



PUBLIC INFORMATION RELEASE MEMORANDUM

DATE: October 8, 2021

SUBJECT: Officer Involved Shooting (Fatal)

Officer: Officer Brandon McCaulley
San Bernardino Police Department

Involved Subject: Mark Matthew Bender (Deceased)
Date of Birth: August 29, 1985
San Bernardino, California

Date of Incident: October 22, 2020

Incident location: 279 East Baseline Street
San Bernardino, CA

DA STAR #: 2021-22452

Investigating Agency: San Bernardino Police Department

Case Agent: Detective A. Reyna

DR #: 2020-114893

PREAMBLE

This was a fatal officer involved shooting by a police officer from the San Bernardino Police Department. 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, video recordings, and audio recordings submitted by the San Bernardino Police Department, DR 2020-114893.

PRINCIPAL INVOLVED PARTIES

Mark Matthew Bender, DOB: 08/29/1985, of San Bernardino, California, was fatally wounded during the incident under review.

Officer Brandon McCaulley of the San Bernardino Police Department was the police officer involved in this shooting.

SCENE

This incident occurred on October 22, 2020, at approximately 11:18 pm at 279 East Baseline Street in the City of San Bernardino, California. The location is a strip mall containing several businesses.

BACKGROUND INFORMATION

Mark Matthew Bender has a prior criminal history that includes convictions for offenses listed below:

10/16/2003, PC243(e)(1), Spousal Battery and PC236 False Imprisonment, Riverside County case number SWM021478, misdemeanors.

03/15/2004, HS11550(a) Under the Influence of a Controlled Substance, Riverside County case number SWM023250, a misdemeanor.

06/30/2004, HS11359(b), Possession of Marijuana for Sale, Riverside County case number, SWF007694, a felony.

10/20/2004, HS11351.5, Possess Cocaine Base for Sale, Riverside County case number SWF008603, a felony.

01/23/2007, VC10851(a), Take Vehicle without Consent, Riverside County case number SWF019563, a felony.

Mark Matthew Bender had the following criminal cases pending on the date of this incident for which he was out on bail:

09/28/2020, VC23152(a) and (b), Driving Under the Influence, misdemeanors, San Bernardino County case number MWV20023766.

12/22/2019, PC273.5(a), Corporal Injury to Spouse, a felony, PC459 First Degree Burglary Person Present, a felony, PC273.5(a) Corporal Injury to Spouse, a felony, PC148(a)(1), Resist Delay Peace Officer, a misdemeanor, San Bernardino County case number FSB20000374.

05/18/2018, PC664/187(a), Attempted Murder with Special Allegations PC12022.53(b) Personal Use of Firearm and PC12022.7(a) Infliction of Great Bodily Injury, PC26100(c), Shooting from a Motor Vehicle, felonies, San Bernardino County case number FSB18001934.

FACTUAL SUMMARY

On October 22, 2020, at approximately 11:16 in the evening, 9-1-1 dispatch received a call reporting a man at 200 block of East Baseline Street was waving a gun around, was “real drunk” and “jumping on top of cars.” The caller said, “He has a gun and he’s just going crazy.” The caller said the suspect was a black male, wearing a white tee-shirt, black shorts and was in the parking lot at the location. Brandon McCaulley from the San Bernardino Police Department was the first police officer to arrive on scene at 11:18 pm. Officer McCaulley was in full uniform and his body camera was activated.

Officer McCaulley walked into the parking lot area and saw the defendant who fit the description provided by the 9-1-1 caller. Bender was walking on the sidewalk towards the liquor store when Officer McCaulley approached Bender. Officer McCaulley initially had his firearm raised. McCaulley told Bender, “Hey, yo man, come here.” Bender raised one hand and then raised both hands in the air briefly but then put them both back down, while pulling up his shorts and continued walking towards the liquor store. Officer McCaulley told Bender three times to “come here” however Bender continued walking and said he was going to the store. As Bender walked away from Officer McCaulley, McCaulley grabbed Bender near Bender’s right upper arm attempting to keep Bender from entering the liquor store. Bender resisted telling McCaulley not to touch him while McCaulley tried to detain Bender and a struggle ensued.

When Officer McCaulley and Bender went to the ground, McCaulley was across Bender’s back attempting to detain Bender. McCaulley later said he had trouble detaining Bender while Bender resisted due to their size difference as Mark Bender was taller and heavier than McCaulley. As Bender resisted McCaulley, they were in the parking lot on the sidewalk near the liquor store and in front of three parked cars which included Bender’s white Ford Expedition. During the struggle McCaulley’s body worn camera was obstructed and the video went dark, but the audio continued recording. A bystander also recorded part of the incident as that person stood behind Officer

McCaulley near the doorway of King Tut Liquor. On the bystander's video, Officer McCaulley was seen already in a physical struggle with Bender. Initially Bender was standing and facing the camera until McCaulley pulled Bender to the ground. Bender was then facing down with Officer McCaulley on Bender's back trying to detain Bender. Officer McCaulley then stood up and backed away from Bender as Bender's right hand was near the right side of his shorts. As Bender got to his feet, a handgun was visible in Bender's right hand. As Officer McCaulley backed up he unholstered his firearm and pointed it at Bender. Bender then turned to his left towards Officer McCaulley with the gun still in his right hand and Officer McCaulley fired four rounds at Bender. Bender was struck and fell onto the sidewalk where he remained until medical personnel later transported him to the hospital.

Officer McCaulley immediately radioed that shots were fired and asked to "roll medic." Within seconds a second San Bernardino Police officer arrived on scene to assist McCaulley and shortly thereafter several additional police units arrived to contain the scene. Officer McCaulley patted Bender down for weapons. McCaulley told another officer on scene that Bender had a gun and that McCaulley felt the gun as they were fighting on the ground. Initially McCaulley could not find Bender's gun and believed Bender was lying on the gun. Bender's loaded handgun was found under the front of Bender's Ford Expedition which was a few feet from where the shooting occurred.

While the scene was being secured, a crowd gathered nearby. Many people in the crowd yelled at the officers. San Bernardino County Fire and an AMR ambulance arrived on scene. Bender was transported to St. Bernadine Medical Center where he was pronounced dead at approximately 11:59 pm.

WITNESSES AND CORROBORATION

Surveillance cameras at nearby businesses recorded hours of video before and after this incident occurred all of which were reviewed. A bystander also recorded the incident via cell phone and submitted that recording to the news media which was then publicized.

Eyewitnesses

Although several people are seen on video in the parking lot at the time of the incident, the video showed them leaving the scene.

Witness 1 saw the incident and provided a brief statement at the scene. She was then transported to the police station for an interview. At the scene, Witness 1 said she saw the whole thing. She said, "He was fighting with the officer" and that "he tried to take the officer down." Witness 1 did not want to speak to the officers where people could

see her and agreed to go to the police station for an interview. Later Witness 1 became upset at how long she had to wait to be interviewed and became uncooperative.

Bystander Video

A person who wished to remain anonymous filmed the altercation and shooting on their cell phone. That video was sent to freelance reporter Rob Burmudez. Burmudez then forwarded the cell phone video to a detective with the San Bernardino Police Department via email. The cell phone video was disseminated by news outlets.

The video is approximately nine seconds long. The person recording the video was near the entrance to King Tut Liquor facing Joy's Beauty Supply. The video began after the physical altercation between Bender and Officer McCaulley was underway. Bender was facing the camera with Officer McCaulley behind Bender. McCaulley's left arm was across Bender's left shoulder and chest towards Bender's neck. A red Chrysler sedan was behind McCaulley and Bender and the sedan had been backed into the parking space.

McCaulley struggled to detain Bender and pulled Bender to the ground. Bender's left side hit the ground while his right side was on the sidewalk and Bender was facing down. McCaulley positioned himself on Bender's back and said, "Stop fighting dude." Bender said, "What are you doing?" as he started to push himself up onto his hands and knees with McCaulley still across Bender's back. Bender and McCaulley struggled on the ground for a moment before Bender began standing up while McCaulley placed both of his feet back on the ground. McCaulley had his left arm wrapped around Bender's left side. McCaulley unholstered his weapon with his right hand and simultaneously stepped backwards while facing Bender's back. At the same time, Bender stood up facing Joy's Beauty Supply and began turning to his left towards Officer McCaulley. As Bender turned a black handgun was visible in Bender's right hand. Bender continued turning and his left side was facing Officer McCaulley when McCaulley stepped further backwards while firing his weapon. He fired four shots in rapid succession. After the fourth shot the camera pans downward and the video stops.

Axon Body Camera Summary

Officer McCaulley was equipped with a body camera which was activated during this incident. The recording is approximately fifteen minutes long. Officer McCaulley had the camera and audio activated as he arrived at the scene and walked into the parking lot.

At 23:18:46 Officer McCaulley arrived and parked his patrol car on East Base Line Street next to King Tut Liquor store. There were approximately fifteen cars and several people in the parking lot at that time. At 23:19:04 Officer McCaulley walked into the parking lot area in front of King Tut Liquor towards Joy's Beauty Supply. There were three people to

McCaulley's left near a black car and there was a blue car which appeared to be leaving the parking lot which McCaulley walked by them. Officer McCaulley then saw Mark Bender on the sidewalk near Joy's Beauty Supply store and in front of two parked cars. Bender was wearing a white tee-shirt and black shorts as described by the 9-1-1 caller. There were five parked cars to McCaulley's right which were in front of King Tut Liquor including Mark Bender's white Ford Expedition which was parked in front of the Total Wireless store next to the liquor store.

At 23:19:09 Bender looked towards Officer McCaulley as he walked on the sidewalk towards the liquor store. Officer McCaulley had his firearm raised in his right hand and motioned with his left hand saying, 'Hey, yo man, come here. Come here.' Bender raised his open right hand while his left arm was near his waistband and he responded, 'Why you got a gun on me?' as he continued walking in front of the Total Wireless store. At 23:19:13 Bender briefly put both hands in the air as he continued walking but then lowered them. Officer McCaulley said, 'Come here, let me see your hands.' Bender continued walking while pulling up his shorts with both hands and said, 'What are you talking about?' Officer McCaulley again said, 'Let me see your hands.' At 23:19:16 Bender continued walking away from Officer McCaulley and said, 'Man, I'm going to the store.' At that point Bender was nearing the front of his parked Expedition. Officer McCaulley said, 'Come here,' as Bender continued walking then with his back towards McCaulley. At 23:19:18 Bender said 'Man, don't touch me,' as McCaulley's arm was seen reaching towards Bender's right upper arm. Bender continued saying, 'Don't touch me. What are you doing touching me?' Officer McCaulley told Bender to get on the ground. At 23:19:23 Bender is on the ground with Officer McCaulley pushing Bender near his back and shoulder area near a red Chrysler sedan which was backed in next to Bender's white Expedition. Officer McCaulley told Bender to stop fighting and it is clear from the body worn camera video McCaulley was physically struggling to detain Bender. The camera went dark during the struggle at 23:19:30 but the audio continued. Officer McCaulley told Bender to stop fighting two more times. At 23:19:42 four gunshots are heard. Shortly thereafter the body worn camera video resumed as it fell to the ground facing up.

At 23:19:47 Officer McCaulley radioed dispatch saying, 'Shots fired, shots fired.' At 23:19:52 as another officer arrives on scene Officer McCaulley said, 'Watch my back, watch my back!' At 23:20:01 Officer McCaulley radioed to 'Roll medic.' The video continued filming towards the eaves outside the building as the body camera was on the ground. Officer McCaulley tells another officer Bender had a gun. At 23:20:17 red brake lights from the rear of the red Chrysler were visible as someone drove the car from the scene. At 23:20:37 multiple sirens were heard in the background as other police units arrive on scene. At 23:20:57 another officer picked up McCaulley's body worn camera from the ground and handed it to McCaulley who put it back on his uniform. The red Chrysler was no longer in the parking lot and Bender was seen laying supine and diagonally on the sidewalk, with his head towards King Tut Liquor. Dollar bills and trash were seen on the sidewalk. At 23:21:10 Officer McCaulley checked Bender's clothing and pockets as he told another officer that Bender had a gun. At 23:21:28 Officer McCaulley said, 'I felt it, I grabbed it and I don't know where it went.'

At 23:21:53 Officer McCaulley checked Bender's pulse at his carotid artery and said he was still breathing. Bender appeared to respond by moving his head slightly as McCaulley said, "It's alright buddy." McCaulley then tells another officer he "shot about five times" and to lock down the scene saying, "He had a gun, I don't know where he threw it. I grabbed it when we were fighting on the ground and that's when I came up, he branched up."

As the additional officers arrived on scene, they taped off the parking lot. Multiple people can be heard yelling in the background. At 23:23:32 an officer asks McCaulley to check Bender for a pulse. McCaulley again checks Bender's carotid artery for a pulse and at 23:23:40 says, "No." At 23:24:20 an officer began chest compressions on Bender who was still laying supine.

Officer Interview

Officer McCaulley was interviewed by San Bernardino Police Detective A. Reyna at 4:15 a.m. on October 23, 2020.

Officer McCaulley was employed with the San Bernardino Police Department for four years at the time of this incident. He was assigned to patrol in the Central District. He was also a member of the SWAT team and attended the SWAT academy. He was wearing his police uniform equipped with a body worn camera which was activated. He was in a single person police unit.

Officer McCaulley was not injured during this incident other than a small cut to his finger. His uniform was torn during the struggle with Mark Bender.

Officer McCaulley received a call for a possible "man gun" at King Tut Liquor. Officer McCaulley was familiar with the location and described it as being in a high crime area. McCaulley has personally responded to that area for shootings and homicides and he patrols in that area. McCaulley had prior arrests at the location for illegal weapons and handguns. He said the 9-1-1 caller described the person with the gun as a black male adult wearing a white tee-shirt and black shorts. The caller stated that the person was waving a gun in the air and was jumping on top of cars.

McCaulley responded to the scene and parked his patrol vehicle on Baseline Street just north of the business. He entered the parking lot on foot. As he was approaching the entrance of King Tut Liquor, he noticed the subject matching the 9-1-1 caller's description in the southwest corner of the strip mall. When the suspect saw McCaulley he walked in a western direction. The suspect's hands were at his pockets and McCaulley could not see if the suspect had a weapon. McCaulley said he drew his service weapon and told the suspect to show his hands. McCaulley said the suspect asked why McCaulley was pointing a gun at him and was immediately argumentative with McCaulley. McCaulley told the suspect to show his hands multiple times but the suspect continued walking away from McCaulley. The suspect told Officer McCaulley he was going inside the store.

McCaulley said there were multiple people inside and outside of the store as it was normal business hours for the store and McCaulley was fearful that if the suspect was armed, he could take hostages or shoot people. Officer McCaulley did not know at that point if the suspect was armed but was relying on the information from the 9-1-1 caller who said the suspect had a gun. Mark Bender refused to put his hands up and kept walking towards the store so McCaulley said he holstered his duty weapon. McCaulley tried to grab Bender's arms to place Bender's hands behind his back but Bender started to pull away from McCaulley and told McCaulley not to touch him. McCaulley said he gave many commands for Bender to get on the ground and stop fighting but Bender pushed away from McCaulley and was attempting to escape. McCaulley then pushed Bender to the ground and was on top of Bender. McCaulley described Mark Bender as having "a hundred pounds on me" and was heavy set. McCaulley said he had not searched Bender, did not know if Bender had any weapons and was alone at this time. McCaulley continued giving commands to Bender to stop fighting. When McCaulley was lying across Bender's back while on the ground, McCaulley maintained control of Bender's left arm but did not have control of Bender's right arm. McCaulley felt a metal object hit his left forearm while McCaulley was holding on to Bender's right arm while it was under Bender's body. McCaulley then tried putting his right arm under Bender's body, felt an object that was in Bender's hand and immediately realized that it was a handgun. As McCaulley was holding on to Bender, Bender began pushing himself off the ground. McCaulley looked over Bender's right shoulder while McCaulley was still holding onto Bender's hand and saw a silver metallic object which was Bender's handgun. McCaulley was holding on to the upper slide of Bender's gun. At that point while Bender was beginning to stand up or "bridging up" as McCaulley described it, McCaulley could no longer keep Bender on the ground. McCaulley said he was tired and out of breath and Bender was overpowering McCaulley. McCaulley then pushed off Bender as Bender was standing up and McCaulley stepped back while grabbing his service weapon. McCaulley lost his footing and began to fall backwards. Bender then started to turn to his left with his handgun out. McCaulley feared he would be shot and in response, McCaulley fired four rounds at Bender.

Officer McCaulley immediately radioed shots were fired and he requested medical aid for Bender. McCaulley told additional officers who responded to lock down the scene and began looking for the handgun Bender had which was found underneath a nearby car. McCaulley also realized his body camera had fallen off and he put it back in place. McCaulley made sure no one else was injured at the location. McCaulley said he checked Bender's pulse several times before another officer started CPR on Bender. Officer McCaulley said a sergeant responded to the scene and advised McCaulley to return to the station.

McCaulley recalled seeing Bender at that location multiple times before but did not recall ever previously detaining Bender nor did he know Bender's name. McCaulley recalled seeing Bender hanging out in front of that liquor store previously. McCaulley did not recall having any information about Bender's previous activity or any prior criminal history.

McCaulley said he decided to pull his duty weapon when Bender overpowered him and after he felt Bender's handgun. McCaulley said he did not have any time to choose another tool or alternative and he thought that Bender was going to kill him. McCaulley said he fired his weapon from about five to ten feet away in self-defense and in defense of the other people at the scene. McCaulley reiterated he thought he would be shot and "executed" when Bender had the gun in his hand and turned towards McCaulley.

Crime Scene Investigation

The shooting occurred on the sidewalk in front of the liquor store. The scene consisted of the sidewalk area, a small area inside the liquor store and the parking stall where Mark Bender's Ford Expedition was parked.

Four fired shell casings were found at the scene. Two expended casings were found on the sidewalk area in front of the store and two were found just inside the store's front doors. All expended casings were from Officer McCaulley's duty weapon.

A small amount of blood, three cell phones and a large amount of cash were found on the sidewalk near Mark Bender. Some of these items were removed from Bender's pockets by the police officers as he was on the ground. After Bender was transported to the hospital, more cash, two lighters and a large amount of suspected narcotics were found concealed on Bender's person.

Mark Bender's handgun was found under the front of his Ford Expedition which was a few feet from where the shooting occurred. Inside the Expedition, officers found a large amount of marijuana and documents belonging to Mark Bender. The Expedition was registered to Witness #1. Witness #1 was not a witness to the incident but was interviewed about the Expedition. Witness #1 said she had known Mark Bender for about eight years. Witness #1 and Bender bought the Expedition at an auction. She said the Expedition was in her name because when it was purchased Bender did not have identification. Bender was supposed to transfer the car into his name. She also said that Mark Bender frequented the strip mall where the shooting occurred and sold drugs there. She added that Bender was known to be armed.

Surveillance video obtained from businesses in the strip mall showed Bender engaged in what appeared to be sales of narcotics and marijuana while he was at the location. At one point in the video, Bender is seen examining a large bag of suspected marijuana while at the trunk of an unidentified man's car.

Weapon

A black Taurus G3C 9-millimeter semiautomatic handgun was located underneath Mark Bender's white Ford Expedition which was parked in the parking lot near the liquor store. The handgun was loaded with eleven rounds on the magazine and one chambered round.

The gun was not registered to Mark Bender. Latent prints lifted from the magazine of the gun were examined by CAL-ID and identified as Mark Matthew Bender's.

On October 27, 2020, Detective A. Reyna collected the gun from evidence to test fire the weapon. Detective Reyna determined the gun was fully functional.

De-escalation

Officer McCaulley's body camera video and the bystander's video show that this incident unfolded very quickly. Officer McCaulley attempted to de-escalate that situation with numerous verbal commands throughout the encounter. McCaulley initially told Bender to show his hands and to "come here" but Bender ignored the commands. McCaulley holstered his duty weapon as an attempt to deescalate and instead decided to physically detain Bender to keep Bender from entering the store however Bender then physically resisted and struggled with McCaulley. McCaulley continued telling Bender to stop fighting to gain compliance however none of these measures were successful. McCaulley believed by holstering his weapon and trying to physically detain Bender instead he was deescalating the situation. He also used many verbal commands throughout their short encounter to gain compliance, without success.

Injuries

Mark Bender was transported to St. Bernadine Medical Center in San Bernardino. He was pronounced dead at 11:59 pm. A deputy coroner conducted an examination of Mark Bender at the hospital. Mark Bender sustained three gunshot wounds to the left side of his back and one gunshot wound to his left thigh.

An autopsy was conducted on November 2, 2020. Three rounds were recovered from Bender's body. The rounds had traveled from back to front, left to right and downward. One round penetrated Bender's liver and aorta which was determined to be the only fatal shot. As of the time of this memo, the coroner's full report has not been received.

When Bender was examined by medical personnel, a large amount of suspected controlled substances was found in his underwear. Bender also had several thousand dollars in cash on him.

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 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 actually 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 person's 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 October 22, 2020, at around 11:16 p.m., police officers from the San Bernardino Police Department were dispatched to a report of a man waving a gun in the parking lot near King Tut Liquor on East Base Line Street in the City of San Bernardino. The 9-1-1

caller described the man as “real drunk” and “going crazy.” King Tut Liquor is situated in a strip mall containing several other businesses.

At approximately 11:18 pm, Officer Brandon McCaulley was the first officer at the scene. At that time, surveillance and body camera videos show there were approximately fifteen cars in the parking lot as well as several bystanders. Officer McCaulley walked around a blue sedan that appeared to be leaving the parking lot and saw Mark Bender walking on the sidewalk away from Joy’s Beauty Supply and towards King Tut Liquor. Bender was wearing the same clothing described by the 9-1-1 caller which was a white tee-shirt and black shorts. McCaulley walked past other people in the parking lot who did not fit the description of the 9-1-1 caller. McCaulley said he noticed that Bender saw him. McCaulley walked towards Bender, raised his firearm with his right hand while motioning with his left hand and said, “Hey, yo man, come here.” Bender asked, “Why you got a gun on me?” but he did not comply with McCaulley’s directive. Officer McCaulley said he approached with his firearm initially because the reporting party said the suspect had a gun. Initially Bender raised one hand, then both hands briefly before putting both hands towards his waist and pulling up his shorts. He did not stop walking. His shorts were baggy with pockets.

Officer McCaulley said he was concerned for the safety of the citizens in the liquor store because it was reported that the suspect was armed. McCaulley said he thought citizens at the store could be shot or taken hostage. Because of that, McCaulley said he went “hands on” attempting to physically detain Bender and keep Bender from entering the store. On his body worn camera, McCaulley is seen reaching for Bender’s upper arm and shoulder area. Bender told McCaulley not to touch him. At that point, Bender had not complied with any of the directives given. McCaulley had not searched Bender, did not know if Bender had a gun on him but noted that Bender was immediately uncooperative and would not follow any commands. What Officer McCaulley did not know at the time was that Bender had a handgun on his person, had a large amount of cash and suspected controlled substances on his person, and was out on bail on two felony cases, one of which was for a charge of attempted murder with a firearm. It is reasonable to assume that Bender was not complying and knew if he was searched and those illegal items were found on him, he would be arrested and forfeit bail on his pending cases.

When Officer McCaulley tried to detain Bender, Bender struggled with McCaulley and tried to continue to walk to the store. Officer McCaulley pulled Bender to the ground because Bender would not stop walking or comply with any orders. While on the ground Bender continued to struggle with Officer McCaulley. McCaulley told Bender, “Stop fighting, dude.” The bystander’s video captured this portion of the struggle as McCaulley’s body worn camera went dark as McCaulley was on Bender’s back. It is evident from the video that Mark Bender was much larger than Officer McCaulley. Mark Bender’s driver’s license listed his height and weight at six foot three inches and three hundred pounds respectively. Officer McCaulley believed Bender was at least a hundred pounds heavier than McCaulley and Bender was clearly taller than McCaulley.

Those facts are evident from the bystander's video of the shooting. McCaulley was on Bender's back trying to detain Bender but Bender was overpowering McCaulley.

While Officer McCaulley was across Bender's back, McCaulley said he felt a metal object hit his arm and then grabbed onto the gun in Bender's hand. McCaulley also saw a metal object in Bender's right hand. At that time, Officer McCaulley's gun was still holstered. McCaulley said he was out of breath and that Bender was starting to stand up in spite of McCaulley being on Bender's back while on the ground. The video shows Bender begin to raise himself up. McCaulley said he knew he was overpowered and began to stand up and back away from Bender. The video shows McCaulley backing up as Mark Bender got to his feet. Bender's handgun is clearly seen in Bender's right hand on the video. Officer McCaulley said he knew it was a gun. As McCaulley stood up and backed away from Bender, the video shows McCaulley reaching for his firearm. At about the same time, Bender is seen moving to his left towards Officer McCaulley with the gun in his right hand. It was then that Officer McCaulley fired four rounds in rapid succession at Bender.

At no time did Mark Bender comply with any of Officer McCaulley's orders. At no time did he raise his hands above his head. At no time did Mark Bender advise Officer McCaulley he had a gun, nor did he try to dispose of the gun. Mark Bender fought with Officer McCaulley and resisted all commands. The gun was clearly in Mark Bender's right hand as Bender turned towards Officer McCaulley. McCaulley had seen and grabbed the gun and was aware Bender was armed. Bender had the gun in his right hand and turned to his left towards Officer McCaulley. Under all of those circumstances, it was objectively reasonable for Officer McCaulley to believe that Mark Bender posed an immediate and serious threat to his physical safety and to the safety of others and thus, Officer McCaulley's decision to use deadly force was justified.

CONCLUSION

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