



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

DATE: April 15, 2024

SUBJECT: Officer Involved Shooting (Fatal)

Officer: Sergeant David Newland
Ontario Police Department

Involved Subject: Brian Keith McKinney (Deceased)
Date of Birth **/**/**

Date of Incident: July 14, 2022

Incident location: **** E. Ontario Mills Parkway
Ontario, CA

DA STAR #: 2023-43217

Investigating Agency: Ontario Police Department

Case Agent: Detective Kyle Mena

Report Number#: DR# 220700537

TABLE OF CONTENTS

PREAMBLE	3
FACTUAL SUMMARY.....	3
STATEMENTS BY POLICE OFFICERS	4
Sergeant David Newland.....	4

STATEMENTS BY CIVILIAN WITNESSES..... 5
 Witness #15
 Witness #27

INCIDENT VIDEO AND AUDIO..... 8

WEAPON..... 10

DECEDENT..... 10
 Autopsy10
 Toxicology11
 Criminal History11

DE-ESCALATION..... 11

APPLICABLE LEGAL PRINCIPLES 12

ANALYSIS 19

CONCLUSION..... 20

PREAMBLE

This was a fatal officer involved shooting by an officer from the Ontario Police Department. The shooting was investigated by the Ontario Police Department. This factual summary was based on a thorough review of all the investigative reports, photographs, audio recordings, and video recordings submitted by the Ontario Police Department, DR# 220700537.

FACTUAL SUMMARY

On the evening of July 14, 2022, Witness #1 was working as a clerk at the Mobil gas station located at **** E. Ontario Mills Parkway in the City of Ontario. Witness #1 observed a subject, later identified as Brian McKinney, approach another male standing outside the front door to the store. Witness #1 said McKinney was holding a knife in his right hand. Witness #1 saw McKinney swing the knife at the other man. The man threw a soda at McKinney and backed away. McKinney got distracted when he noticed his shopping cart rolling away and stopped his attack on the other man.

Witness #1 walked to the front door of the store and locked it to prevent McKinney from entering. McKinney walked away from the door. However, a few minutes later, Witness #1 saw McKinney on the security camera approach a customer, Witness #2, as he walked towards the front door of the store. Witness #2 was going to pay for his gas and buy a bottle of water when McKinney approached him and said, 'Give it to me, give it to me.' Witness #2 tried to ignore McKinney. Witness #2 then saw McKinney take out a knife with his left hand. Witness #2 noticed McKinney was holding a fork in his right hand. McKinney moved closer to Witness #2 and told him, "Get the fuck out of here before I hurt you." Witness #2 thought McKinney was going to stab him. Witness #2 got back into his vehicle and drove away. At that time, Witness #1 called 9-1-1 to report what happened.

Sergeant David Newland, from the Ontario Police Department, responded to the 9-1-1 call. When Sergeant Newland drove up to the gas station, he saw Witness #1 and asked her where the suspect was. Witness #1 directed Sergeant Newland to McKinney's location. Sergeant Newland drove his patrol vehicle towards McKinney. When Sergeant Newland exited his patrol vehicle, McKinney immediately started walking towards Sergeant Newland.

Based upon the 9-1-1 call, Sergeant Newland believed McKinney was armed with a knife. Sergeant Newland drew his handgun and started giving McKinney verbal commands to get on the ground. McKinney refused to comply with Sergeant Newland's commands. Sergeant Newland described McKinney's demeanor as aggressive. McKinney continued to advance towards Sergeant Newland. McKinney was yelling, "Fuck you! Fuck you!" McKinney had his arms up at shoulder height and was swinging them in a slashing

motion. Sergeant Newland noticed McKinney was holding a straight metallic object in each hand. Sergeant Newland believed the objects were knives.

Sergeant Newland made a tactical retreat and tried to create distance between himself and McKinney. As Sergeant Newland rounded the back of the patrol unit, McKinney continued to advance towards Sergeant Newland. McKinney then started to run at Sergeant Newland. Sergeant Newland feared McKinney was going to injure him. Sergeant Newland fired his duty weapon three times at McKinney. Sergeant Newland estimated McKinney was eight feet away at the time of the shooting.

After the shooting, McKinney fell to the ground. Sergeant Newland ordered McKinney not to move. Additional officers responded to the scene and rendered medical aid to McKinney. Ontario Fire Department personnel also responded to the scene and rendered medical aid to McKinney. McKinney was pronounced deceased at the scene.

Two silver colored metallic forks were located at the scene. The forks were laying on the ground northeast of McKinney's body.

STATEMENTS BY POLICE OFFICERS

On July 18, 2022, **Sergeant David Newland** was interviewed by Detective Shahrouz Sadeghian and Detective Kyle Mena.¹

On July 14, 2022, Sergeant David Newland, from the Ontario Police Department, was assigned to graveyard patrol. Sergeant Newland was wearing an Ontario Police Department uniform and driving a marked patrol vehicle. On that date, at around 10:48 in the evening, Sergeant Newland heard a radio call of a subject exhibiting a knife and threatening customers at the Mobil gas station located **** E. Ontario Mills Pkwy in the City of Ontario.

Sergeant Newland was close by and responded to the call. Sergeant Newland knew going into the situation that it would be dangerous approaching someone armed with a knife. Sergeant Newland was also aware that the Ontario Mills had a lot of transients. If the suspect with the knife was transient, Sergeant Newland was aware of the possibility that the subject may have mental health issues.

As he drove up to the gas station, Sergeant Newland contacted one of the clerks who was walking out of the front doors of the business. Sergeant Newland asked the clerk where the suspect was and she pointed east and said he was over there. Sergeant Newland made a U-turn and drove east through the Mobil parking lot toward the suspect, later identified as Brian McKinney. Sergeant Newland plan was to keep some distance

¹ Sergeant Newland reviewed his body camera recording and surveillance video recording prior to being interviewed by Detective Sadeghian and Detective Mena.

between him and the suspect. Sergeant Newland was going to stand behind his door for cover and give McKinney verbal commands. When Sergeant Newland contacted McKinney, McKinney immediately started walking toward Sergeant Newland.

Based on the initial information in the call that McKinney was armed with a knife, Sergeant Newland exited his patrol vehicle and immediately drew his handgun. Sergeant Newland held the weapon in front of him at a low-ready position. McKinney's appeared agitated and his demeanor was aggressive. Sergeant Newland started giving McKinney verbal commands to get down on the ground. McKinney did not comply with those commands and quickly closed the distance between him and Sergeant Newland. Sergeant Newland pointed his handgun at McKinney.

Sergeant Newland started making a "tactical retreat" and moved west along the driver side of his patrol unit. McKinney was yelling and swinging his arms in slashing motions. Sergeant Newland saw McKinney was holding an item in each hand. The items appeared to be straight and metal. Sergeant Newland believed McKinney was holding two knives. Sergeant Newland continued to back up as McKinney got closer. McKinney continued to close quickly on Sergeant Newland. As he was swinging his arms, McKinney started running toward Sergeant Newland. Sergeant Newland was scared and felt threatened. Sergeant Newland believed McKinney was going to attack him and fired his duty weapon three times at McKinney. Sergeant Newland estimated McKinney was eight to ten feet from him when he fired his weapon. After the shooting, McKinney fell to the ground.

Sergeant Newland advised dispatch over the radio that shots were fired and requested back up. Sergeant Newland then yelled at McKinney, "Don't move, don't move!" Sergeant Newland heard a siren and knew additional units were close. Sergeant Newland did not know McKinney's status and decided to wait for other units before he started to render medical aid. However, once the first and second patrol units arrived, those officers began providing medical aid to McKinney. Sergeant Newland then removed himself from the scene.

STATEMENTS BY CIVILIAN WITNESSES

On July 15, 2022, **Witness #1** was interviewed by Detective Gary Naranjo and Detective Jorge Galvez.²

On July 14, 2022, Witness #1 was working as a cashier at the Mobil gas station located at **** E. Ontario Mills Pkwy. Witness #1 expressed to the detectives she was afraid to talk to them for fear of retaliation. However, Witness #1 agreed to talk about what had occurred at her place of employment.

² The interview was conducted in Spanish. Detective Naranjo is a department certified Spanish interpreter.

There was a male subject standing just outside the front doors to the business begging customers for cigarettes. Witness #1 looked at the store's video surveillance monitor and saw the suspect, later identified as Brian McKinney, approaching from a distance. McKinney was pushing a shopping cart toward the front doors of the business. Witness #1 heard McKinney say something to the subject. The front doors of the business opened when McKinney approached the front entrance. Witness #1 saw McKinney, without provocation, chase after the male subject who was standing in front of the business. Witness #1 believed McKinney had what appeared to be a pocketknife in his right hand. She estimated the blade of the knife was three inches in length. The male subject moved backwards as McKinney attempted to stab him and threatened to stab him. Witness #1 saw McKinney thrust the knife forward at least three times towards the male subject. The male subject threw a cup of soda at McKinney to stop McKinney from getting closer. As McKinney was attempting to stab the male subject, McKinney's shopping cart started to roll away. McKinney became distracted and ran towards the shopping cart and caught it before it got away. McKinney then walked towards the front doors of the business.

Witness #1 was afraid of McKinney and locked the front doors of the business. As she was locking the front doors, McKinney attempted to enter the business, but Witness #1 would not allow McKinney inside. McKinney asked Witness #1 why she would not let him enter the business. Witness #1 told McKinney she did not want any problems. McKinney tried telling Witness #1 that it was the other subject who was causing problems. Witness #1 told McKinney she saw what happened and that McKinney was the one who had caused problems. Witness #1 refused to allow McKinney into the store. McKinney started cursing at Witness #1 and then he disappeared out of her sight.

Witness #1 thought McKinney had left the area, but then a few minutes later she saw McKinney on her surveillance video monitor. McKinney was near the gas pumps throwing things around. Witness #1 called 9-1-1 and told the dispatcher what happened. As she was on the phone, a customer drove up and parked next to the gas pumps. A male driver got out of the vehicle and was immediately attacked by McKinney. Witness #1 said McKinney tried to stab the male at least four times. The male was able to get away from McKinney and get back into his vehicle. The male driver put his vehicle in reverse and fled the area. Witness #1 told the dispatcher McKinney was armed with a knife and had attempted to stab the male driver.

Witness #1 believed McKinney returned a second time to the front doors of the business. Witness #1 told McKinney he was not allowed inside. Witness #1 advised McKinney she was calling the police. McKinney then left with his shopping cart and walked towards the Kentucky Fried Chicken (KFC). As Witness #1 was outside looking at the KFC, she saw a police officer drive up. The officer, later identified as Sergeant Newland, asked Witness #1 where the suspect was. Witness #1 said she pointed east towards the KFC restaurant and told Sergeant Newland, in English, "Over there."

She saw Sergeant Newland drive over to gas pump #5, where McKinney appeared. Witness #1 heard Sergeant Newland tell McKinney in a forceful voice, "Don't move." Sergeant Newland was still inside his patrol vehicle when he ordered the suspect to stop. According to Witness #1, McKinney raised his hands in the air and was holding a knife in his right hand.³ When Sergeant Newland exited his patrol vehicle, Witness #1 saw McKinney advance towards Sergeant Newland. Sergeant Newland attempted to retreat. Witness #1 thought McKinney was going to kill Sergeant Newland. Witness #1 stated Sergeant Newland was able to unholster his firearm and defend himself by firing three times at McKinney. Witness #1 saw McKinney fall to the ground. Witness #1 estimated she was fifty to sixty feet away when she witnessed the shooting.

Witness #1 said Sergeant Newland had no choice but to shoot McKinney. Based on McKinney's actions, Witness #1 believed McKinney intended to kill Sergeant Newland. She indicated McKinney did not give Sergeant Newland time to formulate any other plan. If Sergeant Newland had not fired his weapon, Witness #1 believed McKinney would have ended up "hurting [Sergeant Newland]." Witness #1 also believed McKinney had intended to kill both the male subject standing by the business doors and the male driver who drove up to the gas pumps. Witness #1 felt that if McKinney had been able to get inside the store, he would have killed her.

On July 14, 2022, **Witness #2** was interviewed by Detective Noah Robson and Corporal Clayton Carson.

On July 14, 2022, at around 10:45 in the evening, Witness #2 was driving on the 10 freeway. Witness #2 exited the freeway on Milliken Avenue and drove to get gas at the Mobil gas station on Ontario Mills Parkway. Witness #2 pulled up to pump #16 to pump gas on the driver's side of his car. Witness #2 exited his vehicle and walked towards the gas station store to pay for gas and get a bottle of water.

As Witness #2 was walking, he saw a male, later identified as Brian McKinney, walking towards him with a shopping cart. Witness #2 did not think anything of it. McKinney was rambling and kept coming closer to Witness #2. Witness #2 ignored McKinney and moved to get out of McKinney's way. McKinney then left his shopping cart and confronted him. McKinney started following Witness #2.

McKinney caught up to Witness #2 between the middle gas pumps. McKinney told Witness #2, "Give it to me, give it to me." Witness #2 asked McKinney, "What?" Witness #2 told McKinney he did not have anything. Witness #2 was unsure whether McKinney wanted Witness #2's vehicle or some other property. At that point, McKinney said Witness #2 took out a knife with his left hand and started coming closer to Witness #2. Witness #2 started backing up to get away from McKinney. McKinney held the knife in front of him with the blade pointing towards Witness #2. McKinney told Witness #2, "Get the fuck

³ The subsequent investigation into the lethal force encounter would show McKinney was holding a fork and not a knife.

out of here before I hurt you, get the fuck out of here before I hurt you.” When McKinney threatened Witness #2 with the knife, Witness #2 estimated McKinney was seven feet away.

Witness #2 said he was scared when he saw McKinney with the knife. Witness #2 did not want to get hurt or stabbed. Witness #2 backed away from McKinney. Witness #2 indicated McKinney was also holding a fork in his right hand. McKinney was holding the fork with the pointed end up. During the incident, Witness #2 said McKinney only pointed the knife at him. Witness #2 then got into his car and drove off without getting gas or going into the gas station store. As he was driving away, McKinney was approaching his vehicle on the driver side. McKinney was still talking and telling Witness #2 to get the fuck out of there. Witness #2 said McKinney was still holding the knife and fork in his hands. At that time, Witness #2 estimated McKinney was five feet away from him.

Witness #2 pulled over by the nearby hotel and called 9-1-1. The dispatcher told Witness #2 if he saw a police officer to pull over and tell the officer what he saw. Witness #2 pulled over near the Mobil gas station and contacted a police officer. Witness #2 was able to see McKinney laying down on the ground near some pumps at the gas station. Witness #2 heard police officers telling McKinney to put his hands behind his back.

INCIDENT VIDEO AND AUDIO

AXON VIDEO RECORDING. Sergeant Newland was equipped with a body worn camera on the date of the incident under review. The body worn camera was activated and recording at the time of the officer involved shooting. The body camera video is approximately 7 minutes in length.⁴ There is a thirty second delay before the audio on the recording can be heard.

At the start of the video, Sergeant Newland was standing outside of his patrol vehicle. The driver side door was open. McKinney entered the frame and walked towards Sergeant Newland. Both of McKinney’s arms are raised up to shoulder height. McKinney’s hands are balled up into fists. McKinney appeared to be holding an object in each hand. McKinney could be seen moving towards Sergeant Newland. Sergeant Newland started backing up toward the rear of his patrol vehicle.

McKinney continued to swing his arms and advance towards Sergeant Newland. At one point, McKinney stopped and dropped his hands to his sides. McKinney swung his left arm across his body and pointed north. McKinney then placed both of his hands behind his back, leaned his upper body forward, and continued to advance towards Sergeant Newland. McKinney went out of frame on the video recording. Sergeant Newland

⁴ The summary of Sergeant Newland’s body camera video will only cover from the start of the recording through the lethal force encounter.

appeared to slow down as he reached the rear passenger corner of his patrol vehicle. McKinney came back into frame on the video recording and was walking around the rear driver side corner of the patrol vehicle.

McKinney's body was bladed with his right leg behind his left. McKinney's left hand was up around McKinney's waist. McKinney's right hand was down by his leg. McKinney then jumped forward at Sergeant Newland. McKinney was still holding an object in each hand as he moved towards Sergeant Newland. Sergeant Newland backpedaled away from McKinney. At this time, Sergeant Newland's shadow could be seen on the pavement. Sergeant Newland appeared to have his firearm drawn and pointed at McKinney.

McKinney continued advancing towards Sergeant Newland. McKinney hopped forward with both feet off the ground. Sergeant Newland continued to retreat. McKinney briefly went out of frame and then came back into frame on the video recording. McKinney could be seen hopping forward towards Sergeant Newland. McKinney took three steps forward. McKinney swung his arms forward. McKinney could be seen increasing his pace as he moved forward. McKinney then took a big step towards Sergeant Newland. McKinney moved his left arm in towards his abdomen and bent over slightly at the waist.

McKinney went out of frame on the video recording. Sergeant Newland continued to retreat from McKinney. At that time, two casings could be seen coming down from the top of the frame on the video recording. McKinney fell to the ground. A third casing could be seen coming down from the top of the frame on the video recording. Sergeant Newland stopped moving backwards. McKinney came back into frame and could be seen lying on his right side with his legs pulled up. McKinney kicked his legs up in the air and rolled on the ground. McKinney then stopped moving.

SURVEILLANCE VIDEO. Surveillance video was obtained from the Mobil Gas Station. The video was reviewed in its entirety. The summary will be from the file labeled 20220714224738.⁵ The incident under review happened in the evening and the lighting in some areas on the surveillance video was poor.

McKinney could be seen walking, with a shopping cart, towards a parked vehicle. McKinney stopped near the vehicle. As McKinney appeared to approach the driver side door, the lights of the vehicle turned on and the vehicle backed out of the parking spot. McKinney appeared to walk towards the vehicle as it was backing away. The vehicle then drove out of the parking lot. At this time, another vehicle drove past the gas pumps and went out of frame.

Sergeant Newland's patrol vehicle could be seen entering the gas station from the street. Sergeant Newland's patrol vehicle then went out of frame. Then patrol vehicle then entered the frame and drove towards where McKinney had approached the parked vehicle.

⁵ The summary will only cover from when McKinney approached a parked vehicle through the occurrence of the lethal force encounter.

Sergeant Newland stopped his patrol vehicle just past the gas pumps. The patrol vehicle's headlights illuminated McKinney's shopping cart.

Sergeant Newland exited the patrol vehicle. McKinney could be seen approaching Sergeant Newland with his arms raised. McKinney was swinging his arms at shoulder height. Sergeant Newland could be seen retreating away from McKinney. As Sergeant Newland was backpedaling around the rear of the patrol vehicle, McKinney continued to advance towards Sergeant Newland.

McKinney appeared to hop and then quickly jump forward towards Sergeant Newland. Sergeant Newland continued to retreat away from McKinney. Sergeant Newland appeared to have his firearm drawn. McKinney ran towards Sergeant Newland with his arms swinging. The view of Sergeant Newland and McKinney became obstructed by the gas pumps. Sergeant Newland moved back into view of the camera. Sergeant Newland stopped moving and McKinney appeared to fall to the ground.

WEAPON

Two silver colored metallic forks were located at the scene. The forks were laying on the ground northeast of McKinney's body.

DECEDENT

AUTOPSY. Witness #3, Forensic Pathologist for the Coroner Division of The San Bernardino County Sheriff's Department, conducted the autopsy of Brian McKinney on July 20, 2022. Witness #3 determined the cause of death was gunshot wounds of the chest and abdomen.

Number One - Gunshot Wound of the Chest and Abdomen⁶:

An entry wound was noted on the left shoulder, 9 inches from the top of the head and 8 inches left at midline. It consisted of a ½ inch circular defect. The direction of the wound path was front to back, left to right, and downward. There was no exit wound.

Number Two – Gunshot Wound of the Abdomen:

⁶ The numbering of the gunshot wounds is for reference only and not meant to indicate the order in which the gunshot wounds occurred.

An entry wound was noted on the left lower chest, 20 inches from the top of the head and 6 inches left at midline. It consisted of a ½ inch circular defect. The direction of the wound path was from front to back, left to right, and downward. There was no exit wound.

Number Three – Gunshot Wound of the Right Hip:

An entry wound was noted on the right hip, 30 inches from the top of the head, and 6 inches right at midline. It consisted of a 1 inch irregular shaped defect. There was an exit wound noted on the right hip, 31 ½ inches from the top of the head and 6 inches right at midline. It consisted of a regular shaped 1 ¼ inch defect. There was a re-entry wound noted on the right hip, 33 ½ inches from the top of the head and 7 inches right at midline. It consisted of a regular shaped 1 inch defect. There was a re-exit wound noted on the right buttock, 38 inches from the top of the head and 9 inches right at midline. It consisted of a ¾ inch irregular shaped defect. The direction of the wound path was from front to back, left to right, and downward.

TOXICOLOGY. Pericardial blood, and vitreous samples were collected from Brian McKinney on July 20, 2022.

Toxicology results for the pericardial blood sample were listed as follows:

- Amphetamine – 18 ng/mL
- Methamphetamine – 58 ng/mL
- Delta-9 Carboxy THC – 21 ng/mL
- Delta-9 THC – 0.67 ng/mL
- Caffeine – presumptive positive
- Cotinine – presumptive positive

CRIMINAL HISTORY.

2006, 12500(a) of the Vehicle Code, Driving without License. Riverside County case number INM165057, an infraction.

DE-ESCALATION

From the time Sergeant Newland contacted McKinney to the time the lethal force encounter occurred was approximately fifteen seconds. In that extremely short period of time, Sergeant Newland managed to take steps to try and de-escalate the situation. Sergeant Newland was aware the call he was responding to was of a subject armed with a knife

threatening customers. When Sergeant Newland contacted McKinney, McKinney immediately started walking towards Sergeant Newland's patrol vehicle. Sergeant Newland attempted to de-escalate the situation by giving verbal commands for McKinney to get on the ground. McKinney failed to comply with those verbal commands. Sergeant Newland had his gun drawn and in a low ready position. The visual site of Sergeant Newland with his duty weapon drawn was not enough to get McKinney to stop advancing. Sergeant Newland chose to make a tactical retreat. Sergeant Newland's attempt to de-escalate by creating more distance between himself and McKinney was also unsuccessful. Sergeant Newland saw McKinney was holding an object in each hand. McKinney was swinging his arms in a slashing motion as he continued to close the distance between himself and Sergeant Newland.

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***

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

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 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

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

grounds to believe that the person to be arrested is aware of those facts. (Penal C. §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.*)

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.

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* (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, Sergeant Newland had an honest and objectively reasonable belief that McKinney posed an imminent risk of serious bodily injury or death. Witness #1 had called 9-1-1 to report McKinney was armed with a knife and threatening customers at the Mobil gas station. Sergeant Newland responded to the gas station in a marked patrol vehicle. Sergeant Newland was wearing a law enforcement uniform identifying him as a police officer with Ontario Police Department. When Sergeant Newland arrived at the gas station, Witness #1 directed him to where McKinney was standing.

Sergeant Newland drove his patrol vehicle toward McKinney. Sergeant Newland stopped and exited his vehicle to contact McKinney. McKinney immediately started walking towards Sergeant Newland. Sergeant Newland believed McKinney was armed with a knife and had his duty weapon drawn. Sergeant Newland told McKinney to get down on the ground but McKinney ignored Sergeant Newland's verbal commands. It appeared to Sergeant Newland that McKinney was looking at him when Sergeant Newland ordered McKinney to get down on the ground.

Throughout the incident under review, McKinney appeared agitated and his demeanor was aggressive. At one point, McKinney yelled at Sergeant Newland, "Fuck you! Fuck you!" McKinney was swinging his arms fast as he advanced toward Sergeant Newland. Sergeant Newland could see McKinney was holding an object in each of his hands. The objects were metallic and straight leading Sergeant Newland to reasonably believe McKinney was holding two knives.

Sergeant Newland made a tactical retreat around the rear of his patrol vehicle. Sergeant Newland wanted to create some distance between himself and McKinney. McKinney, however, continued to advance towards Sergeant Newland. As the two rounded the back of Sergeant Newland's patrol unit, McKinney started running towards Sergeant Newland. Witness #1, who witnessed the incident, stated she believed McKinney was going to stab Sergeant Newland. McKinney was screaming at Sergeant Newland and continued swinging his arms in a slashing motion. Sergeant Newland was scared and felt threatened. McKinney was armed and quickly closing the distance between them. Witness #1 saw McKinney lunge at Sergeant Newland. When McKinney was approximately eight feet away, Sergeant Newland fired his weapon three times. Witness #1 believed Sergeant Newland had no choice but to shoot McKinney.

The incident under review occurred within fifteen seconds of Sergeant Newland exiting his patrol vehicle to contact McKinney. Throughout the incident under review, McKinney's demeanor was aggressive. McKinney's confrontational behavior severely restricted any options Sergeant Newland would consider trying to de-escalate the situation. McKinney completely ignored Sergeant Newland's verbal commands and refused to get down on the ground. It is also important to note that even though Sergeant Newland had his firearm drawn and pointed at McKinney, McKinney continued to swing his arms and advance towards Sergeant Newland. Sergeant Newland's honest belief that McKinney was going to attack him if he got close enough was objectively

reasonable. Given those circumstances, the decision by Sergeant Newland to use deadly force was justified.

CONCLUSION

Based on the facts presented in the reports and the applicable law, Sergeant Newland's use of lethal force was a proper exercise of Sergeant Newland'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**

