



## INTEROFFICE MEMORANDUM

**DATE:** October 17, 2022

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

**Involved Officers:** Lieutenant Christopher Kirby  
Barstow Police Department

Captain Andrew Espinoza  
Barstow Police Department

**Involved Subject:** Lance Montgomery Powell (Deceased)  
Date of Birth 02/06/1961  
Barstow, CA

**Date of Incident:** Wednesday, March 31, 2021

**Incident location:** 701 Montara Road, Space XXX<sup>1</sup>  
Barstow, CA

**DA STAR #:** 2021-449161

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

**Case Agent:** Det. Brett Chandler  
**DR #:** 602100076  
**H#:** 2021-043

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<sup>1</sup> Specific residence addresses will not be included in this memorandum for privacy purposes.

## PREAMBLE

This fatal officer involved shooting involved deputies from Barstow Police Department. The factual summary is based on a thorough review of all the investigative reports, photographs, video recordings, and audio recordings submitted by the Homicide Division of the San Bernardino County Sheriff's Department under DR# 602100076, H# 2021-043.

## PRINCIPAL INVOLVED PARTIES

**Lieutenant Christopher Kirby** of the Barstow Police Department was involved in the shooting of Lance Powell.

**Captain Andrew Espinoza** of the Barstow Police Department was involved in the shooting of Lance Powell.

**Lance Powell**, DOB 02/06/1961, of Barstow, California, was fatally injured during the incident under review.

## SCENE

This incident occurred on the afternoon of March 31, 2021. The officer involved shooting portion occurred in a mobile home complex, at 701 Montara Road, space XXX, in Barstow, California.

## FACTUAL SUMMARY

At approximately 3:22 pm, on Wednesday, March 31, 2021, Witness #1 called Barstow Police Department dispatch and reported a tenant of the Holiday Homes Mobile Home Park threatened her. Witness #1 identified the tenant to dispatch. Witness #1 also called Captain Andrew Espinoza of Barstow Police Department on his cell phone because she did not want an officer responding alone to the reported threats. Captain Espinoza asked Lieutenant Christopher Kirby of the Barstow Police Department to accompany him to conduct an area check to locate Powell. Lieutenant Kirby drove his unmarked Barstow Police Department vehicle to the incident location and Captain Espinoza sat in the front passenger seat.

While driving through the complex, the officers located Powell at the east end of the mobile home park. Powell was driving a light silver Chrysler Town and Country minivan. Powell proceeded to drive toward his residence and Lieutenant Kirby drove behind him. Powell eventually parked his vehicle, and when he exited the vehicle, Lieutenant Kirby and Captain Espinoza could see Powell was armed with a firearm. Powell held a black revolver in one hand and a holster in the other hand as he walked to the front door of his residence. Captain Espinoza was wearing a standard issued police uniform and

identified himself as a Barstow Police Officer. Both Lieutenant Kirby and Captain Espinoza ordered Powell to drop his firearm. Powell did not comply with the officers' commands.

Powell entered his residence and immediately exited again. Powell began shooting at Lieutenant Kirby and Captain Espinoza. Lieutenant Kirby ran for cover and Captain Espinoza returned fire at Powell. During the incident Powell re-entered his residence for a brief moment. Powell returned again and continued shooting toward Captain Espinoza. Both Lieutenant Kirby and Captain Espinoza returned fire at Powell. Powell was struck several times and eventually fell face down onto the front of his porch. Powell succumbed to his wounds after life-saving attempts were made by officers.

## LAW ENFORCEMENT INTERVIEWS

### Lieutenant Kirby<sup>2</sup>

Lieutenant Kirby heard Captain Espinoza call for him from the hallway of the Barstow Police Department. Captain Espinoza told Lieutenant Kirby he had talked to Witness #1, who is the former mayor and is now the manager at 701 Montara. Lieutenant Kirby's understanding that day was that Powell pointed at his waist band to Witness #1 indicating he had a firearm and made some threatening statements. It was also Lieutenant Kirby's understanding that Powell had shown his firearm in the past. Captain Espinoza wanted to go and check that area. Lieutenant Kirby was dressed in business casual attire and Captain Espinoza was dressed in standard Barstow Police uniform. Captain Espinoza and Lieutenant Kirby left the station and got into Lieutenant Kirby's unmarked Dodge Charger. Lieutenant Kirby did not have a belt recorder. Lieutenant Kirby's unit vehicle did not have a camera, and he was not wearing a body camera.

When Lieutenant Kirby drove into the mobile home park he saw a marked patrol vehicle pull into the park behind them. Lieutenant Kirby and Captain Espinoza started to check the park and came across a vehicle they believed was involved based on the description given by the reporting party. The officers ran the license plate and it did not match with their suspect name.

The officers continued to drive around the southeastern corner of the park when they passed a van in that area and Captain Espinoza said, "That's him". Initially Powell was driving really slow. Lieutenant Kirby gave an estimate of five miles an hour, and then Powell increased his speed to 25-35 miles per hour. Powell failed to stop for any stop signs in the park and he would go right through them. The officers did not engage Powell in a traffic stop. Lieutenant Kirby never activated the lights and sirens on his unmarked vehicle. As the officers followed behind Powell, they could see Powell's silhouette which

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<sup>2</sup> Lieutenant Kirby was interviewed on April 6, 2021, at Sheriff's Headquarters of the San Bernardino County Sheriff's Department. He was not represented by an attorney, nor was he *Mirandized*. He chose to provide a voluntary statement.

was leaning down and into the center console area, down on the ground of the vehicle and that heighten both officers' concerns and awareness. Powell then pulled into a spot near a trailer. Lieutenant Kirby was unable to see the trailer number.

Powell then got out of the vehicle. Lieutenant Kirby could see Powell was holding a holster in his left hand and a gun was in his right hand but was still in the holster. The holster was not attached to his belt and he was holding it out in front of him. Lieutenant Kirby stated the firearm was a revolver, black in color. He could not recall the color of the holster but believed it was darker. Powell walked up the porch and to the front door of the trailer as both Captain Espinoza and Lieutenant Kirby gave verbal commands for Powell to drop the gun. Lieutenant Kirby said he probably said it at least seven times, maybe as many as seventeen times. Prior to seeing the gun, he had not given Powell any instructions. There were no instructions for Powell to get out of the vehicle. Lieutenant Kirby saw that Powell hesitated, and there was no doubt in Lieutenant Kirby's mind that Powell knew the officers were there and he was hearing what the officers were saying.

Lieutenant Kirby stated that Powell then got to the doorway of the mobile home. He may have stepped briefly inside but he was never fully out of view. He then turned around came back onto the top of the porch. A female also stepped out with him. The porch was elevated by about three feet. At that point, he still had the gun in his hand. Powell started yelling at the officers and unholstered his gun. Powell used some foul language calling the officers "mother fuckers" and told the officers he was deaf. Lieutenant Kirby stated Powell could clearly communicate. Powell then "came up on target" and took a shooting stance like he was at the range. Lieutenant Kirby believed Powell pointed the gun primarily at him but was also in the general direction of Captain Espinoza. At that point Lieutenant Kirby estimated that he was within shooting distance of Powell. Lieutenant Kirby estimated that distance to be between 15 to 35, or 40 feet and he was in fear of being shot by Powell. Lieutenant Kirby was near the driver's door of the police vehicle but he could not recall if his driver's door was open or closed. Powell then began to shoot at Lieutenant Kirby. Lieutenant Kirby heard the bullets whizzing by and he could hear the bullets striking the metal of the police vehicle.

To obtain cover, Lieutenant Kirby ran into the carport of the trailer just east of Powell but fell as he was running. He felt a burning sensation and at that moment, he thought he was hit but he did not know how bad. After falling in the carport, he recovered quickly because the shooting was still happening. He initially took cover behind a vehicle parked in the carport nearby, but then he decided to leave the cover of the vehicle and use concealment of the siding of the trailer.

Lieutenant Kirby could see that Powell was standing mostly square in front of the doorway of the trailer and looking in the direction of Captain Espinoza. At that point Lieutenant Kirby engaged in gun fire with Powell and Powell went down. Powell's gun was underneath him when he went down. Lieutenant Kirby then made his way back to his unit because he thought Captain Espinoza was potentially hit since he could not see him. As Lieutenant Kirby was approaching the rear of his unit, Captain Espinoza emerged from

the passenger side, and they met at the rear of the vehicle. Lieutenant Kirby stated that Captain Espinoza mentioned something about a rifle and to get it out of the trunk of the vehicle so he could cover him. Lieutenant Kirby pulled the rifle out while Captain Espinoza covered him and then the Lieutenant covered Captain Espinoza as he gained control of the rifle. Lieutenant Kirby continued to provide coverage of Captain Espinoza while the Captain broadcasted the information that they had been involved in a shooting.

At that time, other officers arrived. Powell was still moving a little on the porch. Both Lieutenant Kirby and Captain Espinoza approached Powell. When they rolled him over, they found two black revolvers that had been underneath him. He was then handcuffed and they began to give CPR to Powell.

### **Captain Espinoza**<sup>3</sup>

On March 31, 2021, Captain Espinoza was in full Barstow uniform and rode passenger in Lieutenant Kirby's vehicle. Captain Espinoza had his department issued firearm on him, and it was the only piece of equipment he had with him. Captain Espinoza did not have a belt recorder, nor a body worn camera. Captain Espinoza had his Glock 23, .40 caliber service weapon on him. He always has 13 rounds and does not chamber the round in his Glock. After the incident, Captain Espinoza checked his chamber and noticed that there were no more rounds.

It was 3:30pm when Captain Espinoza was sitting at his desk and he got a call from Witness #1, who he knows to be the ex-mayor of the City of Barstow. She called him on his cellphone. Witness #1 told him that she had already made a call to Dispatch and they were sending an officer, but she wanted to let him know about it. Witness #1 told Captain Espinoza briefly that a man named Lance Powel had come to her office which was located at 701 Montara.

At the time of their conversation, Captain Espinoza already had knowledge that Witness #1 was the manager at 701 Montara and that she started that job shortly after losing the bid for mayor around November. It was not uncommon for him to take her calls and actually go help with area checks. She had called previously about someone stealing some property from tenants, so he would assist an officer or would go down to the property himself.

On March 31, 2021, Witness #1 told Captain Espinoza that Lance Powell had come to the office. He was angry and had threatened her. Witness #1 tried to tell Powell that she is not the owner of the complex, that she is the manager, and that it

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<sup>3</sup> Captain Espinoza was interviewed on April 6, 2021, at the Sheriffs Headquarters Station of the San Bernardino County Sheriff's Department. He was not represented by an attorney, nor was he *Mirandized*. He chose to provide a voluntary statement.

- Captain Espinoza's notes consisted of Powell's description, light blue minivan, he lived at space XXX, Witness #1's quote of what she said. Captain Espinoza also looked at the elements of Penal Code Section 422.

should not have anything to do with her. Powell informed Witness #1 that it will have something to do with her on Friday because she wasn't going to be here on Friday and he pointed to his right side where she said he carries a gun.

Captain Espinoza asked Witness #1 if she saw a gun and if Powell was carrying a gun. She said no, but she had seen it in the past. She also informed Captain Espinoza that Powell motioned to the gun and she said she thinks he is going to come back and shoot us. She also informed Captain Espinoza that Powell was driving around the complex right now in a blue minivan. Captain Espinoza informed Witness #1 that officers are in route, and he would head down there himself and see if he could do an area check to find Powell. Captain Espinoza then hung up the phone and took some notes.

Captain Espinoza then went to locate Lieutenant Kirby. Captain Espinoza asked a sergeant who was on light duty if there was anyone responding to the call at 701 Montara. The sergeant told him nobody. Captain Espinoza agreed to start it and the sergeant would assign someone as soon as someone was freed up. As Captain Espinoza and Lieutenant Kirby were leaving, they were notified that dispatch had assigned the call to Officer Carson and they heard while in route, Officer J. Day was the backing officer.

While in the car Captain Espinoza gave Lieutenant Kirby a rundown of what Witness #1 told him over the phone. The update included the fact that she did not see a gun today, but he had threatened her and she felt like he was going to shoot her on Friday and they were scared of him. He also informed Lieutenant Kirby that Powell was driving around in a light blue car somewhere in the complex.

When they rode into the complex, they did see a blue van but the plates did not come back to their potential suspect Powell. Lieutenant Kirby continued to drive through the complex and noticed another van. They proceeded to follow that van and the driver of the van looked out of his window at Lieutenant Kirby and Captain Espinoza. Captain Espinoza informed Lieutenant Kirby that the driver was Powell. Captain Espinoza could see that Powell was making reaching motions within the vehicle. They continued to follow Powell until Powell stopped his vehicle abruptly at the residence of #XXX.

Captain Espinoza exited the vehicle he was in and Powell got out of his van. Captain Espinoza said to Powell that they were the Police Department and they wanted to talk to him. Captain Espinoza observed Powell reach down and pick something up from the same area he saw him previously reaching towards in the van. Captain Espinoza observed a brown holster as Powell started walking toward the residence. Captain Espinoza told Powell to stop and that they wanted to talk to him. Captain Espinoza could see that Powell had a gun. At the same time, he heard Lieutenant Kirby state "He has a gun." Captain Espinoza continued to give Powell verbal directives to put the gun down and talk to the officers. Powell continued to walk away, did not look at either officer and continued up his porch stairs.

At this point, a female comes out of the trailer and starts yelling at Lieutenant Kirby, saying "What the F are you doing here?" Captain Espinoza continues to tell Powell not to go inside and to come talk to them. Captain Espinoza said that three times to Powell. Powell proceeded to enter the residence and shut the door behind him. The female was still out front in front of the door. Captain Espinoza proceeded to put out on the radio that they had contacted Powell and that Powell was armed with a gun. Powell then came bursting out the front door with a gun in his hand that was aimed at Lieutenant Kirby. Powell fired at Lieutenant Kirby. Powell then swung the gun toward Captain Espinoza which caused the Captain to get down and he heard rounds hitting the car. Captain Espinoza then got up in the door jam and began returning fire at Powell. Captain Espinoza heard Lieutenant Kirby return fire as well. Captain Espinoza continued to shoot until he ran out of battery. About the same time, he noticed that Powell went down. The Captain then contacted dispatch advising shots fired and to roll medics. Captain Espinoza then went and check on Lieutenant Kirby; neither officer had been hit. At that time, they pop the trunk to get the long gun. Captain Espinoza then gets back on target. Powell was still moving with the gun. Captain Espinoza tells Powell to roll away from the gun, but Powell does not comply. Captain Espinoza advises dispatch that Powell continues to not comply and to send a shield. He also gives dispatch directives as to where to stage the medics. Captain Espinoza had notice that the female had run to the corner about that time and was in a chair screaming. By that time, other officers arrive with a shield. They put a React Team together to go and get the female out of the way and to handcuff Powell. After placing Powell into handcuffs, they then clear the house and begin giving CPR. Medics then arrive and take over the CPR.

## **BWC VIDEOS**

### **Body Worn Camera (BWC)**

Body Worn Camera video was recorded from Barstow Police Officer Michael Carson. The date stamp on the video was 2021-03-31. The video began at 15:43:45 hours. The video was 39 minutes and 40 seconds in duration. The video was positioned on Officer Carson's chest. There was a 30 second delay until the audio started. Officer Carson exited his patrol vehicle and walked to the club house for the mobile home park. Officer Carson was greeted by reporting party, Witness #1. Witness #1 began telling Officer Carson about the incident involving tenant Lance Powell.

15:45:00 hours- Officer Carson turns toward the club house door. Officer Carson runs out of the office and enters his patrol vehicle.

15:46:26 hours- Officer Carson enters his patrol vehicle and responds to space number XXX.

15:46:30 hours- Captain Espinoza is heard on the patrol vehicle's radio saying, "Shots fired! Shots fired at XXX. Roll medics. Suspect is not in-custody and still armed with a handgun." Captain Espinoza is heard on the patrol vehicle's radio saying, "I had to check on my partner. We are not hit but suspect down. Several shots fired at us and my unit. One unit on scene."

Officer Carson arrives on scene west of space number XXX. Officer Carson retrieves his rifle from his patrol vehicle and runs toward Captain Espinoza and Lieutenant Kirby.

15:46:52 hours- Officer Carson reached Lieutenant Kirby's unmarked patrol vehicle and took cover behind the vehicle. Officer Carson asked Lieutenant Kirby if he was shot and he had Lieutenant Kirby take a position behind him because the Lieutenant was not wearing a ballistic vest.

15:47:09 hours- Captain Espinoza is heard yelling at someone to go inside.

15:47:47 hours- Lieutenant Kirby asked Paula Witness #3 to walk toward their position. Lieutenant Kirby was east of space XXX behind his unmarked patrol vehicle.

15:48:24 hours- Lieutenant Kirby and Captain Espinoza told other neighbors to go inside because they were just shot at and the suspect still had the firearm.

15:49:21 hours- Officer Carson, Lieutenant Kirby and Captain Espinoza began their approach toward Witness #3.

15:50:09 hours- Officer Carson, Lieutenant Kirby and Captain Espinoza approach the front door of space number XXX and extracted Witness #3 out of the scene.

15:50:20 hours- Video catches a glimpse of Powell. Powell is laying face down with blood coming out from under his face. Powell has a visible gunshot wound to the back of his head.

15:50:56 hours- Officer Carson and other Barstow Police Officers enter the residence and secure the residence.

15:51:50 hours- Officers finish clearing the residence and Barstow Police Detective Tom Lewis begins cardiopulmonary resuscitation (CPR) on Powell.

15:52:28 hours- Officers set up an interior and exterior perimeter around crime scene.

15:52:42 hours- Officer Carson takes over CPR from Detective Lewis

15:54:16 hours- Barstow Police Detective Matthew Helms takes over CPR from Officer Carson.

15:54:23 hours- Barstow Fire personnel arrive on scene and medically assist Powell.



15:55:05 hours- Barstow Fire Personnel Paramedic pronounces Powell deceased.

15:55:44 hours- Officer Carson walks down the porch stairs to obtain the fire personnel's names and a black revolver lays next to Powell.

### CIVILIAN INTERVIEW

#### Witness #1<sup>4</sup>

Witness #1 was the mayor of Barstow from 2012 to 2020 and has remained in contact with members of the Barstow Police Department after she retired. In February of 2021, she accepted a job as the onsite manager at the Holiday Homes Mobile Park where she assisted residents and supervised the grounds workers. She attended Barstow High School with one of the residents, Lance Powell. According to Witness #1, Powell was an aggressive person who used intimidation to bully people. Powell worked for the mobile home park as a ground keeper and quit his job for unknown reasons. Powell previously had cancer and had one ear removed. Powell told people he was completely deaf and could only read lips. Witness #1 believed Powell was able to partially hear because he responded when his back was turned.

Powell has told Witness #1 in the past that he worked as a bodyguard and held a concealed carry permit. He also informed her, "You know I'm always carrying." In approximately February 2021 to March 2021, Powell told her, "If the police come in here, I'm doing this first," and motioned with his hand, as if shooting a gun.

On March 31, 2021, sometime in the morning, employee Witness #2 was confronted by Powell and Powell's wife, Witness #3. Powell wanted to discuss a lawsuit he had against the owners of the mobile home park. Witness #2 informed Witness #1 about this confrontation. Around 1500 to 1530 hours both Witness #2 and Witness #1 rode around the park on a golf cart delivering bills to the residences. Witness #1 approached Powell and Witness #3's unit, and the two approached her golfcart. Powell became upset after Witness #1 and Witness #2 both informed him, they did not want to discuss or be involved with his lawsuit. His verbal response to them was, "Then I want both of your resignations by Friday, and I want you both out of this park!". Powell pointed to his right hip and said, "And I'll make it happen." Witness #1 did not see a gun or a bulge on Powell's hip but believed he would shoot her if she did not resign and move out of the park by Friday. Witness #1 was afraid for her and Witness 2's lives and believed Powell would kill them.

Witness #1 and Witness #2 left Powell's residence and continued delivering bills. Approximately five minutes later, Powell drove his van by their golf cart at around 45 miles per hour through residential streets. Powell was alone in the van and made a U-turn after

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<sup>4</sup> Witness #1 was interviewed on April 1, 2021, inside of her residence.

he passed them. Powell proceeded to follow directly behind them. Witness #1 called 9-1-1 and stated she and Witness #2 were threatened by Powell. She also called the Chief of Police for BPD, Albert Ramirez. Ramirez did not answer her call, so she called Captain Espinoza. She informed Captain Espinoza about Powell's threats toward her and Witness #2.

Approximately five minutes after her phone call with Captain Espinoza, Officer Michael Carson from BPD arrived at the office of the Holiday Homes Mobile Park. She noticed after a minute Officer Carson appeared to received information over his radio and he looked alarmed. Officer Carson asked, "Where's XXX?" She pointed the officer towards the space and waited in the office with Witness #2. She saw the officer enter his marked patrol vehicle and drive towards space XXX. She could not see space XXX from inside the office and did not hear gunshots.

### **Witness #2**

Witness #2 became the assistant manager for Holiday Homes in September of 2018. Several residents had expressed concern about Powell confronting them when they attempt to throw away trash. They were afraid to take out their trash. Witness #2 and Witness #1 would encourage them to call the police if Powell threatened them. Witness #2 indicated that Powell would drive around the mobile home park between 5 to 20 times a day for unknown reasons. Witness #2 believed Powell was unstable and believed his aggressive behavior escalated in March of 2021. Powell told Witness #2 on many occasions that he had a concealed carry permit and always carried guns. Sometime between January of 2021 and March of 2021, Powell lifted his shirt and showed Witness #2 two handguns in his waistband. Witness #2 described them only as handguns.

Sometime in February of 2021, an unknown resident called Barstow Police Department after Powell threatened them. Witness #2 called her friend at dispatch and encouraged her to warn the responding officers that Powell was "packing two guns every day and he's crazy."

Witness #2 indicated the same information as Witness #1, that Powell was upset with them for not wanting to get involved in his lawsuit. At one point, Powell threatened to have their resignations by Friday, and have them out of this park. Then Powell pointed to his right hip and said, "Never mind, I'll fuckin' fix it." Witness #2 said she did not see a gun but Powell inferred he would shoot her and Witness #1 if they did not resign from their jobs and move out of the mobile home park by Friday. Witness #2 was afraid for her and Witness #1's lives and believed Powell would kill them.

### **Witness #3**

On Wednesday, March 31, 2021, Witness #3 was interviewed at the Barstow Police Department Sub-Station. Since May of 2018, Witness #3 lived at Holiday Homes Park in space XXX. She was in a dating relationship with Lance Powell for 11 years and they lived together. Powell owned three guns and she considered Powell to be a "gun

person.” Powell carried his guns in a small blue nylon purse wherever he went. Witness #3 also informed officers during the interview that Powell was deaf and would read lips to communicate. Powell did not know sign language. According to Witness #3, Powell’s close up vision was poor, and he needed reading glasses. Powell had excellent vision from a distance. According to Witness #3, Powell could read lips up to 25 feet away.

On March 31, 2021, Witness #3 and Powell went to the grocery store that morning and ran into Witness #2. Powell asked Witness #2 to meet with him at his house later and talk about problems in the park. Powell asked Witness #2 if Witness #1 could also attend the meeting. Witness #2 told Powell she would meet with him later in the day because she had appointments. Witness #3 and Powell saw Witness #1 and Witness #2 in a golf cart collecting rent around 1530 hours. They expressed their frustrations with the trash bin overflow near their unit, and Witness #2 said they did not want to get involved. Powell said he would sue both Witness #1 and Witness #2 for lack of management. Powell told Witness #1 she had until Friday, or he would take her job away. According to Witness #3, Powell did not gesture as if he had a gun. Witness #1 and Witness #2 drove away.

Witness #3 went back inside her residence and Powell drove away. Powell returned home approximately ten minutes later. Powell told Witness #3 he was worried Witness #1 called the police and he said, “I’m tired of this.” Powell left the residence again by vehicle and returned. She then could hear yelling at the front of the residence. She could not understand what Powell was saying. Powell walked into the residence and did not say anything to Witness #3. Witness #3 looked out to the front of the residence and “saw cops” with their handguns pointed toward the residence. One of the officers stood by the open front passenger door of an unmarked police vehicle and the other by the front driver’s door. Powell told Witness #3, “I’m deaf.” Witness #3 told the officers Powell was deaf.

Witness #3 informed officers during the interview that Powell had met Captain Espinoza in the past. Witness #3 could see that the Captain was wearing a recognizable police uniform. Witness #3 said that Espinoza and Kirby told her that Powell had a gun and to get out of the way. Witness #3 said she did not look at Powell to see if he did have a gun. Witness #3 told Espinoza and Kirby that Powell was deaf and that she had dogs in the house. Espinoza and Kirby told Witness #3 again to get out of the way. Espinoza and Kirby then yelled, “drop the gun,” several times. Witness #3 held a dog in her arms and called the other three dogs in the residence. Witness #3 exited the residence and went toward the rear yard. Witness #3’s back was turned away from Powell, Espinoza and Kirby as she walked away. Witness #3 did not make it to the rear of the property before she heard gunshots. Witness #3 could only describe the shot as rapid. Witness #3 did not know who shot first. Witness #3 stated, “It just went so fast.” Witness #3 sat of a chair in the backyard until Kirby came to her.

In Witness #3’s interview, she stated that she was not surprised Powell was shot by law enforcement officers. She said that Powell watched movies that depicted subjects surrounded and “shooting it out” with officers.

## INJURIES

Powell was a 60-year-old male weighing 262 pounds; 6 feet 4 inches.

An autopsy was performed by a forensic pathologist with San Bernardino County Coroner's Office. The following injuries were examined:

Gunshot wound #1 was an entry wound to Powell's right shoulder. The trajectory was front to back, left to right, and downward. The fired bullet fractured Powell's right humerus and exited the top rear side of Powell's right shoulder.

Gunshot wound #2 was an entry wound to Powell's right jaw line. The trajectory was front to back, left to right, and downward. The fired bullet struck Powell's external jugular, aorta, and left lung. A fired bullet was recovered from Powell's left lung. According to the forensic pathologist, this was a fatal wound.

Gunshot wound #3 was an entry wound to Powell's left upper back. The trajectory was right to left and downward. Fired bullet fragments from Powell's left shoulder were recovered.

Gunshot wound #4 was an entry wound to Powell's upper left leg. The trajectory was front to back, left to right. A fired bullet was recovered from Powell's pelvis.

Gunshot wound #5 was an entry wound to Powell's left facial cheek. The trajectory was front to back, left to right, and downward. According to the forensic pathologist, the fired bullet struck a major artery in the neck. The bullet was lodged in Powell's cervical spine. This wound was a fatal wound.

There were two graze wounds to the back of Powell's head. One of the trajectories was downward. The other trajectory was left to right and slightly downward. The two gunshot injuries intersected in the back of Powell's head and formed a "T." These gunshot injuries left two large lacerations to the back of Powell's head.

The forensic pathologist determined the cause of death was gunshot wounds #2 and #5. Both of these wounds struck major arteries within Powell's body; death occurred within seconds of these gunshot wounds.

There was no toxicology information contained within the reports received from the Sheriff's Office.

## CRIMINAL HISTORY

At the time of this event, Mr. Powell's criminal history included the convictions listed below:

1979: Felony violation of Penal Code section 245(a), Assault with a deadly weapon; and a Felony violation of Penal Code section 217, Assault with intent to murder, San Bernardino County case number VCR771

1979: Felony violation of Penal Code section 496, receiving known stolen property, San Bernardino County case number VCR938.

1985: Felony violation of Penal Code section 207 (a), Kidnapping; and a Felony violation of Penal Code section 243.4, Sexual Battery, Orange County case number C-57210.

1987: Felony violation of Penal Code section 12021, Felon addicted, possess firearm, Orange County case number C62251.

1993: Misdemeanor violation of Penal Code section 594(a), Vandalism; and a misdemeanor violation of Penal Code section 148(a), Resisting, Delaying or Obstructing a Peace Officer, San Bernardino County case number MSB01607.

1994: Misdemeanor violation of Penal Code section 273.5, Inflict corporal injury on spouse/cohabitant, Orange County case number GGW94WF1059

1995: Misdemeanor violation of Penal Code section 314.5, indecent exposure; Orange County case number CYW95WM05378.

1996: Felony violation of Penal Code section 487.1, Grand Theft Robbery, Los Angeles County case number VA022308-1.

2003: Misdemeanor violation of Vehicle Code section 20002(a), Hit and Run, property damage, Orange County case number 03WM03105.

2012: Misdemeanor violation of Penal Code Section 290.018 (J), failure to provide registration information; Kern County case number BF128043A.

1993: Misdemeanor violation of Penal Code section 594(A), Vandalism; and a misdemeanor violation of Penal Code section 148(a), Resisting, Delaying or Obstructing a Peace Officer, San Bernardino County case number MSB01607.

## EVIDENCE

Lieutenant Kirby's vehicle's front door was struck by two fired bullets. One fired bullet strike was in the lower left corner of the door. This bullet appeared to ricochet inside the door and caused a dent inside the door panel near where the bullet entered.

The second fired bullet strike was in the lower center portion of the door's window. This fired bullet traveled through the window and through the front passenger seat. A fired bullet fragment laid on the middle of the rear floorboard.

A Colt .45 caliber, eight cartridge capacity magazine was on the exterior rear window.

One cartridge of .45 caliber was loaded in the magazine. The head stamp was "WINCHESTER 45 Auto."

A Colt AR-15A3, .223 caliber rifle, with serial number LBD037652, was inside the trunk of the Dodge Charger. An EO Tech Red Dot sight, MOE foregrip, and Streamlight Tactial light were attached to the rifle. A Kay Industries 30 cartridge capacity magazine was seated in the magazine well of the rifle. One unfired .223 cartridge was in the rifle's chamber.

12 fired cartridge casings (FCC) were north of the passenger side of the Dodge Charger. All 12 FCC were .40 caliber. The Headstamp for each of these FCC's was "Win 40 S&W."

One FCC laid in the gravel front yard of driveway space number 269. Space 269 was one space east of space XXX. The FCC in the gravel and the FCCs on the driveway were all .45 caliber. The headstamps for each of these FCCs were "WINCHESTER .45 AUTO".

A fired bullet fragment was at the base of the porch stairs for space XXX.

A set of keys, two revolvers, and Powell laid on top of the porch. The keys were later determined to be the keys to the Chrysler Town and County van. The two revolvers were a Taurus .357 Magnum, with serial number MK863361, and a Rohm Model 66, .22 caliber revolver, with serial number IB369570. Six "GFL .357 MAG" cartridges were loaded into the Taurus revolver. Five of the six cartridges had been fired. Six "F" .22 caliber cartridges were loaded into the Rohm revolver. None of the cartridges were fired.

A bullet fragment lay on the bottom south stair of the porch. Four fired bullets struck the porch.

Eight fired bullet strikes were to the front doorway.

Five fired bullet strikes were to the front door.

Twelve fired bullet strikes were on a small pony wall inside the residence south of the front door.

## APPLICABLE LAW

### Assault with a Deadly Weapon, Penal Code section 245(a)

An assault pursuant to Penal Code section 245(a) requires

1. The defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person;
2. The defendant did that act willfully;
3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; and,
4. When the defendant acted, he had the present ability to apply force with a firearm to a person.

Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

Voluntary intoxication is not a defense to assault.

(CALCRIM No. 875 (New January 2006; Revised June 2007, August 2009, October 2010, February 2012, February 2013, August 2013)).

Penal Code section 245 (a) requires only “the general intent to willfully commit an act, the direct, natural and probable consequences of which if successfully completed would be the injury of another.” (*People v. Rocha* (1971) 3 Cal.3d 893, 899; similarly, see *People v. Colantuono* (1994) 7 Cal.4th 206, 214.)

[W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to

establish that the act by its nature will probably and directly result in the application of physical force against another.

(*People v. Williams* (2001) 26 Cal.4th 779, 790; see also *People v. Golde* (2008) 163 Cal.App.4th 101, 108.)

## Law 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.)

## 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.

(CALCRIM 3470 (REVISED 2012)).

### **USE OF DEADLY FORCE BY A PEACE OFFICER**

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.)

A peace officer may use objectively reasonable force to effect an arrest if he believes that the person to be arrested has committed a public offense. (Calif. Penal Code §835a(b).) Should an arresting officer encounter resistance, actual or threatened, he need not retreat from his effort and maintains his right to self-defense. (Penal Code §835a(d).) An officer may use objectively reasonable force to effect an arrest, prevent escape or overcome resistance. (Penal Code §835a(d).)

An arrestee has a duty to refrain from using force or any weapon to resist arrest, if he knows or should know that he is being arrested. (Penal Code §834a.) This duty remains even if the arrest is determined to have been unlawful. (*People v. Coffey* (1967) 67 Cal.2d 204, 221.) In the interest of orderly resolution of disputes between citizens and the government, a *detainee* also has a duty to refrain from using force to resist detention or search. (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4<sup>th</sup> 321, 332-333.) An arrestee or detainee may be kept in an officer's presence by physical restraint, threat of force, or assertion of the officer's authority. (*In re Gregory S.* (1980) 112 Cal. App. 3d 764, 778, *citing, In re Tony C.* (1978) 21 Cal.3d 888, 895.) The force used by the officer to effectuate the arrest or detention can be justified if it satisfies the Constitutional test in *Graham v. Connor* (1989) 490 U.S. 386, 395. (*People v. Perry* (2019) 36 Cal. App. 5th 444, 469-470.)

An officer-involved shooting may be justified as a matter of self-defense, which is codified in Penal Code sections 196 and 197. Both 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 Section 196 states that homicide by a public officer is justifiable when it results from a use of force that "is in compliance with Section 835a." Section 835a specifies a ***police officer is justified in using deadly force*** when he reasonably believes based upon the totality of the circumstances, that it is necessary:

- (1) to defend against an imminent threat of death or serious bodily injury to the officer or another, or

- (2) to apprehend a fleeing felon who threatened or caused death or serious bodily injury, if the officer also reasonably believes that the fleeing felon would cause further death or serious bodily injury unless immediately apprehended.

(Penal Code §835a(c)(1).)

Discharge of a firearm is “deadly force.” (Penal Code §835a(e)(1).) The “[t]otality of the circumstances” means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.” (Penal Code §835a(e)(3).)

While the appearance of these principals is new to section 835a in 2020, the courts have been defining the constitutional parameters of use of deadly force for many years. In 1985, the United States Supreme Court held that 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.) California courts have held that when a police officer’s actions are reasonable under the Fourth Amendment of our national Constitution, that the requirements of Penal Code § 196 are also satisfied. (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 349; *Brown v. Grinder* (E.D. Cal., Jan. 22, 2019) 2019 WL 280296, at \*25.) There is also a vast body of caselaw that has demonstrated *how* to undertake the analysis of what is a reasonable use of force under the totality of the circumstances. (See *Reasonableness* discussion, *infra*.) As such, our pre-2020 state caselaw, developed upon the former iteration of section 196, is still instructive.

There are two new factors in section 835a that did not appear in the section previously, nor did they develop in caselaw pertaining to use of deadly force. First, a peace officer must make reasonable efforts to identify themselves as a peace officer and warn that deadly force may be used, prior to using deadly force to affect arrest. (Penal Code §835a(c)(1).) This requirement will not apply if an officer has objectively reasonable grounds to believe that the person to be arrested is aware of those facts. (Penal Code §835a(c)(1).) Second, deadly force cannot be used against a person who only poses a danger to themselves. (Penal Code §835a(c)(2).)

While the codified standards for use of deadly force in the course of arrest are set forth at subsections (b) through (d) of Section 835a, the legislature also included findings and declarations at subsection (a). These findings and declarations lend guidance to our analysis but are distinct from the binding standards that succeed them within the section. In sum, the findings are as follows:

- (1) that the use of force should be exercised judiciously and with respect for human rights and dignity; that every person has a right to be free from excessive uses of force;

- (2) that use of force should be used only when necessary to defend human life and peace officers shall use de-escalation techniques if it is reasonable, safe and feasible to do so;
- (3) that use of force incidents should be evaluated thoroughly with consideration of gravity and consequence;<sup>5</sup>
- (4) that the evaluation of use of force is based upon a totality of the circumstances, from the perspective of a reasonable officer in the same situation; and
- (5) that those with disabilities may be affected in their ability to understand and comply with peace officer commands and suffer a greater instance of fatal encounters with law enforcement, therefore.

(Penal Code §835a(a).)

**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 section 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;
- (2) he reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and
- (3) he used no more force than was reasonably necessary to defend against that danger.

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<sup>5</sup> Penal Code §835a (a)(3) conflates a demand for thorough evaluation of a use of force incident with a dictate that it be done “in order to ensure that officers use force consistent with law and agency policies.” On its face, the section is clumsily worded. Nothing included in AB-392 plainly requires that a use of force also be in compliance with agency policies. A provision in the companion bill to AB-392—Senate Bill No. 230 [(2019-2020 Reg. Sess.) approved by the Governor, September 12, 2019] (Hereinafter “SB-230”), does explicitly state that “[a law enforcement agency’s use of force policies and training] may be considered as a factor in the totality of circumstances in determining whether the officer acted reasonably, but shall not be considered as imposing a legal duty on the officer to act in accordance with such policies and training.” (Sen. Bill No. 230 (2019-2020 Reg. Sess.) §1.) It is noteworthy, however, that this portion of SB-230 is uncoded, unlike the aforementioned portion of Penal Code §835a (a)(3).

(CALCRIM 505.) The showing required under section 197 is principally equivalent to the showing required under section 835a(c)(1), as stated *supra*.

**IMMINENCE.** “Imminence is a critical component” 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.4th 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, supra*, 39 F. 3d at 915.)

Imminence, newly defined in the context of use of force to effect an arrest, is similar:

A threat of death or serious bodily injury is “imminent” when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

(Penal Code §835a(e)(2).)

**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. Connor, supra*, 490 U.S. at 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.) It was previously held that 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.)<sup>6</sup> 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.)

The use of force policies and training of an involved officer’s agency *may* also be considered as a factor to determine whether the officer acted reasonably. (Sen. Bill No. 230 (2019-2020 Reg. Sess.) §1. See fn. 3, *infra*.)

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<sup>6</sup> The legislative findings included in Penal Code section 835a(a)(4) suggest to the contrary that “the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation.” As such, if the officer using force was acting in an effort to *effect arrest*, as is governed by section 835a, then it appears the more generous standard included there would apply.

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* (6th 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. (*Baldrige v. City of Santa Rosa* (9th Cir. 1999) 1999 U.S. Dist. LEXIS 1414 \*1, 27-28.)

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.)

## **ANALYSIS**

Lieutenant Kirby and Captain Espinoza assisted with a criminal threats call on March 31, 2021. They located the suspect in the mobile home complex located at 701 Montara Road, in the City of Barstow. Lance Powell, the suspect, upon seeing the officer's unmarked vehicle, drove in a speedy fashion to his residence located at space number XXX. Powell exited his vehicle with a handgun and failed to comply with the officers' commands to drop his weapon. The officers repeatedly ordered Powell to put down his gun; this is corroborated by Witness #3. Powell then entered his residence

and exited quickly proceeding to fire at both officers. Both officers took cover as quickly as possible and returned fire towards Powell. Powell was already actively shooting toward the officers and Captain Espinoza could hear that their vehicle was being hit by Powell's gunfire. The officers feared the likelihood of injury or death to themselves or to others. As a result, both officers justifiably fired their weapons in self-defense and defense of others.

As a result of Lance Powell's decision to fire, Lieutenant Kirby and Captain Espinoza each held an honest and objectively reasonable belief that Lance Powell posed an imminent threat of serious bodily injury or death.

### CONCLUSION

Based on the facts and the applicable law, it was objectively reasonable for Lieutenant Kirby to believe that Powell posed an immediate and serious threat of bodily injury or death. Lieutenant Kirby's use of deadly force was a proper exercise of his right of self-defense and defense of others. His actions, therefore, were legally justified.

Based on the facts and the applicable law, it was objectively reasonable for Captain Espinoza to believe that Powell posed an immediate and serious threat of bodily injury or death. Captain Espinoza's use of deadly force was a proper exercise of his right of self-defense and defense of others. His actions, therefore, were legally justified.

**Submitted By:**  
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**Dated: October 17, 2022**

