



PUBLIC INFORMATION RELEASE MEMORANDUM

DATE: April 10, 2023

SUBJECT: Officer Involved Shooting (Non-Fatal)

Officer: Deputy Kyle Smit
San Bernardino County Sheriff's Department

Involved Subject: Joseph McLaughlin (Injured)
Date of Birth 12/20/89

Date of Incident: October 23, 2020

Incident location: ***** Baseline Road
Twentynine Palms, CA

DA STAR #: 2022-30218

Investigating Agency: San Bernardino County Sheriff's Department

Case Agent: Detective David Carpenter

Report Number#: DR# 202001722 / H# 2020-119

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PREAMBLE

This was a non-fatal officer involved shooting by a deputy from the San Bernardino County Sheriff's Department. The shooting was investigated by the San Bernardino County Sheriff's Department. This factual summary is based on a thorough review of all the investigative reports, photographs, audio recordings, and video recordings submitted by the San Bernardino County Sheriff's Department, DR# 202001722 and H# 2020-119.

RELATED CASE

Because of this incident, the San Bernardino County Sheriff's Department, Morongo Basin Sheriff Station, submitted a case to the San Bernardino County District Attorney's Office to review for potential criminal charges against Joseph McLaughlin. Criminal charges were filed against McLaughlin in San Bernardino County Superior Court Case FMB20000538. On November 11, 2021, McLaughlin entered a plea agreement and the criminal case was resolved. McLaughlin entered a plea of nolo contendere to Count 1, a violation of Penal Code 245(c) Assault Upon a Peace Officer, and to Count 2, a violation of Penal Code 69, Obstructing or Resisting an Executive Officer. As to Count 2, McLaughlin admitted the allegation that he personally inflicted great bodily injury in violation of Penal Code 12022.7(a). McLaughlin was placed on three years felony probation with terms and conditions and a suspended prison sentence of seven years four months.

FACTUAL SUMMARY

On October 23, 2020, at around 4:30 in the afternoon, deputies from the San Bernardino County Sheriff's Department Morongo Basin Patrol Station were looking for Joseph McLaughlin, a parolee at large with an active warrant for his arrest. Deputy Kyle Smit was notified by security staff at the Tortoise Rock Casino located at ***** Baseline Road in the City of Twentynine Palms that McLaughlin was seen inside the casino. Deputy Smit and Deputy Adan Ochoa responded to the casino. Deputy Smit and Deputy Ochoa were both wearing San Bernardino County Sheriff's Department uniforms and driving marked patrol vehicles.

Deputy Ochoa was the first deputy to arrive at the casino. Deputy Ochoa saw McLaughlin had left the casino and was walking to the parking lot. Deputy Ochoa exited his patrol vehicle and started to follow McLaughlin on foot. When Deputy Smit's patrol vehicle arrived at the location, McLaughlin started walking east across the parking lot. Deputy Ochoa asked McLaughlin where he was going. McLaughlin continued walking. Deputy Ochoa then said, "Hey. Come back here." McLaughlin took off running. Deputy Ochoa yelled at McLaughlin, "Hey. Stop. Get on the ground." McLaughlin failed to comply with Deputy Ochoa's verbal commands and continued running. Deputy Ochoa

ran into a cactus during the pursuit, causing a cactus branch to impale his left arm. Deputy Ochoa stopped running to tend to his injury.

Deputy Smit exited his patrol vehicle and also chased after McLaughlin. Deputy Smit yelled, "Sheriff's Department. Stop running. Joseph, stop running. Get on the ground." McLaughlin failed to comply with Deputy Smit's verbal commands and continued running from the deputies. During the foot pursuit, McLaughlin stopped and picked up a large rock. The rock weighed approximately five to ten pounds. McLaughlin lifted the rock above his head and made a throwing motion in Deputy Smit's direction. Although McLaughlin did not release the rock from his hand, Deputy Smit believed he was about to be struck and shielded his face and head.

Deputy Smit believed McLaughlin had thrown the rock, but it missed striking the deputy. When Deputy Smit looked in McLaughlin's direction, Deputy Smit saw McLaughlin was in a bladed stance and there was another large rock in McLaughlin's right hand. When Deputy Smit saw McLaughlin start to bring his right hand up, Deputy Smit feared McLaughlin was going to throw a second rock at him. Deputy Smit feared for his life. Deputy Smit also feared for the safety of Deputy Ochoa and the general public. Deputy Smit fired seven rounds from his duty weapon, striking McLaughlin three times.

After the shooting, McLaughlin dropped the rock and fell to the ground. Deputy Smit approached McLaughlin and started to render medical aid. Deputy Smit applied a tourniquet to McLaughlin's right arm to control the bleeding. McLaughlin was transported to the hospital for medical treatment. McLaughlin suffered gunshot wounds to his left shoulder, right forearm, and right bicep.

McLaughlin was interviewed as part of the investigation. McLaughlin stated he did not want to stop when Deputy Ochoa and Deputy Smit ordered him to because he knew he had a warrant for his arrest. McLaughlin did not want to go back to prison. McLaughlin admitted he picked up the rock and pretended to throw it at Deputy Smit to try and scare him. McLaughlin said he did not want to hurt Deputy Smit.

STATEMENTS BY POLICE OFFICERS

On October 29, 2020, at approximately 9:28 in the morning, **Deputy Kyle Smit** was interviewed by Detective David Carpenter and Detective Tony Romero.¹

On October 23, 2020, Deputy Kyle Smit, from the San Bernardino County Sheriff's Department, was assigned to patrol at the Morongo Basin station. Deputy Smit was wearing a San Bernardino County Sheriff's Department "Class A" uniform and driving a marked patrol vehicle. Deputy Adan Ochoa was Deputy Smit's partner on that date.

¹ Deputy Smit reviewed audio and video recordings from the incident under review prior to being interviewed by Detective Carpenter and Detective Romero.

Approximately two weeks prior to the lethal force encounter, Deputy Smit was following up on a stolen vehicle report involving a suspect by the name of Joseph McLaughlin. During the follow up investigation, Deputy Smit reviewed McLaughlin's criminal history and learned McLaughlin had multiple arrests for violent crimes. Deputy Smit contacted McLaughlin's parole officer, Parole Agent Loretta Hall, and inquired as to McLaughlin's status. Agent Hall advised Deputy Smit that McLaughlin was a parolee at large but there was not a current warrant for his arrest. Parole Agent Hall said she would update Deputy Smit when the warrant became active. Deputy Smit then contacted the security staff at the Tortoise Rock Casino and told them he was looking for McLaughlin. The security staff advised Deputy Smit that McLaughlin is at the casino every day. Deputy Smit asked the security staff to update him when they saw McLaughlin in the casino. Deputy Smit told the security staff that McLaughlin should have a warrant very soon and that McLaughlin has a violent criminal history.

On October 22, 2020, Parole Agent Hall contacted Deputy Smit and let him know that McLaughlin's warrant was active in the system. She asked Deputy Smit to arrest McLaughlin if he came across the parolee. Parole Agent Hall also asked Deputy Smit to contact her and let her know when McLaughlin was booked into a jail facility.

During the morning of October 23, 2020, Deputy Smit contacted the security staff at the Tortoise Rock Casino and notified them that McLaughlin was now wanted by Parole and had an active felony warrant. The security staff said they would contact Deputy Smit if they saw McLaughlin in the casino. Deputy Smit's partner on that day was Deputy Ochoa. Deputy Smit told Deputy Ochoa he was looking for McLaughlin who was wanted for violating his parole. Deputy Smit showed Deputy Ochoa a photograph of McLaughlin and asked Deputy Ochoa to contact him if Deputy Ochoa came across McLaughlin. At approximately 4:15 in the afternoon, the staff at the casino called Deputy Smit on his cell phone and told him that McLaughlin was at the casino on the east side of the building. Deputy Smit was on the other side of town at the time, so he called Deputy Ochoa and told him McLaughlin was at the casino. Deputy Smit asked Deputy Ochoa to meet the casino staff at the south side of the casino.

Deputy Ochoa arrived at the casino at approximately 4:30 in the afternoon. Deputy Ochoa tells Deputy Smit over the radio that McLaughlin just walked out of the western door of the building and was traveling north out of the casino through the parking lot. As Deputy Smit turned onto Baseline Road, he saw McLaughlin walking down a sidewalk ramp. As Deputy Smit was getting ready to turn south into the casino entrance, McLaughlin looked at Deputy Smit's patrol unit. McLaughlin made an abrupt southbound turn to go back but then McLaughlin saw Deputy Ochoa. McLaughlin then cut eastbound through the parking lot.

Deputy Smit temporarily saw McLaughlin running across the parking lot. Deputy Smit parked, exited his patrol vehicle, and chased after McLaughlin. Deputy Smit yelled, "Sheriff's Department. Stop running. Joseph stop running. Get on the ground." McLaughlin looked over his shoulder, made eye contact with Deputy Smit and continued running. McLaughlin ran north across a dirt field, dropped down into a wash jumped a

fence and crossed Baseline Road. McLaughlin continued running north through a dirt field.

Deputy Smit and Deputy Ochoa crossed over on Baseline and chased after McLaughlin. Deputy Smit described the terrain in the dirt field as loose rock and dirt with cactus and bushes everywhere about hip high. As he was running, Deputy Smit continued yelling for McLaughlin to get on the ground and to stop running. McLaughlin looked back at Deputy Smit a few times, but McLaughlin did not stop running. Deputy Smit lost sight of Deputy Ochoa during the pursuit.

Deputy Smit continued to run after McLaughlin for another twenty to thirty seconds. Deputy Smit estimated they ran another one hundred to one hundred fifty yards. McLaughlin took off the face mask and hat he was wearing and threw them into the air. McLaughlin looked back at Deputy Smit a couple more times and saw that Deputy Smit was gaining on him. When Deputy Smit was approximately fifteen feet from McLaughlin, McLaughlin abruptly stopped and bent over. At that time, McLaughlin dropped down into a little wash approximately eighteen inches deep. Deputy Smit thought McLaughlin was going to give up.

Deputy Smit jumped down into the wash. Deputy Smit then saw McLaughlin bend down and grab a rock. The rock was as big as McLaughlin's hand. Deputy Smit described the rock as "between a basketball size and softball size, but more on the side of a softball" and estimated it weighed at least five to eight pounds. Deputy Smit observed McLaughlin bring the rock back over his head like a pitcher's stance when preparing to throw a baseball. Deputy Smit put up his hand, with his left arm over his face, and dropped his left shoulder to protect himself. At the same time, Deputy Smit drew his handgun and braced for the impact of the rock. Deputy Smit did not feel the rock hit him. Deputy Smit peeked through his arm and shoulder and could see McLaughlin turning his body slightly to the right. Deputy Smit saw a rock in McLaughlin's right hand. Deputy Smit believed McLaughlin had picked up a second rock and was preparing to throw it at Deputy Smit.

Deputy Smit pushed his handgun out at McLaughlin. McLaughlin turned his body and made "a twitch" like he was shocked to see Deputy Smit's firearm. McLaughlin then ran at a perpendicular angle. McLaughlin still held the rock in his hand. Deputy Smit ordered McLaughlin to drop the rock as McLaughlin was turning. Deputy Smit could clearly see McLaughlin's face, left shoulder, and the rock. As Deputy Smit ordered McLaughlin to drop the rock, Deputy Smit saw the rock coming up near McLaughlin's hip. Deputy Smit believed McLaughlin was going to throw the rock at him again. Given the size of the rock, Deputy Smit believed he would suffer great bodily harm or death if the rock struck him. Deputy Smit also stated he feared McLaughlin could harm civilians in the nearby residences which were approximately one hundred yards away. Deputy Smit fired what he believed to be was five rounds.²

² It was determined that Deputy Smit fired seven rounds at McLaughlin.

Deputy Smit estimated he ran after McLaughlin for approximately three hundred yards before he fired his first shot. Deputy Smit estimated McLaughlin was ten feet away from him when he fired his first shot. In addition, Deputy Smit estimated from the time he drew his weapon to the time he fired his first shot was less than three seconds.

After the shooting, Deputy Smit saw McLaughlin go down. McLaughlin fell on his chest. Deputy Smit heard McLaughlin groaning in pain. McLaughlin rolled on his back and was holding his right arm. Deputy Smit saw McLaughlin was losing a lot of blood. Deputy Smit gave McLaughlin additional verbal commands. Deputy Smit quickly searched McLaughlin and handcuffed him to the front. Deputy Smit then assessed McLaughlin's injuries. Deputy Smit placed a tourniquet on McLaughlin's right arm and was able to stop the bleeding. Deputy Smit then escorted McLaughlin back to Baseline Road to wait for medical aid to arrive.

On October 29, 2020, at approximately 9:28 in the morning, **Deputy Adan Ochoa** was interviewed by Detective David Carpenter and Detective Tony Romero.³

On October 23, 2020, Deputy Adan Ochoa, from the San Bernardino County Sheriff's Department, was assigned to patrol at the Morongo Basin station. Deputy Ochoa was wearing a San Bernardino County Sheriff's Department "Class A" uniform and driving a marked patrol vehicle. On that date, Deputy Smit sent Deputy Ochoa a text message with a photograph of a person, later identified as Joseph McLaughlin. Deputy Smit asked Deputy Ochoa to meet up with him at the Tortoise Rock Casino. As he drove to the casino, Deputy Ochoa placed himself on the call for service with Deputy Smit. Deputy Ochoa saw that McLaughlin had an active no bail felony warrant and was a parolee at large. Deputy Ochoa immediately knew Deputy Smit was going to try and arrest McLaughlin for the outstanding warrants.

Deputy Ochoa drove to the back side of the casino. Deputy Ochoa called and told Deputy Smit that he would wait for him at the back of the casino. The public safety sergeant from the casino walked out the back of the casino and asked Deputy Ochoa whether he was there for McLaughlin. Deputy Ochoa told her yes. The sergeant told Deputy Ochoa that McLaughlin was at the casino and that he was walking towards a bar on the west side of the property. A couple seconds later the sergeant advised Deputy Ochoa that McLaughlin was walking out the west door.

Deputy Ochoa turned around the southwest corner of the building and immediately saw McLaughlin. McLaughlin had already exited the building and was walking northbound on the sidewalk. Deputy Ochoa got on his radio and advised Deputy Smit that McLaughlin had walked out of the casino. Deputy Ochoa provided Deputy Smit a description of what McLaughlin was wearing. Deputy Ochoa told Deputy Smit was carrying a backpack. Deputy Smit said he was still en route to the casino.

³ Deputy Ochoa reviewed audio and video recordings from the incident under review prior to being interviewed by Detective Carpenter and Detective Romero.

Deputy Ochoa walked behind McLaughlin. Deputy Ochoa saw Deputy Smit's patrol vehicle go eastbound on Baseline Road. Around that time, Deputy Ochoa observed McLaughlin look over in Deputy Smit's direction. McLaughlin immediately changed direction and started walking east across the parking lot at the casino. Deputy Ochoa paralleled McLaughlin and was about to put that information over the air when McLaughlin looked at Deputy Ochoa. Deputy Ochoa asked McLaughlin where he was going. McLaughlin took a couple more steps and then started walking northeast. Deputy Ochoa yelled for McLaughlin to come back, but McLaughlin took off running.

Deputy Ochoa started running after McLaughlin. Deputy Ochoa yelled at McLaughlin to stop and get on the ground. Deputy Ochoa saw Deputy Smit was out of his patrol vehicle and running with them. McLaughlin ran northeast down into a little wash out area and then came back up and hopped a fence. McLaughlin continued to run northbound as the deputies chased after him.

As Deputy Ochoa was running, he hit a cactus plant. The cactus impaled Deputy Ochoa's arm. The deputies continued running after McLaughlin. Deputy Ochoa heard Deputy Smit yelling something at McLaughlin but was unable to make out what Deputy Smit was saying. Deputy Ochoa ran for a couple more seconds after that, but the pain in his arm forced him to stop. Deputy Ochoa looked down and tried to pull the cactus out of his arm. Deputy Ochoa was only able to pull one little piece of the cactus out of his arm. Deputy Ochoa decided to continue running. When Deputy Ochoa looked up to get his bearings, he heard two pops. Deputy Ochoa did not believe the two pops sounded like gunfire. Deputy Ochoa thought the pops came from a Taser.

Deputy Ochoa could see McLaughlin and Deputy Smit. Deputy Ochoa started running towards McLaughlin. At this time, Deputy Ochoa could see McLaughlin had a bladed stance towards Deputy Smit and McLaughlin had something in his hand. It appeared to Deputy Ochoa that McLaughlin was ready to throw something at Deputy Smit. Deputy Ochoa was unable to see what the object was that McLaughlin was holding in his hand. Deputy Ochoa heard Deputy Smit say something to McLaughlin but did not know specifically what was said. Deputy Ochoa took one or two steps when he heard gunfire come from Deputy Smit. After the shooting, Deputy Ochoa saw McLaughlin had completely turned away from Deputy Smit and fallen to the ground. Deputy Ochoa estimated he heard four to five gunshots and indicated there was no pause in between each gunshot. Deputy Ochoa indicated the foot pursuit lasted approximately one minute and he was about forty yards away when he heard the gunshots.

It took Deputy Ochoa a couple of seconds to reach where Deputy Smit and McLaughlin were at. Deputy Ochoa heard McLaughlin tell Deputy Smit he did not know Deputy Smit was going to shoot him. Deputy Ochoa and Deputy Smit gave McLaughlin verbal commands to turn around and put his hands behind his back, but McLaughlin did not comply with the commands. Deputy Ochoa grabbed the backpack McLaughlin was wearing off McLaughlin's back. Deputy Smit handcuffed McLaughlin and then administered medical aid to him. Deputy Smit called for medical services to meet them at

Baseline Road. Deputy Ochoa and Deputy Smit walked McLaughlin back to Baseline Road where they met the ambulance.

STATEMENTS BY CIVILIAN WITNESSES

On October 24, 2020, at around 12:20 in the afternoon, **Joseph McLaughlin** was interviewed at the hospital by Detective David Carpenter and Detective Mike Gardea.⁴

Initially, McLaughlin told the detectives he had just left the casino and was walking through the casino parking lot when he heard a noise. McLaughlin looked behind him and saw a guy walking toward him. McLaughlin stated he did not know the subject was a sheriff deputy at first but later realized he was a deputy. McLaughlin ran from the deputy through a ditch, across the street, and into the desert. McLaughlin heard the deputy yelling at him as he ran through the desert. McLaughlin started to get tired and stopped. McLaughlin bent down, picked up a rock, and turned around toward the deputy. McLaughlin stated he saw the deputy had his gun drawn. He said he put his hands above his head and the deputy shot him. McLaughlin denied making a throwing motion with the rock. After the deputy started shooting, McLaughlin attempted to take off running again but was unable to because of his injuries. McLaughlin said he stopped, sat down, and asked the deputy why he shot him. The deputy told McLaughlin to "Shut up. We are going to get you medical attention." McLaughlin was given medical treatment and transported to the hospital.

McLaughlin was told by Detective Carpenter the incident was recorded on video surveillance and the video showed something different from his statement. McLaughlin then changed his story and gave a different statement.

On the morning of October 23, 2020, McLaughlin got into a fight with his girlfriend Witness #1. McLaughlin left the residence and went to a friend's house. His friend later gave him a ride to the Tortoise Rock Casino. McLaughlin arrived at the casino between 12:00 and 1:00 in the afternoon. McLaughlin gambled on the slot machines inside the casino for approximately ten minutes. McLaughlin left the casino through the west exit and walked north toward the casino parking lot.

As he was walking, McLaughlin heard a noise that sounded like a clap. When McLaughlin turned around, he saw casino security and Deputy Ochoa. Deputy Ochoa yelled out, "Don't run Joseph." McLaughlin knew Deputy Ochoa was a deputy sheriff because of the uniform he was wearing. McLaughlin stated he ran from Deputy Ochoa

⁴ McLaughlin was advised of his Miranda rights prior to being interviewed by Detective Carpenter and Detective Gardea. McLaughlin indicated he understood his rights and was willing to speak with the detectives.

because he knew he had a parole warrant, he was upset about his fight with his girlfriend earlier in the day, and he was feeling suicidal.

As he was running, McLaughlin saw Deputy Smit driving a patrol vehicle. McLaughlin knew Deputy Smit was a deputy based on the uniform Deputy Smit was wearing. When he was running through the desert, he heard Deputy Smit yell, "Stop running." McLaughlin estimated he ran sixty to eighty feet into the desert when he started to get tired and stopped. McLaughlin bent down and picked up a rock with his right hand. McLaughlin estimated the weight of the rock to be between eight and ten pounds and was the size of his hand.

McLaughlin turned around toward Deputy Smit, held the rock above his head and pretended to throw it at Deputy Smit. McLaughlin estimated when he turned around, he was ten feet from Deputy Smit and thirty feet from Deputy Ochoa. McLaughlin indicated he held the rock over his head in a way that could appear he was attempting to throw the rock at Deputy Smit. McLaughlin used the rock as a weapon to scare Deputy Smit. McLaughlin wanted to keep the deputies away from him because he did not want to go back to jail.

McLaughlin did not throw the rock. Instead, McLaughlin turned and ran away with the rock in his hand. Deputy Smit fired his weapon, striking McLaughlin in the back of his left shoulder. McLaughlin estimated he was ten feet from Deputy Smit when he was shot. McLaughlin turned toward Deputy Smit with the rock still in his right hand. McLaughlin estimated at this time he was ten to eleven feet away from Deputy Smit. While he was facing Deputy Smit, McLaughlin was shot two more times. McLaughlin was shot once in the front of his right bicep and once in his right forearm.

After the shooting McLaughlin dropped the rock and fell to the ground. McLaughlin believed he heard approximately four to five gunshots. McLaughlin stated there was a one to two second delay after the first two shots and the last three to four shots were in rapid succession.

While he was on the ground, McLaughlin asked Deputy Smit why he shot him. McLaughlin told Deputy Smit it was not necessary to shoot him four times, one time was good enough. Deputy Smit placed a tourniquet on McLaughlin's right arm and escorted him to the street. McLaughlin estimated he was at the street four to five minutes before medical personnel arrived and treated his injuries.

McLaughlin said he had a "violent record" but has never been violent with law enforcement in the past. McLaughlin indicated he threatened to assault Deputy Smit but did not assault him. McLaughlin said he was not going to throw the rock at Deputy Smit. McLaughlin was asked what he would do if he had a gun, the roles were reversed, and someone tried to throw a ten-pound rock at him. McLaughlin said he would shoot the person in the leg if the person tried to throw a rock at him.

McLaughlin indicated on the day of the incident under review he took two "hits" of methamphetamine between 7:00 and 8:00 in the morning. According to McLaughlin, he was feeling the effects of the methamphetamine during the incident. McLaughlin described the effect as feeling "awake." According to McLaughlin, if he had given up and not ran from the deputies he would not have been shot. McLaughlin also said if he had not picked up the rock he would not have been shot. McLaughlin said, "I kind of wanted them to shoot me, but I kind of didn't." McLaughlin indicated he had been thinking about suicide by cop. McLaughlin then changed his statement and said he was not suicidal and was in a sane state of mind. McLaughlin said he has made suicidal statements to his girlfriend in the past and that some of those statements referenced suicide by cop.

If he had the opportunity to talk to Deputy Smit, McLaughlin said he would apologize for picking up the rock. McLaughlin also hoped Deputy Smit would apologize for shooting him. McLaughlin said he did not have "hard" feelings for Deputy Smit. McLaughlin said, "I was not going to hurt him. I had no intention of hurting him. I got what I got coming. I got shot."

On October 28, 2020, at around 9:34 in the morning, **Witness #1** was interviewed by Detective David Carpenter and Detective Floyd Stone.

Witness #1 had been in a dating relationship with Joseph McLaughlin for approximately two months. However, the two had known one another for approximately twenty years. Witness #1's uncle had recently passed away and McLaughlin had agreed to drive with Witness #1 up north to pick up her mother.

On the morning of October 23, 2020, Witness #1 and McLaughlin were getting ready to drive up to Witness #1's mother's residence. Sometime between 2:30 and 3:00 in the afternoon, McLaughlin told Witness #1 he was not going with her to pick up her mother. McLaughlin argued with Witness #1 because he did not want to go on the trip. During the argument, McLaughlin became very angry and broke two televisions and Witness #1's cell phone. McLaughlin also punched a wall in the apartment. Before leaving the residence, McLaughlin told Witness #1, "I have nothing else to lose." Witness #1 believed McLaughlin was suicidal when he said that. McLaughlin eventually left the residence.

McLaughlin had made suicidal statements to Witness #1 in the past. McLaughlin told Witness #1 he struggled mentally and had nothing else to lose, and he was going to kill himself. McLaughlin messaged Witness #1 in the past, telling her he was mentally unstable and wanted Witness #1 to help him. McLaughlin sent the messages to Witness #1 recently. Approximately two days before the lethal force encounter, McLaughlin told Witness #1 he would kill himself but never told Witness #1 how he was going to kill himself. Witness #1 believed McLaughlin's threats to commit suicide were credible. Witness #1 did not know whether McLaughlin had attempted suicide in the past. Witness #1 did not believe McLaughlin would attempt suicide by cop.

On October 23, 2020, at around 9:22 in the evening, **Witness #2** was interviewed by Detective David Carpenter.

Witness #2 was the Public Safety sergeant at the Tortoise Rock Casino located at ***** Baseline Road in the City of Twentynine Palms. On the morning of October 23, 2020, Deputy Smit contacted Witness #2 and asked her to contact him if Joseph McLaughlin was seen inside the casino. At around 4:28 in the afternoon, McLaughlin arrived at the casino wearing a black shirt, grey sweatpants, and a red hat. Witness #2 contacted Deputy Smit over the telephone and advised him McLaughlin was at the casino.

Deputy Ochoa arrived at the casino and Witness #2 contacted him on the south side of the casino. Deputy Ochoa told Witness #2 he was waiting for his partner, Deputy Smit. Between 4:36 and 4:38 in the afternoon, McLaughlin exited the casino's west doors. After he exited the casino, McLaughlin walked north toward the front of the casino. Deputy Ochoa, who was in uniform, walked in the direction of McLaughlin. McLaughlin turned around and saw Deputy Ochoa. Deputy Ochoa yelled out and told McLaughlin he needed to speak with him. McLaughlin continued to walk north, away from Deputy Ochoa. Witness #2 heard Deputy Ochoa yell out to McLaughlin not to run. McLaughlin then ran north through the casino parking lot away from Deputy Ochoa. Deputy Smit drove into the casino parking lot at the same time McLaughlin started to run from Deputy Ochoa.

Deputy Smit, who also was in uniform, exited his patrol vehicle and ran after McLaughlin. McLaughlin ran north, out of the casino parking lot, across Baseline Road into the desert. Witness #2 estimated McLaughlin ran one hundred yards from where she was standing and then stopped. Witness #2 saw McLaughlin reach down and pick up an unknown object from the ground. McLaughlin made a throwing motion toward Deputy Smit. Witness #2 said she heard approximately six gunshots and then saw McLaughlin fall to the ground.

Witness #2 saw Deputy Smit and Deputy Ochoa standing near McLaughlin but was unable to see what was happening because her view was blocked by shrubs and bushes. Witness #2 saw McLaughlin stand up from the ground and the two deputies escorted McLaughlin to Baseline Road. It appeared to Witness #2 that Deputy Smit was applying pressure to McLaughlin's right arm while he escorted McLaughlin to Baseline Road. Witness #2 saw blood on McLaughlin's upper right shoulder and around his groin. Medical personnel arrived approximately one minute after the deputies escorted McLaughlin to Baseline Road.

On October 23, 2020, at around 9:47 in the evening, **Witness #3** was interviewed by Detective David Carpenter and San Bernardino County District Attorney Senior Investigator Andrew Reyes.

Witness #3 was a public safety officer at the Tortoise Rock Casino located at ***** Baseline Road in the City of Twentynine Palms. On October 23, 2020, at around 4:00 in the afternoon, Joseph McLaughlin arrived at the casino. Witness #3 knew McLaughlin was wanted by the San Bernardino County Sheriff's Department. Witness #3 followed McLaughlin in the casino and updated his dispatch regarding McLaughlin's location in the casino.

At around 4:20 in the afternoon, Witness #3 watched McLaughlin walk out of the casino's west entrance. Witness #3 exited the casino and saw McLaughlin walking north on the west walkway. Witness #3 saw Deputy Ochoa walking behind McLaughlin. Witness #3 heard Deputy Ochoa asked McLaughlin, "Where are you going?" McLaughlin turned and looked in Deputy Ochoa's direction and then walked off the walkway into the parking lot. Witness #3 heard Deputy Ochoa tell McLaughlin, "Don't run." McLaughlin then ran north through the parking lot away from Deputy Ochoa. At the same time, Witness #3 saw Deputy Smit exit his patrol vehicle and start running after McLaughlin.

McLaughlin ran north out of the casino parking lot, across Baseline Road and into the desert. Witness #3 was standing at the main entrance of the casino. Witness #3 estimated McLaughlin ran one hundred yards into the desert. McLaughlin then reached down and picked up an unknown object off the ground. Witness #3 observed McLaughlin make a throwing motion toward Deputy Smit. Witness #3 heard approximately six gunshots and saw McLaughlin fall to the ground. Witness #3 did not see who was shooting. Witness #3 saw Deputy Smit and Deputy Ochoa standing near McLaughlin but could not see what was happening because his view was blocked by some shrubs and bushes. Witness #3 went back inside the casino and returned to his regular duties.

On October 23, 2020, at around 9:24 in the evening, **Witness #4** was interviewed by Detective Tony Romero.

Witness #4 was the surveillance supervisor at the Tortoise Rock Casino located at ***** Baseline Road in the City of Twentynine Palms. Witness #4 witnessed part of the incident under review from the security monitor inside his office.

On October 23, 2020, at around 4:30 in the afternoon, Witness #4 was in his office when he received a phone call from the casino's Public Safety Supervisor, Witness #2. Witness #2 told Witness #4 that deputies from the San Bernardino County Sheriff's Department were en route to the casino to contact Joseph McLaughlin. According to Witness #2, McLaughlin was a suspect in a stolen vehicle investigation. Witness #2 asked Witness #4 to use the casino's security camera system to locate McLaughlin inside the casino. Witness #4 was familiar with McLaughlin from past contacts McLaughlin had with casino security officers. Witness #4 located McLaughlin and provided Witness #2 with McLaughlin's location.

At around 4:27 in the afternoon, McLaughlin had entered the casino through the north side entrance of sat down to play slot machines. At approximately 4:38 in the afternoon,

McLaughlin walked out the west side entrance to the casino parking lot. McLaughlin turned north in the parking lot and continued to walk. Moments later, McLaughlin looked over his shoulder and saw Deputy Ochoa walk toward his direction. McLaughlin immediately ran north through the parking lot and off the casino property.

McLaughlin ran north across Baseline Road and into an area of open desert, north of the casino. Deputy Ochoa and Deputy Smit pursued McLaughlin on foot into the desert. During the foot pursuit, McLaughlin picked up an unknown object from the ground and turned his body to throw it at Deputy Smit. At that moment, Deputy Smit removed his firearm and shot toward McLaughlin. Witness #4 observed McLaughlin fall to the ground. Deputy Ochoa and Deputy Smit then walked McLaughlin out of the desert toward Baseline Road and waited for medical aid to arrive.

On October 23, 2020, at around 10:23 in the evening, **Witness #5** was interviewed by Detective Tony Romero.

Witness #5 was a Public Safety Officer at the Tortoise Rock Casino located at ***** Baseline Road in the City of Twentynine Palms. On October 23, 2020, at around 4:20 in the afternoon, Witness #8 broadcasted over the security radio channel that Joseph McLaughlin entered the casino. McLaughlin was known among casino security staff from past incidents of disruptive behavior. Witness #5's supervisor, Witness #2, advised all security staff to keep an eye out for McLaughlin because he had a warrant and deputies were on their way to the casino to arrest him. A few minutes later, Witness #5 saw McLaughlin inside the casino playing slot machines.

A few minutes later, McLaughlin walked toward the west entrance doors to leave. Witness #5 followed McLaughlin out of the west side doors but maintained a distance not to alert McLaughlin. After he went outside, Witness #5 saw Deputy Ochoa standing in the parking lot speaking with Witness #2. McLaughlin continued walking north in the parking lot. Deputy Ochoa started to follow McLaughlin through the parking lot. Witness #5 estimated Deputy Ochoa remained twenty feet behind McLaughlin. At one point, Witness #5 observed McLaughlin turn and look over his shoulder. McLaughlin saw Deputy Ochoa walking toward him. Deputy Ochoa yelled out, "Hey, where are you going?" McLaughlin started looking around. Witness #5 heard Deputy Ochoa yell, "Don't run." McLaughlin then ran north through the parking lot toward Baseline Road.

As McLaughlin fled, Deputy Smit arrived at the location from the west side entrance. Deputy Ochoa used his radio to broadcast that McLaughlin ran from him. Deputy Smit exited his patrol vehicle and both he and Deputy Ochoa chased after McLaughlin. The deputies ran after McLaughlin through the north parking lot, across Baseline Road, and into the open desert north of the casino. Witness #5 and Witness #2 remained on the casino property and watched from the north parking lot.

Witness #5 observed McLaughlin dropped his hat and another unknown item during the foot pursuit. Deputy Ochoa slowed down to retrieve the dropped items. Deputy Smit

continued to chase after McLaughlin. McLaughlin slowed down and eventually stopped running. Witness #5 saw McLaughlin pick up a "boulder-sized rock" and turn his body toward Deputy Smit. Witness #5 said the rock looked "pretty huge" because he was approximately one hundred yards from McLaughlin and saw a large rock in McLaughlin's hand.

Witness #5 indicated McLaughlin raised his right arm with the rock in his right hand and moved it forward in a throwing motion toward Deputy Smit. Deputy Smit turned his body away from McLaughlin to avoid being struck by the rock. Because of the distance and some tall shrubs that blocked his view, Witness #5 did not see whether the rock left McLaughlin's hand. Witness #5 believed McLaughlin threw the rock because of how quickly Deputy Smit turned to avoid the object. McLaughlin turned and started to run away from Deputy Smit. Witness #5 saw another object in McLaughlin's hand when he fled.

Witness #5 observed Deputy Smit remove his firearm from his holster and point it at McLaughlin. McLaughlin again turned his body toward Deputy Smit and began to raise his arm. Witness #5 believed McLaughlin intended to throw another object at Deputy Smit when Deputy Smit fired his firearm approximately six times at McLaughlin. Witness #5 estimated Deputy Smit fired all six rounds within three to four seconds. After the shooting, Deputy Smit and Deputy Ochoa walked McLaughlin out of the desert toward Baseline Road to wait for medical personnel to arrive.

On October 23, 2020, at around 8:20 in the evening, **Witness #6** was interviewed by Detective Scott Abernathy.

Witness #6 was a paramedic for the Morongo Basin EMS ambulance service. On October 23, 2020, Witness #6 was partnered with Emergency Medical Technician (EMT) Witness #7. Witness #7 was assigned as the driver of the ambulance. At around 4:45 in the afternoon, Witness #6 and Witness #7 were dispatched to a gunshot wound call at the Tortoise Rock Casino located at ***** Baseline Road in the City of Twentynine Palms. When they arrived at the location, Witness #6 saw Deputy Smit and Deputy Ochoa waiting with Joseph McLaughlin.

Witness #6 saw McLaughlin had a tourniquet on his right arm and his hands were handcuffed in front of his torso. Witness #6 assessed McLaughlin's injuries. Witness #6 found McLaughlin had two gunshot wounds to his right forearm, two gunshot wounds to his right bicep, one gunshot wound to his upper left chest, and one gunshot wound to his left tricep. Witness #6 requested one of the deputies remove McLaughlin's handcuffs so he could be treated more easily. Witness #6 and Witness #7 transported McLaughlin to the hospital for medical treatment.

On October 23, 2020, at around 8:11 in the evening, **Witness #7** was interviewed by Detective Scott Abernathy.

Witness #7 was an EMT for the Morongo Basin EMS ambulance service. On October 23, 2020, Witness #7 was partnered with Paramedic Witness #6. At around 4:43 in the afternoon, Witness #7 and Witness #6 were dispatched to a gunshot wound call at the Tortoise Rock Casino located at ***** Baseline Road in the City of Twentynine Palms. When they arrived at the location, Witness #7 saw Deputy Smit and Deputy Ochoa standing with Joseph McLaughlin. McLaughlin had a tourniquet on his right bicep. Witness #7 saw McLaughlin had a gunshot wound to his right forearm and a gunshot wound to his right bicep. Witness #7 and Witness #6 transported McLaughlin to the hospital for medical treatment. Witness #7 described McLaughlin's behavior in the back of the ambulance as "erratic" and "frustrated." Witness #7 indicated McLaughlin admitted he had smoked methamphetamine several hours earlier.

INCIDENT VIDEO AND AUDIO

VIDEO RECORDING AND BELT RECORDINGS. All belt recordings and video recordings submitted were reviewed in their entirety. The summaries of these recordings will only cover the period of time from the beginning of each recording through the occurrence of the lethal force encounter.

DEPUTY SMIT

Deputy Smit had his belt recorder activated and recording during the incident under review. The recording was approximately 11 minutes and 27 seconds in length.

Deputy Smit can be heard driving his patrol vehicle. Deputy Smit broadcasts he saw McLaughlin walking through the casino parking lot. Sounds consistent with Deputy Smit parking and exiting his patrol vehicle can be heard. Deputy Smit can be heard yelling, "Sheriff's Department. Stop running." Deputy Smit can be heard running and then giving verbal commands. Deputy Smit yells for McLaughlin to stop running two times. Deputy Smit yells for McLaughlin to get on the ground four times. Deputy Smit can be heard calling McLaughlin by his first name, "Joseph." Deputy Ochoa can be heard in the background ordering McLaughlin to get on the ground.

It sounds like Deputy Smit stopped running. Deputy Smit can be heard ordering McLaughlin to "drop the rock." The sound of two gunshots then five gunshots can be heard. Deputy Smit can be heard broadcasting, "20-22. Shots fired. Male picked up the rock and tried to throw it at me." McLaughlin can be heard asking Deputy Smit why he shot him. Deputy Smit asks McLaughlin, "Why did you pick up the rock?" McLaughlin told Deputy Smit he was sorry.

DEPUTY OCHOA

Deputy Ochoa had his belt recorder activated and recording during the incident under review. The recording was approximately 10 minutes and 7 seconds in length.

Deputy Ochoa can be heard walking. Deputy Ochoa can be heard asking McLaughlin where he was going and then ordering McLaughlin to come to him. You can hear Deputy Ochoa continuing to walk and then ordering McLaughlin not to run. Deputy Ochoa says, "here we go" and then he can be heard running. Deputy Ochoa asks dispatch to give him a "Code 33."⁵

Deputy Ochoa orders McLaughlin to stop three times. Deputy Ochoa can be heard broadcasting McLaughlin ran northbound. Deputy Ochoa orders McLaughlin to get on the ground. It sounds like Deputy Ochoa stops running. Deputy Ochoa can be heard breathing heavily. The sound of two gunshots followed by five gunshots can be heard in the background. Deputy Ochoa can be heard running again. Deputy Ochoa broadcasts "shots fired." McLaughlin can be heard in the background asking for medical attention.

TORTOISE ROCK CASINO SECURITY VIDEO

Surveillance camera footage video was obtained from the Tortoise Rock Casino. The lethal force encounter was captured on the video recording from the camera labeled "331 Center Lot PTZ." The camera was positioned approximately thirty feet above the ground and two hundred seventy-eight yards from where the lethal force encounter occurred.

The video shows McLaughlin running away from Deputy Ochoa and Deputy Smit. Deputy Smit and Deputy Ochoa can be seen chasing after McLaughlin on foot. McLaughlin can be seen running across Baseline Road and into a desert field. You can see Deputy Ochoa's left arm hit a cactus as he is running after McLaughlin. Deputy Ochoa looks down at his left arm. McLaughlin can be seen removing a mask from his face. The red hat McLaughlin was wearing falls off his head as he is running. Deputy Ochoa can be seen stopping and bending over at the waist.

At 4:40:22⁶ McLaughlin stops running, bends down, and picks a rock up off the ground with his right hand. McLaughlin's body is angled with the left side of his body facing Deputy Smit. At 4:40:23 McLaughlin's brings his right hand up over his head and makes a throwing a motion toward Deputy Smit. Deputy Smit can be seen putting his right hand on his handgun while at the same time putting his left arm up and looking away from McLaughlin. At 4:40:24 McLaughlin can be seen facing Deputy Smit. McLaughlin's hands are down by his side. McLaughlin is still holding a rock in his right hand. Deputy Smit can be seen with both of his arms fully extended pointing his handgun at McLaughlin.

⁵ Deputy Ochoa was requesting a radio channel for himself during a critical incident so that there would not be other radio traffic on that channel.

⁶ The times listed in the summary are based upon the player and are for reference only. The times listed are not intended to indicate when a particular action occurred.

At 4:40:25 McLaughlin is running in a northeast direction. Deputy Smit fires the first and second rounds from his handgun. At 4:40:26 McLaughlin is running in a northeast direction. Deputy Smit fires the third, fourth, fifth, and sixth rounds from his handgun. At 4:40:27 McLaughlin is running in a northeast direction. Deputy Smith fires the seventh round from his handgun. After the shooting, you can see McLaughlin fall to the ground.

At 4:40:42 Deputy Smit and Deputy Ochoa approach McLaughlin who is on the ground. At 4:41:14 Deputy Smit handcuffs McLaughlin to the front of his torso. At 4:41:34 Deputy Smit applies a tourniquet to McLaughlin. At 4:42:42 Deputy Smit helps McLaughlin stand and they walk toward Baseline Road. At 4:45:08 Deputy Smit, Deputy Ochoa, and McLaughlin arrive at Baseline Road. Deputy Smit helps McLaughlin sit down. At 4:46:33 an ambulance arrives, and medical personnel can be seen treating McLaughlin. At 4:47:41 McLaughlin is placed on a gurney and placed inside an ambulance. At 4:51:40 you can see the ambulance leave the scene.

INVOLVED SUBJECT

INJURIES. Joseph McLaughlin was transported to the hospital for medical treatment. McLaughlin suffered a gunshot to the left shoulder. The surgeon who treated McLaughlin indicated the fired bullet struck the front end of McLaughlin's left shoulder and exited the rear of his left shoulder. McLaughlin suffered a gunshot wound to the right forearm. The surgeon who treated McLaughlin indicated the fired bullet struck the rear of McLaughlin's right forearm and exited the front of his right forearm. McLaughlin also suffered a gunshot wound to the right bicep. The surgeon was unable to indicate the trajectory of that fired bullet from the photographs he reviewed.

TOXICOLOGY. A blood sample was obtained from Joseph McLaughlin on October 24, 2020.

Toxicology results for the blood sample were listed as follows:

- Amphetamines – detected
 - Methamphetamine, LC/MS/MS – 290 ng/mL
 - Amphetamine, LC/MS/MS – 39 ng/mL

CRIMINAL HISTORY.

2009, 496(a) of the Penal Code, Receiving or Concealing Stolen Property. San Bernardino County case number FMB00527, a felony.

2010, 148(a)(1) of the Penal Code, Resisting, Delaying, or Obstructing a Peace Officer. San Bernardino County case number FMB1000257, a misdemeanor.

2012, 10851(a) of the Vehicle Code, Driving or Taking a Motor Vehicle Without Owner Consent. San Bernardino County case number FMB1200153, a felony.

2013, 243(a) of the Penal Code, Battery on Person. Kern County case number BM819055A, a misdemeanor.

2013, 12500(a) of the Vehicle Code, Drive Without a License. Kern County case number BM824158A, a misdemeanor.

2014, 459 of the Penal Code, First Degree Burglary. Kern County case number BF152326A, a felony.

2014, 20510 of the Penal Code, Manufacture, Sale, or Possession of Cane Sword. San Bernardino County case number FMB1400178, a felony.

2014, 12500(a) of the Vehicle Code, Drive Without a License. Kern County case number BM847950A, a misdemeanor.

2016, 10851(a) of the Vehicle Code, Driving or Taking a Motor Vehicle Without Owner Consent. San Bernardino County case number FMB1500597, a felony.

2018, 459 of the Penal Code, First Degree Burglary. San Bernardino County case number FMB18000228, a felony.

DE-ESCALATION

Deputies from the San Bernardino County Sheriff's Department were attempting to locate Joseph McLaughlin, a parolee at large who had an active warrant for his arrest. McLaughlin was located at the Tortoise Rock Casino.

Deputy Ochoa was the first to arrive at the location. Deputy Ochoa was in uniform and driving a marked patrol vehicle. McLaughlin was in the process of exiting the casino when Deputy Ochoa saw him. Deputy Ochoa walked behind McLaughlin at a distance. When McLaughlin noticed Deputy Ochoa following him, Deputy Ochoa asked McLaughlin where he was going. Deputy Ochoa ordered McLaughlin to come to him and not to run. McLaughlin failed to comply and took off running. Deputy Ochoa ran after McLaughlin and continued to give verbal commands. Deputy Ochoa ordered McLaughlin to stop three times. Deputy Ochoa also ordered McLaughlin to get on the ground.

Deputy Smit arrived at the location shortly thereafter. Deputy Smit was in uniform and driving a marked patrol vehicle. When Deputy Smit saw McLaughlin, he yelled "Sheriff's

Department. Stop running.” Deputy Smit ran after McLaughlin and gave him verbal commands. Deputy Smit ordered McLaughlin to stop running twice. Deputy Smit also ordered McLaughlin to get on the ground four times. After McLaughlin picked up a rock during the foot pursuit, Deputy Smit ordered McLaughlin to drop the rock.

At no time did McLaughlin comply with the verbal commands from Deputy Ochoa or Deputy Smit. There was no indication from McLaughlin that he intended to cooperate with the deputies. Instead, McLaughlin picked up a large rock and prepared to throw it like a baseball at Deputy Smit. Ultimately, McLaughlin’s movement of bringing the rock up behind his head like a baseball combined with his failure to comply with the deputies’ verbal commands left Deputy Smit believing he had no choice but to fire his weapon.

APPLICABLE LEGAL PRINCIPLES

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 C. §835a(b).)⁷ Should an arresting officer encounter resistance, actual or threatened, he need not retreat from his effort and maintains his right to self-defense. (Penal C. §835a(d).) An officer may use objectively reasonable force to effect an arrest, prevent escape or overcome resistance. (Penal C. §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 C. §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.4th 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 at §§196 and 197. Both of these code sections are pertinent to the analysis of the conduct involved in this review and are discussed below.

PENAL CODE SECTION 196. Police officers may use deadly force in the course of their duties, under circumstances not available to members of the general public. Penal Code §196 states that 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

⁷ All references to code sections here pertain to the California Penal Code.

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 C. §835a(c)(1).) Discharge of a firearm is “deadly force.” (Penal C. §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 C. §835a(e)(3).) A peace officer need not retreat or desist from efforts to arrest a resistant arrestee. (Penal C. §834a(d).) A peace officer is neither deemed the aggressor in this instance, nor does he lose the right of self-defense by the use of objectively reasonable force to effect the arrest, prevent escape or overcome resistance. (*Id.*)

While the appearance of these principals was new to section 835a in 2020,⁸ 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 C. §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 C.

⁸ Assem. Bill No. 392 (2019-2020 Reg. Sess.) approved by the Governor, August 19, 2019. [Hereinafter “AB-392”]

§835a(c)(1).) Second, deadly force cannot be used against a person who only poses a danger to themselves. (Penal C. §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, lawfulness and consistency with agency policies;⁹
- (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 C. §835a(a).)

⁹ Penal C. §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 uncodified, unlike the aforementioned portion of Penal C. §835a (a)(3).

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

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

- (1) he reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury;
- (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.

(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 more recently 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 C. §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.4th 1125, 1147.)¹⁰ 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.

¹⁰ The legislative findings included in Penal C. 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.

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* (9th 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* (9th 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*.)

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.4th 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.4th 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.4th 1077, 1109, citing *Graham v. Connor*, [*supra*] 490 U.S. 386, 396.)

NON-LETHAL FORCE. This does not suggest that anything *less than* deadly force requires no justification. “[A]ll force—lethal and non-lethal—must be justified by the need for the specific level of force employed.” (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 825, citing *Graham [v. Connor]* (1989) 490 U.S. [386], 395.) The *Graham* balancing test, as described *supra*, is used to evaluate the reasonableness of lethal and non-lethal force, alike. (*Deorle v. Rutherford* (9th Cir. 2001) 272 F.3d 1272, 1282-83.) Use of a taser or a shotgun-fired bean bag has been categorized as intermediate non-lethal force. (*Bryan v. MacPherson*, *supra*, 630 F.3d at 825[taser]; *Deorle v. Rutherford*, *supra*, 272 F.3d at 1279-80 [bean bag].) This designation exists despite the fact that such force is *capable* of being used in a manner causing death. (*Id.*) To be deemed “lethal force” the instrumentality must be force that “creates a substantial risk of death or serious bodily injury.” (*Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, 693.); use of a taser or shotgun-fired bean bag both fall short of this definition. (*Bryan v. MacPherson*, *supra*, 630 F.3d at 825; *Deorle v. Rutherford*, *supra*, 272 F.3d at 1279-80.) Similarly, the use of a trained police dog does not qualify as “deadly force” as it too has fallen short of the lethal force definition set forth in *Smith*. (*Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 165-169.)

Beyond the traditional *Graham* factors, and particularly in the use of non-lethal force, the failure of officers to give a warning and the subject’s mental infirmity can also be considered when assessing the totality of the circumstances. (*Bryan v. MacPherson*, *supra*, 630 F.3d at 831; *Deorle v. Rutherford*, *supra*, 270 F.3d at 1283-84.) Failure to pass-muster under *Graham* can deem the use of non-lethal force as “excessive” and therefore violate the Fourth Amendment. (*Id.*) On the other hand, active resistance could justify multiple applications of non-lethal force to gain compliance and would not be deemed “excessive” nor violate the Fourth Amendment. (*Sanders v. City of Fresno* (9th Cir. 2008) 551 F.Supp.2d 1149, 1182 [not excessive to use physical force and tase an unarmed but actively resisting subject with 14 taser cycles where such was needed to gain physical control of him].)

ANALYSIS

In this case, Deputy Smit had an honest and objectively reasonable belief McLaughlin posed an imminent risk of serious bodily injury or death. Approximately two weeks prior

to the incident under review, Deputy Smit became aware McLaughlin was a suspect in a vehicle theft investigation. In an attempt to locate McLaughlin, Deputy Smit conducted follow up investigation, during which Deputy Smith learned that McLaughlin was also a parolee at large with a violent criminal history. McLaughlin's parole agent would later advise Deputy Smit that McLaughlin had an active felony no-bail arrest warrant for a parole violation.

On October 23, 2020, Deputy Ochoa and Deputy Smit were both in uniform and driving marked patrol vehicles when they arrived at the Tortoise Rock Casino. Deputy Ochoa followed McLaughlin on foot after McLaughlin exited the casino. When McLaughlin saw Deputy Ochoa was following him, McLaughlin started to run. A foot pursuit ensued and both Deputy Ochoa and Deputy Smit chased after McLaughlin as he ran into the desert. Deputy Ochoa gave verbal commands for McLaughlin to stop and get on the ground. Deputy Smit identified himself as law enforcement and gave McLaughlin verbal commands to stop running and to get on the ground. McLaughlin failed to comply with the verbal commands of either deputy.

McLaughlin ran across Baseline Road and into the desert. Deputy Smit continued to yell for McLaughlin to stop running and to get on the ground. As he was running, McLaughlin took off the face mask and hat he was wearing and threw them into the air. When Deputy Smit was within fifteen feet of McLaughlin, McLaughlin abruptly stopped, bent down and picked a large rock up off the ground. McLaughlin brought the rock back over his head like he was a baseball player preparing to throw a ball. Afraid he was going to be struck, Deputy Smit put his hand and left arm up to protect his face. At the same time, Deputy Smit drew his duty weapon with his right hand and braced for the rock to hit him.

Deputy Smit never felt the rock strike him. When Deputy Smit peeked through his arm and shoulder, he saw McLaughlin turning his body slightly to the right. McLaughlin was holding a rock in his hand. Deputy Smit believed McLaughlin had picked up a second rock and was preparing to throw it at Deputy Smit. Deputy Smit pointed his duty weapon at McLaughlin and ordered him to drop the rock. As Deputy Smit gave this verbal command, he saw the rock coming up. Deputy Smit then fired his duty weapon seven times.

The security video from the casino appeared to show McLaughlin had turned his body and was running away from Deputy Smit when he started firing his weapon. The surgeon who treated McLaughlin indicated one of the fired bullets struck the front end of McLaughlin's left shoulder and exited the rear of his left shoulder. This injury would be consistent with how Deputy Smit described McLaughlin standing in a bladed position. It should also be noted that Deputy Smit fired all seven rounds in less than three seconds.

Deputy Smit had an honest and objectively reasonable belief that McLaughlin posed an imminent risk of seriously bodily injury or death. Deputy Smit believed McLaughlin had already thrown a rock at him but missed. Therefore, when Deputy Smit saw the large rock in McLaughlin's hand coming up, Deputy Smit reasonably believed McLaughlin intended to try to harm him a second time. Deputy Smit knew McLaughlin had a violent

criminal history and was a parolee at large. Deputy Smit estimated the size of the rock to be between a basketball and softball and weighing five to eight pounds. Given the size of the rock McLaughlin was holding, Deputy Smit believed if he was struck by the rock, he would suffer serious bodily injury or even death.

Deputy Smit was standing approximately ten feet from McLaughlin when he fired his first shot. Had McLaughlin had been given the opportunity to throw the large rock, the threat to Deputy Smit's physical safety would have been immediate. During his interview, Deputy Smit told detectives he knew if he were incapacitated or dead, McLaughlin would have access to the items on his belt, including his firearm. Deputy Smit explained to the detectives he feared McLaughlin could then use those items to kill Deputy Ochoa. Deputy Smit saw residences nearby and he also feared that were McLaughlin to escape, McLaughlin could possibly commit new crimes and harm the civilians who lived in those residences. There were no indications from McLaughlin during the incident that he intended to comply with the deputies' verbal commands and surrender. Given those circumstances, Deputy Smit had an honest and objectively reasonable belief McLaughlin posed an imminent risk of serious bodily injury or death to himself, his partner, and potentially citizens in nearby residences. Therefore, the decision by Deputy Smit to use deadly force was justified.

CONCLUSION

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

Submitted By:
San Bernardino County District Attorney's Office
303 West Third Street
San Bernardino, CA 92415

