

INTEROFFICE MEMORANDUM

DATE: January 5, 2010 **PHONE:** (909) 945-4216

FROM: **John P. Kochis**
Chief Deputy District Attorney
West Valley Division

TO: **Dennis D. Christy**
Assistant District Attorney

James B. Hackleman
Assistant District Attorney

SUBJECT: Officer Involved Death/Injury
INVOLVED OFFICERS: Kevin Cushman, Travis Cotton
INVOLVED AGENCY(IES): Upland Police Department
INJURED/DECEASED PARTY: Jordan Roberts, DOB: 09-18-1990
CITY OF RESIDENCE: Upland, CA
DATE AND TIME OF INCIDENT: June 26, 2009, 2015 hours
INVESTIGATING OFFICER: Steven Pennington
SHERIFFS DR #: 600900095
SHERIFFS H#: 52-09
STAR #: 2009-53793

OVERVIEW

The Upland Police Department received information on June 24, 2009 that Jordan Roberts had engaged in sexual intercourse with an underage teenage female. Detectives from the Upland Police Department assisted the victim in making a pretext telephone call to Roberts. Roberts admitted having sexual intercourse with the under aged victim during the call and begged her not to report the incident to the police. Roberts mentioned during the call that he would kill himself rather than be arrested and face prosecution for his actions.

Upland Police Detectives obtained a search warrant for Roberts' home based upon the facts uncovered during their investigation. They went to his home on June 26, 2009 to serve that search warrant. When they arrived they made contact with several persons present who informed them that Jordan was upstairs in the bathroom taking a shower.

Members of the Upland Police Department then entered the residence and announced their presence. They received no response.

Officers searched the first floor, found no one and proceeded upstairs. Once outside the bathroom they were able to hear someone inside. Due to the prior statements Roberts had made about intending to harm himself, officers decided to kick the door in and take Roberts into custody.

Officers kicked the door in and found Roberts inside the bathroom. They ordered Roberts to show his hands. Roberts instead reached for a handgun that was located on top of the toilet tank and raised the gun toward the officers. Officers Cushman and Cotton both fired their service weapons at Roberts. One of the bullets struck Roberts in his right upper leg and the other missed and shattered the shower door. Roberts then pointed the gun he was holding to his head and fired one time into his own skull. He was transported to the hospital where he later died from a self-inflicted gunshot wound to his head.

FACTUAL BASIS

The following materials have been submitted and form the basis for this Overview, Factual Basis and Summary; the San Bernardino County Sheriff's Department's investigation and reports, witness and officer interviews, pretext call, photographs, recordings, diagrams, medical records, autopsy protocol, evidence logs and lab reports.

FACTUAL SUMMARY

Upland Police Officers received information on approximately June 24, 2009 that Jordan Roberts, age 18, had engaged in sexual intercourse with a 14 year old female. Officers initiated a criminal investigation. Through witness interviews officers obtained statements that Jordan Roberts had provided the 14-year-old victim with Oxycontin and subsequently engaged in sexual activity, including intercourse, with her.

Upland Police Detectives then assisted the victim in making a pretext telephone call to Jordan. That call was monitored by the detectives. Jordan made numerous admissions during the telephone call about having sex with the under aged female. He confronted and questioned the victim as to why she told her parents about the incident. He pleaded with her not to report the incident to the police. Jordan also stated during the pretext call that if the police came to arrest him he was going to shoot himself in the head because he did not want to be prosecuted or go to jail.

After the pretext call Jordan confided in friends that the police wanted to speak with him about having sex with an under aged girl. He admitted to friends that he did have

sex with the under aged female. He also told friends that if the police showed up to question him about the case that he was going to kill himself.

Upland Police Detectives obtained a search warrant for Jordan's home based upon the information they received during their investigation. They planned to serve the search warrant on Friday afternoon June 26, 2009 in the late afternoon or early evening. They called Jordan's home and asked the person who answered the phone if Jordan was there. They were told he was not.

Detectives and Officers from the Upland Police arrived at Jordan's home in Upland at approximately 5:45 pm on June 26, 2009 to serve the search warrant. As they approached the house they contacted a family friend who was walking out of the garage. That friend confirmed that Jordan was at home and in the upstairs bathroom taking a shower. He also told police that Jordan was not armed and that there were others in the house at the time.

Officers approached the front door to the home. As they were preparing to give their knock notice the front door was opened by Jordan's sister who was standing inside the house with a friend. The police ordered them both out of the house. They both complied.

Once outside officers asked them who else was inside the house. They told the officers that only Jordan was at home. They said he was upstairs taking a shower. Officers asked if Jordan was armed and they were told he was not. Officers then asked if Jordan had access to any guns and they were again told no.

Upland officers then began giving knock and notice announcements at the open front door. Officer Cotton announced, "Police Department, search warrant, police department search warrant, come out with your hands up." No one else came out and they heard no acknowledgements from inside the house.

Officers entered the house and moved through the downstairs. Officer Cotton repeated the announcement several times on the first floor. He repeatedly announced, "Police Department, search warrant, come out with your hands up." They received no response. They searched the first floor and the garage and found no one.

Officers then proceeded to the bottom of the stairs. Officer Cotton repeated his announcement of, "police department, search warrant, if you're up there come out with your hands up." He made this announcement over ten times while he was in the house. He never received a response.

Officers Cotton, Cushman and Steenerson moved upstairs. They searched the bedrooms first and found no one. The last room to be searched was an upstairs bathroom. The door to that bathroom was closed. When Officers approached that

door they heard the sound of someone moving around the bathroom. Officer Cushman checked the door and found it to be locked.

Officer Cushman kicked the door open. Officers found Jordan inside wearing only his boxer shorts. Jordan looked directly at the officers. Officer Cotton yelled, "Police, stay where you are at, let me see your hands, keep your hands up." Jordan turned toward the toilet. Officers saw a handgun on top of the toilet tank. Jordan grabbed the handgun and turned toward the officers. Officer Cotton yelled, "Gun..gun." Jordan continued to turn toward officers Cotton, Cushman and Steenerson while holding the gun. The Officers saw Jordan raise the gun and turn it toward them.

Officers Cotton and Cushman, out of fear for their safety and the safety of each other, each fired their handguns one time at Jordan. One of the shots missed Jordan altogether and shattered the shower door, the other shot struck Jordan in the right leg.

Jordan continued to raise up the handgun he was holding. Jordan brought the gun up to his head and pulled the trigger. The bullet Jordan fired entered the right side of his head several inches above his ear. Jordan fell over onto the toilet. The handgun he was holding fell onto the floor.

Officers immediately yelled for medical aid. Officer Cushman entered the bathroom and retrieved the handgun Jordan had been holding. Officers Cushman and Cotton then moved Jordan into the hallway outside the bathroom. They saw a possible gunshot wound to Jordan's head. Upland Officers stayed with Jordan until the members of the fire department arrived. Paramedics subsequently arrived and transported Jordan to the emergency room at the Arrowhead Regional Medical center.

Jordan was pronounced brain dead at the hospital and placed on life support. Jordan subsequently passed away after his family arrived at the hospital.

An autopsy was later conducted. The cause of death was determined to be a fatal gunshot wound to the head. Based upon the presence of soot on the entry wound and in the underlying soft tissue of the entry wound the pathologist determined the wound to be a contact wound. The direction of the bullet path was from the back of the head to the front and from right to left. The gunshot wound to Jordan's right thigh was determined to be non-fatal by the pathologist. Based upon the autopsy findings, and the investigation including the statements of the officers the manner of death was determined to be a suicide.

Investigators from the San Bernardino County Sheriff's Office collected evidence from the home Jordan lived in including the bathroom where he shot himself and the upstairs area adjacent to the bathroom. They recovered a loaded .22 caliber Beretta pistol; one fired "C" casing on the tile floor of the upstairs bathroom (same casing as in the .22 caliber Beretta pistol); one fired S & W 40 casing located on the tile floor of the

upstairs bathroom; one fired WIN 45 caliber casing located on the carpet floor just south of the doorway to the bathroom as well as other items. (Officer Cushman was armed with and fired his 40 caliber Department issued handgun during the incident. Officer Cotton was armed with and fired his 45-caliber duty weapon during the incident. Decedent Jordan Roberts fired the family owned .22 caliber handgun during the incident.)

STATEMENT OF APPLICABLE LAW

The legal doctrine of self-defense is codified in Penal Code Sections 197 through 199. Those sections state in pertinent part: Where from the nature of an attack a person, as a reasonable person, is justified in believing that his assailant intends to commit a felony upon him, he has a right in defense of his person to use all force necessary to repel the assault; he is not bound to retreat but may stand his ground; and he has a right in defense of his person to repel the assault upon him even to taking the life of his adversary. (People v. Collins (1961) 189 CA 2d 575, 1 Cal Repr. 504).

Justification does not depend on the existence of actual danger but rather depends upon appearances; it is sufficient that the circumstances be such that a reasonable person would be placed in fear for his safety and the defendant act out of that fear (Penal Code Sec. 19; People v. Clark (1982) 130 CA 3d 371, 277, 181 Cal. Repr. 682

CAL CRIM 3470 (REVISED JUNE 2007) RIGHT TO SELF-DEFENSE OR DEFENSE OF ANOTHER

Self-defense is a defense to the unlawful killing of a Human Being. A person is not guilty of that/those crimes if he/she used force against the other person in lawful self-defense or defense of another. A person acts in lawful self-defense or defense of another if:

1. The person reasonably believed that he/she or someone else was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully;
2. The person reasonably believed that the immediate use of force was necessary to defend against that danger; AND
3. The person used no more force than was reasonably necessary to defend against that danger.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The person must have believed there was imminent danger of violence to himself/herself or someone else. The person's belief must have been reasonable and he/she must have acted because of that belief. A person is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the person used more force than was reasonable, the person did not act in lawful self-defense/ or defense of another.

When deciding whether a person's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the person and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the person's beliefs were reasonable, the danger does not need to have actually existed.

The person's belief that he/she or someone else was threatened may be reasonable even if he/she relied on information that was not true. However, the person must actually and reasonably have believed that the information was true.

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of death/bodily injury has passed. This is so even if safety could have been achieved by retreating.

USE OF DEADLY FORCE BY A PEACE OFFICER

Authorization of the use of Deadly Force is analyzed under the Fourth Amendment's "*objective reasonableness*" standard. *Brosseau v. Haugen*, 543 U.S. 194, This question "is governed by the principles enunciated in *Tennessee v. Garner*, (1985) 471 U.S. 1 and *Graham v. Connor* (1989) 490 U.S. 386.

In these decisions, the US Supreme explained "it is unreasonable for an officer to 'seize an unarmed, non-dangerous suspect by shooting him dead.... However, where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force." (**Tennessee V Garner supra**)

Reasonableness is an objective analysis and must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. It is also highly deferential to the police officer's need to protect himself and others. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary.

Graham, 490 U.S. at 396, . The question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

The US Supreme Court in *Graham* set forth factors that should be considered in determining reasonableness: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. The question is whether the totality of the circumstances justifies a particular sort of ... seizure. (See also *Billington v. Smith*, (2002 9th Cir) 292 F.3d 1177, 1184.) The most important of these factors is the threat posed by the suspect. *Smith v. City of Hemet*, (9th Cir. 2005) 394 F.3d 689.

Thus, under *Graham*, the high court advised we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. "We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." (*Smith v. Freland* (6th Cir.1992) 954 F.2d 343, 347.

The US 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. *Roy v. Inhabitants of City of Lewiston* (1st Cir.1994) 42 F.3d 691, 695, In effect, the Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases.... (*Ibid.*) Thus, "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. In these circumstances, the Courts cannot ask an officer to hold fire in order to ascertain whether the suspect will, in fact, injure or murder the officer."

Based on the above stated principles, where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. *However where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to apprehend the suspect or prevent escape. (Tennessee v Garner; Graham V Conner supra.)*

ANALYSIS

First, Officers Cushman and Cotton were justified in using deadly force against Jordan Roberts due to the danger he presented when he raised a loaded handgun in their direction. They were justified in firing at him to protect themselves and each other from the danger he presented. They were confronted with a situation in which Jordan did not comply with any of their knock-notice directives that were given when they entered the home and searched the first floor. He did not comply with their directives to show his hands and keep his hands up when they entered the bathroom. Instead Jordan reached for a handgun and raised it toward them when they entered into the bathroom. It was reasonable for the officers to believe their lives were in danger when Jordan picked up the handgun and raised it toward them.

Second, the two shots fired by officers Cushman and Cotton were not fatal and did not cause Jordan's death. One shot missed Jordan entirely and the other struck him in the right thigh. Jordan's death was a suicide that occurred when he pointed the handgun he was holding at his own head and pulled trigger.

CONCLUSION

The shooting at Jordan Roberts by Upland Officers Cotton and Cushman was legally justified as a proper use of deadly force to protect themselves at the scene and in response to Jordan's pointing a loaded handgun in their direction. Neither shot fired by the officers resulted in any fatal injury to Jordan. One shot missed him completely and the other struck him in the right thigh. Jordan died from a gunshot wound to his head that he self-inflicted to avoid arrest and prosecution for a criminal case that was under investigation.

By: _____
John P. Kochis
Chief Deputy District Attorney

Dated: _____

Approved
By: _____
Dennis D. Christy
Assistant District Attorney

Dated: _____