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DISTRICT ATTORNEY

SACRAMENTO COUNTY

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CHIEF OF POLICE
SACRAMENTO

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September 24, 2010

Police Chief Rick Braziel
Sacramento Police Department
5770 Freeport Boulevard, Suite 100
Sacramento, CA 95822

RE: Officer-Involved Shooting, Case No. 2010-189016

Shooting Officers: Officer Henry McClusky, Badge #501

Person Shot: Robert Thomas Harris
(DOB 10/1/1972; [REDACTED] [REDACTED])

Dear Chief Braziel:

The District Attorney's Office, as an independent agency, has completed its investigation and review of the above-referenced officer involved shooting. Issues of civil liability, tactics, and departmental policies and procedures were not considered. We address only whether or not there is sufficient evidence to support the filing of a criminal action in connection with the shooting of Robert Thomas Harris. For the reasons set forth below, we conclude that the shooting was lawful.

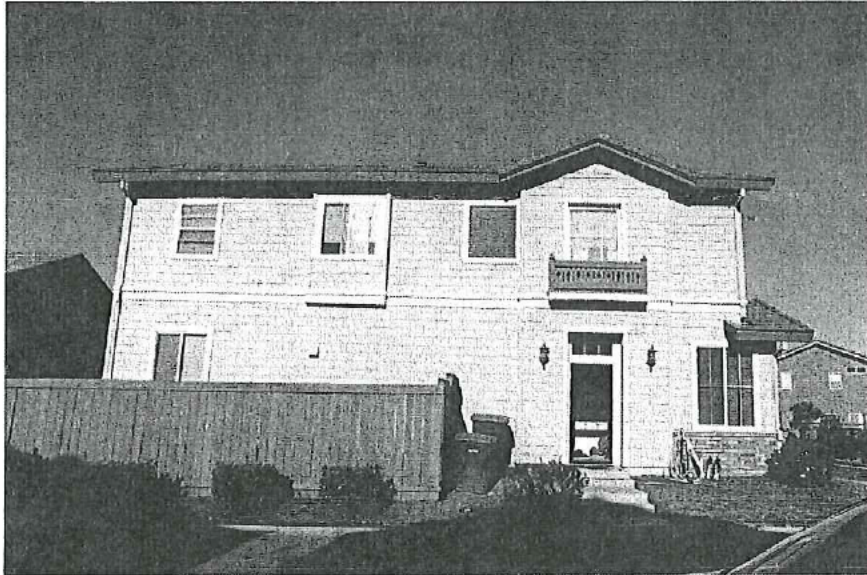
Written reports and other documentary items were reviewed. These consisted of: Sacramento Police Department (SPD) report 2010-189016, Sacramento County Laboratory of Forensic Services report 2010-006337, video and audio recordings, 911 calls, witness interviews, photographs, diagrams, evidence logs, and reports prepared by District Attorney Investigators.

SPECIAL INVESTIGATIONS

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FACTUAL SUMMARY:

On June 26, 2010, at approximately 0330 hours, dispatch centers of the California Highway Patrol (CHP) and the Sacramento Police Department (SPD) received no fewer than two separate 911 emergency telephone calls. These calls described a violent disturbance involving an unknown male with a gun inside the residential address known as [REDACTED] Lumley Lane (below) - located within the Natomas area of Sacramento.



[REDACTED] Lumley Lane

One of these callers described the suspect as a large black male adult with his hair styled in a "pony tail" fashion and further relayed that the suspect had been physically assaulting an occupant of the residence. This caller, later determined to be an adjacent neighbor with an unobstructed and relatively close view of the residence, indicated that she could hear the suspect screaming and that she had personally observed the suspect throwing furniture within the home.

A second caller, later identified as a familial relation to the suspect, called law enforcement to warn them that the suspect was extremely intoxicated, in possession of a handgun and in a violent rage that was mainly directed at the suspect's wife, [REDACTED]. The caller further relayed that the suspect was uttering physical threats of harm to his wife, his family and had also threatened violence toward police. The caller believed that the suspect had in fact already discharged the weapon inside one of the second floor bedrooms of the home.

The suspect was later identified as 37-year-old Robert Thomas Harris (DOB: 10/1/1972 [REDACTED]). Harris is further described as an African American male with black hair styled in a "pony tail" fashion, 6'02" in height and with an approximate weight of

185 pounds. [REDACTED]

As a result of the 911 emergency phone calls detailed above, marked SPD squad cars were dispatched to the Lumley Lane address and responded Code 3 (lights and siren). Officers Henry McClusky (SPD/501) and Brad Parvin (SPD/582) responded as a partnered team in Vehicle Unit #1A12. Officer McClusky was assigned as the Field Training Officer (FTO) for Officer Parvin. Other initial responding officers were: Sergeant Kiser (SPD/445) in Unit #1SM1 and Officer Stone (SPD/553) in Unit #1A11.

While en route and within blocks of the scene, Officers McClusky and Parvin were flagged down by two percipient witnesses. The visibly frightened witnesses told the officers that suspect Harris had mentioned that if the police were called, he was going to shoot [REDACTED] (their mother). Officer McClusky then relayed the updated information via radio. Immediately thereafter, Officers McClusky and Parvin arrived at the Lumley Lane address.

Officers Kiser, Stone, McClusky and Parvin arrived at the scene within five minutes of the initial dispatch notification. The officers pulled their respective vehicles close to the home. After a tactical analysis of the situation and scene, Officers Stone and McClusky took their rifles for their approach to the home while Officers Kiser and Parvin opted for their side arms. Nearby street lamps provided illumination.

Shortly after making his first efforts to approach the residence on foot, at a distance of approximately thirty feet, Officer McClusky observed a black male adult with hair styled into a "pony tail" matching the known description of the armed suspect. The suspect, Harris, had exited the front door of the residence leaving the front door open upon leaving. Harris then took several steps away from the front of the residence, down the front walkway toward the street and just beyond the home's six-foot privacy fence. At that moment, Officer McClusky observed Harris to be in possession of a hand gun in one hand and a possible rifle or other long gun in his other hand.

Officer McClusky then issued two loud verbal commands at Harris to "drop the weapon!" The commands visibly startled Harris who at the time had been looking in Officer McClusky's direction. Harris then made an abrupt turnabout apparently intent upon returning to the confines of the home. As Harris headed back to the front door of the home, Officer McClusky moved to ensure that his line of fire was free of the impediment posed by the exterior fence, thereby also enabling him a continued full view of the armed suspect.

Given the information known to Officer McClusky, from police dispatch, from percipient witnesses and in conjunction with his personal observation of Harris' possession of weapons, Officer McClusky concluded that were Harris allowed to reenter the premises, the safety of its

occupants would be in serious and immediate danger of great bodily harm or death. Officer McClusky then aimed his rifle at the torso of Harris and discharged one round striking Harris in the rear upper left thigh region. This action caused Harris to drop to a supine position at the threshold of the home's front door. The action also prevented Harris from creating a potential hostage situation within the home.

At the home's foyer, officers were able to secure Harris in handcuffs and thereafter successfully removed the remaining occupants of the home unharmed. Officer McClusky then began to check Harris' condition and conducted a search for weapons. Officer McClusky then rolled Harris onto his side to determine the extent of his injuries. Upon doing so, Officer McClusky recovered a loaded .38 caliber "Lorcal" semi-automatic pistol previously concealed underneath Harris' body.

A subsequent search of [REDACTED] Lumley Lane revealed two bullet holes in the walls within the upstairs bedroom (the same bedroom previously described by the 911 caller who had witnessed the initial altercation between Harris and [REDACTED] his wife). Further, two bullet shell casings consistent with the weapon taken from underneath Harris' body were located in the same room. Officers also located a loaded rifle and an illegal sawed-off shotgun within the garage of the home. Access to the interior of the garage (from the home's front door) is within steps of where Harris was eventually detained and later arrested. Officers also located numerous empty beer cans and bottles within the home. A subsequent blood test revealed that Harris' blood alcohol content was 0.19% . The presence of morphine was also detected in the sample (Sacramento Laboratory of Forensic Services Report Number: 10-006337).

The District Attorney's Consolidated Intake Division reviewed the case and filed charges against Harris, on July 7, 2010, for two violations of Penal Code Section 12021(a)(1), felon in possession of a firearm; one violation of Penal Code Section 417(a)(2), unlawfully using a firearm in any fight or quarrel; and one violation of Penal Code Section 246.3, unlawful and intentional discharge of a firearm in a grossly negligent manner which could result in death or injury to a person. As of this date, that matter is still pending, Sacramento Superior Court Docket Number 10F04320.

Crime Scene Investigator Crowell (SPD/6353) was assigned to assist in the collection of evidence. While collecting samples for gunshot residue from the suspect, Harris made the following spontaneous statement: "I have gunshot powder on my hands. You will find gunshot powder on my hands. I'm not going to lie."

LEGAL ANALYSIS:

A peace officer may use deadly force under circumstances where it is reasonably necessary for self-defense or defense of another. Additionally, an officer who had reasonable cause to believe a person has committed a public offense or is a danger to others may use reasonable force to affect arrest or detention, to prevent escape or to overcome resistance. (*Tennessee v. Garner* (1985) 471 U.S. 1; *Graham v. Connor* (1989) 490 U.S. 386; *Kortum v. Alkire* (1977)

69 C.A. 3d 325; California Penal Code Section 853a; CALCRIM 2670.) An officer who attempts to arrest or detain a person need not retreat or desist from his efforts by reasons of the resistance or threatened resistance of the person; nor shall the officer be deemed an aggressor or lose the right to self-defense by use of reasonable force. (California Penal Code section 835a.) Police may use some degree of physical coercion or threat thereof to accomplish an arrest. The force used must be objectively reasonable, considering such issues as the severity of the crime, whether the suspect posed an immediate threat to police or others, and whether the suspect actively resisted arrest or attempted flight. (*Graham v. Connor* (1989) 490 U.S. 386.) The reasonableness inquiry takes into account those facts known to the officer at the moment he or she uses deadly force to apprehend a fleeing suspect. (*Ford v. Childers* (7th Cir. 1988) 855 F.2d. 1271, 1275; *Sherrod v. Berry* (7th Cir. 1988) 856 F.2d 802, 804.)

The person being detained or arrested may be subjected to such restraint as is reasonably necessary for his arrest and detention and has a concomitant duty to permit himself to be detained. (*People v. Allen* (1980) 109 C.A.3d 981, 985; CALCRIM 2670, 2671, 2672.) The rule “requires that the officer’s lawful conduct be established as an objective fact; it does not establish any requirement with respect to the defendant’s mens rea.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020.) California law permits the use of deadly force if the officer actually and reasonably believed he was in imminent danger of death or great bodily injury. (CALCRIM 3470.) An officer who uses deadly force must actually believe that force is necessary. The appearance of danger is all that is necessary; actual danger is not. (*People v. Toledo* (1948) 85 Cal.App.2d 577; *People v. Jackson* (1965) 233 Cal.App.2d 639.) Thus, the officer may employ all force reasonably believed necessary. (CALCRIM 3470.) The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 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. (*Graham v. Connor* (1989) 490 U.S. 386.)

Applying these legal principles to the factual circumstances, Officer McClusky had a right to act in self-defense, in defense of other officers and in defense of civilians. Officer McClusky had probable cause to believe that Harris had committed a felony offense and Harris needed to be apprehended for that felony offense. Officer McClusky knew that shots had been fired at the residence before his arrival, had information that Harris was in possession of a firearm and had threatened the lives of his own family, and had made statements to relatives that he was intent upon hurting members of law enforcement. When Officer McClusky attempted to effectuate the arrest, Harris refused to comply with his lawful verbal directives. Moreover, during the situation, Officer McClusky knew that other occupants of the [REDACTED] Lumley Lane residence were still inside the home.

Based on the totality of the circumstances, Officer McClusky reasonably believed that the then armed Robert Harris was going to harm him, other officers or the other civilians present at the scene. Officer McClusky’s observation of Harris in possession of weapons in close proximity

to the opened front door of the home supported the reasonable belief that Harris posed an imminent threat of great bodily injury or death. Faced with an armed suspect, in a violent drunken rage, who had uttered numerous threats of harm, Officer McClusky reasonably concluded that Harris was a clear and present danger if allowed to reenter the home. Therefore, Officer McClusky was entitled to use deadly force to defend himself, other officers and potential civilian hostages.

Given the circumstances, Officer McClusky was justified in using deadly force in defense of another. We find the shooting to be lawful and will take no further action in this matter.

Very truly yours,

JAN SCULLY
DISTRICT ATTORNEY



ROBERT E. CLANCEY
Deputy District Attorney

cc: Sacramento Police Detective Marnie Stigerts, Badge #3096
Sacramento Police Officer Henry McClusky, Badge #501
Francine Tournour, Office of Public Safety Accountability

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Report Number: 2010-189016

Please note that the records provided in this release do not include records or portions of records that are exempt from disclosure pursuant to applicable law. Without limiting other arguments against disclosure that may exist, the following records or portions of records are specifically prohibited or exempted from disclosure:

Records or information, the disclosure of which would compromise the anonymity of whistleblowers, complainants, victims or witnesses (Cal. Pen. Code § 832.7(b)(6)(B));

Records or information, the disclosure of which would reveal personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information (Cal. Pen. Code § 832.7(b)(7));

Records or information wherein the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure (Cal. Gov. Code § 7922.000);

Records or information that constitute confidential medical, financial, or other information, the disclosure of which is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy (Cal. Pen. Code § 832.7(b)(6)(C)); and

Records or information, the disclosure of which is exempted or prohibited pursuant to federal or state law (Cal. Gov. Code § 7927.705; see also Cal. Const. art. 1 Sec. 1 and Cal. Pen. Code §§ 11105 and 13300).

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