P U B L I C R E L E A S E M E M O R A N D U M

DATE:	**October 21, 2026**
SUBJECT:	**Officer Involved Shooting (Fatal)**
Officers:	**Officer Johnny Tuitavake** **Fontana Police Department**
Involved Subject:	**Daverion Kinard (Deceased)** **Date of Birth 02/14/1992**
Date of Incident:	**February 13, 2021**
Incident location:	**16000 Block of Casa Grande Avenue** **Fontana, CA**
DA STAR #:	**2021-51139**
Investigating Agency:	**San Bernardino County Sheriff's Department**
Case Agent:	**Detective Edward Hernandez**
Report Number #:	**DR# 602100038 / H# 2021-021**

PREAMBLE

This was a fatal officer involved shooting by an officer from the Fontana Police Department. The shooting was investigated by 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# 602100038 / H# 2021-021.

FACTUAL SUMMARY

On February 13, 2021, at around 10:33 in the evening, Fontana Police Officers Andrew Hackett and James Escarpe responded to a call for service at an apartment in the 16000 block of Case Grande Avenue in the City of Fontana. An off-duty Los Angeles Police Department officer called dispatch and reported that his neighbor had seen a black male adult on her ring camera, entering her home. When Officers Hackett and Escarpe arrived at the location they found an open window and the outside screen removed. Hackett and Escarpe verbally called out and announced themselves. Hackett and Escarpe saw the male, later identified as Daverion Kinard, walk down the stairs inside the residence, and then run out of the apartment through the garage door.

Officers Hackett and Escarpe gave chase and were joined by other Fontana Police Department personnel as back up: Officers Jacob Gregg, Johnny Tuitavake, and Detective Chris Drayer. Kinard fled over a block wall into another residence's backyard. The homes that Kinard fled to were empty model homes where no one currently lived. The officers pursuing Kinard lost sight of him.

Officer Tuitavake drove a marked patrol vehicle in an attempt to locate Kinard. Officer Tuitavake drove east on Casa Grande, south on Napa Valley Road, west on Grove Mill Lane, north on Heitz Way, and stopped to coordinate with Officer Gregg on Justin Street to continue their search for Kinard. Officer Tuitavake exited the patrol vehicle and walked west on Justin Street and south along the model home sales office at the corner of Justin Way and Heitz Way. Officer Tuitavake held his flashlight in his right hand and his handgun remained in his holster on his left hip as he searched the area for Kinard. Officer Tuitavake saw a large portable restroom on the west side of the model home sales office and approached.

When Officer Tuitavake tried to open the restroom door, it was locked from the inside. Officer Tuitavake pulled a second time and managed to forcibly open the locked door. Seated inside was Kinard; he was fully dressed and seated upon the closed toilet lid. Kinard leaned forward with his elbows on his knees and his arms folded across his waist, hands obscured. Officer Tuitavake said, "hey" and illuminated Kinard with his flashlight. Kinard moved his left arm from his waist area and opened his left hand. Kinard's right hand remained hidden and near his waistband, crossed over to his left side. Kinard's right hand was crossed and tucked under his left elbow. (See photos below.) Officer Tuitavake saw Kinard's closed right hand move from across Kinard's body at Kinard's waist. Officer Tuitavake believed that Kinard had a handgun in his right hand because it was closed and it appeared to Officer Tuitavake that Kinard held something in that right hand.

Officer Tuitavake drew his firearm from its holstered position with his left hand and simultaneously lost his grip on the portable bathroom door. The door was spring-loaded and forcibly closed on Officer Tuitavake's left leg. The spring-loaded door required being held open by design. Officer Tuitavake reached across his body with his right hand to grab the door and hold it open. He continued to hold his flashlight in his right hand, but it pointed

towards the ground, in his left hand was his firearm. Officer Tuitavake placed the left side of his body in front of the restroom door and pointed his handgun at Kinard. Officer Tuitavake shot one round at Kinard, striking Kinard in the chest. Upon review of Officer Tuitavake's body worn camera, at the time of the shooting, Kinard had a blue object in his partially closed right hand. This object was later identified as a cigarette lighter.[1]

Officer Tuitavake ordered Kinard to put his hands up and get on the restroom floor. Kinard complied with Officer Tuitavake's command and laid on the ground, Officer Tuitavake called out "shots fired" over the radio and attempted life saving measures. After other officers attempted additional life saving measures, and after paramedics arrived, Kinard was pronounced dead.

STATEMENTS BY POLICE OFFICERS

On March 3, 2021, **Officer Johnny Tuitavake** was interviewed by Detectives Scott Abernathy and Edward Hernandez.

On February 14, 2021, **Officer Johnny Tuitavake** was employed by the Fontana Police Department assigned to patrol. Officer Tuitavake was in uniform and drove a marked patrol vehicle. While on patrol, Officer Tuitavake and his partner were dispatched to a residence in the 16000 block of Casa Grande. Information aired that a burglary was in process, the suspect was gaining access to the inside of the home, and an occupant was possibly inside the home. The reporting party was aired to be an off-duty police officer who was relaying third-party information to dispatch. Officer Tuitavake believed that based on his training and experience, the suspect could be armed and dangerous as residential burglars "tend to carry weapons with them such as firearms in case they encounter any conflict" inside the home.

Upon arrival at the scene other officers were engaged in a foot pursuit of the suspect and the suspect's description, male wearing all black, was put out over the radio. Officer Tuitavake quickly got out of his patrol vehicle to help his partners pursue the suspect (later identified as Daverion Kinard). However, Kinard scaled a residential fence into another backyard. Officer Tuitavake did not know whether that second residence was occupied. Officer Tuitavake returned to his patrol vehicle and circled the block in an attempt to locate Kinard.

Officer Tuitavake found a broken fence[2] and saw a portable restroom situated next to the broken fence. Officer Tuitavake was unsure if Kinard had kept running or was hiding in the portable restroom. Officer Tuitavake checked the portable restroom for Kinard. Officer

[1] The lighter was photographed inside the portable restroom near placard five but was not initially collected at the scene. Its evidentiary value was noted after review of the body worn camera footage. The following day Sheriff's Department personnel returned to the scene to collect the lighter. The lighter was found in an area adjacent to the portable restroom as it has been washed out of the portable restroom when it was cleaned.

[2] A Lennar Homes construction manager confirmed that the fence had been damaged previously by high winds.

Tuitavake tried to open the door with his left hand, while he held his flashlight in his right hand. The portable restroom door was locked from the inside, an indicator on top of the handle showed that it was occupied.
Officer Tuitavake used additional force to open the locked door and illuminated the inside with the flashlight in his right hand. Officer Tuitavake was "immediately surprised and startled" because Kinard was inside. Kinard was seated on top of the closed toilet lid.

Kinard sat leaned forward with both his arms crossed and hands tucked in his waistband area. Kinard matched the clothing description that was previously given out and wore a heavy black coat. Officer Tuitavake noted Kinard's demeanor and hand placement. Kinard's demeanor was that he "looked like he was thinking about something," and Kinard's hands were "tucked in his waistband area, out of view." Officer Tuitavake believed that Kinard was "contemplating whether he was going to use a gun on [Officer Tuitavake]."

Kinard raised his left hand up, and kept his right hand down, concealed, and tucked into his waistband. Officer Tuitavake believed that Kinard may have raised his left hand in an effort to distract Officer Tuitavake from a firearm concealed in his waistband and held by his right hand. When Kinard moved his right hand, it looked like he was grasping something and looked, "kind of a halfway closed fist."[3]

The door to the porta potty was spring loaded and began to close on Officer Tuitavake. Officer Tuitavake used his right hand, which held the flashlight, to stop the door from closing on him. This movement caused his flashlight to point down, and the inside of the porta potty was no longer illuminated. Officer Tuitavake used his left hand to unholster his firearm. During this time, Officer Tuitavake saw Kinard's right hand come away from his waistband and out towards Officer Tuitavake. Officer Tuitavake believed that Kinard was drawing a firearm to shoot Officer Tuitavake.

Officer Tuitavake fired one shot from his duty weapon and ordered Kinard to the ground. Officer Tuitavake fired only one shot because after the first shot, Kinard raised both of his arms. At the time the shot was fired, Officer Tuitavake saw Kinard's left hand raised, with his right hand tucked into his waistband, and the right hand moved and started to come out of Kinard's waistband.

After the shooting, Kinard was searched, and aid was rendered by Officer Tuitavake until his partner came to the location, aired their location on the radio, and took over life saving measures.

On February 14, 2021, **Officer James Escarpe** was employed by the Fontana Police Department assigned to patrol. Officer Escarpe was in uniform and driving a marked patrol vehicle. While on patrol, Officer Escarpe and his partner were dispatched to a residence in the 16000 block of Casa Grande reference a burglary in process.

[3] While Officer Tuitavake noted the shape of Kinard's right hand as being a "halfway closed fist," he stated that he did not see a specific object in Kinard's right hand. At the scene, a blue BIC brand lighter was found inside the portable restroom, and it was determined that Kinard held the lighter during the incident.

Upon arrival, Officer Escarpe's saw that the window east of the front door did not have a screen attached. Officer Escarp's partner announced twice, loudly, that they were "Fontana PD." Kinard, who was inside the residence ran down the residence's interior stairs and wore all black clothing and wore a black backpack. Officer Escarpe yelled, "Hey! Stop! Fontana PD!" Kinard looked at Officer Escarpe with a startled expression and fled the residence. As Kinard fled, Officer Escarpe chased him and was joined by additional backing units, to include Officer Tuitavake. During the foot pursuit Officer Escarpe could not see whether Kinard held anything in his hand. Kinard jumped over a block wall and Officer Escarpe followed over the same wall. Once both Kinard and Officer Escarpe got over that block wall, Officer Escarpe and other trailing officers lost sight of Kinard. Pursuing officers continued to look for Kinard.

Moments later, Officer Escarpe heard a single gunshot and broadcasted, "shot fired" over the radio. Officer Escarpe heard Officer Tuitavake also broadcast "shots fired" and his location, and Officer Escarpe went to Officer Tuitavake's location. Officer Escarpe saw Kinard lying supine on the portable restroom's floor and recognized Kinard as the subject inside the home and the person who ran from officers. Officer Escarpe helped to perform lifesaving measures on Kinard.

INCIDENT AUDIO AND VIDEO

BODY WORN CAMERA. Officer Tuitavake had his body worn camera activated while he and his partner responded to the scene. They discussed the location, and the call detail records as they were driving to the scene. Officer Tuitavake was in the passenger seat and helped to direct his partner who was driving. Officer Tuitavake is heard excitedly telling his partner to stop the car, and he jumped out of the passenger side and looked for Kinard who fled on foot. Officer Tuitavake ran around the patrol vehicle from the passenger side and jumped into the driver's seat.

Officer Tuitavake drives quickly around the corner, the tires of the patrol vehicle squeal and Officer Tuitavake put out on the radio that "he's hiding on the other side of the wall." Officer Tuitavake stopped the patrol vehicle and is heard talking to another officer; he asks, "Hey, was that you right there? He's on the other side of the wall bro." Officer Tuitavake runs along the side of a model home towards the portable restroom. The video is dark, but Officer Tuitavake turns on his flashlight and illuminates the broken fence just outside of the portable restroom.

Officer Tuitavake checked the portable restroom and his flashlight illuminates Kinard, seated inside, both of Kinard's hands are tucked along the opposite sides of his waistband. Officer Tuitavake says, "Hey!" and Kinard's left hand raises, while his right hand remains tucked behind Kinard's right elbow.





Immediately after being shot, Kinard pulled out his right hand from his waist area and held both hands up. Body worn camera showed that he was holding a blue BIC lighter that was later found at the scene.



DECEDENT

AUTOPSY. Dr. Brian Hutchins, Forensic Pathologist for the Coroner Division of the San Bernardino County Sheriff's Department, conducted the autopsy of Daverion Kinard on February 25, 2021. Dr. Hutchins determined the cause of death was gunshot wound to his chest and abdomen.

A gunshot entrance wound was noted on the left chest, near midline, 18 inches from the top of the head and one-half inch left of midline. There was no exit wound noted. The wound path was directed front to back and right to left, and downward.

TOXICOLOGY. Blood samples were collected from Daverion Kinard on February 25, 2021.

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

- Blood Alcohol Level – .118%
- Amphetamine – 39 ng/mL
- Methamphetamine – 290 ng/mL

CRIMINAL HISTORY.

2015, 273.5(a) of the Penal Code, Inflict Corporal Injury on a Spouse or Co-Habitant, with Great Bodily Injury. San Bernardino County court case FWV1501406, a felony.

2016, 459 of the Penal Code, First-Degree Burglary. San Bernardino County court case 16CR-007242, a felony.

2019, 459 of the Penal Code, Second-Degree Burglary. San Bernardino County court case FWV19001864, a felony.

DE-ESCALATION

The incident under review unfolded quickly when Officer Tuitavake was in active pursuit of Kinard and found him hiding inside a potable restroom. Before Officer Tuitavake could issue a command, he saw Kinard make a furtive movement with his hand that Officer Tuitavake perceived as drawing a weapon. Officer Tuitavake stated, "I didn't have two hands on the gun I just had one hand on my gun 'cause I had to quickly get it out of my holster and quickly shoot because I thought he was going to shoot me." There was insufficient time to order Kinard to comply or deescalate the rapidly moving situation.

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).) [4] 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.)

[4] All references to code sections here pertain to the California Penal Code.

An officer-involved shooting may be justified as a matter of self-defense, which is codified in Penal Code at §§196 and 197. Both of these code sections are pertinent to the analysis of the conduct involved in this review and are discussed below.

PENAL CODE SECTION 196. Police officers may use deadly force in the course of their duties, under circumstances not available to members of the general public. Penal Code §196 states that homicide by a public officer is justifiable when it results from a use of force that "is in compliance with Section 835a." Section 835a specifies a ***police officer is justified in using deadly force*** when he reasonably believes based upon the totality of 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,[5] 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.

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

There are two new factors in section 835a that did not appear in the section previously, nor did they develop in caselaw pertaining to use of deadly force. First, a peace officer must make reasonable efforts to identify themselves as a peace officer and warn that deadly force may be used, prior to using deadly force to affect arrest. (Penal C. §835a(c)(1).) This requirement will not apply if an officer has objectively reasonable grounds to believe that the person to be arrested is aware of those facts. (Penal C. §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;[6]
>
> (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

[6] 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).

enforcement, therefore.

(Penal C. §835a(a).)

PENAL CODE SECTION 197. California law permits *all persons* to use deadly force to protect themselves from the imminent threat of death or great bodily injury. Penal Code §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. (*Id.*)

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. (*Id.*) 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.4th1125, 1147.)[7] 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.*)

[7] 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. (*Baldridge 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, Officer Tuitavake had an honest and objectively reasonable belief that Kinard posed an imminent risk of serious bodily injury or death. During the interview with Officer Tuitavake, he was asked, "when did you actually decide to shoot, just to be clear?" Officer Tuitavake stated,

> It was the time where he had his left hand up and he had his right hand tucked in his waistband area out of view and simultaneously I'm trying to prop that door open, my flashlight is facing down, it is dark inside and I'm simultaneously trying to grab my gun out of the holster and when he is moving his right hand away from his waistband area, that's the time where I thought he was pulling out a gun to shoot me, so that's the time I shot him.

Imminence is an important part of the right to self-defense, and here, the entire event unfolded in mere seconds. Likewise, reasonableness is judged from the perspective of a reasonable officer on scene. Given the circumstances of the call for service, Officer Tuitavake's training and experience, and the furtive movements of Kinard as verified by body worn camera, Officer Tuitavake reasonably believed Kinard was armed and was going to shoot him in a further effort to get away.

Officer Tuitavake fired one round from his weapon and did not continue shooting when Kinard raised both arms to show Officer Tuitavake that he was not armed. Given the totality of the circumstances, Officer Tuitavake's decision to use lethal force was justified.

CONCLUSION

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

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