



OFFICE OF THE
DISTRICT ATTORNEY
HUMBOLDT COUNTY

PAUL V. GALLEGOS
DISTRICT ATTORNEY

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NEWS RELEASE

FOR IMMEDIATE NEWS RELEASE – March 2, 2007

EUREKA, CALIFORNIA –

DISTRICT ATTORNEY DETERMINES THAT NO CRIMINAL CHARGES WILL BE FILED AGAINST EUREKA POLICE DEPARTMENT OFFICER

District Attorney, Paul V. Gallegos, made public his determination that no criminal charges will be filed against Eureka Police Department Officer Liles for the shooting death of Christopher Burgess. The report states that:

“We were provided the investigation ... to independently review for possible criminal prosecution. Our review did not and cannot address issues of civil liability, tactics, or department policies or procedures. The review addressed only whether there is a basis for criminal prosecution against Officer Liles in connection with the shooting of Ryan Burgess; to wit: the review is a determination of what the officer could do under the circumstances - not what he should do.”

It goes on further to state that:

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“*Penal Code* section 835a allows a peace officer to use reasonable force in making an arrest:

“Any peace officer¹ who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape, or overcome resistance.

“A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right of self defense by the use of reasonable force to effect the arrest or the prevent the escape or to overcome resistance.”

Penal Code section 834a states:

“If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.”

Penal Code section 245(a), provides that “any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury” is guilty of a felony offense. The punishment for such offense is increased where a person knows, or reasonably should know, that the victim is a peace officer is engaged in the performance of his or her duties. *Penal Code* section 245(c).

Penal Code section 196 provides:

“[H]omicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either . . . [i]n obedience to any judgment of a competent court; or . . . [w]hen necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or . . . [w]hen necessarily committed in arresting persons charged with a felony and who are fleeing from justice or resisting such arrest.”

He concluded that based on the facts that were presented to him and the law that:

“I am not satisfied that the evidence shows that Officer Liles is either legally or factually guilty of a crime. Nor do I believe, if criminal charges were filed, that there is a likely probability of a unanimous finding of guilt beyond a reasonable doubt by a reasonable and objective fact-finder hearing the admissible evidence.”

¹ A Probation Officer is a Peace Officer while performing the usual or authorized duties of his or her employment. *Penal Code* section 830.5(a)(5).

“In fact,” he continued, “the more probable conclusion that would be reached by an objective fact-finder is that the Probation Officers, Humboldt County Sheriff Deputy Sylvia, and Officer Liles were placed in a tense, highly uncertain and rapidly evolving situation. They made split second judgments intended first to avoid the use of force and then, finally with Officer Liles facing an immediate threat of serious physical injury or death to himself or to others, to use deadly force.”

“Therefore, my office will not be pursuing criminal charges against Officer Liles.



OFFICE OF THE
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HUMBOLDT COUNTY

PAUL V. GALLEGOS
DISTRICT ATTORNEY

February 28, 2007

Detective Curt Honeycutt
Eureka Police Department
604 C Street
Eureka, California 95501

Re: Officer Involved Shooting Investigation and Findings
Eureka Police Department Case No.: 3C06-8080
Injured Person: Christopher Burgess
Date of Incident: October 23, 2006
Location: 2265 Chester Street, Eureka, California
Date Submitted to District Attorney's Office: November 30, 2006

Dear Detective Honeycutt:

Laws exist to foster and maintain individual freedom and security within society. The enactment and enforcement of those laws, however, necessarily interferes with and limits individual freedom and security. Therefore, to maintain the appropriate balance between the individual's freedom and security and the rights of others and of society, a prosecutor must both prosecute crimes and protect the rights of the factually and the legally innocent.

Specifically, to minimize the risk of convicting the innocent the American legal system contains certain presumptions and rules that have the effect of protecting both the innocent and the guilty. Examples of these presumptions and rules are the presumption of innocence; a standard of proof of "beyond a reasonable doubt"; and the "exclusionary rule" which prohibits the use of evidence obtained unlawfully by the government. As a result of these presumptions and rules, a person can be factually guilty of an offense while being legally innocent of it.

We were provided the investigation into the shooting death of Christopher Burgess to independently review for possible criminal prosecution. Our review did not and cannot

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address issues of civil liability, tactics, or department policies or procedures. The review addressed only whether there is a basis for criminal prosecution against Officer Liles in connection with the shooting of Ryan Burgess; to wit: the review is a determination of what the officer could do under the circumstances - not what he should do.

In independently reviewing an investigation to determine whether to file criminal charges a prosecutor should charge only if the following four basic requirements are satisfied:

1. Based on a complete investigation and a thorough consideration of all pertinent data readily available, the prosecutor is satisfied that the evidence shows that the suspect is guilty of the crime to be charged;
2. There is legally sufficient, admissible evidence of the corpus delicti;
3. There is legally sufficient, admissible evidence of the suspect's identity as the perpetrator of the crime charged; and
4. The prosecutor has considered the probability of a unanimous finding of guilt beyond a reasonable doubt by a reasonable and objective fact-finder hearing the admissible evidence.

The admissible evidence should be of such convincing force that it would warrant conviction of the crime charged by a reasonable and objective fact-finder after hearing all the evidence available to the prosecutor at the time of charging and after hearing the most plausible, reasonably foreseeable defense that could be raised under the evidence presented to the prosecutor. See generally, *California District Attorneys Association, Uniform Charging Standards*.

The reports and documentary items that were reviewed included:

- Eureka Police Department Detective Curt Honeycutt's written report/investigation;
- Eureka Police Department Evidence Technician, James Isaac's report;
- Eureka Police Department Evidence Technician, Judy Taylor's report;
- California Department of Justice, Senior Criminalist, Toby Baxter's, Forensic Alcohol Analysis report: EPD Officer Liles;
- California Department of Justice, Senior Criminalist, Toby Baxter's, Forensic Alcohol Analysis report: Christopher Burgess;
- Central Valley Toxicology, Inc.'s Complete Drug Screen report: Christopher Burgess;
- California Department of Justice, Bureau of Forensic Services, Senior Criminalist, Toby Baxter's, Crime Scene Investigation Report;
- California Department of Justice, Bureau of Forensic Services, Forensic Toxicologist, Nathan Sato's, Toxicology Screening: EPD Officer Liles;
- California Department of Justice, Senior Criminalist, Toby Baxter's, Physical Evidence Examination Report;
- Arcata Police Department Detective Gary Bates' written report;
- Eureka Police Department Detective Dave Parris' written report;

- Humboldt County Sheriff's Office Detective Marvin Kirkpatrick's report;
- Humboldt County Sheriff's Office Detective Tom Cooke's written report;
- Humboldt County Sheriff's Office Detective Rich Schlesiger's written report;
- Humboldt County Sheriff's Office Detective Wayne Hanson's written report;
- Humboldt Fire District # 1 Report;
- Eureka Police Department runaway juvenile report 3C06-7358;
- Eureka Police Department CAD call narrative for October 23, 2006;
- Photos of knife possessed by Christopher Arion Burgess, his black jeans shorts & X-rays;
- Transcripts of Eureka Police Department Officer Terry Liles;
- Transcripts of Eureka Police Department dispatch radio transmission for October 23, 2006;
- Transcripts of Eureka Police Department Dispatch phone line for October 23, 2006;
- Transcripts of Humboldt County Probation Officer Steven Schaening;
- Transcripts of Humboldt County Probation Officer Andrew McLaughlin;
- Transcripts of John Sivia;
- Transcripts of Eureka Police Department Officer Robert Metaxas;
- Transcripts of Eureka Police Department Officer Cory Crnich;
- Transcripts of Eureka Police Department Sargeant Mike Hislop;
- Transcripts of Eureka Police Department Officer Steve Watson;
- Transcripts of Phenicia Martinez;
- Transcripts of Chanti Jackson;
- Transcripts of Darin Stevens;
- Transcripts of Douglas Clayton;
- Transcripts of Judith Pascocello;
- Transcripts of Gary DeGrave;
- Transcripts of Boyd "Buddy" Salizzoni;
- Transcripts of Brooks Conner;
- Transcripts of Brett Banduci;
- CAD calls for Marjorie Burgess;
- Transcripts of second interview of Eureka Police Department Officer Terry Liles;
- Transcripts of Petrina Fennell;
- Transcripts of Eureka Police Department Sargeart Mike Johnson;
- Transcripts of Virginia Cadieux;
- Transcripts of Laura Smith;
- Transcripts of Shannon Cobillas;
- Transcripts of George & Jane Kneaper;
- Transcripts of Betsy Thomas;
- Transcripts of Terrance & Nadine Fleek;
- Transcripts of Janice Pires;
- Transcripts of Judith Pascocello;
- Transcripts of Ami McBride;
- Transcripts of George Kneaper;
- Transcripts of Barbara Craft (phone call);
- Transcripts of Ronald Kempton;
- Transcripts of Barbara Kraft;

- Transcripts of Lisa Nelson-Flowers;
- Transcripts of Casey Campbell;
- Transcripts of Angeliqe Olmstead;
- Transcripts of Destere Harrison;
- Transcripts of Jane Kneaper;
- Transcripts of Alvin Pires;
- Transcripts of Marjorie Burgess;
- Transcripts of Dennis Bingham;
- Transcripts of Colleen Robinson;
- Transcripts of Randy Garcia;
- Forensic Pathologist, Susan Comfort, M.D., Report of Autopsy: Christopher Burgess;
- Prior contacts/reports of Eureka Police Department and Christopher Burgess;
- Eureka Police Department Detective, Curt Honeycutt's, December 7, 2006, Supplemental Report;
- Video of top field and scene of EMT site and ravine;
- Video of walk through probation Officer Steven Schaening;
- Digital images as of 10/30/06;
- District Attorney Investigator, Mike Losey's, Investigation Report;
- District Attorney Investigator, Mike Losey's, Executive Summary;

Inconsistencies contained in witness statements and/or inconsistencies and/or discrepancies between various witnesses' statements were considered and evaluated pursuant to law. What each witness was able to see, hear or otherwise perceive, as established by the reports, was also considered and evaluated pursuant to law. Evidence of alcohol and/or drug ingestion or the lack of it by Christopher Burgess and/or other witnesses was also considered and evaluated pursuant to law.

I

SUMMARY

On October 23, 2006, at approximately 2:00 p.m., Humboldt County Probation Officers Steve Schaening, Petrina Fennell, and Andrew McClaughlin went to 3337 Dolbeer Street located in the City of Eureka to arrest Christopher Burgess on an outstanding felony warrant for failure to comply with probation requirements. The residence the officers went to is down Kneaper Lane. Kneaper Lane is off Dolbeer Street across from Washington Elementary School.

As the officers walked into the open door of the residence, Christopher Burgess stood up and confronted the Officers with a fixed blade knife described generally as a buck-type hunting knife. Christopher Burgess threatened the officers with the weapon causing them to back out of the residence and away from him so he could escape arrest. Officer Schaening, who was the sole probation officer with pepper spray, sprayed Christopher Burgess with pepper spray. However, it did not appear to have any significant impact on him and he continued to threaten the officers with the knife until they had backed up enough to allow him an escape route. On being presented with an open escape route, Christopher Burgess ran down Kneaper Lane to Dolbeer Lane and then Chester.

During the time leading up to Christopher Burgess gaining an escape from the officers, he was told several times to drop the knife by the officers and by other people that were present.

As the Probation Officers chased Christopher Burgess down Chester Street, they put out a call for assistance to 3337 Dolbeer Street where they had a subject armed with a knife. As the Probation Officers were chasing Christopher Burgess, off duty Humboldt County Sheriff Sergeant Jon Sylvia saw him running west on Chester Street holding a knife. Sergeant Sylvia joined in the Probation Officers' pursuit of Christopher Burgess. Both he and the Probation Officers were unarmed.

Eureka Police Officer Terry Liles, who had a citizen ride along with him, was in the vicinity of Hodgson Street and O Street, on patrol when he heard the call for assistance. As he arrived on Chester Street he saw children and parents on the sidewalk in front of Washington Elementary School, in the street, and on the playground. Officer Liles stopped his patrol car in front of 2215 Chester Street, and ordered his ride along to remain in the car while he got out.

Probation Officers advised by radio that the suspect ran into the back yard at 2265 Chester Street. At about the same time Officer Liles saw Probation Officers pointing toward the back yards of the residences facing Chester Street. Officer Liles, in an attempt to cut off the suspect, went into the back yard at 2215 Chester Street. He crossed a fence between 2215 Chester Street and 2235 Chester Street and followed a fence line to the edge of a gully. He stopped there and listened for any noise of where the suspect might have gone. He heard yelling and a neighbor came out and confronted Officer Liles thinking he was the suspect. The Officer assured the resident that he was a police officer and Officer Liles continued his search for the suspect. Officer Liles went through a gate into the wooded gully where he found Probation Officer Schaening and Sergeant Jon Sylvia. As Officer Liles was standing on the east side of the gully behind the houses at 2235 and 2265 Chester Street, Probation Officer Schaening was standing to his right side, around thirty yards away and Sgt. Jon Sylvia was standing about the same distance away to Officer Liles's left side. Officer Liles called out to Christopher Burgess that the dogs would be released and it would be better to give up than be bit. At about that time Officer Liles saw the brush move down below him in the gully.

Because Officer Liles knew the Probation Officers were not armed and he thought Sergeant Sylva was not armed, he felt that, at that point, he was the only officer in a position to capture Christopher Burgess. Therefore, he went into the gully toward the location where he saw the movement. The brush was mostly thick bamboo and as Officer Liles went further down into the gulley the light diminished due to the thickness of the foliage.

Officer Liles caught a glimpse of Burgess in front of him moving through the brush, swinging his right hand from side to side. Then, he lost sight of him.

Officer Liles then went around a large fir or redwood tree about six to seven feet in diameter and stepped into a depression approximately one to two and a half feet deep. In front of him was a small clear area with Christopher Burgess was standing, facing him about five to six feet away. Officer Liles observed a large knife in Christopher Burgess'

right hand.

Officer Liles's escape route to the left was blocked by a large tree. His route of escape to the right was impeded by very thick bamboo. Escape in reverse was impeded by the fact that he would have to retreat uphill in mud, which would require him to turn his back to Christopher Burgess.

Officer Liles yelled for Burgess to drop the knife. Those orders were heard by Probation Officer Schaening and Deputy Sylvia. Christopher Burgess then said to Officer Liles, "I don't want to go" and then, with the knife elevated and pointing toward Officer Liles, took a half step toward him. This reduced the distance between the officer and Christopher Burgess to approximately four to four and half feet.

At this point, Officer Liles was holding his Glock .40 Cal., firearm out in front of him, in a two handed grip, about waist level, pointed at Christopher Burgess. Officer Liles stated he feared that Burgess was too close to him and he was in danger of being seriously injured or killed. Officer Liles fired three rounds at Christopher Burgess. He believed all three of his rounds struck Christopher Burgess in the chest.

Christopher Burgess fell backwards, onto his left side into a hole. As he was lying on the ground he stated, "I don't want to die." Officer Liles radioed that shots had been fired. Within moments Sergeant Sylvia joined Officer Liles in the depression. When Officer Liles moved Christopher Burgess from the location where he fell, Sergeant Sylvia saw the knife on the ground where he had fallen. Sergeant Sylvia assisted the officer in handcuffing Burgess and helped carry Burgess to the top of the gully.

Once the officers arrived at the top of the gully, Eureka Ambulance and Humboldt Fire District One Personnel were on scene and began life saving procedures. Christopher Burgess was immediately transported to St. Joseph Hospital where he was pronounced dead. The knife recovered at the scene and the one the Burgess held while threatening the Probation Officers and Officer Liles was about 10 inches in length with a blade of about five and half inches long.

Dr. Susan Comfort performed an autopsy of Christopher Burgess at the Shasta County Coroner's Office. Dr. Comfort noted that there were present several smaller abrasions and puncture types of injuries on different parts of Burgess' body which were consistent with a person who might have gone through or been carried through very thick brush or bamboo. Dr. Comfort confirmed that there was no blunt force trauma present or any other indications as in a strike or a beating. She noted two gunshot wounds, one to the right chest which penetrated the heart and imbedded in the vertebrae of the spine and a second gunshot wound to the left thigh where the bullet came to rest in Christopher Burgess' lower left back. Dr. Comfort listed the cause of death as gunshot wound to the right chest and the left thigh.

II

LEGAL ANALYSIS

The District Attorney's Office investigates officer-involved shootings to determine

whether the officer's acts violate state criminal laws. In making that determination, as with all other criminal cases, the burden of proof of beyond a reasonable doubt. The findings made by our office are both authorized and required by law. *Cal. Const.* Article III, Section 3; *Government Code* Section 26500; *Hicks v. Board of Supervisors*, () 69 Cal.App.3d 228, 138 Cal.Rptr. 101.

Applicable law in this case includes California Penal Code Sections, as well as State and Federal published cases.

CALIFORNIA PENAL CODE SECTIONS

Penal Code section 835, states:

“An arrest is made by the actual restraint of the person or by submission of the custody of the officer. The person arrested may be subjected to such restraint as is reasonable for his arrest and detention.”

Penal Code section 835a allows a peace officer to use reasonable force in making an arrest:

“Any peace officer¹ who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape, or overcome resistance.

“A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right of self defense by the use of reasonable force to effect the arrest or to prevent the escape or to overcome resistance.”

Penal Code section 834a states:

“If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.”

Penal Code section 245(a), provides that “any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury” is guilty of a felony offense. The punishment for such offense is increased where a person knows, or reasonably should know, that the victim is a peace officer is engaged in the performance of his or her duties.

¹ A Probation Officer is a Peace Officer while performing the usual or authorized duties of his or her employment. *Penal Code* section 830.5(a)(5).

Penal Code section 245(c).

Penal Code section 196 provides:

“homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either ... [i]n obedience to any judgment of a competent court; or... [w]hen necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or... [w]hen necessarily committed in arresting persons charged with a felony and who are fleeing from justice or resisting such arrest.”

CALIFORNIA CASES

California Appellate Court cases have interpreted the use of force by police officers, including the use of deadly force in apprehending suspects. In *Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 138 Cal.Rptr. 26, citing *Penal Code* sections 835a and 196, the court held that deadly force may be used by a peace officer against a fleeing felony suspect if “the felony is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another.” See also, *Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334 (officers responded to a report that a man high on PCP was walking about brandishing a knife. When the officers arrived, the man come toward the officers threatening to kill them despite their attempts to talk to him and their repeated admonitions to drop the knife. When he was within 10 to 15 feet the officers shot and killed him; *Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269 (Officer responded to an officer-involved high speed chase that ended with suspect wrecking and running from car. The officer followed and yelled for suspect to stop and put up his hands until suspect spun around and reached into his jacket toward his waistband. The officer shot and killed him).

Citing *Penal Code* Section 835a, the *Edson* court held, at page 1272, that a “...police officer in California may use reasonable force to make an arrest, prevent escape, or overcome resistance, and need not desist in the face of resistance....”

The *Edson* court also held that:

“Equally important, a police officer must have control over the manner and means of making an arrest or detention. The interests of the commonwealth happily coincide here with sound logic. Both dictate that ‘[t]he 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. Conner*, supra, 490 U.S. at pp. 396-397, [109 S. Ct. at p 1872].) Placing the burden of proof on the plaintiff [in a civil lawsuit context] gives the police appropriate maneuvering room in which to make such judgments free from the need to justify every action in a court of law.”

“It makes sense to ‘surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases....’(emphasis added), *Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 344, quoting from *Roy v. Inhabitants of City of Lewiston* (1st Cir. 1994) 42 F.3d 691, 695. We share the view of the Missouri courts that ‘the officer in the first instance is the judge of the manner and means to be taken in making an arrest unless a plaintiff can show that unnecessary force was being used, courts will protect the officer.’ (*Neal v. Helbling*, supra., 726 S.W.2d at Op. 487)....”

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FEDERAL CASES

In addition to the above California case authority, there are numerous Federal cases that are instructive.²

Two landmark cases that discuss the use of deadly force by a police officer are *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct 1694 (1985) and *Graham v. Conner*, 490 U.S. 386, 109 S.Ct. 1865 (1989). These cases enunciated the principles for the use of force that are discussed and applied in factual scenarios in subsequent cases.

In *Graham v. Conner*, supra, the Supreme Court discussed the “objective reasonable test,” and held at pp. 791-792:

“... The reasonableness of an officer’s particular use of force ‘must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight...’ (emphasis added).

The Supreme Court in *Garner*, supra, further held at p. 396, that:

“... ‘reasonableness’ meant the ‘standard of reasonableness at the moment,’ and that the calculus of reasonableness must embody allowance for the fact public officers are often forced to make split-second judgments – in circumstances that are tense, uncertain,

² Federal cases cited herein are primarily civil rights lawsuits pursuant to 42 USC 1983 wherein police officers or their employers are sued as a result of using deadly force. These cases involve a lower standard of proof (preponderance of evidence) than is required in a criminal prosecution (beyond a reasonable doubt). Many of the cases involve issues of qualified immunity or summary judgments, the latter of which have even a lower civil standard (no issue presented for a jury’s determination). Such cases are therefore helpful in the ultimate analysis of a potential criminal case.

and rapidly evolving – about the amount of force that is necessary in a particular situation...” (emphasis added).

The determination of whether the force used was unlawful or unconstitutional is based upon the “information possessed” by the involved police officer and what a reasonable police officer would believe to be lawful [i.e. objective belief] under the circumstances and based upon the information then possessed, not what the shooting officer may have believed. *Anderson v. Creighton*, 48 U.S. 635, 641, 107 S.Ct. 3034 (1987).

Further, courts have rejected the argument that an officer must use the least amount of force, as an alternative to deadly force, in a situation where the use of force is reasonable.

“...We have rejected that position and stated, ‘**we do not believe that the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable under *Garner v. Tennessee and Graham v. Conner*...**’ *Plabos v Drinski*, 19 F.3d 1143, 1149 (7th Cir. 1994)...” *Scott v. Edinburgh*, 346 F.3d 752 (7th Cir. 2003). See also, *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992). (emphasis added).

Ting v. United States of America, 927 F.2d 1504 (9th Cir. 1991) involved the shooting of a suspect by FBI agents. At pages 1509-10, citing *Graham v. Conner*, supra, the Court held:

“Determining the ‘reasonableness’ of the force used to effect an arrest or seizure ‘requires a careful balancing of the nature and the quality of the intrusion on the individual’s Fourth Amendment interests against countervailing governmental interests at stake.’ *Id.* (Quotations omitted) **Factors to consider include ‘the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.’** (emphasis added). Pages 1510-1511.

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene. *Id.* ‘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.’ p. 1511.

“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the

officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. **Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.**” (emphasis added). p. 1511.

Ting, supra, discussed the application of California law and held, at p. 1511:

“... at the time of [a] shooting that **an officer could use deadly force to effect arrest if, under the circumstances, he reasonably believed such force was necessary to protect himself or others from death or serious bodily harm.**” See, e.g. *Kortum v. Alkire*, 69 Cal.App.3d 325, 333, 138 Cal.Rptr. 26, 31 (1977). (emphasis added).

The Supreme Court’s most recent discussion of the use of deadly force was in the case of *Brosseau v. Haugen* (2004) U.S. Lexis 8275 (Dec. 13, 2004). In *Brosseau*, supra, the Court reiterated the holding of *Graham v. Conner*, supra, stating:

“There is no doubt that *Graham v. Conner*, supra, clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under the objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson [v. Creighton]* ‘that the right the official is alleged to have violated must have been ‘clearly established’ in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. 485 U.S. [635] 640, 97 L.Ed.2d 523, 107 S.Ct. 3034 [1987]. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* At 201-202, 150 L.Ed.2d 272, 121 S.Ct.2151.”

In this context, the Court also held that “The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.” *Graham v. Conner*, 490 U.S. at p. 396. The inquiry then becomes:

“Whether at the time of [the officer’s] actions, it was ‘clearly established: “in this more ‘particularized’” sense that [the officer] as violating [the suspect’s] Fourth Amendment right. *Saucier v. Katz*, 533 U.S., at 202.... 121 S.Ct. 2151....”

In *Brosseau*, supra, a fleeing suspect, after a foot pursuit, got into a vehicle. The officer pointed a gun at the suspect, ordered him out of the car, and attempted to remove him from the vehicle. The vehicle was described as either starting or slowly moving causing the officer to jump back but did not hit him. The officer fired one shot at an angle through the driver's side window hitting the suspect and wounding him.

Under this factual scenario, the Court cited the principles enunciated in *Tennessee v. Garner*, supra, and *Graham v. Conner*, supra, which established that claims of excessive force are to be judged under the Fourth Amendment's "objective reasonableness" standard⁰ and held that case law "by no means 'clearly establishes that Brosseau's conduct violated the Fourth Amendment'." The Supreme Court thereby reversed the U.S. Court of Appeal for the Ninth Circuit.

In making such a holding, the *Brosseau* Court, supra, relied upon *Smith v. Freland*, 954 F.2d 343 (6th Cir 1992) where, after a high-speed chase, the suspect crashed his car into an officer's parked car. As the suspect then drove past the officer's car, the officer pulled his gun and fired one shot at the suspect's car killing him. A civil rights lawsuit contended that the officer used excessive force. The trial court dismissed this claim and the dismissal was upheld on appeal.

The *Smith* case, supra, reiterated the principles articulated in *Tennessee v. Garner*, supra, where the Court struck down a state statute that authorized the use of deadly force against fleeing suspected felons, including those who were unarmed and presented no danger. However, the court did not forbid the use of deadly force in seizing a suspect. Instead, at p. 11, it established the following rule:

“... Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officers or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.... “ See also, *Ting v U.S.* 927 F.2d 1504.

In determining that the officer acted reasonably in using deadly force, the Court relied on *Graham v. Conner*, supra, which in turn cited *Bell v. Wolfish*, 441 U.S. 520, 559, 00 S.Ct. 1861 (1979). The Court held “that in applying the test, judges must consider the difficulties of modern police work,” and stated:

“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 vision of 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....” (emphasis added).

Smith, supra, further stated, at p. 347, that:

“Thus, under *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex work that policemen face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure....” (emphasis added).

It is instructive to note that in *Smith*, supra, at p. 347, the Court stated that an officer’s violation of the City’s policy regarding police use off force does not require a different result. The issue is whether the officer violated the Constitution, not whether he should be disciplined by the local police force. In other words, the City’s shooting policy may be stricter, or hold its officers to a higher standard, than that required by the Constitution without being subjected to increased liability under the Civil Rights statute. See also, *Scott v. Edinburg* 346 F.3d 756 (7th Cir. 2003) (USDC No. 112002) for a similar decision.

Additional Federal Court holdings in scenarios similar to the facts in *Smith*, are relevant.

In *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 471), the suspect’s vehicle lurched forward and accelerated at a top speed of approximately 15 miles per hour as officers shot at him. Officers were close enough to the suspect’s vehicle that the suspect could have hit them in approximately one second, but they were not hit. In fact, the vehicle avoided the officers by several feet. As the vehicle passed the officers they approached the vehicle and fired their weapons at it from behind and from the passenger’s side. In all, within the approximately six-second period after the suspect’s vehicle lurched forward, three officers fired a total of eight bullets, striking the suspect five times killing him.

Citing the principles enunciated in *Tennessee v. Garner*, supra, and *Graham v. Conner*, supra, the Court held that the force used was not excessive. The holding in this case was based upon the threat that the suspect posed to the shooting officers and to their fellow officers, as opposed to a threat to the general public.

In *Waterman*, supra, the Court stated at pp. 477-78:

“When Waterman’s vehicle lurched forward, the officers were forced to immediately decide whether Waterman was attempting to assault the officers ahead of him or whether he intended to drive by them, having them unharmed. To the extent that reasonable officers under these facts could have taken time to ponder whether the lurching of the [car] and Waterman’s accelerations were the beginning of an aggressive move towards them, they would have considered several factors suggesting that it was. Those would have included: 1) that Waterman, by any account was not acting rationally in leading the officers on a more than 10 – minute chase; 2) that he was not stopping despite seeing the officers approaching ahead of him, with their weapons

drawn; 3) that he was accelerating in the general direction of the officers; and, most importantly, 4) that Officer Watkowski had reported just minutes before that Waterman had attempted to run him off the road....”

In this regard, *Waterman*, supra, at p. 478-79, concluded that:

“While reasonable officers would have recognized the possibility that [the suspect] intended only to accelerate by them rather than at them, they also – in the instant they had to decide—could have interpreted the acceleration in the face of this show of force as the initiation of a second attempt by Waterman to avoid capture by using his vehicle as a weapon against law enforcement personnel. See *Garner*, 471 U.S. at 11 (holding that an officer may use deadly force when a fleeing suspect ‘threatens the officer with a weapon’). Thus, although appellant’s could have held their fire and taken the chance that Waterman’s accelerations in traffic was not for the purpose of committing another assault against an officer, **‘the Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm...’** (emphasis added).

Waterman, supra, at p. 479, acknowledged that the position of the person(s) relative to the path of the vehicle is an important factor. And, while not striking any officer with the suspect’s vehicle in that case, the court noted that the “closeness of the officers to the projected path of Waterman’s vehicle is crucial to our conclusion that deadly force was justified.” See also, *Abraham v. Raso* 183 F.3d 279 (3d Cir.) 1999), *Acosta v. Co. of San Francisco*, 83 F.3d 1143 (9th Cir.); *Scott v. Edinburgh*, 346 F.3d 752 (7th Cir. 2003). See also *Cole v. Bone*, 993 F.2d 1378 (8th Cir. 1993); *Vaughn v. Cox*, 343 F.3d 1323 (11th Cir. 2003).

In *Pace v Copbianco*, 283 F.3d 1275 (11th Cir. 2002), after a high-speed chase with the suspect swerving his car at oncoming police vehicles, deputies blocked the suspect’s vehicle on three sides in a cul-des-sac. Deputies yelled at the suspect to get out his car. A deputy shot the suspect through the front windshield of the suspect’s car before the suspect car moved. As the suspect’s car began to move, deputies fired several more shots. The entire event last a matter of seconds.

In *Pace*, supra, the court, using guidance from *Garner*, supra, and *Graham*, supra, found the use of deadly force was appropriate. Specifically, the Court held that the suspect’s aggressive use of his vehicle during the chase resulting in the officers having probable cause to believe that the suspect had committed a felony involving the threatened infliction of serious physical harm [aggravated assault per the Georgia state criminal statute].” By the time of the shooting, (the suspect) had used the automobile in a manner to give reasonable policemen probable cause to believe it had become deadly weapon with which [the suspect] was armed.” *Id.* at 1282.

The above holding in *Pace*, supra, was based primarily on the previous driving of the vehicle which occurred before the shooting incident. The suspect did not try to run over the deputies, did not aim his car at the deputies, nor did he actually hit a deputy.

In *Scott v. Edinburgh*, supra, cited in *Waterman*, supra, an off duty police officer observed the suspect attempting to steal his personal vehicle. The officer yelled as the suspect backed the vehicle towards the officer, who had to move out of the way to avoid being hit. As the officer moved out of the way, he yelled “stop, police” and withdrew his gun from his holster. Two to four seconds later the suspect stopped backing up and immediately drove forward. The officer fired a first shot before the car had moved any appreciable distance when it was relatively close to the officer. Then, as the suspect drove off, the officer fired a second shot, and pursued the vehicle on foot firing 6-8 more shots. Two bullets entered the suspect’s back causing death.

Scott, supra, was analyzed based on the principles set forth in *Garner*, “which addressed the question of whether an officer could use deadly force to prevent the escape of ‘an apparently unarmed suspected felon.’” The Court determined that the suspect was deliberately trying to hit the officer with the car, which was the most important part of the case and one that sets the stage for all that was to follow. Clearly, when used in this manner, a car is a deadly weapon analogous to a knife. See, *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992)...

In *Scott*, supra, the Court went on to say:

“This action of deliberately backing into an officer directly implicates several rationales listed by the Supreme Court in *Garner*. Specifically, Scott ‘posed a threat of serious physical harm, either to the officer or to others;’ he threatened the officer with a weapon;’ and ‘there [was] probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm.’ *Garner*, 471 U.S. at 11-12.

In *Freire v. City of Arlington*, 957 F.2d 1768 (5th 1992) a police officer shot and killed a suspect after a high speed chase when the officer got out of his vehicle and suspect sped toward him. The officer waited to the last second to shoot when the suspect’s vehicle was “dangerously close.” Notwithstanding the fact that the suspect’s vehicle did not strike the officer, the court held that the officer did not use excessive force under the principles set forth in *Garner*, supra. Therefore, the shooting was reasonable under the circumstances due to the fact that the suspect posed an immediate threat of serious physical injury or death to the officer or others.

In *Pittman v. Nelms*, 87 F.3d 116 (4th Cir. 1996), the suspect began to drive away in his vehicle as the officer approached the vehicle on foot. The officer’s arm became entangled in the vehicle resulting in the officer being dragged several feet then thrown to the side. The officer got up, ran toward the vehicle, and fired his gun at the vehicle as it sped away. A second officer fired at the suspect vehicle as it moved away, when the vehicle was approximately 25 feet in front of the officer, and the shooting officer could see that the other officer who was struck by the vehicle was no longer in danger. The Court held that because the entire series of events took only a few short seconds during

which the officer was dragged by the vehicle, was in serious danger, and because the situation was ‘tense, uncertain, and rapidly evolving, the force employed was not excessive. *Id.* At p. 482.

In *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988), police officers approached a car after a robbery had occurred and thought the suspects were “probably armed.” The officers ordered the suspects to raise their hands three times before the suspects complied. This recalcitrance on the part of the suspects further aroused the officers’ suspicion as to the imminent danger confronting them. An officer’s gun was pointed at the occupants of the car and, as he approached the car, he observed the driver make a “quick movement with his hand into his coat ... [as if] he was going to reach for a weapon.” The officer shot the suspect, killing him. *Sherrod*, *supra*, cited *Tennessee v. Garner*, *supra*, and *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988), holding that : “When an officer believes the suspect’s actions places him, his partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force....” See also, *Davis v. Freels*, 583 F.2d 337 (7th Cir. 1978), upholding the shooting of a detained suspect who made a sudden and suspicious movement with his right elbow in a backward direction. See also *Muhammed v. City of Chicago*, 316 F.3d 680 (7th Cir. 2002).

In *Sherrod*, *supra*, at p. 806, discussing a police officer’s use of deadly force based on information known to the officer at the time of his actions, the court held:

“it is not necessary that the danger which gave rise to the belief actually existed [whether or not the suspect was armed], it is sufficient that the person resorting to the self defense at the time involved reasonably believed in the existence of such danger, and such reasonable belief is sufficient even where it is mistaken. In forming reasonable belief, a person may act upon appearances. In other words, it is sufficient that the danger was reasonably apparent.”³

Based on the above, the *Sherrod* Court discussed the “objective reasonableness” standard which measures an officer’s actions “under the circumstances” presented.

“Under the circumstances” refers to those circumstances known and information available to the officer at the time of his action. Knowledge of the facts and circumstances gained after the fact (that the suspect was, in fact, unarmed) is irrelevant in the analysis of the reasonableness of the actor’s judgment. *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987).

The determination of whether the force used was unlawful or unconstitutional is based on the “information possessed” by the involved officer and what a reasonable officer would believe to be lawful under the circumstances and based on information then possessed. *Anderson v. Creighton*, 48 U.S. 635, 641, 107 S.Ct. 3034 (1987).

³ In a footnote in *Sherrod*, *supra*, at p. 807, the court discussed FBI statistics at the time of the shooting (1987). It discussed the fact that during an eleven year period from 1976 to 1986, law enforcement officers killed by gunshot were most often within 10 feet of their assailants at the time of the fatal encounter. It noted that FBI statistics further establish that patrol officers on investigative stops have consistently comprised the largest percentage of law enforcement victims throughout the past decade.

CONCLUSION

Humboldt County Probation Officers went to arrest Christopher Burgess on an outstanding warrant. At that time, Christopher Burgess was obligated to refrain from using force or any weapon to resist that arrest. When he resisted arrest by threatening the officers with a knife he was committing a felony crime and, at that time, the officers had the right to self-defense by the use of reasonable force and to arrest, prevent his escape or overcome his resistance. When Christopher Burgess ran from the officers toward a middle school that was in the process of letting children out to go home, he extended the potential threat of harm to those children, their parents and school personnel. Then, after his attempt to escape arrest by running into a ravine was thwarted by Officer Liles, Christopher Burgess committed an additional felony crime when he threatened Officer Liles with a knife.

Specifically, when Christopher Burgess drew his knife, did not comply with the officer's commands to drop it, and then moved in the direction of the officer, he was committing, at a minimum, a felony offense of aggravated assault in violation of *Penal Code* section 245. Further, Officer Liles had reasonable cause to believe that he was resisting arrest, committing an aggravated assault upon him, and was engaged in conduct that posed an immediate threat of serious physical injury or death to both the officer and others. At that point, Officer Liles had the right to self-defense and to use reasonable force to arrest Christopher Burgess, prevent his escape or to overcome his resistance.

Based upon these facts and the case law defining reasonable force discussed above, I am not satisfied that the evidence shows that Officer Liles is either legally or factually guilty of a crime. Nor do I believe, if criminal charges were filed, that there is a likely probability of a unanimous finding of guilt beyond a reasonable doubt by a reasonable and objective fact-finder hearing the admissible evidence.

In fact, the more probable conclusion that would be reached by an objective fact-finder is that the Probation Officers, Humboldt County Sheriff Deputy Sylva and Officer Liles were placed in a tense, highly uncertain and rapidly evolving situation. They made split second judgments intended first to avoid the use of force and then, finally with Officer Liles facing an immediate threat of serious physical injury or death to himself or others, to use deadly force. Therefore, my office will not be pursuing criminal charges against Officer Liles.

Sincerely,

Paul V. Gallegos
District Attorney

