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January 5, 2009

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

Re: Fatal shooting of Joseph Giordano on September 12, 2008, by San Diego Police Lieutenant Kenneth Hubbs, Agent Gary Hill and Officers Manuel Escalante, Larry Triplett, Riter Flores and Scott Wilkinson; SDPD case numbers 08-051958, 08-051961; DA Special Operations case number 08-097PS; Deputy District Attorney assigned: A. Craig Rooten

Dear Chief Lansdowne:

We have reviewed the reports and other materials compiled by your department concerning the fatal shooting of Joseph Giordano by the above-named officers on September 12, 2008. A District Attorney Investigator responded to the scene soon after the incident and was briefed by your investigators. This case was presented to our office for review on November 25, 2008.

Persons Involved
Joseph Giordano, age 64, lived with his wife in the 6200 block of Lake Ariana Avenue in San Diego.

Lieutenant Kenneth Hubbs was a Watch Commander. Officers Scott Wilkinson and Larry Triplett were assigned to the K-9 Unit. Officers Gary Hill, Riter Flores, and Manuel Escalante were assigned to Eastern Patrol.

Background
On September 9, 2008, at about 8:00 p.m., San Diego County Sheriff's Sergeant Scott Ybarrondo, who was off-duty and at home, was urgently summoned to a neighbor's house across the street. When he arrived he encountered Joseph Giordano, a stranger. Sergeant Ybarrondo saw that Mr. Giordano was upset, drunk and verbally threatening. He detained and handcuffed Mr. Giordano, and he told his neighbors to call the police. While Sergeant Ybarrondo and his neighbors waited for the police to respond, Mr. Giordano's wife arrived in her car. Sergeant Ybarrondo spoke to Mr. Giordano's wife and saw that she had also been drinking.

San Diego Police officers responded but decided not to arrest either Mr. Giordano or his wife. Instead, they transported them and their two vehicles to their home in the 6200 block of Lake Ariana Avenue.

Shooting Incident

Three days later, on September 12, at about 9:00 p.m., Sergeant Ybarrondo's wife told him Mr. Giordano was on their front porch. Thinking Mr. Giordano wanted to apologize for his previous behavior, Sergeant Ybarrondo went to the front door to talk to Mr. Giordano. He took a digital tape recorder with him and the following was captured on that recording. When he opened the front door Mr. Giordano asked him, "Are you the police officer?" Sergeant Ybarrondo said he was, and he saw that Mr. Giordano was holding something covered in a white towel behind his back. Sergeant Ybarrondo asked Mr. Giordano what he was holding. As Mr. Giordano raised the object, Sergeant Ybarrondo saw that it was a black revolver. Sergeant Ybarrondo slammed the door, told his children to get under their beds, told his wife to call 911, and ran to get his gun. As he did so he heard a number of gunshots as Mr. Giordano fired into the front of his house.

Several uniformed officers including Lieutenant Hubbs, Agent Hill and Officers Escalante, Triplett, Flores and Wilkinson responded. Neighbors who heard the shots saw Mr. Giordano drive away in his van. A police helicopter spotted Mr. Giordano's van parked in the driveway of his home in the 6200 block of Lake Ariana. Uniformed officers surrounded the home and then began trying to communicate with Mr. Giordano, who was inside the home with his wife.

After about forty minutes, Mr. Giordano walked out his front door onto his porch, armed with a revolver. He raised the gun and fired at the officers, who returned fire, killing him.

Investigation

Examination of the physical evidence at the scene revealed that Lieutenant Hubbs fired three shots, Agent Hill fired two shots and Officer Flores fired seven shots from their .9 mm pistols. Officer Escalante fired two shots, Officer Triplett fired three shots and Officer Wilkinson fired six shots from their .45 caliber handguns.

Mr. Giordano was armed with a Colt Detective Special .38 caliber blue steel revolver. When recovered at the scene, the gun contained one live and five expended cartridges.

The gunshots fired by Mr. Giordano at Sergeant Ybarrondo's home can be heard on Sergeant Ybarrondo's tape recorder.

The police helicopter recorded the exchange of gunshots between Mr. Giordano and the officers on video tape. The tape shows Mr. Giordano walking out his front door onto the porch and firing a shot at the officers, and the six officers returning fire.

Mrs. Giordano was interviewed. She said she was at home when her husband returned after he tried to shoot Sergeant Ybarrondo. She saw her husband had a gun and asked him what he had done. He said he told her, "I went over there to kill that mother fucker Mexican Spic… If I see a cop at the front door, I'll blow their mother fucking brains out. The first one that comes to the door."

On September 15, 2008, Deputy Medical Examiner Dr. Christopher Swalwell performed an autopsy on Mr. Giordano's body. Dr. Swalwell determined the cause of death to be multiple gunshot wounds to the chest, back, and knees. A toxicological examination revealed that Mr. Giordano had a blood alcohol level of .36%.

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.

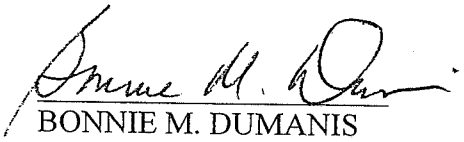
Conclusions

In this incident, Mr. Giordano attempted to murder an off-duty Sheriff's sergeant at his home. The officers were aware that Mr. Giordano was armed with a handgun and minutes earlier had fired it several times into Sergeant Ybarrondo's house. After surrounding Mr. Giordano's residence, the officers tried to contact him. However, Mr. Giordano came out and fired at the officers, causing them to return fire and kill him.

Based on the circumstances of this incident, we conclude that the officers acted in self defense and defense of one another. Therefore, their use of deadly force was justified and they bear no criminal liability for their actions.

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

Sincerely,



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District Attorney
County of San Diego

BMD:jh
Cc: Captain Jim Collins