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November 19, 2009

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

Re: Fatal shooting of Ms. Gianine Desiderio-Ohara on July 15, 2009 by San Diego Police Officer Robert Todd Heims. SDPD Case # 09-037217; DA Special Operations Case No. 09-137PS; 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 Ms. Gianine Desiderio-Ohara by Officer Robert Heims on July 15, 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 September 29, 2009.

Persons Involved
Ms. Desiderio-Ohara was 47 years-old and living in Mira Mesa. She was armed with a knife. Officer Heims was in full uniform and assigned to patrol duties in Northeastern Division. He was armed with a Beretta .9 mm semi-automatic handgun.

Background
Ms. Desiderio-Ohara and her 85 year-old mother, Mrs. Helen Desiderio resided together at their home in Mira Mesa. Patrol officers were familiar with both mother and daughter as they'd been to the home on previous occasions. Several of the officers were also aware Ms. Gianine Desiderio-Ohara was a drug abuser, had psychological problems, had been previously admitted to County Mental Health and had assaulted her elderly mother in the past.

Shooting Incident
On July 15, 2009 at 10:32 p.m., the San Diego Police Department received an emergency 911 call regarding a disturbance at 10587 Greenford Street in San Diego. Several uniformed officers, including Officer Heims, responded to the call. When the officers arrived they found the home locked, but they could hear a female inside screaming. Fearing for the safety of the occupants, the officers eventually forced entry into the home. Officer Heims was the first officer inside. When he made his way into the bedroom, he found Ms. Desiderio-Ohara holding her mother against her will in a choke hold on the bed while pressing a knife against her neck.

When Officer Krall arrived, who knew Ms. Desiderio-Ohara, she began speaking to her to try to de-escalate the situation and calm her down. While Krall spoke, Ms. Desiderio-Ohara continued to hold the knife against her mother's neck and Officer Heims trained his gun on her. While Officer Krall spoke, Officer Heims saw that Ms. Desiderio-Ohara wasn't listening or paying any attention.

When Officer Heims saw Ms. Desiderio-Ohara start to ***"saw cut"*** on her mother's neck with the knife, he feared Mrs. Helen Desiderio was going to be killed so he fired twice at Ms. Desiderio-Ohara who was mortally wounded and died at the scene. Mrs. Helen Desiderio was rescued and transported to a local hospital for treatment of cuts to her left hand and abrasions to her forearms and neck.

Officers Heims' Statement
Officer Heims supplied a voluntary and recorded statement. He said he responded with his partner Officer Fish, along with other uniformed officers, to a radio call of a mother and daughter arguing and fighting. When they arrived, Heims saw there were other officers at the front door knocking and announcing their presence. Heims heard screaming coming from inside the home and went around to the back. While in the back yard, Heims heard the officers at the front door trying to kick it open. While standing outside a rear window, Heims saw a younger woman, Ms. Desiderio-Ohara, and an older woman, Mrs. Helen Desiderio, inside the home. Heims said he told Ms. Desiderio-Ohara through the window to go and open the front door for the officers, but she ignored him and kept yelling incoherently. Heims said Ms. Desiderio–Ohara was growling, that her face was contorted, that she looked angry and that her yelling was non-stop.

Officer Heims was able to enter the home through an unlocked patio window and found both Ms. Desiderio-Ohara and Mrs. Helen Desiderio in a bedroom. Both women were on the bed. Ms. Desiderio–Ohara was positioned behind her mother who was in a seated position. Ms. Desiderio–Ohara was holding her mother in a choke hold and was also holding a knife with a serrated edge against her mother's neck.

Officer Heims said he repeatedly ordered Ms. Desiderio-Ohara to, ***"Drop the knife! Drop the knife! Put the knife down!"*** When Heims saw Ms. Desiderio-Ohara becoming angrier and start cutting her mother's neck, he said he fired twice from a distance of about three feet.

Mrs. Helen Desiderio's Statement
Mrs. Desiderio told investigators her daughter was in jail last year for beating her and was diagnosed as psychotic. This morning her daughter burst into her room, told her she was the reason all the people on the earth were dying and that if she didn't stop that from happening, she was going to kill her.

Mrs. Desiderio said later that evening Gianine, while delusional and armed with a knife, again burst into her bedroom and threatened to kill her. Mrs. Desiderio said her daughter attacked her, grabbed her from behind, covered her mouth and wrapped her arms around her. She said her daughter held her with her left hand and wielded the knife in her right hand.

When the police entered the room, Mrs. Desiderio heard the officers ordering her daughter to drop the knife she didn't care and replied, ***"I don't care if you shoot me."***

Investigation
The crime scene was secured and a scene investigation was conducted. The investigation revealed Officer Heims fired two shots at Ms. Desiderio-Ohara. Two expended .9 mm shell casings were recovered at the scene. The casings were located in areas consistent with the officer's stated firing position, bullet trajectories and blood spatter patterns. A serrated knife with a black handle and stained with blood was found on the bedroom floor.

Autopsy:
On July 17, 2009, Dr. Christopher Swalwell from the San Diego County Medical Examiner's Office performed an autopsy on Ms. Desiderio-Ohara. Dr. Swalwell determined she sustained two gunshot wounds; one to the upper torso and one to the right arm which penetrated the right side of her chest. No soot or stippling was present. Toxicological tests were positive for the presence of Methamphetamine in her system. The manner of death was 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.

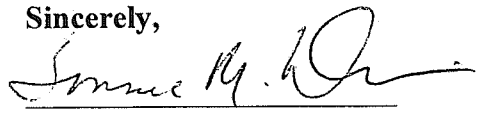
Conclusions

During this incident, Officer Heims along with other uniformed officers responded to an emergency call of a domestic elder abuse in progress at the home of Ms. Gianine Desiderio-Ohara and her mother, 85 year-old, Mrs. Helen Desiderio. When the officers entered the home they found Gianine holding her mother against her will at knife point. The officers repeatedly ordered Ms. Gianine Desiderio-Ohara to drop the knife and also tried reasoning with her. When Gianine became angrier and tried cutting her mother's throat, Officer Heims fired twice, killing Ms. Desiderio-Ohara at the scene.

Based on these circumstances, its apparent Officer Heims fired in defense of Mrs. Helen Desiderio as well as in defense of himself and the other officers present at the scene. 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
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BMD:vf
cc: Captain Jim Collins