

# INTEROFFICE MEMORANDUM

**DATE:** September 14, 2009      **PHONE:** (909) 387-6986

**FROM:** Karen Bell  
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Central Juvenile Division

**TO:** Dennis Christy,  
Assistant District Attorney  
For Criminal Operations

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Assistant District Attorney  
For Administration and Special Units

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**SUBJECT: OFFICER INVOLVED FATAL SHOOTING**

Involved Parties: Officer Serbando, Saenz, San Bernardino Police Department  
Officer Roy Diaz, San Bernardino Police Department

Decedent:: Christopher Mason (11-10-1985)

Date of Incident: May 2, 2009, 0329 hours

Investigating Agency: Detective Pete Higgins, San Bernardino Police  
Department

DR; # 2009 – 14383

DA Star Number: 2009-00-51466

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## PREAMBLE

This memo regarding the incident was completed after reviewing the San Bernardino police reports submitted by case agent Det. Pete Higgins. The reports include diagrams of the areas where the incident occurred, 9 CDs of photographs of the crime scene and aerial shots, a video CD of the parking lot area at the time of the incident, 8 audiocassettes of interviews and a visit to the scene with Det. Higgins after dark.

## FACTUAL SUMMARY

On May 2, 2009 at approximately 3:26 A.M. a 911 call was received by the San Bernardino Police Department from Witness #1. Witness #1 reported that

she was a waitress at Denny's Restaurant at 702 E. Highland Avenue. She saw several black men in front of the restaurant outside the front door and one of them was showing a handgun to the others. A "man with a gun" call was broadcast and two officers near by responded.

## LAW ENFORCEMENT WITNESSES

### Officer Roy Diaz

Officer Roy Diaz was parked on Elk Drive, just south of Highland Avenue a few blocks away from Denny's. When he heard the call from dispatch, he immediately drove westbound on Highland Avenue with his lights off and parked on Highland, east of the restaurant parking lot. He saw 15-20 black men and women standing near the front of the door of Denny's (the east side of the restaurant). He got out of his unit and walked toward the individuals with his handgun "deployed." He could see the arrival of Officer Serbando Saenz who drove eastbound on Highland Avenue to the location.

Officer Diaz continued on foot toward the east side of the restaurant across the parking lot using parked vehicles for cover. As he did, he saw a black male (later identified as suspect Christopher Mason) walking westbound toward the front door of the restaurant and Officer Saenz. Mr. Mason quickly made a u-turn and began walking quickly eastward in Diaz' direction. Officer Diaz believed that Mr. Mason had seen Officer Saenz when he abruptly turned around.

As Mr. Mason walked east, he was "fumbling around his shirt in his waistband". Officer Diaz yelled to Mr. Mason "Police! Let me see your hands." Mr. Mason did not respond, continued to keep his hands in his waist band area and began bobbing up and down near the front of a parked red Ford Expedition. At this point Officer Diaz heard a sound coming from the area where Mr. Mason was moving back and forth and up and down next to the Ford Expedition. The sound was metal hitting the pavement. Officer Diaz recognized the sound of a gun hitting pavement.

Officer Diaz immediately yelled at Mr. Mason "Gun! Let me see your hands". Mr. Mason did not obey, kept his hands out of view and continued to move back and forth in front of the Ford. Officer Diaz believed Mr. Mason might have a second gun, or was retrieving the gun he dropped. Officer Diaz kept the car between himself and Mr. Mason for protection and fired two shots at Mr. Mason.

Officer Diaz stated when Mr. Mason turned around in the parking lot and headed away from Officer Saenz with his hands in his waistband area he (Diaz) was afraid Mr. Mason might have a weapon. Mr. Mason's failure to respond to commands, his attempt to hide from the officer near the Ford and the sound of

the gun hitting the pavement confirmed his suspicions. Officer Diaz was in fear for his safety and Officer Saenz' when he fired two rounds at Mr. Mason. These shots hit a car parked next to the Ford causing damage to a window and the roof of the vehicle. The car was unoccupied.

Mr. Mason then ran east to another row of parked cars stopping in front of a silver PT Cruiser. He was followed by both officers who used the same car for cover positioning themselves to the rear of it. Officer Diaz continued to yell commands to Mr. Mason to show his hands and Mr. Mason kept his hands from sight and crouched down in front of the PT Cruiser. When Mr. Mason failed to comply, and tried to hide behind the front end of the PT Cruiser Officer Diaz felt he and Officer Saenz were in danger and he fired 7 more rounds at Mr. Mason. Several of these shots hit the left front fender of the PT Cruiser.

Officer Saenz fired through the back window of the vehicle and when Mr. Mason moved to the passenger side of the car, Officer Saenz fired again several times. Mr. Mason fell to the ground near to the right front fender and was handcuffed.

#### Officer Serbando Saenz

Officer Saenz arrived at Denny's from the west, parking his unit on the north side of Highland Avenue (facing the wrong way in traffic) next to the restaurant but out of the sight of the individuals gathered at the front door. Both officers arrived at about the same time and were in visual contact with each other. As Officer Saenz walked around the corner of the building toward the front door he asked if anyone had a gun. The group there said no and complied with his commands to show their hands.

As this was happening Officer Saenz heard commands being shouted by Officer Diaz. He saw Mr. Mason running toward him about 20-30 feet way and then turn and run back towards Officer Diaz. Mr. Mason's hands were "low and grabbing" at his waistband. Officer Saenz then heard the word "Gun" shouted by Officer Diaz. He could see Mr. Mason running with his hands near his waist and Saenz thought Mason might be trying to pull a gun out or shoot.

Officer Saenz heard two shots while Mr. Mason was near in the vicinity of the red Ford Expedition. Officer Saenz did not know who had fired the shots and he advised dispatch shots fired. He then ran to the PT Cruiser following Mr. Mason and Officer Diaz.

Officer Saenz stopped at the rear the parked PT Cruiser. Officer Diaz was to his left and Mr. Mason was in front of the car, moving back and forth crouching. Officer Saenz made eye contact with Mr. Mason through the rear and front windshield of the car and Mr. Mason still was not compliant with commands to show his hands. Officer Saenz was afraid for his safety and fired through the

rear window and front windshield. Mr. Mason moved to the right passenger side of the Cruiser and was still "diggin' " (meaning his hands were at his waist band area and not totally visible) so Officer Saenz fired several more shots. Mr. Mason fell to the ground near to the right front fender.

#### Detective Glenn Carr

Det. Carr photographed a .38-caliber revolver with wood grips under the left front side of the red Ford Expedition in the parking lot. He also photographed a tan, multi-compartment zippered top waist pack centrally located under the same vehicle. The revolver was loaded and the waist pack contained ammunition consistent with that in the revolver. The gun was not registered to Christopher Mason.

#### Detective Pete Higgins

Det. Higgins interviewed both officers after the incident and checked their duty weapons. Officer Saenz fired three rounds and Officer Diaz fired ten rounds.

#### Criminalist Jason McCauley

Jason McCauley conducted a gun residue examination on the hands of Christopher Mason and found two particles on his left hand and one on his right hand.

#### Cad Print Out

The CAD printout shows that the first call regarding a man with a gun was received at 03:26:55 hours. The first shots fired call occurred at 03:30:41. The second volley of shots was reported at 03:30:53. The report of a person down was received at 03:31:02

#### CIVILIAN WITNESSES

##### Witness #1

Witness #1 was inside the restaurant at work at the time of the shooting and did not see any of the actions of the officers in the parking lot. She made the call to 911 to report she had seen a man with a gun and remained on the phone with

the dispatcher for several minutes while in the rear of the restaurant. She was not able to identify Christopher Mason from photographs.

#### Witness #2

Witness #2 was the girl friend of Christopher Mason. She was in the PT Cruiser (she is the registered owner) at the time of the shooting. She had been driven to the location by Christopher Mason and remained in the car because she was not feeling well. She saw Christopher Mason walking towards the car looking over his shoulder just prior to the first shots she heard. She also saw an officer near Mr. Mason (Officer Diaz). She then saw Mr. Mason running to her car, heard the officer say something about a gun and Mason respond he did not have a gun. Shots were fired through her car windows and she ducked. She did not see the actual shooting. Her car suffered damage from gun shots but she was not injured.

She did not know if Mr. Mason had a gun that evening or owned one.

#### Witness #3

Witness #3 was standing in front of Denny's smoking a cigarette at the time of the shooting. She was with two men she had just met at a club elsewhere. She saw a black male walking in the parking lot reaching into his back waistband while a police officer (Officer Diaz) was telling him to freeze. She thought this man was going to shoot at the police and saw him move from side to side near a parked car just prior to the officer firing two shots. She ran into the restaurant and did not see the shooting. She identified the man she saw reaching into his waistband as the same person laying on the ground next to the PT Cruiser some time later. She could not identify Christopher Mason from photographs and she did not see him with a firearm.

#### Witness #4

Witness #4 was in front of the Denny's smoking a cigarette with two other people (Corey (last name unknown) and Witness #3). He saw a man walking in the parking lot away from the group of individuals standing in front of the restaurant door. He heard an officer say, "He's got a gun" and then heard 10 – 15 shots. He went into the restaurant and did not see the shooting. He could not identify the man walking across the parking lot.

#### Witness #5

Witness #5 was in his personal vehicle parked directly in front of Denny's in the southern most stall waiting for his girlfriend, Witness #1, to get off work. He saw a police officer walking to the front of the restaurant (Officer Serbando Saenz) with his gun out against his chest. The officer walked to a group of men standing outside and asked them about a gun. He then saw a man running and heard officers telling subject to get on the ground. The man ran east in the parking lot, he heard two shots and 6-7 more. He put his head down after the first shots and did not see the shooting.

#### Witness #6

Witness #6 is the brother of Christopher Mason and was present with him at Denny's that evening. He was attempting to light a cigarette while standing in front of Denny's when he heard shots fired. He ran for cover in the parking lot. He did not see anyone shot and did not have a firearm. He did not know if Christopher Mason had a gun with him that evening.

### **AUTOPSY PROTOCOL**

Dr. Glenn E. Holt, M.D. of the Coroners Office examined the body of Christopher Mason to determine the cause of death on May 6, '09. Dr. Holt made the following findings and observations:

1. A penetrating gunshot wound of the forehead
2. A penetrating gun shot wound of the left chest
3. A penetrating gunshot wound of the right abdomen
4. A grazing wound near the right inguinal ligament
5. Blood alcohol level of 0.12%

Cause of death was determined to be gunshot wounds of the torso and head in minutes.

The toxicology report revealed no drugs of abuse present other than the above noted alcohol level.

### **STATEMENT OF APPLICABLE LAW**

"When, in 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 the 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 the right in defense of his person to repel the assault upon him even to take the life of his adversary. (P. v Collins [1961] 189 Ca 2<sup>nd</sup> 575)

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. (P. v Clark [1982] 130 CA 3<sup>rd</sup> 371)

#### Cal Crim 507 Justifiable Homicide: By a Public Officer (in part)

The defendant is not guilty of murder if he killed someone while acting as a public officer. Such a killing is justified, and therefore not unlawful, if:

1. The defendant was a public officer;
2. The killing was committed while performing any legal duty;
3. The killing was necessary to accomplish a lawful purpose;

AND

4. The defendant had probable cause to believe that Christopher Mason posed a threat of serious physical harm, either to the defendant or to others.

A person has *probable cause* to believe that someone poses a threat of serious physical harm when facts known to the person would persuade someone of reasonable caution that the other person is going to cause serious bodily harm to another.

An officer or employee of the San Bernardino Police Department is a public officer.

#### Penal Code 835a

Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to affect the arrest, to prevent escape or to overcome resistance.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

### Use of Deadly Force by a Peace Officer

In *Graham v. Conner* (1989) 490 U.S. 386 the US Supreme court stated:

“The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. (Cites omitted) The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested (Cites omitted) nor by the mistaken execution of a valid search warrant on the wrong premises. (Cites omitted) With respect to the claim of excessive force, the same standard of reasonableness at the moment applies. (Cites omitted) 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.”

The court went on to say in *Graham*, op. cit., the factors to be considered in determining reasonableness: (1) 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 justified a particular sort of seizure.

### **ANALYSIS**

Officers responding to a call of a “man with a gun” know this is one of the most dangerous calls they get. Responding to an unknown person in public with a gun who may be under the influence of drugs, or alcohol or have mental health issues has a high prospect of danger. Officers are trained to take control of the circumstances, find the weapon, protect the public and themselves and sometimes they must make life-threatening decisions in a split second. On May 2, 2009 two San Bernardino police officers responded to just such a dangerous call and were forced to act in defense of themselves and other members of the public.

Immediately upon arrival of the officers, Mr. Mason refused to comply with commands to show his hands. He ran from them directing attention to himself and tried to hide behind vehicles. Mr. Mason had a duty to submit to the orders

of the officers and in failing to do so escalated a detention into a deadly encounter. All of this was dangerous and inconsistent with a harmless person. When Officer Diaz heard the sound of a gun hitting the pavement the choices left to he and his fellow officer diminished. Both officers believed Mr. Mason was a danger to the public and themselves and were obligated to pursue him and determine if he was armed.

Officers in such circumstances are entitled to use lethal force to defend themselves and need not retreat from their duties. Mr. Mason's continued non-compliance after two shots were fired was nothing short of incomprehensible. They believed he had dropped a gun, might be reaching for a second one and his behavior was irrational. Justification of their actions does not depend on the existence of actual danger but rather on the appearance of danger. Both officers felt they were in danger of being shot and used lethal force in self-defense.

### **CONCLUSION**

Under the facts presented in the reports submitted and the applicable law, Officers Saenz and Diaz use of deadly force was in response to an apparent and immediate threat of death or great bodily injury and therefore legally justified.

Respectfully submitted on behalf of the District Attorney for the County of San Bernardino:

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Chief Deputy District Attorney

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Date

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Assistant District Attorney for Criminal Operations

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Date