with deputies.

### **APPLICABLE LEGAL PRINCIPLES**

A peace officer may use reasonable force to effect an arrest if he believes that the person to be arrested has committed a public offense. (Calif. Penal C. §835a)<sup>7</sup> Should the arresting officer encounter resistance, actual or threatened, he need not retreat from his effort and maintains his right to self-defense or to use reasonable force to effect that arrest. (*Id.*) An arrestee has a duty to refrain from using force or any weapon to resist lawful arrest, if he knows or should know that he is being arrested. (Penal C. §834a.)

An officer-involved shooting may be justified as a matter of self-defense, which is codified in Penal Code at §§196 and 197. Both of these code sections are pertinent to the analysis of the conduct involved in this review and are discussed below.

**PENAL CODE SECTION 196.** Police officers may use deadly force in the course of their duties under circumstances not available to members of the general public. Penal Code §196 states that use of deadly force by a public officer is justifiable when necessarily used in arresting persons who are charged with a felony and who are fleeing from justice or resisting said arrest. Application of the section is broader than on its face; formal written charges are not required. (*People v. Kilvington* (1894) 104 Cal. 86, 92.) When a police officer has probable cause to believe that the suspect he is attempting to apprehend "has committed a crime involving the infliction or threatened infliction of serious physical harm" to the officer or others, using deadly force to prevent escape is not constitutionally unreasonable. (*Tennessee v. Garner* (1985) 471 U.S. 1, 11-12.)

The relevant criminal jury instruction, as written by the Judicial Council of California, is set forth in CALCRIM 507 ("Justifiable Homicide: By Public Officer"). As it may be relevant in this case, a justifiable homicide by a peace officer requires finding a that the police officer acted as follows:

- (1) while arresting a person charged with a felony who was resisting arrest; while overcoming actual resistance to some legal process; or while performing any legal duty, and

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<sup>7</sup> All references to code sections here pertain to the California Penal Code, as they existed at the time of the incident. Significant modifications were made to sections 196 and 835a pursuant to Assembly Bill 392. (Assem. Bill No. 392 (2018-2019 Reg. Sess.) as Chaptered August 19, 2019.) However, those modifications do not apply retroactively. Even if they did, the conclusion of the analysis would be the same.

- (2) the officer had probable cause to believe that the decedent posed a threat of death or great bodily injury either to the defendant or to others.

(CALCRIM 507)

No variation of the word "reasonable" appears in Penal Code §196, but the principle as applied necessarily requires that an officer's conduct be reasonable. A homicide is justifiable under Penal Code §196 when the circumstances reasonably created a fear of death or serious bodily harm to the officer or to another. (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 349.) This standard under Penal Code § 196 is consistent with the Supreme Court standard for reasonable force as stated in *Garner, supra*, 471 U.S. at 11-12. Whether police actions are reasonable under Penal Code section 196 depends on the facts and circumstances known to the peace officer at the time of the arrest. This rule applies even if subsequent investigation reveals the suspect was not guilty of the suspected felony. (*Kilvington, supra*, 104 Cal. at 93.) Similarly, when a police officer reasonably believes a suspect may be armed, it does not change the analysis even if subsequent investigation reveals the suspect was unarmed. (*Reese v. Anderson* (5th Cir. 1991) 926 F.2d 494, 501; *Anderson v. Russell* (4th Cir. 2001) 247 F.3d 125, 129, 131.) California courts have held that when a police officer's actions are reasonable under the Fourth Amendment, the requirements of Penal Code § 196 are satisfied. (*Martinez v. County of Los Angeles, supra*, at 349; *Brown v. Grinder* (E.D. Cal., Jan. 22, 2019) 2019 WL 280296, at \*25.)

**PENAL CODE SECTION 197.** California law permits *all persons* to use deadly force to protect themselves from the imminent threat of death or great bodily injury. Penal Code §197 provides that the use of deadly force by any person is justifiable when used in self-defense or in defense of others.

The pertinent criminal jury instruction to this section is CALCRIM 505 ("Justifiable Homicide: Self-Defense or Defense of Another"). The instruction, rooted in caselaw, states that a person acts in lawful self-defense or defense of another if :

- (1) he reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury, and;
- (2) he reasonably believed that the immediate use of deadly force was necessary to defend against that danger.

(CALCRIM 505.)

"Imminence is a critical component of both prongs of self-defense." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1094.) A person may resort to the use of deadly force in self-defense, or in defense of another, where there is a reasonable need to protect oneself or someone else from an apparent, imminent threat of death or great bodily injury. "An imminent peril is one that, from appearances, must be instantly dealt with." (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) The primary inquiry is whether action was instantly required to avoid death or great bodily injury. (*Humphrey, supra*, 13

Cal.4<sup>th</sup> at 1088.) What a person knows and his actual awareness of the risks posed against him are relevant to determine if a reasonable person would believe in the need to defend. (*Id.* at 1083.) In this regard, there is no duty to wait until an injury has been inflicted to be sure that deadly force is indeed appropriate. (*Scott v. Henrich* (9<sup>th</sup> Cir. 1994) 39 F. 3d 912, 915.)

There is no requirement that a person (including a police officer) retreat even if safety could have been achieved by retreating. (*Id.*, see also CALCRIM 505.) In addition, police officers are not constitutionally required to use all feasible alternatives to avoid a situation where the use of deadly force is reasonable and justified. (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 348.) The court in *Scott* explained:

Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment...Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves.

(*Scott v. Henrich, supra*, 39 F.3d at 915.)

**REASONABLENESS.** Self-defense requires both subjective honesty and objective reasonableness. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1186.) The United States Supreme Court has held that an officer's right to use force in the course of an arrest, stop or seizure, deadly or otherwise, must be analyzed under the Fourth Amendment's "reasonableness" standard. (*Graham v. Conner* (1989) 490 U.S. 386, 395.)

The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on scene, rather than with the 20/20 vision of hindsight....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 in a particular situation.

(*Id.* at 396-397, citations omitted.)

The "reasonableness" test requires an analysis of "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." (*Id.* at 397, citations omitted.) What constitutes "reasonable" self-defense or defense of others is controlled by the circumstances. A person's right of self-defense is the same whether the danger is real or merely apparent. (*People v. Jackson* (1965) 233 Cal.App.2d 639.) If the person's beliefs were reasonable, the danger does not need to have actually existed. (CALCRIM 505.) Yet, a person may use no more force than is reasonably necessary to defend against the danger they face. (CALCRIM 505.)

When deciding whether a person's beliefs were reasonable, a jury is instructed to consider the circumstances as they were known to and appeared to the person and considers what a reasonable person in a similar situation with similar knowledge would have believed. (CALCRIM 505.) When considered in the context of an officer-involved incident, this standard does not morph into a "reasonable police officer" standard. (*People v. Mehserle* (2012) 206 Cal.App.4<sup>th</sup> 1125, 1147.) To be clear, the officer's conduct should be evaluated as "the conduct of a reasonable person functioning as a police officer in a stressful situation." (*Id.*)

The *Graham* court plainly stated that digestion of the "totality of the circumstances" is fact-driven and considered on a case-by-case basis. (*Graham v. Connor, supra*, 490 U.S. at 396.) As such, "reasonableness" cannot be precisely defined nor can the test be mechanically applied. (*Id.*) Still, *Graham* does grant the following factors to be considered in the "reasonableness" calculus: the severity of the crime committed, whether the threat posed is immediate, whether the person seized is actively resisting arrest or attempting to flee to evade arrest. (*Id.*)

Whether the suspect posed an immediate threat to the safety of the officer or others has been touted as the "most important" *Graham* factor. (*Mattos v. Agarano* (9<sup>th</sup> Cir. 2011) 661 F.3d 433, 441-442.) The threatened use of a gun or knife, for example, is the sort of immediate threat contemplated by the United States Supreme Court, that justifies an officer's use of deadly force. (*Reynolds v. County of San Diego* (9<sup>th</sup> Cir. 1994) 858 F.Supp. 1064, 1071-72 "an officer may reasonably use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack.") Again, the specified factors of *Graham* were not meant to be exclusive; other factors are taken into consideration when "necessary to account for the totality of the circumstances in a given case." (*Mattos v. Agarano, supra*, 661 F.3d at 441-442.)

When undertaking this analysis, courts do not engage in *Monday Morning Quarterbacking*, and nor shall we. Our state appellate court explains,

under *Graham* 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.

(*Martinez v. County of Los Angeles, supra*, 47 Cal.App.4<sup>th</sup> at 343, citing *Smith v. Freland* (6<sup>th</sup> Cir. 1992) 954 F.2d 343, 347.) Specifically, when a police officer reasonably believes a suspect may be armed or arming himself, it does not change the analysis even if subsequent investigation reveals the suspect was unarmed. (*Reese v. Anderson* (5<sup>th</sup> Cir. 1991) 926 F.2d 494, 501; *Anderson v. Russell* (4<sup>th</sup> Cir. 2001) 247 F.3d 125, 129, 131.)

The Supreme Court's definition of reasonableness is, therefore, "comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present." (*Martinez v. County of Los Angeles, supra*, 47 Cal.App.4<sup>th</sup> at 343-344, citing *Roy v. Inhabitants of City of Lewiston* (1st Cir. 1994) 42 F.3d 691, 695.) In close-cases therefore, the Supreme Court will surround the police with a fairly wide "zone of protection" when the aggrieved conduct pertains to on-the-spot choices made in dangerous situations. (*Id.* at 343-344.) One court explained that the deference given to police officers (versus a private citizen) as follows:

unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because 'the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'

(*Munoz v. City of Union City* (2004) 120 Cal.App.4<sup>th</sup> 1077, 1109, citing *Graham v. Connor*, [*supra*] 490 U.S. 386, 396.)

**NON-LETHAL FORCE.** This does not suggest that anything *less than* deadly force requires no justification. "[A]ll force—lethal and non-lethal—must be justified by the need for the specific level of force employed." (*Bryan v. MacPherson* (9<sup>th</sup> Cir. 2010) 630 F.3d 805, 825, citing *Graham [v. Conner]* (1989) 490 U.S. [386], 395.) The *Graham* balancing test, as described *supra*, is used to evaluate the reasonableness of lethal and non-lethal force, alike. (*Deorle v. Rutherford* (9<sup>th</sup> Cir. 2001) 272 F.3d 1272, 1282-83.)

Use of a taser or a shotgun-fired bean bag has been categorized as intermediate non-lethal force. (*Bryan v. MacPherson, supra*, 630 F.3d at 825[taser]; *Deorle v. Rutherford, supra*, 272 F.3d at 1279-80 [bean bag].) This designation exists despite the fact that such force is *capable* of being used in a manner causing death. (*Id.*) To be deemed "lethal force" the instrumentality must be force that "creates a substantial risk of death or serious bodily injury." (*Smith v. City of Hemet* (9<sup>th</sup> Cir. 2005) 394 F.3d 689, 693.); use of a taser or shotgun-fired bean bag both fall short of this definition. (*Bryan v. MacPherson, supra*, 630 F.3d at 825; *Deorle v. Rutherford, supra*, 272 F.3d at 1279-80.)

Beyond the traditional *Graham* factors, and particularly in the use of non-lethal force, the failure of officers to give a warning and the subject's mental infirmity can also be considered when assessing the totality of the circumstances. (*Bryan v. MacPherson, supra*, 630 F.3d at 831; *Deorle v. Rutherford, supra*, 270 F.3d at 1283-84.)

Failure to pass-muster under *Graham* can deem the use of non-lethal force as "excessive" and therefore violate the Fourth Amendment. (*Id.*) On the other hand, active resistance could justify multiple applications of non-lethal force to gain compliance and would not be deemed "excessive" nor violate the Fourth Amendment. (*Sanders v. City of Fresno* (9<sup>th</sup> Cir. 2008) 551 F.Supp.2d 1149, 1182 [not excessive to use physical force and tase an unarmed but actively resisting subject with 14 taser cycles where such was needed to gain physical control of him].)

## ANALYSIS

On November 19, 2019, Witness #1 called law enforcement and reported his neighbor, later identified Jacob Cato, was shooting at his property. Witness #1 reported Cato shot approximately eighteen rounds at his trailer. Deputies responded to the scene but maintained a safe distance from the immediate location. Deputies heard approximately twenty-six gunshots from Cato's residence. During the incident, Cato exited his residence wearing a black ski mask and placed a black bag containing unknown items near the main front gate. Cato placed a propane tank near the backyard entry gate to the property. Deputies ordered Cato to surrender but Cato refused to comply.

When Cato failed to comply with deputies' commands to surrender and barricaded himself inside his residence, San Bernardino County Sheriff's Department Specialized Enforcement Division (SED) personnel were requested to respond and assist. The San Bernardino County Sheriff's Department Aviation Unit helicopter, 40 King, was requested to respond to the scene. A crisis negotiation team also responded to the location. The crisis negotiation team spoke to Cato over the telephone in an effort to get Cato to peacefully surrender. The crisis negotiation team spoke to Cato's attorney and requested his help to facilitate Cato's peaceful surrender. The crisis negotiation team's efforts were unsuccessful.

On November 19, 2019, Deputy Cory McCarthy and Corporal Greg Gary, both from SED, responded to the command post that was set up at a nearby gun range. Deputy McCarthy and Corporal Gary were partnered up as a team. Deputy McCarthy and Corporal Gary had learned Cato was a possible sovereign citizen and a possible Hells Angels gang member. Deputy McCarthy and Corporal Gary were advised Cato had fired multiple gunshots at Witness #1's residence and Cato was uncooperative with the initial patrol deputies who responded to the scene. Deputy McCarthy and Corporal Gary learned Cato had placed a black bag containing unknown items near the front gate of the property and a propane tank near a back gate to the property. Cato had also repositioned his vehicles in the middle of the roadway leading up to his property. Deputy McCarthy and Corporal Gary gathered their equipment and made their way to a ridgeline.

Once Deputy McCarthy and Corporal Gary positioned themselves on the ridgeline overlooking the rear of Cato's residence, they monitored Cato's movements in and out of the residence. 40 King hovered above Cato's residence providing additional information to the deputies on the ground regarding any suspicious activity by Cato. At one point during the incident, Cato exited the residence armed with a black semi-automatic handgun. Corporal Gary, through the scope of his rifle, saw Cato take a shooter's stance. Cato took a shoulder width stance, leaned forward, swung the handgun up and pointed it directly at Corporal Gary and Deputy McCarthy. Corporal Gary advised Deputy McCarthy that Cato had a gun.

Corporal Gary feared for his life and the life of Deputy McCarthy. Corporal Gary also feared for the lives of the officers at the command post. Corporal Gary moved his rifle upward with the intent of taking a precision shot towards Cato's head. As Corporal Gary was transitioning his weapon, he heard Deputy McCarthy fire his weapon. Corporal Gary believed he saw a muzzle flash from Cato's handgun at the same exact time he heard Deputy McCarthy fire his weapon. During the time Corporal Gary was transitioning his weapon, Deputy McCarthy also saw Cato's gun and feared for his life, the life of Corporal Gary, and the lives of the other deputies at the scene. Deputy McCarthy fired one round at Cato.

After the shooting, Cato dropped his gun and fell to the ground. While on the ground, Cato continued to move his body around and attempted to pick up his handgun. A plan was initiated for SED personnel to approach Cato and render medical aid. There was concern Cato may have planted improvised explosive devices at different places on the property. The Arson and Bomb detail moved forward and placed an explosive charge on the black bag on the road. Once that was complete, the immediate response team was able to move forward and eventually reach Cato who was still down on the ground. Cato was pronounced deceased at the scene.

In this case, Deputy McCarthy had an honest and objectively reasonable belief that Cato posed an imminent threat of serious bodily injury or death. After being asked to respond to a call of a shooting subject barricaded in a residence, Deputy McCarthy learned additional details which would reasonably have caused him to believe Cato posed a safety threat. Cato had already demonstrated a willingness to fire his gun multiple times at his neighbor's residence. Cato refused to comply with deputies' commands to surrender. Deputy McCarthy was advised that Cato was a possible sovereign citizen and possible Hells Angels gang member. Based on Deputy McCarthy's training and experience, neither the sovereign citizen group nor the Hells Angels gang were known to be law enforcement friendly. Deputy McCarthy was aware the Hells Angels gang have had prior contacts with law enforcement that have resulted in officers being seriously injured or killed.

Equally concerning to Deputy McCarthy were Cato's actions in appearing to plant possible improvised explosive devices prior to Deputy McCarthy's arrival at the scene. Deputies described seeing Cato place a black bag containing unknown items in the roadway near the front gate of the property. Cato also placed a propane tank near the gate to the rear of the property. In addition, Cato was seen moving vehicles on his property to create some sort of blockade. All of these actions caused Deputy McCarthy to honestly and reasonably believe Cato was creating improvised explosive devices and setting possible booby traps for any law enforcement officers that may respond to the location.

Most important to consider were Cato's actions once Deputy McCarthy was observing Cato from the ridgeline. When Cato came out of his residence armed with a handgun, he pointed the weapon directly towards Deputy McCarthy and Corporal Gary. Both deputies described Cato as taking a shooting stance and pointing the handgun directly



at the two deputies. Given all of the circumstances described, it was objectively reasonable for Deputy McCarthy to believe Cato intended to shoot Deputy McCarthy and Corporal Gary and Cato was not looking to surrender peacefully. Corporal Gary saw a muzzle flash from Cato's weapon at the same exact time he heard Deputy McCarthy fire his weapon. Deputy McCarthy had seconds to respond to the imminent threat posed by Cato. When Deputy McCarthy fired his weapon, he had an honest and objectively reasonable fear for his life, the life of Corporal Gary, and the lives of the other deputies at the scene. Thus, the decision by Deputy McCarthy to use deadly force was justified.

### **CONCLUSION**

Based on the facts presented in the reports and the applicable law, Deputy McCarthy's use of lethal force was a proper exercise of Deputy McCarthy's right of self-defense and defense of others and therefore his actions were legally justified.

**Submitted By:**  
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