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May 19, 2009

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

Re: Fatal shooting of Mr. Alan Jay Kosakoff on August 25, 2007 by San Diego Police Officers Brian Lenahan and Benjamin Douglas – Died October 2, 2007; San Diego Police Case No. 07-050636; DA Special Operations Case No. 07-100PS

Dear Chief Lansdowne:

We have reviewed the reports your agency submitted to us in October 2007 and other materials compiled by our investigators in February 2008 concerning the fatal shooting of Mr. Alan Jay Kosakoff on August 25, 2007. Mr. Kosakoff was hospitalized after the shooting but died on October 2, 2007. Members of the San Diego Police Department Homicide Division briefed a District Attorney Investigator, who responded to the scene soon after the incident. It is our conclusion that the officers involved in this incident acted in lawful self-defense and defense of others.

Persons Involved

San Diego Police Officers Benjamin Douglas and Brian Lenahan were assigned to patrol duties in Northwestern Division. The officers were working together as partners, in uniform, and were operating a marked San Diego Police Department police car. Officer Douglas was driving and armed with a Glock .45 caliber semi-automatic pistol. Officer Lenahan was the passenger and armed with a Sig Sauer .9mm semi-automatic pistol.

Mr. Alan Jay Kosakoff was 35 years old, stood 5'9" tall and weighed 140 pounds. He lived at 3586 Caminito El Rincon in the Del Mar Heights area of San Diego. His mother, Ms. Arlene Kosakoff, lived approximately two and a half miles away from her son at 14122 Half Moon Bay Drive, San Diego.

August 25, 2007 Vehicle Pursuit

The pursuit of Mr. Kosakoff lasted approximately fourteen (14) minutes, covered over fifteen (15) miles, and reached a top speed of 120 mph. All of the police radio communication tapes and video surveillance recordings from the officers and units involved were reviewed and analyzed. The tape recordings and voluntary statements provided by the officers and witness accounts reveal the following:

On **August 25, 2007** at **12:19** a.m., San Diego Police Department Traffic Officer Michael Gottfried, who was working alone, saw a Toyota Corolla run the stop light. Officer Gottfried began pursuing the Toyota with lights and siren. The pursuing officers saw the vehicle run red lights and stop signs while traveling approximately 45 MPH in a 25 MPH residential zone. The pursuing units requested a unit with "spike strips" position themselves at Del Mar Heights Road and Mango Drive. Officers Benjamin Douglas and Brian Lenahan radioed they would accommodate the "spike strip" request. However, the pursuit changed directions and the spike strip was not deployed.

At **12:24** a.m., the pursuing units requested a helicopter to assist with the pursuit. The A.B.L.E. helicopter crew radioed they were two minutes away. As the pursuit continued south on I-5 the officers radioed the Toyota was traveling at 100 MPH.

At **12:26** a.m., A.B.L.E. radioed the suspect was traveling at 110 MPH south on I-805 from the I-5 split. Shortly thereafter, the Toyota increased its speed to 120 MPH as it passed the Mira Mesa Boulevard off ramp. The sergeant monitoring the pursuit instructed the patrol units to discontinue the pursuit if the suspect's speed remained in excess of 100 MPH. Officer Gottfried acknowledged, radioed he was dropping out of the chase and turned off his lights and siren. The sergeant also advised A.B.L.E. personnel to continue following the vehicle. A.B.L.E. informed dispatch that the suspect vehicle exited the southbound I-805 at La Jolla Village Drive and got back on I-805, now heading north. Then the car went east on SR-56.

At **12:30** a.m., the helicopter crew radioed the car's ground speed was 113-114 MPH. The monitoring sergeant radioed, ***"We know where's he's going. All ground units out of this pursuit. A.B.L.E. keep observation. One ground unit to his house. The rest just stay in the area out of the pursuit."***

Officers Gottfried, Lenahan and Douglas acknowledged the order and radioed they were discontinuing their pursuit mode. In addition, A.B.L.E. advised they were turning off the helicopter's high intensity spotlight and were switching to infra-red mode as they continued monitoring the Toyota's location and direction of travel. A few minutes later the Toyota exited the freeway and headed towards Half Moon Bay.

ABLE Helicopter Videotape Summary

The overhead helicopter video depicts the Toyota pulling into the driveway at 14122 Half Moon Bay Drive. Immediately thereafter, Officer Gottfried's patrol unit arrives with the driver's side door open; stopping in front of the home. A second police car operated by Officers Douglas and Lenahan can be seen parking behind Officer Gottfried's car as the Toyota pulls into the garage.

Officer Gottfried is seen running from his patrol car across the front yard. As the garage door closes, Officer Gottfried is seen sliding under the door and into the garage. Officer Douglas exits his car, runs towards the closing garage door and slides underneath into the garage. Officer Lenahan runs from his patrol car toward the house and into the garage. It took approximately eight seconds for all three officers to exit their cars, run across the yard and enter the garage.

A.B.L.E. circles around and observed the car rolling out of the garage into a car parked across the street. An officer radios, ***"Ah suspect's been hit... He tried to run us over with the car. ... He's still moving. He's still breathing... Shots fired. He tried to run us over with the vehicle out of the driveway."***

The officers are seen removing the driver from the car. They requested an ambulance and began administering first aid.

Officer's Statements
Officers Gottfried, Douglas and Lenahan all supplied voluntary statements to investigators. The following is a summary of their respective interviews.

Officer Gottfried
Officer Gottfried was working a traffic assignment in full uniform and driving a marked patrol car when he saw a Toyota run a red light at 60–70 MPH at El Camino Real and High Bluff Drive. He activated his lights and siren and notified his dispatcher he had a failure to yield. Officer Gottfried saw the Toyota fail to stop at flashing red lights at Del Mar Heights Road and at I-5. He also saw the vehicle run a red light at the intersection of Del Mar Heights Road and Mango Drive.

At Durango Drive, the Toyota missed its turn and slammed on its brakes. Officer Gottfried had to swerve to avoid crashing into the Toyota. He radioed the car's license plate to dispatch. Officer Gottfried pursued the Toyota through a residential district and then south on I-5. He saw the helicopter join the chase and illuminate the Toyota with its spotlight.

When the Toyota later exited the freeway, Officer Gottfried was able to catch up to it. He saw the Toyota run another red light and followed the car until it reached the driveway of a residence at 14122 Half Moon Bay Drive. As Gottfried parked in front of the house, he saw the garage door was already open and the Toyota was pulling inside the garage. Gottfried got out of his patrol car and ran into the garage to stop the fleeing suspect.

Gottfried immediately went to the driver's door of the Toyota. He saw Officer Lenahan standing behind him and Officer Douglas standing at a position at the right front of the Toyota. While standing between the two cars, Gottfried began hitting the driver's window with his hand to get the driver's attention. He opened the driver's door and told the driver to get out of the car. Gottfried moved in between the open driver's door and the chassis of the car. He grabbed the driver and tried to pull him out. However, the driver still had his seatbelt on and he resisted by pulling backwards, away and to the right. Gottfried saw the driver grab the gearshift, put the car in reverse and saw the vehicle's reverse tail lights activate. According to Gottfried, the driver never said anything, didn't look at him and was acting like he wasn't even there.

Gottfried shared the following with investigating officers regarding his state of mind as the car started backing up: ***"I just know that I was getting hit by the door, the open door and it was forcing me backwards. And I remember feeling my back hitting the parked car…. Everything happened so fast, so to me it seemed quick, but I don't, I don't think he gunned it or floored it out of there, but the car was going backwards, enough that it was pushing me backwards into the parked car… Now at this point I'm stuck. So my only way out was backwards. If I had fallen … it would have run me over. If he had, if he had angled the car to the right… and the car went … to the left, it would have crushed me between the, the two cars. I remember the door was pushing me backwards and I remember the parked car hitting my back and that's when I started retreating out, backing out and yelling that 'He's gonna hit us! He's gonna hit us!' And that's when I was trying to get out of the way of the car."***

Gottfried explained he couldn't escape to the left because of the parked car; he couldn't escape to the front because of the open driver's door and could only try to retreat backwards. Due to the positioning of all three officers, he felt they were all trapped inside the garage.

Officers Douglas and Lenahan

Officers Douglas and Lenahan heard the pursuit over the radio and went to assist Officer Gottfried. They initially began setting up spike strips at Del Mar Heights Road and Mango Drive, but when the Toyota went in another direction, they discontinued that effort and began following the pursuit south on I-5. Douglas and Lenahan saw the Toyota traveling at high speed and swerving in and out of the traffic lanes.

When the Toyota pulled into the driveway at 14122 Half Moon Bay, Officer Douglas saw Gottfried running into the garage. Douglas got out of his car and saw the garage door closing down on Gottfried's head as Gottfried ducked underneath the door and slid into the garage. Douglas stated, ***"All I'm thinking is I gotta get in there before that garage door shuts because I don't want to leave him alone."***

Douglas sprinted and ducked under the garage door as it was closing and went to the right front side of the Toyota. He drew his weapon and covered Gottfried from that position. Douglas said the area inside the garage was very limited because of the space the two parked cars were occupying. Douglas saw Gottfried standing in between the two parked cars, yelling at the driver to get out of the car and trying to pull the driver out. Douglas was aware Officer Lenahan had entered the garage as well and that the garage door opened back up. Douglas said there was no time to give directions. He saw Gottfried physically struggling with the driver and grabbing him with both hands and trying to pull him from the car.

Douglas stated, ***"I noticed that the traffic officer (Gottfried) starts, starts to fall backwards, and I think he's gonna go underneath the car. And at the same time the person whose inside the car puts the car in reverse and it starts to, it starts to, to roll back and to the side, backwards and towards the traffic officer. At that point, I think that the traffic officer is either falling, falling underneath the vehicle or, or going to be dragged by the vehicle. I'm not, I'm not sure what's going to happen but I'm, I'm fearing for the traffic officer's life at that point. I'm***

thinking that the guy's gonna either hit the gas and go forward and hit me, or hit the gas and go backwards and drag the traffic officer underneath the car. And that's when I decided to point my weapon and shoot... I felt the car lurch a little bit and then as I felt the car lurch I saw the car go, go backwards away from me."

Douglas said he was no more than a foot away from the Toyota when he first fired at the driver. He initially fired two rounds, heard Officer Lenahan fire as the car moved backwards, and then fired three more shots. Douglas recalled Gottfried and Lenahan raising their hands to signal they were alright when the Toyota had cleared their positions.

Douglas stated, "I ***believed that he was specifically using the vehicle as a weapon towards the other officers, specifically the traffic unit initially. And then Brian as he entered the danger area... My fear was that if he hit the gas really hard, the motor would spin really hard and there would be motion that would basically take out the traffic guy and pull him underneath the car or drag him along the car and cause injury or possibly death... It just seemed to me that the car was going to move in the direction of the officers, and where the door was, the door was gonna sweep or hit the officers, so there was no, there was no that, that you could possibly move that car without hurting the officers. I can't believe that the officers weren't injured in some way... I perceived that, that danger. I don't know if it was correct or not but I did perceive that danger. I thought for sure that officer was gonna get sandwiched."***

Lenahan said while he was standing at the left rear corner of the Toyota, ***"I heard the transmission shift gears. At that time I said, holy crap. I looked down and I saw reverse tail lights on. The car actually backed towards me. I put both my hands on the back of the car and actually pushed myself to the left, which is now putting me between the driver's car and the parked car, and the front nose of his car was actually going to the left as he reversed out starting to pin in the traffic unit. So at that point I'm trying to get the traffic unit out from there, yelling at him, get out of the way! Get out of the way! ... It looked like he (Gottfried) was starting to get squished between the two cars."***

Lenahan said he drew his weapon because he became concerned for Gottfried's safety who was trapped between both cars. Lenahan estimated the distance they had to maneuver in between the two cars at about two (2) feet. Lenahan stated, ***"I saw the car coming closer to me and then I heard my partner shoot... He started to shoot. The driver was still sitting up driving the car, backing out. At that point, I kinda leaned back and that's when I shot at the driver to stop the threat."***

Lenahan estimated he was about five feet away from the car when he fired center mass, and at an angle down through the driver's window which shattered and broke. He thought he fired three rounds and said he fired to protect himself and Gottfried. He also felt Officer Douglas who was at the front of the car was in a bad position, and if the driver accelerated forward, Douglas would not have been able to escape.

Witness Interview
A neighbor witnessed portions of this incident. He was interviewed by Mr. Kosakoff's relatives the day following the incident. The interview was recorded and a copy was provided the District Attorney's Office. The neighbor lived down the street from the Kosakoff residence and had a partial view of the front yard and garage.

The neighbor was watching television that night when he heard cars screeching around the corner. He went outside after the cars had passed and smelled burnt rubber. About fifteen minutes later, three cars returned, including two police cars. The police cars did not have their lights or sirens on and were driving slowly. He saw the police cars were following a Toyota Corolla that had pulled up into the driveway as the garage door was opening. He saw three uniformed officers run to the garage with one officer holding the garage door open before the door was able to close. He saw two officers go into the garage and said the third officer was on the side of the driveway. He said the police cars were not blocking the Toyota in the driveway and didn't know if the officers exited their cars with their guns drawn.

When asked if he could see where the officers were, the neighbor stated, ***"I couldn't see the ones in the garage because of the angle. But I could see one officer that was kind of in the grass with his ah, weapon."***

The neighbor was asked his opinion of the incident and if the officers had time to make a decision. He stated, ***"It was, it was, looked like a spur of the moment decision... There, there wasn't much time in between um, when they were, they were yelling and then when they stopped the garage door, and then kind of right away, he started backing up. There wasn't time, enough time, ya know, for, for anything else really."***

The neighbor was also asked if he heard what the officers were yelling to the driver. He replied, ***"Most, mostly stuff, just stand down and get out of the car, ya know hands, hands in the air, that kind of stuff. But ah, I, I didn't, couldn't make out exactly, exact words, 'cause there was a lot of commotion going on."***

Mr. Kosakoff's Mental Health History
Evaluation relating to use of force may also necessitate looking at an officer's possible claim of self-defense as well as character evidence relating to propensity for violence of the person the force was used on. In 2007, Mrs. Kosakoff called the San Diego Police Department at least four times for assistance for her son Alan Kosakoff. During these service calls she stated he was violent, aggressive, psychotic, paranoid, talking to himself, not taking his medication and that she feared for her life.

Mr. Alan Kosakoff's mother was also interviewed after the shooting. She was inside the home when the incident occurred and did not see what happened in the garage. Mrs. Kosakoff was

aware her son had been prescribed anti-psychotic and mood stabilizing medication, knew he had been refusing to take his medication and that he had been off the medication for more than a year, which had required her to call the police for his outbursts.

Investigation

The crime scene was secured and a scene investigation was completed. Mr. Kosakoff's person and vehicle were searched. No weapons were found.

The investigation revealed Officer Douglas fired a total of five (5) rounds and Officer Lenahan fired a total of two (2) rounds. Officer Gottfried did not fire his weapon. Of the five shots fired by Officer Douglas, one struck the front license plate frame, one struck the hood and three struck the windshield. Two of the three shots penetrating the windshield embedded in the dashboard. The third shot that penetrated the windshield could have struck Mr. Kosakoff in the right thigh. One of the two shots fired by Officer Lenahan terminated in the driver's door frame. Since the driver's window was shattered, Officer Lenahan's second round most probably caused that damage and then struck Mr. Kosakoff in the right side of his head.

Crime scene photographs were taken during the investigation. They reveal the garage was equipped with a garage door opener with a sensor that automatically opens the garage when tripped. The garage door opener was also equipped with an overhead light. The photos taken that night reveal the light was on and in a working condition. Forensic Pathologist, Dr. Craig Nelson performed an autopsy on Mr. Kosakoff. Dr. Nelson determined the cause of death was a gunshot wound to the head. The manner of death was determined to be a homicide.

One round struck Mr. Kosakoff above and behind the left ear. The second wound sustained was a gunshot wound to the right thigh. The available evidence tends to indicate the round that struck Mr. Kosakoff in the head was fired by Officer Lenahan and the round that struck Mr. Kosakoff in the leg was fired by Officer Douglas.

No toxicological tests were performed during autopsy because of the time span between the incident and Mr. Kosakoff's death. However, as documented in the Medical Examiner's Investigator's report, a urine drug screen conducted by Scripps La Jolla Hospital upon Mr. Kosakoff's arrival was positive for benzodiazepine, tetrahydrocannabinol and opiates.

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 desist his effort to effect 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.]

Conclusions

During this incident, San Diego Police Officers Benjamin Douglas and Brian Lenahan were assisting Traffic Officer Michael Gottfried in stopping and arresting Mr. Kosakoff after he had led them on a high speed vehicle pursuit that covered over fifteen miles, lasted over fourteen minutes and reached a speed of 120 MPH. The officers followed Mr. Kosakoff to his mother's residence on Half Moon Bay Drive where he drove into the garage. As the garage door closed, Officer Gottfried chased Mr. Kosakoff into the garage on foot. Officers Douglas and Lenahan followed to cover and assist Gottfried with the arrest.

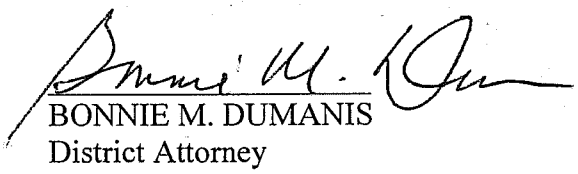
When Mr. Kosakoff put his car in reverse and began backing up, Officers Gottfried and Lenahan were placed in positions where they felt their lives and safety were in jeopardy of suffering great bodily injury or death.

Fearing for the safety of Officers Gottfried and Lenahan, Officer Douglas fired from a position inside the garage and in front of the car at Mr. Kosakoff. Simultaneously, Officer Lenahan, who also feared for both his and Officer Gottfried's safety, fired at Mr. Kosakoff from a position outside the driver's side of the car. The entire shooting took place in a time span of less than five seconds.

As a result, and based on the events as they unfolded, the officers' state of mind at the time they decided to fire, the timeframe of the shooting and Mr. Kosakoff's ability or inability to perceive and comprehend the uniformed officers commands, Officers Lenahan and Douglas 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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Cc: Captain Jim Collins