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November 25, 2009

Chief William Lansdowne
San Diego Police Department
1401 Broadway
San Diego, CA 92101

Re: Fatal shooting of Mr. Phillip James Sewer on August 3, 2009 by San Diego Police Officer Christopher Leahy; SDPD Case # 09-040502; DA Special Operations Case No. 09-154PS; Deputy District Attorney Assigned: Damon Mosler

Dear Chief Lansdowne:

We've reviewed the reports and other materials compiled by your department's Homicide Division concerning the fatal shooting of Mr. Phillip Sewer by Officer Christopher Leahy on August 3, 2009. A District Attorney Investigator responded to the scene and was briefed by your investigators. This case was presented to the DA's Office for review on October 7, 2009.

Persons Involved
Mr. Phillip Sewer was 48 years-old, homeless and had stolen and armed himself with a stainless steel steak knife with a 6" blade.

Officers Leahy was in full uniform, assigned to patrol duties in Central Division and was armed with a Glock .45 caliber semi-automatic pistol.

Background
On Monday, August 3, 2009 at about 4:23 p.m., an employee of the Greyhound Steakhouse located at 685 Fifth Avenue in the Gaslamp area of downtown San Diego, witnessed Mr. Sewer steal a large steak knife from an outside patio dining table. The employee confronted Mr. Sewer and told him to put the knife back. Mr. Sewer refused and stepped towards the employee while waving the knife in a threatening manner and said, ***"What are you going to do about it?"*** When the employee told Mr. Sewer he was going to call the police, Mr. Sewer left the restaurant with the knife he'd stolen. The employee told investigators he feared the man was going to stab him or someone else with the knife. After Mr. Sewer left, the employees from the Greystone Steakhouse made an emergency 911 call reporting that a black male adult, 45 years-of-age, bald, wearing a black shirt and jeans and carrying a black backpack had just stolen a sharp steak knife from their restaurant. The caller said the man, who looked strung out and possibly on drugs, ran away towards Market Street.

Mr. Sewer then went to the Bandar Restaurant located in the 800 block of Fourth Avenue where he confronted and demanded money from an employee at that restaurant. The Bandar employee said Mr. Sewer walked up to him and told him, ***"Give me all your money!"*** The employee told Mr. Sewer he didn't have any money and watched as Mr. Sewer walked away.

The employee continued watching as the police arrived. He saw the officers stop, get out of their car and order Mr. Sewer to, ***"Stop right there!"*** He saw that Mr. Sewer looked crazy and heard him yelling crazy things. He heard the officer yell, ***"Stop right there! Don't come any closer!"*** at least three times before hearing three shots.

Shooting

Responding to the emergency 911 call placed that afternoon were several uniformed San Diego Police Officers including Officers Christopher Leahy and his partner, Kelvin Lujan. Officers Leahy and Lujan arrived within three minutes of the 911 call and located Mr. Sewer, who fit the description of the suspect, walking north on the east side of Fourth Avenue.

While Officer Lujan stopped their patrol car in the southbound traffic lanes of Fourth Avenue, Officer Leahy exited the car, approached Mr. Sewer and started giving him commands. Ignoring the officer's orders, Mr. Sewer knelt down and reached into his backpack. He then pulled out and armed himself with a large stainless steel knife, raising it up to his face in a menacing manner. Officer Leahy drew his handgun, pointed it at Mr. Sewer and ordered him to drop the knife. Mr. Sewer ignored Officer Leahy's commands and began advancing towards him while walking into the middle of the intersection yelling obscenities at him and telling the officer to shoot him.

Officer Leahy retreated backwards into the southbound traffic lanes of Fourth Avenue while continuing to order Mr. Sewer to drop the knife. When Mr. Sewer closed the distance between him and the officer to about five feet, Officer Leahy fired three times. Mr. Sewer was hit by all three shots and died at the scene.

Civilian Witnesses Statements

A number of civilians present in the Gaslamp witnessed the shooting that took place in the intersection of Fourth Avenue and E Streets. One witness heard Officer Leahy yelling, ***"Stop it! Drop the knife or I will shoot!"*** Another witness saw Mr. Sewer running towards the officer holding the knife in a stabbing position while the officer was ordering the man to drop the knife. A third witness saw the officer backing up and yelling "***Stop, Stop"*** while Mr. Sewer held a raised knife in his right hand and walked towards the officer. A fourth witness heard the officer yelling, ***"Stop! I'm gonna shoot! Stop moving."*** A fifth witness saw Mr. Sewer armed with a knife, pointing it at the cop and not stopping as the officer yelled, ***"You have to stop or I'm going to shoot you!"*** A fifth witness saw the officer backing up, heard him yelling, ***"Put it down"*** and felt the officer gave the man plenty of time to drop the knife. A sixth witness heard a policeman scream, ***"Stop or I'm going to shoot."*** When the witness turned around they saw an

officer in the middle of the street and a man armed with a knife walking toward him. A seventh witness saw an officer backing up from a man whose arms were raised while the officer repeatedly ordered the man over and over again to drop the knife. An eighth witness heard the man yelling at the officer, ***"Shoot me! Shoot me! Do it! Do it!"***

Officer Leahy's Statement
Officer Leahy supplied a voluntary and recorded statement. Officer Leahy said after they'd been notified of the robbery and supplied with the suspect's description he and his partner began looking for him. Officer Leahy said after they spotted the suspect walking north on Fourth Avenue at E Street his partner stopped their car and he got out to contact him. Officer Leahy said he told the suspect, ***"Let me see your hands"*** and then saw the man, who appeared angry, place his backpack down on the sidewalk and reach into it.

Leahy said, "***I saw the knife come out and I saw it in his hand. He stands up... And he just b-lines it right for me and I tell him, like, drop the knife, drop the knife, drop the knife... He had it*** (the knife) ***up, like up to his chest and his arm bent, like cocked up... In an aggressive manner... He was ready to start thrashing... His arm was already up and he's just marching right at me. He's totally focused on me the whole time... I started yelling at him. I said drop the knife! Drop the knife! ... He's just like, fuck you! ... And I started back peddling...***"

Officer Leahy said he started to assess what other force options he had available to him but said, "***I can't see traffic behind me in the number three lane... And he's coming at me... I knew that I didn't have enough time, there was nothing else I could do. If I holstered my gun and went to another force option, he would have already been on me... I had my gun at him. I'm giving him directions. He's ignoring me. I'm back peddling.***"

Officer Leahy said when they were about seven to eight feet apart he fired three times and the man went down. Officer Leahy said the man still had the knife in his hand and that he tried to maneuver the knife up towards his own neck.

Investigation
The crime scene was secured and a scene investigation was conducted. The investigation revealed that Officer Leahy fired his weapon three times. Three expended .45 caliber shell casings were recovered at the scene. The expended shell casings were located in areas consistent with Officer Leahy's stated firing position. The weapon Mr. Sewer was armed with, the same one he'd stolen from the Greyhound Steakhouse, was recovered at the scene. Photographs taken immediately after the shooting depict Mr. Sewer lying deceased in the middle of the intersection still gripping a stainless steel knife in his right hand.

Video surveillance footage from a local business was recovered and examined in detail. Although the footage doesn't capture the actual shooting, it did capture Mr. Sewer walking north on Fourth Avenue, removing a knife from his backpack with his right hand, and then holding it

down by his right leg as the patrol car containing Officer's Lujan and Leahy approaches and stops. As Mr. Sewer walks out of view, the footage depicts Officer Leahy exiting his patrol car and running north on Fourth Avenue after Mr. Sewer.

Autopsy

On August 4, 2009, Dr. Christopher Swalwell from the San Diego County Medical Examiner's Office performed an autopsy on Mr. Sewer. Dr. Swalwell determined Mr. Sewer sustained three gunshot wounds to his chest and left forearm. None of these gunshot wounds had any associated soot or stippling. Toxicology tests revealed Mr. Sewer had a blood alcohol level of **.18%**. Dr. Swalwell classified the manner of Mr. Sewer's death as a homicide.

Legal Analysis

This review was conducted pursuant to the joint protocol between this office and all San Diego law enforcement agencies calling upon the District Attorney to conduct an independent assessment of the circumstances surrounding the use of deadly force. The review does not examine such issues as compliance with the policies and procedures of any law enforcement agency, ways to improve training or tactics, or any issues related to civil liability. Accordingly, such a review should not be interpreted as expressing an opinion on these matters.

Under California law, peace officers may use deadly force to protect themselves from the threat of death or great bodily harm and to use reasonable force in making an arrest. California Penal Code section 835a allows an officer to use reasonable force to make an arrest and to overcome resistance by a person for whom he has reasonable cause to believe has committed a public offense. That section states the officer need not retreat or end his effort to make an arrest because of that person's resistance. Penal Code section 196 declares that homicide is justifiable when committed by public officers when necessarily committed in overcoming actual resistance in the discharge of any legal duty.

In accordance with Penal Code section 196, peace officers may use deadly force in the course of their duties under circumstances not available to members of the general public. We are mindful; however, that certain limits on the use of deadly force apply to peace officers. The U.S. Ninth Circuit Court of Appeals, in the case of *Scott v. Henrich* (9th Cir. 1994) 39 F.3d 912, delineated those circumstances under which deadly force may be used:

> "[P]olice may use only such force as is objectively reasonable under the circumstances. An officer's use of deadly force is reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' All determinations of unreasonable force '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.'" [Citations omitted.]

Irrespective of any laws applicable to situations where peace officers use deadly force in accomplishing their duties, the law of self defense is available to any person. Homicide is justifiable in accordance with Penal Code 197 when resisting any attempt by a person to commit great bodily injury on or kill any person.

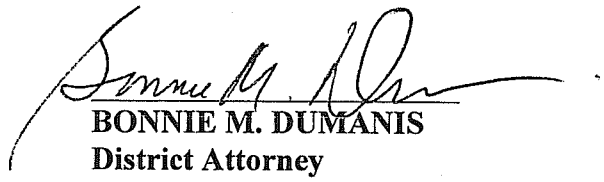
Conclusions

During this incident, Officers Christopher Leahy and Kelvin Lujan responded to an emergency call of a robbery in the Gaslamp area of San Diego. They'd been supplied with both clothing and physical descriptions of the suspect, the color of the backpack he was carrying and the fact that he'd stolen and armed himself with a knife. When the officers arrived, they found Mr. Sewer a few blocks away from the restaurants where the theft and attempted robbery occurred. When Officer Leahy confronted Mr. Sewer and ordered him to drop the knife, Mr. Sewer ignored those commands and advanced on Officer Leahy as the officer retreated, back peddling into oncoming traffic lanes. When Mr. Sewer closed the distance between himself and Officer Leahy to about five feet, Officer Leahy feared for his own safety and fired three times, striking and killing Mr. Sewer in the middle of the intersection.

Based on these circumstances, it's readily apparent that Officer Leahy fired in self-defense and he therefore bears no criminal liability for his actions.

A copy of this letter, along with the materials submitted for our review will be retained in our files.

Sincerely,



BONNIE M. DUMANIS
District Attorney
County of San Diego

BMD:vf
cc: Captain Jim Collins