

DATE: January 26, 2010

FROM: RAY PYLE
Supervising Deputy District Attorney
West Valley Division

TO: Dennis D. Christy
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John P. Kochis
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West Valley Division

SUBJECT: Officer Involved Death
INVOLVED OFFICERS: Det. Patrick Birkett
INVOLVED AGENCY: Ontario Police Department
DECEASED PARTY: Marco Salgado
CITY OF RESIDENCE: Palmdale, Calif.
DATE / TIME OF INCIDENT: Oct. 14, 2009 11:54 PM
INVESTIGATING OFFICER: Det. Dave Rowe, Ontario Police Department
OPD CASE NUMBER: 091000832
STAR #: 2010-4627

INVOLVED PARTIES

Detective Patrick Birkett---Ontario Police Department
Marco Salgado---Deceased

CRIMINAL HISTORY

None

SUMMARY

On Oct. 14, 2009, officers were dispatched to the Liborio Market on G St regarding a man with a gun. The Liborio Market is located in a strip mall. The reporting party advised dispatch that the subject was inside the store with a gun. As officers responded to the scene, they were advised the subject was still inside the market. Officers were advised the subject was wearing a Raiders jacket and had the gun in his waistband, possibly a 9mm. Responding officers positioned themselves outside the market. As they did so, the reporting party exited the market pointing to two subjects between two cars stating, "the subjects are there". Officers observed two subjects between parked cars, one wearing a Raiders jacket. Officers Mikkelson and Barron ran to the

subjects, guns drawn, ordering them to put their hands in the air. Both subjects complied. Officers Barron and Mikkelson transitioned to their Electronic Control Devices (Tasers) as other officers on scene had the subjects at gunpoint. The subject with the Raiders jacket put his hands down not complying with officers commands to put his hands in the air. He reached toward his waist pulling his coat up and back revealing a handgun. When the subject reached for the gun, Det. Birkett shot two times striking the subject both times in the upper torso. Paramedics were immediately called. The suspect died as a result of his wounds.

CAUSE OF DEATH

An autopsy was performed by Dr. Changsri. An examination of the body of Mr. Salgado revealed that he died of two gunshot wounds to the upper torso.

TOXICOLOGY

Blood was drawn by Dr. Changsri from the chest and eyes of Mr. Salgado. Blood drawn from the chest revealed a blood alcohol level of .22%; blood from the eyes revealed a blood alcohol level of .28%. There was a presumptive positive for Benzodiazepines---drugs that slow certain nerve signals throughout the central nervous system. Side effects of benzodiazepines can include confusion, slurred speech, lack of coordination, dizziness, headache and nausea. Traces of Diazepam and Nordiazepam were also detected—both are benzodiazepine derivatives.

FACTUAL BASIS

The following materials have been submitted and form the basis for the factual overview and summary: the Ontario Police Department's investigation reports, photographs, witness and officer interviews, Taser video CD and recordings of radio dispatches.

STATEMENT OF FACTS

WITNESS #1 ---was interviewed by Officer Chavez. Witness #1 related that he was walking toward the store when he saw the suspect walk out of the market. He said he saw some officers walking from the opposite direction towards Salgado. He heard officers tell the suspect to put his hands up. He said the suspect did so initially then put his hands down towards his waistband. He demonstrated by shoving both his hands toward the left side of his waistband. It was at that time that the officers shot the suspect.

WITNESS #2---was interviewed by Officer Kamper and digitally recorded. Witness #2 related that he was the person who called from inside the market. He indicated he was at the bank/check cashing section. Salgado (wearing a Raiders jacket) and another male were in line in front of him. The subject wearing the Raiders jacket was drunk, he could smell alcohol on his breath and body. The subject asked witness #2 "where are you from" with witness #2 replying he was from

South America. The subject became agitated toward witness #2 stating that he was disrespecting him. Witness #2 stood in line for a few more minutes and tried to apologize. It was at that time that the subject turned around, lifted up his jacket and showed him a black 9mm handgun lodged in his waistband (at a later point in time, Detective Ortiz showed witness #2 his Glock 9mm. Witness #2 stated the gun he saw in Salgado's waistband looked just like Det. Ortiz' gun). He told the subject he did not want any problems. He went to the back of the store and called 911 to report a man with a gun inside the store. Witness #2 watched the subject walk out the front of the store. Witness #2 saw Ontario Police officers, telling them that the subject in the Raiders jacket was outside the store. Witness #2 then ran to his vehicle and heard two gunshots as he was entering his vehicle.

WITNESS #3---the wife of witness #3 was also interviewed by Officer Kamper. She corroborated her husband's statement with the exception that she did not see the gun in the subject's waistband.

WITNESS #4---was interviewed by Officer Gray and digitally recorded. When witness #4 arrived at the market, officers were already present. He was told by officers that it was not safe to go into the market. He said he saw two males exit the store where three officers confronted the subjects. Officers stated, "put your hands up, both of you" repeatedly telling the subjects to turn around. He said the subjects refused to put their hands up and refused to turn around. He said Salgado looked at officers like they were stupid and looking as if he were challenging the officers. He saw Salgado move his hand toward his waistband resulting in Salgado being shot. Witness related, "personally, I would have shot him myself, based on what I saw the officers were justified in what they did".

WITNESS #5---was interviewed by Officer Gray and digitally recorded. Witness related she was an employee of the Market working at the Western Union booth. She said suspects came to the window attempting to receive \$60. They did not have the proper control number and, consequently, could not receive the cash. She said the men became angry, yelled at her calling her a "fucking bitch" and were drunk (she could smell a strong odor and acted drunk by yelling at the people around them). They eventually provided the correct control number and received the cash. Mr. Salgado was the name on the form as receiving the money.

WITNESS #6---was interviewed by Officer Clinton. She said she saw officers detaining the subjects in the parking lot. One of the subjects was wearing a Raider jacket. Officers were pointing their guns at the subject. She saw the subject with the Raider jacket lift the left side of his jacket with his left hand and reached into the jacket with his right hand. Officers then fired striking the subject. When asked what she thought the subject was doing she related, "if it was me, I was thinking he had a gun". Witness #6's husband was also interviewed corroborating the statement of his wife. Witness #6's husband stated, "I think he is a bad guy, he wants to kill the police".

WITNESS #7---was interviewed by Detective Lee and digitally recorded. She corroborated the statements of witness #4 and witness #6 and her husband. Officer Kopperud interviewed her co-worker, Witness #8, who was standing next to witness #7. He corroborated witness #7's statement.

WITNESS #9---was the fiancée of the deceased. She indicated the engagement was called off because Mr. Salgado was being sent overseas on military assignment (National Guard). She indicated Mr. Salgado was suffering from depression and was taking medication for his depression. She said Mr. Salgado never mentioned anything about suicide or wanting to be dead.

OFFICER JAMES MIKKELSON---indicated in his report that he was dispatched to the Liborio regarding a call of a man with a gun inside the market. Dispatch further related the man was wearing a Raiders jacket. The caller indicated the gun was a 9mm.

Upon arrival at the store, dispatch advised the suspect was still inside the store. Officers took up positions around the store. The caller left the store, advising Mikkelson and other officers that the suspect was still in the store. It was at that time Mikkelson observed a subject matching the description exit the store. Mikkelson asked the caller if the subject was the person with the gun. The caller answered in the affirmative. Cpl. Barron and Mikkelson approached the subjects in the parking lot. The subject with the Raiders jacket (Salgado) stepped from between two vehicles at which time officers continued to give commands to put their hands above their heads. Detectives Birkett and Burris arrived taking a position approximately five feet from the suspect. Salgado began to lower his hands despite Mikkelson's commands to keep his hands above his head. Salgado failed to follow commands placing his hands near his pants pockets. Mikkelson tried to deploy his taser but it malfunctioned. Cpl. Barron drew his taser at which time Mikkelson observed Salgado begin to pull a handgun from his waist about the same time Barron activated his taser. At the same time Mikkelson heard two gunshots come from Birkett's direction. Salgado fell to the ground. Paramedics were immediately called.

DET. PATRICK BIRKETT---was interviewed by Det. David Rowe, Ontario Police Department. The interview was digitally recorded.

Det. Birkett stated he was in an unmarked detective unit doing follow-up on one of his cases when dispatch broadcast a man with a gun call the location being the Liborio Market. Dispatch informed that the man was seen with the gun and that the gun was in his waistband. As he drove toward the scene, dispatch further informed responding units that the man was still in the market wearing a Raiders jacket. Upon arriving at the market, Birkett and his partner Det. Burris, took up a perimeter position. Birkett put on his bulletproof vest marked with police on the front and back together with a velcro badge on the front. In addition, Birkett had a police badge on his belt. He removed the AR 15 rifle from the trunk of his vehicle. After a brief conversation with his partner, Birkett heard either officer Gutierrez or officer Devey state, "there's the guy in the Raiders jacket, leaving". Birkett spotted the individual and walked quickly toward him. At the same time he noticed Officers Mikkelson and Barron, both in OPD uniforms, approach the suspect. Upon arriving at the suspects location, all officers were on the same side of the individual to avoid a crossfire situation. Birkett related Mikkelson and Barron were repeatedly giving the suspects orders to put their hands up. Mikkelson tried to deploy his taser but it malfunctioned. Barron also had taser in hand. Birkett was the only one who had deadly force capability against the suspect. At this point in the interview Birkett remembers the suspect stating "it's only a BB gun" (later in the interview, Det. Rowe asked Det. Birkett about the suspect's statement. Det. Birkett related that he has been a police officer for 14 years, that

people lie to him all the time, that he could not take the suspects statements as true and chance jeopardizing the lives of Officers Mikkleson, Barron, other officers and civilians on scene, nor his own life). Birkett said he was concentrating on the suspects hands with his rifle in the low, ready position. He noted that the suspect never responded to commands given by putting his hands up, on top of his head or to get down on the ground or to turn around as instructed. Based on the suspect's statement re a BB gun, there was no language barrier. Birkett noted the suspect kept his hands down, moving them closer and closer to his waistband all the while ignoring officer's commands. Birkett noted the suspects hands were still down, not at his sides, but in front of him—described as directly above where his thighs would be. Birkett remembers the suspects hands moved from the position described to an area near his mid waist area (belt buckle area) after Mikkleson's taser failed to deploy.

It should be noted at this point that Detective Rowe questioned Detective Birkett regarding his experience as a police officer. Birkett noted that in his 14 years as a police officer, people usually carry guns in their waistband and predominantly in the front portion of the waistband for ready access.

Birkett indicated the suspects actions let him to believe he was going to use his gun against the officers as the suspect refused to comply with officer's numerous commands to lay down, go down to his knees, turn around or put his hands up . Rather, his actions were to reach for his waistband. It was at that time that Detective Birkett shot twice. The suspect fell to the ground on his back. Birkett stated it was at that time that he saw the gun in the suspect's waistband, to the left of the belt buckle, in the front, with the grip facing to the suspects right side. It was in line with the way the suspect was grabbing for his waistband.

A subsequent examination of the gun revealed it was a BB gun.

WITNESS #10---on the night of the incident witness #10 was at the AM/PM market when Mr. Salgado drove to his location. Witness #10 stated Salgado appeared to be intoxicated. Salgado was asking directions to Chino Hills to contact a friend to get some money. As witness #10 was homeless, he agreed to guide Salgado to Chino Hills in return for a promise of food and money. As Salgado was driving, he was unable to maintain his traveling direction swerving from right to left crossing freeway lanes. After a near collision they stopped, allowing witness #10's companion to drive. Witness #10 saw Salgado holding a "small black handgun" which Salgado put under the seat at one point. As they continued their travels, Salgado made several phone calls to people begging for money. Salgado apparently made arrangements with someone to wire money via Western Union. They arrived in Ontario looking for a Western Union. They repeatedly got bad directions from members of the public angering / frustrating Salgado. They eventually got to the Liborio Market. He remembers Salgado getting into an argument with a customer, Salgado thinking that he was being disrespected. Salgado got angry with witness #10 having to calm him. When they exited the market, witness #10 heard someone say, "that's him". He immediately saw several police officers converge on them with guns drawn. He heard officers give commands to raise their hands and freeze. Officers ordered Salgado away from witness #10. Salgado walked a distance away from witness #10 at which time he heard shots. He did not see what Salgado did to prompt officers to shoot.

WITNESS #11---was the companion of witness #10. He corroborated witness #10's account of the events relating to the drive to the Liborio Market. Once they arrived, he stayed in the car and fell asleep, being awakened when he heard shots fired. He added, however, that he saw Salgado with the gun during the drive as Salgado removed the gun from the glove compartment. Salgado became frustrated because no one would lend him money. When Salgado displayed the gun, witness #11 told him to put it away. Witness #11 said he thought the gun was real, describing it as a black, semi-automatic handgun.

REVIEW OF TASER VIDEO AND PHOTOGRAPH OF GUN

I reviewed the taser video taken from Officer Barron's taser. Inaudible commands can be heard. The video clearly shows Mr. Salgado pulling his sweatshirt / jacket back with his left hand exposing what appears to be a gun. Simultaneously with that action Mr. Salgado appears to reach for the gun. At that moment, Officer Barron's taser fired simultaneously with the rounds from Det. Birkett's AR 15. Mr. Salgado then fell to the ground on his back clearly exposing what appeared to be a gun in his front waistband.

A photograph of the gun taken from Mr. Salgado reveals a gun that has the size and appearance of an authentic semi-automatic pistol.

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 act out of that fear (Penal Code Sec. 19; People v. Clark (1982) 130 CA 3d 371, 277, 181 Cal. Repr. 682

CAL CRIM 507 (2005 NEW) JUSTIFIABLE HOMICIDE: BY PUBLIC OFFICER

A person is not guilty of Attempted Homicide or Homicide if he/ she attempted to kill/killed someone while acting as a public officer/ or obeying a public officer's command for aid and assistance. Such an attempted killing/killing is justified, and therefore not unlawful, if:

1. A person was a public officer/ or obeying a public officer's command for aid and assistance;

2. The attempted killing/killing was committed while taking back into custody a convicted felon [or felons] who had escaped from prison or confinement, arresting a person or persons charged with a felony who was resisting arrest or fleeing from justice, overcoming actual resistance to some legal process, or while performing any other legal duty.

3. The attempted killing/killing was necessary to accomplish one of those lawful purposes; AND

4. The person had probable cause to believe that another person posed a threat of serious physical harm, either to the person or to another person [or that *the person killed* had committed *a forcible and atrocious crime*. 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 physical harm to another. An officer of a local Police Department is a *public officer*.

**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.

Cal. Penal Code section 835a

Any peace officer that 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 the 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

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.* (*Tennessee v Garner*; *Graham V Conner* supra.)

ANALYSIS AND CONCLUSION

Dispatch advised responding officers of a 911 call from a citizen reporting a man with a gun at the Liborio Market. The citizen further advised dispatch that the gun was seen in his waistband, that it was a 9mm and that the individual was wearing a Raiders jacket. Upon officers’ arrival on scene, the situation unfortunately became much more volatile and dangerous through no fault of the officers. When officers made contact, Mr. Salgado ignored officers’ repeated commands to raise his hands, put his hands behind his head, kneel down, lie down or turn around. When he failed to do so, officers became justifiably concerned for their lives, for the lives of fellow officers and for the lives and safety of customers arriving and departing from the strip mall. Instead of complying, Mr. Salgado moved his hands from his sides toward the front of his legs. When Officer Mikkelson’s taser failed to deploy, Mr. Salgado’s hands moved to the area of his belt buckle. The taser video clearly shows Mr. Salgado pulling his jacket back and simultaneously reaching for what appeared to be a firearm. At that point in time, Mr. Salgado’s actions led officers to the reasonable, justifiable belief that Mr. Salgado sensed a window of opportunity and was reaching for the gun they had every reason to believe was in his waistband. When Mr. Salgado ignored officer’s commands and conducted himself as he did, it cannot be said officers on scene acted unreasonably in using deadly force. It is worthy of note that a civilian witness on scene later told interviewing officers, “personally, I would have shot him myself, based on what I saw, the officers were justified in what they did”. Another civilian

witness stated, when asked what she thought the suspect was doing, “if it was me, I was thinking he had a gun” and “I think he is a bad guy, he wants to kill the police”.

This report cites a variety of United States Supreme Court decisions addressing the standard to be used in evaluating the use of deadly force in situations such as this one. Graham tells us the analysis must be made from the perspective of the reasonable police officer on the scene rather than with the 20/20 vision of hindsight. The court was highly deferential to the police officer’s needs to protect himself and others. The Supreme Court allowed for the fact that officers must 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 feeling of the court was summed up with the following quote: “*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*”.

Here, the totality of circumstances gave officers every reason to believe that Mr. Salgado was going to engage them and do so in a violent manner. The law does not require them to wait until the barrel of a gun stares them in the face. In such circumstances, the courts do not ask an officer to hold fire in order to ascertain whether the suspect will, in fact, injure or kill the officer or another. Had they hesitated in this situation, death or great bodily injury could have come to Officers Mikkelson, Barron, Detective Birkett, to any officer in the potential line of fire or to customers entering or leaving the strip mall. These officers had to make an instantaneous decision and their options were limited. A very experienced officer formed the opinion that the use of deadly force was necessary. He had to make a quick decision and the totality of the circumstances dictates that his decision was correct

When confronted with a potentially violent and combative subject such as Mr. Salgado, the amount and type of force used in dealing with Mr. Salgado cannot be said to be unnecessary, unreasonable or excessive. Deadly force was in response to an apparent and immediate threat of death or great bodily injury to the person of officers on scene and to citizens at the strip mall. The nature and amount of force was, therefore, legally justified. There are no legally supportable criminal charges that can be filed against this officer.

By: _____
Ray Pyle
Supervising Deputy District Attorney

Dated: _____

Approved
By: _____
John P. Kochis
Chief Deputy District Attorney

Dated: _____

Approved
By: _____
Dennis D. Christy
Assistant District Attorney

Dated: _____