



PUBLIC RELEASE MEMORANDUM

DATE: January 17, 2025

SUBJECT: Officer Involved Shooting (Fatal)

Officers: Deputy Gaetano Nicassio,
San Bernardino County Sheriff

Senior Inspector Jonathan Autry,
United States Marshals Service

Deputy Eugene Mondragon,
San Bernardino County Sheriff

Involved Subject: Michael Thomas Orr (Deceased)
Date of Birth - April 14, 1971

Date of Incident: January 10, 2022

Incident location: XXXX Victoria Gardens Lane
Rancho Cucamonga, CA

DA STAR #: 2023-18243

Investigating Agency: San Bernardino County Sheriff's Department

Case Agent: Detective Ian Gosswiller

Report Number#: DR# 112200359

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PREAMBLE

This was a fatal officer involved shooting by members of the Specialized Enforcement Division from the San Bernardino County Sheriff's Department. The shooting was investigated by the Specialized Investigations Division of the San Bernardino County Sheriff's Department. This factual summary was 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# 112200359.

FACTUAL SUMMARY

On January 10, 2022, members of Team Four of the Specialized Enforcement Division were assigned to apprehend Michael Orr, a fugitive wanted for attempted murder. Orr was alleged to have stabbed another individual with a knife resulting in the issuance of an arrest warrant. The team members looking for Orr included Deputy Gaetano Nicassio, Detective Eugene Mondragon, and Reserve Deputy Larry Adams. All were from the San Bernardino Sheriff's Department.¹ Senior Inspector Johnathan Autry of the United States Marshals Service was also participating in the search for Orr. The team began searching for Orr in the Ontario area, where the 15 Freeway and 60 Freeway intersected. Each member drove separately in unmarked vehicles. Based on real time electronic surveillance information, the search moved to the area near the Victoria Gardens Mall in Rancho Cucamonga.

The team searched for Orr in different areas of the mall. At approximately 2:00 PM, Detective Mondragon announced the discovery of Orr's vehicle in the Bass Pro Shops' front entrance parking lot. The vehicle, a white Ford Focus, was parked at the eastern end of the parking lot, two lanes north of the store's front entrance. The Ford Focus was facing south in a parking stall. A black Jeep Cherokee was parked in the stall east of the Focus, while a black Jeep Wrangler was parked in the stall just to the west. Other vehicles were parked in stalls in the lane south of where the Ford Focus was parked. A planter separated the driving lanes.

Team members converged on the parking lot after the Ford Focus was confirmed to be Orr's vehicle. They took up positions throughout the lot to observe the vehicle. At first, Orr was not seen in or near his vehicle. Reserve Deputy Adams was then sent into Bass Pro Shops to locate Orr. Sometime after Deputy Adams went into the building, Deputy Mondragon observed someone's feet near Orr's vehicle. After coming into his view, Deputy Nicassio then identified Orr as the person standing near the vehicle. Orr next entered into his car.

¹ Sergeant Jerred Besheer and Detective David King were assigned to the team on January 10, 2022, but were participating in the transportation of a fugitive apprehended earlier that day in Palm Springs.

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The team did not attempt to apprehend Orr at that time. Deputy Nicassio, the case agent, decided to wait for additional personnel to arrive before executing a procedure known as a Vehicle Containment Technique (hereinafter, "VCT").

The circumstances changed, however, when the brake lights on Orr's vehicle came on. Thinking Orr may leave and get away, the team began the VCT. Deputy Nicassio initiated the procedure using a countdown. Detective Mondragon drove his silver Chevy Silverado toward the back of Orr's vehicle, stopping approximately three feet from the Ford's rear bumper. Deputy Nicassio drove his GMC Acacia toward the back Orr's vehicle as well, stopping very near to Detective Mondragon's unit, on the right. The emergency lights on both vehicles were activated. Sirens were also activated, but quickly silenced to enable the giving and hearing of commands. Moments later, Inspector Autry drove up in his unit, also a silver Chevy Silverado, and parked in the lane east of Detective Mondragon's unit.

After blocking in the Ford Focus, Detective Mondragon and Deputy Nicassio exited their vehicles. Deputy Nicassio stood near the door of his vehicle and began giving commands. Detective Mondragon similarly took a position near the open front door of his unit. Inspector Autry stood near Deputy Nicassio in the same general area. Detective Mondragon was armed with a rifle while Deputy Nicassio and Inspector Autry drew their individual handguns.

Both Deputy Nicassio and Detective Mondragon directed commands at Orr immediately after the VCT was executed. Deputy Nicassio addressed Orr by name, indicated they were the Sheriff's Department, and directed Orr to place his hands outside the window. The commands were repeated several times. Detective Mondragon also addressed Orr. Directing commands to Orr by name, Detective Mondragon repeatedly announced they were the Sheriff's Department, and ordered Orr to turn off his engine, open the window, and place his hands outside the window. Orr did not comply. Detective Mondragon then gave Orr multiple commands to slowly open his door. Deputy Nicassio joined in the commands directing Orr to open his door and step out of the vehicle. Orr was also informed of the warrant for his arrest. Orr did not open the car door or step out.

At one point during the commands, Orr rolled his window down and asked, "What's the warrant for?" Detective Mondragon replied, "It doesn't matter, you have a warrant for your arrest." Deputy Nicassio repeatedly added "We just want this to end safely." Detective Mondragon similarly urged "Hey Michael, let's do this nice and safe Michael." Orr responded by rolling the window up and, according to Deputy Nicassio may have stated "fuck you."

As the commands were directed at Orr, Inspector Autry watched Orr moving around within the Ford Focus. Orr kept looking back at the team and appeared agitated. As Orr moved, Inspector Autry saw a large knife in his hand and notified the others about the weapon. Detective Mondragon also observed Orr holding the knife and announced his observation to the team. The knife was approximately 12 inches in length. Deputy Nicassio and

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Inspector Autry then moved closer to where Detective Mondragon stood next to his unit and in area behind the black Cherokee.

After Orr rolled up his window, Detective Mondragon retrieved a Lewis Machine & Tool Launcher (hereinafter, "launcher"). The launcher was loaded with a 40mm less-lethal Blunt Impact Projectile (hereinafter, "BIP" or "projectile"), a gel foam round. Detective Mondragon retrieved the launcher from his truck and announced, "less lethal." Deputy Nicassio responsively yelled "less lethal, less lethal, less lethal."

Deputy Mondragon moved south from the back of the black Jeep Cherokee to the front hood, staying on the driver's side of the vehicle. Detective Mondragon stopped when he was parallel to the front of Orr's Ford Focus. Deputy Mondragon announced, "You want me to hit the window?" Deputy Nicassio instantly replied, "Hit the window." Aiming at the front, driver-side window, Detective Mondragon discharged the BIP. The Ford's window shattered but did not break. Detective Mondragon declared "non-effective, non-effective" and returned to his truck where both Deputy Nicassio and Inspector Autry were located.

Approximately five seconds after the BIP was deployed, the driver side door of the Ford Focus violently opened. Orr quickly exited his vehicle. Without hesitating, Orr sprinted towards Deputy Nicassio, Inspector Autry, and Detective Mondragon. Orr held a knife in his right hand and raised it above his shoulder as he charged forward. He reached the back of the Jeep Cherokee approximately one second after exiting his car.

Deputy Nicassio was approximately 15 feet from the back of Ford Focus when Orr opened the door and charged. Deputy Nicassio reacted by moving left, away from Orr. Orr followed him. Deputy Nicassio believed Orr was determined to kill him and the others after observing the look in Orr's eyes. Deputy Nicassio thus anticipated Orr would stab him in the neck or somewhere on the side of his arm.

Inspector Autry was standing to the right of Deputy Nicassio when Orr charged. He stepped back and away from Orr, trying to create space. Inspector Autry saw rage in Orr's face and similarly thought Orr wanted to kill him and his colleagues. Inspector Autry called the knife a "bonecrusher" and thought someone would die if stabbed with that knife.

Both Deputy Nicassio and Inspector Autry discharged their weapons as Orr charged at them.² Six to seven seconds passed from the time the BIP was discharged until the shooting began. Deputy Nicassio fired a total of six rounds while Inspector Autry discharged eight to nine rounds. Orr went to the ground, falling forward and releasing the knife while as he went down. Orr landed about 18 inches from Deputy Nicassio's feet.

Detective Mondragon did not discharge his weapon. Upon the return to the truck, his back was turned. After hearing a quick burst of rounds, Detective Mondragon brought his rifle up as he turned around but did not discharge it. He saw Orr falling forward and

² Reserve Deputy Larry Adams was in the store at the time of the lethal force encounter.

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determined Orr was not a threat. Orr was next secured and given lifesaving medical treatment. Requests for medical assistance were made. Paramedics arrived and later declared Orr deceased.

STATEMENTS BY POLICE OFFICERS

On January 21, 2022, **Deputy Gaetano Nicassio** was interviewed by Detective Ian Gosswiller and Detective Bryan Sprague.³

On January 10, 2022, Deputy Nicassio was assigned to Team Four from the Specialized Enforcement Division, San Bernardino County Sheriff's Department. On that day, Deputy Nicassio, along with Detective Eugene Mondragon, Reserve Deputy Larry Adams, and Senior Inspector Johnathan Autry from the US Marshall Service were tasked with locating and apprehending Michael Orr, a fugitive. A warrant had been issued for Orr after he stabbed a person with a large, fixed blade knife. Deputy Nicassio's understood Orr was a validated Nazi Low Rider prison gang member with a history of stabbing prison inmates.

The team initially focused the search for Orr to the Eastvale-Corona area. Based on updated electronic surveillance information, the search moved toward Rancho Cucamonga and further narrowed to the Victoria Gardens Mall. As the searched continued, Detective Mondragon indicated that he may have found Orr's vehicle in Bass Pros Shops' parking lot. After Deputy Nicassio confirmed the license plate number matched to Orr's car, the team proceeded to the store's front parking lot. Orr's vehicle, a white Ford Focus, was in a parking stall northeast of the store's entrance. The Ford Focus was surrounded by parked vehicles on all sides except the back.

Upon arrival, Deputy Nicassio backed his unmarked GMC Acacia into a stall located northwest of the Focus to observe for Orr. He could not determine if Orr was in the vehicle due to dark window tinting. After approximately five minutes, Deputy Nicassio identified Orr next to his vehicle after Deputy Mondragon announced someone standing near the Focus. Deputy Nicassio watched Orr get into his vehicle.

The team continued to surveil Orr within his vehicle. Deputy Nicassio decided they would wait for additional personnel before attempting to apprehend Orr. Deputy Nicassio saw the Ford's brake lights turned on and believed Orr was preparing to leave. Not wanting Orr to get away, Deputy Nicassio started a countdown that commenced the VCT. Detective Mondragon drove his Chevy Silverado toward the back of Orr's Ford Focus, stopping approximately three feet from the rear bumper. Deputy Nicassio drove his GMC Acacia toward Orr's vehicle stopping a few feet from Mondragon's right front bumper. After driving close to the scene, Inspector Autry parked his unmarked truck in the lane east of Detective Mondragon's unit.

³ Prior to the interview, Deputy Nicassio reviewed his audio belt recording and a civilian's video of the lethal force encounter.

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Both Detective Mondragon and Deputy Nicassio exited their units after blocking the Ford Focus. Deputy Nicassio activated his unit's emergency lights and siren. From the front door of his unit, Deputy Nicassio verbally identified himself as the Sheriff's Department and addressed Orr by name. He, along with Detective Mondragon, yelled commands at Orr, telling him to open his window and put his hands up and later ordering Orr to open his door and exit the vehicle. Deputy Nicassio saw Orr's silhouette moving within his car. He realized Orr had a knife only after Inspector Autry observed the weapon and shared the information.

Detective Mondragon, who stood at the open door of his unit, took over the commands to Orr. Deputy Nicassio moved to Detective Mondragon's left taking a position that was approximately 10 to 12 feet from the Ford Focus. Similarly, Inspector Autry also moved to position behind Deputy Nicassio.

Orr eventually reacted by rolling down his window and essentially asking what they wanted. Orr was told there was a warrant for him. When Orr asked the reason for the warrant, he was told that it does not matter. Deputy Nicassio then told Orr that he wanted the situation to end peacefully. Orr responded by rolling up his window. Deputy Nicassio believed Orr stated, "fuck you." Deputy Nicassio then approved Detective Mondragon's suggestion to break the window of Orr's vehicle. The team would then be able to observe Orr within his car and allow Orr to hear commands. A chemical agent could also be deployed through the broken window to force Orr out of his vehicle.

Detective Mondragon retrieved his launcher that was loaded with a 40mm less-lethal gel foam projectile. Deputy Nicassio loudly announced "less lethal, less lethal, less lethal" as Detective Mondragon walked on the driver's side of the Jeep Cherokee parked immediately east of Orr's vehicle. Detective Mondragon stopped near the Cherokee's engine block and discharged the less-lethal round. The projectile hit the window almost dead center, causing it to shatter but not break. Deputy Nicassio then heard Detective Mondragon announce the round was ineffective.

Within a very short time frame after using the projectile, the Ford's driver side door violently opened. Orr quickly exited the vehicle and sprinted directly at Deputy Nicassio. Orr had a large black knife in his right hand that was held at the top of his head. The knife was approximately 12 inches in length. Deputy Nicassio was approximately 15 feet from the back of Orr's vehicle, standing left of the open door to Detective Mondragon's unit.⁴ The distance between them closed quickly as Orr charged at Deputy Nicassio. Deputy Nicassio saw Orr's eyes and knew Orr was determined to kill one of them. Deputy Nicassio anticipated being stabbed in the neck or his arm.

⁴ Senior Inspector Autry stood to the right of Deputy Nicassio, behind the open door, as Detective Mondragon returned to his unit.

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As Orr reached the front bumper of Detective Mondragon's unit, Deputy Nicassio discharged his first round. Orr was less than ten feet from Deputy Nicassio when the first shot commenced. Deputy Nicassio believed his initial shots were not effective because Orr continued moving toward him. In total, Deputy Nicassio fired six rounds. Afterwards, he saw Orr fall forward and the knife come out of his hand. Orr landed on his back about 18 inches from Deputy Nicassio's feet.

After Orr was handcuffed, the team started life saving medical treatment. Paramedics arrived and declared Orr deceased.

On January 25, 2022, **Detective Eugene Mondragon** was interviewed by Detective Bryan Sprague and Detective Owenn Domon.⁵

On January 10, 2022, Detective Eugene Mondragon was assigned to the Specialized Enforcement Division of the San Bernardino County Sheriff's Department. On that day, Detective Mondragon was assisting Team Four in locating and arresting violent fugitives including Michael Orr. Detective Mondragon was in plain clothes wearing a black shirt and dark jeans. He wore a ballistic vest over his clothing identifying him as a Sheriff. Detective Mondragon drove a silver, unmarked Chevy Silverado equipped with emergency lights and a siren.

Detective Mondragon responded to the Bass Pro Shops parking lot located near the 15 Freeway based on electronic surveillance information. He arrived after 2:00 PM and observed a white Ford Focus parked in a stall. The vehicle was confirmed to be Orr's vehicle after the information was broadcasted to the team. Detective Mondragon backed his unit into a parking stall to maintain observation of Orr's vehicle. The Ford Focus was parked in a stall facing south. A black Jeep Grand Cherokee was parked on one side to the east while another black Jeep Wrangler was parked in the next stall to the west. A planter in front of the Ford Focus separated the vehicles parked in stalls to the south.

Other members of the team arrived on scene. At one point, Detective Mondragon observed someone's feet between the Ford Focus and the Jeep Cherokee parked to the east. Deputy Nicassio positively identified Michael Orr as the person standing near the Ford Focus. Orr entered his vehicle. Deputy Nicassio decided to wait for additional personnel before conducting a VCT. However, Deputy Nicassio also advised that if the vehicle became mobile, they would execute the VCT to prevent Orr from getting away.

Detective Mondragon watched the Ford Focus begin to reverse out of the stall, stop and then move forward again. Detective Mondragon asked whether they should conduct a VCT to prevent Orr from leaving. Deputy Nicassio said "yes" and began a countdown that initiated the VCT. As a result, Detective Mondragon drove his truck to the rear of Orr's vehicle, stopping close to its bumper without making contact. He activated his

⁵ Prior to the interview, Detective Mondragon reviewed his audio belt recording and a civilian's video of the lethal force encounter.

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emergency lights. He also activated his siren but quickly turned it off. Deputy Nicassio's also drove his unit to the back of Orr's vehicle, stopping close to the right of Detective Mondragon's unit.

Detective Mondragon exited his truck with his rifle and stood behind his driver's side door. Deputy Nicassio initially gave commands to Orr. After he stopped, Detective Mondragon took over and ordered Orr to turn off his vehicle and lower his window. Orr did not comply. Detective Mondragon then directed Orr to open his door and exit slowly. Again, Orr did not comply. Orr eventually turned off the vehicle and lowered his window. Orr asked what they wanted. In response, Detective Mondragon told Orr they were from the Sheriff's Department, and Orr needed to exit his car because there was a warrant for him. Orr then asked what the warrant was for, and Detective Mondragon responded it did not matter, and Orr needed to exit and comply. Detective Mondragon also told Orr that they wanted the encounter to end safely. Orr reacted by rolling his window up.

While in his vehicle, Orr was looking back at the deputies by leaning to his left. As he did so, Orr raised his right hand above the steering wheel. Detective Mondragon saw Orr holding a knife in his right hand. The knife's blade was eight to ten inches long. Detective Mondragon warned the others about the knife.

When Orr failed to comply with commands, Detective Mondragon retrieved a 40mm launcher from his unit. He moved south with the launcher, staying on the driver's side of the Jeep Cherokee parked east of Orr's vehicle. Detective Mondragon took a position near the Cherokee's hood. After Deputy Nicassio confirmed he could use the launcher, Detective Mondragon discharged the BIP at the driver-side window of the Ford Focus. The BIP shattered the window but did not break it. Detective Mondragon announced "ineffective" and moved back to his unit. As he returned, Deputy Nicassio stood toward the back of the Cherokee while Inspector Autry stood near Detective Mondragon's unit.

Detective Mondragon began to reload after reaching his unit. He heard a quick burst of gunfire originating directly behind him. Detective Mondragon threw the launcher onto the back of his truck and brought his rifle up as he turned around. Orr was outside his vehicle, falling forward. Orr landed on his back as he hit the ground. Detective Mondragon did not perceive Orr as a threat and therefore did not discharge his weapon. Detective Mondragon did not see who discharged his weapon.

Deputy Nicassio commanded Orr to move his hands away from his body. Orr did not respond. Detective Mondragon moved toward Orr and kicked his hand away from his body. Orr did not react. Detective Mondragon turned Orr over facedown, placed handcuffs on him, and then rotated him to his back. They began administering medical aid after seeing Orr's gunshot wounds. Paramedics later arrived and pronounced Orr deceased.

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On January 27, 2022, **Senior Inspector Johnathan Autry** was interviewed by Detective Owenn Domon and Detective Ian Gosswiller.⁶

On January 10, 2022, Inspector Autry was employed by the United States Marshals Service and assigned to the Pacific Southwest Regional Task Force. He was assisting Team Four 4 from the Specialized Enforcement Division with the apprehension of wanted fugitives including Orr. Inspector Autry learned Orr was a member of a prison gang, had a violent history, and was wanted for stabbing an individual. On the day of the incident, Inspector Autry wore a green law enforcement vest over plain clothes that identified him as a US Marshal. He carried a 9mm Glock 19 firearm with a magazine containing from 13 to 15 rounds.

Inspector Autry began searching for Orr in the Eastvale-Corona area off the 15 Freeway. Inspector Autry drove alone in an unmarked silver Chevy Silverado. After initially searching near Limonite and the 15 Freeway, Inspector Autry received updated information Orr was near Victoria Gardens Mall and moved his search to that area.

Deputy Mondragon subsequently reported that Orr's vehicle was at the Bass Pro store. Inspector Autry then proceeded to the parking lot next to the Bass Pro Shops' front entrance. He parked approximately 80 feet away from Orr's vehicle to the south. Orr was not in or near the car when Inspector Autry began his surveillance. A team member⁷ was sent into the store to look for Orr. Afterwards, Inspector Autry saw a man standing next to the car and enter it; Deputy Nicassio verified that man as Orr.

Radio chatter ensued discussing tactics. Deputy Nicassio decided to wait for additional personnel before moving on the vehicle. However, a belief arose that Orr was about to move. Consequently, a VCT was executed to box in Orr's vehicle. Deputy Nicassio and Detective Mondragon drove their vehicles toward Orr's vehicle, stopping behind it. Inspector Autry similarly drove his vehicle to a location just east of where the VCT was taking place. Inspector Autry exited his unit and took a position next to Deputy Nicassio, who was standing next to the open driver's door of Mondragon's Chevy Silverado. He heard Deputy Nicassio giving commands to Orr that he had a warrant and had to exit his vehicle.

Inspector Autry focused on Orr as commands were directed at him. Inspector Autry was approximately 15 feet away from Orr's car. He had drawn his weapon, holding it at a 45-degree angle toward the ground. Through tinted windows, Inspector Autry saw Orr moving around within his vehicle. When Orr moved his right hand to the top of the steering wheel, Inspector Autry saw Orr holding a knife.

⁶ Prior to the interview, Senior Inspector Autry reviewed a video recording of the lethal force encounter taken by a civilian.

⁷ Reserve Deputy Larry Adams was assigned to look for Orr within the building.

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At one point, Orr rolled down his window and asked why a warrant was issued for him. In response, he was told, many times, that he just needed to come out because there was a warrant. Orr remained non-compliant by rolling the window up and staying in his car. Orr made an incoherent statement that may have been cussing directed at the team.

Afterwards, Deputy Nicassio called for the use of "less lethal." Inspector Autry observe Detective Mondragon move [south] with a less-lethal launcher, staying on the east side of the car parked next to Orr's vehicle. Detective Mondragon pointed the "less-lethal" device at Orr's vehicle and discharged a less-lethal projectile. The projectile hit the driver's side window but had no effect upon it. Inspector Autry observed Orr become very animated, moving around within his vehicle. He thought Orr was going to either run or ram his way out of the VCT.

As Detective Mondragon returned to the team, Inspector Autry saw Orr suddenly opened the door and sprint toward him. Orr carried a large knife in his hand and his face was full of rage. Inspector Autry stood east of the Chevy Silverado's open door. They were 10 to 15 feet apart when Orr started charging at him.

Inspector Autry began firing his weapon to stop the immediate threat. He stepped back as Orr charged. Inspector Autry thought his shots had no effect because Orr kept moving forward. Inspector Autry stopped firing after Orr stopped pursuing them. Inspector Autry discharged eight to nine shots.⁸ Orr finally went to the ground, falling forward, and landing within two feet from Inspector Autry.

Orr wielded a large knife as he charged forward. The blade was approximately eight to ten inches long. Inspector Autry feared for his life and the lives of the team. He believed one hit from Orr's "bonecrusher" knife would have resulted in someone's death.

After Orr went to the ground, Inspector Autry heard Deputy Nicassio give Orr commands. Inspector Autry checked Orr's vehicle to verify no other person was inside. Afterwards, he assisted in administering medical aid to Orr, who sustained several wounds to his torso. Other law enforcement and fire personnel arrived and began assisting with the incident.

On January 10, 2022, **Sergeant Jerred Besheer**, was interviewed by Detective Bryan Sprague and Detective Owenn Domon.

On January 10, 2022, Sergeant Besheer was assigned to Team Four of the Specialized Enforcement Division. The team was part of the Pacific Southwest Regional Fugitive Taskforce whose primary duties were to apprehend violent fugitives. On January 10, 2022, the team consisted of himself, Detective King, Deputy Gaetano Nicassio, Detective Eugene Mondragon, Reserve Deputy Larry Adams, and Senior Inspector Johnathan

⁸ Inspector Autry's Glock 9mm was loaded with 13 to 15 rounds. After the shooting, Inspector Autry's weapon contained six live cartridges while eight 9mm fired cartridges casings were found on scene.

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Autry of the United States Marshall's Service. Based on a warrant of arrest, the team was assigned to locate and arrest Michael Orr.

In the morning of January 10, 2022, the team initially apprehended a fugitive located in Palm Springs. Afterwards, Sergeant Besheer and Detective King stayed in the area to help transport the fugitive while the remaining team members were sent to the Ontario area in search of Orr. Based on electronic surveillance, the search narrowed to the Victoria Gardens Mall in Rancho Cucamonga.

Orr's vehicle was observed in the Bass Pro Shops' parking lot. Orr did not appear to be in his vehicle so Reserve Deputy Adams went into the building to look for him. Sergeant Basheer monitored the operation on the radio.

Sergeant Besheer understood there were several options to contact Orr. They did not want to contact Orr on foot while outside his vehicle. Besheer believed Orr was likely armed with a knife and could flee into the mall placing patrons in danger. Besheer also believed letting Orr enter his vehicle and drive away was not a viable option. Orr could flee and start a pursuit that would be dangerous to the officers and the public. Finally, Sergeant Besheer thought letting Orr drive away without arrest would be irresponsible because Orr could victimize other community members.

Orr was later observed standing near his vehicle and then entering it. Sergeant Basheer listened to the conversations as to blocking Orr's vehicle. Consequently, Sergeant Besheer notified Deputy Nicassio that he was comfortable blocking Orr's vehicle using the VCT. He heard the countdown that initiated the VCT. Radio broadcasts indicated Orr was not complying with commands and was in possession of a knife. Sergeant Besheer heard a radio broadcast of "shots fired" about five minutes after the VCT countdown. He called Deputy Nicassio verifying no injuries to the team. He also gathered information as to the incident. Sergeant Besheer arrived on scene approximately 25 minutes after the incident.

STATEMENTS BY CIVILIAN WITNESSES

On January 10, 2022, **Witness #1** was interviewed by Detective Michelle Del Rio and Detective Owenn Doman. Witness #1 video recorded the shooting incident on his cellular phone.

Witness #1 arrived at the Bass Pro Shops between 2:10 and 2:20 PM on January 10, 2022. He parked his car in the parking lot adjacent to the store's front doors. He then sat inside his car watching a sports show on his mobile phone. As he watched, he heard a police vehicle "chirp" and thought a car had been pulled over on the freeway. Witness #1 exited his car, heard a commotion, and looked toward it. He then began recording the encounter on his phone.

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Witness #1 noticed two vehicles stopped behind a white car parked in a stall. Witness #1 deduced the two vehicles were law enforcement units because he saw a bald adult male, identified as Deputy Nicassio, standing near one of the blocking vehicles behind the driver's door. Deputy Nicassio wore a vest with the word "SHERIFF" on the front. Witness #1 was approximately 50 feet away. Deputy Nicassio was facing south, focusing upon the parked car in front of him. Witness #1 also saw a man, identified as Orr, sitting in the driver's seat of the parked car that was blocked.

Witness #1 heard an unknown deputy repeatedly shouting, "You have a warrant out for your arrest" and "Let me see your hands." Witness #1 also heard someone shout "knife." He saw Orr holding a cell phone but not a knife.

As the standoff continued, Witness #1 observed another law enforcement officer, identified as Detective Mondragon, wearing a vest with the word "SHERIFF" across the front and carrying a "small little rifle. Someone called out "less lethal" several times. Witness #1 watched the Detective Mondragon raise the less-lethal weapon and shoot a projectile at the driver's window of Orr's vehicle.⁹ The window then shattered liked a spider web. Detective Mondragon then walked back toward Deputy Nicassio.

Orr exited his vehicle approximately five seconds after the less-lethal device was deployed. Orr charged at the law enforcement officers, covering approximately 15 feet in one second. Witness #1 then heard five to ten rapid gunshots. The gunshots came from more than one handgun. Witness #1 did not know if Orr held anything in hands because the vehicles blocked his view.

After the shooting, Witness #1 observed the LEOs giving commands and pointing their weapons towards the ground where, he believed, the man had fallen. Afterwards, additional law enforcement and fire personnel arrived on scene.

On January 11, 2022, **Witness #2** was interviewed by Detective Bryan Sprague and Detective Owen Domon. The relevant part of her interview is summarized below.

Witness #2 and Orr were previously in a long-term dating relationship. However, they continued to spend time with each other. Witness #2 last saw Orr in the early morning on January 10, 2022. Later that same day, Orr called Witness #2 at 2:19 PM. Orr told Witness #2 that he was surrounded by police who had drawn their guns and wanted to kill him. Witness #2 advised him to talk with the police and tell his side of the story. As the call continued, Orr stopped speaking. Witness #2 heard five to six gunshots and heard someone yell "Michael." She thought Orr had been shot because he did not respond.

⁹ Witness #1 indicated a law enforcement officer walked with the less-lethal weapon but did not describe from where the officer started to where he stopped. Similarly, Witness #1's sketch of the scene, did not clearly reflect the movement of the law enforcement officer.

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On numerous occasions in the past, Orr said he would not go back to prison and had reiterated that sentiment to Witness #2 on January 9, 2022. Orr also told Witness #2 he would rather be dead and would commit suicide by cop. According to Witness #2, Orr had spent 10 years in prison for stabbing a neighbor. Witness #2 indicated Orr frequently carried a knife; he had recently purchased a knife at Bass Pro Shops.

INCIDENT VIDEO AND AUDIO

Civilian Video. Witness #1 video recorded the incident on his cellular phone. The video was reviewed in its entirety. The relevant parts of the video are summarized below.

The beginning of the video shows an unmarked truck parked behind the Ford Focus occupied by Orr.¹⁰ The Ford Focus is parked in a stall facing south. A black Jeep Cherokee and black Jeep Wrangler are parked east and west of the truck, respectively. Deputy Nicassio, Inspector Autry, and Detective Mondragon¹¹ have taken positions behind the Focus and near the truck's open driver-side door. Orr sits in the driver's seat of the Ford Focus. His head is turned back looking at the Deputy Nicassio.

00:01- Detective Mondragon tells Orr that "there is a warrant for your arrest." He later responds to an apparent question by Orr, stating "It doesn't matter, you have a warrant for your arrest."

00:15 - Orr rolls up his window. Deputy Nicassio simultaneously announces, "less lethal, less lethal, less lethal." Detective Mondragon walks south on the driver's side of the Jeep Cherokee holding a launcher.

00:23 - Detective Mondragon stops next to the Jeep Cherokee's hood on the driver's side. He aims the launcher at the Ford Focus and calls out "Hit the window?" Deputy Nicassio immediately responds, "Hit the window."

00:25 - Mondragon discharges the launcher. The projectile hits the window. Orr flinches backward, raising his right hand holding a knife.

00:26 - Mondragon immediately walks back towards Deputy Nicassio and Inspector Autry and announces "non-effective, non-effective."

00:29 - Nicassio looks away from the Focus as he speaks with Inspector Autry. Detective Mondragon reaches the truck.

00:31 - Orr opens the driver's side door of the Ford Focus and begins sprinting back towards Deputy Nicassio, Inspector Autry, and Detective Mondragon. Deputy Nicassio sees Orr coming toward him and moves to his left. Deputy Nicassio raises his hands,

¹⁰ The other vehicle used in the VCT is not seen in the video.

¹¹ Detective Mondragon was not seen in the video until he walks behind the black Cherokee parked east of the Ford Focus.

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pointing his weapon at Orr, who is fully out of his car. Inspector Autry, based on his silhouette, is behind and to the left of Deputy Nicassio.

00:32 - Orr reaches the back of the black Jeep Cherokee raising his hand between ear level and shoulder height. Deputy Nicassio continues moving left, away from Orr.

00:33 - The sound of gunshots starts. (The video pans behind a vehicle while the sound of gunfire continues).

00:35 - The sound of gunfire ends. Inspector Autry stands looking at the ground with outstretched arms pointing his weapon downward.

00:37 - Deputy Nicassio comes into view pointing his weapon toward the ground; he gives commands to Orr to put out his hands and roll over.

01:04 - Deputy Nicassio calls out for meds and continues to give Orr commands.

01:27 - Detective Mondragon moves into view and crouches down towards Orr.

Belt Recordings. The belt recorders worn by Detective Mondragon and Deputy Nicassio capture the same acts and are summarized collectively.

The belt recordings start with the team observing Orr in his vehicle and executing the VCT blocking Orr's vehicle; police sirens were activated but quickly shut off.

Commands from Deputy Nicassio and Detective Mondragon began after the sirens stopped. Addressing Orr by name, Deputy Nicassio repeatedly identified themselves as the Sheriff's Department and directed Orr to place his hands outside the window. Detective Mondragon then took over the commands by telling Orr they were the Sheriff's Department and directed Orr to open his window and turn off his vehicle. The commands were repeated several times with no apparent compliance from Orr. Detective Mondragon then commanded Orr, repeatedly, to slowly open his door. As he was calling out commands, Detective Mondragon loudly announced [to the team] that Orr had a knife.

Deputy Nicassio resumed giving commands by again telling Orr they were the Sheriff's Department and demanding Orr open the door and step out of his vehicle. Orr was also told that there was a warrant for his arrest. After hearing about the warrant, Orr asked "What's the warrant for?" Detective Mondragon replied, "It doesn't matter, you have a warrant for your arrest." Several times afterwards, Deputy Nicassio stated, "We just want this to end safely." Detective Mondragon similarly stated, "Hey Michael, let's do this nice and safe Michael." Orr's response was unintelligible.

After the last commands were given, Detective Mondragon stated, "Less lethal." Deputy Nicassio loudly answered, "Less lethal, less lethal, less lethal." Several seconds later Detective Mondragon asked, "You want me to hit the window?" Deputy Nicassio replied,

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“Hit the window.” A loud pop noise followed and Detective Mondragon immediately stating, “non-effective, non-effective.”

Six to seven seconds later, the sound of multiple gun shots can be heard. The gunshot sounds lasted for almost 3 seconds. Deputy Nicassio afterwards said, “Shots fired, let them know shots fired, let them know shots fired.”

Commands were then given to Orr directing him to put his hands out and to roll over. Requests for “meds” were made, as well as multiple reports and confirmations of “shots fired.” The remainder of the recording captured the medical treatment of Orr, securing the scene, and the subsequent arrival of fire and law enforcement personnel.

INCIDENT SCENE

The lethal force encounter occurred in the front entrance parking lot of Bass Pros Shops located at XXXX Victoria Gardens Lane, Rancho Cucamonga. In particular, the incident occurred at the eastern end of the parking lot, two lanes north of the store’s front entrance.

A white Ford Focus was parked facing south near the eastern end of a row of parking stalls. A black Jeep Cherokee was parked in the stall east of the Focus, while a black Jeep Wrangler was parked to its west. A planter separated vehicles that were parked directly south of the Focus.

A silver Chevrolet Silverado was parked behind the Focus facing southwest. Another vehicle, a black GMC Acadia was also parked behind the Focus but faced southeast. A second silver Chevrolet Silverado was parked facing north, just east of a planter, in the lane bordering the eastern end of the parking lot.

In between the two trucks and north of the black Jeep Cherokee, Orr’s body laid prone, from north to south. A black Ka-Bar Knife, approximately 12 inches in length, was located about four feet south of Orr. Multiple fired cartridge casings, both 9mm and .45 Auto calibers, were located near and around Orr’s body, primarily to the east and northeast.

DECEDENT

AUTOPSY. Dr. Timothy Jong, Forensic Pathologist for the Coroner Division of The San Bernardino County Sheriff’s Department, conducted the autopsy of Michael Orr on January 24, 2022. Dr. Jong determined the cause of death were gunshot wounds to the torso.

Gunshot Wound of the Left Chest:

A gunshot entry wound was located on the left upper chest, 13 inches from the top of the head and 2.5 inches left of anterior midline. The wound is a ½ x ¾ inch ovoid defect. The direction of the wound path was slightly front to back, left to right, and slightly upward.

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There was no exit wound noted. A deformed projectile was recovered in soft tissue of the right upper chest.

Gunshot Wound of the Central Chest:

A gunshot entry wound was located on the central chest, centered 17 & $\frac{3}{4}$ inches from the top of the head and $\frac{5}{8}$ inch right of anterior midline. The wound is a $\frac{3}{8}$ x $\frac{1}{4}$ inch ovoid defect. The direction of the wound path was front to back, left to right, and downward. A gunshot exit wound was located on the lateral right torso, centered 18 $\frac{1}{4}$ inches from the top of the head and 7 $\frac{1}{2}$ inches right of anterior midline. It is a $\frac{5}{8}$ -inch lacerated defect. A deformed projectile was recovered in the thermal shirt on the body.

Gunshot Wound of the Left Abdomen:

A gunshot entry wound was located on the left abdomen, centered 26 $\frac{7}{8}$ inches from the top of the head and 4 inches left of anterior midline. The wound is a $\frac{5}{16}$ x $\frac{1}{4}$ inch defect. The direction of the wound path was front to back, left to right, and downward. There was no gunshot exit wound noted. A deformed projectile was recovered in the soft tissue of the posterior right hip.

Gunshot Wound of the Central Upper Back:

A gunshot entry wound was located on the central upper back, centered 7 $\frac{3}{4}$ inches from the top of the head and $\frac{3}{4}$ inch left of posterior midline. The wound is a $\frac{1}{4}$ inch diameter defect. The direction of the wound path was left to right with no discernable front/back or upward/downward direction. A gunshot exit wound was located on the upper right back, centered 7 $\frac{3}{4}$ inches from the top of the head and 7 $\frac{1}{2}$ inches right of posterior midline. It is a $\frac{3}{4}$ inch lacerated defect.

Gunshot Wound of the Central Mid Back:

A gunshot entry wound was located on the central mid back, centered 15 $\frac{1}{2}$ inches from the top of the head and 1 inch right of posterior midline. The circular wound is a $\frac{1}{4}$ inch diameter defect. The direction of the wound path was back to front, right to left, and slightly downward. A deformed projectile was recovered in the soft tissue of the lateral left torso. There was no gunshot exit wound noted.

Gunshot Wound of the Left Mid Back:

A gunshot entry wound was located on the left mid back, centered 16 $\frac{1}{2}$ inches from the top of the head and 6 $\frac{1}{2}$ inches left of posterior midline. The circular wound is a $\frac{1}{4}$ inch diameter defect. The direction of the wound path was slightly back to front, right to left, and downward. A gunshot exit wound was located on the lateral left torso, centered 18 $\frac{3}{4}$ inches from the top of the head and 6 $\frac{1}{2}$ inches left of anterior midline. It is a $\frac{3}{4}$ inch lacerated defect.

Gunshot Wound of the Central Lower Back:

A gunshot entry wound was located on the central lower back, centered 22 inches from the top of the head and $\frac{1}{2}$ inch right of posterior midline. The circular wound is a $\frac{3}{16}$ -inch diameter defect. The direction of the wound path was back to front, right to left, and

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slightly downward. A deformed projectile was recovered in the left side of the abdomen. There was no gunshot exit wound noted.

Gunshot Wound of the Right Shoulder No. 1:

A gunshot entry wound was located on the right shoulder, centered 1/8 inch from the top of the shoulder and 1 inch right of anterior midline. The circular wound is a 1/4 inch diameter defect. The direction of the wound path was front to back, right to left, and downward. A deformed projectile was recovered in the left chest cavity. There was no gunshot exit wound noted.

Gunshot Wound of the Right Shoulder No. 2:

A gunshot entry wound was located on the right shoulder, centered 7/8 inch from the top of the shoulder and 2 inches right of anterior midline. The circular wound is a 1/4 inch diameter defect. The direction of the wound path was back to front, right to left, and downward. A deformed projectile and fragments were recovered in the soft tissue of the right upper arm. There was no gunshot exit wound noted.

Gunshot Wound of the Right Upper Arm:

A gunshot entry wound was located on the lateral right upper arm, centered 3 3/8 inches from the top of the shoulder and 1 1/4 inches right of anterior midline. The ovoid wound is a 3/8 x 5/16-inch diameter defect. The direction of the wound path was front to back, right to left, and downward. A gunshot exit wound was located on the medial right upper arm, centered 5 inches from the top of the shoulder and 1 1/2 inches left of anterior midline. It is a 3/4 inch lacerated defect.

Gunshot Wound of the Right Hand:

A gunshot entry wound was located on the dorsal right hand, centered 23 inches from the top of the shoulder and 1/8 inch left of posterior midline. The circular wound is a 1/4 inch diameter defect. The direction of the wound path was back to front, left to right, and downward. A gunshot exit wound was located on the right palm, centered 24 inches from the top of the shoulder and 1 1/2 inches left of anterior midline. It is a 1 1/4 inch irregular laceration.

Gunshot Wound of the Left Elbow:

A gunshot entry wound was located on the left elbow, centered 13 1/2 inches from the top of the shoulder and 1/4 inch left of posterior midline. The circular wound is a 1/4 inch diameter defect. The direction of the wound path was back to front, slightly left to right, and upward. There was no gunshot exit wound noted. Deformed projectile fragments and a deformed metal jacket were recovered in the soft tissues of the left upper arm.

Incised Wound of the Left Hand:

An incised wound was located on the palmar surface of the 4th finger on the left hand, centered 28 inches from the top of the shoulder and 3/4 inch right of anterior midline. The horizontally oriented wound is 5/8 inch in length.

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Other Injuries:

Abrasions and contusions were located on Orr's face and extremities.

TOXICOLOGY. Femoral blood, Peripheral blood, Urine, and vitreous fluid samples were collected from Michael Thomas Orr on January 24, 2022.

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

- 11-Hydroxy Delta-9 THC - 5.8 ng/mL
- Delta-9 Carboxy THC - 93 ng/mL
- Delta-9 THC – 15 ng/mL

CRIMINAL HISTORY.

- August 15, 1990, Vehicle Code § 10851, Taking Vehicle without Owner Consent. San Bernardino County Case FCH5602, a Misdemeanor.
- November 7, 1991, Penal Code § 245(a)(1) (2 Counts), Assault Deadly Weapon. San Bernardino County Case FWV27671, a Felony.
- December 1, 2000, Penal Code § 4574(a)(2), Possession of a Weapon in Jail. San Bernardino Case FCH04171-1, a Felony
- May 20, 2003, Health & Safety Code § 11550(a), Use of a Controlled Substance. San Bernardino County Case MWV073946, a Misdemeanor.
- November 15, 2006, Health & Safety Code § 11550(a), Use of a Controlled Substance. San Bernardino County Case MWA052308, a Misdemeanor.
- August 22, 200, Penal Code § 417, Exhibit Deadly Weapon. San Bernardino County Case FVA700781, a Misdemeanor.
- July 2, 2008, Penal Code § 12020(a)(4), Carry Concealed Dirk or Dagger. San Bernardino County Case MWV803154, a Misdemeanor.
- June 16, 2020, Vehicle Code § 23103(a), Reckless Driving on Highway. San Bernardino County Case MSB20000422, a Misdemeanor.

DE-ESCALATION

Members of Team Four were specifically tasked with locating and apprehending Orr, a fugitive wanted for attempted murder. After containing Orr within his car, Deputy Nicassio and Detective Mondragon identified themselves as the Sheriff Department and informed him of the warrant for his arrest. Multiple commands to Orr sought his compliance to arrest him peacefully. He was directed to shut off his car, open his window, and place his hands outside. Orr apparently shut off his car but did not open his window. Other commands directed Orr to open the door of his vehicle and exit his vehicle. Orr did not comply. Orr instead rolled down his window and asked about his warrant. Detective Mondragon answered telling him it did not matter because a warrant had issued. Both Deputy Nicassio and Detective Mondragon emphasized to Orr that they wanted his arrest to end safely. Orr reacted by rolling his window up and, according to Deputy Nicassio, responded, "Fuck you."

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The team next used a less-lethal 40mm launcher to deploy a foam-gel projectile. They wanted to get Orr's compliance by breaking the window to his vehicle. Breaking the window would allow them to see Orr, ensure he could properly hear commands, and allow the possible use of a chemical agent to extract Orr. Deputy Nicassio also hoped to induce a reaction from Orr resulting in his surrender. Using the launcher allowed the team to maintain a safe distance from Orr. The team knew Orr possessed a large knife and had a history of violence using a knife. Moreover, each knew Orr's warrant for attempted murder was based on allegations he stabbed another individual with a knife.

Within seconds after the BIP was discharge, Orr violently opened his door and exited his vehicle holding his large knife. Without hesitating, he sprinted toward Deputy Nicassio, Inspector Autry, and Detective Mondragon, raising the knife to his head as he closed in. In seconds, Orr was in the area where they stood. Deputy Nicassio and Inspector Autry, thinking Orr was trying to kill them, discharged their weapons. The sudden and fast-moving attack provided no opportunity to de-escalate the encounter verbally or through some other less-lethal means at that point.

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).)¹² If an arresting officer encounters 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. (Penal C. §§196 and 197.)

¹² All references to code sections here pertain to the California Penal Code.

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PENAL CODE §196. Police officers may use deadly force in the course of their duties, under circumstances not available to members of the public. Penal Code §196 states that homicide by a public officer is justifiable when use of force “is in compliance with Section 835a.” Section 835a specifies a ***police officer is justified in using deadly force*** when he reasonably believes based upon the totality of the circumstances, that it is necessary:

- (1) to defend against an imminent threat of death or serious bodily injury to the officer or another, or
- (2) to apprehend a fleeing felon who threatened or caused death or serious bodily injury, if the officer also reasonably believes that the fleeing felon would cause further death or serious bodily injury unless immediately apprehended,

(Penal 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. §835a(d).) A peace officer is neither 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 2020,¹³ courts have defined the constitutional parameters as to the use of deadly force for many years. 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, 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.) Caselaw also demonstrates *how* to undertake the analysis as to 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.

¹³ Assem. Bill No. 392 (2019-2020 Reg. Sess.) approved by the Governor, August 19, 2019. [Hereinafter “AB-392”]

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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).) The 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. §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 standards for use of deadly force during arrest are set forth at subsections (b) through (d) of Section 835a, the legislature also included findings and declarations at subsection (a). While they provide guidance, the findings and declarations 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;¹⁴
- (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).)

¹⁴ 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).

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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, 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.

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(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’ given 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.) In 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.)¹⁵ The officer’s conduct should be evaluated as “the conduct of a reasonable person functioning as a police officer in a stressful situation.” (*Id.*)

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

¹⁵ 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 to *effect arrest*, as is governed by section 835a, then it appears the more generous standard included there would apply.

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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 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.)

When undertaking this analysis, one court explained:

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 “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.) The police are surrounded with a 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.’

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(*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 even though 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 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 is not “deadly force” as it falls short of the definition 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

Both non-lethal and lethal force was used against Orr in this case. In both instances, the use of force was justified.

Use of Non-Lethal Force: Members of Team 4 were specifically tasked with locating and apprehending Orr. The assignment was consistent with the team’s general mission to locate and arrest violent fugitives. As to Orr, a warrant of arrest for attempted murder had been issued based on allegations he had stabbed another individual with a knife.

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Orr was found in the parking lot of Bass Pro Shops and was contained in his vehicle after a VCT was executed on his vehicle. Deputy Nicassio, Detective Mondragon, and Inspector Autry took up positions near the unmarked units parked behind Orr's vehicle. Detective Mondragon carried his rifle while Inspector Autry and Deputy Nicassio were armed with handguns.

The team attempted to peacefully arrest Orr by issuing commands. Orr was directly addressed by name. He was told they were the Sheriff's Department. Orr was also told of a warrant for his arrest. He was ordered to shut down his car, open his window and place his hands outside. Although he turned off the engine, Orr did not open his window. Orr was subsequently directed to slowly open his vehicle's door and exit his vehicle. Although the command was repeatedly given, Orr did not open his door. As commands were directed at Orr, he was moving within his vehicle. As a result, both Inspector Autry and Detective Mondragon saw Orr holding a large knife in his hand. After hearing about the warrant, Orr rolled down his window and asked, "What's the warrant for?" Detective Mondragon replied, "It doesn't matter, you have a warrant for your arrest." Deputy Nicassio stated several times "We just want this to end safely." Detective Mondragon similarly urged, "Hey Michael, let's do this nice and safe Michael." Showing his non-compliance, Orr responded by rolling up his window and remaining in his vehicle.

Tactics to effectuate Orr's arrest changed after verbal commands to Orr were unsuccessful. Using a 40mm launcher, Detective Mondragon discharged a less-lethal gel-foam projectile to break the closed driver's window of Orr's car. The team could continue to observe Orr, continue giving commands and ensure he was hearing those commands. Deputy Nicassio also hoped such strong action would induce Orr to surrender. Finally, breaking the window allowed for the future use of a chemical agent, if necessary, to extract Orr from his vehicle. There was no intention to use the projectile directly on Orr and no physical contact was made with Orr after it was discharged.

Deploying the launcher to discharge the less-lethal projectile was reasonable given the circumstances. "A police officer in California may use reasonable force to make an arrest, prevent escape or overcome resistance, and need not desist in the face of resistance. ... They are charged with acting affirmatively and using force as part of their duties, because 'the right to make an arrest ... necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.' (Citation omitted.) Equally important, a police officer must have control over the manner and means of making an arrest or detention." (*Edson v. City of Anaheim* (1998) 63 Cal.App4th, 1269, 1273.) In this instance, the team had a duty to arrest Orr, a dangerous and armed fugitive. The decision to break the window was essentially a means to continue communication with Orr after he ignored the initial commands to surrender. Using the tactic permitted the team to maintain a safe distance from a fugitive armed with a knife who was prone to use it. Moreover, breaking the window was a means to prompt Orr's voluntary surrender or, his extraction by chemical agent, a less-lethal option. Under the circumstances, the use of a less-lethal force by Detective Mondragon to facilitate Orr's arrest was reasonable and thus justified.

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Use of Lethal Force: The later use of lethal force by Deputy Nicassio and Inspector Autry Officer was based on honest and objectively reasonable beliefs that Orr posed an imminent risk of serious bodily injury or death individually and to all of them, collectively.

Within seconds of deploying the projectile, Orr violently opened the door of his vehicle and exited with a large knife. Orr charged toward Deputy Nicassio, Inspector Autry, and Detective Mondragon who stood in a confined space toward the back of Orr's vehicle. Within seconds, Orr reached their immediate area and raised his knife above his shoulder, near his head. Deputy Nicassio reacted by moving to his left, away from Orr; the video recording shows that Orr followed Deputy Nicassio. Inspector Autry reacted to Orr's attack by stepping backwards. Both Deputy Nicassio and Inspector Autry discharged their weapons as Orr advanced toward them with his knife.

Both Deputy Nicassio and Inspector Autry believed Orr wanted to kill them. Deputy Nicassio thought Orr was going to stab him in the neck or on the side of his arm. Likewise, Inspector Autry believed Orr would have killed him if stricken with the knife. Deputy Nicassio saw Orr's eyes showed a determination to kill, while Inspector Autry said Orr's face was full of rage.

The use of lethal force is objectively reasonable when there is a sudden attack by a rapidly advancing suspect carrying a knife. This is especially true when the confrontation takes place in a small, proximate area. (*Reynolds v. County of San Diego, supra*, 661 F.3d at 1072.) In this instance, Orr's attack presented an imminent danger resulting in the need for both Deputy Nicassio and Inspector Autry to protect themselves individually and each other. The video recording shows that Orr was physically close to both Deputy Nicassio and Inspector Autry when he raised his knife. The encounter was sudden and fast moving, taking place within a confined area. In seconds, Orr was in front of them within arm's reach. Under such circumstances, neither Deputy Nicassio nor Inspector Autry were required "to hold fire ... to ascertain whether [Orr would] in fact, injure or murder [them]." (*Id.*) The facts and circumstances surrounding this shooting event called for Deputy Nicassio and Inspector Autry to protect themselves individually and collectively by use of deadly force. Their belief Orr was an imminent threat was honest and objectively reasonable.

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CONCLUSION

Based on the facts presented in the reports and the applicable law, the use of lethal force by both Deputy Nicassio and Inspector Autry was a proper exercise of the right of self-defense and defense of others. Deputy Nicassio was legally justified in his action and no criminal liability attaches in this case. Inspector Autry was also legally justified in his action resulting in no criminal liability in this case.

Detective Mondragon's use of Less-lethal force was a proper and reasonable exercise of his power of arrest and his actions were legally justified.

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